
THE TAX DISPUTES AND LITIGATION REVIEW

THIRD EDITION

EDITOR
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LAW BUSINESS RESEARCH

THE TAX DISPUTES AND LITIGATION REVIEW

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EDITOR'S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the third edition, we have continued to concentrate on the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

It is noticeable in this third edition that the past year has seen a general increase in litigation as tax authorities in a number of jurisdictions take a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal. A further announcement has just been made to introduce a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax. These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing

important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are members, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Alice McDonald in the editing and compilation of this book.

Simon Whitehead

Joseph Hage Aaronson LLP

London

February 2015

Chapter 7

CANADA

*Jacques Bernier and Mark Tonkovich*¹

I INTRODUCTION

Taxation in Canada falls within both federal and provincial jurisdiction. While each province enjoys the exclusive power to raise revenue for provincial purposes by imposing direct taxes within its borders, Canada's Constitution enshrines the Canadian parliament's broader authority to impose any system of taxation.² This structure gives rise to a complex web of laws, including multiple regimes for personal and corporate income taxes, sales and commodity taxes, excise taxes, and property and estate taxes. The federal Income Tax Act (the Act)³ stands against this background both as the leading paradigm for the resolution of civil tax disputes and as the primary source of tax jurisprudence.⁴

Federally, the Minister of National Revenue is responsible for administering and enforcing the Act. The Minister's powers are normally exercised through officials of the Canada Revenue Agency (CRA). The CRA also administers and collects almost all provincial personal and corporate income taxes under federal-provincial tax collection

1 Jacques Bernier is a partner and Mark Tonkovich is an associate at Baker & McKenzie LLP.

2 Apart from one coming within a province's exclusive jurisdiction over direct taxes in the province (see Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3, Sections 91(3), 92(2)).

3 R.S.C. 1985 (5th Supp.), c. 1. Unless otherwise specified, all references to statutory provisions in this chapter, including references to particular sections or parts thereof, are to the Act.

4 Among other things, the Act contains federal tax rules relating to the income of individuals, corporations, trusts, partnerships, and other entities and organisations, both those resident in Canada (in which case income tax is generally imposed on worldwide income) and non-resident (in which case income tax is generally imposed on income that is considered sufficiently connected to Canada).

agreements.⁵ Most of the provincial tax regimes parallel or expressly incorporate large portions of federal tax laws. These include the Act's systems for taxpayer self-reporting, the making of formal tax assessments, and sophisticated structures for administrative objections and judicial appeals. Despite these formal structures, taxpayers are often able to resolve disputes through less formal negotiations with the CRA in the course of tax audits or through pre-emptive measures taken before the commencement of an official audit. Although the majority of tax disputes are resolved at these earlier stages, traditional tax litigation remains prevalent in Canada and many tax disputes must ultimately be decided in court.

When planning for potential litigation, taxpayers must weigh the benefits of the court process against its inherent uncertainties and the investment of time and resources required to mount a proper judicial appeal. Current trends suggest that growth areas for civil tax litigation in Canada include inter-jurisdictional and domestic anti-avoidance matters (for both businesses and individuals), transfer pricing issues and the classification of novel types of receipts or deductions (such as the tax treatment of hybrid financing arrangements). These areas tend to involve unsettled legal questions and fact-intensive scenarios with greater potential litigation gains than those with developed bodies of jurisprudence.

Compared with civil tax disputes, criminal tax litigation in Canada is quite rare. Criminal tax prosecutions arise most often in relation to tax evasion, fraudulent benefit claims, deceitful misrepresentation or the failure to provide information or returns to the CRA. Criminal tax offences incorporate some concept of intentional wrongdoing (i.e., both an *actus reus* and a *mens rea*). They are punishable by significant penalties (which may include fines and imprisonment) designed to redress the wrongs done to society at large rather than to facilitate the raising of public revenues. Short of meeting the criminal threshold, Canadian tax authorities may also apply a wide assortment of regulatory or civil penalties intended primarily to curtail improper taxpayer conduct.

II COMMENCING DISPUTES

i Civil tax disputes

The formal process for resolving civil tax disputes commences after the CRA or a provincial tax authority issues written notification that it has assessed a taxpayer – typically by way of a ‘notice of assessment’. That notice identifies the amount of a taxpayer’s liability under a particular tax statute or statutes. In the normal course of events, the underlying assessment is made following an examination of tax returns and

5 The CRA currently administers all personal income taxes in each of Canada’s three territories and in nine of its 10 provinces – Quebec being the single exception. Similarly, the CRA administers both federal and provincial corporate income taxes in all provinces except Quebec and Alberta. Ontario, which is Canada’s most populous province, only joined the tax collection agreement scheme for corporate income taxes in 2009. Ontario corporate income taxes for taxation years ending before 1 January 2009 continue to be administered under the prior provincial tax system and dispute resolution structure.

the taxpayer's activities relating to a particular period or transaction.⁶ Depending on the nature of the examination, the taxpayer may have been subject to any number of information-gathering audit activities prior to the actual assessment of tax. The taxpayer will normally also have been advised in writing of the basis for the assessment and will have been given opportunities to make representations concerning any controversial factual or legal issues. The significance of these pre-assessment interactions cannot be overemphasised as most disputes will be resolved through communications with the tax authority well before the making of a formal assessment. Once made, however, a tax assessment is deemed to be valid and binding and can only be modified through the formal administrative objection and judicial appeal process, or by virtue of a subsequent reassessment made under the same statute.⁷

The required first step in commencing the objection and appeal process is filing a written notice of objection that sets out the relevant facts and reasons for the objection.⁸ Under the Act, taxpayers must normally object within 90 days of the disputed assessment, irrespective of the length of the audit leading up to the assessment or the number of issues that the assessment covers.⁹ Unlike other taxpayers, 'large corporations'¹⁰ are obligated to include extensive details in their written objections, and any subsequent litigation will be limited to the issues raised in those documents.¹¹ They are also obligated to pay 50 per cent of any disputed amount fixed by an assessment while waiting for the outcome of the objection and appeal process.¹² Although the same obligation does not apply to other taxpayers, many taxpayers will pay the disputed amount in full since the interest on any unpaid portion is usually non-deductible for tax purposes and is calculated at a substantially higher rate than that which applies to tax refunds.

6 Normally, Canadian tax authorities are only able to reassess taxpayers within a statutory 'normal reassessment period'. For most taxpayers, that period expires three years after the initial tax assessment for a particular taxation year, but it will be longer in a number of specified circumstances (where additional time might be required to reassess). For example, the normal reassessment period for private corporations that are not Canadian-controlled is four years rather than three, and any reassessment is permitted for an additional three years where it is made as a consequence of a transaction with a non-resident, non-arm's-length person (Sections 152(3.1)(a), (4)(b)(iii)). Similarly, the limitation period will not apply where the taxpayer has supplied fraudulent information under the Act or where the taxpayer has expressly waived its right to the statutory limitation period for the particular year (Section 152(4)(a)).

