Canadian Civil Tax Disputes: Taxpayer Opportunities to Resolve Tax Issues

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Introduction

Civil tax disputes are primarily all about money. Occasionally, a Canadian Charter of Rights and Freedoms[1] issue finds its way into the process of challenging the government's taxpayer assessment, but it is not common. From the government's perspective, a civil tax dispute generally involves a principled approach, applying both the language of the taxing statute and the relevant common law. More often than not, while a taxpayer seeks to comply with the law, the primary concern is how much will it cost; 'What do I have to pay in tax, if anything?' This dynamic sets the stage for the majority of civil tax disputes. No one needs to be told that challenging a tax dispute is an expensive, time-consuming and not entirely efficient process. In Canada, there are a few ways to resolve a tax dispute. This article provides the reader with an overview of the options to resolve Canadian tax disputes.

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1 Part 1 of the Constitution Act 1982, being Sch B to the Canada Act 1982 (UK), 1982, c 11.

Assessment periods

Pursuant to subsection 152(4) of the Income Tax Act (the 'Act'), the Minister of National Revenue (the 'Minister') is prohibited from reassessing outside the 'normal period of reassessment' unless one of the conditions contained therein is satisfied.[2] The Canada Revenue Agency's (CRA's) normal reassessment period is determined by reference to the Act's characterisation of the taxpayer. Paragraph 152(3.1)(b) establishes that the normal reassessment period that applies to a mutual fund trust or a corporation other than Canadian-controlled private corporation (CCPC) is four years after the day the CRA sends the original notice of assessment.[3] In all other cases, including individual taxpayers and CCPCs, paragraph 152(3.1)(a) of the Act provides that the normal reassessment period is three years from the day the CRA sends the original notice of assessment.[4]

The reassessment periods that apply to foreign-controlled corporations are different from their domestic counterparts. More precisely, the reassessment period for foreign affiliates of Canadian corporations, such as members of multinational enterprises (MNEs), is extended for an additional three years beyond the normal reassessment period as established by clause 152(4)(b)(iii)(B) of the Act.[5]

Limitation periods

In the absence of fraud or misrepresentation on the part of the taxpayer, the Minister is only permitted to reassess a taxpayer within the normal period of reassessment articulated in subsection 152(4) of the Act.[6] Thus, when applied to MNEs, the Minister is generally only permitted to reassess within four years of the date of the original notice of assessment and reassessments beyond the expiry of the normal reassessment period are statute-barred. However, where an MNE fails to withhold proper amounts of goods and services tax (GST)/harmonised sales tax (HST), the Minister is not bound by the typical limitation periods under the Excise Tax Act.

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2 RSC 1985, c 1 (5th Supp), as amended, s 152(1).
3 *Ibid* s 152(3.1)(b).
4 *Ibid* s 152(3.1)(a).
5 *Ibid* s 152(4)(b)(iii)(B).
6 *Ibid* s 154(2).

Disagreeing with the government determination and existing opportunities to resolve the tax dispute

To begin with, the Canadian income tax system is based on the principle of self-assessment whereby a taxpayer declares his, her or its income and provides an estimated tax liability. Under the auspices of the Minister, the CRA is responsible for the administration (including the collection of monies) in accordance with the provisions of the federal taxing statutes.[7] The CRA verifies the information contained in the taxpayer's return of income and issues an assessment or reassessment that either confirms or varies the taxpayer's determination of tax liability under the Income Tax Act.[8]

Advance rulings

An advance tax ruling (ATR) is a written statement proffered by the CRA, which confirms the CRA's interpretation of how specific provisions of the Act will apply to a proposed transaction that a taxpayer is contemplating. The Income Tax Rulings Directorate (the 'Directorate') is responsible for providing taxpayers with these advance rulings, and is empowered with the discretion to determine whether or not it will accept a taxpayer's request for an ATR. There is no legal requirement for the Directorate to issue an ATR.[9] Nevertheless, the CRA will generally accept a taxpayer's request for an advance ruling provided that the request does not fall within one of the CRA's enumerated prohibited categories,[10] so that it may provide tax certainty to the taxpayer.[11]

Generally, an ATR will be binding on the CRA provided that the law remains unchanged at the time that the transaction is undertaken. Unlike an Interpretation Bulletin, which is provided in response to a hypothetical situation, an ATR is given in response to a set of specific facts and circumstances, which enables the CRA to make binding statements on how

7 The Canada Revenue Agency Act, RSC 1999, c 17 sets out the mandate of the CRA. In practice, the CRA has the responsibility for the administration of the Income Tax Act, the Excise Tax Act and other legislation dealing with the Canada Pension Plan, Employment Insurance, Softwood Lumber and Tobacco.

8 See n 2 above, s 152(1).

9 CRA, 'IC70-6R11 Advance Income Tax Rulings and Technical Interpretations' (1 April 2021) para 12, www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic70-6/ic70-6-advance-income-tax-rulings-and-technical-interpretations.html accessed 21 October 2021.

10 See n 9 above, para 19 for a non-exhaustive list of the circumstances under which the Directorate will not entertain a taxpayer's request for an advance ruling.

