taxpayer had further closed its Ontario tax accounts and was reporting and remitting the amounts exclusively under its CRA GST/HST number. A private admission by the taxpayer to the ministry that it should have remitted RST, which was given significant weight by the Ontario Superior Court in finding in favour of the ministry, did not ultimately undermine the fact that the taxpayer had collected and remitted HST.

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Tax Reporting by Cryptocurrency Funds: Income Versus Capital

There are at least three scenarios to consider regarding income-versus-capital issues for tax reporting concerning cryptocurrencies, depending on the reporting entity and the assets involved: (1) reporting by individuals and corporations transacting in cryptocurrencies; (2) reporting by cryptocurrency-focused investment funds (which have proliferated since 2020) transacting in cryptocurrencies; and (3) reporting by individuals and corporations transacting in units of cryptocurrency-focused investment funds.

Scenarios (1) and (2)—which consider the taxpayer-reporting issue and the fund-reporting issue, respectively—have interesting similarities and differences.

The CRA has stated that it will treat cryptocurrency like a commodity. Further, case law supports a rebuttable presumption that property that does not produce income (rent, dividends, etc.) until it is sold is held on income account. The CRA has adopted this general view on commodity trading as an administrative position (CRA document no. 2004-0081971E5, December 16, 2004). The case law relates to commodities in general (particularly gold) rather than cryptocurrency specifically; it also relates to taxpayer reporting as opposed to fund reporting. Whether these nuances matter is not yet known.

The primary factor in determining treatment on account of income or capital remains a taxpayer's intention, and a rebuttal to the CRA's position is the view that the property was not acquired for resale but rather as a store of value to protect against an economic downturn. In *Harms v. MNR* (84 DTC 1666), the TCC concluded that a taxpayer's gain on the sale of gold was on capital account because the taxpayer had acquired gold as a source of security and not on a short-term basis or to be sold at the best opportunity. The taxpayer did not deal with the gold in the same way as a regular trader; he did not sell when gold reached a high price, but only when he believed that an alternative investment provided better protection. A similar conclusion was reached in *Orzeck v. MNR* (87 DTC 618 (TCC)), where real property was found to be held on capital account where it was purchased as a hedge against an economic downturn.

Cryptocurrency's potential as a store of value may be in doubt in light of significant drops in its value, both historically and recently. However, some commentators continue to take a more positive view, pointing to cryptocurrency's scarcity, portability, security, and decentralization as well as its low economic correlation to other asset classes.

As a practical matter, both funds transacting in precious metals and funds transacting in cryptocurrencies frequently report them on capital account.

For the fund-reporting issue, there are two special arguments that could support the idea that the property was not acquired for resale but rather as a store of value to protect against an economic downturn. First, funds can make credible public commitments about the nature of the trading they will do, while taxpayers have no such opportunity. For example, a fund could make the following representations:

- it will not deal with cryptocurrency as a trader or dealer,
- it will hold cryptocurrency indefinitely, and
- sales will generally be undertaken only as required to fund expenses or redemptions.

Second, the revenue streams of investment funds are diverse. They could include, for example, fees based on the amount of assets under administration. Thus, funds do not earn revenue only from cryptocurrency holdings through resale.

It remains the case that a fund's general conduct (frequency of trades, holding period, and whether trades are timed to generate profit) may all be indicative of intention and character. In this regard, the character of cryptocurrency to a fund is not determinative of its character to holders of units of the fund. Notably, the subsection 39(4) capital treatment election for Canadian securities may be available to taxpayers that hold units of cryptocurrency-focused investment funds; however, it would not be available for direct transactions in cryptocurrency by the individuals or the funds.

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NFT Losses May Be Restricted as LPP or PUP

Prices of non-fungible tokens (NFTs) soared, followed by a dive in 2022, leading to questions about the tax treatment of NFT losses. Because of the personal-use element of NFTs—which is not present in cryptocurrencies—losses may be restricted in some way. The best outcome may be that an NFT is considered to be listed personal property (LPP).

An NFT is a unit of data recorded on a digital ledger—known as a blockchain—that identifies the public wallet address

of the owner. Ledger entries signal that the owners of the identified wallets are also the owners of the relevant NFTs. NFTs typically provide a URL where a unique digital asset—a photo, video, or audio file—is accessible. The personal-use element is that NFT owners often display these artworks on their websites or social media pages, use them as avatars in online spaces, or view them on their personal devices.

