Taxpayer Relief Provisions

Author : admin

Taxpayer Relief Provisions – Waiver and/or Cancellation of Interest and/or Penalties

1. General

Taxpayer relief provisions are generally those provisions and amendments that were released by the Minister of National Revenue on 24 May 1991 (“Fairness Package”). These provisions deal with a number of administrative aspects of the ITA and give the Minister discretionary power to act in ways that benefit the taxpayer where because of misfortune or other circumstances beyond the taxpayer’s control the taxpayer was unable to comply with the ITA requirements.

Relief is available for individuals, employers, payers, corporations, partnerships, trusts, estates, and organizations. Note that not all types of relief is available or all taxpayers. The provisions include:

- Subsection 220(3.1) – discretion to waive or cancel interest and penalties ;
- Subsection 152(4.2) and (4.3) – discretion to issue assessments and refunds for statute-barred years;
- Paragraph 164(1.5)(a) – Discretion to issue a refund to an individual or testamentary trust for returns filed outside the normal reassessment period;
- Sections 166.1 and 166.2 – discretion to grant extensions of time to object; and
- Subsection 220(3.2) to (3.7) – discretion to extend the time for making an election, permit an amendment, or permit a revocation.

The CRA provides guidelines in Information Circular 07-1 “Taxpayer Relief Provisions”, and revoked Information Circulars 92-1, 92-2, and 92-3. However, as with any administrative guidelines, IC 07-1 is not legislation and cannot limit the Minister’s decision-making authority or otherwise fetter the discretion granted by legislation (see *Guimont v MNR*, 72 TR 192

(FCTD)).

Back To Top

2. Waivers of Interest and Penalties

The taxpayer relief provisions often refer to those provisions that are located in subsection 220(3.1) of the *Income Tax Act*. This provision gives the Minister the discretion to waive or cancel all or any portion of any interest or penalties otherwise payable by a taxpayer or a partnership. A *waiver* refers to relief granted before penalties and interest that would otherwise be payable are assessed or charged, while a *cancellation* refers to the relief granted after these amounts were assessed or charged.

Before this provision was added, a taxpayer who sought relief was limited to either engaging the appeals process or seeking a remission order under section 23 of the Financial Administration Act, RSC 1985 c F-11.

Back To Top

2.1 Time Limits

s application for relief. The result of this limitation is that interest and penalties that apply to years preceding this 10 year period are not eligible for relief (see *Montgomery v MNR* (1994), 77 FTR 223 (FCTD), aff'd [1995] 1 CTC 196 (FCA)).

The CRA used to, and sometimes still does, take the position that this means that an application for relief under subsection 220(3.1) has to be made within 10 years after the end of the taxation period that gave rise to the tax to which the interest and penalties apply. However, the Federal Court of Appeal in *Bozzer v MNR*, 2010 FC 139, rev'd 2011 FCA 186 held that the MNR has the discretion to grant relief for interest (not penalties, as these generally apply in the year the tax arose) that accrued during the 10 years before the year in which the relief is requested irrespective of the year in which the tax debt arose. This means that arrears interest that relates to interest and penalties more than 10 years old is eligible for relief, but only for that portion accruing during the last 10 years before the application of relief was made.

NOTE that this may lead to potential problems when doing a Voluntary Disclosure that relates to taxation years more than 10 years old.

In seeing relief for taxation years that involve years that are within the 10 year period for subsections 220(3.1) (and 152(4.2)), as well as years that are before, a combination of the fairness provisions and remission orders may be used.

Back To Top

2.2 Initiating an Application under the Taxpayer Relief Provisions

The taxpayer seeking relief must send a request for waiver or cancellation of interest and penalties to the taxpayer's Tax Services Office. The application for relief must be made in writing and addressed: (1) in case of relief from penalties and interest, to the Chief of Collections; (2) in case of issues related to source deductions or directors' liability, to the Chief of Source Deductions or the Chief of Collections; and (3) in case of requests for reassessment beyond the normal reassessment period, to Chief of Appeals. The letter must outline all the applicable facts and the reasons why it is "fair" for the Minister to grant the relief requested to the taxpayer. Alternatively, the CRA Form RC4288 can be used.

