

TAXPAYER RELIEF APPLICATIONS - PART II

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm regarding taxpayer relief applications to the CRA and applications to the Federal Court for judicial review of taxpayer relief decisions by the CRA. Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

This issue of the Legal Business Report focuses on recent Federal Court of Canada decisions involving judicial review of taxpayer relief applications in the following circumstances: (i) time delays on the part of Canada Revenue Agency (the "CRA"); (ii) serious illness; and (iii) exceptional circumstances.

A. TIME DELAYS BY THE CRA

1. *Dort Estate v. Minister of National Revenue, 2005 DTC 5512*

In this Federal Court of Canada decision, the taxpayer's estate made a fairness request to the CRA, based on: (i) the CRA's delay in processing the tax return; (ii) financial hardship of the taxpayer; and (iii) mental distress of the taxpayer. The first level fairness decision by the CRA did not address the CRA's delay in processing the tax return. The estate made an application to the Federal Court for judicial review of the first level fairness decision.

The Federal Court agreed with the estate and referred the matter back to the CRA for a second level fairness review based upon the CRA's delay in processing the tax return.

2. *Cole v. Attorney General of Canada, 2005 DTC 5667*

In this Federal Court of Canada decision, due to litigation in the Federal Court regarding the taxpayer's 1983 taxation year, the assessment for the taxpayer's 1987-1988 taxation year was delayed. The taxpayer made a request for fairness relief from interest owing in respect of the taxpayer's 1987-1988 assessment. The Minister refused to grant any relief to the taxpayer. The taxpayer applied to the Federal Court for judicial review of the Minister's first level decision. The Federal Court granted the application for

judicial review of the first level decision and referred the matter back to the Minister for reconsideration.

At the second level, the Minister granted some relief but stated that delays resulting from court proceedings are beyond the control of the CRA and are not taken into consideration in granting relief. The taxpayer made a second application to the Federal Court for judicial review of the second level decision.

The Federal Court granted the taxpayer's application for judicial review. The Federal Court held that the fairness legislation does not restrict relief to situations involving delays within the Minister's control. Delays in court proceedings, depending on the circumstances, could also be considered as grounds for granting fairness relief. Accordingly, the Minister's fairness decision was quashed and the matter was again referred back to the Minister for reconsideration.

3. Telfer v. Canada Revenue Agency, 2009 DTC 5046

In this Federal Court of Appeal decision, the taxpayer filed Notices of Objection for the taxation years 1993 to 1999 inclusive (except 1995). With the taxpayer's consent, the CRA opted to hold the taxpayer's Notices of Objection in abeyance, as the issue raised therein was substantially similar to that in a case that was before the Tax Court of Canada at the same time. At the time of the decision, the CRA informed the taxpayer that interest would continue to accumulate on the unpaid balance. Approximately two years later, following the decision of the Tax Court in the similar case, the CRA and the taxpayer agreed on a settlement. The taxpayer applied for interest relief on the grounds of departmental delay and financial hardship. The Minister denied the request, and the taxpayer appealed to the Federal Court for judicial review.

The Federal Court allowed the taxpayer's application for judicial review. Applying **Cole**, the Federal Court held that even though the taxpayer was not a party to the proceedings that caused the delay, the delay can nevertheless be a basis for relief under the fairness provisions. The Federal Court held that although the taxpayer agreed to the delay and was informed that interest would continue to accumulate, it would not be fair to impose all of the interest on her. Therefore, the Federal Court allowed the taxpayer's application and referred the matter back to another agent of the Minister, noting that the taxpayer should only be required to pay half of the interest accrued during the waiting period.

The Federal Court of Appeal reversed this decision in favour of the CRA. The Federal Court of Appeal held that the trial judge should not have intervened with the Minister's decision, and made an error in law by utilizing a standard of correctness,

instead of reasonableness. The Federal Court of Appeal found that when reviewing for unreasonableness, a court must examine the decision making process to ensure that it is: (i) rational; (ii) transparent; and (iii) falls within a range of possible outcomes. Applying the correct standard of reasonableness, the Federal Court of Appeal held that the decision of the Minister was reasonable because the Minister: (i) was aware of all the relevant facts; and (ii) did not exclude relevant facts from consideration.

An application for leave to appeal was denied by the Supreme Court of Canada.