7 See, e.g., Section 152(8).

8 It is notable that an objection may be made against almost any tax assessment, even a 'quick assessment' that assesses the taxpayer in complete conformity with its earlier tax returns.

9 See Section 165(1).

10 These are corporations employing more than C\$10 million of taxable capital in Canada, calculated along with the Canadian taxable capital of any related corporations (Section 225.1(8)).

11 See Sections 165(1.11), 169(2.1).

12 See footnote 10, *supra*; see, e.g., Section 225.1(7).

ii Criminal tax prosecutions

The distinction between criminal and civil tax matters is significant in the dispute resolution process because there are extensive constitutional and procedural protections that only apply in the criminal context.¹³ Criminal tax prosecutions arise only after the formal laying of charges under a federal statute and they normally proceed in provincial courts of general jurisdiction. Although charges relating to less serious 'summary conviction' offences must be laid within eight years of the purported offence,¹⁴ there is no equivalent limitation period for the more serious 'indictable' class of offences.

III THE COURTS AND TRIBUNALS

i Objections to federal tax assessments

A taxpayer's objection will be considered 'with all due dispatch'¹⁵ by the CRA's Appeals Branch. This branch is an independent internal division of the CRA mandated to conduct an impartial and expeditious review of the objection and the underlying assessment. The taxpayer will have the opportunity to engage in significant negotiations with the Appeals Branch, during which time the taxpayer may decide to submit new information and documentation in support of its objection.¹⁶ Once the Appeals Branch completes its review, it will confirm, vary or vacate the initial assessment, or will otherwise reassess the taxpayer.¹⁷ If the taxpayer continues to dispute the assessment (or any reassessment issued in response to its objection), or if 90 days have passed from the date of the objection and

13 See the decisions in *Guindon v. Canada* for recent discussion of the classification of tax penalties as either criminal or civil matters (2012 TCC 287, 2012 D.T.C. 1283, rev'd 2013 FCA 153, 2013 D.T.C. 5113, judgment on appeal to S.C.C. pending). Both Parliament and the provincial legislatures also have the authority to create 'quasi-criminal' or regulatory offences. These assist in maintaining high standards of public health, safety, and order in a limited sphere of activity, but do not relate to acts or omissions considered truly wrongful in a moral sense. In general terms, regulatory offences incorporate a lower threshold of wrongdoing and attract fewer procedural protections, less-significant penalties, and less social stigma than federal criminal offences.

14 See Section 244(4).

15 There is no formal time period for processing an objection, but there exists a developing body of jurisprudence interpreting the CRA's obligations to issue assessments and respond to objections in a timely manner.

16 The taxpayer may also generally submit new information or documents at the Tax Court appeal stage, but a variety of potential negative consequences may flow from a taxpayer's failure or refusal to provide information to the CRA at the earlier stages.

17 See Section 165(3). In practice, a reassessment to increase taxes payable will not be made in response to an objection as a matter of administrative practice or because reassessment is statute-barred.

the Appeals Branch has yet to complete its review, the taxpayer has the option of filing a judicial appeal against the assessment without further negotiation with the CRA.¹⁸

ii Appeals to the Tax Court of Canada

The Tax Court of Canada, a specialised court completely independent of the CRA, has exclusive original jurisdiction over appeals from tax assessments made under the Act. Only the correctness of the assessed amounts is in issue in these types of proceedings. In particular, the Tax Court cannot reduce an assessment for reasons relating to how CRA officials have treated a taxpayer, how that treatment compares with that of other similarly situated taxpayers, or any other sympathetic or mitigating circumstances.¹⁹ The Court holds trials across Canada and a single judge (and no jury) hears each appeal. Each judge was a practising lawyer prior to his or her appointment and many of the Court's judges have extensive tax practice experience. The taxpayer and the CRA are each represented by experienced tax litigators in any substantial tax appeal.

Only assessed taxpayers may bring appeals from assessments to the Tax Court. This occurs in one of two ways: under the 'informal procedure' for appeals involving smaller monetary amounts,²⁰ and through the Court's 'general procedure' in all other cases.²¹ All tax appeals are effectively *de novo* proceedings and are not limited to the material before the CRA at the audit or objection stages.²² They are also adversarial in nature: taxpayers and the CRA each have an opportunity to make their case through direct oral testimony, documentary evidence, cross-examination, and detailed legal argument. The CRA has the initial benefit of relying on any factual 'assumptions' it made in the course of issuing or confirming the disputed assessment. To the extent that the taxpayer disagrees with a significant assumption, the taxpayer has the burden of putting evidence before the Court to rebut that assumed fact.²³ The judge will then weigh the evidence and the

18 See Section 169(1). An appeal to the Tax Court must normally be initiated within 90 days from the day the CRA sends the taxpayer notice that it has confirmed the assessment or has reassessed in response to an objection.

19 See, e.g., *Main Rehabilitation Co v. Canada*, 2004 FCA 403, 2004 D.T.C. 6762. See also Section V.ii, *infra*, concerning challenges to the CRA's administrative activities.

20 The informal procedure appeal process effectively creates a 'small claims court' for federal tax disputes and removes the need for many of the litigation formalities that operate under the general procedure. For example, under the informal procedure, originating court documents may be prepared in summary fashion, the Court and the parties are not bound to follow formal rules of evidence, and the parties may be represented by non-lawyers. Currently, the informal procedure may only be used to obtain a reduction of up to C\$25,000 per taxation year in disputed federal taxes and penalties, or an increase of up to C\$50,000 per taxation year in disputed tax losses.

21 It is also possible to refer particular legal or factual questions to the Tax Court for a binding determination outside the traditional assessment appeal process (see, e.g., Sections 173, 174).