The application must include all circumstances that they wish to rely on in seeking relief in the initial application. A full accounting of the facts and circumstances that warrant relief will allow the CRA to properly assess whether or not to grant the requested relief. The CRA recommends providing the following information (where applicable):

(a) the name, address, telephone number, social insurance number, account number, partnership number, trust account number, and business number or any other identification tax number assigned by the CRA to the taxpayer;

(b) the tax year(s) or fiscal period(s) involved;

(c) the facts and reasons supporting that the interest or penalties were either mainly caused by factors beyond the taxpayer's control, or were as a result of actions of the CRA;

(d) an explanation of how the circumstances affected the taxpayer's ability in meeting their tax obligation;

(e) the facts and reasons supporting the taxpayer's inability to pay the interest or penalties levied, or to be levied;

(f) any relevant documentation such as death certificates, doctor's statements, or insurance statements to support the facts and reasons;

(g) in cases involving financial hardship (inability to pay), a meaningful payment arrangement which covers at least the tax and the penalty part, if applicable, and full

financial disclosure including a statement of income and expenses, as well as a statement of assets and liabilities;

(h) supporting details of incorrect information given by the CRA in the form of written answers, published information, or other objective evidence;

(i) where incorrect information given by the CRA is of a oral nature, the taxpayer should give all possible details they have documented, such as date, time, name of the CRA official spoken to, and details of the conversation; and

(j) a complete history of events including what measures were taken (e.g., payments and payment arrangements) and when they were taken to resolve the non-compliance.

Once received, a Fairness Committee within the Tax Services Office where the taxpayer's returns are filed will consider the application for relief. Recently there have been attempts to centralize all determinations to a particular Tax Services Office.

NOTE that for relief from provincial interest and penalties, a separate application to Alberta and Quebec must be made. These two provinces do not automatically grant relief merely because federal relief was granted by the CRA.

Back To Top

2.3 Circumstances Where Relief is Granted

The *Income Tax Act*, subsection 220(3.1) does not provide or any guidance as to how the discretion under this provision is to be exercised. The explanatory notes accompanying subsection 220(3.1) provide an indication of when it might be appropriate for the Minister to exercise this discretion, and are dealt with in Part II of Information Circular 07-1.

The CRA has identified three general categories of circumstances where taxpayers may seek relief pursuant to subsection 220(3.1). However, relief is not limited to these circumstances and the Minister has the power to grant relief in circumstances that fall outside the enumerated ones. The three identified circumstances are:

1. **Extraordinary circumstances** beyond the taxpayer's control. Examples include natural or man-made disasters, civil disturbances, illness, accidents, postal strikes, delays in court proceedings (see *Cole v MNR*, 2005 FC 1445), emotional or mental distress that

prevented the taxpayer's compliance with the ITA;
2. **Errors or Failings of the CRA**. Examples include errors in material provided to the public, processing delays and errors, provision of incorrect advice, errors or delays in providing information to the taxpayer; and
3. **Taxpayer's inability to pay** the amount owing **or hardship** related to the debt owed to the CRA. Examples include when collection was suspended because of inability to pay, when substantial interest had accrued or would accrue, when extended payment arrangements may be needed, when payment of accumulated interest would cause a prolonged inability to provide for basic necessities (food, medical help, transportation, shelter, etc), or when business financial difficulties would cause enforcement of penalties and interest to potentially result in jeopardy to the continuity of operations, jobs of employees, or the welfare of the community.

The Fairness Committee considers a number of factors in determining whether or not to grant relief to the taxpayer. These considerations include:

- The taxpayer's history of compliance with tax obligations
- Whether the interest and penalties are in regards to a balance the taxpayer has knowingly allowed to exist;
- Whether the taxpayer has exercised reasonable care or whether the taxpayer was negligent;
- The diligence or speed with which any delay or omission by the taxpayer, giving rise to the interest or penalties, was remedied by the taxpayer

When the interest and penalties that the taxpayer seeks relief from are due to the actions of a third person (such as a tax preparer or adviser), the CRA has stated that relief may be granted in exceptional circumstances. Normally, however, the CRA is of the view that the third party is liable to the Taxpayer for the errors and the expense associated with them.

