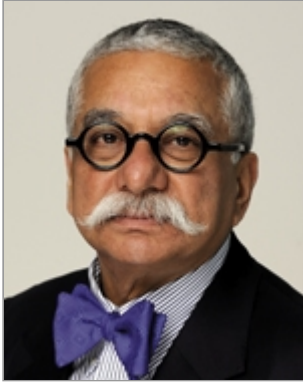


## Tax

## Tax Views: Appealing tax assessments a long and expensive journey | Vern Krishna

By Vern Krishna



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(September 18, 2017, 9:40 AM EDT) -- Taxpayer appeals to the Canada Revenue Agency (CRA) are the first step in resolving tax disputes following an assessment for taxes. The procedures are strictly controlled, the timelines are stringent and subject to technical issues of delivery of documents.

There are three principal steps for resolving income tax disputes with the CRA. 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 scope of the Objection can become an issue in subsequent litigation.

The filing deadline is tight. Generally, the taxpayer must file the objection within 90 days of the date that it is mailed or electronically sent, or within one year of the due filing date. The deadline is strictly enforced, even if 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. Seeking to extend the deadline is a cumbersome process.

Alternatively, the CRA can post the assessment electronically to the individual's "My Account" or "My Business Account" and send an e-mail to the taxpayer's e-mail on file [ss. 244 (14.1)]. The notice is "presumed" to be sent to the person at the e-mail address. However, and notwithstanding the deeming provision in subsection 244 (15), the presumption is, presumably, rebuttable [ss. 244 (14); *Hughes v. Canada (Minister of National Revenue - M.N.R.)*, [1987] T.C.J. No. 920].

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. Taxpayers must evaluate whether it is better, cheaper, and faster to bypass the administrative appeal and file an appeal directly to the Tax Court of Canada ninety days after filing the Objection.

The statutory obligation of the Minister of National Revenue (MNR) is to reconsider the assessment *with all due dispatch*, and then either vacate, confirm, or vary it, and notify the taxpayer in writing. The so-called *Taxpayer Bill of Rights* gives taxpayers the right to a formal review, and a right to receive timely information. The Bill is a feel-good public relations document. It has no legal status whatsoever, and is administered by an Ombudsman, who has no direct authority over the CRA.

The CRA 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, compounding daily at five per cent [2017], on any disputed taxes that are unpaid during the review. As the *Auditor General's Report* tabled in Parliament on Nov. 29, 2016 stated, the CRA interpretation of timeliness and the statutory mandate of processing "*with all due dispatch*" is flexible.

In 2014, for example, the CRA processed approximately 27 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, 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 between 9 and 12 months for initial contact by an appeals officer. Thereafter, it took an average of 143 days to resolve low complexity objections, which represented approximately 60% of the yearly objection intake.

The CRA resolved 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 is taxable as income. Hence, the taxpayer pays non-deductible interest on unpaid taxes, and is taxable on any refunded interest.

The average resolution time for medium and high complexity objections is longer: 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-a-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. The CRA has almost complete discretion in considering timely resolution. As the Exchequer said in *Provincial Paper Ltd. v. Minister of National Revenue*, [1954] 54 DTC 1199: "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."

And again, six years later in *Joseph Baptiste Wilfrid Jolicoeur v. Minister of National Revenue* [1960] 60 DTC, "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."

All of this before taxpayers even get to the third step of tax litigation in the courts, which adds several years before the dispute can be finally resolved. Taxpayers seeking to appeal CRA assessments must be prepared to engage in a lengthy and expensive process that will drag on for many years, during which the government will collect interest on a daily five per cent compounding basis.

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