

MBA MIDWINTER CONFERENCE

2019

BUSINESS LAW SUBSECTION

FARM LAND ACQUISITIONS, DISPOSITIONS AND FINANCING

- 1. INTER-GENERATIONAL FARM TRANSFERS**
- 2. STRUCTURING THE ARMS LENGTH TRANSACTION**
- 3. LAND TRANSFER TAX – TIPS AND TRAPS**

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LAND TRANSFER TAX

- An extraction of cash by the Province of Manitoba pursuant to the provisions of *The Tax Administration and Miscellaneous Taxes Act*
- The amount payable is driven by FMV of the interest being conveyed
- Section 113 – no taxes payable on a transfer of farm land where:
 - The farm land will continue to be used for farming
 - The Transferee is:
 - A farmer
 - The spouse or common-law partner of a farmer
 - A farmer and his or her spouse or common-law partner
 - A family farm corporation
 - A congregation within the meaning of Section 143 of ITA i.e. Hutterite colonies
- This legislation adopts the definition of the following terms from *The Farm Lands Ownership Act*:

“Farm Land” – real property used or reasonably capable of being used for farming (excludes mines and minerals, sand and gravel) *

“Farmer” – an eligible individual who receives a significant portion of his or her income directly or indirectly from their occupation of farming and who spends a significant portion of his or her time engaged in farming

“Eligible Individual” – a citizen of Canada or a permanent resident of Canada within the meaning of *The Immigration and Refugee Protection Act*

“Farming” – tillage of the soil, livestock production, poultry, dairying, fur farming, tree farming, horticulture, bee keeping, fish farming or any other activity undertaken to produce agricultural products

“Family Farm Corporation” – a corporation that is:

- a) Primarily engaged in the business of farming;
- b) Is under the control in fact of farmers or individuals related to farmers or a combination of both; and
- c) Of which a majority of the issued and outstanding shares of each class are legally and beneficially owned by farmers or eligible individuals related to farmers

With these definitions in mind, consider:

- a) An owner of farm land who leases the land to a third party is not necessarily a farmer or engaged in the business of farming;
- b) A transfer of farm land to the widow or widower of a deceased farmer will qualify for the LTT exemption only if the Transferee is a farmer. The spouse or common-law partner of a deceased farmer does not automatically qualify

because a deceased individual cannot spend a portion of their time actively engaged in farming and therefore cannot meet the definition of farmer;

c) Consider transferring to joint names when you encounter a farming couple where land is owned only by one of them

- The transfer is tax neutral because it is inter-spousal
 - It will qualify for the LTT exemption
 - It avoids increasing estate value for purposes of determining probate filing fees
 - It avoids the possibility of attracting LTT on the Transfer from the estate to the surviving joint owner
- Transfer of farm land to a corporation where shares or a majority of the shares are owned by a family trust does not qualify. That corporation would not meet the definition of family farm corporation
 - A transfer to create a life and remainder interest raises some unique issues unless the Transferee of the remainder interest is a farmer. Otherwise, LTO will require the value of the property as a whole together with the value of the life estate. Land transfer tax will be payable on the value of the land as a whole times the value of the life interest divided by the value of the land as a whole. Actuarial tables are available to help with the calculation (see Section 112 (3) of the Act)
 - This same Section would come into play upon the transfer of farm land by a farmer to himself and another party who does not qualify for the LTT exemption. Examples would be a transfer to create a joint tenancy or tenancy in common. LTT is not calculated on the value of the interest conveyed (in these examples usually 50% of the value). Instead it is calculated on the value of the land as a whole and then reduced by the Transferor's share of the total. example: land value of \$450,000.00; LTT on \$450,000.00 = \$6,650.00; LTT on \$225,000.00 = \$2,150.00. The tax is **not** \$2,150.00. Instead it is \$6,650.00 reduced by the share of the Transferor's total i.e. 50% yielding LTT of \$3,325.00.
 - The LTT calculator will automatically calculate the tax payable in the circumstances – be cautious not to advise clients that they pay tax on only half of the value of the land.

LTT anti-avoidance rules:

- LTT is paid on the value at the time a transfer is tendered for registration
- Anyone who acquiesces to an attempt to evade LTT is guilty of an offence so even allowing a client to try to evade the tax puts you at risk of embarrassment or worse
- The anti-avoidance rules appear in Section 119 of the legislation – “**avoidance transaction**” means a transaction:

- a) That, for this section, would result, directly or indirectly, in a tax benefit; or
- b) That is part of a series of transactions that, but for this section, would result, directly or indirectly, in a tax benefit;

but does not include a transaction that may reasonably be considered

- c) To have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or
- d) Not to result directly or indirectly in a misuse of the provisions of this Part or an abuse having regard to the provisions of this Part read as a whole

“tax benefit” is defined in Section 119 as meaning a reduction, avoidance or deferral of tax or an increase in a refund of tax

- It has been common practice to break up values of land by drawing the Transfer in such a way that each parcel could be made the subject matter of a separate title without subdivision approval with a separate value attributed to each such parcel, the objective being to have LTT calculated on the value of each parcel rather than the land as a whole. For example, a section of land worth \$1,000,000.00 where each quarter comprises of 160 acres could be broken up into eight (8) individual parcels (each worth \$125,000.00) by describing, for example, parcel one as the NW ¼ exc the Nly 1,320 feet, parcel two as the Nly 1,320 feet of the NW ¼ and so on. Paying LTT on the value of each individual parcel rather than on the value of the land as a whole significantly reduces the total LTT payable.
- LTO has recently raised the question of whether this procedure offends the anti-avoidance rules. It is possible to apply for an advance ruling with respect to the application of the anti-avoidance rules. The non-refundable application fee is \$300.00 and you then pay a fee of \$60.00 per hour for the time in excess of five (5) hours spent in considering the application and preparing the ruling.
- I have appended directives and commentary from Brandon LTO on these issues which I would urge you to review and consider. They speak to the anti-avoidance rules and to consideration surrounding fair market value statements in Transfers and considerations we as solicitors should bear in mind when signing Transfers as solicitor and agent for the Transferee.

