

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 Taxation Law, and also as a Specialist in Corporate and Commercial Law.

A. REASSESSMENT PERIOD

Where a taxpayer is a corporation which is not a Canadian-controlled private corporation at the time of original assessment, the period for issuance of a Notice of Reassessment is four years from the original assessment pursuant to subsection 152(3.1) of the Income Tax Act (the "Act"). For individual taxpayers and Canadian-controlled private corporations, the reassessment period is three years. Where a taxpayer is an individual or a graduated rate estate, the Minister of National Revenue has discretion under subsection 152(4.2) of the Act to make a reassessment or redetermination beyond the three-year reassessment period at the request of such taxpayer in order to reduce the taxpayer's taxes payable or grant a refund to the taxpayer. The taxpayer's request must be made within 10 years after the taxation year in issue.

For example, the Minister would have the discretion to reassess a return after the three-year reassessment period where (i) a qualifying taxpayer who previously filed a return discovers that a deduction or non-refundable tax credit was inadvertently not claimed; (ii) refundable tax credits such as goods and services tax credits, provincial tax credits, or child tax credits were not claimed; or (iii) there has been an overpayment of taxes by a qualifying taxpayer due to payroll deductions by an employer. In addition, the Minister is able to issue a reassessment or a redetermination beyond the normal reassessment period applicable to a taxation year where such reassessment or redetermination flows as a consequence of an assessment or an appeal in respect of a previous taxation year.

Subsection 152(4) of the Act provides that the Minister may assess or reassess the taxpayer at any time (that is, without regard to the normal reassessment period) if

the taxpayer or the person filing the return has made any misrepresentation that is attributable to neglect, carelessness or willful default, or has committed any fraud in filing the return or in supplying any information under the Act.

B. CASE LAW

1. Vine Estate v. The Queen, 2015 DTC 5063

In this Federal Court of Appeal case, the Estate of Stanley Vine (the “Estate”) appealed the Minister’s reassessment on the basis that it was made after the expiration of the normal assessment period.

Stanley Vine passed away on July 1, 2003. Immediately before his death, Stanley Vine directly held a one-half interest in the Victoria Park property, which was a rental property. Pursuant to subsection 70(5) of the Act, there was a deemed disposition of his interest in the property immediately before his death. The Estate acknowledged that the deemed disposition of this property resulted in both recaptured capital cost allowance and a capital gain. The Estate retained an accountant to prepare the final tax return for Stanley Vine. The accountant omitted the deemed disposition of the Victoria Park property in the final return. The final return was assessed on June 7, 2004. The accountant later on realized the error during the preparation of an amended return for the purpose of requesting a loss carryback. They included the capital gain and the recaptured capital cost allowance of the Victoria Park property in the amended return, which was filed on September 28, 2004.

On June 1, 2009, the final return of Stanley Vine was reassessed. In addition to other changes not in dispute, Stanley Vine’s share of the net income relating to the Victoria Park property was revised to reflect the recaptured capital cost allowance as reported in the amended return. The Estate appealed the reassessment on the basis that it was made outside of the normal assessment period.

The Federal Court of Appeal held that it is irrelevant that the Minister could have examined the amended return and discovered that the recaptured capital cost allowance was now being included. The omission in the original final return for Stanley Vine was still a misrepresentation for the purposes of subparagraph 152(4)(a)(i) of the Act.

The Federal Court of Appeal then held that the misrepresentation was attributable to the Estate’s neglect or carelessness, and the Minister was entitled to make the reassessment after the expiration of the normal assessment period pursuant

to subparagraph 152(4)(a)(i). As a careful and prudent person, the executor of the Estate should have reviewed the return and noted that the Victoria Park property was not included. If questions were raised about why the property was missing in the return, the error relating to the unreported recaptured capital cost allowance would have been found. The Estate did not exercise the required degree of care in reviewing the original final return for Stanley Vine, and its appeal was dismissed.

2. *Robertson v. The Queen, 2015 DTC 1207*

In this Tax Court of Canada case, the taxpayer exercised US-based stock options in 2006 and 2007, and failed to report the options in his tax returns of the respective years as required. The Minister justified reassessing the taxpayer beyond the normal reassessment period on the basis that the taxpayer made misrepresentations attributable to neglect, carelessness, or wilful default.

The taxpayer testified that at the time he filed the 2006 and 2007 returns, his view was that United States law applied to the options because of their country of origin and therefore, he needed to report the options in his US tax returns, but not in Canada. The taxpayer could not recall asking his accountant about the correctness of his understanding of the law.

The taxpayer was an attentive, knowledgeable, and organized president and/or director of many different Canadian, US, and offshore companies. Stock options in his name were commonplace. The Tax Court of Canada held that a prudent person in the taxpayer's situation should have at least verified the issue of the taxation of the options with his accountant or another professional advisor. The Court noted that subparagraph 152(4)(a)(i) is not punitive in its purpose, but rather remedial. Since it is not concerned with establishing culpability, innocent and honest mistakes can lead to a finding of neglect, carelessness, or willful default.

The Minister met the onus of establishing misrepresentation attributable to neglect, and the taxpayer's appeal was dismissed.

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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.

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