11 Diane Lebouthillier, 'Report on progress: commitments made in the government's response to the sixth report of the standing committee on finance' (1 June 2017) www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/report-on-progress-commitments-made-government-s-response-sixth-report-standing-committee-on-finance.html accessed 21 October 2021.

the Act will apply to the specific transactions contemplated by the taxpayer.[12] However, taxpayers must be cognisant of recent legislative changes or court decisions that may propose a legal interpretation that diverges from the CRA's position articulated in its advance ruling. In fact, there are numerous situations where an ATR will no longer apply, such as:

1. if there is a material omission or misrepresentation by the taxpayer in describing the relevant facts, the proposed transactions or other information outlined in the ATR; or
2. the taxpayer's proposed transactions are not implemented within the time allotted by the ATR.[13]

The CRA also has the capacity to revoke a ruling if it later determines that the ruling was issued in error.

Taxpayers seeking an advance ruling are required to pay a fee for the service, which is based on the CRA's cost-recovery estimate. Currently, the initial rate for the first ten hours of work performed for the ATR is $100 plus applicable tax (adjusted annually since April 2019[14] to $104.04 as of 1 April 2021) and at the standard rate of $155 for each subsequent hour (adjusted annually since April 2019 to $161.26 as of 1 April 2021).[15] Moreover, the CRA aims to resolve an ATR request within 90 business days of the receipt of all material information from the taxpayer's proposed transaction.

In sum, the essential point of an advance ruling has been stated in the following way: '[t]he purpose of the Rulings is to promote voluntary compliance, uniformity and self-assessment by providing certainty with respect to the application of Canadian income tax law to proposed transactions. There is no related appeal process'.[16] This process affords taxpayers the opportunity to obtain the CRA's opinion and avoid a potential assessment or reassessment.[17] Some commentators have noted that the programme is mutually beneficial as it provides taxpayers with the benefit of certainty regarding their proposed transactions, but it also enables both the taxpayer and the CRA to forego costly and often uncertain litigation.[18] In effect, by bestowing upon taxpayers a degree of certainty regarding the tax treatment of their proposed transactions, the CRA is able to avoid situations in which the taxpayer is forced to litigate to resolve their tax disputes.

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12 Douglas Cannon et al, 'CRA Session on Advance Tax Rulings: 2017 and Beyond' in *Report of the Proceedings of the 69th Tax Conference* (Canadian Tax Foundation 2018) 34:1, 34:2.

13 *Ibid* 34:3.

14 These annual adjustments are made pursuant to the Services Fees Act, SC 2017, c 20, s 17(1).

15 See n 9 above, para 43.

16 *Ibid* para 12.

17 See n 12 above, 34:5.

18 *Ibid*.

Despite these efforts, the ATR programme has seen a precipitous decline in use in its more recent years. David Williamson and Tim Bryant note that in the 1990s, the Directorate would generally report around 490 to 500 ATR requests every year.[19] However, in 2014, the Directorate reported that it received only approximately 125 ATR requests every year, representing a significant decline from earlier years.[20] Some commentators have attributed the reduced reliance on the ATR programme to the fact that CRA publications are now more readily accessible to tax practitioners, enabling them to discern the CRA's position on most transactions without recourse to an advance ruling.[21] However, Douglas Cannon suggests that the lengthy process of acquiring an advance ruling may also serve as an impediment for some taxpayers who are more eager to complete their transactions.[22]

Finally, following a recommendation from the House of Commons Standing Committee on Finance (the 'Finance Committee') report of 2016, the CRA underwent a comprehensive review of its ATR programme. Some of the more pertinent changes that were implemented include the following:

1. The Directorate will grant taxpayers a face-to-face meeting within four weeks of receiving an ATR request. This will provide CRA and the taxpayer with the opportunity to identify issues, detect shortcomings in the ATR requests or its submissions, and avoid potential delay early in the ATR process.[23]
2. The CRA will conduct workshops for tax practitioners at tax conferences and courses sponsored by national tax organisations in order to increase awareness of the ATR process, and it will more frequently review and revise the relevant Information Circular. These measures are aimed at improving the quality of taxpayers' submissions when requesting an advance ruling, so that unnecessary delay may be avoided.[24]
3. The Directorate will maintain its 90-day service standard for advance rulings; however, it will exempt more complex tax policy issues from this standard. Namely, those requests that require a formal referral to the CRA's General Anti-Avoidance Rule Committee, the Department of Finance or the Department of Justice will no longer be subject to the 90-day service standard, providing taxpayers with a more realistic timeline for advance rulings in these matters.[25]

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19 David Williamson and Tim Bryant, 'The Income Tax Rulings Process: Dispelling the Mystery' (1998) 46 Can Tax J 274, 278.

20 See n 12 above, 34:9.

21 *Ibid.*

22 *Ibid.*

23 See n 12 above, 34:9; see n 11 above.

24 See n 11 above.

25 *Ibid.*

Although the ATR programme has seen a decline in participation in recent years, it remains an excellent opportunity for taxpayers to resolve their tax matters *before* they develop into tax disputes.

