

## Tax Fairness Legislation and the Taxpayers' Ombudsman's Office

Subsection 220(3.1) of the *Income Tax Act*, (the Act) or "the fairness legislation," reads: 220. (...) (3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.

The purpose of this section of the Act is to allow the Canada Revenue Agency (CRA) to administer the tax system more fairly by allowing for the application of common sense in dealing with corporate and other taxpayers. Upon application by a business or person, the CRA can waive or cancel all or part of any interest or penalty owed by a taxpayer because of a delay or error by the CRA, circumstances beyond the taxpayer's or employer's control, or the taxpayer's inability to pay it. The language used in the section bestows a wide discretion on the Minister to waive or cancel interest at any time. The CRA has policy that guides the exercise of this discretion in Information Circular 92-2, superseded by 07-1.

Essentially, every case in which a request for the waiver of interest or penalties is made (fairness request) is required to be decided on its own merit so that the unique facts or circumstances are taken into account. The Minister of National Revenue conducts these reviews by acting through his delegates or staff at the CRA. If the taxpayer's fairness application is denied or only partially granted, a second level of impartial review may be requested. There exists a right in law to have a third level review upon making an application for judicial review to the Federal Court of Canada. In such instances, the Federal Court has the authority to refer CRA decisions it finds unreasonable to another decision maker at CRA for redetermination; it has no authority to overturn the Minister's decisions.

Using common sense in this regard is a step in the right direction by allowing businesses an avenue to reduce interest or penalties that have been thought to be unfairly assessed by the CRA. In practice, court cases published by the Federal Court (*Edison v. MNR*, 2001 FCT 734 (CanLII)) demonstrate that there are cases where the CRA has been found to be denying requests in an inappropriate or unfair manner.

Therefore, the Canadian Chamber of Commerce proposes that in order to provide for a second level review that is consistently objective (see Auditor General's report), brings fresh eyes to the case and is performed by properly trained delegates, the authority to conduct second level reviews under the fairness legislation be conducted by the newly established Taxpayers' Ombudsman's office.

Under this new process:

- Fewer cases will be appealed in Federal Court – saving time and money
- The opportunity for business to make application under the fairness provisions will be promoted and the process will be more transparent
- The decision-making is removed from hands that, on occasion, have been found by the Courts to be unfair

- Business will have an independent redress for interest and penalties regarding decisions with respect to Director's liability for failure to remit - which are frequent and clog the Courts

**Recommendation**

That the federal government amend its legislation to allow for second level reviews of taxpayers' applications under the Fairness Legislation by the Taxpayer's Ombudsman's office.