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2010 Federal Budget Commentary

March 4, 2010

BUDGET OVERVIEW

On Thursday March 4, Federal Finance Minister Jim Flaherty tabled his fifth budget, the second of the current minority Conservative government and the second in succession to follow a period of prorogation of the House.

The budget projects a federal deficit of \$53.8 billion in fiscal 2009-10 and a further \$49.2 billion in 2010-11, but sharp declines thereafter leading to a deficit of only \$1.8 billion in 2014-15. This outlook reflects the government's confidence in longer-term economic recovery as well as the intention to move away from stimulus spending to fiscal restraint, the Minister said. He also forecast that Canada would return to balanced budget status before any other G7 country.

Among proposed and continued spending programs aimed at stimulating and maintaining economic recovery are \$3.2 billion in personal income tax relief including upgrading the basic personal tax credit and raising child benefits; over \$4 billion in unemployment benefits including some EI premium relief; and \$7.7 billion to stimulate infrastructure and housing construction. The budget also proposes investment of \$1.9 billion to "create the economy of tomorrow," including \$600 million to strengthen research and development efforts in Canada.

The minister pledged increased restraint on government spending, most notably by slowing the projected growth of spending on defense and foreign aid. There are, however, few proposed cuts to program spending. He also promised to freeze the total amount spent on government salaries, administration and overhead. This includes freezing the salaries of ministers, members of parliament and senators, as well as the budgets of ministers' offices.

While the budget does not propose major fiscal policy shifts, it contains a number of fairly significant tax-related measures. These are discussed below.

PERSONAL TAX MEASURES

EMPLOYEE STOCK OPTIONS

Currently, a stock option deduction of 50% of the gross stock option benefit is available to employees where qualifying criteria are met. The employer is not allowed to claim a tax deduction for the issuance of its shares. However, where the employee "cashes out" their stock option rights without first acquiring the underlying shares, the employee may still qualify for the 50% deduction and the related payment by the employer may be fully deductible by the employer.

For transactions occurring after 4:00 pm EST on March 4, 2010, the budget proposes generally to limit the 50% stock option deduction to the employee to situations where the employee first acquires the shares. Consequently, this 50% deduction would not generally be available where the employee cashes out their stock option rights without first acquiring the shares. Alternatively, the employer can make a new election to forego the deduction for the qualifying cash payment and thereby allow the employee to claim the 50% stock option deduction.

TAX DEFERRAL ELECTION AND REMITTANCE REQUIREMENT

Currently, employees of most publicly traded companies can elect to defer the applicable tax liability on the taxable stock option benefit where a stock option is exercised and the related shares are not sold. This deferral can apply to the benefit on up to \$100,000 worth of stock options per year. The deferral of this stock option benefit can result in financial difficulties for some individuals where the value of the optioned securities subsequently decreases and the eventual proceeds from the sale of the shares are not sufficient to satisfy his or her tax obligation on the employment benefit.

The budget proposes to repeal this tax deferral election for stock options exercised after 4:00 pm EST on March 4, 2010. In addition, the existing withholding tax requirements will be clarified to ensure that the applicable tax on the stock option benefit is required to be withheld and remitted by the employer at the time the stock option is exercised. These measures will prevent situations in which an employee is unable to meet his or her tax obligations as a result of the decrease in the value of these securities.

The amendments to the withholding and remittance requirements will apply to stock option benefits arising on the issuance of securities after 2010 to provide time for businesses to adjust their compensation arrangements and payroll systems. In addition, these proposals will not apply to options granted before 2011 pursuant to an agreement in writing entered into before 4:00 pm EST on March 4, 2010 where the agreement included restrictions on the disposition of the optioned shares.

SPECIAL RELIEF FOR EXISTING TAX DEFERRAL ELECTIONS

Where a taxpayer disposes of securities of a publicly traded company before 2015 and the related stock option benefit was deferred upon the exercise of the option, special tax relief will be provided by the budget. This special relief will ensure that the tax liability on a deferred stock option benefit will not exceed the sale proceeds from the optioned securities after taking into account the tax relief resulting from the use of the capital loss on the optioned securities against capital gains from other sources.

