TAX FOR THE Owner-Manager

Editor: Thomas E. McDonnell, QC

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Estate Freeze: CCRA on Romkey

Many practitioners were concerned that the *Romkey* decision (FCA 2000) would limit the income-splitting opportunities afforded by a conventional estate freeze. Typically, the owner of common shares of a company would exchange those shares for fixed-value preferred shares and have his or her spouse or minor children, or a trust established for their benefit, subscribe for new common shares having a nominal value. *Romkey* seemed to indicate that the income attribution rules were applicable in what appeared to be typical estate-freeze situations.

In *Romkey,* two brothers controlled a corporation through voting preferred shares. They implemented an income-splitting structure by causing non-voting common shares to be issued to trusts for the benefit of their minor children. The corporation paid dividends on the non-voting common shares for a number of years thereafter. The CCRA included the dividends paid on the non-voting common shares in the income of the brothers on the grounds that the income was attributable to them pursuant to subsection 74.1(2). Both the TCC and the FCA upheld the CCRA's position: by causing the shares to be issued to trusts for their children, the appellants had effected a transfer of property to their respective children and divested themselves of the right to receive a measure of future dividends.

In This Issue

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Although the *Romkey* decision appeared to be fact-specific, it was not clear whether the courts and the CCRA would apply this same conclusion to other estate freezes. In *Romkey,* the estate plan was poorly executed. The courts could not find supporting evidence to confirm that the shares issued to the minor children were actually paid for with family allowance funds. The courts also found that the trust documents were not entirely accurate or complete and that the accounting records for the trust were in disarray.

On May 8, 2001, the CCRA issued TI 2001-0072705 in response to the *Romkey* decision, and clarified that its assessing practice with respect to estate freezes would not change as a result of the case. This is good news for practitioners with owner-manager clients who have already implemented an estate freeze or who are considering a conventional estate freeze as a means of income splitting with their family members. Note, however, that the CCRA says that the attribution rules will not apply *provided that* the shares are issued for an amount equal to their fair market value and paid for with funds that are not obtained from the freezor. Although the CCRA's interpretation focuses on the application of the *Romkey* decision to an estate freeze with a trust for minor children, presumably it will apply equally to estate freezes with growth shares held by a spouse or a spouse trust.

Even though the CCRA has reconfirmed its acceptance of a conventional estate freeze as a means of income splitting, practitioners should be aware of the possible limitations set out in the *Romkey* decision. For a freeze to remain within the CCRA's assessing practice, the growth shares must be issued for fair market value. A valuation of the freeze shares is therefore essential. In addition, the growth shares must be purchased with funds that were not received from the freezor. The bottom line is that a conventional estate freeze will be effective for tax purposes, provided that it is well documented and properly executed.

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Estate Planning, Family Businesses, and Butterflies

Advisers to small enterprises controlled by a single family often do not familiarize themselves with the butterfly rules because they imagine that these rules are not likely to be encountered in day-to-day practice.

However, it is important to have at least a rudimentary knowledge of the rules when advising clients on estate planning.

It is common for one or more children to be involved in the management of a family business while others who have no interest or aptitude are excluded. The children who are active often object to their inactive siblings having a significant interest in the business. It is generally preferable, therefore, that the active children inherit all the shares of the active corporation (Opco); other assets, such as debt owing to the parent by Opco and investments, can be bequeathed to the inactive children to equalize the inheritances.