Common reporting standards and the exchange of information

Taxpayers should be aware that in 2017, Canada adopted the common reporting standards (CRS), which require that financial institutions provide the CRA with information relating to the foreign financial accounts of Canadians.[26] The CRS were implemented by way of amendment to Part XIX of the Act, and accordingly, Canadian financial institutions must identify non-resident financial accounts and report the relevant account details to the CRA. Consequently, the CRA will automatically exchange this information with foreign jurisdictions and receive reciprocal information in return, with a view towards mitigating the risk of tax avoidance in foreign jurisdictions.

Before the issuance of an assessment: the audit process

It does not matter if the taxpayer is the owner of a business or someone in management of a corporation or an individual taxpayer, no one likes to receive a CRA audit inquiry letter or an introductory telephone call from a CRA auditor. It is not uncommon for a CRA audit to occur randomly or on a project basis.[27] Once the audit begins, it can be a relatively benign process. It can end quickly. On the other hand, some audits can be a long, drawn-out ordeal.[28] Generally, there are two types of audits. First, there is the desk audit and, second, there is the field audit. The desk audit, as the name implies, means that the CRA auditor requests information from the taxpayer. This

26 Patrick Lindsay and Rick Barnay, 'Current Issues in Provincial and Federal Tax Law', in 2019 Prairie Provinces Tax Conference (Toronto: Canadian Tax Foundation, 2019), 1:1–48, at 39.

27 The CRA is known to use a risk profile assessment basis to determine if an audit should occur. A number of factors are considered, such as the errors and frequency of those errors in a return or if there are signs of non-compliance with tax reporting requirements; for a discussion of the progression of an audit. See Richard G Fitzsimmons, *Resolving Tax Disputes* (2nd edn, CCH 2004), 8–10.

28 There are multiple factors that determine the length of an audit. Some of these considerations include the following: the scope of the audit – is it a large corporation with subs or associated corporations? Does it include multiple years? What is the state of the taxpayer's records? Is it an audit that requires the review by specialists such as valuation experts or technical specialists? See also Alexandra K Brown and Roger Taylor, 'A Practical Guide to the Audit and Audit Issues' in *Report of Proceedings of the Fifty-Ninth Tax Conference* (Canadian Tax Foundation 2008), 17:1; Janice A McCart, 'The Art of the Deal, Part 2: Settlement at Audit and Appeals' in *Report of the Proceedings of Forty-Sixth Tax Conference* (Canadian Tax Foundation 1995), 31:1.

could include the books, records, documents and any other information relevant to the explanation of the taxpayer's reporting as contained in the return of income. The CRA auditor will ask for this information by oral and written correspondence. There may or may not be a meeting with the taxpayer. The field audit is typically carried out at the taxpayer's place of business. The CRA auditor will call the taxpayer and set up a meeting date. The field audit can take a short period of time or it can stretch into weeks or months; it all depends on the size and complexity of the taxpayer's business as well as the taxpayer's willingness to cooperate with the CRA auditor.

During the course of the actual audit, the CRA auditor clarifies and confirms the factual issues. It is a dialogue between the taxpayer and the CRA auditor. In concluding the audit, the CRA auditor may find that the assessment was correct and nothing more is done. However, if the CRA auditor determines that the taxpayer's return contains errors, then the CRA auditor may call the taxpayer. During that call, the CRA auditor will state the facts and law that explain the problems with the reporting in the return of income. In some cases, the CRA auditor may not call the taxpayer but simply conclude the audit process – as is the case with all audits – with a proposal letter that is mailed to the taxpayer. The proposal letter sets out the precise adjustments that the CRA auditor intends to make to the taxpayer's tax return(s) for the year or years under audit. It is typical that the proposal letter will give the taxpayer 30 days to respond and to provide any counter-arguments to the proposal. It is impossible to establish with complete accuracy how many CRA audits end with the parties being satisfied with the outcome of the audit process. The point here, however, is that it is possible to negotiate and resolve some, if not all, of the issues that arise during the audit process and before an assessment or reassessment is finalised.

The objection stage and CRA appeals

If a taxpayer is not satisfied with the outcome of the audit process and specifically, the resulting notice of assessment or reassessment, the taxpayer has the statutory right to dispute the Minister's position.[29] The taxpayer can file a notice of objection.[30] The opportunity to have another chance to change the mind of the CRA should not be squandered. The taxpayer would be wise

29 See n 2 above, s 165.

30 Numerous publications focus on the subject of the notice of objection. See Colin Campbell, *Administration of Income Tax, 2020* (Carswell 2020), ch 10.5; Michael D Templeton, 'Drafting the Notice of Objection' (Ontario Bar Association 1993); Tom Boddez and others, 'Notices of Objection' in *2012 Tax Dispute Resolution, Compliance, and Administration Conference Report* (Canadian Tax Foundation 2013), 12:1; Tom Limson, 'Objections to Income Tax Assessments' (2019) 2478 Tax Topics (CCH 2019).

to consult with a tax professional and many do. The benefit of seeking this professional advice is obvious by the number of objections that are resolved.[31]

If a taxpayer disagrees with the Minister's assessment, he or she may file a notice of objection in respect of the Minister's assessment for the relevant tax year after a notice of assessment or notice of reassessment has been issued. Very broadly, a notice of objection will outline the reasons for the taxpayer's objections and all relevant facts that support the taxpayer's position. Although there is no prescribed form for the notice of objection, in practice, the Minister will generally accept objections that do not fully set out the taxpayer's positions, with the expectation that all material facts will be made in the future.[32]