A taxpayer may elect to pay a special tax for the year equal to the proceeds from the sale of the optioned shares. This tax election will allow the taxpayer to claim an offsetting deduction equal to the amount of the stock option benefit. In addition, a capital gain equal to one-half of the lesser of the stock option benefit and the capital loss on the optioned shares will be included in income. This capital gain may be offset by the capital loss on the optioned shares, provided that this loss has not otherwise been utilized.

Individuals who disposed of their optioned securities before 2010 will have to make an election for this special tax treatment on or before the filing due-date for their 2010 tax return. In addition, individuals who have not disposed of their optioned shares before 2010 must do so before 2015 in order to qualify for this special tax treatment. The tax election will be required by the filing due-date for the year of disposition.

MEASURES FOR DISABLED TAXPAYERS

RRSP TAX-DEFERRED TRANSFERS ON DEATH

Under current legislation, where the balance in a deceased annuitant's Registered Retirement Savings Plan (RRSP) is payable to a surviving spouse or partner or an infirm financially dependent child or grandchild, the amount may be transferred to the beneficiary's RRSP and tax thereby deferred. The budget proposes to extend this "rollover" treatment where the RRSP proceeds are transferred to a Registered Disability Savings Plan (RDSP) for the benefit of an infirm dependent child or grandchild, effective for deaths after March 4, 2010. The child or grandchild is considered to be financially dependent if his or her income for the year preceding the year of death did not exceed a specified threshold (\$17,621 for 2010 being the aggregate of the basic personal and disability credit bases). The amount rolled over cannot exceed the beneficiary's RDSP contribution room, which currently has a lifetime maximum of \$200,000. Any rolled-over amount will not attract Canada Disability Savings Grants. Because RRSP balances are tax-deferred funds, these amounts will be taxable in the beneficiary's hands when withdrawn from the RDSP.

In order to provide comparable relief where the death occurred prior to March 5, 2010, transitional measures are included for deaths occurring after 2007 and before 2011 to allow a contribution to the RDSP of a financially dependent child or grandchild of the deceased. The contribution will offset the RRSP income inclusion arising on the death. The amount of such contribution will be limited to the available RDSP contribution room and must be made before January 1, 2012.

Taxpayers who wish to take advantage of these provisions should review their wills to ensure the utilization of these provisions can be accommodated.

CARRY FORWARD OF RDSP ENTITLEMENTS

RDSPs are entitled to Canada Disability Savings Grants of up to \$3,500 per year and Canada Disability Savings Bonds of up to \$1,000 per year. Currently, in order to access these government contributions to the RDSP, private contributions must be made in the year. As there is no carry forward of these entitlements, they are lost if private contributions are not made. The budget introduces a 10-year carry forward of the CDSG and CDSB room, retroactive to the introduction of RDSPs in 2008. The carry forward room amounts will first be able to be accessed in 2011.

PROVINCIAL PAYMENTS TO RESPs AND RDSPs

Besides federal payments that are made to these plans, such as Canada Education Savings Grants for Registered Education Savings Plans (RESP) and Canada Disability Savings Grants for RDSPs, the provinces may also provide similar support. The budget clarifies that such provincial payments are on equal footing with the federal subsidies and, accordingly, do not reduce the contribution room for private contributions to these plans or attract federal grants.

SHARED CUSTODY CHILD BENEFITS

Currently, only one individual, usually the mother, may receive the Canada Child Tax Benefit, Universal Child Care Benefit and the child component of the refundable Goods and Services Tax/Harmonized Sales Tax Credit, even where there is shared custody of the eligible child. Effective for benefits payable commencing July, 2011, these payments may be shared equally between two individuals who live separately where the child lives approximately equally with each of them. Each will receive one-half of the amount to which they would be entitled if they were the sole recipient. These credits will still be able to be received by one individual if the two parties so agree.

UNIVERSAL CHILD CARE BENEFIT (UCCB)

In a two-parent family, the \$100 monthly UCCB for each child age five or under is included in the income of the lower income spouse. This disadvantages a single parent in that the tax on the UCCB could be significantly higher than for a two-parent family. Accordingly, for 2010 and subsequent years, a single parent receiving the UCCB will have the option of including the UCCB for all children in the income of the child for whom the eligible dependant (equivalent-to-married) credit is claimed. If no eligible dependant claim can be made, for example if the children's income is too high, the parent will have the option of including the UCCB for all children in the income of one of the children for whom it is paid.