Assume that the parent owns all of the shares of a corporation (Holdco) all of the assets of which (rental real estate, other significant investments, and shares of Opco) are worth substantially more than their tax values. Assume further that there are two children in the family, only one of whom is active in Opco. Finally, assume that it is intended that child 1 should inherit all of the shares of Opco and that child 2 should inherit all of the investments. Subparagraph 55(5)(e)(i) of the Act deems siblings not to be related for the purposes of section 55 (see "Purification Transactions," *Tax for the Owner-Manager*, October 2001, at 22). As a consequence, if the two children were each to inherit 50 percent of the shares of Holdco, paragraph 55(3)(a) could not be relied upon to separate the shares of Opco from the investments into two corporations, each wholly owned by one of the children. Paragraph 55(3)(b) and related provisions can be used to achieve a tax-free separation only if a corporation owned by each shareholder receives a distribution of its proportionate share of *each category* of assets of the target company (Holdco) or if a corporation owned by one of the shareholders receives a distribution of its proportionate share of each asset category.

Administratively, the CCRA divides assets into three categories: cash and near cash, investments, and business assets. Assume that there is no cash in either Holdco or Opco, so that only investments (the assets of Holdco other than its shares of Opco) and business assets (the shares of Opco, which fit into this category by virtue of the CCRA's administrative practices) will have to be dealt with. It is not possible to spin the investments into a corporation owned by one child and the shares of Opco into a corporation owned by the other. This problem can be overcome with pre-death planning, as follows.

During the parent's lifetime, Holdco can spin the shares of Opco into a separate corporation (Holdco 2) (in the manner described in connection with case 1 in "Purification Transactions," cited above), relying on paragraph 55(3)(a). The parent can then bequeath the shares of Holdco 2 to child 1 and the shares of Holdco to child 2. Inheritance equalization can be achieved by leaving assets outside of Holdco to one or both of the children.

If there are no significant assets outside of Holdco with which to equalize the inheritances, a variation of the above plan can be used to achieve internal equalization. This technique will be dealt with in a subsequent article.

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Refinancing a Partnership Interest: Singleton Considered

The recent decision on interest deductibility in *Singleton* (SCC 2001) has attracted a great deal of attention from tax planners and taxpayers. In *Singleton*, a taxpayer withdrew capital from a partnership and used those funds for personal purposes while concurrently replacing the capital with borrowed funds. Interestingly, the SCC said that it did not matter whether the borrowing and contribution of capital occurred before or after the withdrawal of capital; the transactions were to be viewed independently and not as one simultaneous transaction. The "true economic purpose" of the transactions was not the appropriate test to be applied. The court cited the *Shell* decision (SCC 1999), and held that the legal form of the transactions, which established a direct link between the borrowing and an "eligible use," was to be respected in the absence of a clear statutory provision indicating otherwise and so long as the transactions were not a sham.

In the context of financing an interest in a partnership, the decision raises at least two important issues: (1) Is there any scope for *Singleton*-type planning if the partner has previously financed a portion of the cost of the partnership interest? (2) What is the limit on refinancing a partner's capital account where such refinancing takes place during the taxation year of the partnership?

On the first issue, Major J placed considerable emphasis on the fact that the taxpayer had at least $300,000 in his capital account in the law firm before the transactions at issue *and* that his original capital contributions had not been financed with borrowed funds (paragraphs 32 through 38 of the reasons for judgment). If a partner has already financed some of the capital contributions with borrowed funds, that level of borrowing will reduce (likely on a dollar-for-dollar basis) the ability to complete a *Singleton*-type refinancing. This position is consistent with the *Tennant* case (SCC 1996) and the tracing requirement inherent in paragraph 20(1)(c).

On the second point, there is a question whether the amount of the capital account that can be refinanced should be computed according to generally accepted accounting principles (GAAP) at the date of the borrowing or according to the tax cost of the partnership interest at that date. The answer is far from clear. The tax cost of the partnership interest may be quite different from the GAAP cost of the partnership interest, because the tax cost starts with the beginning of the year and is reduced by drawings and increased by capital contributions. For income tax purposes, the income or loss for the particular partner will not be factored into the calculation until after the end of the taxation year. For GAAP purposes, a monthly or periodic interim income or loss should be factored into the ongoing calculation of the capital account. It can be argued that the financing limit of a partnership interest for a *Singleton*-type transaction should be based on the GAAP calculation, which would include interim income or loss and all drawings and capital contributions for that partial fiscal year. This would place the owner's equity in the partnership on the same footing as a business corporation, and is consistent with the reasoning in *Trans-Prairie Pipelines* (Ex. Ct. 1970), *Chase Manhattan Bank* (FCA 2000), and CCRA rulings (for example, *Interpretation Bulletin* IT-80), which permit a corporation to deduct interest on debt incurred to pay dividends subject to the overall limit of the accounting retained earnings of the corporation immediately before the dividend payment.

