

# Voluntary Disclosure

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## Voluntary Disclosure to the CRA

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### 1. Introduction

The Canada Revenue Agency (“CRA”) has a “Voluntary Disclosure Program” (“VDP”) designed to encourage compliance with the ITA. It was first administered by the CRA’s Appeals Branch, but since April 1, 2006, the VDP has been administered by the Enforcement and Disclosure Directorate. The disclosure must be made to the Assistant Director, Enforcement, and must be sent to the appropriate Tax Services Office.

This program relies on the administrative policy not to impose criminal or civil penalties on a taxpayer who voluntarily discloses incorrect filings and other failures to comply with the ITA. Benefits of voluntary disclosure include:

- Avoiding Criminal penalties (not specifically mentioned in the statutory authority)
- Avoiding civil penalties
- Receiving partial relief from interest (in regards to the taxation years preceding the 3 most recent years for which returns ought to have been filed)

There is a general limitation that relief of interest and penalties is only available for the past 10 taxation years. If the voluntary disclosure relates to years that fall outside of this limitation period, then relief from interest and penalties is not administratively available.

The CRA’s policy is contained in [Information Circular 00-1R3](#), and the legislative authority is found in subsection 220(3.1) of the ITA. For a taxpayer to be eligible under the VDP, the disclosure:

1. Must be voluntary;
2. Must be complete;

3. Must involve the application of a penalty or the potential application of a penalty; and
4. Must include information that is at least one year past due OR must correct a previously filed return.

The CRA has taken the position that the relief under the VDP is not available under certain circumstances, including:

- Where the income tax return does not contain tax owing or where refunds are expected
- Where the disclosure involved an election
- Where the disclosure involved an advance pricing arrangement (see Information Circular [IC94-4](#))
- Where the disclosure involves rollover or other tax-deferral elections or transactions
- Where the disclosure related to the return of a taxpayer in the year of bankruptcy (bankruptcy returns)
- Where the application is an attempt at retroactive tax planning

Generally, the VDP is available on a one-time basis for each taxpayer. A second VDP by the same taxpayer may be considered by the CRA if the circumstances are beyond the taxpayer's control. A taxpayer making a second VDP application is required to do so on a named basis, and is required to state that the taxpayer has previously made a VDP application.

Note that if relief is not available under the VDP, relief may still be available under the Taxpayer Relief provisions (see Information Circular [IC07-1](#) and [Memorandum 16.3](#)).

## **2. Details**

This section covers the details of the VDP and its requirements. A voluntary disclosure can be made by a natural person, a partnership, a corporation or a trust, and can be made by resident or non-resident persons. A taxpayer can make a disclosure itself, or can ask an authorized representative to make the disclosure on the taxpayer's behalf (need a consent [Form T1013](#) for individual taxpayer; [Form RC59](#) for corporate taxpayer; and [Form CPT139](#) for Canada Pension Plan or Employment Insurance Disclosures).

Also note that given the discretionary nature of the practice and the handling of cases by three different offices, local practices may differ from what is provided here.

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### **2.1. Disclosure Must be Voluntary**

To be eligible for the VDP, the disclosure must be voluntary. Disclosure won't be considered voluntary if the information is likely to have been uncovered in the following circumstances:

- The taxpayer was aware of an audit, an investigation, or some other enforcement action taken by the CRA
- The disclosure was a result of the CRA taking enforcement action with regard to an

associated or related person

- Any other agency or body has begun investigation or enforcement with respect to the information being disclosed

The policy behind this requirement is that no relief ought to be granted where the taxpayer only comes clean because the taxpayer was going to be caught and the disclosed information would have been discovered in any event. See for example [L'Heureux v Canada \(Attorney General\), 2006 FC 1180](#); [Robinson v Canada, 2009 FC 795](#); [Livaditis v Canada \(Revenue Agency\), 2010 FC 950](#); [Worsfold v Canada \(National Revenue\), 2012 FC 644](#); [Poon v Canada, 2009 FC 432](#); [Charky v Canada \(Attorney General\), 2010 FC 1327](#).

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### **2.1.1. What counts as enforcement action that makes a disclosure ineligible for the VDP?**

Enforcement action is not limited to audits and investigations, but also includes requests for information, demands, and/or requirements relating to a return, installments, any source deductions, as well as any contact with CRA staff that relates to either non-compliance, an audit, or an investigation. It doesn't matter if the audit or investigation relates to the actions taken by another administrative agency such as a securities commission, professional organization, or the police – so long as the investigation was likely to turn up the information disclosed and the taxpayer was aware of the audit or investigation the policy requirement for allowing entry into the VDP is not met. See [Bontje v R, 2011 FC 165](#) , aff'd [2012 FCA 53](#) .

