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Vern Krishna: Extending tax justice to the middle class



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The wheels of justice grind slowly in tax law and the rules are heavily weighted against middle-income individuals. Tax Columnist Vern Krishna says Canada could speed things up by extending the reach of a special tax court program called the informal procedure. [Sean Kilpatrick/The Canadian Press](#)

The absence of justice in a tax system is a path to fiscal chaos and reduced funding for our social safety net. Although there is much talk about access to justice, it is only parsimoniously dispensed to those who provide the revenues to support our social programs — the Canadian middle class.

The wheels of justice grind slowly in tax law and the rules are heavily weighted against middle-income individuals. Tax disputes with the Canada Revenue Agency (CRA) can extend to eight years from the time that an individual receives his or her notice of assessment to its final resolution. An individual who objects to an assessment must wait six months or more for the file just to be assigned for review by a CRA appeals officer. Thereafter, the appeals officer may take several months, even years, to consider any objections before confirming or varying the assessment.

In theory, the law requires the CRA to consider an objection “with all due dispatch,” which the courts interpret generously to mean whenever. In the interim, individuals have two choices: pay up front before the matter is adjudicated, or pay later upon final resolution of the objection. Both options work for the CRA. Taxpayers who pay up front and ultimately win receive a refund plus 4% interest, which will be fully taxable as income. Taxpayers who lose must pay the assessed amount plus interest at 6%, compounded daily and not deductible from income. Either way, the net 3.6% rate spread does not motivate the CRA to resolve the dispute expeditiously. The longer it waits, the greater its income.

When a dispute moves to the Tax Court of Canada (TCC), a taxpayer must decide if he or she wants to proceed by way of the formal or “general” procedure or the informal procedure.

The general procedure involves full dress regalia, formal rules of evidence, oral and written discoveries, document exchanges, written submissions of fact and law, and interlocutory motions. Justice lawyers (sometimes many) and CRA officials represent the Minister of National Revenue (MNR). The process can be long and the cost is high. Cost recoveries, if any, are minimal. Justice in the general procedure is beyond the reach of most middle-income individuals.

The informal procedure is, as its title implies, less formal. There are no dress regalia or discoveries, and the rules of evidence are flexible. The recent increase in the maximum statutory amount to \$25,000 from \$12,500 for cases under this procedure is welcome news for lower and middle-income taxpayers. The simpler and faster procedures make it a bit easier for taxpayers to represent themselves.

The informal procedure is quite fast. An individual files a notice of objection that takes issue with the CRA's assessment. If that doesn't resolve the dispute within 90 days, the taxpayer can file an appeal with the tax court. The MNR must reply within 60 days. There are no discoveries and the trial on the merits must be no later than 180 days after the last day for the reply – in effect, 240 days after filing of the appeal. Thereafter, the hearing is on an expedited schedule and, absent exceptional circumstances, the court must render its decision within 90 days of the hearing. Properly done, the whole matter can be settled within a year.

However, the informality of the procedures and the speed of dispute resolution should not lull individuals into thinking that the road to justice is smooth. The court is bound by all the substantive rules of the income tax statute and the taxpayer must navigate through the most complex statute in Canada. The taxpayer is presumed to know the law, however and whenever written. The court applies time limits stringently. There is no room for arguments of fairness, equity, discretion, and palm tree justice.

The CRA's assumptions of fact underlying the assessment are presumed to be correct unless the taxpayer can "demolish" them through his or her evidence. This is so even if the CRA assumes new facts in confirming its assessment. In effect, an individual who objects to one set of assumed facts and prepares evidence to disprove them may be faced another set of assumptions. This reverse onus provision is a formidable hurdle.

Reports and speeches on access to justice focus almost exclusively on family and criminal law. Middle-income taxpayers, who actually finance our social programs, are not even on the radar of social activists. They support those programs without meaningful access to justice for themselves.

Ultimately, a country must maintain a fair and accessible system of justice for all its citizens, and all the more so where the system relies upon voluntary assessment and disclosure. Raising the informal procedure limit to \$50,000 would open access to the tax courts for middle-income taxpayers.