

THE CANADIAN TAXPAYER

Editor: Arthur B.C. Drache, C.M., Q.C.

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Sohmer Comments on VDP Proposals

Editor's note: *The following are comments on the Proposed Revisions to The Voluntary Disclosures Program¹ by David H. Sohmer, Spiegel Sohmer Inc. Sohmer is a frequent contributor to this newsletter and can be reached at dhsohmer@spiegelsohmer.com.*

A) Incomplete Information

1) A VDP application must be complete in order to qualify for relief. The Draft Information Circular provides:

A taxpayer's VDP application for a particular issue must be made for all relevant taxation years where there was previously inaccurate, incomplete or unreported information regarding their tax affairs.....In cases where books and records no longer exist, the taxpayer should make all reasonable efforts to estimate the income for these years.....

...

¹ See page 106 of the current volume of *The Canadian Taxpayer*.

If the CRA is satisfied that the taxpayer has provided all available information and legitimately cannot locate or obtain certain documents (e.g. relating to a deceased relative) or has made reasonable efforts to estimate income amounts related to years for which documentation is unavailable, the application may be considered to be complete.

The CRA Voluntary Disclosures Program (VDP) Operations Manual, 2015-07, states at s. 1.9.2 that "(I)n all cases, the final decision on completeness rests with the VDP officer". A determination by a VDP officer that efforts to estimate income were not reasonable may therefore expose a taxpayer to criminal sanctions and gross negligence penalties, including the additional penalties for failure to file or fraudulent filing of Form T1135. Put bluntly, this is a risk which no informed taxpayer will accept.

Another interesting but perverse effect of the requirements may be to encourage taxpayers to delay disclosures until they are *non compos mentis* or are dead, so that the lower bar for "reasonableness" will apply.

2) The revision to the Draft Information Circular was made in response to a recommendation by the Offshore

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Compliance Advisory Committee. The committee appears not to have been aware of the fact that offshore banks will resist attempts to obtain information for years exceeding the retention period provided by the laws to which they are subject. The CRA is well aware of the fact that compelling offshore banks to provide information which they are not obliged to retain may be time-consuming and probably futile. The VDP Operations Manual and CRA practice implicitly recognize this by instructing the VDP officer to check “the record retention policy for banking records located in Appendix XIX Foreign Bank Record Retention” in

determining completeness for disclosures (s. 1.9.5). The Draft Information Circular implicitly recognizes this as well by limiting the time to submit information to 90 days from the effective date of disclosure. The VDP would not have been as successful as it has been if information for years beyond the offshore bank retention period was required. (This is supported in an article by David Sohmer entitled “Canada’s Voluntary Disclosure Program: If It Ain’t Broke Don’t Fix It” in vol. xxxix No. 3 of *The Canadian Taxpayer*, February 10, 2017.)

3) At the CTF 2010 CRA Round Table, the CRA stated:

The CRA can confirm that each disclosure must meet the four conditions necessary for it to be considered a valid disclosure by the CRA, regardless whether the disclosure is for the failure to file a return or for the underreporting of income. How far back the CRA may go in terms of the number of years reviewed and assessed is determined by the facts presented in each case. A decision to open statute-barred years must be based on the provisions of subparagraph 152(4)(a)(i). For unfiled tax returns, the CRA is obliged to assess as far back as there are returns to be filed. [Response 18-6].

In order to re-assess tax for a particular statute-barred year for which tax returns have been filed the Minister must prove facts which support a conclusion that the taxpayer has made a misrepresentation that is attributable to neglect, carelessness or willful default or has committed fraud in filing the return for the particular year. The revisions to the Draft Information Circular require the taxpayer to make reasonable efforts “to estimate income amounts related to years for which documentation is unavailable”. An estimate is not a fact which can be proved and will not discharge the Minister’s burden, even if the estimates are provided by the taxpayer. The burden on the Minister under subparagraph 152(4)(a)(i) in the context of offshore accounts is analyzed in an article written by the Honourable Gerald Rip, David Sohmer, Stéphanie Pépin and Jean-François Reed (Gerald J. Rip et autres, « Regard critique sur l’application de la méthode de l’avoir net rétrospectif au-delà de la période normale de cotisation », (2017), vol. 36, no 4 *Revue de planification fiscale et financière* 511-528.).