4. Lalonde v. Canada Revenue Agency, 2010 DTC 5139

In this Federal Court of Canada decision, the taxpayer was reassessed for his 1992 and 1993 taxation years in connection with his investment in a tax shelter relating to flow-through shares in a mining company. On his 1992 and 1993 tax returns, the taxpayer claimed tax deductions of \$9,600 and \$12,000 respectively, in connection with the shares. In 1995, the CRA began an investigation concerning the exploration expenses of the mining company.

Following the investigation in 2000, the CRA sent notices of reassessment to the taxpayer for his 1992 and 1993 taxation years. There was no explanatory letter from the CRA accompanying the assessment and no subsequent correspondence between the CRA and the taxpayer. The taxpayer claimed to have contacted the CRA regularly for five years regarding the progress of his file, but was never able to obtain any information. This claim was not contradicted by the CRA. The Minister denied the taxpayer's fairness request on the basis that there was no undue delay on the part of the CRA.

In a Federal Court decision, cited at 2009 DTC 5025, the Federal Court allowed the taxpayer's application for judicial review. Applying the reasonableness standard of review, the Federal Court stated that the appropriate test is whether after a "somewhat probing examination", the reasons provided by the CRA, when taken as a whole, can support the impugned decision. The Federal Court held that although it is not necessary for every element of the reasoning in the decision to meet the reasonableness standard, the reviewing judge must be satisfied that the administrative decision-maker made a reasonable decision on the whole after (i) fully reviewing the taxpayer's file and (ii) taking all the relevant criteria into account. The Federal Court also held that where relief is denied or granted, the Minister must provide the taxpayer with an adequate explanation of the reasons for the decision, and how the relevant factors were applied.

The Federal Court held that the CRA did not provide a reasonable explanation for a large portion of the delays since December 2001. The delays were found to be

mainly due to the actions of the CRA. Furthermore, the taxpayer was not informed within a reasonable time that his file had been suspended pending decisions to be rendered in similar cases. Thus, the matter was referred back to the Minister for redetermination.

On May 13, 2008, the Minister granted further partial relief from interest for certain periods, but refused to grant relief from all interest accruing in the 1992 and 1993 assessments after December 2001. The taxpayer applied again to the Federal Court for judicial review.

The Minister's delegate in the current case argued that the taxpayer knew he had a balance owing after he received his reassessments and that it was his fault if interest then accrued because he should have paid off his balance in order to avoid that accrual. This was despite the Federal Court's decision in 2009 that the delays in processing the fairness request primarily arose because of actions of the Agency.

The Federal Court again allowed the taxpayer's application for judicial review. The Federal Court held that the Minister's delegate misinterpreted and misapplied the Fairness Guidelines. While the Minister's delegate did not take into account all the factors in the guidelines, he also did not take into account the Federal Court's 2009 decision. Therefore, the matter was referred back to the Minister for redetermination.

5. Guerra v. Canada Revenue Agency, 2009 FC 459

In this Federal Court of Canada decision, the taxpayer was the victim of four robberies in six months during 1991. The robberies caused the taxpayer to close his high-end retail clothing store in 1993. The taxpayer did not file any GST returns for two years prior to closing. The taxpayer requested relief for the taxation years 1991, 1992 and 1993. The Minister allowed the taxpayer partial relief for 1991 on the grounds of extraordinary circumstances, but denied the relief requested for 1992 and 1993. The taxpayer applied for judicial review to set aside the Minister's decision on the grounds that: (i) the decision to not grant relief for taxation years 1992 and 1993 was unreasonable; and (ii) the CRA failed to consider relevant facts in exercising its discretion.

The Federal Court granted the taxpayer's application, and held that the thefts were extraordinary circumstances beyond the taxpayer's control. As a result of the substantial losses and depleted inventory suffered by the taxpayer, the Federal Court concluded that the impact of the thefts was not limited to 1991. The Federal Court held that it was unreasonable to take the calendar year in which the thefts were committed as the only period where the taxpayer could not pay the taxes as a result of exceptional

circumstances beyond the taxpayer's control. The CRA should have given weight to both the timing of the thefts and nature of the retail business when considering the long-term effects of the theft on the taxpayer's capacity to operate the business profitably.

The Federal Court also held that the CRA did not consider all relevant factors when making its decision. Specifically, the CRA did not consider: (i) the taxpayer's history of compliance; and (ii) the diligence of the taxpayer. As a result, the Federal Court referred the matter back to the Minister for reconsideration.

