

Canadian Current Tax

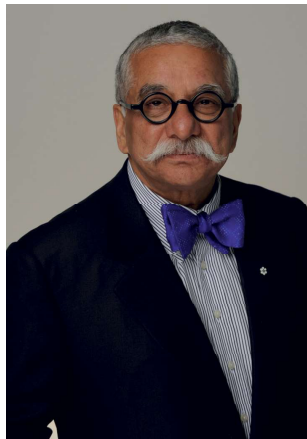
VOLUME 27, NUMBER 4

Cited as 27 Can. Current Tax

JANUARY 2017

• TAXPAYERS MUST STAND AND WAIT TO RESOLVE THEIR APPEALS •

Professor Vern Krishna, CM, QC, FRSC, University of Ottawa Law School,
and Counsel: Tax Chambers LLP (Toronto)
© VERKRISH Investments Ltd., Ottawa



Vern Krishna CM

Canadian taxpayers can be excused for thinking that when the government proclaims a Bill of Rights that they actually acquire rights under it. In fact, as many

taxpayers discover, they must wait, and then, wait some more to resolve their tax disputes. Unlike the criminal law, there is no legal right to speedy access to justice for taxpayers who fund government. Their role is to pay and wait.

There are three principal steps for resolving income tax disputes with the Canada Revenue Agency. The first is to file a proper Notice of Objection. Although the mechanics of this step are fairly simple (identify the taxpayer, the assessment objected to, the years involved, and the reasons for the objection), it is important to set out the relevant provisions and a brief statement of the reasons for the department to review.

The filing deadline is tight: the taxpayer must file the objection within 90 days of the date that it is mailed, or within one year of the due filing date. The deadline is strictly enforced, even if the Canada Post fails to deliver the notice of assessment to the taxpayer! There is no requirement for the CRA to send the notice by secure mail or courier. If it is lost, the taxpayer pays the price for non-receipt.

The next step involves an independent and impartial administrative review of the objection by the CRA. The CRA staffs its own Appeals Branch, which speaks to the independence of the review. The statutory obligation of the Minister of National Revenue is to reconsider the assessment *with all due dispatch* and then either vacate, confirm, or vary it,

• In This Issue •

TAXPAYERS MUST STAND AND WAIT TO RESOLVE THEIR APPEALS <i>Vern Krishna CM</i>	33
SUPREME COURT OF CANADA CLARIFIES THE REMEDY OF RECTIFICATION IN CANADIAN TAX CASES <i>Andrew Boyd, Alexander Cobb and Ilana Ludwin</i>	36



CANADIAN CURRENT TAX

Canadian Current Tax is published monthly by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

All rights reserved. No part of this publication may be reproduced or stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the *Copyright Act*. © LexisNexis Canada Inc. 2016

ISBN 0-409-91091-0 (print) **ISSN 0317-6495**
ISBN 0-433-44637-4 (PDF)
ISBN 0-433-44375-8 (print & PDF)

Subscription rates: \$565.00 per year (print or PDF)
 \$650.00 per year (print & PDF)

General Editor

Professor Vern Krishna, CM, QC
 Firm: Of Counsel: Tax Chambers LLP
 University of Ottawa Law School
 E-mail: vern.krishna@taxchambers.ca

Please address all editorial inquiries to:

LexisNexis Canada Inc.

Tel. (905) 479-2665
 Fax (905) 479-2826
 E-mail: cct@lexisnexis.ca
 Web site: www.lexisnexis.ca

Printed in the United States of America.

Note: This newsletter solicits manuscripts for consideration by the Editors, who reserves the right to reject any manuscript or to publish it in revised form. The articles included in the *Canadian Current Tax* reflect the views of the individual authors, and limitations of space, unfortunately, do not permit extensive treatment of the subjects covered. This newsletter is not intended to provide legal or other professional advice and readers should not act on the information contained in this newsletter without seeking specific independent advice on the particular matters with which they are concerned.



