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Dealing With a Tax-Search Warrant

Date: December 2, 2009

Vern Krishna

A tax search and seizure of a lawyer's or accountant's office can be stressful, but it does not have to be so. What do you do when the taxman arrives with a search warrant and sworn information authorizing the search to look for documents in connection with a criminal tax investigation?

First, take a deep breath and normalize your blood pressure. There are various legal protections available, but you must be calm enough to invoke them.

Both the Income Tax Act and the Criminal Code allow the Minister of Revenue to apply ex parte, or without notice, to a judge for a search warrant to enter into premises and seize documents or things found therein. The minister (officially, it's a minister of the Crown that seeks the warrant) seeking the warrant must support the application for a warrant with information establishing the facts on which he or she seeks the warrant. The judge has discretion to issue the warrant.

The judge will issue the warrant if the government establishes reasonable grounds that the taxpayer or person being investigated has committed an offence under the Income Tax Act and that documents contained on the premises will be evidence of the offence. This is a fairly low threshold and the tax authorities will likely have enough to get a warrant.

Second, examine the search warrant and any information sworn to determine the scope of the warrant and any limitations that it outlines. At this juncture, you must determine whether the Canada Revenue Agency is investigating a particular client, the professional firm or a third part.

The warrant must be specific and identify the particular offence to which it relates. It must also identify the particular building or premises that it authorizes for search and the person who is the target of the search and is alleged to have committed the particular offence.

If the search warrant pertains to a client, you should obtain instructions immediately from the client and, on his or her instructions, retain legal counsel.

If the client authorizes the search, you can co-operate with the authorities in their investigation, but you should keep a detailed record and notes—preferably in the presence of another person—of all documents that the CRA seizes.

You should co-operate with the tax officials to the extent that you can do so. It is an offence to interfere with, hinder or molest any official or prevent him from doing his authorized duties under the tax statute or the Criminal Code.

Third, claim privilege on all documents at the outset. You can ask for the documents to be sealed and placed in custody under the authority of the Criminal Code or the Income Tax Act.

Once the documents have been seized and are in authorized custody, you have 12 days to apply to the court to determine whether the documents—or any portion thereof—should be disclosed to the tax authorities. You will need to review all of the documents to select the particular ones in respect of which you wish to claim privilege on behalf of your client. Failure to pursue this document review will result in the documents being turned over to the CRA after 14 days.

The Charter of Rights and Freedoms circumscribes the law in respect of search and seizure warrants. The information cannot be simply a fishing expedition; it must specify the documents or things that the government is looking for. Thus, the tax authorities or police must limit their search and seizure to the document or things that they specify and believe reasonably support the commission of the offence. Under the “plain view” doctrine, however, the person executing the warrant may also seize any other documents or things that are evidence of any other offence under the law.

There is very little that the taxpayer or his or her legal counsel can do to curtail the execution of a properly obtained and executed warrant. The remedies, if any, lie after the search and seizure.

A judge will determine whether the government can retain the seized materials. The revenue minister is entitled to retain seized materials—and the judge must so order—unless the government waives retention. The taxpayer can, however, through his legal counsel apply to a judge for the return of documents if he can show that the documents will not be required for an investigation or in criminal proceedings. Of course, any documents or things that were improperly seized and outside the scope of the warrant will be returned to the taxpayer.

A tax search and seizure can be traumatic. If handled professionally and politely, it should be less so. The client may panic; the professional must remain calm. The courts are quite zealous in protecting unwarranted state intrusions in matters pertaining to criminal tax evasion charges.

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