That said, audit or investigation action that is in relation to an entirely unrelated matter of the same taxpayer will not disqualify the taxpayer from accessing the VDP. For large corporations, where the audit protocol is one that falls outside the disclosed material, the VDP program is available for the disclosure outside the audit protocol. However, where the enforcement action is sufficient to invalidate a VDP application in one year, the action is seen by CRA as making all tax years ineligible or the VDP (note that courts have required that the enforcement action must have been likely to have uncovered the information disclosed for the disclosure to be considered not voluntary).

The question is whether the CRA either has the information that the disclosure relates to in its possession or is likely to have the information in its possession at the end of the enforcement action in question (see [Amour International Mines d'Or Ltee v Canada \(Attorney General\), 2010 FC 1070](#)).

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### **2.1.2. What counts as complete disclosure?**

To be considered complete disclosure, the disclosure has to include the facts and documents for all the previously inaccurate or incomplete years, must include all previously unreported information, and must extend this to all consequential taxes or related taxes affected (i.e

GST/HST). Thus, the taxpayer is required to provide the CRA with full, accurate, and complete facts and documents for all of taxation years where there is or was previously incomplete, unreported, or inaccurate information relating to all tax accounts with which the taxpayer is associated. Minor errors and omissions may not invalidate the VDP application.

To be complete disclosure, the taxpayer must also cooperate with any and all further requests by the CRA so as to allow the CRA to verify the material in the disclosure within 30 days of the request being sent to the taxpayer.

The type of information that must be submitted include, but is not limited to:

- Unreported or under-reported personal or business income from any source and from any place
- Unreported source deduction – both failure to make deductions and deductions not remitted
- Unreported withholding taxes
- Un-filed or late-filed income tax returns (T1, T2, T3, etc)
- Excessive or unwarranted expense claims, income deductions, or credits
- Unfiled informational returns
- GST/HST omissions, Input Tax Credit over-claims, or wash transactions

If a later audit or other source of information shows that the disclosure was not full and complete, any previously granted reprieve under the VDP would be invalidated, exposing the taxpayer to penalties, interest on penalties, taxes owing, interest on taxes owing, civil and criminal sanctions – in relation to the newly uncovered matters and the previously disclosed matters.

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### **2.1.3. A Penalty would have or may apply**

To meet this requirement, any type of penalty qualifies, including gross negligence penalties, late filing penalties, late remittance penalties, and so on. The purpose of this requirement is to limit access to the VDP to taxpayers who are NOT looking for technical or substantive corrections that are properly handled through the normal process for corrections (remembering that there is no obligation on the CRA to accept an amended return).

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### **2.1.4. The disclosure involved information that is at least one year late**

The disclosure can involve information that is less than a year late so long as the disclosure also includes information that is more than a year late. This criterion aims at preventing late filing taxpayers from avoiding late filing penalties on their filings. Note that Quebec allows for voluntary disclosure where the information is less than a year old in certain circumstances.

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## 2.2. Ways of Making Disclosure

There are two general ways in which one can make a disclosure as part of the VDP: (1) a named disclosure; and (2) an un-named or anonymous disclosure.

The disclosure must be in writing and must:

- Identify the taxpayer (if a named disclosure) – note that where an un-named disclosure is made, the taxpayer has 90 days after the filing of the disclosure during which the taxpayer's identity need not be disclosed while discussions are ongoing with the CRA.
- Provide the details of the disclosure – see guidance in paragraph 44 of [IC 00-1R3](#)

Whether a named or un-named disclosure is made, the CRA prefers that the appropriate form ([Form RC199](#)) be used. Not using the CRA form does not disqualify the taxpayer from the VDP. **NOTE** that sometimes CRA auditors may insist that the CRA form be used. However, even where the ITA requires a prescribed form to be used, Section 32 of the [Interpretation Act](#) ensures that so long as the substance of the form is provided in any format, the application is not invalid on the basis that the form was not used (i.e. a letter with the substantive information is sufficient). For a FCA decision confirming the application of section 32 of the *Interpretation Act*, see *Mitchell v The Queen*, [2002 FCA 407](#).

An un-named disclosure only keeps the identity of the taxpayer secret for a limited period while discussions with the CRA are ongoing. The purpose of making an un-named disclosure is getting greater certainty about the likely relief available. If a taxpayer making an un-named disclosure wants to continue with the VPD, the taxpayer has to disclose his/her/its identity within 90 days of the original filing of the disclosure. Any discussion before the name of the taxpayer is disclosed is considered to be informal and non-binding.

After the information is provided, the CRA is going to make a decision about whether or not the disclosure is valid.