SCHOLARSHIP EXEMPTION AND EDUCATION TAX CREDIT

For 2010 and subsequent years, the tax-free portion of a scholarship will be limited to the total of the fees paid to a designated educational institution for tuition and the cost of program-related materials where the taxpayer is enrolled in a part-time qualifying educational program. Scholarships awarded to disabled or infirm students who are prevented from enrolling on a full-time basis will continue to be fully tax exempt. In addition, an amount will be eligible for the scholarship exemption only to the extent that it can reasonably be considered to be received in connection with enrollment in an eligible educational program for the duration of the period of study related to the scholarship.

A qualifying post-secondary school program, for the purpose of the education tax credit and the scholarship exemption, will not include a program which consists primarily of research unless the program leads to a diploma from a college or CEGEP or a bachelor, masters or doctoral degree or equivalent degree. Consequently, post-doctoral fellowships will be taxable.

MEDICAL EXPENSE CREDIT

Expenses for medical or dental services, including related expenses such as travel, which are purely for cosmetic purposes, will not qualify for the medical expense credit effective for expenses incurred after March 4, 2010. Expenses necessary for medical or reconstructive purposes will continue to qualify for the credit.

US SOCIAL SECURITY BENEFITS

Prior to 1996, Canadian residents receiving US social security benefits were only required to include 50% of these benefits in income, pursuant to the Canada-United States Income Tax Convention. Tax changes in 1996 increased the inclusion rate for these benefits to 85%. The budget proposes to reinstate the 50% inclusion rate for Canadian residents who have been in receipt of US social security benefits since before January 1, 1996 and for their spouses and common-law partners who are eligible to receive survivor benefits. This measure will apply to US social security benefits received on or after January 1, 2010.

MINERAL EXPLORATION TAX CREDIT

The budget proposes to extend eligibility for the mineral exploration tax credit for one year to flow-through share agreements entered into on or before March 31, 2011.

BUSINESS TAX MEASURES

CAPITAL COST ALLOWANCE (CCA)

TELEVISION SET-TOP BOXES

To better reflect their estimated useful life, satellite set-top boxes and cable set-top boxes that are currently governed by Class 8 (20% declining balance CCA rate) and Class 10 (30% declining balance CCA rate), respectively, will be eligible for a higher declining balance CCA rate of 40%. The budget proposes to make this higher CCA rate available for such assets acquired after March 4, 2010 and that have not been used or acquired for use before March 5, 2010.

CLEAN ENERGY EQUIPMENT

Taxpayers who acquire specified clean energy generation and conservation equipment after February 22, 2005 and before 2020 are permitted to treat these assets as Class 43.2 (50% declining balance CCA rate) property. Generally, such assets acquired before February 23, 2005 are classified as Class 43.1 (30% declining balance CCA rate) property. With a view to further encourage taxpayers to invest in energy generation equipment with low or zero emission levels, the budget proposes to broaden the definition of Class 43.2 to include heat recovery equipment used in a broader range of applications and distribution equipment used in district energy systems that rely primarily on ground source heat pumps, active solar systems or heat recovery equipment. Lower-efficiency fossil-fuel-based distribution equipment will now be included in Class 43.1. These measures will apply to eligible assets acquired on or after March 4, 2010 that have not been used or acquired for use before that date.

CANADIAN RENEWABLE AND CONSERVATION EXPENSES

If the majority of a project's tangible property qualifies for inclusion in Class 43.2, then certain project start-up expenses (for example, feasibility studies and engineering and design work) qualify as Canadian Renewable and Conservation Expenses. Canadian Renewable and Conservation Expenses can be fully deducted in the year incurred or transferred to investors using flow-through shares. A corporation must be a "principal business corporation" in order to transfer Canadian Renewable and Conservation Expenses to an investor using flow-through shares. Accordingly, to enhance investment in this sector, the "principal business corporation" definition has been expanded, effective for taxation years ending after 2004, to include corporations the principal business of which is any of distributing energy, fuel production or generating energy using Class 43.1 or Class 43.2 property.