In a professional partnership, the partnership capital accounts for income tax purposes can differ from the partnership capital accounts for accounting purposes for many reasons, including the timing of income inclusions or loss deductions and special elections that apply for income tax purposes, such as an election to exclude work in progress under section 34. In calculating the level of a *Singleton* refinancing that is possible, it will be necessary to analyze these capital account differences and to determine whether any related corporate jurisprudence provides insight as to how the difference should be treated.

These issues highlight the degree of uncertainty that can arise in applying the *Singleton* decision to partnerships when the borrowing takes place mid-year and the partner's capital account for income tax purposes differs from the partner's capital account according to GAAP.

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Taxability of Non-Competition Payments

The issue of whether payments received in consideration for a non-competition agreement (NCA) are taxable as proceeds of disposition of a capital property has long been a matter of debate between taxpayers and the CCRA. The CCRA has generally viewed NCA payments received in conjunction with a share sale as a capital receipt. Taxpayers have argued that merely providing a promise or covenant not to do something does not constitute property for the purposes of the Act. Further, even if it is a right in the nature of property, a disposition does not occur as a result of making the promise. When a person gives a covenant not to compete, he does not alienate his ability to compete; he merely promises to not to exercise that ability. The ability to compete remains with the covenantor, even though the covenantee may be able to seek damages or other relief as a result of the NCA.

The *Fortino* decision (TCC 1996, aff'd. FCA 1999), in which both courts held that the receipt of NCA payments did not constitute income from a source under section 3 of the Act and thus were not taxable, intensified the debate. Although the issue of whether the NCA payments constituted proceeds of disposition from capital property was not addressed directly by either court, *Fortino* has been relied on by taxpayers in support of the argument that NCA payments are not taxable on any basis.

Manrell (TCC 2002) is the first case to deal directly with the question of whether a capital gain arises from the receipt of NCA payments. In that case, the taxpayer and others entered into a share purchase agreement to sell their share interests in a manufacturing business. The share purchase agreement was executed in conjunction with an NCA under which the vendors agreed not to compete with the business carried on by their former company. Manrell was paid $979,575 for entering into the NCA. The minister assessed this amount as a capital gain, and Manrell appealed. The only issue before the Tax Court was whether the NCA payments were taxable as a capital gain.

The taxpayer argued at trial that an agreement not to exercise a right to compete does not constitute "property" for the purposes of the Act. Because the definition of property in subsection 248(1) defines property to mean, first, "property," the taxpayer argued that the meaning must be restricted to the common law concept of property. On the basis of English, Australian, and Canadian jurisprudence, he argued that "property" does not include the ability to compete. Further, the term "right of any kind whatever" in subsection 248(1) has not expanded the common law definition of property so as to include the ability to compete. Last, even if the taxpayer's ability to compete was property for the purposes of the Act, he did not sell his right, but simply covenanted not to exercise it. Accordingly, he argued, there had been no "disposition" for tax purposes.

While McArthur J acknowledged that the ability to compete may well not be property at common law, he found that the definition of "property" in subsection 248(1) is not restricted to its common law definition. Relying on a number of Canadian tax cases, he concluded that the right to compete is "property" for purposes of the Act. He found that the covenant restricting the taxpayer's actions was a disposition of a right, and that a right generally cannot be disposed of in any other way.