Back To Top

3. Other Relief Provisions

3.1 Discretion to Accept Late Elections and to Amended or Revoked Elections

There are many elections that a taxpayer can make. Most of these elections don't provide for a mechanism where the election can be made after the expiry of the time provided for making the election or providing for the cancellation or amendment of the election once filed. Subsection 220(3.2) of the ITA gives the Minister discretion to provide relief for certain elections. The list of prescribed elections for which relief can be granted is found in Section 600 of the Income Tax Regulations, CRC c 945.

The authority to grant relief for late-filed elections, to amend filed elections, or to revoke elections is limited to the 10 taxation years preceding the tax year in which the application for relief is made.

To seek relief, you must file with the Minister, in writing, a late, amended, or revoked election that is correct in law based on the law in place at the relevant time (the relevant taxation year to which the election applies). The election must be made in the proper form required by law. Instead of a letter, the taxpayer can use Form FC4288. The following information should be included:

(a) the name, address, telephone number, social insurance number, partnership number, trust account number, and business number or any other identification tax number assigned by the CRA to the taxpayer;

(b) the tax year(s) or fiscal period(s) involved;

(c) the dates and details of the transactions;

(d) the date and details of the original election, including an explanation of why the taxpayer is asking to have an election amended or revoked;

(e) details of a late election, and an explanation of why it is late;

(f) a description of the income tax implications of the acceptance or refusal of the request for all the parties involved;

(g) a schedule indicating any changes to tax account balances resulting from the acceptance of the request; and

(h) where the request involved more than one taxpayer, an agreement signed by all the parties to the changes reuested.

If accepted by the CRA, the election is deemed to have been made at the time it was required to have been made. The CRA may accept an application in these circumstances:

(a) There have been tax consequences not intended by the taxpayer, and there is evidence that the taxpayer took reasonable steps to comply with the law. This could include, for example, the situation where the taxpayer obtained a bona fide valuation for a property, but after the CRA's review the valuation was found to be not correct.

(b) The request arises from circumstances that were beyond the taxpayer's control. Such extraordinary circumstances could include natural or man-made disasters such as flood or fire; civil disturbances or disruptions in services, such as a postal strike; a

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

(c) It is evident that the taxpayer acted on incorrect information given by the CRA. This could include incorrect written replies to queries and errors in CRA publications.

(d) The request results from what is a mechanical error. This could include using the net book value amount when obviously the taxpayer intended to use the undepreciated capital cost or using an incorrect cost.

(e) The later accounting of the transactions by all parties is as if the election had been made, or had been made in a particular manner.

(f) The taxpayer can demonstrate that they were not aware of the election provision, even though they took a reasonable amount of care to comply with the law, and took remedial action as quickly as possible.

The CRA has stated that it won't accept a request in the following circumstances:

(a) It is reasonable to conclude that the taxpayer made the request for retroactive tax planning purposes. This could include taking advantage of changes to the law enacted after the due date of the election.

(b) Adequate records do not exist.

(c) It is reasonable to conclude that the taxpayer had to make the request because he or she was negligent or careless in complying with the law.

The taxpayer is liable for a penalty pursuant to subsection 220(3.5) for late-filed, amended, or revoked elections. The penalty is the lesser of (1) $8,000 or (2) $100 for each complete month from the original due date until the date the application was made. The CRA won't accept applications unless the penalty is paid along with the request.

NOTE that the assessments and reassessment that relate to and result from such a request to late-file, amend or cancel an election are subject to the interest charged on balances owing. It may be wise, where appropriate, to make an application for interest relief at the same time.

