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Tax Implications of Expropriation

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Introductions



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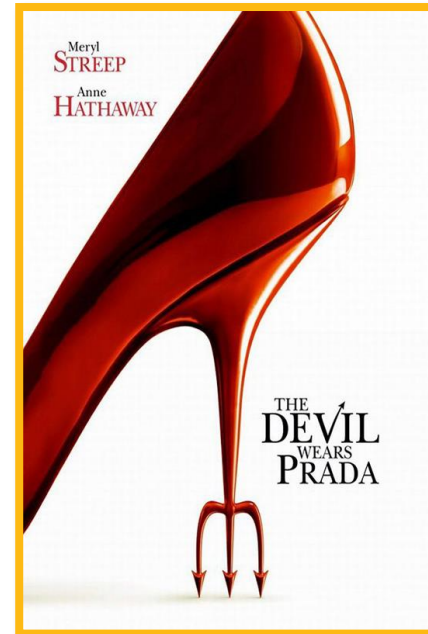
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Flashback to 2006



Flashback to 1995



Policy

- Fairness and Equity
- “It has also come to my attention that the tax system does not apply fairly where property has been expropriated, lost or destroyed. Quite often a taxpayer may be faced with a significant tax liability long before a settlement date has been agreed upon and funds are available. This seems quite unfair, and I am introducing a relieving amendment which will ensure that under certain circumstances no tax is payable until the compensation has been finally determined.”
- John Turner (Finance Minister 1974)

Application of Policy

- Dispose of certain capital property (i.e., land or building)
- Entitled to “proceeds of disposition”
- Acquire capital property that is a replacement
- Time limitation to acquire replacement property -- two years in expropriation cases
- Replacement property not disposed before former property
- Election is made

"Proceeds of Disposition"

- Defined term which includes examples of involuntary dispositions
- Compensation for property taken under statutory authority
- Sale price of property sold to whom a notice of intention under statutory authority was given
- Note that compensation for property injuriously affected or compensation for property unlawfully taken also qualify for similar treatments

Notice of Intention

- Guidance provided by Canada Revenue Agency Interpretation Bulletin (archived)
- Formal – Notice of Application for Approval to Expropriate Land
- Any notice – information circular, letter
- Verbal notice
- Damka Lumber & Development Limited v. the Queen (F.C.C.) – beware ! – are verbal notices enough?

When is Property Considered Disposed?

- Not until final compensation is determined (M.N.R. v. Benaby (S.C.C.))
- Earliest of:
 - Date taxpayer agrees on full compensation
 - Date compensation finally determined by a tribunal or court
 - When not taken before a tribunal or court, two years from the taking
- Considered to own the property continually until this period
- Without prejudice advances not considered proceeds
- Two year clock starts

Acquire Replacement Property

- Reasonable to conclude that property acquired is to replace the former property
- Property acquired for same or similar use as the former property
- If property used in a business, the new property must be used for the same purpose in a similar business

Disposal of Replacement Property

- Do not dispose replacement property before former property
- Amendments to tax returns may be necessary

Elections

- Rules do not apply automatically
- Depending on year property disposed election procedure varies
- Elections can be late-filed
- Capital losses
- Security can be provided in lieu until final tax is determined

Treatment of Taxation in Determining Compensation

- Policy to avoid double taxation / double penalty
- If income stream forming award considered after tax and then award is subject to taxation, this amounts to double taxation / double penalty
- City Park v. Toronto – Held: Look at pre-tax income to avoid double penalty
- B.C. Court of Appeal in MacMillan Bloedel required evidence of taxation on award
- Law unclear in cases where awards may not be subject to tax

Determining Compensation

- Market value for land acquired
- Injurious affection to remaining lands
- Disturbance damages
- Special difficulties in relocating
- Interest, including additional interest
- Reimbursement of expenses

Taxation of Compensation

- Income
 - Ordinary interest (T5)
- Capital (including goodwill)
- Non-taxable -- “windfalls”
 - “Additional interest” or damages
- Reimbursement of expenses (i.e., legal and accounting)

Reimbursement for Tax Advice

- Intention of Expropriations Act to make Owners whole
- Owners can recover costs that are the natural and reasonable consequences of the expropriation [s.18(1) of Expropriations Act]
- Tax advice appears recoverable if required because of expropriation and would not have otherwise been required
- As tax advice is not for determination of compensation, it is not recoverable under s.32 of the Expropriations Act

Other Tax Issues

- Non-residents
- Principal residence
- Easements (20% administrative rule)
- Voluntary dispositions



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Thank You

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