Many observers view the *Manrell* decision as wrong in its interpretation of the Act, the common law, and the case law. The decision has been appealed to the Federal Court of Appeal.

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Tax Planning for Capital Gains Reserves

Taxpayers who realize a capital gain in a taxation year are entitled to claim a "reasonable reserve" when a portion of the proceeds received is not due until a future year. The mechanics of the reserve calculation are fairly well established. A reserve may be claimed for each year in which there are proceeds that remain payable after the end of the year. Generally, clauses 40(1)(a)(iii)(C) and (D) limit the reserve period to 5 years regardless of the terms of the sale agreement. Subsection 40(1.1) allows a 10-year reserve period when certain farm-related property or small business shares are sold to a child.

The CCRA considers the reasonable reserve to be that proportion of the amount payable to the taxpayer after the end of the taxation year that the original capital gain (before the reserve) is of the proceeds of disposition of the property:

$$\frac{\text{capital gain}}{\text{proceeds of disposition}} \times \begin{array}{c}\text{amount payable after}\\\text{the end of the year}\end{array}$$

Advisers should be aware that when a demand promissory note is accepted by the vendor as consideration on the disposition of property, a reserve is not available because the entire note is considered a present debt.

Another potential pitfall that may restrict access to the reserve occurs when the purchaser of the property is a corporation that immediately after the sale was controlled directly or indirectly in any manner whatever by the taxpayer (subsection 40(2)). This provision denies a reserve claim if an owner-manager transfers property to a corporation over which he or she is considered to have de facto control.

Careful planning can maximize the reserve. The full amount of the reserve need not be claimed in any year, thereby triggering excess income. This may be beneficial if in future years a taxpayer will be subject to the clawback of Old Age Security or at risk of losing the age amount credit when reserve amounts would otherwise be brought back into income. Taxpayers should consider maximizing the eligible reserve amount when negotiating for the sale of several properties at the same time. The reserve amount may be maximized by allocating the note-payable portion of proceeds to property with the largest gain. For example, if there are two classes of shares, one of which bears a higher tax cost, the share purchase agreement should be worded to allocate the reserve-eligible consideration to the shares with the highest accrued gain. When taxpayers have crystallized their capital gains exemption and their shares have increased in value above the crystallized amount, similar planning can be completed to split a single class of shares into two separate classes of shares, one with tax basis and the second with no tax basis. This cost base isolation transaction is completed by transferring the existing shares of the corporation back to the corporation under subsection 85(1). Two classes of shares are taken as consideration—new preferred shares with a redemption amount and agreed amount equal to the cost base of the former shares, and new common shares. Paragraphs 85(1)(g) and (h) allocate the tax cost of the former shares to the new shares such that the full basis of the old common shares attaches to the new preferred shares. The common shares are allocated only a nominal basis amount.

It is possible to transfer the untaxed portion of a capital gains reserve to the spouse or common law partner of a deceased taxpayer, provided that the right to the remainder proceeds not due is assigned to the deceased taxpayer's spouse and that the executor and spouse have jointly elected under the provisions of subsection 72(2).

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Series of Transactions: The OSFC Case

On September 11, 2001, the FCA issued its first decision on the GAAR in *OSFC Holdings Ltd.* Central to the court's decision was the meaning and scope of subsection 248(10), which purports to extend the meaning of "series of transactions." The vagueness of the language used in the subsection and the absence of a clear legislative intent have encouraged speculation about the nature and scope of the provision ever since its introduction in 1985. In *OSFC*, the FCA attempted to establish intelligible standards for its application.

Having acknowledged the lack of clarity of the provision, the court concluded that subsection 248(10) broadens the meaning of "series" from the definition given by the House of Lords in landmark decisions such as *Furniss v. Dawson* and *Craven v. White*. The Canadian drafters' use of the word "include" effectively confirms such an enlargement of the term's meaning.