4) The House of Commons Standing Committee on Finance recommended that the CRA “calculate Canada’s federal tax gap on an ongoing basis”. Minister

Lebouthillier issued a news release on June 6, 2017, which stated that in 2018 the CRA will be releasing a study in its tax gap series which focuses on international tax evasion. Estimates of income are unreliable and of limited use in estimating Canada's tax gap.

5) The CRA should have the ability to extract the ages of disclosing taxpayers from disclosures which have been processed. Based on personal experience involving hundreds of disclosures, the vast majority of disclosing taxpayers are golden-agers. Since golden-age taxpayers are unlikely to continue evading tax from offshore sources and since imminent automatic reporting of information will also dramatically reduce the use of offshore banks to evade tax, estimates of past unreported income will not be useful in estimating future tax gaps.

B) Relief Provided Under the VDP

1) Section 14 of the Draft Information Circular provides that under the Limited Program, the taxpayer "will not be charged a gross negligence penalty". It is suggested that the waiver refer to "penalties" rather than to "penalty". This will confirm that the additional penalties for failure to file and for fraudulent filing of Form T1135 will be waived as well as the general gross negligence penalty provided for in subsection 163(2).

C) Limited Program

1) The vast majority of taxpayers who have failed to disclose income from offshore accounts will only qualify for the Limited Program. This holds true for heirs and executors of deceased taxpayers who have done so, since death does not provide absolution for the tax sins of a deceased.

2) If the intention is to permit less egregious cases involving undisclosed offshore income to qualify under the General Program, the Draft Information Circular should provide some "bright line" tests. This will allow these cases to be processed efficiently.

3) Since many taxpayers are more concerned with removing a source of anxiety than with the cost of disclosing, the Draft Information Circular should permit taxpayers to elect to have the disclosure governed by the Limited Program. This will reduce the time involved in processing the disclosure.

D) Concluding Observation

The CRA should recommend that the ten year limit for relief in subsection 220(3.1) be removed. There is no basis in tax policy to retain it. A taxpayer who meticulously retains records for 20 years should not be treated more severely than a taxpayer who meticulously shreds all records not required to be retained by subsection 230(4).

Some Breathing Space for Horgan in British Columbia

Once the defeat of the Liberal government, a foregone conclusion, occurred and the Lieutenant-Governor refused Premier Christy Clark's request for a new election, John Horgan of the NDP became what one might call Premier-elect. He was to formally sworn in on July 18 at which time he is truly the Premier, at least for the time being. His cabinet will be sworn in at the same time.

But until July 18, Clark was still Premier and had to deal with reacting to the wildfire situation across so much of the province including allocating \$100 million for relief and firefighting.

The Legislature is in adjournment until mid-September and in the summer months Horgan is faced with a host of decisions...and a wrong one could trigger another election in the fall.

To recapitulate the situation, the minority government will face a strong political opposition: 43 Liberal MLAs and three Green MLAs to his 41 New Democrats. Minus the Speaker, who will come from the NDP benches, the New Democrats will have only 40 votes in the House.

The Greens have an accord with the NDP designed to allow the minority government to function by promising support on matters of confidence in the Legislature, but for all else, the NDP will need to earn support for policies, projects and positions.

The New Democrats are taking part of the summer to plan the transition and they expect an audited statement of the financial books they are to inherit in that time. Horgan needs to pick a cabinet which presents its own

challenges because of the party's slim representation in rural in B.C. and he must find a way to open doors in Washington when he travels there to lobby on behalf of the province's softwood lumber industry.

In addition to his party's election promises, the commitments he has made to the Green caucus in exchange for its support have bound his party to several actions that dictate a tight timeline.

Horgan's government is pledged to introduce legislation to reform campaign finance and regulation of lobbyists. It will bring in bills to launch a referendum on electoral reform, and to move the fixed dates for provincial elections to the fall. As well, the Site C dam will be reviewed and the government will search for every legal tool in its toolbox to stop construction of Kinder Morgan's TransMountain pipeline expansion.

