

## Tax Mistakes and Errors: Should You Make a Voluntary Disclosure?

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The “Voluntary Disclosures Program” provides taxpayers with a potential avenue to reduce or eliminate penalties and some interest which might otherwise be assessed by the Canada Revenue Agency (the “CRA”) and avoid prosecution on under-reported or unreported income and other tax errors and omissions.

Canada has a self-reporting tax system, meaning that taxpayers are responsible for correctly reporting their incomes in their tax returns and filing tax returns within the times required under the law. As a general statement, this responsibility is not diminished by the fact that taxpayers’ tax returns are prepared by an accountant or tax return preparer.

Taxpayers making tax errors or omissions (intentionally or unintentionally) may, following an audit by the CRA, be assessed for tax on under-reported or unreported income, payroll amounts which should have been, but were not, withheld and other amounts, along with non-deductible interest, and substantial penalties.

Penalties imposed for various failures under the Income Tax Act (Canada) are numerous and may be substantial. For example, as a general statement, a penalty may be assessed in the amount of 10% of the under-reported or unreported income. If the CRA determines that the taxpayer was grossly negligent, penalties in the amount of 50% of the tax which would otherwise be payable on the under-reported or unreported income may be assessed. Interest accrues on any penalties assessed. In extreme circumstances, taxpayers may be prosecuted for tax evasion.

The CRA is generally prohibited from reassessing taxation years beyond the most recent three (for individuals and certain corporations) or four taxation years. The three or four taxation year period is generally referred to as the “normal reassessment period”. However, the CRA may reassess taxpayers at any time (i.e., beyond the normal reassessment period) where there is a misrepresentation attributed to carelessness, neglect, wilful default or fraud. Very generally, a “misrepresentation” is simply an error. The CRA takes an expansive view of the circumstances in which misrepresentations or errors or omissions by taxpayers are such that it is entitled to reassess taxpayers beyond the normal reassessment period.

Moreover, in certain circumstances, the CRA may assess taxpayers at any time where the taxpayers have failed to withhold and remit tax from amounts paid to certain recipients (e.g., non-residents)

As such, where tax errors or omissions have been made, taxpayers should not simply assume that the passage of time will eliminate the risk of audit and the assessments of additional tax, interest and penalties and/or prosecution.

### **How to Make a Voluntary Disclosure?**

To make a voluntary disclosure, a taxpayer makes a submission to the CRA in which the taxpayer discloses the relevant errors and omissions and the relevant facts surrounding the errors and omissions. The taxpayer then pays the income tax and all, or a portion, of the interest on the tax owing as a result of the under-reported or unreported income. In cases where the errors or omissions involve the failure to file tax or information returns, such returns must also be filed as part of completing the voluntary disclosure.

### **What is the Advantage of Making a Voluntary Disclosure?**

If a taxpayer's voluntary disclosure is accepted by the CRA, the taxpayer will not be liable for penalties which might otherwise be assessed in respect of the under-reported/unreported income. Such penalties, if independently discovered by the CRA on an audit, can be substantial. Partial interest relief may also be provided in respect of taxes owing.

For further information regarding the Voluntary Disclosures Program and the Canada Revenue Agency's administration in respect thereof, please see the Canada Revenue Agency's Information Circular IC-00-1R2--"Voluntary Disclosures Program" at <http://www.cra-arc.gc.ca/gncy/nvstqtns/vdp-eng.html>.

Further, if a taxpayer's voluntary disclosure is accepted by the CRA, the CRA will not prosecute (i.e., criminally) the taxpayer in respect of the errors and omissions described in the voluntary disclosure.

### **What Conditions Must Be Met in Order for the Canada Revenue Agency to Accept a Voluntary Disclosure?**

In order for a voluntary disclosure to be accepted by the CRA, certain conditions must be met, including:

1. Voluntary—a disclosure will be voluntary as long as the taxpayer is not aware of: (i) any enforcement action directed towards the taxpayer that is currently underway or about to start; or (ii) an enforcement action directed towards a related party that is likely to uncover the errors and omissions being disclosed;
2. Complete—full and accurate facts and documentation must be provided for all taxation years where there was previously inaccurate or unreported information;
3. The disclosure must involve the application of a penalty; and
4. The disclosure must include information which is at least one year past due.

