FCA Decisions on Charities

Paragraph 168(1)(c) gives authority to the minister to revoke a charity's registration for failure to file an information return as and when required under the Act or regulations. Two FCA decisions—*Jaamiah Al Uloom Al Islamiyyah Ontario* (**2016 FCA 49**) and *Opportunities for the Disabled Foundation* (**2016 FCA 94**)—provide much-needed guidance on the provision's interpretation and grant broad scope to the minister in revocation procedures.

On the facts in *Jaamiah*, the CRA issued a notice of intention to revoke the taxpayer's charitable registration: the CRA said that audits of the taxpayer's 2007 and 2008 taxation years showed that the taxpayer had not complied with the requirements necessary to maintain registration under the Act. The CRA said that three grounds supported revocation: (1) failure to maintain adequate books and records; (2) the issuance of receipts for gifts not in accordance with the Act and regulations; and (3) failure to file information returns as and when required "by not preparing and issuing proper statements of remuneration (T4s or T4As)."

The taxpayer conceded that shortcomings existed in each area of concern, including failure to prepare and issue T4 and T4A slips. However, the taxpayer said that it had never failed to file a form T3010 ("Registered Charity Information Return"), but had filed the form late. Moreover, the taxpayer said that revocation was unreasonable because it had taken remedial steps to prevent the recurrence of these failures, including the retaining of experienced and qualified accountants.

The FCA reviewed the jurisprudence and said that the minister can revoke registration if "the record . . . establishes that the non-compliance . . . can be regarded as 'serious' . . . . [The] seriousness of the non-compliance must be apparent from the record." Moreover, the seriousness threshold could be met for any ground raised by the minister. Because there was serious non-compliance (the charity failed to maintain adequate books and records), there was no need to consider any other ground, including failure to prepare and issue T4 and T4A slips. The charity's appeal was therefore dismissed.

After auditing several taxation years, the CRA in *Opportunities* raised concerns about deficiencies in the taxpayer's books and records, failures to devote all of its resources to charitable activities, incomplete and inaccurate information returns, and gifts made to non-qualified donees. Under a compliance agreement, the CRA outlined its concerns, and the taxpayer agreed to undertake corrective action, including a commitment to "file, on a timely basis, complete and accurate information reports as required by the Act."

The subsequent audit of a different taxation year resulted in a new CRA letter (the administrative fairness letter) that identified additional concerns. The taxpayer did not respond to the letter and insisted that the CRA answer certain questions before the taxpayer made submissions. A few years later, the CRA issued a revocation proposal resulting from an audit of the taxpayer's 2010 taxation year that outlined its reasons for not answering the taxpayer's questions and said that the taxpayer's limited responses to the CRA's concerns were insufficient. The CRA revoked registration on five grounds, including failure to file an information return as required by paragraph 168(1)(c).

On appeal, the FCA said that the onus was on the taxpayer to demonstrate that the minister acted unreasonably in issuing the revocation proposal. Regarding the failure to file an information return as required by the Act, the FCA pointed to 10 apparent instances of error and omission in one taxation year. Moreover, in the compliance agreement, the taxpayer had committed to ensuring that its subsequent returns were complete and accurate.

The taxpayer argued that the inaccuracies were the result of "the arbitrary reallocation of expenditures by the CRA auditor" and did not evidence a failure to file "as required" by the Act. The FCA said:
I reject the [taxpayer's] narrow interpretation of paragraph 168(1)(c). Filing an information return "as required" by the Act or a regulation must entail filing a return that corresponds with the requirements for a return set out in the Act and in applicable regulations. The Appellant's submission essentially reads down paragraph 168(1)(c) to eliminate the word "as."

On the other hand, I do not wish to be taken as having concluded that any minor inaccuracy in a T3010 will justify a Ministerial decision to issue a notice of intention to revoke the registration of a registered charity.

In the circumstances, I am satisfied that the record amply demonstrates that the inaccuracies in the T3010 cited by the Minister in the Administrative Fairness Agreement are well beyond what might reasonably be viewed as minor.

The FCA clearly rejected the taxpayer's interpretation of paragraph 168(1)(c) as only requiring the taxpayer to submit a form T3010 annually for it to be filed "as required" under the Act. On the other hand, the FCA clearly said that minor inaccuracies in the form T3010 do not justify the revocation of a charity's registration.

Because there were several significant inaccuracies in form T3010 and because the taxpayer failed to meet its related commitment under

the compliance agreement, the FCA concluded that the taxpayer failed to demonstrate that the minister was acting unreasonably when the revocation proposal was issued on the basis of paragraph 168(1)(c). The FCA also concluded that each of the five grounds for revocation raised by the minister was sufficiently serious to dismiss the taxpayer's appeal.

Subsection 168(1) allows the minister to send a notice to a charity proposing to revoke the charity's registration on any listed ground, including failure "to file an information return as and when required under this Act or a Regulation" (paragraph 168(1)(c)). *Jaamiah* is the first decision to suggest that the relevant information return is a form other than form T3010 and includes T4 slips or T4A slips. The CRA said that the taxpayer failed to file an information return "by not preparing and issuing proper statements of remuneration (T4s or T4As)," but the FCA did not consider whether this was a sufficient ground for revocation. Thus, *Jaamiah* should not be interpreted to mean that failure to prepare and issue such slips can support revocation: any suggestion to the contrary by the CRA should be resisted.

In *Opportunities*, the FCA reiterated the commonly held view that minor instances of non-compliance are insufficient grounds for revocation. The Opportunities for the Disabled Foundation had a lengthy history of non-compliance and did not follow a compliance agreement with the CRA: the FCA concluded that this non-compliance was more than minor. However, the FCA also came to a more troubling conclusion: that a T3010 that contains serious errors is not a form that was filed as and when required and is therefore an independent ground for revocation. Form T3010 preparation is not an exact science, and the CRA often disagrees with a charity's T3010 filing positions. Unfortunately, the CRA can also be expected to take the position that any disagreement over a filing position is a serious error that warrants revocation, and the FCA seems to support the position that a T3010 must be filed free of errors to be in compliance. This harsh result does not seem to be required by the Act: arguably, the requirement that the form T3010 be filed "as" required by the Act is merely a requirement to file and give reasonable answers to the questions asked. If Parliament had intended to allow revocation for making a mistake—even a serious one—on a T3010, it could easily have set out that requirement.

Because the taxpayer has the onus of showing, on an appeal to the FCA, that the minister acted unreasonably in respect of each ground supporting revocation, a charity (especially a small charity) is put in a costly and difficult situation. Moreover, the minister may be motivated to raise any and all potential grounds for revocation and not focus on serious non-compliance: the process seems to favour the raising of many potential grounds for revocation in hope of success on at least one ground—perhaps because the charity cannot refute the reasonableness of the minister's position. The result may be distrust, in a situation where both parties should cooperate to ensure the satisfaction of compliance requirements. As the FCA dissent in *Canadian Magen David Adom* (**2002 FCA 323**) suggested, if the CRA initially averred multiple grounds, it should be required to reconsider revocation taking into account only grounds judicially upheld.

It is hoped that a court will soon correct the interpretation that paragraph 168(1)(c) supports revocation for serious mistakes in a form T3010: that provision has always been, and should continue to be, understood to permit revocation only if the charity fails to file a form T3010. A pattern of mistakes on T3010s warrants only penalties of general application. Alternatively, Parliament should amend the Act to permit revocation only for T3010 mistakes that amount to conduct considered culpable in other provisions of the Act.

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