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Tax Policy Branch
Department of Finance Canada
90 Elgin Street
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Via email Consultation-Legislation@fin.gc.ca

Re: Deloitte's Comments relating to Measures to Grow Canada's Clean Economy contained in August 4, 2023 Draft Legislation

Dear Sir or Madam:

We are writing to provide our comments on select proposals released on August 4, 2023, with an emphasis on Measures to Grow Canada's Clean Economy through proposed amendments to the Income Tax Act (the "Act"). Many of these measures were first announced in the 2022 Fall Economic Statement and further expanded in Budget 2023¹ (herein referred to as the "Draft Legislation").

Deloitte and its affiliated entities constitute one of the largest professional services firms in Canada. We work with many taxpayers, ranging from individuals and private businesses to Canadian and global multinationals, to advise and support them in meeting their compliance obligations under the Act.

We have focused our comments in this submission on components of the Draft Legislation that pertain to the investment tax credit for Carbon Capture, Utilization and Storage (CCUS) and the Clean Technology Investment Tax Credit (CTITC).

General observations

The announcements in the 2022 Fall Economic Statement and Budget 2023 have generated significant interest from many organizations. In our experience, organizations are focused on predictability and certainty in the interpretation of the legislative measures, in part because many of these investments are large scale, multi-year capital projects with financial capital requirements from both debt and equity providers. Organizations are focused on "de-risking" projects to ensure an appropriate capital structure and having certainty and predictability in the interpretation and scope of the investment tax credits is a crucial part of this phase of development.

Similarly important is the swift passage of legislation by Parliament to enable the refundable investment tax credits to be processed by the Canada Revenue Agency, which will help organizations with their cash flows and to enable prompt development of these projects.

¹ The term Budget 2023 is used throughout the document and incorporates references to the Tax Measures: Supplementary Information.

Promote equitable competitiveness

The government's clean economy plan clearly indicates that the policy framework put into place aims at keeping pace with other countries, particularly the United States, to build a strong net-zero economy that will require significant investments from both governments and the private sector.

In this regard, we suggest that Canada's competitiveness with other countries will be more effective if the competitiveness amongst the stakeholders of the private sector is better balanced.

To reach this goal, our first recommendation is to further eliminate the differentiation between certain taxable and non-taxable stakeholders who will participate in the transition towards a net-zero economy. While Budget 2023 proposed a new Clean Electricity Investment Tax Credit which would assist non-taxable entities (including Crown Corporations) with the transition to a clean electricity grid, by limiting other investment tax credits (including the CCUS and the CTITC) to taxable corporations, there will be many taxpayers that will be at a disadvantage.

More precisely, for the purposes of the CCUS and the CTITC, the Draft Legislation proposes to limit the investment tax credits to taxable Canadian corporations. This limitation was not previously outlined in the 2022 Fall Economic Statement or Budget 2023, and we expect it to be detrimental to projects for which a non-taxable entity is a part, because it introduces a bias in favour of projects that are undertaken solely by taxable Canadian corporations².

To obviate such a bias, the notion of qualifying taxpayer should include non-taxable taxpayers: for example, Indigenous partners of a project. It should also include taxpayers who may not pay income tax in certain circumstances, such as real estate investment trusts (REITs), which may play an important role in achieving a net-zero economy. Accordingly, we recommend that the definition of "qualifying taxpayer" used for the CCUS and CTITC includes, at a minimum, entities that are a "real estate investment trust" as defined in subsection 122.1(1) of the Act.

Furthermore, in certain circumstances a lessor can claim the CTITC and we suggest that an election should be put into place to allow a lessee to claim the CTITC instead. Such an election could be similar to the joint elections between lessors and lessees for certain capital property found in section 16.1 of the Act, and would serve to further align the full tax consequences associated with a leasing relationship, should such an election be made.

Finally, a limited partnership structure will often be the vehicle chosen to carry out an investment of the magnitude of those which will be required to achieve the task Canadians are facing to transition to a net-zero economy. To the extent that limited partners have primarily made contributions to the partnership through work performed or other contributions, they may have a small "at-risk amount", which will reduce the ability for certain limited partners to claim their fair share of the CCUS or CTITC. Removing the restriction on at-risk amounts for these refundable ITCs, while still preserving a reasonableness allocation amongst partners, would provide flexibility for the myriad of commercial transactions in the industry.

² Including partnerships to the extent there are taxable Canadian corporations as partners.