6. Rosenberg Estate v. Minister of National Revenue, 2011 FC 445

In this Federal Court of Canada decision, the Rosenberg Estate made an application for judicial review of a decision by the CRA denying the taxpayer's request for cancellation of penalties and interest. The deceased, Mr. Rosenberg, had died in June 2003, leaving no will and naming no liquidator for his estate. A liquidator was appointed, but the estate's accountant failed to file the Mr. Rosenberg's terminal return and was replaced. Shortly thereafter, disputes arose between the heirs of the estate, which resulted in judicial proceedings and further delays. On April 21, 2004, the liquidator advised the CRA that the estate's terminal return would not be filed by the deadline of April 30, 2004. The liquidator sent the CRA a cheque for \$50,000 to reduce or avoid penalties. The return was filed in September 2004, and a payment of \$500,000 was made to the CRA in November 2004. The CRA issued notices of assessment for the taxation years ending June 14, 2004 and June 14, 2005, which included penalties and interest. The estate applied for cancellation of the interest and penalties for those taxation years, which was granted. In 2008 and 2009, notices of reassessment were issued for the 1998-2003 taxation years. These included \$106,141.06 in interest and penalties in respect of the 2003 taxation year. The estate applied for cancellation of those amounts, but the request for relief was denied on the basis that the difficulties that arose between the heirs did not constitute extraordinary circumstances.

The Federal Court dismissed the estate's judicial review application. The estate submitted that it was denied natural justice because it was not given the opportunity to make further submissions to the CRA prior to the second level review. The estate's representative had requested that the CRA provide her with the report that led to the first refusal, which it never did. However, the Federal Court held that the estate was provided with sufficient reasons to allow it to respond with any relevant arguments at the time it requested the second level review. Furthermore, the Federal Court held that there were no new elements that should have been introduced at that time and the omission of which could have caused prejudice to the estate.

The estate also asserted that the CRA erred by only considering the four examples of extraordinary circumstances included in paragraph 25 of the Fairness Guidelines and by failing to consider the applicability of paragraph 24 of the Guidelines, which states “[t]he Minister may also grant relief if a taxpayer’s circumstances do not fall within the situations stated in paragraph 23” (i.e. extraordinary circumstances, actions of the CRA, and the inability to pay or financial hardship). The Federal Court held that there was no indication that the decision-maker did not consider the residual discretion granted in paragraph 24, and that the decision-maker clearly considered the reasons provided by the estate for its failure to file the terminal return on time.

Finally, the estate argued that the CRA did not properly consider other facts, such as the fact that the deceased suffered from a lengthy illness and his affairs were extremely disorganized as a result, and that the estate had attempted to estimate the tax payable. The Federal Court held that these facts were not brought to the CRA’s attention prior to the second-level review, and therefore the CRA’s failure to consider them was not a reviewable error.

B. SERIOUS ILLNESS

1. Sutherland v. Canada Customs and Revenue Agency, 2006 DTC 6151

In this Federal Court of Canada decision, the taxpayer made a fairness application on the basis of serious illness in order to waive penalties and interest resulting from late filings of her 1994 to 2001 tax returns. The Minister waived one late filing penalty for 2000 and refused to grant any further relief on the grounds that the taxpayer’s illness did not prevent the taxpayer from filing her tax returns in a timely manner. The taxpayer applied for judicial review of the Minister’s fairness decision.

The Federal Court dismissed the taxpayer’s application and held that the Minister’s decision was reasonable. Where the taxpayer’s fairness application is based on serious illness, the taxpayer must provide satisfactory evidence to prove not only the facts relating to the illness, but also that the illness directly contributed to the taxpayer’s inability to comply with filing the tax returns on a timely basis.

2. Carter-Smith v. Attorney General of Canada, 2006 DTC 6707

In this Federal Court of Canada decision, the taxpayer made a fairness application on the basis of serious illness in order to waive penalties and interest resulting from late filing of her tax returns. The Minister denied the taxpayer’s application on the grounds that the taxpayer was capable of self-employment during the

relevant period and accordingly, should have been capable of complying with the requirements of the Income Tax Act (the “Act”).