INTER-GENERATIONAL TRANSFER

In any discussion of this topic, you will hear constant references to the following terms:

- (Farmer and Farming) refer to the definition of those terms in the Farmlands Ownership Act
 - Most importantly qualified farm property (“QFP”) – what is it?
1. It is defined in Section 110 of the ITA
 - The property must be land, depreciable capital property, eligible capital property, interest in a family farm partnership or shares in a family farm corporation
 - Land owned by the individual, their spouse or common law partner used principally for farming by the individual, the spouse or common law partner, child or parent of the individual for at least 24 months prior to the disposition; or
 - In at least two years while the property was so owned, the gross revenue of that person from farming exceeded the gross revenue from all other sources
 2. A disposition of qualified farm property qualifies for capital gains exemption (\$1,000,000.00 per individual) provided they are resident in Canada throughout the year in which the disposition occurs.
 3. Transition strategies
 - Can transfer at any value between ACB and FMV;
 - Plan the strategy with the clients’ accountant to determine optimum price;
 - Beware the impact of increase to net income;
 - The taxable capital gain (even though its eroded by the exemption) forms part of the calculation of net income with a resulting impact on:
 - Pharmacare deductible;
 - Provincial tax credits;
 - Old age pension entitlement – claw back starts at net income of \$80,000.00

**** Note: No impact on cost of care calculation in personal care home**

**** Where the land does not qualify, consider the “custom farming” arrangement**

**** In the event the Transferee sells the land within three years, the capital gain will be attributed back to the Transferors.**

EXAMPLE: ACB = \$100,000.00

Land is transferred to a child at its fair market value of \$300,000.00 which becomes the ACB of the recipient the recipient sells the land within three years for \$310,000.00 – the \$10,000.00 capital gain is attributed back to the parents and taxed in their

hands. This provision is in place to avoid the instant multiplication of the capital gains exemption.

- Minimum or flat tax will be payable even where the exemption erodes the capital gains tax payable – flat tax is refundable over the following seven years
- Beware the “brother trap”
- Documents should include:
 - Offer to Purchase;
 - Promissory Note;
 - Mortgage security;
 - Debt forgiveness clause in the Transferor’s Will

4. Other Considerations:

- GST is payable on the fair market value unless the Transferee is a GST registrant
- Land Transfer Tax – does the Transferee qualify for the exemption?
- Mines and minerals – to be included or reserved?
- “Gift” vs. “Sale” in the inter-generational transfer: (Section 73 of ITA)
 - Gift deemed to take place at ACB on inter vivos Transfer;
 - Gifting provides a measure of protection in the event of marriage breakdown;
 - Exemption – “use it or lose it”

5. Qualified Small Business Shares

- Remember a Corporation does not have the capital gains exemption if it sells land; however if the shares are “qualified small business shares” the same planning strategies generally are available if those shares are sold in an arms length transaction or passed on to the next generation into vivos or upon death utilizing the inter-generational transfer strategies;
- In order for the shares to be “qualified small business shares” the following criteria must be met:
 - 90% or more of the Corporation’s assets must be active business assets (cash is not an active business asset);
 - In the two years prior to the disposition, more than 50% of the assets of the Corporation must be used in active business
- \$1,000,000.00 capital gain exemption is available for the Shareholders where the shares meet the criteria set out above.

STRUCTURING THE ARMS LENGTH TRANSACTION

1. The Offer to Purchase – be mindful of:

- GST implications;
- Property tax adjustment;
- **** allocation** purchase price – residence
 - recapture
- Representations in respect of environmental matters;
- **** beware** the sewage ejector;

- Fixtures vs. chattels – clarity is required;
- Mines and minerals/sand and gravel;
- Conditions to benefit the Purchaser – inspections – hydro, water potability, etc.
- Farm Lands Ownership Act – qualifications of Buyer;
- Homesteads evidence – agreement of sale is a disposition – Rose v. Dever [1972] 2 W.W.R. 431 (Man. C.A.);
- **** non-resident** Vendors – clearance required;
Application submitted to: Canada Revenue Agency
Suite 10 – 9700 Jasper Avenue
Edmonton, AB T5J 4C8
- Retention of yard site – subdivision issues

2. The transfer documents:

- Transfer – reservation of minerals
 - Land Transfer Tax Exemption
 - Farm Lands Ownership evidence
 - Homesteads Act evidence
 - Where land transfer tax exemption is not available, consider valuing parcel by parcel to reduce total payable
 - Declaration as to Possession
 - GST Declaration and Undertaking
 - GST reporting requirements

ATTACHMENTS

1. The Tax Administration and Miscellaneous Taxes Act (Part 3)
2. BLTO memoranda re LTT
3. Manitoba Health Policy re cost of care calculation
4. Custom Farming Agreement
5. Application for Certificate of Exemption (sewage ejector)
6. Application for Non Resident Certificate of Compliance
7. Price Allocation Agreement
8. Farm Lands Ownership Act – Section 1 – 5

PART III

LAND TRANSFER TAX

Definitions

111(1) In this Part,

"collector" means

(a) a service provider authorized to collect fees under *The Real Property Act*, or

(b) if there is no service provider authorized to collect fees under *The Real Property Act*, the district registrar of a land titles district and the registrar of a registration district; (« percepteur »)

"common-law partner" of a person means another person who, not being married to the person, is cohabiting with him or her in a conjugal relationship and

(a) has so cohabited with the person for a continuous period of at least one year,

(b) is the parent of a child of the person, or

(c) with the other person, registered their common-law relationship under section 13.1 of *The Vital Statistics Act*,

and, for the purpose of clause (a), persons who have been cohabiting with each other in a conjugal relationship are deemed to continue to cohabit in that relationship throughout any period of separation unless it is a period of at least 90 days throughout which they were not cohabiting because of a breakdown of their conjugal relationship; (« conjoint de fait »)

"FMV" and **"fair market value"** mean fair market value, at the time a transfer is tendered for registration, of the land as a whole with respect to which the transfer is tendered for registration; (« JVM » et « juste valeur marchande »)