22 But see footnote 16, *supra*.

23 This structure reflects the rule that the CRA's assessment is deemed to be correct in law and that, in Canada's self-reporting system, the taxpayer (and not the CRA) is in control

parties' factual assertions on the balance of probabilities and in accordance with the Court's interpretation of the relevant law. The Court will then dispose of the appeal by vacating the CRA's tax assessment, directly substituting its view of the correct assessment for the CRA's assessment,²⁴ referring the matter back to the CRA for reassessment with particular instructions, or dismissing the appeal and leaving the assessment intact.

iii Further judicial appeals

Both taxpayers and the CRA have a right to appeal judgments and orders of the Tax Court of Canada to the Federal Court of Appeal.²⁵ Appellate review proceeds on the basis of the record before the Tax Court, and parties are unlikely to have an opportunity to present new evidence on appeal. If either party is unsatisfied with the Court of Appeal's disposition, it may seek permission to bring a further appeal on the matter to the Supreme Court of Canada.²⁶ The Supreme Court may agree to hear an appeal where it considers any underlying question to be of such public or national importance that it warrants the Court's attention. Since the Supreme Court typically decides between two and four tax appeals per year, the Federal Court of Appeal is the final adjudicator in most federal tax matters.

iv Objections and appeals to provincial tax assessments

When a civil tax dispute concerns the same issues under parallel federal and provincial legislation, the federal objection and appeal process will normally proceed and the related provincial tax matter will be determined in accord with the result of the federal process.²⁷

of information relating to its affairs and so should bear the burden of 'demolishing' the assumptions on which the assessment is based. Although rare, the taxpayer may also argue that particular assumptions were not actually made and thus cannot be relied upon to justify the assessment.

24 The Court may only decrease the assessment or leave it intact; it may not increase the disputed amount.

25 The Federal Court of Appeal is an intermediary appellate court that hears all appeals from orders of the Tax Court of Canada, the Federal Court and certain federal administrative tribunals. Its judges come from a wide range of practice backgrounds (not limited to tax), and frequently have experience as judges of first instance in lower federal or provincial courts. Historically, roughly a quarter of the proceedings in the Federal Court of Appeal are appeals from the Tax Court.

26 The Supreme Court of Canada is Canada's highest appellate court and is the final level of judicial decision-making for all litigation in Canada. The Court may hear appeals concerning every subject matter from each Canadian jurisdiction, in both official languages and arising under either the common or civil law tradition.

27 Although such inter-jurisdictional matters raise a variety of issues, coordination is often achieved through provincial legislation that designates federal assessments or Tax Court dispositions as binding in respect of provincial tax issues, or which mandates that provincial tax authorities reassess taxpayers to achieve consistent treatment across federal and provincial regimes.

In contrast, if a dispute concerns solely provincial tax issues, the taxpayer must follow the particulars of the applicable provincial objection scheme. It will then have a right to appeal from the underlying assessment to a court of general jurisdiction in the assessing province (rather than to a specialised tax court), to that province's court of appeal and, with leave, to the Supreme Court of Canada.

v Criminal tax prosecutions

Like civil appeals of provincial tax assessments, criminal tax prosecutions normally proceed in provincial courts of general jurisdiction. Judges come from a wide variety of legal practice backgrounds and may have little or no experience in tax matters. Criminal tax litigation follows the same format as the prosecution of non-tax offences. This may involve various constitutional, procedural and jurisprudential particularities that have no application to civil tax appeals. The office of the federal or provincial Attorney General, which represents the public interest, has the burden of leading evidence to prove the taxpayer's guilt beyond reasonable doubt.

vi Tax disputes broken down by numbers²⁸

<i>Annual activities (civil tax disputes)</i>	
Tax objections resolved by CRA Appeals Branch	65,000–95,000
Appeals to the Tax Court of Canada	4,250–5,400
Appeals to the Federal Court of Appeal	80–150
Appeals to the Supreme Court of Canada	<5
Appeals to a provincial court (figure does not include appeals to the provincial court in Quebec)	60
<i>Annual activities (criminal tax disputes)</i>	
Criminal enforcement audits	800–850
Matters referred to prosecution	120–130

28 Estimates prepared from figures for recent fiscal years of the CRA and the federal Courts Administration Service (CAS), as reported in: CRA, Annual Report to Parliament: 2013–2014 (www.cra-arc.gc.ca/gncy/nlnl/2013-2014/ar-2013-14-eng.pdf); CRA, Annual Report to Parliament: 2012–2013 (www.cra-arc.gc.ca/gncy/nlnl/2012-2013/images/ar-2012-13-eng.pdf); CRA, Annual Report to Parliament: 2011–2012 (www.cra-arc.gc.ca/gncy/nlnl/2011-2012/images/ar-2011-2012-eng.pdf); CRA Corporate Audit and Evaluation Branch, Tax Appeals Evaluation: Final Report (May 2012) (www.cra-arc.gc.ca/gncy/ntrnl/2012/txpplsvltn-eng.html); CAS, 2013-2014 Annual Report: Supporting the Delivery of Justice for all Canadians (cas-ncr-nter03.cas-satj.gc.ca/CAS/AR-RA/2013-14/ar-ra2013-14/images/14-062-SATJ-Rapport-Annuel-ANG_R5-Web.pdf); CAS, 2012-2013 Annual Report: Supporting the Delivery of Justice for all Canadians (cas-ncr-nter03.cas-satj.gc.ca/CAS/pdf/13-078-SATJ-Rapport-annuel-ANG-WEB.pdf); and CAS, 2011–2012 Annual Report: Supporting the Delivery of Justice for all Canadians (cas-ncr-nter03.cas-satj.gc.ca/CAS/AR-RA/PDFs/COURTS_AR_E_Web.pdf).

IV PENALTIES AND REMEDIES

In addition to fixing the quantum of taxes owing under a particular statute, a formal tax assessment may also impose civil penalties in respect of a failure to comply with the applicable tax regime.²⁹ These include penalties for late filing or failing to file tax returns, failing to properly report income and participating in the making of false statements or omissions to a tax authority. Civil penalties will consist of a set amount per regulatory infraction or a percentage of any resulting tax deficiency.³⁰ In addition to disputing whether such an infraction actually occurred, taxpayers may successfully defend against a variety of civil penalties by showing that they exercised due diligence in the circumstances (despite committing the infraction).³¹ Objections or judicial appeals from an assessment will determine the correct taxes payable along with the correct quantum (if any) of applicable civil penalties. Notably, however, the CRA cannot increase the amount payable in response to an objection or appeal once the statutory reassessment period has ended.³²

A taxpayer may be liable for both civil and criminal penalties in respect of the same activities. On the criminal side, penalties generally range from relatively minor fines³³ to fines equalling a specified multiple of the tax sought to be evaded and imprisonment for a term not exceeding five years.³⁴ The minimum or maximum penalty depends largely on whether the prosecution is in respect of a ‘summary conviction’ offence or an ‘indictable’ offence (the latter being the more serious).³⁵

V TAX CLAIMS

i Recovering overpaid tax

The Act provides for the return of monies paid in respect of taxes where a taxpayer does not actually owe the amounts paid. For example, a taxpayer may have inadvertently made

29 In contrast to the taxpayer’s burden to ‘demolish’ the CRA’s factual assumptions in respect of the tax portion of an assessment, the CRA will often bear the burden of proving the penalty portion of an assessment in court (see, e.g., Section 163(3)).