To narrow the possible tax treatments, suppose that (1) capital treatment is appropriate, (2) the NFT is used primarily for personal use and enjoyment, and (3) the NFT is purchased outside a registered plan (NFTs are not permissible investments for registered plans). Given these assumptions, losses on NFT dispositions can be considered either LPP losses or (non-LPP) personal-use property (PUP) losses. PUP losses are not deductible, but LPP losses can be deducted against LPP gains, so taxpayers would prefer that NFTs qualify as LPP.

The applicable portion of the definition of LPP in section 54—combining the preamble and paragraph (a)—provides that LPP means "any portion of, or any interest in or right to—or, for civil law, any right in or to—any print, etching, drawing, painting, sculpture, or other similar work of art." The question then becomes whether an NFT constitutes an interest in or a right to the associated artwork, which typically requires an examination of the purchase documents.

Since the rights granted to NFT holders vary widely, the NFT's status as LPP may be either clear or murky. In the following situations, an NFT might be PUP rather than LPP:

- The creator has adopted the Creative Commons' CC0 licence, which essentially means that all rights are in the public domain. Since anyone may exploit the underlying artwork for personal or commercial purposes—not just the purchaser of the NFT—the purchaser may not have acquired any "interest" or "right" at all.
- The terms of purchase and sale do not specify any rights granted to buyers (which is common on OpenSea, the most popular NFT marketplace). Again, there does not seem to be an acquisition of an "interest" or a "right."

On the other hand, in the following situations, the NFT clearly seems to be LPP:

- The buyer obtains all rights, title, and interest to the intellectual property in the underlying artwork (for example, World of Women). From a tax perspective, this appears to be no different from the purchase of a physical artwork.
- The buyer is allowed to use the underlying artwork for personal, non-commercial use but the NFT creator retains all legal rights to the underlying artwork. This seems similar to the previous situation, except that the "interest" or "right" wording does not specify exclusive use. Indeed, this appears similar to selling physical art through selling individual "prints" of the art, which may or may not have a promised numerical limit.

As an additional benefit of purchase in the final situation described above, the buyer may be allowed to generate up to $100,000 in annual revenue by commercializing merchandise based on the NFT (see, for example, CryptoKitties and NFT License). This appears to add an additional "interest" or "right," but it should not change the LPP status, provided that this additional use does not become the primary purpose of the purchase. In that case, the asset would not be PUP of any kind—it would be ordinary capital property or inventory.

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SCC: Equity Cannot Correct Tax Mistakes

In the much-anticipated decision in *Collins Family Trust* (2022 SCC 26; rev'g 2020 BCCA 196, which affirmed 2019 BCSC 1030), an 8-1 majority of the SCC expanded the principles it set forth in *Fairmont* (2016 SCC 56) and *Jean Coutu* (2016 SCC 55) to deny not only rescission, but equitable remedies generally, to correct tax mistakes. The SCC's decision places the risk of ineffective tax plans squarely on taxpayers and their advisers, even where such plans are premised on a mistake of fact or law.

The SCC in *Fairmont* and *Jean Coutu* barred access to rectification sought to achieve retroactive tax planning, and generally limited the availability of rectification in tax cases to situations where legal instruments do not properly record and express the agreement of the contracting parties.

Collins involved a Holdco selling shares of an Opco to a family trust to intentionally trigger subsection 75(2). Although this plan was consistent with the CRA's publicly stated position at the time, the plan ceased to work after the court in *Sommerer* (2012 FCA 207; aff'g 2011 TCC 212) held that subsection 75(2) was not triggered by that type of transaction. As a result, the CRA reassessed the trust. The BCCA and the BCSC granted the equitable remedy of rescission to the taxpayer. The Crown appealed to the SCC, setting up the current judgment, which was necessary since *Fairmont* and *Jean Coutu* had not discussed rescission.

In *Collins*, the majority of the SCC clarified that the principles established in *Fairmont* and *Jean Coutu* are of general application, not to be distinguished on the basis of the particular equitable remedy sought. Those principles include that (1) tax consequences flow from legal relationships, as opposed to a taxpayer's objectives or motivations; (2) tax liabilities should be governed by the ordinary operation of tax statutes; and (3) transactions and documents cannot be modified merely because they caused adverse tax consequences. These principles preclude "equitable relief altogether when sought to