"former common-law partner" of a person means another person who was a common-law partner of the person after this definition came into force and is no longer a common-law partner of the person; (« ex-conjoint de fait »)

"fractional interest in land" means a legal interest, an equitable interest or a beneficial interest in land that is a part, share, portion or fraction of a whole legal, equitable or beneficial interest in the land; (« intérêt fractionné dans un bien-fonds »)

"land as a whole" means, in relation to a transfer, the entire piece or parcel of land to which the transfer relates, including all buildings or improvements situated on the piece or parcel of land and does not include a fractional interest in land; (« bien-fonds global »)

"minister" means the Minister of Finance; (« ministre »)

"non-commercial property" means property that

(a) is owned by a person, alone or together with his or her spouse or common-law partner and is used by them primarily as their family residence or for their recreational purposes, or

(b) is owned by a person, alone or together with his or her former spouse or common-law partner, and was used by them, while they were spouses or common-law partners of each other, primarily as their family residence or for their recreational purposes; (« bien non commercial »)

"regulations" means regulations made under this Part; (« règlements »)

"tax" means the tax imposed under this Part; (« taxe »)

"transaction" includes an arrangement or event; (« opération »)

"transfer" includes a direction in a Real Property Application, deed, grant from the Crown or other instrument, whereby any land is granted, assigned, conveyed, or otherwise transferred but does not include a transmission, request, mortgage or caveat. (« transfert »)

Farm Lands Ownership definitions

111(2) In this Part, **"family farm corporation"**, **"farm land"**, **"farmer"** and **"farming"**, have the same meaning as in the Farm Lands Ownership Act.

Real Property Act definitions

111(3) Subject to subsections (1) and (2), the definitions in *The Real Property Act* apply to the interpretation of this Part.

S.M. 2005, c. 40, s. 103; S.M. 2011, c. 41, s. 61; S.M. 2013, c. 11, s. 79; S.M. 2013, c. 55, s. 54.

Imposition of tax

112(1) Subject to subsections (2) and (3) and sections 112.1 to 114, every person who tenders for registration a transfer shall, at the time of tendering the transfer, pay to the collector a tax calculated to the nearest dollar in accordance with the following formula:

FORMULA

Tax =

$0.005 \times (\text{FMV} - \$30,000.) +$

$0.005 \times (\text{FMV} - \$90,000.) +$

$0.005 \times (\text{FMV} - \$150,000.) +$

$0.005 \times (\text{FMV} - \$200,000.)$

Calculation of nil value

112(2) For purposes of subsection (1), where a calculation results in a negative value, the calculation is deemed to result in a nil value.

Transfer of fractional interests

112(3) Where a fractional interest in land is transferred, the transferee shall pay tax under this Part in an amount that bears the same proportion to the tax payable upon a transfer of the land as a whole, calculated in accordance with the formula in subsection (1), as the fractional interest in the land bears to a whole interest in the land.

Transfer registered in more than one office

112(4) Where a single transfer is registered in more than one land titles office or more than one registry office or in a land titles office and a registry office, the tax is payable once only in respect of the transfer, and is payable upon the first registration thereof.

Refund on rejection

112(5) Where documents tendered for registration are rejected or withdrawn, the collector shall refund the tax paid under subsection (1).

S.M. 2005, c. 40, s. 104; S.M. 2013, c. 55, s. 55.

Refund on rescission

112.1(1) If a court of competent jurisdiction issues an order rescinding an agreement under which a transfer has been registered and requiring the transfer of the land back to the transferor

(a) the tax paid in respect of the initial transfer is refundable by the minister; and

(b) no tax is payable in respect of the transfer of the land back to the transferor.

Refund on Registrar-General's order

112.1(2) If the Registrar-General issues an order under section 169.2 of *The Real Property Act* that cancels a transfer, the tax paid in respect of the transfer is refundable by the minister.

Conditions of agreement not met

112.1(3) If the parties to an agreement under which a transfer has been registered declare in writing that the land must be transferred back to the transferor because the conditions of the agreement cannot be met, the minister may

(a) refund the tax paid in respect of the initial transfer; and

(b) waive the tax payable in respect of the transfer of the land back to the transferor.

S.M. 2013, c. 55, s. 56.

Refund of land transfer tax if RST also paid

112.2 A purchaser of land who pays a tax under *The Retail Sales Tax Act* on a building or improvement situated on the land is entitled to a refund of the amount, if any, by which

(a) the tax paid under this Part on the transfer of the land to the purchaser;

exceeds

(b) the tax that would have been payable under this Part on the transfer if, for the purpose of the formula in subsection 112(1), FMV were the amount by which the fair market value of the land as a whole exceeds the fair value of the building or improvement on which tax under *The Retail Sales Tax Act* was paid.

S.M. 2013, c. 55, s. 56.

Application for refund or waiver

112.3(1) To claim a refund or a waiver under this Part, a person must file an application with the minister in a form approved by the minister.

Notice

112.3(2) The minister must notify the applicant by mail of the minister's decision respecting the application and must include, if applicable, a notice of assessment.

Appeal

112.3(3) An applicant who disagrees with the decision of the minister may, within 30 days of the date the decision is made or such further period as the court may allow, appeal the decision to the Court of Queen's Bench.

S.M. 2013, c. 55, s. 56.

Farm land exemption

113(1) No tax is payable under this Part on a transfer of farm land where

(a) the farm land will continue to be used for farming; and

(b) the transferee is

(i) a farmer,

(ii) a spouse or common-law partner of a farmer,

(iii) a farmer and his or her spouse or common-law partner,

(iv) a family farm corporation, or

(v) a congregation within the meaning of section 143 of the *Income Tax Act* (Canada).