Back To Top

3.2 Discretion to Issue Assessments and Refunds for Statute-Barred Years

The ITA sets a three-year limitation period, from the end of a taxation year, for an individual (other than a trust) and a testamentary trust to file an income tax return so as to claim a tax refund. The ITA also provides for a three-year limitation period from the original Notice of Assessment to ask for an adjustment to an assessment issued for a previous taxation year. Subsections 152(4.2) and 164(1.5)(a) of the ITA allow the Minister to reassess taxation years that are statute barred to allow for deductions or credits.

The request must be made in writing. Instead of a letter, the taxpayer can use Form FC4288. The request should contain the documentation (eg. Official receipts, copies of information slips, detailed calculations, proof of payments, etc) and explanations supporting the request, consisting of the following information:

> (a) the name, address, telephone number, social insurance number, and trust account number or any other identification tax number assigned by the CRA to the taxpayer;
>
> (b) the tax year(s) involved;
>
> (c) all relevant documents to support any claims being made; and
>
> (d) an explanation for the adjustment they are requesting.

The Minister's discretion to reassess statute barred years so as to apply deductions or credits pursuant to subsection 152(4.2) is limited to 10 years. Thus, on application by the taxpayer the Minister may reassess within 10 years of the taxation year that the taxpayer wants to have reassessed.

The CRA may accept the application and issue a refund or reduce an amount otherwise owed where it is satisfied that such a refund or reduction would have been made had the taxpayer filed the return or request on time. The CRA won't accept a request to adjust statute-barred years where it cannot verify the claim or where the adjustment would result in an increase of taxes, interest, or penalties for other individuals that are statute-barred and cannot be reassessed. The CRA also won't process a request to claim permissive deductions so as to result in decrease of tax (for example CCA claims), or as a result of a court decision affecting another taxpayer (see Information Circular 75-7R3).

Back To Top

4. Challenging the Decision of the Minister

A negative discretionary decision can be challenged in successive steps. First internally and then through the courts

Back To Top

4.1 Internal Appeal to the Director

Where the decision of the Fairness Committee is to be challenged, the appeal of the decision is first made to the Director of the relevant Tax Services Office. This is considered a Second Administrative Review and is conducted by CRA officers not involved in the first decision. Practically, it is important to have a copy of the Fairness Committee's report before making representations on appeal (otherwise, you don't know what representations to make).

NOTE that where the Minister has either waived or canceled penalties pursuant to subsection 220(3.2) or issued a Notice of Reassessment beyond the normal reassessment period pursuant to subsection 152(4.2), a taxpayer cannot file a notice of objection to the assessment or reassessment pursuant to subsection 165(1.2). However, where the Minister accepts an application pursuant to subsection 220(3.2) or an assessment or reassessment under subsection 220(3.4) for a late-filed, amended, or revoked election, the taxpayer can file a Notice of Object pursuant to subsection 165(1.1) to challenge matters giving rise to the assessment or reassessment.

Back To Top

4.2 Judicial Review of Minister's Decision

If the Minister declines to exercise discretion to provide a taxpayer with relief, and the internal appeal is not successful, the Minister's decision can be judicially reviewed by filing with the Federal Court. Judicial review applications to the Federal Court must be made within the time limits provided in the Federal Courts Act, RSC 1985 c F-7. The filing of a Notice of Application must use Form 301.

The courts have held that the Minister, in exercising discretion granted by subsection 220(3.1), owes the taxpayer a common law duty of procedural fairness (see Floyd Estate v MNR, [1993] 2 CTC 322 (FCTD); Towers v The Queen, 94 DTC 6118 (FCTD); Catahan v MNR, 95 DTC 5496 (FCTD)). Procedural justice includes the ability to make representations and to know the factors considered in making the decision, though this does not involve the right to make oral presentations (see Barron v MNR, 96 DTC 6262 (FCTD), rev'd 97 DTC 5121 (FCA)).

