Challenging CCRA Fairness Decisions

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Subsection 220(3.1) of the *Income Tax Act* (the Act) – the "fairness provisions" -- gives the Minister the discretion to waive or cancel any or all of the interest and penalties (but not the tax) owed by a taxpayer or partnership. What happens if a taxpayer makes a fairness request, the request is denied and the taxpayer believes that the CCRA (for the Minister) did not give proper consideration to the request?

The CCRA's Information Circular IC 92-2 explains how the CCRA will exercise the fairness discretion on behalf of the Minister, and it describes the process for making a fairness request. The IC also notes that a taxpayer cannot object to the Minister's fairness decision. The IC states, however, that if a taxpayer is unhappy with a fairness decision, the taxpayer may make a request in writing that "the director of a district office or taxation centre review the situation".

Subsection 165(1.2) of the Act prevents a taxpayer from filing an objection and, by extension, from appealing to the Tax Court about a CCRA fairness decision. Nevertheless, a taxpayer is not completely without recourse if he or she feels that the CCRA has not adequately considered a fairness request.

In *Brickenden v. Canada*, 2003 FC 929 (F.C.T.D.), two related taxpayers applied to the Federal Court for a judicial review of several related fairness decisions. The taxpayer claimed that personal and family health problems and a divorce had prevented him from complying with his and his corporation's compliance obligations under the Act and affected his ability to pay interest and penalties. On these grounds, the taxpayers requested a waiver of the interest and penalties. The CCRA rejected the requests. The taxpayers applied to the Federal Court for an order "quashing" (nullifying) the CCRA's decisions and remitting the matters back to the CCRA for re-consideration by another decision-maker. The Court granted this order.

The Court, in its reasons, noted that it had jurisdiction to consider and grant the taxpayers' application under the *Federal Court Act.* The *Federal Court Act* provides that the Trial Division may, among other things, quash a decision of a "federal board, commission or other tribunal" (which includes the CCRA) where such a body exceeded its jurisdiction, failed to observe a principle of natural justice, erred in law or based its decision on erroneous findings of fact "that it made in a perverse or capricious manner or without regard to the material before it".

Notwithstanding this statutory language, the Courts generally have been reluctant to scrutinize the substance of CCRA fairness decisions. The Courts will usually intervene only if the CCRA's decision-making process was "patently unreasonable". A Court will not intervene merely because it might have decided the matter differently. "This Court's function is to review the manner in which the decision was made rather than substitute its views for those of the decision maker" (*Brickenden,* at para. 22).

The Court was willing to intervene in *Brickenden*, however. Why? The taxpayers' fairness requests were first reviewed by a collections officer, who summarized them for her "team leader" (a Mr. Pratt) and recommended that the requests be granted. Mr. Pratt disagreed, however, and he recommended that the CCRA deny the requests. A committee of team leaders that did not include Mr. Pratt agreed with his assessment. The CCRA notified the taxpayer of its decision, and the taxpayer requested a second review.

In the second review, another collections officer, who was not involved in the first decision, summarized the taxpayers' requests. This officer recommended that, in the main, the requests be denied. Two CCRA managers then reviewed the summary, approved it and then prepared *another* summary for a memorandum to the acting director of the TSO requesting a decision. The acting director accepted the summary and decided to reject the requests. The CCRA did not accept that the taxpayers were unable to pay the interest and penalties owing, and it refused to accept the causal link between the misfortunes suffered by the individual taxpayer and his compliance failures and those of his corporation.

The Court quashed the CCRA decision because it was based on incomplete and inaccurate information. The Court found that the CCRA decision makers did not have important information before them or had misconstrued or misunderstood the information that was before them. It appears that the CCRA ignored certain information supplied by the taxpayer and relied instead on internal information that was misleading or simply wrong. As a result, the CCRA decision-makers understood neither the finances nor the emotional and physical health of the taxpayer. On this basis, the Court ordered the CCRA to re-consider the matter.

Brickenden nicely illustrates two key points to keep in mind when making a fairness application. First, the application itself must be clear and supported by relevant evidence. If the adviser can relate or reconcile the information he or she is providing to information the CCRA is likely to have already (from the taxpayer's tax returns), then errors like those in *Brickenden* might be avoided. Second, through a review of IC 92-2 and discussions with the relevant CCRA personnel, the adviser should try to understand and anticipate, with relevant evidence and arguments, the questions that will be asked by the decision-makers in considering the fairness request.

If the CCRA rejects the request, the adviser should ask for copies of the CCRA's internal documents and memoranda relating to the request. The adviser should also try to understand what information the CCRA considered in reaching its decision. The adviser can review these documents and the information to ensure that the CCRA decision-makers had all of the relevant information before them when considering the request. If the adviser finds that the decision-makers did not have the relevant information in front of them or that the information was incorrect, the adviser should consider recommending that the taxpayer apply to the Federal Court for a judicial review of the decision.

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