The taxpayer appealed to the Federal Court, arguing that the accumulation of penalties and interest resulted from circumstances beyond her control, namely: (i) the stress associated with the taxpayer being the sole family caregiver for her severely ill mother and adult sister; and (ii) the taxpayer’s debilitating back problems. The Federal Court granted the taxpayer’s application on the basis that the Minister did not take into account and give due weight to all the relevant facts. The Minister failed to consider the taxpayer’s emotional distress as well as the taxpayer’s back problems. The Federal Court referred the matter back to the Minister for reconsideration by a different decision-maker.

3. *The Estate of Gary McLeod v. Minister of National Revenue, 2007 DTC 5623*

In this Federal Court of Canada decision, the taxpayer was a successful businessman until 1999 when a series of tragedies struck his family. The taxpayer’s two daughters became seriously ill. One died and the other required expensive treatment only available in the U.S. The taxpayer’s marriage broke down, and he was involved in a catastrophic car accident that left him injured. He developed serious mental and emotional problems as a result of these events. The taxpayer failed to file timely returns during this period and the Minister imposed late-filing penalties. After submitting a request for relief, the taxpayer took his life. The Minister denied the taxpayer’s fairness request. The taxpayer’s estate applied for judicial review of the Minister’s decision.

The Federal Court allowed the application and set aside the Minister’s assessment on the basis that the Minister’s decision to deny the taxpayer fairness relief was unreasonable. The Federal Court held that the Minister erred in concluding that the extenuating circumstances did not negatively impact the taxpayer’s capacity to manage his financial affairs.

4. *Hauser v. Canada Revenue Agency, 2007 DTC 5217*

In this Federal Court of Canada decision, the taxpayer failed to pay her income taxes for several taxation years. She applied to the Minister for a waiver of interest and penalties on the grounds of financial hardship and extraordinary circumstances, in particular, her physical and emotional health issues. Her request for a waiver of interest was denied. The Minister found no financial hardship or extraordinary circumstances, as the taxpayer was able to maintain both her regular and business income during the time in question.

The taxpayer applied for judicial review, claiming that the CRA decision did not properly address her health issues and did not take into account her emotional distress. The taxpayer maintained that the Minister should have consulted a medical professional, who would have been able to explain how it was possible for someone to be able to meet certain obligations while not maintaining others in a time of stress.

The Federal Court dismissed the taxpayer's application. It held that there is no obligation on the Minister to consult with a health care professional in making a fairness decision. The Federal Court determined that it was not unreasonable for the Minister to conclude that the taxpayer was merely showing a preference to other creditors over the CRA.

5. **Lemerise v. Attorney General of Canada, 2010 DTC 5068**

In this Federal Court of Canada case, the taxpayer filed his 2006 return nearly one year after the filing deadline. Consequently, the Minister imposed interest and penalties on the taxpayer for late filing. The taxpayer made a request for relief, seeking the cancellation of the interest and penalties. He claimed that he suffered from attention deficit hyperactivity disorder (ADHD), which was the reason behind the late filing, and that this was a situation beyond his control. However, the Minister denied this request, and also decided not to cancel the interest and penalties upon a second review. The taxpayer challenged this decision, arguing that his late filing was due to his medical condition and not because of negligence or carelessness.

The Federal Court dismissed the taxpayer's application for judicial review. In its decision, the Federal Court cited **Young v. Canada**, 98 DTC 6028, stating that taxpayers who cite their medical condition in support of a request for relief from penalties or interest have the burden of proving that their condition was a factor beyond their control and that the interest owed was primarily caused by this factor. In this case, the taxpayer submitted a note from his doctor; however, it contained insufficient information and did not explain how his medical condition would have prevented him from filing his tax return on time. The following are examples of the types of information that a court may be seeking in a doctor's note:

- (i) The recommended dosage;
- (ii) The possible effects the medication may have on the taxpayer;
- (iii) How long the taxpayer has been taking the medication;

- (iv) The taxpayer's general health (i.e. why the applicant performs well in some areas of activity and less well in others); and
- (v) In what way the medication may hamper the taxpayer in his ability to perform certain tasks, such as filing his annual tax return.

Furthermore, there were gaps in the taxpayer's past filings, in that he was able to file on time in some years but not others. Thus, the taxpayer's application for judicial review was dismissed.