INTEREST ON OVERPAID CORPORATE TAXES

To curb possible deliberate overpayments of tax by corporations to earn attractive rates of refund interest from the government, and to reduce its cost of borrowing funds, the prescribed quarterly rate of interest on amounts owing to corporations will no longer include the 2% premium above the prescribed quarterly rate of interest. This new lower interest rate for corporations will apply in respect of amounts including, but not limited to, income tax, Goods and Services Tax/Harmonized Sales Tax (GST/HST), employment insurance premiums and Canada Pension Plan contributions. The interest rates for non-corporate taxpayers will remain unchanged.

This measure is effective July 1, 2010.

TAXATION OF CORPORATE GROUPS

The budget indicates that the government intends to review the framework for the taxation of corporate groups to assess if changes could be made in this area to improve the functioning of the tax system. Potential new rules will be explored, including a formal system of loss transfer or consolidated reporting. The government intends to solicit stakeholders' views before introducing any legislation.

FEDERAL CREDIT UNIONS

The budget proposes to permit the establishment of federal credit unions. Therefore, existing tax rules will be amended so that the income tax rules that apply to other credit unions also apply to federal credit unions.

SIFT CONVERSIONS AND LOSS TRADING

Currently, tax rules exist to facilitate the conversion of specified investment flow-through (SIFT) trusts and partnerships into corporate form on a tax-deferred basis. Absent the conversion to corporate form, SIFT trusts and partnerships will be taxed on their distributions no later than 2011.

The budget contains measures intended to curtail what it perceives as inappropriate tax-loss trading using the SIFT conversion rules that would not be permitted between two corporations. The loss trading usually involves a reverse-takeover where an acquiring corporation's tax attributes, including its loss carryovers, are available without restriction to shelter future income earned by the acquired SIFT trust. Existing tax rules prohibit such loss trading if the acquired entity was instead a corporation. The budget proposes to extend these existing rules to situations where units of a SIFT trust or SIFT partnership are exchanged for shares of a corporation.

Measures have also been introduced to facilitate the wind-up of SIFT trusts with corporate investments.

These measures will generally be applicable to transactions undertaken after 4:00 pm EST on March 4, 2010.

SPECIFIED LEASING PROPERTY RULES

The budget proposes, for leases entered into after 4:00 pm EST on March 4, 2010, to expand the scope of existing specified leasing property rules to otherwise exempt property that is the subject of a lease to a non-resident or to a government or tax-exempt entity. However, there is an exception if the total value of the leased property is less than \$1 million, subject to an anti-avoidance rule.

CHARITIES

DISBURSEMENT QUOTA REFORM

Currently, the disbursement quota rules require that the amount that a charity spends annually on charitable activities be at least the sum of:

- 80% of the previous year's tax-receipted donations plus other amounts relating to enduring property and transfers between charities (the "charitable expenditure rule")
- 3.5% of all assets not used in charitable programs or administration, if these assets exceed \$25,000 (the "capital accumulation rule")

The budget proposes to reform the disbursement quota for fiscal years that end on or after March 4, 2010 by the following measures:

- repeal of the charitable expenditure rule
- modification of the capital accumulation rule
- strengthening of related anti-avoidance rules

REPEAL OF THE CHARITABLE EXPENDITURE RULE

As a result of repealing the charitable expenditure rule, the disbursement quota will no longer require application of a number of concepts including enduring property (i.e., gifts to a charity for endowments or multi-year projects) and its related capital gains pool and specified gifts.

The current rule which provides the Canada Revenue Agency (CRA) with the discretion to allow charities to accumulate property for a particular purpose, such as a building project, will be amended due to the absence of the charitable expenditure rule. Instead, CRA will be given the discretion to exclude the accumulated property from the capital accumulation rule calculation.

MODIFICATION OF THE CAPITAL ACCUMULATION RULE

The current \$25,000 exemption from the capital accumulation rule for assets not used in charitable programs or administration will be increased to \$100,000 for charitable organizations. However, the threshold for charitable foundations will remain at \$25,000. The amount of all assets not currently used in charitable programs or administration, for the purpose of the capital accumulation rule, is subject to a calculation contained in the Income Tax Regulations. This calculation will be amended to clarify that it applies to both charitable foundations and charitable organizations.