Of note, the Act prescribes higher standards that apply to notices of objection submitted by large corporations, which include most MNEs. A corporation is considered a large corporation if the total of taxable capital employed in Canada at the end of a particular taxation year by it and its related corporation exceeds $10,000,000.[33] In particular, subsection 165(1.11) of the Act outlines the substantive requirements for objections filed by large corporations. The corporation must:

1. reasonably describe each issue to be decided;
2. specify, in respect of each issue, the relief sought, expressed as a balance of undeducted outlays, expenses or other amounts of the corporation; and
3. provide facts and reasons relied on in respect of each issue.[34]

It is imperative that a tax practitioner acting on behalf of a large corporation is cognisant of these rules when drafting a notice of objection. For instance, subsection 169(2.1) of the Act restricts the arguments that a taxpayer can raise before the Tax Court of Canada to the issues that had initially appeared in the notice of objection. Similarly, that provision also restricts the relief available to the taxpayer to the same relief initially sought in the taxpayer's notice of objection. For instance, in *Potash Corporation of Saskatchewan Inc v Canada*,[35] a large corporation drafted its notice of objection with reference to items of income that were disallowed in the reassessment; however, the taxpayer later learned that it had inadvertently neglected to include certain

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31 It has been reported that 95 per cent of income tax objections are settled before proceeding to trial at the Tax Court. See CRA, *FPC Presentation Series on the CRA Approach to Compliance*, 15 (fifth paper, updates); Diana van Hout, 'Is Mediation the Panacea to the Profusion of Tax Disputes' (2018) 10 World Tax J 43, 76 n 218.

32 Sophie Virji and Dennis Auger, 'Anatomy of a Tax Dispute: Understanding the CRA Audit and Objection Process', 41.

33 See n 2 above, s 225.1(8).

34 *Ibid* s 165(1.11).

35 2003 FCA 471.

amounts into its income for the Minister's reassessment. The Federal Court of Appeal refused to allow the taxpayer to amend its notice of objection to correct its inadvertent errors and include the items listed in its initial notice of objection, since permitting it to do so would be contrary to the requirements of subsection 169(2.1).[36]

However, more recently in *Devon Canada Corporation v The Queen*,[37] the Federal Court of Appeal permitted a large corporation to raise issues not previously enclosed in its notice of objection, but which were contained in its supplementary memorandum to the Appeals Division. In applying a purposive interpretation of the Act, the court held:

> 'The interpretation of the reference to "notice of objection" in subsection 169(2.1) of the Act that would be harmonious with the Act, *is that this "notice of objection" would include any amendments or additional submissions that are accepted by the Minister*. As noted above, the Large Corporation Rules were introduced to allow the Crown to know at the objection stage the nature and quantum of tax litigation.'[38]

Similar to the audit process, there are multiple steps involved when dealing with a CRA appeals officer. The function of the appeals officer is independently to review the audit work and findings. The notice of objection will in all likelihood contain the reasons why both in fact and law the CRA audit position and subsequent assessment or reassessment are incorrect. Even though the review by the CRA appeals officer is presumably impartial, it is not uncommon for an appeals officer to speak with the auditor about his work. In some, not all, cases, it is possible for the taxpayer to influence the appeals officer in order to obtain a reduction in the number of issues in dispute. In other cases, the appeals officer may agree entirely with the taxpayer's submission and reverse the audit findings and, therefore, the assessment or reassessment in full. In those few cases that no compromise or settlement can be readied, the taxpayer has the statutory right to file an appeal to the Tax Court of Canada once the CRA position regarding the notice of objection is confirmed.[39]

The Tax Court (and the settlement conference)

By now, and before commencing a court action, the taxpayer has had two full opportunities to resolve a tax dispute with the CRA (first, at the audit stage, next at the objection stage). Whether it is due to the diligent work on

36 *Ibid* para 29.
37 2015 FCA 214.
38 *Ibid* para 30.
39 See n 2 above, s 169.

the part of the CRA to ensure compliance with the Act or if it is due to the efforts by taxpayers to maximise their right to minimise tax, there are still many cases that proceed to the Tax Court of Canada for resolution.

At the Tax Court, there are two procedures available to taxpayers.[40] The informal procedure applies to appeals where the taxpayer has made the appropriate election and the total of all amounts in dispute is equal to or less than $25,000, or the amount of a loss in issue is equal to or less than $50,000 (with respect to appeals filed after 26 June 2013).[41] The general procedure applies to all other appeals.[42] One of the major distinctions between the informal and general procedures is that the general procedure requires the taxpayer to be represented by a lawyer, whereas in the informal procedure the taxpayer can be represented by a person other than a lawyer.[43] In either case, the taxpayer can appear in person. There are other significant distinctions between the two procedures such as the informality, as the name suggests, of the informal procedure. In an informal procedure appeal, it is common for the judges of the Tax Court to insure that a self-represented taxpayer has an opportunity to present their case even if they have little knowledge of the rules of evidence or of court procedures. In the general procedure, the rules are expected to be followed by counsel in a meticulous manner. The general procedure appeal is subject to a full prescription of rules dealing with all forms of pre-trial matters including motions, the filing of documents, the examinations for discovery and the rules are explicit and detailed when it comes to the actual trial and costs.