30 For example, penalties for failing to file a tax return range from 5 to 50 per cent of the taxpayer’s unpaid taxes for that year, depending on the egregiousness of the failure (Sections. 162(1), (2)).

31 See, e.g., *Canada v. Consolidated Canadian Contractors Inc.* (1998), [1999] 1 F.C. 209 (C.A.).

32 See footnotes 6 and 17, *supra*.

33 For example, a bond or debenture issuer who fails to record a prescribed code on any coupon evidencing a right to interest on the bond or debenture is liable on summary conviction to a fine not exceeding C\$500 (Section 240(2)).

34 See Section 239(2)(b), which applies to convictions for indictable offences relating to tax evasion, the making of false or deceptive statements or omissions, destruction or alteration of tax records, or conspiracy to commit any of these offences.

35 Many tax offences are ‘hybrid’ in that the Attorney General may elect to proceed in either manner.

too many payments on account of tax or may have been subject to improper withholding on the receipt of income from other parties during a particular taxation year. As a matter of practice, the taxpayer's initial tax assessment for the period in question will reveal the overpayment and the resulting refund will issue automatically.

As a matter of law, the general statutory rule obligates the CRA to refund any overpaid amount without delay if the taxpayer filed its tax return within three years of the end of the taxation year in issue, and the taxpayer requests its refund during the period within which the CRA can reassess the taxpayer.³⁶ If the taxpayer is an individual or testamentary trust, the CRA has discretion to issue a refund at any time, as long as the taxpayer filed its tax return within 10 years of the end of the taxation year in question.³⁷ However, no refund will issue unless the taxpayer has also filed all tax returns that it is obligated to file under the Act or a host of other tax statutes.³⁸ Where circumstances fall outside both the general rule and the few available (largely-discretionary) exceptions,³⁹ the taxpayer's remaining options are a lawsuit for unjust enrichment or applying for a tax remission order from the government (as discussed in Section VII.vi, *infra*).

ii Challenging administrative decisions

Apart from filing an internal service complaint with a particular tax authority, taxpayers enjoy a general right to seek judicial review of a Canadian tax authority's decisions, administrative activities or failures to act. These types of challenges⁴⁰ are brought in the Federal Court.⁴¹ In contrast to the Tax Court's limited jurisdiction in an appeal from an assessment, the breadth of issues that may be raised in the Federal Court is quite wide. These include constitutional or jurisdictional questions about the CRA's authority to act, the propriety of legal or factual interpretations that led to an administrative decision,

36 See Section 164(1).

37 See Section 164(1.5)(a).

38 See Section 164(2.01).

39 For example, the CRA may also refund an overpaid amount at any time where the overpayment is the result of a reassessment that waives interest or penalties, is made further to an accepted late-filed tax election or relates to amounts withheld by another person on account of certain tax liabilities of non-residents (see generally Sections 164(1.5)(b), (c)). In addition, a taxpayer may request that the CRA 're-appropriate' a statute-barred overpayment to pay a subsequent liability under the Act or a number of other tax statutes (see Section 221.2).

40 Corresponding provincial court procedures exist in respect of provincial tax authorities' administrative activities.

41 The Federal Court is Canada's national trial court. It hears a wide variety of legal disputes, in both common and civil law jurisdictions. In contrast to the Tax Court, the Federal Court is a court of both common law and equity. This allows it the discretion to fashion a variety of remedies appropriate to any particular dispute, as opposed to 'merely' interpreting and applying tax provisions. The Federal Court has exclusive original jurisdiction to hear applications for judicial review from the decisions or activities of most federal boards, commissions, and tribunals, including the CRA.

and the fairness of the procedures followed by the CRA. However, owing to the nature of the CRA's statutory duties and the jurisdictional divide between Canadian courts, the circumstances in which judicial review of tax matters will be the correct remedy are also carefully circumscribed.⁴² Governing principles include: (1) the judicial review process cannot be used to launch an indirect attack against a tax assessment;⁴³ and (2) judicial review is a remedy of last resort, available only where the taxpayer lacks an adequate alternative remedy.⁴⁴

Depending on the nature of the question at issue, a court sitting in review of impugned administrative activity will review the matter on the standard of 'correctness' or the deferential standard of 'reasonableness'. Whereas a correctness review shows no deference to the tax authority's conduct or decision-making, a reasonableness review is concerned with whether there exists sufficient justification, transparency and intelligibility in the decision-making process.⁴⁵ If the taxpayer succeeds in its judicial review application, the reviewing court will usually return the underlying matter to the tax authority for reconsideration in accordance with specific directions.

iii Claimants

The general rule is that only the taxpayer who is the subject of an assessment will object or appeal the assessment.⁴⁶ This coincides with the fact that most Canadian tax disputes concern direct taxes imposed on the assessed taxpayer. In contrast, in the case of indirect taxes such as the goods and services tax and the harmonised sales tax, the subject of the assessment is typically the supplier responsible for collecting the tax payable by the recipient of a taxable supply.⁴⁷ However, the law allows the CRA to assess either the supplier or the recipient where the supplier fails to collect tax on a particular supply.⁴⁸ Where the supplier collects the tax but fails to remit it to the CRA, the recipient is

42 See especially the recent decisions in *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (*JP Morgan*) and *M.N.R. v. Sifto Canada Corp.*, 2014 FCA 140.

43 This stems from a number of principles, including that the Federal Court lacks jurisdiction to modify assessed taxes, interest or penalties, and that there is often no meaningful distinction between the decision to assess taxes and the assessment itself (but see *JP Morgan*, *ibid.*, at Paragraph 98).

44 Adequate alternative remedies could perhaps include Tax Court appeals or a traditional civil lawsuit against the tax authority or its officers.

45 See generally *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

46 Tax liability is normally considered to be a private matter between the taxpayer and the state. Nevertheless, it is possible for other interested parties to take part in the Canadian tax dispute resolution process in various ways, including as formal interveners in the course of judicial appeals.