6. *Yachimec v. Minister of National Revenue, 2010 FC 1333*

In this Federal Court of Canada case, the taxpayer applied for judicial review of the Minister's decision to deny the taxpayer's request for relief from penalties and interest on the basis of the taxpayer's serious illness. The taxpayer suffered a severe brain injury following a car accident in 1985, and was unable to work. He paid no tax from 1992 to 2007. As a result of the brain injury, the taxpayer was clinically paranoid, depressed, and suffered from an unshakeable delusion that the government has no legal right to impose income tax. The Minister denied the taxpayer's first level request on the basis that the medical information submitted was insufficient. The taxpayer provided additional documentation, including a second medical opinion, but his request was denied on the basis that although he was disabled, he was never declared a dependent adult. The Minister also noted that the taxpayer had a poor record of compliance with tax obligations.

The taxpayer argued that he had established on a balance of probabilities that his failure to pay taxes arose from extraordinary circumstances beyond his control, and that his compliance history relating to the period in which compliance was in his control should be considered, rather than the period in which extraordinary circumstances, namely his illness, were present. Finally, the taxpayer argued that the Minister should not have considered a failed court application brought by the taxpayer's family to be appointed as his trustees as a finding of competence.

The Federal Court allowed the taxpayer's appeal and referred the matter back to the Minister for redetermination by a decision-maker not previously involved in the taxpayer's case. The Federal Court held that the reasons provided for the Minister's decision demonstrated "a misapprehension of the [taxpayer's] circumstances that is out of sync with the spirit and intent of the fairness provisions of the Act."

C. EXCEPTIONAL CIRCUMSTANCES

1. *Cooke v. Attorney General of Canada, 2010 DTC 5077*

In this Federal Court of Canada case, the taxpayer carried on business in the real estate field. The taxpayer had a tax liability of over \$110,000. The taxpayer claimed that he was unable to pay the liability, penalties and interest claimed from him due to the major financial hardship and the state of his health. Based on these circumstances, the taxpayer made a request to the CRA to cancel the interest and penalties. The request was denied on the basis that the taxpayer had not proved financial hardship (i.e. an inability to provide himself with basic necessities and, within reasonable limits, to obtain other non-essential items). This decision was confirmed in a second review. The taxpayer applied to the Federal Court for judicial review.

The Federal Court dismissed the application for judicial review. The taxpayer submitted that the real estate crisis was similar to extraordinary circumstances as discussed in the Fairness Guidelines, as it was an event beyond his control. However, the Federal Court held that the real estate crisis was caused by a series of decisions made by businesspeople, and did not arise out of extraordinary circumstances such as the examples provided in the Fairness Guidelines (e.g. fires, floods, and other natural disasters).

The taxpayer also submitted that he was depressed as a result of the real estate market crisis. However, the Federal Court found that during the period under review, and notwithstanding the physician's note, the taxpayer had gone about his affairs. More importantly, during that period, the taxpayer made it a priority to pay certain creditors, to the detriment of the CRA. Thus, the Federal Court dismissed the taxpayer's application.

2. *Paterson v. The Queen, 2010 DTC 5130*

In this Federal Court of Canada case, the taxpayer was a sole proprietor who prepared and submitted income tax returns for a number of clients electronically, using the EFILE program. With the assistance of a third party, who worked for a company that purported to campaign on behalf of charitable organizations, the taxpayer accepted money from clients who wished to "donate" to these charities in exchange for an "enhanced receipt" for tax purposes. The receipt provided to the taxpayer would reflect a much larger sum of money than was actually paid and would then be used in the preparation of each client's tax return to provide the client with a large deduction from his taxable income. For each client that purchased one of these enhanced receipts, the taxpayer received \$25 from the third party involved in the scheme.

On May 1, 2009, the Minister notified the taxpayer that his EFILE privileges were revoked as of April 30, 2009 on the basis that the taxpayer's conduct was "disreputable in nature". The taxpayer sought review of this decision, arguing that he never engaged in any disreputable conduct, as he never had any reason to question the authenticity of the receipts provided to his clients.

The Federal Court held that: (i) while there is no jurisprudence concerning the applicable standard of review when assessing the decision to revoke an individual's electronic filing privileges, it is clear that the standard is that of reasonableness; and (ii) the impugned decision was reasonable. In its decision, the Federal Court found that the taxpayer knew that the amounts paid by his clients were not the same as the amounts they were given credit for when he was preparing their income tax returns. Furthermore, the taxpayer never denied his involvement in the scheme and he also admitted that he participated in the scheme for gain. Thus, the application for judicial review was dismissed.

The decision was upheld by the Federal Court of Appeal on the ground that the Federal Court of Canada had not made any reviewable errors in reaching its conclusion.