Whether the taxpayer is in the informal or general procedure, the taxpayer may settle an appeal without actually appearing in court. In an informal procedure appeal, there are a limited number of opportunities to settle as there are few pre-trial steps. There can be some exchanges between the taxpayer and the justice lawyer assigned to the file. It is possible that the taxpayer may have not produced information at the earlier stages of the dispute or in some instances, the taxpayer will receive an explanation from the justice lawyer that convinces the taxpayer that there is no reason

40 For a complete survey of the Rules for the Informal Procedure and General Procedure see Gordon Bourgard and Robert McMechan, *Tax Court Practice*; Andre Gallant, 'The Tax Court's Informal Procedure and Self-represented Litigants' (2005) 53 Can Tax J 333. Appeals are governed by the Tax Court of Canada Act, RSC 1985 c T-2.

41 Bourgard and McMechan, *Tax Court Practice*, n 40 above.

42 For commentary on the conduct of tax appeals see the following: Pooja Samtani, 'The Possibilities and Perils of Tax Litigation' in *Report of Proceedings of the Sixty-Fifth Tax Conference* (Canadian Tax Foundation 2014), 38:1, Pooja Samtani and Justin Kutyan, 'Tax Litigation Demystified' (2011) 59:3 Can Tax J 527; Hon Donald G H Bowman, 'Good Practices in the Tax Court of Canada' in D W Chodikoff and J L Horvath (eds), *Advocacy and Taxation in Canada* (Irwin Law 2004), 80–90.

43 Tax Court of Canada Rules (General Procedure), SOR/90-688a, r 30 as amended.

to continue the appeal. In the general procedure appeal, settlement opportunities can even occur before the justice lawyer files the reply to the notice of appeal.[44] Thereafter, settlement discussions often happen after the filing of the lists of documents, or more often immediately following the completion of oral or written examinations for discovery. Finally, it is not uncommon that settlements are reached on the eve of trial.

Even with all of these opportunities to resolve tax disputes, the reality is that there is growing concern that the costs of justice are far too high for many taxpayers. Consequently, the Tax Court of Canada implemented rule changes that were formalised in 2014 in order to facilitate the settlement of tax appeals.[45] Rule 126.2 of the Tax Court of Canada Rules (General Procedure) permits the Tax Court, at any time on its own accord or at the request of either party, to schedule a settlement conference.[46] Typically, with the consent of both parties, the settlement conference is scheduled by the Tax Court hearings coordinator. All parties, including counsel, must attend the settlement conference. The Tax Court judge that conducts the settlement conference does not conduct the trial if one does occur. Moreover, any discussions held at the settlement conference cannot be shared with the trial judge. The express purpose of the settlement conference is to narrow the issues on appeal and to encourage the settlement of the appeal. The settlement conference is only available for general procedure appeals. There are also a number of procedural steps that must be followed before a settlement conference is held. Each party is required to prepare and serve a brief on the other party 14 days before the date of the settlement conference. The brief will summarise the facts and issues in the case.[47] It will also disclose a short summary of any expert opinion. It will also list issues that the parties have already agreed upon. The brief will identify the issue or issues that are 'road blocks' to a settlement. Finally, the brief will identify any facts or legal matters that would assist the settlement judge in facilitating the settlement process.

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44 David Chodikoff has had the experience where a notice of appeal is filed; the Crown subsequently and after a review of the notice proposes to delay the filing of the reply based on the prospect that the case may settle without the need to file a reply. Consent of the appellant's counsel is required and should be recorded.

45 See n 30 above, 613-4.

46 See n 43 above, r 126.2(1).

47 See Discussions of the settlement conference in Hon Donald G H Bowman, 'The Settlement of Tax Disputes in Canada' (2011) 3 *International Association of Tax Judges Newsletter* 1, 6 https://iatj.net/content/newsletters/Newsletter-Volume3.pdf accessed 21 October 2021; Colin Jackson, 'Into the "Vortex of Legal Precision": Access to Justice, Complexity, and the Canadian Tax System' (PhD dissertation, Dalhousie University 2019), 34–7.

In 2018, the Tax Court of Canada issued Practice Note 21, Settlement Conferences.[48] The Practice Note advised that settlement conferences would not be held as scheduled unless the parties to the litigation confirmed in writing an offer of settlement and that a written reply had actually been provided. Further, the parties are required to be present at all times during the settlement conference. Both parties have an obligation to insure that a person who has the authority to settle is present at the settlement conference. The court also stated that it may award costs against a party where it determines that the conduct of a party impeded the proper functioning of the settlement conference.

