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Clock never stops in CRA disputes

VERN KRISHNA | August 29, 2012 8:55 AM ET
More from Vern Krishna

The CRA always stands its ground on its strict and technical legal rights, such as the tight timeline that limits the amount of time taxpayers have for challenging their tax bills. Getty Images/Thinkstock

Fighting City Hall is always difficult. It is even more difficult to fight the tax department when it has written all the rules of how the fight will proceed. The first rule of a tax dispute is that taxpayers who object to their assessments from the Canada Revenue Agency (CRA) must file a timely "notice of objection" to protect their rights. Failure to adhere to the strict timelines eradicates all legal rights of appeal.

The CRA always stands its ground on its strict and technical legal rights, such as the tight timeline that limits the amount of time taxpayers have for challenging their tax bills. The Tax Court of Canada is in a straitjacket and cannot extend those statutory timelines. Thus, unrepresented individuals unfamiliar with the fiscal statute are particularly vulnerable to the limitation rules and are left without remedy and denied access to justice.

The limitation period is strictly statutory. For an individual filing a notice of objection the limit is 90 days from the date of mailing of the assessment — regardless of whether she receives the mail — or within one year of a taxpayer's "filing due date." This is considerably shorter than the two-year limitation period that governs the filing of cases in provincial courts. The 90-day notice of objection deadline ensnares many unrepresented taxpayers who do not know better.

The taxpayer should also pay any claimed assessment as soon as possible. Outstanding accounts accrue interest at 5% compounded daily, which is an outrageous rate in today's financial markets. Worse, the interest is not deductible for tax purposes. If the taxpayer succeeds in her objection, she will receive a refund with interest at 3%, which will be taxable.

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Fairness is not an issue in tax administration and collection. For example, in Hewstan vs. The Queen, a decision of the Tax Court released in June, the taxpayer's 90 days expired Sept. 9, 2009, and the one-year extension expired a year later. The unrepresented taxpayer did not file an objection until February of 2012. The Tax Court judge dismissed the taxpayer's plea for consideration of her appeal: "Even though the law is unfair I do not have the jurisdiction to change it." The judge was, in effect, handcuffed.

Unlike the courts, the Minister of National Revenue has some equitable powers and may extend the time for filing a notice of objection if he is satisfied that the extension would be "just and equitable" in the circumstances. The words "just and equitable" conjure up an impression of soft law and palm-tree justice. In fact, the courts are quite reluctant to grant extensions of time and the taxpayer must comply with strict rules.

The taxpayer must have a bona fide intention to object to the assessment and act as soon as circumstances permit and, at the very latest, no later than one year after the expiry of the original time limit. The two time periods are conjunctive and the taxpayer must satisfy each independently of the other. Thus, the taxpayer should not wait to see if negotiations with the CRA might prove successful and then file for an extension of time if they are not. The better course is to file the application for extension immediately upon becoming aware of the expiration of the initial deadline and to continue negotiations with the CRA on a parallel track. It is also advisable for taxpayers to maintain a detailed written log of their communications and discussions with the CRA as personnel changes can obliterate corporate memory.

The courts construe the phrase "as soon as circumstances permit" strictly. It does not mean that the taxpayer can simply apply at any time within the maximum limit of one year. For example, in the 1987 case of Canada v. Pennington, the taxpayer filed a notice of objection three days after the 90-day limitation period. The CRA rejected the notice and sent the taxpayer a letter telling him that he could apply for an extension of time, and that the application must be made "as soon as possible and not later than one year" from the 90-day limit. The taxpayer took up the matter with his accountant and asked him to attempt to negotiate a settlement of the matter. When it became clear some time later that a satisfactory settlement was unlikely, the taxpayer applied for an extension of the limitation period. The Federal Court of Appeal refused the extension because the taxpayer did not act "as soon as possible" to file his application and it was not a sufficient excuse in law that he had passed the matter on to his accountant for settlement.

The Minister of Finance should consider extending the objection limitation period for individuals to two years to harmonize with the provincial rules, and extending the jurisdiction of the Tax Court to remedy bona fide filing oversights, particularly by unrepresented taxpayers. There would be no additional cost to the government for such an amendment as it already collects interest on unpaid amounts at a high rate on the basis of daily compounding. It would be a small step in facilitating better access to justice, about which much is spoken but little is done.