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INCOME TAX APPEALS

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on the rules governing income tax appeals and administrative changes regarding notices of objection and reassessment periods.

Alpert Law Firm is experienced in providing legal services to its clients in tax dispute resolution and tax litigation, tax and estate planning matters, corporate-commercial transactions and estate administration. Howard Alpert has been certified by the Law Society as a Specialist in Estates and Trusts Law, and also as a Specialist in Corporate and Commercial Law.

A. NOTICES OF OBJECTION

Pursuant to section 165 of the Act, If a taxpayer who is an individual (other than a trust) or a graduated rate estate wishes to object to an assessment by the Minister, it is necessary to serve a Notice of Objection on the Minister before the later of (i) one year after the due date for filing the particular tax return for that taxation year, and (ii) 90 days after the date of sending of a Notice of Assessment in respect of that taxation year. For all other taxpayers, the Notice of Objection must be served on the Minister no later than 90 days after the date of sending of a Notice of Assessment.

Generally, it is recommended that the taxpayer file the Notice of Objection using the prescribed form. However, it is possible to commence an appeal simply by delivering or mailing a letter to the chief of appeals in the local district office or taxation centre summarizing the facts and reasons for the objection. While the Notice of Objection may be filed by ordinary mail, it is recommended that the taxpayer file the Notice of Objection by registered mail in order to have proof of service.

In a decision of the Tax Court of Canada, *Marilyn Wichartz v. The Queen*, (1994) DTC 1703, an application by the Minister of Revenue to dismiss the taxpayer's appeal on the ground that she had failed to file a valid Notice of Objection was dismissed by the Tax Court. In this case, the taxpayer had sent a letter to the CRA objecting to the imposition of late filing penalties and interest arrears. The Tax Court held that, although the taxpayer's letter had not been specifically addressed to the chief of appeals as required by the Act, there was no doubt that the CRA received it and therefore, it was a valid Notice of Objection.

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The CRA administers objections regarding Ontario Corporation Tax and handles appeals arising from these objections. In addition, the CRA performs integrated audits of federal and Ontario Corporation Tax for large corporations and small business corporations.

B. TAX COURT OF CANADA

The Tax Court of Canada (the "Tax Court") is the sole court with original jurisdiction over income tax appeals. In order to accommodate the increased workload, the Tax Court has increased the number of judges available to hear appeals.

In order to simplify the appeal procedure and expedite the resolution of tax disputes, the Tax Court follows two separate procedures: an informal procedure and a general procedure. Each procedure has its own set of rules.

The Tax Court also has jurisdiction in appeals under the Petroleum and Gas Revenue Tax Act, Part IV of the Employment Insurance Act (contributions area), Part I of the Canadian Pension Plan Act (contributions area), the Old Age Security Act (to the extent that the appeal involves a determination as to income), the War Veterans Allowance Act and the Civilian War-related Benefits Act (from an adjudication of the Veterans Appeal Board as to what constitutes income). In addition, appeals under the Excise Tax Act relating to the Goods and Services Tax are heard by the Tax Court.

C. NOTICE OF APPEAL

Pursuant to subsection 165(3) of the Act, on receipt of a notice of objection, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm, or vary the assessment or reassess, and shall thereupon provide the taxpayer with a notice in writing of the Minister's action.

In the event that the Minister has confirmed the assessment in whole or in part, the taxpayer must file a written Notice of Appeal with the Tax Court of Canada within 90 days of the date of sending of the Minister's Notice of Confirmation.

The Notice of Appeal must contain allegations of fact, the statutory provisions of the Act and any other relevant legislation or tax treaty, and the reasons upon which the taxpayer seeks to rely at trial.

The Minister of Revenue must file a response to the Notice of Appeal, called the Reply, within sixty days after service of the Notice of Appeal. The Minister of Revenue may apply to the Tax Court for an extension of time, or the Appellant may consent to an

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extension for filing the Reply to within a specified time after service of the Notice of Appeal. Where the Minister fails to meet this deadline, the allegations of fact contained in the appellant's written Notice of Appeal will be presumed to be true for the purpose of the appeal. All allegations of fact in the Notice of Appeal which are not denied in the Reply will be deemed to be admitted unless the Minister of Revenue pleads that he has no knowledge of the particular fact.

The taxpayer is then entitled to file an Answer to the Reply, if desired, within thirty days after service of the Reply.

D. BURDEN OF PROOF

The general rule in tax appeals places the burden of proof with respect to the facts and the law on the taxpayer to prove that the Notice of Assessment issued by the CRA is incorrect. However, when the appellant's allegations of fact are presumed to be true, the burden of proof switches to the CRA to rebut the presumed facts. In a case where the CRA is unable to rebut such presumed facts, the taxpayer may merely be required to argue the application of the law to these presumed facts.

Where, in an appeal under this Act, a penalty assessed by the Minister under section 163 or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

E. INFORMAL APPEAL PROCEDURE

I. General Provisions

A taxpayer may elect to use the informal procedure for an appeal if (a) the amount in issue is $25,000 or less, excluding interest and provincial tax; (b) in the case of determinations of losses, the losses determined by the CRA are $50,000 or less; or (c) where the only matter under appeal is the amount of the interest assessed. These threshold amounts are not indexed.