More recently, on 21 July 2020, the Tax Court issued Practice Note 24 regarding fast-track settlement conferences. Recognising that the Covid-19 pandemic had created delays for parties conducting appeals before the Tax Court and in order to offer more ways to settle tax appeals, the Tax Court introduced a fast-track settlement conference process.[49]

One of the differences from Practice Note 21 is that Practice Note 24 states that the parties are not required to make a written offer of settlement. If the parties want a fast-track settlement conference, the parties have to file a joint written request. Practice Note 24 sets out that a fast-track conference will only be available temporarily to help reduce the backlog caused by the court's closure.[50] The settlement conference is only available for general procedure appeals. A reply to the notice of appeal must be filed. The procedure requires a brief to be filed outlining the amount in issue, the facts in dispute, the issues to be canvassed at the settlement conference, the position of the party on the issues, the basis for believing that the party's case is suitable for a settlement conference, the current state of the appeal vis-à-vis discoveries, whether any offers of settlement had been made, that the request must be in the official language in which the parties want the settlement conference conducted and that the parties can identify their preferred location for the settlement conference (the choice of cities includes Toronto, Vancouver or Montreal).[51] Assuming that the court concludes that a fast-track settlement conference will be worthwhile, the settlement conference will be scheduled within 90 days of the dates of the parties' joint written request. In the event that a settlement is not reached, the Tax Court will put the appeal back

48 Tax Court of Canada, *Practice Note 21* (30 November 2018), 1 www.tcc-cci.gc.ca/Content/assets/pdf/base/practicenotes/practicenote21_en.pdf accessed on 21 October 2021.

49 Tax Court of Canada, *Practice Note 24* (21 July 2020), 1 www.tcc-cci.gc.ca/Content/assets/pdf/base/practicenotes/practicenote24_en.pdf accessed on 21 October 2021.

50 *Ibid.*

51 *Ibid.*

in the scheduling queue at the same stage as the appeal was prior to the conference being held.[52]

As we have attempted to demonstrate, there are quite a few ways and opportunities for a taxpayer to settle a tax dispute. Even before an audit commences, there is an avenue available to taxpayers to obtain the CRA's interpretation of a specific provision of the Act and how it would apply to a transaction or transactions that a taxpayer plans to execute.[53] By doing so, the taxpayer can potentially avoid an assessment or reassessment.

Taxpayer relief

No one wants to assume the worst but what happens if a taxpayer does not settle and goes to trial but is unsuccessful at the Tax Court? Even in this situation, there are a least two immediate avenues that are open to the taxpayer to seek redress: taxpayer relief and remission.

In accordance with subsection 220(3.1) of the Act, the Minister has the authority to waive in whole, in part or to completely cancel penalties and/or interest otherwise payable by a taxpayer under the Act on or before the day that is ten calendar years after the end of a taxation year of the taxpayer.[54] To apply for taxpayer relief from interest or penalties, the taxpayer must file an application for relief using Form RC4288 or draft a letter requesting relief. However, the taxpayer is not automatically entitled to relief under the Act, and the Minister may exercise his or her discretion to deny such a request. In these instances, the taxpayer can either request a 'second administrative review',[55] or if the Minister has confirmed its previous decision, file an application for judicial review of the Minister's denial. Information Circular 07-1R1 establishes administrative guidelines for when an application for taxpayer relief will be apposite, and the following are a non-exhaustive list of situations in which the Minister may exercise his or her discretion to waive or cancel the imposed interest and penalties:

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52 *Ibid.*

53 See n 9 above.

54 See n 2 above, s 220(3.1). See CRA, 'IC07-1R1: Taxpayer Relief Provisions' (18 August 2017) www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic07-1/taxpayer-relief-provisions-1r1.html accessed on 21 October 2021 (IC07-1R1). There has been a great deal written about taxpayer relief. See also John A Sorensen, 'A Comprehensive Review of Penalty and Interest Relief Under the Income Tax Act' in *Report of Proceedings of the Sixty-Seventh Tax Conference* (Canadian Tax Foundation 2016), 41:1; Michael Lubetsky, 'Interest Relief under Federal and Provincial Regimes' (2015) XX *Tax Litigation (Federated Press)* 1182; Martin Sorensen and Nicholas Arrigo, 'Two-Tier Justice in the CRA's New Voluntary Disclosures Program' (2018) XXI *Corporate Finance (Federated Press)* 23.

55 Sorensen, n 54 above, 41:26.

1. Extraordinary circumstances beyond the control of the taxpayer that prevented the taxpayer from complying with an obligation under the Act, such as natural or human-made disasters or serious illness;[56]
2. The taxpayer's reliance on incorrect information provided by the CRA, or undue delay stemming from the actions of CRA; or[57]
3. If the CRA has confirmed that the taxpayer will be unable to pay all amounts owing, or it would cause undue financial hardship to require the taxpayer to pay the imposed penalties and interest.