The FCA identified three essential requirements for the application of subsection 248(10). First, there must be a "series of transactions" within the common law meaning; second, there must be a transaction related to that series; third, the related transaction must be completed in contemplation of that series.

The first requirement raises the question whether it is necessary to have a common law series for subsection 248(10) to apply. Arguably, the modern rule of statutory interpretation leads to the conclusion that a transaction following a related transaction can itself be part of the series, and there is no precondition that a common law series exist for subsection 248(10) to apply.

Note, however, that the FCA's interpretation of the subsection can lead to absurdity. Consider a situation in which a dividend is paid by A Co to Holdco; later on, A Co is sold to an unrelated purchaser (unknown at the time the dividend was paid). According to the English test of "series of transactions" and based on the test developed by the FCA in *OSFC*, subsection 55(2) does not apply because no common law series exists. Consider a second situation in which A Co participates in a reorganization whereby a dividend is paid to Holdco—a "series of transactions" under the English test. Later on, A Co is sold to an unrelated purchaser (unknown at the time the dividend was paid). On the basis of the FCA's test, subsection 248(10) applies and triggers the application of subsection 55(2).

The FCA's third requirement also deserves comment. The court made it clear that whether the related transaction is completed in contemplation of the common law series "requires an assessment of whether the parties to the transaction knew of the common law series, such that it could be said that they took it into account when deciding to complete the transaction. If so, the transaction can be said to be completed in contemplation of the common law series" (Rothstein J, at paragraph 36). In our example, it is possible that only the seller knew of the common law series. Although the purchaser may have had actual knowledge of the reorganization, that is probably not sufficient to affirm that he took it into consideration when he decided to complete the transaction. Does this mean that the related transaction was not completed in contemplation of the common law series and, as a result, that the reorganization and the sale were not part of the same series of transactions such that subsection 55(2) is not applicable? Should subsection 248(10) bear a different meaning depending on the particular provision at issue? The phrase "series of transactions" is used in many other provisions of the Act.

The CCRA recently confirmed its view that subsection 248(10) extends the common law meaning of "series" (*Income Tax Technical News*, January 11, 2002). See comments to the same effect in *Granite Bay Charters* (TCC 2001), and a decision to the opposite effect on the meaning of "series" in *C.P.L. Holdings* (FCTD 1995).

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Owner-Manager Compensation 4: Retiring Allowances

Editor's note: This is the fourth in a planned series of articles by Mr. Belley on owner-manager compensation.

Subparagraph 56(1)(a)(ii) and paragraph 60(j.1) of the Act set out the rules for the inclusion in and deduction from income of a retiring allowance (RA). Briefly put, an RA is taxable when received and may be (partly) deductible when contributed to a registered pension plan (RPP) or a registered retirement savings plan (RRSP). It may be paid as a lump sum or in instalments (TI 9328525) to the extent that it is a reasonable amount (TI 9211150). An RA can also be paid directly to an RRSP (TI 2000-0060453), but a lump-sum payment to an RPP allowing a retiring employee to receive a full pension at his normal retirement age or a reduced pension payable immediately may not be considered an RA (TI 9705403).

Under subsection 248(1), an RA is defined as an amount received on or after the retirement of a taxpayer from an office or employment in recognition of the taxpayer's years of service, or an amount received in respect of a loss of an office or employment. The payment may be on account of damages, but does not include a superannuation or pension benefit, an amount received as a consequence of the death of an employee, or a benefit related to mental, physical, employment, or retirement counselling services.

If the amount of an RA is excessive, section 67 may prevent a deduction by the payer, or the amount may not be characterized as an RA. In determining reasonableness, one must consider the retiree's length of service, the remuneration received, and other retirement benefits to which the retiree is entitled. For full-time employees, the amount eligible for deduction should be seen as reasonable (TI 2000-0060453 and 9428957).