Publications Mail
 Reg. No. 186031

and notify the taxpayer in writing. The Taxpayer Bill of Rights gives taxpayers the right to a formal review, and a right to receive timely information. The Bill, however, is nothing more than a good feel public relations document. It has no legal status whatsoever, and is administered by an Ombudsman who has absolutely no authority over the CRA.

The administrative review is a slow and long drawn out process, which can drag on for years, during which time the taxpayer is charged non-deductible interest, at 5% (2016) compounding daily, on any disputed taxes that are unpaid during the review.

As the Auditor General's Report tabled in Parliament on November 29, 2016 confirms, the CRA interpretation of timeliness and the statutory mandate of processing "*with all due dispatch*" is flexible. Due dispatch conveys an image of speed and efficiency. The reality is otherwise. In 2014, for example, the CRA processed approximately 29.6 million income tax returns. Taxpayers filed objections to 66,864 of the returns for income taxes totaling \$4.8 billion. However, as of March 2016 there was a backlog of 171,744 objections for personal and corporate returns, representing more than \$18 billion of federal taxes. This represents an increase of 300 per cent from \$6 billion in 2005.

After filing an objection on a low or medium complexity file, a taxpayer can expect to wait up to a year for initial contact by an appeals officer. Thereafter, it takes an average of 143 days to resolve low complexity objections, which represent approximately 60 per cent of the yearly objection intake. The CRA resolves about 65 per cent of these objections in favour of the taxpayer, and had to cancel almost \$1.1 billion in penalties and interest in 2016. However, any interest that the CRA pays the taxpayer (3 per cent in 2016) is taxable as income. In the result, the taxpayer pays non-deductible interest at 5 per cent on unpaid taxes, and is taxable on any refunded interest at 3 per cent.

The average resolution time for medium and high complexity objections is staggering: 431 days for medium, and 896 days for high complexity files. Add in the initial contact time from an appeals officer,

and medium complexity files can take more than two years to resolve; high complexity files can take up to three and one-half years! Some files go unresolved for half a dozen years or more.

The CRA is under no pressure to expedite files and become more efficient. In theory, the taxpayer can apply to the federal court to have his or her assessment considered with all due dispatch. In practice, the probability of success is minimal to non-existent. The court follows its precedents from 60 years past, even before the advent of electronic technology or calculators, that allow the CRA almost complete discretion in considering timely resolution. As the Exchequer said in *Provincial Paper Ltd. v. Minister of National Revenue*:

“... There is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the Minister must do to make a proper assessment. It is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer.”¹

And again six years later in *Jolicoeur v. Minister of National Revenue*:

“There is no doubt that the Minister is bound by time limits when they are imposed by the statute, but, in my view, the words “with all due dispatch” are not to be interpreted as meaning a fixed period of time. The “with all due dispatch” time limit purports a discretion of the Minister to be exercised, for the good administration of the Act, with reason, justice and legal principles”²

Taxpayers also pay for the inefficiencies of tax administration in other ways. In 2015, for example, the CRA employed the equivalent of 1,138 full time employees and spent \$148 million on salaries and associated costs. In the result, Canadian taxpayers end up paying both ways, for their own dispute resolution, and the costs of government administration.

All of this before taxpayers get to the third and final step of tax litigation in the courts, which adds several years before the dispute is resolved. Canadians deluded by government public relations into believing that they actually have taxpayer rights must accept John Milton’s sage admonition that “they also serve who only stand and wait.” And wait we shall as governments pump more money into tax administration.

[**Vern Krishna, CM, QC, FRSC** is Professor of Common Law at the University of Ottawa, and Tax Counsel, Tax Chambers, LLP (Toronto). He is a member of the Order of Canada, Queen’s Counsel, a Fellow of the Royal Society of Canada, and a Fellow of the Chartered Professional Accountants of Canada. His practice encompasses tax litigation and dispute resolution, international tax, wealth management, and tax planning. He acts as counsel in income tax matters, representing corporate and individual clients in disputes with Canada Revenue Agency, and appears in all courts as tax counsel.]

¹ [1955] Ex.C.R. 33, [1954] C.T.C. 367 at para. 2.

² [1961] Ex.C.R. 85, [1960] C.T.C. 346 at para. 47.