

What's New at CRA?



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Summary

- “ General Comments
 - “ Taxpayer Bill of Rights – Ombudsman Report / AG Report
 - “ Trusts
 - “ Real property transactions (ITA and HST)
 - “ Penalty assessments
 - “ New Rules for Voluntary disclosures
 - “ Q & A

Current Audit Initiatives

- “ Trusts
 - “ Substance of trust arrangements
 - “ properly dated?
 - “ settlement funds?
 - “ proper signing authority exercised?
 - “ Trust allocations (less important with new rules but still important because of c.g. exemption)
 - “ who are beneficiaries?
 - “ receive funds?
 - “ owed the funds legally?
 - “ Residency
 - “ management and control

Current Audit Initiatives continued

- “ Real property project still ongoing
 - “ Principal residence
 - “ Income vs. capital
 - “ Gross negligence
 - “ HST issues

Current Audit Initiatives continued

- “ Factors considering:
 - “ Timelines
 - “ Financing
 - “ Pattern of behavior
 - “ Income
 - “ Related business
 - “ Business of parents

Current Audit Initiatives continued

“ Negligence/Gross Negligence

- “ Under ss. 152(4) a taxpayer may be reassessed in respect of a statute-barred year where the taxpayer “has made any misrepresentation that is attributable to neglect, carelessness or willful default or has committed any fraud...”
- “ In ss. 163(2) every person who, knowingly, or under circumstances amounting to gross negligence, has made or participated in the making of a false statement or omission may be liable for penalties

Current Audit Initiatives continued

- “ In both cases the Minister has the burden to prove negligence/gross negligence; *Lacroix v. R.*, 2009 DTC 5625 (FCA)
- “ Generally the CRA’s position is that any mistake on a tax return is a “misrepresentation” and thus can reopen a statute barred year
- “ Term “misrepresentation” is undefined in the ITA
- “ Courts have noted that the purpose of the limitation period is to provide certainty and encourage diligence on the part of the CRA; *R. v. Markevich*, 2003 DTC 5185 (SCC) and *Produits Forestiers St-Armand Inc. v. R.*, 2004 DTC 2494 (TCC)

Current Audit Initiatives continued

- “ Where a taxpayer has a reasonably considered position, allowing the CRA to reassess beyond the limitation period would render the time limit theoretical; *Chaumont v. R.*, 2009 TCC 493
- “ Proving negligence more than a mere formality but not a particularly heavy onus; *Chaumont*
- “ Mere fact of misrepresentation insufficient to prove neglect; *MNR v. Bisson*, 72 DTC 6374 (FCTD)
- “ *Bona fide* belief in the information and simple mistake do not support negligence finding

Current Audit Initiatives continued

- “ Must involve failing to make a reasonable effort to comply; *Regina Shoppers Mall v. R.*, 91 DTC 5101 (FCA)
- “ Honest but incorrect belief that amounts reported properly will not be negligence – what would a wise or prudent person do? *McKellar v. R.*, 2007 DTC 1007 (TCC)
- “ If taxpayer determines later that a mistake was made at the time of filing a return, and the taxpayer reasonably believed, at the time of filing, that the return was correct, no positive obligation to revise the return

Current Audit Initiatives continued

- “ Gross negligence is “tantamount to intentional acting”; *Venne v. R.*
- “ Gross negligence penalty requires a higher degree of reprehensibility than opening a statute-barred year
- “ Courts say that if there are two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt should be given to the taxpayer; *Farm Business Consultants Inc. v. R.*

New Rules for Voluntary Disclosures

- “ Proposed changes released June 9, 2017 – *Information Circular IC00-1R6*
- “ New rules effective for voluntary disclosures made after February 28, 2018
- “ CRA received approximately 5000 requests between February 26 and February 28, 2018

New Rules for Voluntary Disclosures (Continued)

- “ No-names disclosure option is eliminated – all disclosures must be made on a named basis
- “ CRA will offer “pre-disclosure” discussions
 - “ anonymous discussion with a CRA official to provide insight into the VDP process, risks of non-compliance and relief under VDP
 - “ appears to be informational only - no mention of discussion being used to *advise* taxpayer on possible tax implications of VDP disclosure
 - “ does not constitute acceptance into VDP – protection does not start until name is revealed

New Rules for Voluntary Disclosures (Continued)

- “ New condition: pre-payment of tax
 - “ In addition to four existing criteria (voluntary, complete, penalty and one year overdue)
 - “ Taxpayers required to either pay (or post security for) the amount of taxes they estimate to be outstanding at time disclosure is made
 - “ No mention of pre-payment for estimated interest or penalties

New Rules for Voluntary Disclosures (Continued)

- “ Two new streams of relief: the “Limited Program” and “General Program”
- “ Under the “Limited Program” disclosing taxpayer gets:
 - “ Relief from prosecution and gross negligence penalties only
 - “ No relief for other penalties
 - “ No relief of interest

New Rules for Voluntary Disclosures (Continued)

- “ Under the “General Program” disclosing taxpayer gets:
 - “ Full penalty relief (as with old VDP), but
 - “ Interest relief is limited to only 50% of the interest owed for taxation years preceding the three most recent years of returns required
 - “ e.g. no interest relief on three most recent years (consistent with current program)
- “ Restricted objection rights on tax assessed
 - “ Calculation errors and characterization issues (e.g. capital v. income) only
 - “ Appeals following VDP uncommon in any event

New Rules for Voluntary Disclosures (Continued)

- “ The “Limited Program” will be applied if, in the CRA’s opinion, one or more of the following conditions exist:
 - “ Efforts to avoid detection through the use of offshore vehicles or other means
 - “ Large dollar amounts at issue
 - “ Multiple years of non-compliance
 - “ Taxpayer is sophisticated
 - “ GST/HST: Disclosure involves failure to remit tax collected (unless saved as a Wash Transaction)

New Rules for Voluntary Disclosures (Continued)

- “ Disclosure is made after an official CRA statement regarding its intended focus of compliance or following CRA correspondence or campaigns
- “ Any other circumstance in which a high degree of taxpayer culpability contributed to failure to comply
- “ Interpretation of these conditions and how they will be applied by CRA remains unclear
- “ If “Limited Program” is not applied, then disclosure will fall in to the more generous “General Program”

New Rules for Voluntary Disclosures (Continued)

- “ Additional circumstances where VDP relief will not be granted include:
 - “ Reporting income from proceeds of a crime
 - “ Corporations with gross revenue in excess of \$250 million in at least two of its last five taxation years
 - “ Transfer pricing adjustments or penalties under section 247 of ITA
 - “ Discretionary agreements under a tax treaty

New Rules for Voluntary Disclosures (Continued)

- “ New information required on initial disclosure
 - “ Proof of pre-payment of estimated tax
 - “ Identity of any tax advisor who assisted taxpayer in non-compliance
 - “ Whether taxpayer made a previous disclosure under the VDP
 - “ Whether the disclosure relates to foreign source income
 - “ May trigger classification for “Limited Program”

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