In addition he has to write a Throne Speech and a new budget to present in early September. The budget will be substantially different than the Liberal document tabled last February. The NDP has promised to eliminate bridge tolls and increase spending on child protection, education and social housing. It also wants to freeze hydro rates and eliminate Medical Service Plan premiums.

Throughout the summer, the NDP transition team will consult with the Greens. Although they are sitting in opposition, the NDP will need them on board to accomplish change.

Horgan has said he has three main priorities to start with: education, the opioid crisis and negotiating a softwood lumber agreement.

Horgan has said the primary way he'll help with the Canada-U.S. softwood lumber negotiations is by making sure B.C.'s voice is heard at the table. He also expressed admiration for B.C.'s current softwood lumber trade envoy, David Emerson, saying he hoped he would stay on.

Susan Yurkovich, the president of the B.C. Lumber Trade Council, said she appreciated Horgan's commitment although she also acknowledged the leadership of Premier Christy Clark during her tenure.

"Softwood lumber is a non-partisan issue which impacts communities and workers around the province. It's critical to continue to have a strong voice for B.C. and we look forward to working with him on this important issue," she said.

By mid-September we'll know how Horgan's government will function and then can speculate on its life span.

Federal Court Chief Justice Speaks Out

It is unusual in this country for sitting judges to speak to the media at all...and we think almost unheard of to take this route to get a message to the government.

But this is what Paul Crampton, Chief Justice of the Federal Court has done. In an interview with CBC News,¹ Crampton said it is inappropriate that the Court, which decides disputes involving federal departments, tribunals and agencies, should have to go "cap in hand" to the government at budget time.

Canada's Federal Court needs more independence from government as it deals with a funding crunch that threatens timely access to justice, says its Chief Justice.

"It is unseemly and it seems wrong for a government that is appearing before the very body that is supposed to be holding it in check or adjudicating its cases, to be able to effectively determine what that other body does through the budget mechanism," Crampton said.

It's time to try something new, he said, where the judicial branch of government won't have to appeal directly to the executive branch.

He points to officers of Parliament, such as the information, privacy and ethics commissioners, who appear before a committee of parliamentarians.

"This parliamentary process that the parliamentary officers avail themselves of — it would be a step in the right direction. Clearly, I feel that some involvement of the legislative branch would be highly desirable."

Crampton said his Court is starving for resources.

¹ <http://www.cbc.ca/news/politics/federal-court-judiciary-court-1.4178317>.

"We don't have enough staff in the courtrooms. We don't have enough staff at the registries. And this is giving rise to delays. It comes right back to access to justice."

The Chief Justice said the Federal Court needs at least another \$25 million to fill dozens of unfilled jobs, translate decisions and implement a new court records management system.

Over the last few years the Chief Justice said he's had to cover inflation, salary increases and infrastructure from a stagnant operating budget. Meanwhile, the IT system is just about ready to quit.

"We're facing within the next two or three years the real risk of a complete failure of that system," he said with exasperation. "We are now operating with a system that was created in the late '80s, with software that was programmed at that time, and there's virtually no one left now who can work with that code."

While Justice Minister Jody Wilson-Raybould has been supportive of his pleas for more funding, Crampton said the buck appears to stop at the Treasury Board Secretariat, which oversees government spending.

In response to a request for comment, a spokesperson for the Justice Minister's office referred to a statement prepared by the Justice Department that mentioned competing funding priorities, including the need to alleviate the pressure of large criminal caseloads by appointing 28 more judges to provincial superior courts.

"Unfortunately, however, the government was not in a position to also approve all of [Courts Administration Service's] request for funding under Budget 2017," referring to the arm's length office that administers courts at the federal level.

Crampton explained that the budget must include funding for the simultaneous release of decisions in both official languages. Right now, it can take up to 18 months to have documents translated.

In its most recent budget, the government set aside \$2 million over two years to improve translation at the Federal Court. But Crampton said the Court needs 10 times that amount.