## **What if a Taxpayer is Unsure if They Wish to Undertake a Voluntary Disclosure?**

Apart from consulting with a tax professional regarding the advisability of a voluntary disclosure, a voluntary disclosure can initially be made on a “no-names” basis (meaning no identifying information is provided to the CRA). Upon receipt of a “no-names” voluntary disclosure, the CRA will generally provide ninety days for the taxpayer to provide identifying information to the CRA. During this ninety day period, the taxpayer and/or the taxpayer’s advisors may engage in discussions with the CRA Voluntary Disclosure Officer regarding the manner in which the voluntary disclosure may be completed. Recognizing this, recent experience is that CRA Voluntary Disclosure Officers are less willing to discuss “no-names” disclosures during this ninety day window.

A “no-names” voluntary disclosure can be made and then abandoned by a taxpayer, but the CRA has administratively stated that it will only accept a future voluntary disclosure for the same taxpayer in respect of the same errors and omissions on a “named” basis.

## **Will the Canada Revenue Agency Accept the Disclosure Made by the Taxpayer, No Questions Asked?**

Information provided to the CRA in the course of a voluntary disclosure is subject to audit. Voluntary Disclosure Officers of the CRA are not auditors and, following submission, they will generally refer the named voluntary disclosure to the CRA’s audit division.

## **Who Can Make Voluntary Disclosures?**

Voluntary disclosures can be made by corporations, sole proprietorships, partnerships, individuals, employers and trusts. Residents and non-residents of Canada can make voluntary disclosures.

## **Can Voluntary Disclosures Only Be Made in Respect of Income Tax Errors and Omissions? Can Voluntary Disclosures Be Made Under Other Taxing Statutes?**

Voluntary disclosures can be made in respect of errors and omissions with respect to payroll withholdings (income tax, Canada Pension Plan contributions, Quebec Pension Plan contributions and Employment Insurance premiums), Employer Health Tax, GST/HST/QST and under certain other taxing statutes.

## **How Can the Taxation Group at Cummings Cooper Schusheim Berliner LLP Help?**

Members of the Taxation Group at Fasken Martineau have extensive experience in providing practical and cost-effective advice to clients with respect to the voluntary disclosure process, drafting both “no-names” and named voluntary disclosures, and liaising with Voluntary Disclosure Officers and auditors of the CRA and other agencies to complete voluntary disclosures.

Some examples of matters, among others, in which Cummings Cooper Schusheim Berliner LLP taxation lawyers have assisted clients in making voluntary disclosures include:

- employers failing to withhold and remit payroll amounts (income tax, Employment Insurance premiums, Canada Pension Plan contributions) in respect of taxable

benefits provided to employees and failing to report such benefits in T4 information returns;

- individuals failing to report interests in and income from offshore entities, such as offshore trusts, and offshore bank accounts;
- non-resident entities which are deemed, under the Income Tax Act (Canada), to be resident in Canada failing to comply with their Canadian tax responsibilities;
- failing to register, charge, collect and remit GST/HST;
- individuals failing to report cash remuneration received in prior years; and
- companies failing to include remuneration paid to or on behalf of employees for the purposes of computing Employer Health Tax obligations.

If taxpayers have concerns about under-reported or unreported income, or that they may not otherwise be in compliance with tax laws, it is in the taxpayers' interest to consult with a tax lawyer as soon as possible. Communications with the lawyer regarding errors and omissions should be privileged and delays may preclude the ability to make a voluntary disclosure since, as noted earlier, a voluntary disclosure and the relief which may accompany it, are only available if the CRA has not first identified the relevant errors and omissions and commenced an audit or other enforcement action.

For more information on the subject of this bulletin, please contact the author:

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