Other exemptions

113(2) No tax is payable under this Part in respect of a transfer where

(a) the transferor is the Director under the *Veterans' Land Act* (Canada), and the transferee is a veteran or the spouse or common-law partner of a veteran;

(a.1) the transferor is a registered charity as defined in subsection 248(1) of the *Income Tax Act* (Canada) and the transferee is a non-profit corporation that, at the time that the transfer is submitted for registration, is controlled by the transferor;

(b) the transferee is a registered charity as defined in subsection 248(1) of the *Income Tax Act* (Canada); or

(c) in the distribution of the property of a corporation upon dissolution or winding up, the transferee is a corporation which immediately prior to the dissolution or winding up of another corporation held all of the issued shares of that other corporation.

Transfer for benefit of Indian band

113(3) No tax is payable under this Part in respect of a transfer of land where

(a) the transferee acquires the land, for the use and benefit of a band (as defined in the *Indian Act* (Canada)), pursuant to or as contemplated by an agreement made between the band and the Government of Canada in settlement of a treaty land entitlement of the band; and

(b) an agreement made between the Government of Manitoba and the Government of Canada to enable the Government of Canada to fulfill its treaty obligations to the band provides that no tax shall be payable under this Part in respect of an acquisition described in clause (a).

Affidavit

113(4) A transferee who claims an exemption under this section shall verify the claim by filing with the collector an affidavit in a form satisfactory to the collector.

S.M. 2005, c. 40, s. 105; S.M. 2010, c. 29, s. 65; S.M. 2012, c. 1, s. 87.

Other exemptions

114(1) No tax is payable under this Part in respect of the registration of

(a) a transfer where the transferor and the transferee are the same person and the sole purpose of the transfer is

(i) to give effect to a change of name, or

(ii) to change the form of tenure from tenancy in common to joint tenancy or to fractional interests or from joint tenancy to tenancy in common or to fractional interests;

(b) a petroleum or gas lease under the old system or an assignment thereof;

(b.1) an instrument that creates, but does not assign or transfer, a statutory easement under section 111.1 or 111.2 of *The Real Property Act*;

(c) a transfer for the purpose of facilitating a scheme of subdivision where the transfer is from the registered owners to a trustee, or from a trustee back to the registered owners, and the owners' proportion of beneficial ownership in the land is unchanged after each transfer;

(d) a transfer made to correct an error in a previous transfer where the collector is satisfied that the full tax payable under section 112 was paid on the previous transfer; or

(e) a transfer of non-commercial property by a person or the executor or administrator of a person's estate to the person's spouse or common-law partner or former spouse or common-law partner.

Evidence of eligibility for exemption

114(2) A transferee who claims an exemption under clause (1)(e) shall verify the claim by filing with the collector a statutory declaration in a form satisfactory to the collector.

S.M. 2005, c. 40, s. 106; S.M. 2013, c. 55, s. 57.

Affidavit of value

115(1) There shall be filed with each transfer tendered for registration an affidavit setting out the fair market value of the land as a whole with respect to which the transfer is tendered for registration.

By whom affidavit made

115(2) The affidavit of value required under subsection (1) may be made by the transferor, the transferee, a person acting for either of them under a power of attorney, an agent accredited in writing by the transferor or the transferee, a solicitor for either the transferor or the transferee, or some other person approved by the minister.

Certificate of value

115(3) If a district registrar is not satisfied that the fair market value set out in an affidavit under this section is correct, the district registrar may require the person tendering the transfer to produce an appraisal or any other evidence.

S.M. 2005, c. 40, s. 107; S.M. 2011, c. 35, s. 49; S.M. 2013, c. 11, s. 79.

Protest of payment of tax

116(1) Where the right of the collector to require payment of tax is disputed by a person tendering a transfer for registration, the person shall pay the tax as provided in this Part, and shall file, without fee, with the collector at the time of payment, a notice of protest.

Protest referred to minister

116(2) Where a person tendering a transfer for registration files a protest under subsection (1), the collector shall forthwith send the notice to the minister.

Contents

116(3) The notice of protest shall contain the reasons for the protest and shall state all relevant facts, including an estimate of the fair market value of the land as a whole with respect to which the transfer is tendered for registration where the person protesting considers that estimate to be relevant to the objection.

Minister's determination

116(4) On receipt of the notice of protest and all relevant information, the minister shall determine the amount of tax owing.

Notice

116(5) The minister shall notify by mail the person who made the protest of the minister's decision and shall include, if applicable, a notice of assessment.

Appeal

116(6) Where the person who paid the tax disagrees with the decision of the minister under subsection (4), that person may, within 30 days of the date the decision is made or such further period as the court may allow, appeal the decision to the Court of Queen's Bench.

S.M. 2005, c. 40, s. 107.

Assessment

117(1) The minister may, on information available to him or her,

(a) determine the fair market value of the land as a whole with respect to which a transfer is tendered for registration and the correct amount of tax payable;

(b) determine whether tax is payable in respect of a transaction and, if so, the correct amount of tax payable; and

(c) if he or she is satisfied that section 119.1 (general anti-avoidance rule) applies to a transaction or series of transactions, determine the correct amount of tax payable in respect of the transaction or series of transactions in accordance with that section.

Notice to transferee

117(2) Where the minister determines that the correct amount of tax has not been paid, the minister shall make an assessment and mail a notice of assessment to the transferee.

Contents of notice

117(3) The notice of assessment shall contain the determination made by the minister under subsection (1), the total amount of tax payable, the amount of tax paid, the balance owing or overpaid and the date of the notice of assessment.

Payment

117(4) The transferee shall pay to the minister the amount of tax owing as set out in the notice of assessment within 30 days after the date shown on the notice of assessment whether or not an objection to the assessment is made.

Limitation

117(5) Except as provided in this Part, the minister shall issue the notice of assessment within two years after the later of

(a) the date that the transfer was registered in the land titles office, or

(b) the tax became payable.

Formal errors

117(6) An assessment, subject to being varied or vacated on objection or by reassessment, is valid and binding, notwithstanding any error, defect, omission or error in procedure.

Interest on tax owing

117(7) The tax owing under a notice of assessment bears interest, beginning the 30th day after the assessment date shown on the notice, as prescribed under *The Financial Administration Act*. The interest is payable to the minister for the use of the Crown.

S.M. 2005, c. 40, s. 107; S.M. 2013, c. 55, s. 58.

