

TAX COUNSEL

APPEALING TO THE ZEBRAS: THE WAIVER PROCESS

As citizens of the Great White North and frequent viewers of "Hockey Night in Canada", we are all used to the concept of penalties. Unfortunately, in the Tax Arena, a few minutes in the "Sin Bin" won't suffice.

Penalties under the *Income Tax Act* are invariably financial. The Act is rife with penalty provisions such as the following:

- ss. 162(1): Penalty for failing to file a return of income.
- ss. 162(2): Penalty for repeatedly failing to file a return of income.
- ss. 162(3): Penalty for failing to file a return of income as required under subsection 150(3) (e.g. trustees, agents).
- ss. 162(4): Penalty for failing to complete an ownership certificate (section 234), or for failing to deliver an ownership certificate as required, or for cashing a coupon or warrant without completing an ownership certificate.
- ss. 162(7): Penalty for failing to make an information return or failing to comply with a duty or obligation.
- s. 163.1: Penalty for failing to pay all or part of an installment on the day it is required.
- s. 163(2): Penalty for knowingly or negligently making a false statement or omission on a return.
- ss. 227(8), (8.5): Penalty for failing to deduct or withhold.
- ss. 227(9), (9.5): Penalty for failing to remit or pay amounts deducted or withheld.

In the G.S.T. League, simple failure to remit attracts an automatic penalty of 6%, together with the prescribed amount of interest.¹ It is quite routine for an alleged transgressor in hockey to make an immediate appeal to a referee to reconsider the sanction. The protestations invariably fall on deaf ears. Persons looking to avoid tax or G.S.T. penalties have a slightly better chance of reconsideration. Both

the *Income Tax Act* and the *Excise Tax Act* contain provisions allowing the Minister to waive interest and penalties, and place no restriction on the ability of the Minister to provide such a waiver.² However, the policies in regards to the waiver of interest and penalties in both the G.S.T. and Income Tax realms are virtually identical and fairly restrictive.

It is the policy of CCRA that penalties and interest may be waived or cancelled in whole or in part in circumstances in which the taxpayer, for reasons beyond his or her control, is prevented from complying with the *Act*.³ Examples given are: (a) natural or human-made disasters such as flood or fire; (b) civil disturbances or disruption in services, such as a postal strike; (c) serious illness or accident; or (d) serious emotional or mental distress, such as a death in the immediate family. Interest or penalties can also be waived when they arise primarily because of the actions of the CCRA and in circumstances in which the taxpayer can show an inability to pay or an inability to conclude a reasonable payment arrangement because the interest component absorbs a significant portion of the payments.

An application for waiver of interest or penalties is made in writing directly to CCRA. The Minister has the absolute discretion to waive interest and penalties or not. He has but one requirement, namely, to act fairly. Faced with an unfavourable waiver decision, the taxpayer has the option of applying to the Court for judicial review of the Minister's decision. In such an application, the Court will not look at the end result – that is, the decision itself - but rather, the decision-making process. The court must determine whether the decision was made fairly, not arbitrarily or in bad faith. So long as the evidence in the records supports the decision, the courts will not interfere. Following are examples of recent judicial review application results:

- The Court held that it is not a breach of fairness to deny a right to make oral representations where the decision-maker has full discretion to make such a decision⁴;

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THE WAIVER PROCESS (CONT'D)

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- The taxpayer's application was allowed when the evidence before the court did not demonstrate the ministerial decision-makers had considered all of the relevant facts on which the taxpayer's application for a waiver had been based⁵;
- A decision made by the Minister without having regard to CCRA's own guidelines, as well as without regard to the taxpayer's own particular circumstances, was overturned⁶;
- Failure by the Minister's officer to attempt to analyze the taxpayer's submission in a serious and objective way meant the taxpayer's application must be granted⁷;
- In the course of his application for judicial review of the Minister's decision denying him an interest waiver, the taxpayer was not entitled to documents and statistics relating to other taxpayers⁸;
- The Minister's decision to decline a waiver of interest was upheld. There was evidence upon which he could find that such illness would not prevent compliance with the **Act**⁹;
- Although the Minister's letters of explanation in response to the taxpayer's application for the rescission of arrears of interest and penalty owing could have been "more fulsome", they did not provide grounds on which to conclude that there had been a fettering of discretion¹⁰;
- The taxpayer's application for judicial review was dismissed because the taxpayer had been given ample opportunity to make representations, the Minister's discretionary powers had been exercised in good faith and not based on inappropriate considerations, and there was evidence to reasonably justify the Minister's conclusion¹¹.

cations in these instances fail. This is to be expected. So long as the Minister exercises his discretion fairly, the discretion remains his. However, as one can see from the cases above, one must examine each situation on its own merits to determine the fairness of the process. If an inequity exists, the courts will intervene.

There is yet another way to achieve a waiver of interest and penalties. This is through the process of remission – an appeal to the League Commissioner, if you will. More on this another day.

¹ *ETA s. 280*

² *ITA s. 220(3.1); ETA s. 281.1*

³ *IC 92-2; GST memorandum 500-3-2-1*

⁴ *Syal v. A.G. of Canada, (F.C.T.D.) 99 DTC 5451*

⁵ *Grant v. The Queen, (F.C.T.D.) 99 DTC 5146*

⁶ *Bilida v. Revenue Canada (F.C.T.D.) 97 DTC 5041*

⁷ *Courchesne v. Revenue Canada et al (F.C.T.D.) 96 DTC 6604*

⁸ *Veale v. The Queen, (F.C.T.D.) 98 DTC 6136*

⁹ *Young et al v. The Queen, (F.C.T.D.) 98 DTC 6028*

¹⁰ *356575 Ontario Ltd. v. Revenue Canada et al, (F.C.T.D.) 98 DTC 6059*

¹¹ *Dubé v. The Queen et al, (F.C.T.D.) 99 DTC 5218*

NEXT ISSUE:

“Ye reap what ye sow”, the case of the foul mouthed taxpayer.

The fact is that the majority of judicial review appli-



Suite 100 - 10328 - 81 Avenue
Edmonton, Alberta
Canada T6E 1X2

Tel (780) 439-7171
Fax (780) 439-0475

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Donald P. Mallon, BSc LLB, a partner in Prowse & Chowne, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



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