STRENGTHENING OF ANTI-AVOIDANCE RULES

The budget proposes to extend existing anti-avoidance rules to situations where it can reasonably be considered that a purpose of a transaction was to delay or avoid the application of the disbursement quota. The proposals will ensure that amounts transferred between non-arm's length charities will not be able to be used to satisfy the disbursement quota of both charities. Penalties of 110% of the expenditure avoided or delayed can be imposed on both charities on a joint and several basis.

INTERNATIONAL TAXATION

SECTION 116 AND TAXABLE CANADIAN PROPERTY

Pursuant to Canadian tax rules, non-residents of Canada are subject to income tax in Canada on gains arising from the disposition of "taxable Canadian property". However, many of Canada's tax treaties with other countries contain an exemption from such tax in respect of taxable Canadian property, except for taxable Canadian property that is real estate or shares that derive their value principally from real estate.

The budget proposes a relieving measure to amend the definition of "taxable Canadian property" to exclude shares of corporations (and certain other interests) that do not derive their value principally from real estate situated in Canada, Canadian resource property and timber resource property in order to reduce deterrents to foreign investors to invest in Canada. This measure will eliminate, in most cases, purchaser withholding and section 116 certificate compliance obligations for these types of properties. It will also eliminate the existing requirement of a vendor to file a related Canadian tax return in instances where no Canadian tax liability exists in respect of the sale.

This measure will apply for determinations after March 4, 2010 of whether property owned by a taxpayer constitutes taxable Canadian property.

REFUNDS UNDER REGULATION 105 AND SECTION 116

Regulation 105 imposes a withholding tax requirement on payors on amounts paid to a non-resident of Canada who renders services in Canada. Also, section 116 imposes a withholding tax requirement on a purchaser of taxable Canadian property from a non-resident. In each case, the amounts are to be withheld and remitted to the CRA on account of a non-resident's potential Canadian tax liability. The responsibility of the payor to withhold and remit the subject taxes may exist notwithstanding that a non-resident is exempt from tax in Canada due to a tax treaty.

The ability of the non-resident to file a Canadian income tax return and claim a refund of any such excess amount withheld is subject to certain time limits. The budget proposes to correct a technical anomaly that otherwise prevents a non-resident from recovering any such excess amount withheld and remitted to the CRA. The tax return is required to be filed within two years of the assessment of the withholding tax. It is proposed that this measure is to be effective for refunds claimed in tax returns filed after March 4, 2010.

FOREIGN TAX CREDIT GENERATORS

The Department of Finance is concerned that excessive foreign tax credits are being claimed with respect to interest income from foreign corporations. The budget introduces proposals to deny these excessive claims.

This measure applies to foreign taxes incurred in respect of taxation years that end after March 4, 2010.

FOREIGN INVESTMENT ENTITIES AND NON-RESIDENT TRUSTS

The budget contains new proposals to replace previous draft proposals pertaining to Foreign Investment Entities and Non-Resident Trusts. Taxpayers who voluntarily complied with the previous draft proposals for Foreign Investment Entities may choose either to have applicable previous years reassessed or may claim a deduction, in respect of any excess income previously reported, in the current year.

SALES AND EXCISE TAXES

GST/HST MEASURES

COSMETIC PROCEDURES AND RELATED GOODS AND SERVICES

Current GST/HST legislation specifies that dental and surgical services for cosmetic purposes (not reconstructive or medical purposes) are taxable. This budget proposes that all purely cosmetic procedures whether dental, surgical or otherwise will be subject to tax. Typical procedures will include: liposuction, hair replacement procedures, botox injections and teeth whitening. If a cosmetic procedure is paid for by a provincial health insurance plan it will continue to be GST/HST exempt. This proposal will apply to all supplies made after March 4, 2010 or supplies made on or before March 4, 2010 if the supplier charged, collected or remitted GST/HST in respect of the supply.