In effect, the Minister must decide if the taxpayer's submission amounts to a case of some extraordinary circumstance, some actions on the part of the CRA justify relief or the taxpayer has an inability to pay or faces financial hardship.[58] Although the CRA's guidelines are instructive, the jurisprudence has confirmed that the Minister is not bound by the information contained in Information Circular 07-1R1, and the Minister may exercise his or her discretion outside the situations contemplated by that publication.[59]

A taxpayer is not required to wait until the CRA levies a penalty against him or her to seek relief under subsection 220(3.1) of the Act. Instead, the taxpayer may make an application under the CRA's voluntary disclosure programme (VDP), which provides the taxpayer with an opportunity voluntarily to correct inaccurate or incomplete tax information previously provided to the CRA, or to disclose information not previously reported to the CRA. The CRA made extensive changes to the VDP, which came into effect on 1 March 2018 following the recommendations contained in the Offshore Compliance Advisory Committee Report on the Voluntary Disclosure Program.[60] Accordingly, taxpayers who commenced or will commence a voluntary disclosure on or after 1 March 2018 involving non-compliance with the Act will proceed under one of two tracks: the limited programme or the general programme.[61] In general, if the CRA determines that the disclosure involves 'an element of intentional conduct on the part of the taxpayer or a closely related party',[62] then the disclosure will proceed under the limited programme and the Minister will not apply any penalties for intentional or

56 IC07-1R1, n 54 above, para 25.
57 *Ibid* para 26.
58 IC07-1R1, n 54 above.
59 *Guindon v R*, 2013 FCA 153 para 58.
60 CRA, 'Offshore Compliance Advisory Committee report on the Voluntary Disclosure Program' (2016), https://publications.gc.ca/pub?id=9.829230&sl=0 accessed 21 October 2021.
61 CRA, 'IC00-1R6 – Voluntary Disclosure Program' (15 December 2017) www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1/ic00-1r6-voluntary-disclosures-program.html accessed 21 October 2021 (IC00-1R6).
62 *Ibid* para 6.

grossly negligent misrepresentations or omissions.[63] However, other penalties and interest will still be imposed on a taxpayer proceeding under the limited programme.[64] In contrast, if the Minister finds no intentional conduct and all other elements necessary to participate in the VDP are satisfied, then the disclosure will proceed under the general programme. Under the general programme, the Minister may waive *all* interest and penalties including, for example, late filing penalties[65] in addition to refusing to apply gross negligence penalties under subsection 163(2) of the Act. Accordingly, the VDP offers taxpayers a robust opportunity for taxpayer relief.

In order to qualify for participation in the VDP, the disclosure must meet the following eligibility criteria as more precisely described in Information Circular 00-1R6:[66]

1. The application must be voluntary. The taxpayer must not be aware of any enforcement action that the CRA is contemplating in relation to the subject matter of the voluntary disclosure, the CRA must not be conducting any such enforcement action against the taxpayer and the CRA must have no prior knowledge about the taxpayer's tax liability.
2. The application must be complete. The disclosure must contain all information for all relevant taxation years in which there was inaccurate, incomplete or unreported information by the taxpayer.
3. The application must involve the application or potential application of a penalty imposed by the CRA under the Act.
4. The disclosure must relate to information that is at least one year past due.
5. The taxpayer must pay an estimate of the tax owing upon submitting their application to the CRA.

Prior to the 1 March 2018 amendments to the VDP, the CRA did not require the taxpayer to include payment for the estimated amounts owing in the application. Of note, the CRA takes the position that pursuant to subsection 165(1.2) of the Act, the taxpayer cannot object to the assessment of penalties or interest imposed on the taxpayer by virtue of subsection 220(3.1) of the Act.[67]

Like many tax authorities around the world, the CRA was forced to respond to the practical reality that many of its taxpayers required flexibility to repay their tax owing as a result of the global Covid-19 pandemic. Accordingly, the CRA announced an administrative change to its interest waiver policy on 9 February 2021 indicating that certain taxpayers would 'not be required to pay interest on any outstanding income tax debt for the 2020 tax year until

63 See n 2 above, s 163.
64 See n 61 above, paras 14, 16.
65 *Ibid* para 13.
66 *Ibid* para 28.
67 *Ibid* para 65.

April 30, 2022'.[68] This sort of taxpayer relief would automatically be applied to individual taxpayers with a total taxable income of $75,000 or less in 2020 and who received income support in 2020 through one of the federal government's Covid-19 measures.

In sum, the salient point here is that there is the possibility, however remote, to seek some negotiated relief of interest and/or penalties that are part of the original tax dispute.

Remission

Most people come to realise that there is little equity in tax matters. Yet, remission is one of those ways that Canadians get to see their government exercise common sense and compassion. Essentially, the Governor-in-Council (the Federal Cabinet) can, if it so decides, forgive a taxpayer's liability for tax, interest and penalties if satisfied that it would be in the public interest to do so.[69] The statutory authority for issuing a remission order is found in section 23 of the Financial Administration Act.[70] It is interesting to note that remission orders have been available since the introduction of the Financial Administration Act, which was proclaimed in force on 1 April 1952.[71] However, over the years, remission orders have not been all that common a remedy for tax cases. Even so, in 1974, Douglas Sherbaniuk, the Director of the Canadian Tax Foundation, recognised the importance of a remission order as a way to resolve tax disputes. Sherbaniuk supported 'the liberal exercise of the power to relieve taxpayers who had been caught up in the seamless web of highly complicated provisions'.[72] It was Sherbaniuk that encouraged the government to provide a clear statement on the procedure and the basis for a taxpayer to obtain a remission order.