Labour requirements related to certain investment tax credits

The proposed apprenticeship criteria for CCUS and CTITC defines a “Red Seal trade” as a “Red Seal trade for a province under the Red Seal Program managed by the Canadian Council of Directors of Apprenticeship.” This definition differs from the existing definitions used in the Act for “eligible apprentice” found in section 127 of the Act and Regulation 7310, which rely on a “Red Seal trade for the province under the Interprovincial Standards Red Seal Program.” We suggest that the definitions are harmonized.

Other discrepancies can occur in regard of the prevailing wage requirements which provide that each covered worker at a designated work site of an incentive claimant must be compensated for their work on the “preparation or installation” of specified property. Such compensation must be at least equal to the amount of wages and benefits as specified in the eligible collective agreement that “most closely aligns with the covered worker’s experience level, tasks and location.” Determining the degree of “close alignment” may be a challenge, particularly in some rural areas. Additional comments in the explanatory notes would be welcome, or alternatively, more detailed administrative guidance upon enactment of the legislation from the Canada Revenue Agency to provide taxpayers with certainty on this interpretation.

Similar clarification would be helpful regarding the meaning and scope of the expression “preparation or installation” to aid in predictability for taxpayers. Likewise, clarification should be undertaken regarding the meaning and scope of the expression “reasonable steps” that an incentive claimant must take to attest that any covered workers employed by any other person must have been compensated in accordance with the prevailing wage requirements.

The Draft Legislation applies the labour requirements in respect of specified property “prepared or installed” after September 30, 2023. Given the timing of the release of the Draft Legislation, combined with the clarifications noted above, we suggest that such requirements be applicable upon a time period with reference to Royal Assent³ to ease the administrative burden for taxpayers. Such an approach would also provide additional timelines for certain taxpayers to complete the negotiation of project labour agreements for multi-year projects.

Recapture of clean technology investment tax credits

The 20-year period during which the CTITC can be recaptured does not reflect the multiple facets of the industry considering the wide range of clean technology property (for example comparing the life span of a heat pump to that of a wind turbine). We suggest that this period should be replaced by a period equivalent to the expected useful life of a particular clean technology property acquired by a taxpayer who benefited from the CTITC. In this regard, the usual period applicable to capital cost allowance (CCA) of a particular clean technology property could be a starting point for determining the expected useful life of a particular clean technology property.

Moreover, an exception to the recapture of CTITC should be added in circumstances where a taxpayer became entitled to a CTITC in respect of the capital cost, or a portion of the capital cost, of a particular property that has been disposed of in the context of the sale of all or substantially all the assets of a business of a taxpayer, notwithstanding whether a taxpayer is dealing at arm’s length or not with the purchaser. This would provide commercial flexibility on the structuring of sale of businesses transactions (e.g., assets or shares) where the assets are still used for their intended purpose.

³ For example, 90 days following Royal Assent.

An exception should also be added when a particular property ceased to be used because of certain circumstances such as destruction of property or property that is expropriated. In this regard, leveraging similar definitions to those used for involuntary dispositions under the replacement property rules in the Act would be helpful at preventing recapture of investment tax credits in situations where the taxpayer did not have control over the situation giving rise to the proceeds of disposition.

Additional eligible property for CTITC

We suggest that the goal of the CTITC would be better served if heat recovery equipment that does not use fossil fuel be added to the list of eligible equipment for the CTITC. Eventually, for the Clean Electricity Investment Tax Credit (CEITC), heating, cooling and heat recovery equipment that does not use fossil fuel should be eligible equipment for this investment tax credit.

Electrified ships/vessels should also be added to the list of eligible equipment for the CTITC considering the important role of such equipment for attaining a net-zero economy.

Finally, many industry groups will undoubtedly strive to decarbonate their activities and, in doing so, will acquire particular property that is not actually listed among the clean technology property for the CTITC. While a precise list can evolve over time, we suggest that property that a taxpayer acquires to transform its processes leading to greatly reduced carbon dioxide emissions of its activities be considered eligible equipment for the CTITC. Introducing measurable thresholds for the meaning of “greatly reduced” would serve to ensure integrity of these measures.

Conclusion

The investment tax credits represent a significant investment in Canada’s journey towards net zero. We look forward to the forthcoming draft legislation for the Clean Hydrogen Investment Tax Credit, more detailed proposals on the CEITC, and the introduction of final legislation.

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We hope that our specific comments are helpful in your further development of the Draft Legislation. We would be pleased to meet with you or other officials to discuss our submission as Deloitte is committed to making a significant contribution to help shape Canada’s tax policy and its application to the future of our country.

We consent to the disclosure of our comments under the *Access to Information Act* and have made a copy of our submission available on our website at www.deloitte.ca.

Yours very truly,



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