Notice of objection

118(1) A person who objects to an assessment made under section 117 shall mail a notice of objection to the minister within 90 days after the date shown on the notice of assessment.

Contents

118(2) The notice of objection shall contain the reasons for the objection and shall state all relevant facts, including an estimate of the fair market value of the land as a whole with respect to which the transfer is tendered for registration where the person objecting considers that estimate to be relevant to the objection.

Minister's determination

118(3) On receipt of the notice of objection and all relevant information, the minister shall determine the amount of tax owing.

Notice

118(4) The minister shall notify by mail the person who made the objection of the minister's decision and shall include, if applicable, a notice of assessment.

Extension of time

118(5) The time within which a notice of objection is to be mailed may be extended by the minister if application for extension is made in respect of a notice of objection under subsection (1) before the expiry of the time allowed under subsection (1) for mailing of the notice of objection, and the application contains the reason for the extension and specifies the period of time applied for.

Appeal

118(6) Where the person who paid the tax disagrees with the decision of the minister under subsection (3), that person may, within 30 days of the date the decision is made or such further period as the court may allow, appeal the decision to the Court of Queen's Bench.

S.M. 2005, c. 40, s. 107; S.M. 2007, c. 6, s. 95.

Failure to pay tax

119(1) A person who fails to pay the tax imposed by this Part commits an offence.

False affidavits, etc

119(2) A person commits an offence who

(a) has made a false or deceptive statement in an affidavit required to be made under this Part;

(b) in order to evade payment of tax, has destroyed, altered, mutilated, secreted or otherwise disposed of a record of a transferor or transferee;

(c) has, in a record of a transferor or transferee, made a false or deceptive entry or omitted or assented to or acquiesced in the omission to enter a material particular; or

(d) [repealed] S.M. 1990-91, c. 12, s. 17;

(e) has wilfully, in any manner, evaded or attempted to evade compliance with this Act or the regulations or remittance or payment of taxes required by this Act or the regulations.

Persons acquiescing

119(3) A person who participates in, assents to or acquiesces in any of the acts referred to in subsection (2) commits an offence.

Corporate officers

119(4) Where a corporation commits an offence under this section, every director, officer, employee or agent of the corporation who authorized, permitted or acquiesced in the offence commits an offence.

Fine on corporation

119(5) A corporation convicted of an offence under subsection (1), (2) or (3) is liable to a fine equal to

(a) the amount of tax not paid or remitted, with interest, plus

(b) an amount not less than \$5,000. and not more than \$50,000.

Fine on individual

119(6) An individual convicted of an offence under subsection (1), (2), (3) or (4) is liable to

(a) a fine equal to

(i) the amount of tax not paid or remitted, with interest, plus

(ii) an amount not less than \$1,000. and not more than \$25,000.;

(b) imprisonment for not more than two years; or

(c) both fine and imprisonment.

Minister's certificate

119(7) In a prosecution under this section, the certificate signed by the minister or the authorized person stating the amount of tax and interest is evidence of the amount of tax and interest referred to in subsection (5) or (6).

No action

119(8) No action taken under this section shall suspend or affect any remedy for the recovery of any tax or amount payable under this Act.

S.M. 2005, c. 40, s. 108.

Definitions

119.1(1) The following definitions apply in this section.

"avoidance transaction" means a transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit; or

(b) that is part of a series of transactions that, but for this section, would result, directly or indirectly, in a tax benefit;

but does not include a transaction that may reasonably be considered

(c) to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or

(d) not to result directly or indirectly in a misuse of the provisions of this Part or an abuse having regard to the provisions of this Part read as a whole. (« opération d'évitement »)

"tax benefit" means a reduction, avoidance or deferral of tax or an increase in a refund of tax.
(« avantage fiscal »)

General anti-avoidance rule

119.1(2) The minister may, by assessment under section 117, determine or redetermine the tax consequences of an avoidance transaction, or of a series of transactions that includes an avoidance transaction, as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

Request for adjustments

119.1(3) Within 180 days after an assessment in respect of a transaction or series of transactions is mailed to a person, any other person involved in the same transaction or series may, by written notice to the minister, request the minister to adjust, under subsection (2), tax consequences to the person of that transaction or series.

Minister's response

119.1(4) On receipt of the request, the minister must consider the request and determine the tax consequences under subsection (2) to the person who made the request.

Determining tax consequences

119.1(5) Without limiting the generality of subsection (2), in determining or redetermining the tax consequences to a person of a transaction or series of transactions under that subsection, the minister may do one or more of the following:

- (a) determine or redetermine the fair market value of land as a whole;
- (b) allow or disallow an exemption in relation to a transfer;
- (c) recharacterize the nature of a transaction or series of transactions;
- (d) ignore the tax effects that would otherwise result under this Part.

S.M. 2013, c. 55, s. 59.

Advance ruling

119.2(1) The minister may, upon written application, make an advance ruling regarding the application of section 119.1 in respect of a proposed transaction or series of transactions.

Fees re advance ruling

119.2(2) A person who applies for an advance ruling regarding the application of section 119.1 must pay the following fees to the Minister of Finance:

- (a) at the time of applying for the ruling, a minimum non-refundable fee of \$300;
- (b) upon receiving the ruling or withdrawing the application for it, an additional fee of \$60 per hour for time in excess of five hours spent in considering the application and, where applicable, preparing the ruling.

S.M. 2013, c. 55, s. 59.

Application of Part I

120 The provisions of Part I (Tax Administration) apply with necessary modifications to the collection of tax, penalties and interest payable under this Part.

S.M. 2005, c. 40, s. 109.

Property of collector deemed to be held in trust

120.1(1) Money and other property of a collector, and property held by a secured creditor, that but for a security interest would be property of the collector, equal in value to the tax collected is deemed, from the time the tax is collected until it is remitted,

- (a) to be held in trust for, and beneficially owned by, the government;
- (b) to be held separate and apart from other property of the collector and other property that, but for a security interest, would be property of the collector; and
- (c) to form no part of the estate or property of the collector.