47 See, e.g., Excise Tax Act, R.S.C. 1985, c. E-15, Section 165(1) (ETA).

48 ETA, *ibid.*, Sections 296(1)(a) (i.e., allows for the assessment of the supplier in respect of its net tax), 296(1)(b) (i.e., allows for the assessment of the tax payable by the purchaser).

relieved of any further obligation and cannot be assessed.⁴⁹ Where the supplier collects and remits an amount on account of tax that was not actually payable, the recipient (or the supplier, in limited circumstances) may seek a rebate from the CRA for the amount paid.⁵⁰ Any person who has been assessed may object and appeal against the assessment.⁵¹

Similarly, a resident making certain payments to a non-resident is responsible for withholding and remitting income tax to the CRA on the non-resident's account, despite the fact that the non-resident is itself liable for the tax.⁵² Where the resident payer fails to withhold and remit an amount on the non-resident's behalf, the resident also becomes liable and will typically be assessed in respect of that same tax.⁵³ The assessed resident or non-resident may then follow the usual objection and appeal procedure under the Act.

VI COSTS

Canadian courts normally order an unsuccessful litigant to pay an amount to the successful party in respect of costs associated with bringing or responding to civil tax claims.⁵⁴ These discretionary awards are intended to provide only partial compensation to the successful party and, traditionally, increased costs awards were only used in response to reprehensible conduct or actions that unnecessarily delayed the litigation process. Although the underlying principles remain applicable, recent cases suggest enhanced costs awards are becoming more common in federal tax cases, probably because of the increasing disparity between the Tax Court's standard costs tariff and actual litigation costs.⁵⁵ Outside of civil litigation, the taxpayer can only be required to pay for the CRA's administrative costs in limited (voluntary) circumstances.⁵⁶ Similarly, the tax authorities will not be responsible for costs incurred by taxpayers in the course of preparing their tax filings or resolving disputes out of court. However, taxpayers will normally be able to deduct such expenses for income tax purposes.⁵⁷

Costs awards in the criminal context are very rare. Criminal courts tend to use costs awards in only two circumstances: to control abuses of court process or in response to the infringement or denial of an accused taxpayer's fundamental rights.

49 See, e.g., *Airport Auto Ltd v. Canada*, 2003 TCC 683, 2003 G.T.C. 899-105.

50 ETA, see footnote 47, *supra*, Section 261.

51 ETA, *ibid.*, Sections 301(1.1), 302.

52 See, e.g., Part XIII of the Act; especially Sections 212(1), 215(1).

53 See Sections 215(6), 227(10).

54 The Act also contains a rarely used mechanism that permits the Tax Court to order a taxpayer to pay an additional 10 per cent of any amount disputed in an appeal where there were no reasonable grounds for the appeal, or where one of the main purposes for the appeal was to defer the payment of an amount payable (Section 179.1).

55 See, e.g., *Daishowa-Marubeni International Ltd v. Canada*, 2013 TCC 275, 2013 D.T.C. 1222.

56 For example, with respect to taxpayers' requests for advance tax rulings from the CRA, or the preparation and disclosure of information under statutory access to information regimes.

57 See, e.g., Section 60(o).

VII ALTERNATIVE DISPUTE RESOLUTION

i General principles and settlement

The CRA has a statutory obligation to assess taxes solely on the basis of its appreciation of the facts and what it considers to be the correct interpretation of the law.⁵⁸ As a result, the CRA generally has no authority to enter into compromise settlements with taxpayers based on external considerations, such as the costs involved or the risks inherent in litigating a tax dispute in court.⁵⁹ For similar reasons, it is not possible for taxpayers and Canadian tax authorities to subscribe to private arbitration for the resolution of tax disputes. Although private non-binding mediation is available, it is very rarely used in practice. Nevertheless, taxpayers can take advantage of a number of additional avenues for seeking relief, whether prior to undertaking a particular transaction, following the completion of a transaction or in response to unreasonable or abusive conduct at the hands of a Canadian tax authority.⁶⁰

ii Before the transaction

Prior to entering into a proposed transaction, taxpayers may request an advance ruling on how the CRA will interpret particular tax provisions in respect of the transaction. Similarly, they may request a technical interpretation of tax provisions, which is not tied to a proposed transaction. Both advance rulings and technical interpretation procedures are creatures of administrative practice and discretion,⁶¹ and the CRA may refuse to provide either a ruling or an interpretation in various circumstances.⁶² Although the CRA will normally consider itself bound by advance rulings,⁶³ this is not so with regard to technical interpretations. Taxpayers are also required to pay for the comfort provided by an advance ruling: hourly fees apply to compensate the CRA for the work conducted on a taxpayer's behalf.⁶⁴ Taxpayers may reduce the time and money involved in certain

58 See, e.g., *Galway v. Minister of National Revenue* [1974] 1 F.C. 600 (C.A.); *CIBC World Markets Inc. v. Canada*, 2012 FCA 3, 2012 G.T.C. 1011.

59 Narrow exceptions to this rule exist, such as where the CRA acts in its capacity as a creditor in the bankruptcy context, or pursuant to a discretionary power found in certain provincial tax statutes.

60 In addition to the alternative dispute resolution avenues identified herein, taxpayers may also consider active lobbying aimed at achieving a change in the law that gives rise to their tax dispute.

61 See CRA, Information Circular IC70-6R6, 'Advance Income Tax Rulings and Technical Interpretations' (29 August 2014).

62 For example, where an issue is before the courts, where it concerns proposed rather than enacted legislation, or where doing so would require the CRA to opine on foreign law.

63 Although it may not be possible for a taxpayer to legally enforce its advance ruling against a subsequent shift in the CRA's position.

64 The fee payable for an advance ruling is currently C\$100 for each of the first 10 hours spent in preparing the ruling and C\$155 for each subsequent hour (see the current Advance Income Tax Ruling Fees Order, S.O.R./90-234, Section 2).

cases by holding a pre-ruling consultation with the CRA.⁶⁵ This new programme provides a forum for discussing novel or unique technical issues that are critical to a proposed transaction within weeks of requesting a consultation.

iii After the transaction

Following the close of a transaction or the end of a taxation period, but before the initiation of related audit or enforcement actions, taxpayers may make a 'voluntary disclosure' to correct inaccurate or incomplete information previously provided to the CRA.⁶⁶ The benefit of such disclosures is that the taxpayer will be liable for the taxes and certain interest amounts relating to the prior inaccuracies but will be saved from civil or criminal penalties that may otherwise apply. Taxpayers may also seek to file amended tax returns to correct prior inaccuracies or to take advantage of elective measures that they did not claim in their original returns. Although the CRA will be obligated to process an amended tax return in limited circumstances,⁶⁷ doing so often depends on the exercise of administrative discretion that can only be employed within the applicable statutory reassessment period.⁶⁸ It is also possible for taxpayers to obtain a discretionary waiver or cancellation of interest or penalties in sympathetic circumstances by requesting 'taxpayer relief'.⁶⁹

Similarly, taxpayers may undertake a transaction only to realise later that the transaction that was carried out, the legal effect of that transaction or the documentation evidencing the transaction differs from what the parties had intended. In such circumstances, taxpayers may be able to obtain a court order rescinding the transaction or rectifying the relevant transaction documents so as to carry out their true intentions.⁷⁰ The benefit of such court orders is that Canadian tax authorities will be bound to follow the Court's retroactive rulings as to the nature and legal characteristics of the transaction in question, and the content of the documentation that evidences the transaction.⁷¹

65 The pre-ruling consultation procedure began as a one-year pilot project in late 2013 but the CRA has since announced that it will continue offering pre-ruling consultations going forward (see www.cra-arc.gc.ca/tx/tprfssnls/srvcs/prcnsltns/pltrjctprcnsltnts-eng.html).