The Chief Justice said openness also means electronic access to court records inside and outside the

courtroom. He pointed to a recent pilot project where exhibits were accessed electronically and projected onto a screen inside the courtroom for all to see.

"They were saving at least an hour a day if not two hours a day, which is like 15 to 20 per cent per day, which is massive in a 400-day trial. We're talking registry time, judicial time, time people have to pay their lawyers," Crampton said.

Looking ahead, the Chief Justice is also projecting a significant increase in caseload due to, among other things, intellectual property disputes arising from the Canada-European Union trade agreement and a spike in refugee asylum claims.

It remains to be seen whether Crampton's approach will result in positive changes to his Court's budgets. We wouldn't bet on it.

Government Response to Report on Income Tax Objections

Just before the Commons rose for the summer break, the government responded to the Committee on Public Accounts *Report 2, Income Tax Objections — Canada Revenue Agency, of the Fall 2016 Reports of the Auditor General of Canada*, tabled in the House of Commons on May 15, 2017.

The following represents the Government's initial response, including responding to Recommendation 2 and Recommendation 5 requests for progress reports on or before September 1, 2017. As requested by the Committee, the Government will provide supplementary information on or before April 30, 2018, with respect to progress made in implementing Recommendations 1 to 4 and Recommendations 6 to 9.

Recommendation 1: That, by 30 April 2018, the Canada Revenue Agency confirm in writing to the House of Commons Standing Committee on Public Accounts that it has published a service standard for the resolution of low and medium-complexity objections on its website, and provide the information on high-complexity objections that is available.

The Government of Canada supports this recommendation. The CRA has published a service standard for the resolution

of low-complexity objections on its website, effective April 1, 2017. Work is currently underway to determine an appropriate service standard for the medium-complexity workload, to be published on CRA's website by April 1, 2018. In the meantime the actual timeframes to assign and resolve low and medium-complexity objections are being provided on the website. As requested, by April 30, 2018, the CRA will provide to the Committee available information on high-complexity objections.

Recommendation 2: That, by 1 September 2017, the Canada Revenue Agency provide the House of Commons Standing Committee on Public Accounts with a clear target for the planned reduction of its inventory of outstanding objections over the period of 31 March 2016 to 31 March 2018, and report the actual reduction achieved by 30 April 2018.

The Government of Canada supports this recommendation. As requested, by September 1, 2017, the CRA will provide the Committee with a clear target for the planned reduction of its inventory of outstanding objections and by April 30, 2018, the CRA will issue a report to the Committee confirming the actual reduction achieved.

Recommendation 3: That, by 30 April 2018, the Canada Revenue Agency provide the House of Commons Standing Committee on Public Accounts with the key results of its review of the objection process, and clearly explain how it has used these results to improve the timely resolution of objections.

The Government of Canada supports this recommendation. The CRA is currently conducting process reviews of its key steps in the objections process, using the Lean methodology. As requested, by April 30, 2018, the CRA will issue a report to the Committee informing how the key results of these reviews have and will be applied to existing efforts to facilitate the timely resolution of objections.

Recommendation 4: That, by 30 April 2018, the Canada Revenue Agency explain to the House of Commons Standing Committee on Public Accounts the rationale for its definition of the timely resolution of an objection based on the level of complexity, and how this definition compares with that of similar tax administration in other countries.

The Government of Canada supports this recommendation. As requested, by April 30, 2018, the CRA will issue a report to the Committee explaining its rationale for the methodology used in determining its current definition of "timely". The CRA will also explain how this definition compares with that of similar foreign tax administrations.

Recommendation 5: That, by 1 September 2017, the Canada Revenue Agency confirm in writing to the House of Commons Standing Committee on Public Accounts that it has published its updated performance indicators that take into account the entire time an objection is within the Agency's control in its Departmental Results Report.

The Government of Canada supports this recommendation. The methodology used in the calculation of the reported results has been revised to take into account the entire time an objection is within the Government of Canada's control. In addition, the CRA is going beyond this recommendation by publishing two services standards, one for low-complexity and a second for medium-complexity objections. The first service standard, namely to resolve a low-complexity tax objection within 180 calendar days, 80% of the time, has already been published. Results related to this service standard will be reported through the Departmental Results Report in Q3 of 2018-2019. The implementation of the service standard for medium-complexity objections will be outlined in the CRA Corporate Business Plan for 2018-2019 and results reported in Q3 of 2019-2020.

