Everything Old is New Again – Part 2

By Charles M. Rotenberg

In the last issue of The Canadian Taxpayer, I talked about the apparent return of the CRA to the pre-Perrin Beatty days. Those were times when Revenue Canada (as it then was) was completely un-cooperative with taxpayers and their representatives, when they couldn't be trusted to honour their word, and when they acted as if they are above the law.

In this issue I explore that theme further.

2012 Tax Assessments

Of more concern than the CRA position in the Kiddie Tax assessments (discussed in the previous issue of The Canadian Taxpayer), is their position regarding 2012 tax assessments for taxpayers who participated in tax shelter arrangements. It is no secret that the CRA does not like such arrangements. Every year they issue warnings to taxpayers about the perils of participating. Last year they went farther. On October 31st, 2012, the CRA issued a press release, stating:

Starting with the 2012 tax year, the CRA will put on hold the assessment of returns for individuals where a taxpayer is claiming a credit by participating in a gifting tax shelter scheme. This will avoid the issuance of invalid refunds and discourage participation in these abusive schemes. Assessments and refunds will not proceed until the completion of the audit of the tax shelter, which may take up to two years. All gifting tax shelter schemes are audited and the CRA has not found any that comply with Canadian tax laws. A taxpayer whose return is on hold will be able to have their return assessed if they remove the claim for the gifting tax shelter receipt in question.

It is impossible to deny that many gifting arrangements are not in compliance with Canadian tax laws. However, to state that none comply is, bluntly, an outright lie. I have personally been involved in audit meetings for charities involved in gifting arrangements that continue to pass audit year after year.

This new audit position has not been well thought out. The CRA states that if a claim is made for a tax credit based upon participation in a gifting arrangement, the taxpayer's return will not be assessed until the arrangement has been audited. This raises a number of interesting issues. First, the CRA has a legal obligation to assess returns that have been filed "with all due dispatch". This is the wording of the *Income Tax Act*. It will be interesting to see if the Tax Court will consider an assessment to have been made "with all due dispatch" when the CRA has stated that it will sit on the returns until it gets around to auditing a gifting arrangement.

But it also raises a bigger issue. If i file my tax return claiming a receipt from a gifting arrangement and I still have tax amounts owing, those amounts will not be collectible if an assessment hasn't been issued. Although tax liability does not depend upon the issuance of a Notice of Assessment, and interest will accrue, the ability of CRA to take collection action is restricted under Section 225.1. Collection action cannot commence until 90 days have elapsed from the date of issuance of a Notice of Assessment. CRA may consider itself to be clever in stating that it will not assess returns that include a claim for a credit based upon a gifting

arrangement, but what will that mean in terms of the tax liabilities that it will be unable to collect during that period?

In the 2012 Budget, the Government tinkered with tax shelter reporting. But no changes were made in the income tax rules related to gifting arrangements. Although it is clear that the CRA has an overriding policy about gifting arrangements there is clearly no Government policy. If there were, with a majority government, changes would have been made.

The policy stated in the October 2012 press release was clearly and definitively set aside by the Federal Court in the *Ficek* decision, issued on May 14th, 2013. The Court examined this "New Policy" of the CRA and concluded,

The intent of the New Policy – to delay and discourage – was further reinforced in a December 4, 2011 e-mail from officials in Winnipeg that CRA was prepared to defend the "strategy behind the Prairie Region's decision to delay the assessment of [GLGI-related] returns … vigorously at all levels including any application attempting to compel the assessment of these returns".

To the extent that there may have been some basis for awaiting the audit, the decision to audit is so tainted by the real reason for the New Policy that the audit is an excuse for delay not a reason for delay. [emphasis added]

The Court went on,

Whatever the merits of CRA's concerns about the legitimacy of the GLGI donation program, that is a matter for the Tax Court.

This Court must conclude that the delay in assessing the Applicant was not truly related to examining her return and ascertaining her tax liability. It was for the purpose of discouraging participation in the GLGI program. …

CONCLUSION

The Applicant is entitled to a declaration that the Minister failed to comply with the duty to assess with all due dispatch.

One might conclude that the CRA, if they were at all interested in complying with the law, would now assess those taxpayers who filed their 2012 tax returns, including charitable receipts related to tax shelter programs. One would be wrong.

Notwithstanding the clear decision of the Federal Court that the refusal to assess has been undertaken for improper purposes and that it constitutes a failure by the Minister to assess "with all due dispatch", the CRA has continued in its refusal to issue Notices of Assessment in respect of these taxpayers. There are now Mandamus applications pending for other taxpayers to try to force the CRA to comply with the existing Federal Court ruling and with the legal obligation to assess "with all due dispatch".

Taxpayers should not have to go to Federal Court and incur the expense of that process to have the CRA comply with the law. Especially when the Federal Court has already ruled in the

matter. One must question the judgement of the Department of Justice in advising its client department, the CRA. There is a large cost for the CRA in defending such a motion. One must consider whether the Court will order a higher scale of costs against the CRA for such a blatant disregard of the Court's previous ruling.

Aside from the tax issues, the refusal to issue a notice of assessment has other implications. Business people trying to borrow money for their businesses, or taxpayers who have students as dependents where those students apply for student loans, are required by most institutions to submit a copy of their previous year's notice of assessment as part of the credit process. The CRA actions could have wide ranging adverse effects on such taxpayers. The results for some of these taxpayers could be devastating, but the CRA seems indifferent. One must question whether this could result in actions against the CRA for damages where they have clearly, improperly, withheld assessments. We are seeing more and more civil actions against the CRA for their improper and heavy handed actions toward taxpayers.

Everything old is new again. We have seen a return to the bad old, pre-Perrin Beatty, days. And, it is a Conservative majority government that is undoing the work of a previous Conservative majority government.

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