66 See CRA, Information Circular IC00-1R4, 'Voluntary Disclosures Program' (21 March 2014). The Voluntary Disclosures Program has roots both in statutory provisions and in administrative practices. Canadian courts have yet to fully define the scope of the CRA's powers and obligations in this context.

67 For example, where the taxpayer seeks to carry deductions arising in a subsequent taxation year back to a prior year (Section 152(6)).

68 See CRA, Information Circular IC75-7R3, 'Reassessment of a Return of Income' (9 July 1984); see also footnote 6, *supra*.

69 See CRA, Information Circular IC07-1, 'Taxpayer Relief Provisions' (31 May 2007).

70 See also Section X.ii, *infra*.

71 Foreign tax authorities may also recognise a Canadian court order where a particular transaction has consequences in multiple jurisdictions.

iv International tax disputes

Where a dispute or potential dispute involves issues covered by one of Canada's international tax treaties, taxpayers may also have the option of seeking relief through dispute resolution procedures provided under that treaty. These may include seeking relief through the treaty's mutual agreement procedure or requesting a bilateral or multilateral advance pricing arrangement on transfer pricing matters. Furthermore, certain of Canada's bilateral treaties also allow (or require) contracting states to refer unresolved disagreements to binding arbitration. For example, Canada's tax treaties with the United Kingdom and the United States provide for mandatory arbitration where the countries' competent authorities are unable to resolve a dispute covered by the treaties. Taxpayers often stand to benefit from pursuing these international dispute resolution avenues in parallel with domestic dispute resolution strategies, but it may be necessary to hold one proceeding in abeyance pending the completion of the other.

v Alternative forms of litigation

As discussed in Section V.ii, *supra*, taxpayers also enjoy a general right to bring judicial proceedings to challenge administrative decisions, activities, or failures to act. In a similar vein, where a taxpayer has been subjected to particularly egregious conduct, the taxpayer may bring a civil lawsuit against the relevant tax authority or against particular tax officials. Although taxpayers regularly succeed in judicial review proceedings in respect of administrative activities in the tax sphere, successful civil actions against Canadian tax authorities or officials are exceedingly rare.⁷² However, recent legal developments suggest civil damages actions against Canadian tax authorities may become a more common and effective means of obtaining redress in the future.⁷³

vi Remission orders

Finally, where they have been unable to obtain relief against civil tax assessments through any of the traditional or alternative dispute resolution procedures, taxpayers may seek a tax remission order from the applicable taxing jurisdiction. Remission orders are formal, discretionary decisions made by the executive branch of government that excuse taxpayers

72 For many years, the only successful lawsuits against the Canadian tax authorities in the modern day were *Chhabra v. Canada* (1989), 26 F.T.R. 288, 89 D.T.C. 5310 (F.C.T.D.) (where the taxpayer obtained damages of only C\$11,000) and *Longley v. Minister of National Revenue* (1999), 66 B.C.L.R. (3d) 133, 99 D.T.C. 5549 (S.C.) (where the taxpayer obtained total damages of C\$55,000). More recently, the Quebec Superior Court awarded almost C\$4 million to a corporate taxpayer and the corporation's president as a result of the provincial tax authority's abusive audit and assessment activities (*Groupe Enico inc. c. Agence du revenu du Québec*, 2013 QCCS 5189 (*Groupe Enico*), appeal to Q.C.C.A. pending).

73 Including jurisprudential trends suggesting that it is possible to pursue negligence claims against Canadian tax authorities (see, e.g., See *Leroux v. Canada Revenue Agency*, 2012 BCCA 63, 27 B.C.L.R. (5th) 125; *McCreight v. Canada* (A.G.), 2013 ONCA 483, 116 O.R. (3d) 429; *Leroux v. Canada Revenue Agency*, 2014 BCSC 720, appeal to B.C.C.A. pending), and a new high-water mark for civil damages awards (*Groupe Enico, ibid.*).

from debts considered to be unreasonable, unjust or where forgiveness is otherwise in the public interest. The CRA has developed guidelines based on past experience for determining when remission might be supported, which includes the following four situations:

- a* in cases of extreme hardship;
- b* where CRA officials have acted incorrectly or given incorrect advice;
- c* where financial setback is coupled with extenuating factors beyond the taxpayer's control; or
- d* where the tax debt was not intended by the relevant legislation.⁷⁴

VIII ANTI-AVOIDANCE

Although federal and provincial tax statutes contain numerous discrete anti-avoidance provisions, the 'general anti-avoidance rule' (GAAR) found in most of these statutes stands at the forefront of tax avoidance law in Canada.⁷⁵ The GAAR draws a line between legislative compliance that achieves legitimate tax minimisation and a level of compliance that frustrates the rationale of the provisions relied upon. The latter constitutes abusive tax avoidance, which is the target of the GAAR.⁷⁶

Under the GAAR, the taxpayer has the burden of demonstrating that its activities did not give rise to the particular tax benefit identified by the CRA, or that it engaged in those activities primarily for *bona fide* non-tax reasons. If the taxpayer fails to establish either point, the tax authority has the burden of demonstrating that the resulting tax benefit is inconsistent with the object, spirit or purpose of the provisions that give rise to that benefit. It is this 'abuse analysis' that generally forms the crux of the GAAR test. Where the tax authority succeeds in establishing an abuse of the statutory provisions, the GAAR operates to deny the benefit in question. Conceptually, the GAAR will apply only where the abusive nature of a transaction or series of transactions is clear; where the existence of abusive tax avoidance is unclear, the taxpayer receives the benefit of the doubt. This analytical structure preserves consistency, predictability and fairness, and reflects the long-standing principle that taxpayers have the right to arrange their affairs so as to attract the least amount of tax.⁷⁷ The same legal analysis should apply for the foreseeable future, despite growing public sensitivity to issues of 'tax fairness' and the popular notion that multinational enterprises should not use mismatches in international legal rules to minimise their tax burdens.