3. *Asper Holdings Inc. v. Attorney General of Canada, 2010 FC 894*

In this Federal Court of Canada case, the taxpayer was a corporation that held foreign property upon which income was earned. Under subsection 233.3(3) of the Act, a foreign income verification statement (T1135 form) is required to be filed annually when the total cost amount of all specified foreign property owned by a taxpayer is more than \$100,000. The taxpayer did not file T1135 forms for the taxation years 2000 to 2003, as it was under the impression that T1135 forms were not required where an investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements.

In April 2005, the CRA notified the taxpayer that it had not filed T1135s since 2000, and requested access to the company ledgers. On June 2, 2005 the taxpayer sent the missing T1135s along with a letter, explaining their mistaken reasons for not filing. In December 2005, the CRA imposed penalties for each taxation year for which the T1135 form was filed late. Subsequently, the taxpayer's request for relief from penalties and interest was denied. The second level fairness request was also denied; however, there was a reduction of interest charged for six months to address the lengthy delay in replying to the first request for relief. Consequently, the taxpayer filed an application for judicial review.

Among the taxpayer's list of submissions was that the decision not to file the T1135 forms was the result of confusion, and the CRA should have been more lenient about penalties. However, the Minister claimed that there was a conscious decision not to file the T1135 forms. The Federal Court agreed that this decision was one that was lacking due diligence rather than confusion, and thus, dismissed the application for judicial review.

4. *Murphy et al v. Minister of National Revenue, 2010 DTC 5009*

In this Federal Court of Canada case, a RCMP officer provided Fjoser, a team leader in the CRA's Special Enforcement Program (SEP), with a list of known or suspected UN Gang members who were likely to have unreported earned income from illegal activities. SEP conducts audits and undertakes other civil enforcement actions on individuals suspected of earning income from illegal activities. One of the tools used by the SEP is the issuance of Requirements for Information (RFIs). Fjoser prepared the RFI authorization documentation and authorized the RFIs by stamping them with the signature of the Director of the Vancouver Tax Service Office. While the Director was authorized to sign and issue RFIs, Fjoser was not. The Applicants were personally served with the RFIs by police. One of the claims submitted by the Applicants in this judicial review was that the RFIs were invalid because they were not issued by a person authorized to do so.

The Federal Court allowed the application for judicial review. In its decision it held that the issue of whether Fjoser had the authority to decide to issue the RFIs is a jurisdictional question to be reviewed on a standard of correctness. As the Federal Court found that the issuance of a RFI was a discretionary exercise, and not a purely administrative power, the official holding the power to issue RFIs (i.e. the Director) did not have the authority to sub-delegate this power. As such, the Federal Court concluded that the RFIs were invalid.

5. *CPNI Inc. v. Minister of National Revenue, 2013 FC 96*

In this Federal Court of Canada case, the taxpayer was a corporation, and requested relief from interest and penalties for the taxation years 2008 to 2010 on the basis of inability to pay. The taxpayer accrued operating losses in 2008, 2009 and 2010 and failed to remit withholding taxes on behalf of its employees. The taxpayer was developing a new product line aimed at the banking community, but its target customers were adversely affected by the mortgage lending crisis in 2008. The Minister cancelled the interest but refused to cancel the penalties. The taxpayer claimed that the financial crisis qualified as a "man-made disaster" under paragraph 25 of the Fairness Guidelines and that the penalties should have been cancelled on that basis.

The Federal Court dismissed the taxpayer's appeal. The Federal Court found that the taxpayer had not presented its argument that the financial crisis qualified as a "disaster" to the Minister in its first or second level review requests. Therefore, the Minister's failure to consider this argument could not be considered unreasonable. The Federal Court cited ***Cooke v Canada (Attorney General)***, 2009 FC 1161, in which the Court held that the real estate slump in the 1990s was "caused by a series of decisions made by businesspeople" and "did not arise out of extraordinary circumstances such as the examples in the Guidelines". Agreeing with this analysis, the Federal Court held that in a market economy, financial fluctuations are not extraordinary.

The Federal Court also considered paragraph 28 of the Guidelines, which refers to "exceptional situations" and gives the following example: "when a business is experiencing extreme financial difficulty, and enforcement of such penalties would jeopardize the continuity of its operations, the jobs of the employees, and the welfare of the community as a whole, consideration may be given to providing relief of the penalties." The Federal Court found that the taxpayer failed to make any submissions regarding the continuity of operations, the impact on employees, or the impact on the welfare of the community. Therefore, the Minister was unable to consider whether the taxpayer's circumstances were related to an exceptional situation as contemplated by paragraph 28. On the whole, the Federal Court found that there was nothing unreasonable in the Minister's decision and thus dismissed the taxpayer's appeal.