Recommendation 6: That, by 30 April 2018, the Canada Revenue Agency provide the House of Commons Standing Committee on Public Accounts with a report outlining the controls that it has added to its objections systems and processes, and the detailed instructions that it has provided to officers on data entry to ensure the accuracy of data. This report should also explain how the Agency will regularly monitor the effectiveness of these measures.

The Government of Canada supports this recommendation. As requested, by April 30, 2018, the CRA will issue a report to the Committee detailing all efforts to date on improving its data integrity through both systems and procedural changes. The report will outline actions to date including its monitoring plan and current results, as well as ongoing initiatives planned for continued emphasis and improvement on this important issue.

Recommendation 7: That, by 30 April 2018, the Canada Revenue Agency provide the House of Commons Standing Committee on Public Accounts with a report outlining the opportunities to resolve issues before an objection is filed that the Agency has identified through its review of the reasons for which objections are decided in favour of taxpayers. This report should also explain how the Agency took full advantage of each of these opportunities to improve services to Canadians.

The Government of Canada supports this recommendation. As requested, by April 30, 2018, the CRA will issue a report to the Committee outlining the opportunities for taxpayers

to resolve issues before filing an objection and the work that has been done to ensure that these opportunities are being implemented within and promoted by the Agency to improve services to Canadians.

Recommendation 8: That, by 30 April 2018, the Canada Revenue Agency provide the House of Commons Standing Committee on Public Accounts with a report outlining the concrete measures that it has implemented to ensure that decisions on objections and appeals are shared within the Agency in such a way that those performing assessments can use that information to improve future assessments.

The Government of Canada supports this recommendation. As requested, by April 30, 2018, the CRA will issue a report to the Committee to demonstrate its advancement in the sharing of decisions on objections and appeals within the Agency and concrete measures it has taken to improve processes for and service to Canadians in light of these results.

Recommendation 9: That, by 30 April 2018, the Canada Revenue Agency develop a performance indicator that scientifically measures Canadians' overall level of satisfaction with its services and customer experience, and report annually the results in its Departmental Results Report.

The Government of Canada supports this recommendation. As part of the Departmental Results Framework, the CRA has developed a performance indicator, the Public Perception Index (PPI), which will be publically reported on in the 2017-2018 Departmental Results Report. The PPI incorporates select responses from the Annual Corporate Research, which uses qualitative and quantitative methods to gather feedback from three groups of participants: individuals, small and medium business, and tax intermediaries. The PPI measures factors such as Canadians' level of satisfaction with the overall performance of the CRA, quality of service received, and understandability of information and resources. As requested, by April 30, 2018, the CRA will issue a report to the Committee confirming and informing progress on the above.

Taxpayer Ombudsman Weighs in on CPP/EI Decision Letters from CRA

Anybody who has worked in the tax area for any length of time realizes that the question of whether an individual is an employee or independent contractor is an ongoing issue between government and taxpayers.

As a matter of law, the issue of status is not always clear.

The first case we ever argued before the courts (actually before the Tax Review Board) involved the question of whether a lawyer working for the Department of Justice who taught a single course at the University of Ottawa Law School was an employee of the University.¹ The judge held that he was an employee though we strongly disagreed. Subsequent case law from the FCA and the Supreme Court vindicated our original position. The result for the client was a denial of a deduction of almost \$100 for law journals!

The Taxpayers' Ombudsman has issued a report² which deals with the difficulties that workers and payers have understanding Canada Pension Plan and Employment Insurance decisions made by the Canada Revenue Agency (CRA) and their potential impacts. A CPP/EI ruling is an official decision made by the CRA that confirms whether a worker is considered an employee or self-employed. To give you some idea of the scope of the problem, in 2015-2016, the CRA completed 44,091 Canada Pension Plan and Employment Insurance rulings requests. Each request for a ruling resulted in the creation of at least two letters (worker and payer), for a total of at least 88,182 letters being issued.