IX DOUBLE TAXATION TREATIES

Canada has one of the world's most extensive bilateral tax treaty networks, currently consisting of 92 in-force double taxation conventions. Canada's bilateral treaties are

74 See CRA, CRA Remission Guide (October 2014), Section III.

75 See, e.g., Section 245.

76 See generally *Canada Trustco Mortgage Co v. Canada*, 2005 SCC 54 [2005] 2 S.C.R. 601.

77 *Commissioners of Inland Revenue v. Duke of Westminster* [1936] A.C. 1 (House of Lords).

generally based on the Model Tax Convention on Income and on Capital, prepared by the Organisation for Economic Co-operation and Development (OECD). The OECD's model convention protects against various forms of double taxation, includes limits on taxing different types of income and capital, allows for tax information exchange and assistance in the collection of taxes, and provides procedures for resolving international tax disputes.

In addition, Canada recently ratified the OECD and the Council of Europe's amended Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The new convention covers a wider range of taxes and provides for more forms of administrative assistance than traditional bilateral treaties.⁷⁸ In this regard, the multilateral convention may streamline and provide new bases for international cooperation in tax matters with many of Canada's existing treaty partners, as well as a growing number of nations with which Canada does not have a bilateral tax treaty.

Having been considered in numerous court cases, it is now well established that Canadian tax treaties are to be read in good faith, with a view to giving their text meaning based upon the language used and the intentions of the contracting states.⁷⁹ Judicial precedent, official commentaries, and other extrinsic evidence of the contracting states' intentions assist in the interpretive exercise, and implementing statutes often make clear that a particular treaty takes precedence over domestic laws.⁸⁰ It is also notable that the GAAR applies to the provisions of Canada's bilateral tax treaties.⁸¹ The CRA has advanced GAAR arguments in a number of treaty-related disputes, including 'treaty-shopping' cases (where taxpayers structure their affairs through another state so as to obtain tax treaty benefits not available under the domestic laws or under the treaties that would otherwise apply).⁸²

Although most tax treaties are entered into and made law by the federal government, provincial tax authorities will normally follow the CRA in giving effect to such treaties by mirroring the resulting federal tax assessments.

78 For example, it provides for traditional information exchange based on OECD standards as well as automatic or spontaneous information exchange, simultaneous audits and the opportunity to attend tax examinations on foreign soil. Although the multilateral convention also contains provisions covering service of documents in foreign countries and international assistance in the recovery of tax claims, Canada has reserved against providing these further forms of assistance under the multilateral convention.

79 See, e.g., *Crown Forest Industries Ltd v. Canada*, [1995] 2 S.C.R. 802.

80 See, e.g., Canada–United States Tax Convention Act 1984, S.C. 1984, c. 20, Section 3(2).

81 See, e.g., Section 245(4)(a)(iv).

82 See, e.g., *Canada v. MIL (Investments) SA*, 2007 FCA 236, 2007 D.T.C. 5437. Notably, with or without resort to the GAAR, the CRA has been largely unsuccessful in litigating treaty shopping cases thus far. See also *Canada v. Prévost Car Inc.*, 2009 FCA 57 [2010] 2 F.C.R. 65 (beneficial ownership of dividends under the Canada–Netherlands treaty); *Velcro Canada Inc. v. Canada*, 2012 TCC 57, 2012 D.T.C. 1100 (beneficial ownership of royalties under the Canada–Netherlands treaty).

X AREAS OF FOCUS

i International tax avoidance

Like other mature taxing jurisdictions, Canada is extensively involved in developing responses to potentially abusive forms of tax avoidance, especially on the international front. Notably, Canada holds a leading position among the G20 countries, which called on the OECD to produce its ongoing Action Plan on Base Erosion and Profit Shifting (BEPS).⁸³ By the end of 2015, the BEPS initiative seeks to develop a coordinated and comprehensive response to international tax planning strategies that have shrunk profits for tax purposes or shifted profits to low-tax countries by (legally) exploiting gaps and mismatches in many states' tax rules. Until the project's completion, the BEPS initiative will remain front-and-centre in the mind of Canada's tax policymakers and sophisticated taxpayers, especially since the OECD has now released its initial round of seven BEPS measures (of the 15 promised deliverables). From a practical standpoint, BEPS is also significant because it has caused certain domestic projects to be put on hold pending the development of BEPS-related policies.⁸⁴

Nevertheless, Canada has proceeded with certain other domestic efforts in its continuing work to combat potentially abusive international tax avoidance. For example, the CRA has received hundreds of telephone calls from potential whistle blowers interested in providing information under the new Offshore Tax Informant Program. Launched in January 2014, that programme proposes to pay rewards of between 5 and 15 per cent of the total federal tax collected as a result of tips on international tax evasion or avoidance activities, where those tips lead to the collection of at least C\$100,000 in federal taxes. By way of further example, the 2014 Canadian budget⁸⁵ announced several modifications to existing 'foreign accrual property income' rules, which modifications are designed to more fully tax certain types of income earned by Canadian taxpayers' foreign subsidiaries.⁸⁶ Canada has also negotiated an intergovernmental agreement with the United States that facilitates reporting on accounts held by one country's taxpayers

83 See generally OECD, Base Erosion and Profit Shifting (www.oecd.org/tax/beeps.htm).

84 For example, Canada's work on a potential domestic anti-treaty shopping rule was placed on hold pending further work by the OECD on related issues (see Department of Finance News Release, "Department of Finance Consults on Draft Tax Legislation" (29 August 2014) Ottawa, Ontario (www.fin.gc.ca/n14/14-113-eng.asp)). The OECD has since released its measure on BEPS action item 6 (OECD (2014), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing (dx.doi.org/10.1787/9789264219120-en)), and additional anti-treaty shopping announcements are expected from Canadian policymakers in the near term.

85 See Canada, The Road to Balance: Creating Jobs and Opportunities (www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf).

86 *Ibid.* at pages 341-360 (for example, income from the insurance of Canadian risks and income earned by regulated foreign financial institutions).

in a financial institution in the other country.⁸⁷ Finally, the CRA recently achieved a number of high-profile Tax Court victories in Canadian transfer pricing cases.⁸⁸ Those wins emphasise to taxpayers the need for both careful planning and implementation of cross-border transactions, and selective and strategic thinking in deciding how best to deal with international tax disputes.

