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Tax Tips and Traps: Charting a Path During the Sale of Business Assets

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TAX TIPS AND TRAPS: CHARTING A PATH DURING THE SALE OF BUSINESS ASSETS

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INTRODUCTION[1]

The most fundamental decision in the sale of a private business typically is whether the transaction is structured as a share sale or an asset sale. For private corporations, in many circumstances there is desire to structure a transaction as a share sale by the vendors. A purchaser, on the other hand, typically desires to acquire the assets of the business in order to minimize the due diligence costs associated with a transaction and to increase the tax cost of purchased assets for the purposes of claiming a future depreciation expense.

When presented with a sale of business assets, it is helpful for a corporate lawyer to understand the basic tax consequences that could arise from the sale. Having a general understanding of the tax consequences that can arise on the sale will assist a corporate lawyer in advising their client throughout the sale transaction by being able to structure the transaction in a more tax effective manner and also to identify potential tax issues that may be caused by modifications to the transaction. The intention of these materials is to review some of the most fundamental concepts considered by tax practitioners approaching an asset sale and to describe why these concepts are important. For context, the focus of the comments contained in this paper will be transactions involving the sale by a private corporation of all of the assets used in an active business carried on in Canada.

SHARE SALE VERSUS ASSET SALE

One of the most lucrative advantages available to Canadian owners of a private corporation is the ability to access the lifetime capital gains deduction (sometimes referred to as the lifetime capital gains exemption) on the sale of "qualified small business corporation" shares.[2] If the shares of a corporation qualify for the lifetime capital gains deduction, then very few tax planning alternatives can match the benefit of this one time deduction. The multiplication of the lifetime capital gains deduction amongst a number of individual shareholders or throughout beneficiaries of a family trust provides even more robust savings. Although our focus today is on the tax consequences from the

[1] Unless otherwise noted, section references herein are to the *Income Tax Act* (Canada), R.S.C. 1985, c. 1, as amended ("**Act**").

[2] As defined in subsection 110.6(1).