Two years later, the Minister of National Revenue, the Honourable Bud Cullen, provided an explanation as to how to apply for a remission order:

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68 CRA, 'Announced Administrative Change Interest waiver on income tax debt arising from COVID-19 support' (9 February 2021), www.canada.ca/en/revenue-agency/news/2021/02/government-of-canada-announces-targeted-interest-relief-on-2020-income-tax-debt-for-low–and-middle-income-canadians.html accessed 21 October 2021.

69 Remission Orders have been granted for a CRA filing error, payment hardship, circumstances beyond the control of the taxpayer. See Catherine Bland Remission Order, PC 2009-170; Pierre Gosselin Remission Order PC 2009-951 and Eugene Skripkariuk Remission Order PC 2009-169.

70 Financial Administration Act, RSC 1985, c F-11, s 23 as amended.

71 Financial Administration Act, SC 1951.

72 This quotation was taken from an article by H Arnold Sherman and Jeffrey D Sherman, 'Income Tax Remission Orders: The Tax Planner's Last Resort or the Ultimate Weapon?' (1986) 34 Can Tax J 801, 806.

> 'where the taxpayer feels strongly that an alleviation of the income tax levied is warranted, the first steps in the process is to file a request for revision with the local District Taxation Office. The request should be fully supported by relevant facts and documents, together with the statement of taxpayer's financial resources and the reasons justifying the request. If the District Office Director recommends a remission of tax, the request is then considered by the Remission Committee at our Head Office who may refer it to me for recommendation to the Treasury Board. The responsibility for recommendation to the Treasury Board for revisions of taxes is primarily that of the Minister of National Revenue. I might add that there have been relatively few remissions under Section 17 (the previous version of the current s. 23) of the Financial Administration Act; in the last fiscal year (1975), for instance, there were fewer than 20 such recommendations.'[73]

Years later, in a number of cases before the tax court, judges, in dismissing the taxpayer's appeal, still suggested that the taxpayer deserved relief from harsh taxation and recommended remission. For example, in *Joyce I Watanabe v HMQ*, Justice Bowman, as he was then, recommended a remission order after dismissing the taxpayer's appeal from a situation of double taxation.[74] In another case, Justice Rip, as he was then, dismissed a taxpayer's appeal because the appeal commenced after the expiration of the statutory limitation period, but he still encouraged the Minister to consider a remission order because of the taxpayer's serious medical problems resulting from a brain tumour.[75] More recently, in *Mokrycke v Canada (Attorney General)*, the Federal Court allowed the taxpayer's application for judicial review of the CRA's decision to deny a remission order request.[76] The facts in *Mokrycke* were extraordinary but even so the decision does demonstrate that seeking a remission order is another viable, although extraordinary, way to challenge the result of an assessment or reassessment.[77]

Collection of tax

The Act generally prescribes a ten-year limitation period for the collection of a tax debt by the Minister[78] and section 158 of the Act provides that where the Minister mails a notice of assessment of an amount payable to the taxpayer,

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73 *Ibid* 807.
74 99 DTC 822, 2 CTC 2962 (TCC).
75 *Rice v R*, 99 DTC 966, 4 CTC 2348 (TCC).
76 2020 FC 1027.
77 *Ibid.*
78 See n 2 above, s 222(4).

that amount is payable *forthwith* to the Receive General.[79] However, in practice and as a general rule, the Minister cannot initiate collection actions on an amount assessed against a taxpayer for a period of at least 90 days after the initial notice of assessment is issued.[80] Further, if the taxpayer elects to file a notice of objection, the Minister cannot collect tax payable until 90 days after the day on which the Minister mails the notice either confirming or varying the initial assessment.[81] Finally, if the taxpayer submits a notice of appeal, then the Minister is prohibited from collecting any tax payable until after the court of first instance rules on the merits of the tax appeal.[82]

Of note, the restrictions on the Minister's power of collection vary with respect to 'large corporations'. Subsections 225.1(1) to 225.1(4) of the Act do not restrict the Minister from collecting half of the amount of tax payable *prior* to the 90-day period set forth in paragraph 225.1(1)(c).[83] Accordingly, the Minister is entitled to collect up to one-half of the amount assessed to a large corporation immediately after the mailing of the notice of assessment. Furthermore, all tax payable stemming for the taxpayer's failure to withhold GST/HST is *not* subject to any collection restrictions, and the Minister is entitled immediately to collect the entirety of the unremitted GST/HST as soon as a notice of assessment is sent.[84]

Conclusion

It is clear that the federal system of taxation in Canada and, more precisely, the methods to resolve tax disputes, are ample. Yet, taxpayers continue to complain about the time and cost it takes to resolve a tax dispute. The fact that the Tax Court of Canada introduced a fast-track settlement conference (even though prompted by the impact of the Covid-19 pandemic) confirms the existence of a backlog of tax cases at the court and the desire to find ways to expedite tax dispute resolution. Put simply, there still is plenty of room for improvement when it comes to resolving tax disputes.

79 *Ibid* s 158.
80 *Ibid* s 225.1(1.1).
81 *Ibid* s 225.1(2).
82 *Ibid* s 225.1(3).
83 *Ibid* s 225.1(1)(c).
84 CRA, 'Collections limitation period' (2017) www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/collections-limitation-period.html accessed 9 November 2021.