DIRECT SELLERS SIMPLIFICATION

The 2009 budget introduced a proposal for network sellers meeting certain criteria to utilize a special GST/HST simplified accounting method. This budget proposes that new entrants to the direct selling industry can apply to the Minister to use this special GST/HST method and that host gifts supplied by network sellers to hosts will not be subject to GST/HST. This budget also proposes that in certain circumstances, a safety mechanism will eliminate the need for network sellers to make GST/HST adjustments in a particular period where the qualification criteria to use the simplified accounting method are not met.

CUSTOMS TARIFF REDUCTIONS ON MANUFACTURING INPUTS AND MACHINERY AND EQUIPMENT

This budget proposes to make Canada a tariff-free zone for industrial manufacturers by eliminating all remaining tariffs on machinery and equipment and goods imported for further manufacturing. 1160 tariff items will have the Most Favoured Nation (MFN) rates of duty reduced to “free” for imports on or after March 5, 2010. Another 381 tariff items will have the MFN rates of duty gradually reduced as of March 5, 2010 and becoming “free” no later than January 1, 2015. When fully implemented, this measure will result in \$300 million in annual duty savings for Canadian business.

OTHER MEASURES

TAX AVOIDANCE TRANSACTIONS

The government intends to hold public consultations on proposals for a formal reporting process for certain so-called tax avoidance transactions. Details of the proposals and the consultation process will be released at the “earliest opportunity.”

The purpose of the eventual legislation will be to institute a reporting mechanism in respect of potentially abusive transactions to enable the CRA to identify aggressive tax planning on a timely basis in order that existing anti-avoidance rules, such as the General Anti-Avoidance Rule (GAAR), can be applied, if warranted.

Reportable transactions will be avoidance transactions, as currently defined in the Income Tax Act, that meet at least two of the following three criteria:

1. A promoter or tax advisor is entitled to fees that are to any extent based on the amount of tax benefit from the transaction, contingent on obtaining the tax benefit or attributable to the number of taxpayers who participate in the transaction.
2. A promoter or advisor in respect of the transaction requires “confidential protection” about the transaction.
3. The taxpayer obtains “contractual protection” in respect of the transaction.

Tax shelters and flow-through share arrangements will be exempted as they have existing reporting mechanisms.

Non-reporting will result in the denial of the tax benefit sought to be obtained. Alternatively, the taxpayer may elect to provide the information, pay a penalty and still receive the tax benefit. The proposals are intended to apply to avoidance transactions entered into after 2010 and those that are part of a series of transactions completed after 2010. The budget papers make it clear that reporting is not considered to be an admission that GAAR is applicable to the transaction or series of transactions.

TAX EVASION AND THE PROCEEDS OF CRIME AND MONEY LAUNDERING REGIME

Criminally indictable offences prosecuted under the *Income Tax Act*, the *Excise Tax Act*, the *Excise Act* and the *Budget Implementation Act, 2000*, are excluded from the Criminal Code aspects of the proceeds of crime and money laundering regime. These Criminal Code provisions, introduced as part of an international initiative, provide for enhanced search and seizure procedures, minimum terms of imprisonment and international assistance. The budget proposes to eliminate the above-noted exclusions to enhance international efforts in this area.

ONLINE NOTICES

Under current legislation certain notices, such as notices of assessment under the *Income Tax Act*, can only be received by taxpayers through the mail or personally. This budget proposes that the *Income Tax Act*, *Excise Tax Act*, *Excise Act, 2001*, *Air Travellers Security Charge Act*, *Canada Pension Plan Act* and *Employment Insurance Act* be amended to allow for electronic issuance of notices that can currently be sent by ordinary mail. Electronic issuance must be authorized by the taxpayer. If a notice is specifically required to be served personally or by registered or certified mail it will be ineligible for electronic transmission.

ABORIGINAL TAX POLICY

The budget reinforces the government's willingness to enter into direct taxation arrangements with interested Aboriginal governments. Currently, 44 arrangements in respect of sales tax and personal income tax are in place with *Indian Act* bands and self-governing Aboriginal groups.

PREVIOUSLY ANNOUNCED MEASURES

This budget confirms the government's intention to proceed with a number of tax measures previously announced. Many of these proposals require reintroduction as a result of the suspension of Parliament on December 30, 2009.