These rules apply to property even if it is subject to a security interest and even if the security interest arose before this subsection came into force or before the tax was collected.

Priority of taxes collected and held in trust

120.1(2) Money held in trust under subsection (1), and the proceeds of any other property held in trust under that subsection, must be paid to the minister in priority to all security interests, including one that arose before this subsection came into force or before the money or other property became subject to the trust.

S.M. 2013, c. 11, s. 79.

Fraud

121 Notwithstanding any other provision of this Part, the minister may, where there has been fraud or misrepresentation, assess tax payable and prosecute for an offence at any time within two years of becoming aware of the fraud or misrepresentation.

S.M. 2005, c. 40, s. 110.

The Estates of Deceased Farmers and The Land Transfer Tax

- See definition of "Farmer" below.
- A deceased person cannot "spend a significant portion of his time actively engaged in farming".
- So a deceased farmer is *not* a farmer for LTT purposes.

The Tax Administration and Miscellaneous Taxes Act

Farm Lands Ownership definitions

111(2) In this Part... "farmer" and "farming", have the same meaning as in the Farm Lands Ownership Act.

Farm land exemption

113(1) No tax is payable under this Part on a transfer of farm land where

- (a) the farm land will continue to be used for farming; and
- (b) the transferee is
 - (i) a farmer,
 - (ii) a spouse or common-law partner of a farmer,

...

The Farm Lands Ownership Act

"farmer" means an eligible individual

- (a) who receives a significant portion of his income either directly or indirectly from his occupation of farming, and
- (b) who spends a significant portion of his time actively engaged in farming;

"farming" includes tillage of the soil, livestock production, raising poultry, dairying, fur farming, tree farming, horticulture, bee keeping, fish farming or any other activity undertaken to produce agricultural products; but does not include the purchase and resale of agricultural products, or the commercial processing of agricultural products;

❖ *This is **UNLIKE** the "inter-spousal" exemption under s. 114(1)(e) which specifically provides for an LTT exemption on a home or cottage transferred by an estate to the deceased's spouse.*

Other exemptions

114(1) No tax is payable under this Part in respect of the registration of

(e) a transfer of non-commercial property by a person or the executor or administrator of a person's estate to the person's spouse or common-law partner or former spouse or common-law partner.

❖ *Conclusion - for the widow(er) of a deceased farmer to claim the "farming" LTT exception - it must be on the basis that she or he, are themselves a farmer.*

Main Identity

From: "Russell, Craig (TPR)" <Craig.Russell@gov.mb.ca>
Sent: Thursday, March 20, 2008 2:05 PM
Subject: LTT on Part interests

Please share this with your land titles staff.
Thanks.

Craig Russell
District Registrar
Brandon Land Titles
ph. 204-726-6520
fax. 204-726-6553

How To Calculate Transfer Tax When Transferring a Part Interest

Example: Mr. Smith owns a house worth \$180,000.00.
He is transferring title to three people – himself, Mr. Brown and
Ms. Jones (either jointly or each as to an undivided 1/3rd).

Question - Do we show the FMV (Fair Market Value) in box 4 as:
a) \$120,000.00 (the value of what Smith is giving to Brown & Jones)
or
b) \$180,000.00 (the full value of the house)?

Answer – Show the FMV as \$180,000.00

Why? – Because Box 4 asks for “the fair market value of the land as a whole”

What do they pay LTT on? - Does this mean they pay the full Land Transfer Tax (LTT)?

Answer - No. Just give us evidence from Mr. Smith in Box 7 that he is one and the same person as the Transferee Mr. Smith and in Box 4 state that he is claiming an exemption from the Land Transfer Tax for the share that he is keeping.

As a result Land Titles will calculate the LTT on the full value and then REDUCE the tax payable by his share of the total.

In our example – tax is calculated on \$180,000.00 = \$1,350.00
then reduced to only 2/3rds of the TAX amount = \$900.00
Mr. Smith doesn't pay the other \$450.00 for his 1/3.

The above applies regardless of the size of the share kept by Mr. Smith.

To Westman lawyers & staff:

A friendly reminder.

Land Transfer Tax is paid on the value "at the time a transfer is **tendered for registration**."

Anyone who **acquiesces to** an attempt to evade land transfer tax is guilty of an offence!

So - even allowing a client to **try** to evade the tax puts you at risk of embarrassment or worse.

See below.

Craig Russell
District Registrar
Brandon Land Titles

The Tax Administration and Miscellaneous Taxes Act

False affidavits, etc

119(2) A person commits an offence who

- (a) has made a false or deceptive statement in an affidavit required to be made under this Part;
- (b) in order to evade payment of tax, has destroyed, altered, mutilated, secreted or otherwise disposed of a record of a transferor or transferee;
- (c) has, in a record of a transferor or transferee, made a false or deceptive entry or omitted or assented to or acquiesced in the omission to enter a material particular; or
- (d) Repealed, S.M. 1990-91, c. 12, s. 17.
- (e) has wilfully, in any manner, evaded or **attempted to evade compliance** with this Act or the regulations or remittance or payment of taxes required by this Act or the regulations.

Persons acquiescing

119(3) A person who **participates in, assents to or acquiesces** in any of the acts referred to in subsection (2) commits an offence.

Fine on individual

119(6) An individual convicted of an offence under subsection (1), **(2), (3)** or (4) is liable to

- (a) a fine equal to
 - (i) the amount of tax not paid or remitted, with interest, plus
 - (ii) an amount not less than \$1,000. and not more than \$25,000.;
- (b) imprisonment for not more than two years; or
- (c) both fine and imprisonment.

The fair market value (FMV) statement in a transfer of land What to consider. Who should sign it? What are the dangers?

