

## Taxpayer Relief Provisions

### CRA's Discretion to Waive Penalties and Interest

The CRA has the discretion to waive penalties and interest.

The Ministerial discretion provisions were formerly referred to as the “fairness provisions”, but the CRA announced in May 2007 that it would in the future use the term “taxpayer relief provisions”.

Under these rules, the CRA may at any time waive or cancel all or any portion of any penalty or interest assessable under the *Income Tax Act*. This rule was originally retroactive to 1985 and later returns, so that if you had grounds for a waiver of penalty and interest (even for a statute-barred year), you could always make a written request to reconsider the issue for any or all years back to 1985. After 2004, however, you can only go back 10 years in seeking such relief. That is, you now have 10 calendar years after the end of the taxation year in issue to make a request under these rules. In the case of a partnership, the period is 10 years after the end of the partnership's fiscal period.

The 10-year rule was modified due to the decision of *Bozzer v. The Queen*, 2011 DTC 5106. In *Bozzer*, the Federal Court of Appeal ruled that the taxpayer's interest incurred during the 10-year period could be waived by the Minister, regardless of when the debt was incurred. The Federal Court of Appeal's rationale was that nowhere in the legislation was there a reference to the year of the assessment. Therefore, interest could be waived in any taxation year in the 10-year period preceding an application for a waiver of interest. Taxpayers seeking interest relief under the taxpayer relief provisions, where the debt was incurred more than 10 years prior to an application, can now cite *Bozzer* to request interest relief for the 10-year period preceding an application. The CRA, in a news release dated November 21, 2011, stated that they will administer the 10-year time limit in accordance with the *Bozzer* decision.

The government has indicated that it will exercise this discretion in favour of a taxpayer who has not complied with a requirement or has failed to pay an amount when due because of extraordinary circumstances beyond the taxpayer's control.

An application for waiver must be made in writing, giving the reasons justifying the waiver in your particular case.

The government has indicated that situations in which it will consider the exercise of discretion to waive penalty or interest fall into three broad categories:

- 1) extraordinary circumstances;
- 2) actions of the CRA (e.g., publishing information which misled the taxpayer); and

3) inability to pay or financial hardship (note also the discretion to refund instalments in cases of financial hardship).

Extraordinary circumstances, to expand on that category, include:

- natural or human-made disasters such as flood or fire; and
- civil disturbance or disruption in services, such as a postal strike.

Though less relevant to corporations (except perhaps very small owner-managed corporations), extraordinary circumstances also include:

- serious illness or accident; and
- serious emotional or mental distress, such as death in the immediate family.

Discretion in your favour will not be exercised unless you have taken a reasonable amount of care in attempting to comply with requirement. If possible, efforts should have been made to avoid or at least minimize the delay in complying or paying. Any delay or omission should be remedied within a reasonable time after you became aware of the delay or omission.

Guidelines to the exercise of this discretion by the CRA are set out in Information Circular 07-1, *Taxpayer Relief Provisions*.

### **Interest on Amounts Waived**

Where a taxpayer fairness waiver is granted and a consequent overpayment is refunded or applied to another liability of the taxpayer, interest is payable from 30 days after the CRA receives a “satisfactory” request until the amount is refunded or applied. The notion of a satisfactory request is apparently intended to ensure that no specific form is required to trigger the waiver as well as to also ensure that a request is sufficiently clear to describe the relief sought and the reasons for it.

### **Voluntary Disclosures Program**

Another method of seeking relief under the Taxpayer Relief Provisions is through the Voluntary Disclosures Program (“VDP”). This program is available to taxpayers to correct inaccurate or incomplete information or to file information not previously reported. The definition of “taxpayer” includes corporations.

The purpose of the VDP as stated by the CRA is to promote compliance with Canada's tax laws by encouraging taxpayers to voluntarily come forward to correct omissions in their dealings with the CRA. It

is not intended to act as a means for a taxpayer to intentionally avoid their legal obligations under acts administered by the CRA.

Taxpayers who make a valid disclosure will have to pay any taxes owing plus interest. However, where a valid disclosure is made, the taxpayer will not be charged penalties or prosecuted with respect to the disclosure. In addition to penalty and prosecution relief, there may be partial interest relief granted in respect of the years or reporting periods preceding the three most recent years of returns required to be filed. For example, where a taxpayer has not filed tax returns from 2006 to 2012 and makes a valid voluntary disclosure in 2013, there may be partial interest relief granted for the years from 2006 to 2009. The years 2010 to 2012 are the three most recent years preceding the application, therefore, they are not eligible for interest relief.

As with other taxpayer relief applications, for voluntary disclosure applications made after December 31, 2004, the Minister's ability to grant relief is limited to the previous 10 years before the calendar year in which the application is made. For example, where a voluntary disclosure application is made in 2013 for the taxation years spanning from 1999 to 2009, the Minister can only grant relief for the period from 2003 to 2009.

To qualify as a valid voluntary disclosure, four conditions must be met, which are as follows:

- 1) Disclosure must be voluntary. For example, this would mean that the taxpayer had no knowledge or was not aware of any audit, investigation, or enforcement action to be conducted by the CRA;
- 2) The disclosure must be complete, meaning the taxpayer must provide full and accurate facts and documentation for all taxation years or reporting periods where there was previous inaccurate, incomplete, or unreported information;
- 3) The disclosure must involve the potential of a penalty. The penalty type may be a late filing penalty, a failure to remit penalty, an instalment penalty, or a discretionary penalty such as a gross negligence penalty. If a penalty does not apply to the disclosure, then the taxpayer should still submit the information and it will be handled through the CRA's normal processing procedures; and
- 4) The disclosure must include information that is at least one year past due.

A second disclosure by the same taxpayer is usually disallowed unless the situation surrounding the second disclosure was beyond the taxpayer's control. Generally, taxpayers are expected to remain within the law once they have availed themselves of the disclosure relief.

Voluntary disclosure applications must be made in writing to the Assistant Director, Enforcement Division of the tax services office that has jurisdiction over the area where the taxpayer resides.

Form RC-199, *Taxpayer Agreement*, can be used or the taxpayer can provide written submissions that provide similar information to that requested by Form RC-199.

If a taxpayer's voluntary disclosure application is denied and the taxpayer believes that the Minister has not exercised discretion in a fair and reasonable manner, then the taxpayer may request in writing that the Director of the tax services office where the original decision was issued conduct a second administrative review. If the second review is also negative, then the taxpayer can file a notice of application with the Federal Court of Canada within 30 days of the date of notification of the decision. Typically, a taxpayer will apply for a second administrative review before filing a notice of application with the Federal Court.

Guidelines to this program are set out in Information Circular 00-1R3, *Voluntary Disclosures Program*. IC 00-1R3 and further information on the Voluntary Disclosures Program can be found on the CRA website.