6. ***Tremblay v. Attorney General of Canada, 2013 FC 1049***

In this Federal Court of Canada case, the taxpayer filed his 1998 and 1999 tax returns 1,085 days late and 719 days late respectively. The Minister assessed the taxpayer for penalties and interest for the late filing of returns. The taxpayer's request for relief was rejected by the Minister, and he applied to the Federal Court of Canada for judicial review of the decision.

The taxpayer submitted that the delay was caused by his accountant and a waiver of penalties was justified because the situation was beyond his control. The Court noted that no misconduct by the accountant was brought to the attention of the Minister. Instead, the evidence showed that the taxpayer failed to pay the fees due to the accountant because of financial difficulty, and as a result the accountant kept the uncompleted financial statements. CRA guidelines provide that an applicant's financial situation does not justify the cancellation of penalties except in exceptional circumstances. The Court held that this was not an exceptional circumstance which warranted taxpayer relief. The taxpayer failed to explain how his situation prevented him from contacting the CRA to learn his rights and obligations, or estimating his revenues

and filing his own returns. The Minister's decision was clear and fell within the range of acceptable outcomes and the taxpayer's application for judicial review was dismissed.

7. *Herrington v. Canada Revenue Agency, 2016 FC 953*

In this Federal Court of Canada case, the taxpayer's income tax returns for the years 2009, 2011, 2012, and 2013 were reassessed by the CRA due to omitted investment income. Penalties were levied against the taxpayer with respect to the 2012 and 2013 omissions. The taxpayer requested for taxpayer relief on the ground that TD Bank had failed to send his 2012 and 2013 T5 slips to the correct mailing address and the circumstances were beyond his control. The Minister denied the request. The decision report acknowledged that the lost mail was beyond the taxpayer's control, but found that the circumstances did not reasonably prevent the taxpayer from disclosing all of his income on his tax filing.

The Federal Court of Canada dismissed the taxpayer's application for judicial review. The Court held that because the taxpayer had been reassessed for similar omissions of investment income in the past, it was reasonable to expect that he would exercise due diligence and ensure that the tax returns he had filed accurately reflected his investment portfolio. While the lost mail was beyond the taxpayer's control, it did not constitute an extraordinary circumstance warranting a grant of relief. Since the Minister's decision was reasonable and fell within the range of possible and acceptable outcomes, the Court found that it should be upheld.

D. REFUNDS BEYOND THE NORMAL THREE-YEAR PERIOD

1. *Hoffman v. Attorney General of Canada, 2010 FCA 310*

In this Federal Court of Appeal decision, the taxpayer made a request for reassessment under subsection 152(4.2) of the Act, which allows the Minister to reassess beyond the normal three-year reassessment period in order to give taxpayers a refund or reduce taxes payable for a given taxation year. The taxpayer requested a recalculation of accrued interest relating to his 1998 taxation year, claiming that a \$35,000 payment made to the CRA in December 1998 was treated as if it had been made in 1999. The taxpayer also requested an increase of \$78,000 to his capital loss account or allowable business investment loss account to reflect the cost of his shares of a failed corporation, and a \$20,000 deduction for legal and accounting expenses.

The Court dismissed the taxpayer's appeal. The Court found that the Minister had thoroughly reviewed and considered the information the taxpayer had submitted,

and that the Minister's decision was reasonable. Furthermore, given the adjustments sought, the nature and quality of the documentary evidence provided, and the confusing manner in which the taxpayer attempted to explain his claims, the Minister's determination that the claims were not proved well enough to justify a further reassessment was reasonable. Lastly, the Court found that the \$35,000 payment was in fact applied to the taxpayer's 1998 taxation year, and that the taxpayer's interest debt was therefore determined correctly.

This issue of the Legal Business Report is designed to provide information of a general nature only and is not intended to provide professional legal advice. The information contained in this Legal Business Report should not be acted upon without further consultation with professional advisers.

Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.

No part of this publication may be reproduced by any means without the prior written permission of Alpert Law Firm.

© 2017 Alpert Law Firm. All rights reserved.