The Land Titles Office reminds us that:

1. Fair Market Value ("FMV") means:
 - the most probable price, as of a specified day,
 - in cash, or in terms of equivalent to cash, or in other precisely revealed terms,
 - for which the specified property rights should sell after reasonable exposure in a competitive market, under all conditions required to a fair sale,
 - with the buyer and the seller each acting prudently, knowledgeably and for self-interest, and
 - where neither party is under undue influence or duress.
2. Other FMV factors to consider:
 - (a) Are the buyer and the seller motivated?
 - (b) Are both parties well-informed or well advised, and are they each acting in what they considered to be their own best interests?
 - (c) Has the property been exposed to the open market for a reasonable period of time?
 - (d) Is the purchase price to be paid in cash (in Canadian dollars), or by comparable financial arrangements?
3. While an arm's length relationship between the buyer and seller may support a conclusion that the price agreed to is the FMV, this won't always be so.

Consider these situations:

- (a) The buyer convinces an unsophisticated or unknowledgeable seller that the value of the property is much lower than the seller could actually get if they were properly informed and the property was "exposed" to the marketplace.

The buyer may or may not be acting fraudulently vis-à-vis the seller.
But in either case, the FMV of the property is greater than the contracted purchase price.
- (b) The buyer takes title subject to substantial property tax arrears. (Perhaps under a mortgage auction.)
The actual FMV is at least the purchase price paid at the auction plus the property tax arrears.
- (c) Mortgage Sale auction issues:
 - (i) Such properties aren't exposed in the open market for a reasonable period of time. Typically all that's required is the publication of notice of the auction in one issue of a newspaper.
 - (ii) The mortgagee isn't a typically motivated seller. They are only looking to recover the amount of the reserve bid, which is capped at the amount of the mortgagee's outstanding debt plus costs. That can be far less than the property's FMV.

4. FMV is the value at the time the transfer is submitted for registration at Land Titles.

Discrepancies between the consideration and FMV arise:

- a) When there is long period of time between the offer & the closing.
- b) When an unimproved lot is purchased and the transfer isn't filed until after a building has been constructed (or partially constructed).

5. FMV includes the value of all improvements.

This includes all improvements (renovations) made by the buyer before the transfer is registered.

6. Watch for FMV issues when:

- (a) A lessee buys a leased property they have improved. The FMV must include the value of all improvements, even if the purchase price doesn't.
- (b) An option to purchase is exercised. The original price may not include the value of improvements or rising property values.
- (c) You resubmit a rejected transfer after an initial rejection and sufficient time goes by so as to result in an increase in the property value (before the corrected transfer is resubmitted for registration).
- (d) You rely on the assessed value in a changing market. Consider:
 - (i) Assessed values can be based on information that's years old and may not reflect the current FMV (i.e. the current assessed values are based on an April 1, 2014 market value).
 - (ii) Changed property conditions that may affect FMV. (i.e. additions & other improvements, or deterioration.)

7. Is it safe for a lawyer to take and sign the statement or declaration of FMV?
Arguably yes, provided that the purchase is bona fide, the seller and buyer are dealing at arm's length and the transaction is for valuable consideration.

A lawyer should not sign a FMV statement where:

- (a) The sale is between family members, related corporations, spouses, etc.;
- (b) The seller could be considered a vulnerable person, including but not limited to those with diminished capacity due to age, disability or addiction;
- (c) The purchaser regularly acquires land from vulnerable persons; and
- (d) The sale is of a type (such as a mortgage sale) where the usual FMV factors aren't present.

8. Lawyers and their staff members should be aware of their own personal liability under s. 119(2) & (3) of *The Manitoba Tax Administration and Miscellaneous Taxes Act*.

Under s. 119(2) & (3) a person who participates in, assents to or acquiesces in another person's evasion or attempted evasion of the legislation is themselves guilty of an offence.

- So:
- (a) If you permit your client to make a false FMV statement in a transfer, or
 - (b) If you have reason to suspect that your client's FMV evidence isn't correct, you may be held to have committed the offence of acquiescing to the evasion (or the attempted evasion) of land transfer tax.

9. Best practice:
- (a) Advise your client about the factors that should be taken into account in determining FMV before making a declaration.
 - (b) Have your clients give the FMV statement evidence themselves.
 - (c) If you know, or have reason to suspect that your client's FMV statement isn't correct, you should refuse to be involved in the transaction.

(Prepared by Craig Russell, Russell Davidson, Irv Simmonds and Edward D. (Ned) Brown - October, 2016)

The Tax Administration and Miscellaneous Taxes Act

Transfer of fractional interests

112(3) Where a fractional interest in land is transferred, the transferee shall pay tax under this Part in an amount that bears the same proportion to the tax payable upon a transfer of the land as a whole, calculated in accordance with the formula in subsection (1), as the fractional interest in the land bears to a whole interest in the land.

Definitions

111(1) In this Part,

"fractional interest in land" means a legal interest, an equitable interest or a beneficial interest in land that is a part, share, portion or fraction of a whole legal, equitable or beneficial interest in the land;

In other words, you need to give the value of the property as a whole, together with the value of the life estate. LTT will be payable on the value of the land as a whole multiplied by the value of the life interest, divided by the value of the land as a whole.

LTO, as the collector, does have a responsibility to satisfy ourselves as to the FMV being appropriate. To these ends, it is useful to have some circumstances regarding the parties, from the parties (age, general health, general information about the land and its use, etc.). It is possible that LTO could call for an actual actuarial valuation, although that would not be our usual practice where the values provided seem reasonable in light of the evidence submitted.

There are actuarial tables online which may be of assistance in calculating the value of the life estate. Here is an excerpt from one such table:

DETERMINING THE VALUE OF LIFE ESTATE

To determine the value of the life estate

1. First find the line for the person's age as of the last birthday.
2. Then multiply the figure in the life estate column for that age by the current market value of the property.
3. The result is the value of the life estate.