A corporation may pay an RA to a shareholder if she is also employed by the corporation (TI 2000-0060453), usually as an officer, even if she has been remunerated with dividends rather than salary (ATR 2000-0055453; see also TI 9331675, where the CCRA took the position that dividends are received by shareholders qua shareholders and should not be considered remuneration for the purpose of the calculation of the retiring allowance). An employee-shareholder may remain a director of a corporation after retirement, provided that her compensation is nominal (ATR 9622013). Where the shareholder ceases to be an officer and maintains a continuing involvement with the corporation, it will be a question of fact as to whether or not she has retired (TI 9325085). However, a payment to a former partner of a partnership generally does not qualify as an RA (TI 9714285), except in certain cases where the payment is in recognition of the taxpayer's service as an employee. Similarly, a payment upon the admission of an employee to the partnership does not generally qualify as an RA, since admission to partnership is a promotion rather than retirement (TI 9409700).

An RA may generally be paid when a business is sold. A payment qualifies as an RA if the former employer sold assets to an arm's-length purchaser who subsequently hires the taxpayer (see *Fostey*, TCC 1999). However, where shares of the employer corporation are sold, the amount is not an RA since it does not result in a loss of office (TI 9618245). In some cases, a change of legal vehicle may also have an impact on the qualification of a payment as an RA. For example, in the case of a taxpayer who worked for an unincorporated employer, acquired the business, and subsequently transferred the business to a corporation, the CCRA stated that the qualifying years of service for the purpose of the calculation of the RA included those spent as an employee of the unincorporated business and as an employee of the corporation, but not those spent as owner of the unincorporated business (TI 9728365). Amalgamations seem less problematic. The amalgamation of two corporations is generally a continuation of the predecessor corporations; where employees of a predecessor corporation are employed by the amalgamated corporation, a payment by the predecessor corporation will not be considered an RA (TI 9700995). One advantage of this is that where corporations have been amalgamated, the resulting corporation should be considered an affiliate of the predecessor corporations for the purpose of determining the years of service of the employee (TI 9634035 and 9532795).

Finally, an RA is not required to be paid in cash. For example, if property is transferred to an employee as part of a severance package, the fair market value (FMV) of the property should be considered part of the RA. If an employee is allowed to purchase property at a discount, the discount should be considered part of the RA (TI 2000-0000246 and 2000-0003955). Similarly, cash payments at retirement replaced with stock unit awards should qualify as an RA; the FMV of shares is part of the RA (TI 9820283).

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UPDATE: REASONABLENESS OF OWNER-MANAGER REMUNERATION

For an expense to be deductible for tax purposes, it must be reasonable in the circumstances. On January 18, 2002, the CCRA issued TI 2001-0114993, which confirmed that the CCRA reserves the right to challenge the reasonableness of intercorporate management fees. Intercorporate management fees that are paid from Opco to Holdco and then ultimately to certain individuals may not fall within the CCRA's current assessing policy. Accordingly, intercorporate management fees paid in such situations may be challenged for reasonableness by the CCRA.

At the Canadian Tax Foundation's 2001 annual conference, specific situations in which the CCRA will not challenge the reasonableness of shareholder-manager remuneration were considered. The CCRA's views are set out in *Income Tax Technical News* no. 22, January 11, 2002. Generally speaking, the CCRA will not challenge the reasonableness of owner-manager remuneration if it is paid directly to individuals resident in Canada who are active shareholder-managers of a Canadian-controlled private corporation. The key is that the Canadian-resident recipients must be active in the operating business and must contribute to the income-producing activities from which the remuneration is paid.

Practitioners should note that regardless of the corporate structure, remuneration must be paid *directly* to the owner-manager in order to remain within the CCRA's current assessing practice on the reasonableness of owner-manager remuneration.

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Employment Income: Reimbursed Taxi and Parking Expenses

Paragraph 6(1)(a) of the Act includes in employment income the value of most benefits received in respect of an office or employment. Generally, if the expenses are incurred primarily for the employer's benefit, they will not be taxed: *Hoefele* (FCA 1995). It is a judgment call whether certain reimbursed expenses fall into this category.

