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Beware of CRA's formidable audit powers



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The Canada Revenue Agency has virtually unlimited powers to audit taxpayers, inspect and seize any document or thing, or demand information that may afford evidence as to the commission of an offence under the Income Tax Act.

Except for requiring a search warrant approved by a Federal Court judge to enter a dwelling house, the CRA's audit powers are formidable. The items to be searched for and seized do not have to be described with specific particularity in the application for the warrant.

The courts will not supervise or prescribe the intensity of audit examinations, which is exclusively a matter for the minister of National Revenue. The Charter of Rights and Freedoms provides only minimal protection against the use of tainted evidence obtained through an improper or unreasonable seizure of tax documents.

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The minister can also demand from any person information for the purpose of administering the tax act, tax treaty with another country, or information exchange agreement. Under this power, the CRA can demand accountants' and auditors' working papers, which are not protected by privilege. To be sure, the demand must be for relevant information, but it is for the CRA auditor to

determine what is relevant. Failure to comply with a demand for information can lead to prosecution.

The charter only protects individuals against unreasonable seizures and then only in limited circumstances. Corporations cannot claim charter relief in tax appeals.

What is unreasonable depends upon the particular circumstances. For example, a demand for information constitutes a “seizure,” but it is not unreasonable in the context of the administrative and regulatory scheme of the tax act. On the other hand, seizure of a restaurant’s records as part of an electronic records compliance research project that was not part of any audit was unreasonable.

The person from whom the documents have been seized has the right to obtain a copy of all the seized documents, which the CRA must supply at its expense. In addition, the owner of the documents can access the documents at all reasonable times, subject to such reasonable conditions that the minister may impose.

An official may also seize any documents in “plain view.” Thus, a CRA official may seize any document that he reasonably believes is evidence of the commission of an offence. Section 489 of the Criminal Code similarly enables a person executing a warrant to seize material that affords evidence of an offence for which the warrant was issued.

To be sure, the charter protects against unreasonable seizures, but the protection is not absolute. The underlying value that the charter protects is the taxpayer’s interest in privacy. The test for “reasonable” search and seizure is fluid and depends upon the type of intrusion into the taxpayer’s privacy (for example, demand for information vs. physical seizure of documents), the type of taxpayer (for example, individual vs. corporate), the location where the seizure is executed (for example, business premises vs. personal residence), and the context (for example, criminal vs. regulatory/administrative).

The burden of proof for adducing evidence that charter rights have been infringed or denied depends upon the nature of the search. If the search and seizure was conducted pursuant to a warrant, the burden rests initially with the person making the allegation of infringement — that is, the taxpayer. He or she can discharge the burden on a balance of probabilities. Where, however, the search was conducted without the authority of a warrant, the onus is on the CRA to show that the search was, on a balance of probabilities, reasonable in the circumstances.

Although the charter confers broad discretionary power on a court to provide relief from illegal conduct, it does not mandate the court to exclude the all tainted evidence from judicial proceedings. The court will exclude evidence only if it is also satisfied that its admission would harm the administration of justice. Thus, tainted evidence is prima facie admissible and the taxpayer must also show that its admission would bring the administration of justice into disrepute.