The CRA may seek an order to apply the general procedure, rather than the informal procedure, where the outcome is likely to affect other appeals and assessments and the aggregate of the amounts affected exceeds $25,000.

A taxpayer can represent himself personally or be represented by either a lawyer or an agent other than a lawyer in the informal appeal procedure.

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The rules of evidence are more flexible in the informal appeal procedure. While informal appeal decisions have no precedential value, these decisions are often referred to in judicial reasons under general appeal procedure.

Where the informal procedure is chosen, no appeal will be permitted on the decision of the Tax Court with respect to a question of fact. The decision may be reviewed by the Federal Court of Appeal on questions of law and jurisdiction only.

II. Discovery

Unlike an appeal under the general procedure, there is no mandatory exchange of documents, discovery or other procedures prior to the hearing of an appeal instituted pursuant to the informal procedure. A judgment must be rendered within 90 days of the hearing, except in exceptional circumstances, and the reasons may be in either oral or written form. The entire procedure is intended to be completed in approximately 6 months.

F. GENERAL APPEAL PROCEDURE

I. General Provisions

The general appeal procedure is available for all tax appeals and is required for tax appeals where the amount in issue, not including interest and provincial tax, is greater than $25,000, or where the income tax loss determined by the Minister is greater than $50,000.

The taxpayer must either represent himself personally or be represented by a lawyer. The taxpayer may not be represented by an agent other than a lawyer.

The rules of procedure are similar to those previously applicable to the Trial Division of the Federal Court, and strict rules of evidence apply.

II. Notice of Appeal

Pursuant to the rules, an appeal under the general procedure is commenced by filing with the Registry of the Tax Court in Ottawa or one of the Tax Court's satellite offices, a Notice of Appeal in the prescribed form, naming the taxpayer as the Appellant and Her Majesty the Queen as Respondent.

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III. Discovery

The rules under the general procedure also include a mandatory requirement for each party to provide a list of documents of which it has knowledge and that might be used in evidence. In addition, the Tax Court may direct a party to disclose all relevant documents in the possession or control of the party's subsidiary or affiliated corporation. Also, examinations for discovery may be conducted, whereby each party may question the other party on all facts relating to the appeal.

IV. Court Orders and Appeals

Where an appeal instituted under the general procedure has not been set down for hearing or otherwise disposed of within 60 days after the filing of the Reply, a status hearing may be held, at which the judge may dismiss the appeal or set time limits for the completion of any remaining steps.

Where the Tax Court allows an appeal, it may vacate or vary the assessment or it may refer the assessment back to the Minister for reconsideration and reassessment. Unlike a decision rendered under the informal procedure, the reasons, if issued under the general procedure, must be in writing.

Appeals from decisions of the Tax Court are heard in the Federal Court of Appeal.

V. Costs

Sections 147 to 152 of the *Tax Court of Canada Rules (General Procedure)* ("the Rules") provide the general rules for costs of all parties involved in proceedings in the Tax Court of Canada.

In awarding costs to or against the Crown or the taxpayer, the Court has a wide discretion and can consider the following factors:

i) the result of the proceedings;
ii) the amounts in issue;
iii) the importance of the issues;
iv) any offer of settlement made in writing;
v) the volume of work;
vi) the complexity of the issues;
vii) the conduct of the parties;

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viii) the denial, neglect or refusal of any party to admit anything that should have been admitted;
ix) whether any stage of the proceedings was vexatious or taken through negligence or mistake; and
x) any other matter relevant to the question of cost.

Schedule II, Tariff B provides a list of amounts to be awarded in respect of party and party costs. The Court has the power to fix a lump sum for costs, in excess of the sum that would have resulted from the usual application of the Tariff provided for in the Rules.

Pursuant to Practice Note No.17, effective January 18, 2010, the new subrules 147(3.1) and 147(3.2) provide for the calculation of costs, taking into account written settlement offers as compared to the outcome at trial.

Subsection 147(3.1) provides that unless otherwise ordered by the Court, where an Appellant made a written offer to settle and obtained a judgment as favourable or more favourable than the terms of the offer to settle, the Appellant is entitled to party-and-party costs to the date or service of the offer and substantial indemnity costs after that date, plus reasonable disbursements and applicable taxes. Subsection 147(3.2) provides that where a Respondent made a written offer to settle and the Appellant obtained a judgment as favourable or less favourable than the settlement terms or fails to obtain judgment, the Respondent is entitled to party-and-party costs to the date of service of the offer and substantial indemnity costs after that date, plus reasonable disbursements and applicable taxes.

Subsection 147(3.3) provides that the offer to settle: (i) must be in writing; (ii) must be served no earlier than 30 days after the close of pleadings and at least 90 days before the commencement of the hearing; (iii) cannot be withdrawn; and iv) cannot expire earlier than 30 days before the commencement of the hearing.

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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.