These various examples generally illustrate the state of the Canadian tax regulatory environment. Stepping back, Canadian administrators are bowing to public and economic pressures and are actively investing resources, developing new programmes, and proceeding with formal litigation to combat what they see as aggressive cross-border tax planning. International taxpayers are likely to face additional audit scrutiny in the coming years and tax disputes may occasionally lead to surprising results as the authorities become increasingly creative and steadfast in their efforts to maintain the Canadian tax base. Canadian businesses and multinationals considering expansion into the Canadian market must remain vigilant to ensure they can efficiently respond to these new challenges.

ii Alternative forms of relief in tax matters

While Canadian and other tax authorities are considering new ways to combat perceived gaps in their respective tax systems, taxpayers and their advisors are similarly experimenting with alternative strategies to keep the tax authorities in check. For example, the use of court-ordered rectification and related equitable remedies to retroactively correct errors stemming from implemented transaction documents continues to push the envelope in Canada.⁸⁹ Although Canadian courts have repeatedly affirmed the availability of such remedies when errors become apparent upon reviewing evidence of the contracting parties' prior intentions,⁹⁰ the precise contours of these remedies are yet to be fully defined. Future cases may lead to new common law rules concerning, for example, the interaction between these judicial remedies and retroactive legislative amendments, the implementation of Canadian (or foreign) rectification orders in sister jurisdictions or to

87 *Ibid.* at pages 358-359 (in connection with the United States' Foreign Account Tax Compliance Act).

88 See, e.g., *McKesson Canada Corp. v. Canada*, 2013 TCC 404, appeal to F.C.A. pending; *Marzen Artistic Aluminum Ltd. v. Canada*, 2014 TCC 194, appeal to F.C.A. pending.

89 While contracting parties may attempt to self-correct mistakes in their prior written agreements through subsequent amending agreements, the CRA will normally give effect to such corrections only from the date of the subsequent amendment. As a result, a retroactive rectification order (which generally deems the mistaken documentation to be corrected from the time of its creation) may be needed to correct prior mistakes and neutralise negative tax consequences flowing from a strict application of the terms of the original transaction documents.

90 See, e.g., *Canada (A.G.) v. Juliar* (1999), 46 O.R. (3d) 104 (Sup. Ct. [Comm. List]), aff'd (2000), 50 O.R. (3d) 728 (C.A.), leave to appeal to S.C.C. denied; *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.*, 2013 SCC 65.

foreign entities, and whether creative steps may be taken to protect the interests of third parties in respect of the interim period since the date of the initial erroneous transaction.

By way of further example, many taxpayers are also frequently pushing back demands from tax officials in attempts to ensure that their interactions with Canadian tax authorities are as fair and efficient as possible. As the authorities become more aggressive and exhaustive in their administrative activities, taxpayers are finding themselves in the unenviable position of needing to forcefully assert their procedural rights at each step of the audit and dispute resolution process in order to minimise negative effects on day-to-day business. Where this leads to a breakdown in the relationship, taxpayers have the opportunity to escalate matters internally within the CRA or, as a last resort, to pursue administrative law judicial review of CRA conduct.⁹¹ Service-related complaints or allegations of systemic problems with CRA procedure may also be submitted for impartial review by the Office of the Taxpayers' Ombudsman.⁹² Where allegations rise to the level of negligent, abusive, or malicious action by tax officials, taxpayers may also choose to seek compensation directly from the tax authorities through civil lawsuits.⁹³ The breadth and depth of these various avenues of relief emphasise the complexity of modern interactions with Canadian tax authorities. As both taxpayers and government administrators continue to grow in sophistication, the CRA's audit playbook and the taxpayer's dispute resolution toolbox are likely to increase in complexity and precision – not unlike the way that substantive tax rules have multiplied over the years.

XI OUTLOOK AND CONCLUSIONS

Like private organisations seeking to maximise efficiencies and returns on investment, the CRA has for some time been shifting its resources to target those taxpayers and issues most prone to non-compliance. For example, the CRA's move to a risk-based audit system for Canada's largest businesses⁹⁴ is now well under way. Such shifts foreshadowed current trends aimed at combating international tax avoidance, an area that Canadian and foreign tax authorities see as a major weakness in their work to protect national tax bases. In reality, the various international initiatives discussed in this chapter constitute attempts to better integrate the effects of globalisation into somewhat antiquated domestic taxing regimes. However, without further legislative changes, many of the tax authorities' efforts may prove to be rather like forcing a square peg into a round

91 See Section V.ii, *supra*.

92 Although the Ombudsman lacks authority to direct the CRA to take steps to remedy the underlying problems (see generally www.oto-boc.gc.ca).

93 See Section VII.v, *supra*.

94 The CRA commenced its new risk-based approach for businesses with annual sales greater than C\$250 million in 2011. The risk assessment process may consider factors such as a business's audit history, corporate governance style and controls, transparency in dealings with the CRA, participation in aggressive tax planning or in unusual, complex or international transactions, participation in major acquisitions or disposals and several industry-specific risk factors.

hole. Litigation remains the best safeguard against overzealous tax authorities in these circumstances because Canadian courts focus on careful legal analysis and the consistent application of governing legislation, not on creative attempts to maintain the tax base or unauthorised retroactive application of new tax rules.

In the near term, taxpayers can expect further growth in tax information gathering and exchange, increases in other forms of cooperation between global tax authorities, and more audit scrutiny with respect to both domestic and cross-border tax planning and all manner of international transactions. This makes it especially important for international taxpayers to maintain efficient and cooperative dealings with tax authorities in each jurisdiction in which they operate. Taxpayers should recognise that every interaction with the authorities is an opportunity to present one's case and avoid (or prepare for) a future tax dispute. By keeping these principles in mind and preparing early, the well-informed international taxpayer will be able to appreciate when to cooperate unreservedly and when to take a more careful or aggressive posture. This approach minimises overall risk and allows taxpayers to keep their resources focused on their primary objectives rather than on fighting unnecessary battles with the tax authorities.

Appendix 1

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Jacques Bernier is a partner (through a professional corporation) in Baker & McKenzie LLP's Toronto office. His practice focuses on litigating and resolving substantial Canadian tax disputes. Jacques has represented corporations and select individuals before tax authorities and tax courts on transfer pricing, anti-avoidance, permanent establishment, scientific research and experimental development, commodity and payroll tax issues, as well as in voluntary disclosure and judicial review processes. He is recognised as a leading practitioner in *Chambers Global: The World's Leading Lawyers for Business*, *The International Tax Review's Tax Controversy Leaders Guide*, *The Legal Media Group Guide to the World's Leading Transfer Pricing Advisers* and *The Legal 500's Table of Leading Lawyers*, and is repeatedly recommended for corporate tax litigation by the *Canadian Legal Expert Directory*. Jacques contributes to various publications and is a frequent speaker at conferences and seminars for tax executives, private practitioners, and Canada Revenue Agency personnel. He is a member of the Quebec Bar and the Law Society of Upper Canada.

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