Courts will review the discretionary decisions of the Minister on the standard of reasonableness on questions of fact, mixed law and fact, discretion, and policy and will review on the standard of correctness on questions of procedural fairness or questions of law (outside of the law the interpretation of which the tribunal has particular expertise in) (see *Dunsmuir v New Bunswick*, 2008 SCC 9; *Lanno v The Queen,* 2005 FCA 153; *334156 Alberta Ltd v The Queen*, 2008 FCA 228; *Poon v The Queen*, 2009 FC 432; *Spence v The Queen*, 2010 FC 52; *Quastel v The Queen*, 2011 FC 143). The Federal Court of Appeal has stated in *Telfer v Canada (Revenue Agency)*, 2009 FCA 23, leave to appeal to SCC refused:

> [25] When reviewing for unreasonableness, a court must examine the decision-making

process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision itself falls "within a range of possible acceptable outcomes which are defensible in respect of the facts and the law".

However, the decision by the Minister remains a discretionary one (see Orsini v R, 112 FTR 289 (FCTD)). The Minister need not arrive at any particular decision, but is only required to consider all of the relevant circumstances and exercise the discretion reasonably. As with any administrative discretion, the discretion cannot be made arbitrarily or in bad faith (see McNabb Family Trust v The Queen, 115 FTR 219 (FCTD); Curzon v MNR, 119 FTR 301(FCTD); Young v The Queen, 98 DTC 6028 (FCTD); Protech Construction Ltd v The Queen, 98 DTC 6273 (FCTD); *Netupsky v R*, 2003 FCT 578(FCTD)). The Minister's decision stands if no relevant facts were ignored, no irrelevant facts were considered, the proper factors were considered, improper factors were not considered, the decision was not made in bad faith, and the decision is not clearly contrary to law (see *Slau Ltd v Canada (National Revenue),* 2008 FC 1142, rev'd 2009 FCA 270; Bilida v MNR (1996), 97 DTC 5041 (FCTD); *Grant v The Queen*, 99 DTC 5146 (FCTD); *Miller v Canada (Customs and Revenue Agency)*, 2004 FC 46; *Hillier v Canada (AG)*, 2001 FCA 197; *Robertson v MNR*, 2003 FCT 16; *Simmonds v Canada (Minister of National Revenue)*, 2006 FC 130).

In reviewing a decision, the Court must look at the decision made given the information that was before the Minister. Additional evidence and representations not before the Minister cannot be considered by the Court (see *Formosi v Canada Revenue Agency*, 2010 FC 326). The Courts won't second-guess the Minister under normal circumstances (Housser v The Queen, [1994] 2 CTC 2233 (TCC); *McLean v Canada (Revenue Agency)*, 2007 FC 1072; *MacCloy v Canada Revenue Agency*, 2011 FC 40; *Canwest Communications Corporation v Canada (AG)*, 2010 FC 897). Even when allowing a judicial review and granting relief, the Court cannot mandate a specific result as the decision is still within the Minister's discretion (*Slau Ltd v The Queen*, 2009 FCA 270).

Back To Top

5. Remission Orders

The discretion to waive or cancel penalties under subsection 220(3.1) applies only to taxation years ending after and including 1985 (see *Montgomery v The Queen*, 95 DTC 5032 (FCA)). For relief in taxation years 1980 to 1984, recourse to remission orders must be made. Remission orders are only available for individuals and testamentary trusts.

A remission order under section 23 of the Financial Administration Act is made to a Cabinet Minister of the Federal Government (usually the Minister of National Revenue *via* the Director of the relevant Tax Services Office). If the Minister approves the application, s/he will make a recommendation to the Governor in Council. However, remission orders are no easy and are

time-consuming. The benefit offered by remission orders is that it can apply to taxes due as well as to interest and penalties. Therefore, where relief from taxation is sought, a remission order is the only alternative to the objection and appeal procedure.

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

Back To Top OR Home

medianet_width = "160"; medianet_height = "90"; medianet_crid = "749795932"; medianet_versionId = "111299"; (function() { var isSSL = 'https:' == document.location.protocol; var mnSrc = (isSSL ? 'https:' : 'http:') + '//contextual.media.net/nmedianet.js?cid=8CUW8XQ2I' + (isSSL ? '&https=1' : ''); document.write(''); })();