The question of whether legal and accounting fees involved in making the voluntary disclosure are tax-deductible or not is shaky. It is generally assumed that such fees are tax-deductible, because taxpayers earning business or property income can generally deduct the fees associated with preparing financial statements and tax returns, as well as accounting and legal fees incurred to deal with the CRA in the audit stage (see [Interpretation Bulletin IT-99R5](#)). However, the CRA has taken several positions that call this into question (see CRA Document Number 2010-037408117, 9 September 2010; and CRA Document Number 2012-0434071E5, 6 February 2012).

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(isSSL ? '&https=1' : ''); document.write(""); })();
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### 2.3. Relief under the VDP

The VDP can offer relief from criminal penalties, civil penalties, and interest (partial). The ITA does not have a specific provision dealing with voluntary disclosures. However, the ITA contains subsection 230(3.1) which grants the CRA the discretionary power to cancel and reduce interest and penalties. Since 2004, the ability to grant discretionary relief under 230(3.1) is subject to a 10-year limitation period. Thus, for VDP applications made on or after January 1, 2005, relief is limited to any taxation year that ended within the previous 10 years before the calendar year in which the taxpayer files the VDP application (for some other acts, the 10 year limitation period may apply after a different date).

Note that the 10 year limitation is hard to reconcile with other limitation periods in the ITA (see s 152(3.1) – 3 or 4 year limitation of normal reassessment period; 152(4)(a) unlimited reassessment period; s 203 – 6 year retention of records), and may result in abuse of the VDP or in action that makes it less effective than it could otherwise be. Also, the 6 year document retention period may make it difficult for the CRA to assess further back, as do the limits imposed by the normal reassessment period (and conditions for assessing beyond this period).

Relief under the VDP is entirely discretionary. The taxpayer has no right to object or appeal from a decision denying relief. However, in addition to the usual review of discretionary power by the Minister, there may be some (most likely procedural only) relief on the basis of the Administrative Law principle of Legitimate Expectations or the common law principles of Estoppel or Abuse of Power. This relief is accessible through a Judicial Review application at the Federal Court of Canada under Section 18.1 of the [Federal Courts Act, RSC 1985, C F-7](#) (See for example [McCracken v Canada, 2009 FC 1189](#) (FCTD)).

For example, where the taxpayer makes disclosure to his/her/its detriment, and did so relying on the CRA's assurances in its public statements and policy as to what would or would not be done, the CRA can be estopped from later denying the taxpayer the benefit of the VDP (see [Karia v MNR, 2005 FC 639](#)).

Alternate routes of disputing the results of a VDP application include a second level review with the CRA (not available unless the taxpayer has provided all information requested by the CRA), or a Notice of Objection to an Assessment or Reassessment.

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### **3. Further sources of information**

The Canada Revenue Agency at <http://www.cra-arc.gc.ca/gncy/nvstgtns/vdp-eng.html>

**NOTICE: The addresses and phone numbers may have changed. Please contact the CRA or look at the CRA website to ensure that addresses are still accurate and appropriate.**

If mailing your voluntary disclosure:

**If you are a resident of, or your principal place of business (for corporations) is, the Atlantic provinces, Quebec, Ontario, Manitoba, Saskatchewan or Alberta (the Prairie Region), Nunavut or the Northwest Territories, please send your disclosure submissions to:**

The Voluntary Disclosures Program  
Shawinigan-Sud Tax Centre  
Post Office Box 3000, Station Bureau-chef  
Shawinigan, QC G9N 7S6  
Fax:1-888-452-8994

**If you are a resident of, or your principal place of business (for corporations) is, British Columbia (the Pacific Region), or Yukon please send your disclosure submissions to:**

The Voluntary Disclosures Program  
Surrey Tax Centre  
9755 King George Boulevard  
Surrey, BC V3T 5E1  
Fax:604-951-5691

**If you're a resident of, or your principal place of business (for corporations) is, Manitoba or Saskatchewan, please send your disclosure submissions to:**

*The Voluntary Disclosures Program*

Winnipeg TC

66 Stapon Road

Winnipeg, MB R3C 3M2

Fax: 204-984-4141

After you receive a letter and have been assigned a VPD number, you can call the following numbers for more information:

- Resident Businesses: 1-800-959-5525
- Resident Individuals: 1-800-959-8281

### **International and Non-resident inquiries**

#### **Calls from anywhere in Canada and the United States**

- Individuals 1-855-284-5942
- Non-resident corporations 1-855-284-5944
- Non-resident trusts 1-855-284-5942
- Part XIII tax and Non-resident withholding 1-855-284-5946

#### **Calls from outside Canada and the United States (collect calls accepted)**

- Individuals 1-613-940-8495
- Non-resident corporations 1-613-940-8497
- Non-resident trusts 1-613-940-8495

- Part XIII tax and Non-resident withholding 1-613-940-8499

### **Fax numbers**

- Individuals 1-613-941-2505
- Non-resident corporations & trusts 1-613-952-3845
- Part XIII tax and Non-resident withholding 1-613-941-6905

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

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