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The Disability Tax Credit: Eligibility and Recent Developments

Employment and Social Development Canada reports that in 2012, 13.7% of Canadians described themselves as having a disability. The Income Tax Act (the "Act") recognizes that individuals with a disability require additional resources to meet the needs of daily living, and the income tax system is used to facilitate support to those Canadians in a variety of ways.

Not all of the 3.8 million who self-reported having a disability in 2012 will qualify for the support the Act provides, but there is no question that a significant portion of our population benefits from these rules. This portion can only grow as the population ages.

In this article, we look at the rules governing deductions and credits that flow from disability, and examine the other tax-delivered support provided to the disabled, both during the supporting person's lifetime and in an estate plan.

What Does it Mean to be Disabled?

Just as individuals vary in their conditions, the Act recognizes several categories of disability.

"Mental or physical impairment" is the phrase used to describe the most severe disabilities. Impairment in this sense must be certified by a qualified practitioner, using Form T2201, which is submitted to the Canada Revenue Agency ("CRA"). The criteria for qualifying as disabled in this sense are spelled out in detail in the tax legislation. Here, we refer to those who qualify under these provisions as "disabled".

"Infirmity"—or "dependency by reason of infirmity"—is a weaker test that also provides special income tax relief. Unlike disability, there are no statutory rules which define whether a person is infirm, so the determination is generally based on the facts, although financial dependency due to infirmity is often measured by an objective test. In certain circumstances, infirmity must be attested to by a third party.

Disability

The rules dealing with disability require that an individual be **markedly restricted** in a **basic activity for daily living** for a **prolonged period**. The restriction can be either physical or mental and a blind person is markedly restricted by default. Restriction is evidenced by requiring an **inordinate amount of time** to perform the related activity. A person may also be found to be markedly restricted where he or she would have been markedly restricted but for life-sustaining therapy.

An individual may also be found to be disabled if he or she is **significantly restricted** in performing more than one activity for daily living and the cumulative effect amounts to being **equivalent to markedly restricted**.

A disability is considered to be prolonged if it is anticipated to last for a continuous period of 12 months.

The CRA has given some guidance in how it interprets these rules in practice:

- It is the CRA's view that time spent is inordinate if the activity involved would not be undertaken if it were not for the fact that the activity is basic. On the T2201, time is considered to be inordinate if it is three times the normal time required to complete the activity.
- The determination of whether the disability is prolonged must be made when the practitioner completes the certification (see below). If the practitioner is completing the certification after the person died, and death was less than 12 months after the onset of the condition, it cannot have been prolonged. However, if the patient dies within 12 months of onset, this alone will not indicate that the disability was not prolonged.
- The CRA believes that an individual is markedly restricted in performing an activity if the individual cannot perform it or takes an inordinate amount of time to perform it (i.e., 90% or more of the time).

The T2201 and Practitioner Certification

The T2201 form comes in two parts. Other than the introductory identification section, the form is to be completed by the practitioner certifying the disability.

The professional qualifications of a practitioner who is eligible to complete the form vary with the nature of the disability. For example, if the disability relates to hearing, either a medical practitioner or audiologist is appropriate; if the impairment relates to elimination, only a medical practitioner will do. (The CRA accepts that fees paid to a practitioner for completing the T2201 qualify for the medical expense credit.)

In practice, it is not unusual to encounter individuals who clearly have prolonged and more or less debilitating problems but who do not qualify as disabled under these rules. This is particularly true for individuals who have a learning disability. These individuals may well be able to speak, hear, walk, dress themselves, and so on, but will also clearly need professional support for much of their lives. Generally, such individuals are not found to be disabled.

Another commonly encountered problem arises where the practitioner certifying the application does not read completely or does not understand the criteria, and fails to define a prolonged disability that will qualify. This can often be the case when dealing with a practitioner who is highly specialized and who views a patient through a fairly narrow lens. A process of back and forth with the CRA follows, not always ending in a way the taxpayer believes to be equitable.

The T2201 is to be filed with the return for the first year in which the disability credit is claimed. It is not necessary to wait until the return is filed to get approval and it is a good idea to file the T2201 in advance, so the CRA's views can be obtained before the related return is filed.

The Tax Credit

The non-refundable disability tax credit can only be claimed for a person whose disability has been confirmed by the CRA on the submission of the certificate.

The basic credit is available to any disabled person. Where he or she has not turned 18 by the end of the taxation year, the basic credit is increased, but the increase is limited to the extent that amounts have been deducted with respect to the disabled person either as a child care expense or a disability support deduction or have been included in an amount claimed as a medical expense credit.

A rather convoluted rule denies the availability of the disability credit where a medical expense credit is claimed for attendant care or care in a nursing home for the disabled person. However, care payments of up to $10,000 a year ($20,000 in the year of death; collectively, the "dollar limit")—whether in a nursing home or not—can be included in a medical expenses credit claim without affecting the disability credit claim.

