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MUNICIPAL TAXES: IS IT POSSIBLE TO REDUCE THE BILL?

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The tax pressure stemming from municipal taxes certainly constitutes an irritant for businesses. It was recently described as "unjustified" and "unfair for SMEs" by the Canadian Federation of Independent Business (CFIB), which made the following observation:

> [TRANSLATION]
> **"(...) in 2013, for real-estate assets of equal value, Quebec SME owners pay on average 2.22 times the taxes charged to owners of residential properties"** [1].

In a context where the payment of municipal taxes constitutes a significant expense for SMEs, it seems appropriate to review the means and programs that are available to SMEs and may have a favourable impact on their municipal tax burden.

CONTESTATION OF THE MUNICIPAL ASSESSMENT

The property tax bill which the owner of a property must pay is the result of the following mathematical operation: the assessment of the property multiplied by the tax rate applicable to its category.

Thus, the establishment of the municipal property taxes which a business owes is based on the value of its property as determined by the municipal assessor and entered on the property assessment roll of the municipality.

The value of the property entered on the property assessment roll must be equal to its actual value, that is, "its exchange value in the free and open market" [2]. What can be done if the commercial or industrial property is overvalued?

Any person having an interest has recourses available for contesting the correctness, existence or absence of an entry on the property assessment roll. This recourse is exercised by filing an application for review with the municipal body which is responsible for the assessment before May 1 following the coming into force of the triennial assessment roll. Failing an agreement with the municipal assessor, the person who made the complaint may exercise a recourse before the immovable property division of the Tribunal administratif du Québec (TAQ) within the time prescribed by law.

CONTENT

NON-TAXABLE EQUIPMENT

When dealing with contestations pertaining to industrial properties, the TAQ must rule on, among other things, the taxability of some items of equipment.

In fact, the *Act Respecting Municipal Taxation* provides that equipment used or intended to be used for industrial production purposes is not to be entered on the roll [3]. In another recent decision, the TAQ ruled that silos, robots, palletizers and coating machines used for industrial production purposes must be excluded from the value of the property [4]. In the same way, only the electrical or mechanical systems or portion thereof which

[1] « *PME et bungalow : deux poids, deux mesures dans la taxation municipale* », October 2013, http://www.cfib-fcei.ca/cfib-documents/rr3304f.pdf (French only).

[2] Sec. 42 and 43 of the *Act Respecting Municipal Taxation*, C.Q.L.R. c. F-2.1.

[3] Sec. 65 of the *Act Respecting Municipal Taxation*.

[4] *9008-5747 Québec inc.* v. *Ville de Boucherville et al.*, 2014 QCTAQ 09135.

are necessary for lighting, heating, air conditioning, ventilation, drinking water supply or water evacuation for a building must be included in the municipal assessment while any other element must be excluded. Furthermore, a machine, device and their accessories intended to abate or control pollution must be excluded from the property value.

TAX CREDIT AND ASSISTANCE PROGRAMS FOR ENTERPRISES

Non-litigious solutions are also available to business seeking to lighten their municipal tax burden. They may avail themselves of tax credits and assistance to businesses under municipal programs, where available.

Since 2006, municipalities have new powers in respect of support to economic development. A municipality may grant assistance to any person that operates a private-sector enterprise already present on its territory and is the owner or occupant of an immovable other than a residence. It is to be noted that the value of the assistance that may be granted to the beneficiaries as a whole in this way may not exceed $100,000 per fiscal year [5].

Municipalities may also grant assistance for relocating on their territories a commercial or industrial enterprise which is already established on their territory, the amount of such assistance being limited to the actual cost of the relocation.

Lastly, municipalities may adopt a tax credit program intended for persons that operate a private-sector enterprise for profit and cooperatives that are the owners or occupants of an industrial immovable or conduct certain types of commercial activities [6].

It must be noted however that although such programs constitute an interesting tool for local economic development, not all municipalities have implemented them.

CONCLUSION

A major obstacle to the growth and development of SMEs, property taxes constitute a recurring expense which is often neglected by businesses. In a highly competitive economy, SMEs would be well-advised to more carefully review solutions for reducing this form of taxation which is unrelated to their economic performance.

[5] Sec. 92.1 of the *Municipal Powers Act*, C.Q.L.R. c. C-47.1.

[6] Sec. 92.1 and 92.2 of the *Municipal Powers Act*.

PATENTS ON INFORMATION TECHNOLOGY: NEW BENCHMARKS

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Businesses often develop and try to protect intellectual property related to computer-based business methods, which may consist, among other things, of websites through which a business can be operated in an innovative manner.

In 2011, in the case of *Canada (Attorney General) v. Amazon.com, Inc.* [1], The Canadian Federal Court of Appeal invited the commissioner of patents to determine the patentability of a one-click shopping process on the Internet, keeping in mind that a new business method may constitute an essential element of a valid patent claim. However, the Court repeated that a claim of this nature cannot be allowed where the only inventive aspect of the claim is an algorithm programmed in a computer.

A parallel may be drawn between the above decision and another decision issued last June by the U.S. Supreme Court in the case of *Alice Corporation PTY. Ltd. v. CLS Bank International et al.* [2] (hereinafter, "Alice"). In this case, CLS Bank was requesting the invalidation of patents held by Alice Corporation, which were related to a method for mitigating financial risk. The claims in support of this patent application related to a method of exchanging financial obligations, as well as a computer system and a computer-readable medium containing the source code enabling an individual to implement the method.

The U.S. Supreme Court determined that the patents were invalid on the ground that they related to abstract ideas which were not patentable. The fact that the underlying business method has been declared non-patentable is in line with the prior decisions of this same court.

[1] 2011 CAF 328, [2012] 2 RCF 459.

[2] (2014) (Docket No. 13-298).

However, the *Alice* decision institutes several additional benchmarks as to the inventions implemented by computer. Among other things, the highest U.S. court is of the view that the generic computer implementation of a method does not have the effect of rendering patentable an abstract idea which would not otherwise qualify to a patent.

These decisions highlight the difficulty of obtaining valid patents for inventions implemented by computer and will henceforth have to be taken into account when drafting patent applications related to inventions of that nature. Developers often wish to obtain patents on software. However, in the light of recent case law, this is not possible for simple *generic* implementations of computer algorithms.

Therefore, in many cases, the best protection will no longer be afforded by the monopoly which may stem from a patent, but rather by alliances forged with major players of the industry or the notoriety acquired by a business based on the fact that it was the first to occupy a specific niche.

Furthermore, for businesses wishing to acquire rights on patents pertaining to computer-implemented inventions, it will certainly be relevant to first assess the validity of these patents. It must be noted that in the last few months, U.S. lower courts invalidated many patents granted prior to the *Alice* case. Acquiring rights on patents of that nature may thus reveal to be a very bad investment.

Lastly, one must not overlook the importance of carefully documenting the source code pertaining to the computer-implemented business methods since such source code is usually protected by copyright. Copyrights confer in many cases a complementary protection to that which may result from a patent.

Although it is sometimes relatively easy to circumvent copyrights by developing source code with a different structure but yielding equivalent results, it nonetheless remains that situations often occur where source codes which required extensive developing efforts from a business are simply copied by unscrupulous ex-employees or business partners. In these situations, it is crucial to be in a position to prove to the satisfaction of the courts what was developed by the business in order to enforce copyrights on the relevant source code.

In concluding, a strategy must be established in matters pertaining to the computer-related intellectual property of a business, covering commercial secrets, patents and copyrights and taking into account the recent benchmarks established by case law in the area of computer-related patents.

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