The report, entitled "Rights and Rulings: Understanding the Decision", brings out the following difficulties faced by workers and payers who receive a CPP/EI ruling letter:

- Lack of information regarding the reasons for the decision, and the potential consequences of a change in employment relationship;
- Lack of information as to their right to obtain a written copy of the Rulings Report that contains the full reasons;
- Insufficient guidance regarding the steps to be taken to pay any outstanding amounts.

In response to these findings, the Taxpayers' Ombudsman has made five recommendations urging the CRA to make more information available in the CPP/EI rulings letters and other publications. The Ombudsman's recommendations are based on the taxpayers' right to be

¹ *Molot v. Minister of National Revenue*, 1977 CarswellNat 324, [1977] C.T.C. 2170, 77 D.T.C. 111 (T.R.B.).

² https://www.canada.ca/en/taxpayers-ombudsman/news/2017/06/employee_or_self-employedthetaxpayersombudsmancallsformoreinfo rm0.html.

treated professionally, courteously and fairly, their right to complete, accurate, clear and timely information, and their right to expect the CRA to be accountable.

We found that there are only two ways to receive an explanation of a CPP/EI ruling: the worker or payer can call the officer who issued the ruling and request a verbal explanation; or they can request a copy of the CPP/EI Rulings Report. However, both of these options are dependent upon the worker or payer being aware that this request for an explanation is available. Our examination of the rulings letters found that they contained the name and telephone number of the CPP/EI rulings officer, and indicated that if the worker or payer had any questions about the content of the letter they could contact directly the officer who made the ruling. However there was no indication that the worker or payer could request a copy of the CPP/EI Rulings Report.

.....

The Taxpayers' Ombudsman (the Ombudsman) is partially satisfied with the CRA's action to address the issues identified during this examination, and finds that the addition of the "Have you received a CPP/EI ruling?" web address in the rulings letters is an improvement. To satisfy the issues raised during this systemic examination, the Ombudsman recommends that the:

- CRA's CPP/EI rulings letters inform the parties to a ruling of their right to request a copy of the Rulings Report and how to request it;
- CRA's CPP/EI rulings letters, where applicable, inform the parties to a ruling that an amount owing or over-contribution may result from the decision;
- CRA clearly communicates with the parties to a CPP/EI ruling about the steps they need to take following the receipt of a rulings letter, including the steps required by the parties to pay any outstanding CPP contributions and/or EI premiums, and updates the relevant sections of its publications and webpages accordingly;
- CRA continues to include in the CPP/EI rulings letters the contact information of the rulings officer for an explanation of the decision as well as reference to the "Have you received a CPP/EI ruling?" website; and,
- CRA review the CPP/EI rulings program to determine whether efficiencies can be made that would allow for the inclusion of an explanation of the relevant factors within each rulings letter.

Of course, it is beyond the purview of the Ombudsman to opine on the law *per se* but if communications improve, that would be a positive result.

Letter to the Editor

Dear Arthur, I am writing in the hope that you will share these thoughts with the readers of *The Canadian Taxpayer*.

In tax law, the word "prescribed" means specified by regulation, or in some cases (such as a prescribed form or prescribed information), authorized or specified by the CRA. The word "prescription" means an instruction given to a pharmacist to dispense a drug.

Unfortunately, some translators who are translating documents from French use these words to refer to a legal deadline having passed, such as a deadline for the CRA issue an assessment. These are mistranslations of the French word "prescrit".

If a GST/HST reporting period cannot be assessed because the time limit has passed under section 298, it is "statute-barred", meaning barred by the statute (the Act). The period during which an assessment can be issued is the "limitation period".

The term "prescribed" should never be used for statute-barred, nor should the limitation period be called a "prescription".

Even the Supreme Court of Canada (which is normally "right because it is final") is sometimes prone to this error. The words "prescribed" and "prescription", meaning "statute-barred", appear in the recently-released official English version of *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29.

I have asked a colleague with connections at the Supreme Court to bring this to the Court's attention.

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