This rule merits a few comments.

First, although the description of attendant care which qualifies for the medical expense credit refers to total amounts **paid** for attendant care not exceeding the dollar limit, the CRA interprets the provision as not affecting the disability credit so long as the amount **claimed** does not exceed the dollar limit. Thus, for example, a disabled taxpayer who pays $15,000 for qualifying attendant care but only includes $10,000 in his or her medical expense credit claim is still able to claim the disability credit.

Second, it is clear that where total payments for care exceed the total of the dollar limit and the amount on which the disability credit is claimed, it is better to include the total payments for care in the medical credit and forgo the disability credit (which is optional—it need not be claimed in any given year). Certain other provisions allowing a medical expense credit for care—the general rule or in-home care—require that the care be full-time.

Finally, note that the medical credit is claimed by the person who pays for the attendant care and the cost will qualify if the patient receiving the care is the payer's spouse/partner or minor child.

Transfer of the Disability Credit

The disability credit can be transferred to another taxpayer, to the extent it is not needed to eliminate the tax of the disabled person.

The transfer can be made to the disabled person's spouse/partner. Note that attendant care up to the dollar limit can be claimed in the medical expense credit of the spouse who is not disabled and need not be used first against the tax of the disabled person.

The unused disability credit may be transferred to a supporting person in certain circumstances. Whether a transferee is a supporting person is a question of fact, turning both on the type of support given and on the disabled person's ability to provide for himself or herself.

This transfer is contingent on the supporting person having claimed a credit for the disabled person as equivalent-to-spouse, for home-care as a relative, or as a related dependent adult, or, if the disabled person's income eliminates these claims, on having been able to make a claim if the disabled person had no income.

The transfer is not permitted if the disabled person has a spouse and that spouse claims any personal credit with respect to the disabled person.

There is no requirement that the disabled person file a return before the disability credit can be transferred. Where no return is filed, the CRA will normally seek supporting documentation from the transferee.

Upcoming Changes to the Disability Credit?

Following an increase in the number of disability tax credit ("DTC") applications being rejected, the Senate Committee on Social Affairs, Science and Technology held three meetings and heard the concerns of witnesses with respect to the structure and administration of the DTC and RDSPs. The report was released on June 27, 2018. The report identifies several issues, including:

- the DTC being underutilized;
- people with certain types of disabilities have more difficulty claiming the credit;
- the DTC is administered in a way that is rigid, complicated, and costly;
- the criteria related to mental functioning are problematic;
- people with lifelong disabilities are required to periodically reapply for the DTC;
- the costs of completing the application are a significant barrier;
- more low-income/vulnerable people should be using RDSPs; and
- the DTC should not be the only gateway to the RDSP.

The report made numerous recommendations to significantly alter the rules and administration of the DTC and RDSPs. The Committee recommends that the Minister of Finance revise the tax rules as follows:

- impairments in problem solving, goal setting, and judgment need not be present together to be eligible;
- work be included as a basic activity of daily living;
- administrative guidance not clearly specified in the Income Tax Act be reviewed so that they better capture the realities of living with a severe disability and are not prohibitive;
- the lifelong nature of certain disabilities be recognized in such a way that taxpayers need not reapply for the credit;
- the period between when bond and grant contributions end and when an RDSP beneficiary can begin to make withdrawals (without having to repay the federal contributions) be reduced from ten years to five years;
- individuals who are not eligible for the DTC but are eligible for provincial/territorial disability support payments should be eligible for the RDSP;
- the DTC be made a refundable credit; and
- the federal government should coordinate with the provinces/territories to ensure that income from the credit is exempt for the purposes of disability support eligibility.

The Committee also recommended that the Minister of National Revenue review the appeals process in order to create a straightforward, transparent, and informed process where the applicant has access to all relevant information. Another recommendation suggested that individuals should be allowed to keep all RDSP contributions for periods in which they were eligible for the DTC. Most notably, the Committee recommended that the Minister of Finance shift the responsibility of assessing eligibility for the DTC and RDSP to Employment and Social Development Canada.

Note however, that tax recommendations made by a Committee are often not acted upon by the Minister. There is no guarantee that any of these changes will occur. That being said, given media controversy and scrutiny by the Committee, it would not be unreasonable to anticipate that the government might make changes to the credit in order to appease critics.

Summary

This article should have provided you an overview of the criteria, administration of, and benefits of the DTC. There is no question that these rules are complex and difficult for many taxpayers to navigate. This is particularly problematic because the credit requires a lot of effort (and even financial resources) to apply for. Time will tell if the government chooses to make life easier for those seeking to apply for the credit.