In TI 2000-0049425 (January 29, 2001), the CCRA suggested that reimbursed taxi expenses paid to an employee called back to work after normal business hours were caught by paragraph 6(1)(a). More recently, the CCRA has said that an employee's right to park free of charge in the employer's parking lot is generally a taxable benefit: *Income Tax Technical News* no. 22, January 11, 2002 (ITTN).

The CCRA's reasoning with respect to taxi expenses is that the cost of travel between home and the workplace is a personal expense. In the CCRA's view, this includes the cost of unexpected trips to the employer's place of business after normal business hours.

The TI on taxi expenses is quite short and does not offer much in the way of analysis or examples. One can envision a number of situations in which reimbursed taxi expenses should not be regarded as benefits from employment. In *Hoefele*, the FCA said that the basic question was whether the expense was incurred for the employer's or the employee's benefit. If the expense was incurred primarily for the employer's benefit, it was not taxable.

Consider the case of an employer that asks a female employee to work into the evening hours. Out of concern for the employee's safety when returning home later in the evening, the employer pays for the cost of a taxi. Should this be regarded as a taxable benefit? The brief comments in the TI suggest that this might be the case. However, is it not the case that the expense is really incurred for the benefit of the employer, to ensure that staff are available when overtime is required?

In this respect, the taxi expense is not unlike the cost of providing the late-working employee with a supper allowance. In our experience, the CCRA has not generally regarded the payment of a reasonable amount as a taxable benefit in such circumstances. It is hard to see why a reimbursed taxi expense should fall into a different category.

Another example is the case referred to in the TI—namely, the employee who is called back to work outside of normal working hours. Again, it seems that the payment of the taxi expense should be regarded as an expense incurred primarily for the employer's benefit. There are many variations on this theme. For example, suppose that the employee does not live in a location that is convenient to public transit, or that the public transit service is operating on limited hours or not at all. The employer wants the services of the employee without delay and tells the employee to take a taxi. This should not constitute a taxable benefit. Nonetheless, employers need to be aware of the CCRA's position, and make appropriate judgments with respect to the tax treatment of reimbursed taxi expenses in individual cases.

The right to park free in an employer's parking lot raises similar issues. Assuming that the employer allows non-employees to park in the lot for a fee, does the right to free parking by the employee constitute a taxable benefit? An interesting aspect of this question was considered in *Chow* (TCC 2001). The CCRA took the position that parking is the same as travelling to and from work, and that the value of the free parking was a personal expense. About 50 percent of Chow's work was done after hours. After 6:00 p.m., public transit was not a reasonable option for his return trip home. The court noted that the employer could have paid for taxis in lieu of the free parking, but that the cost of the taxis would have exceeded the value of the free parking. Parenthetically, it is interesting to note that the court seemed to be of the view that if the employer had paid for taxis in these circumstances, there would be no taxable benefit to the employee.

The court allowed Chow's appeal. It said that the root question was whether the primary advantage attributable to the right to free parking enured to the benefit of the employer or the employee. On the facts of this case, the court said, the employer received many times the value of the parking privilege in extra hours of overtime work.

The CCRA says in the ITTN that *Chow* was argued under the informal procedure and is not a binding precedent. It does acknowledge that cases of this kind are fact-specific, and that the underlying question is whether the right to free parking benefits the employer more than the employee. However, the CCRA states that its general policy is that the right to free parking will usually be considered a benefit, except where the parking is provided for business reasons and the employee is regularly required to use a vehicle for business reasons.

All of this leaves employers in a difficult position with respect to the proper treatment of taxi and parking expenses. While *Chow* indicates that such expenses are not automatically benefits (as the CCRA implies in the ITTN), each case will have to be evaluated on its particular facts in light of the basic question: for whose benefit is the expense incurred?

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