Age	LifeEstate	Age	Life Estate	Age	Life Estate
0	.97188	37	.93026	74	.53862
1	.98988	38	.92567	75	.52149
2	.99017	39	.92083	76	.50441
3	.99008	40	.91571	77	.48742
4	.98981	41	.91030	78	.47049
5	.98938	42	.90457	79	.45357
6	.98884	43	.89855	80	.43659
7	.98822	44	.89221	81	.41967
8	.98748	45	.88558	82	.40295
9	.98663	46	.87863	83	.38642

10	.98565	47	.87137	84	.36998
11	.98453	48	.86374	85	.35359
12	.98329	49	.85578	86	.33764
13	.98198	50	.84743	87	.32262
14	.98066	51	.83674	88	.30859
15	.97937	52	.82969	89	.29526
16	.97815	53	.82028	90	.28221
17	.97700	54	.81054	91	.26955
18	.97590	55	.80046	92	.25771
19	.97480	56	.79006	93	.24692
20	.97365	57	.77931	94	.23728
21	.97245	58	.76822	95	.22887
22	.97120	59	.75675	96	.22181
23	.96986	60	.74491	97	.21550
24	.96841	61	.73267	98	.21000
25	.96678	62	.72002	99	.20486
26	.96495	63	.70696	100	.19975
27	.96290	64	.69352	101	.19532
28	.96062	65	.67970	102	.19054
29	.95813	66	.66551	103	.18437
30	.95543	67	.65098	104	.17856
31	.95254	68	.63610	105	.16962
32	.94942	69	.62086	106	.15488
33	.94608	70	.60522	107	.13409
34	.94250	71	.58914	108	.10068
35	.93868	72	.57261	109	.04545
36					

With respect to an exemption, the same information would need to be provided, and the proper exemption claimed. If you fill out the eTransfer properly it should allow you to provide LTT exemption evidence as to the interest in question.

I hope this helps, if there is anything else, let me know.

Tyler M. Watt, B.A., J.D.

District Registrar – Brandon Land Titles Office

District Registrar – Dauphin Land Titles Office

The Property Registry

705 Princess Ave., Brandon, MB, R7A 0P4

Ph: 204-726-6520

tyler.watt@tprmb.ca

If you do not wish to receive future marketing emails, please email us at tprclient@tprmb.ca and indicate your request to be removed from our marketing email list. Please note that even if you unsubscribe you may still receive certain emails as permitted by law. Contact The Property Registry at 276 Portage Avenue, Winnipeg MB R3C 0B6 or www.tprmb.ca.

The Property Registry

A Service Provider for the Province of Manitoba



Office d'enregistrement des titres
et des instruments

Un prestataire de services pour la province du Manitoba

Brandon Land Titles Office - Titres fonciers Brandon

705 Princess Avenue

Brandon, Manitoba R7A 0P4

December 14, 2018

To: Brandon & Area Lawyers

Re: Avoidance Transactions – Tax Administration and Miscellaneous Taxes Act

Subsections 119.1(1) and (2) of *The Tax Administration and Miscellaneous Taxes Act* have recently come to my attention and are appended to this letter.

It is a relatively common practise to "break-up" the values of land by parcel for land in a single title when doing so is advantageous for the purposes of Land Transfer Tax and the land in the title can be broken up in such a way that each parcel could itself support a separate title without subdivision approval.

E.g.

Title reads:

THE NW ¼ OF SECTION 1-1-1 WPM

Transfer breaks up NW 1-1-1 WPM for Land Transfer Tax purposes as:

Parcel 1:

THE WLY 1320 FEET PERP OF
THE NW ¼ OF SECTION 1-1-1 WPM

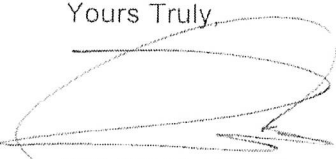
Parcel 2:

THE NW ¼ OF SECTION 1-1-1 WPM
EXC: THE WLY 1320 FEET PERP

As I was unaware of Subsections 119.1(1) & (2) I am drawing them to your attention as a courtesy since they may assist you in advising your clients. In doing so, I wish to be clear that:

- (1) They are offered without comment, interpretation or suggestion; and,
- (2) That there is no change in practise or policy by this office as a result of same.

Yours Truly,



TYLER M. WATT

District Registrar – Brandon Land Titles Office

Encls.

/tw

The Tax Administration and Miscellaneous Taxes Act

Definitions

119.1(1) The following definitions apply in this section.

"avoidance transaction" means a transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit; or

(b) that is part of a series of transactions that, but for this section, would result, directly or indirectly, in a tax benefit;

but does not include a transaction that may reasonably be considered

(c) to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or

(d) not to result directly or indirectly in a misuse of the provisions of this Part or an abuse having regard to the provisions of this Part read as a whole. (« opération d'évitement »)

"tax benefit" means a reduction, avoidance or deferral of tax or an increase in a refund of tax. (« avantage fiscal »)

General anti-avoidance rule

119.1(2) The minister may, by assessment under section 117, determine or redetermine the tax consequences of an avoidance transaction, or of a series of transactions that includes an avoidance transaction, as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

Request for adjustments

119.1(3) Within 180 days after an assessment in respect of a transaction or series of transactions is mailed to a person, any other person involved in the same transaction or series may, by written notice to the minister, request the minister to adjust, under subsection (2), tax consequences to the person of that transaction or series.

Minister's response

119.1(4) On receipt of the request, the minister must consider the request and determine the tax consequences under subsection (2) to the person who made the request.

Determining tax consequences

119.1(5) Without limiting the generality of subsection (2), in determining or redetermining the tax consequences to a person of a transaction or series of transactions under that subsection, the minister may do one or more of the following:

(a) determine or redetermine the fair market value of land as a whole;

(b) allow or disallow an exemption in relation to a transfer;

(c) recharacterize the nature of a transaction or series of transactions;

(d) ignore the tax effects that would otherwise result under this Part.

S.M. 2013, c. 55, s. 59

Advance ruling

119.2(1) The minister may, upon written application, make an advance ruling regarding the application of section 119.1 in respect of a proposed transaction or series of transactions.

Fees re advance ruling

119.2(2) A person who applies for an advance ruling regarding the application of section 119.1 must pay the following fees to the Minister of Finance:

- (a) at the time of applying for the ruling, a minimum non-refundable fee of \$300;
- (b) upon receiving the ruling or withdrawing the application for it, an additional fee of \$60 per hour for time in excess of five hours spent in considering the application and, where applicable, preparing the ruling.