

TAX LAW

New appeals regime intends to be more accessible and affordable for charities

By Karen J. Cooper

Amendments to the *Income Tax Act* (the "Act") contained in Bill C-33, *A second Act to implement certain provisions of the budget tabled in Parliament on March 23, 2004*, received Royal Assent on May 13, 2005, are now in force and represent a new regulatory regime for registered charities. The amendments implement new rules concerning the taxation and administration of charities set out in the 2004 federal budget, including a more accessible appeals regime, new intermediate sanctions, improved transparency and more accessible information,

as well as new disbursement quota rules for charities. Changes to the appeals regime provide registered charities with access to Canada Revenue Agency's ("CRA's") internal appeals process and the Tax Court of Canada, remedies familiar to tax practitioners but not necessarily to lawyers practising in the charitable sector.

Centralized internal appeals regime

The new appeals regime is intended to make the process more accessible and affordable. Previously, the only avenue for challenging CRA's decisions on charitable matters was through the

Federal Court of Appeal. The amendments have extended CRA's existing internal objection review process to decisions by CRA regarding the revocation or annulment of a charity's registration, the designation of a charity as a private or public foundation or a charitable organization, the denial of applications for charitable status, suspension of tax-receipting privileges, and the imposition of monetary penalties or revocation tax against a registered charity. Filing a notice of objection is now a required step before an appeal may be brought to the courts.

In the above mentioned circumstances, a charity may file a notice of objection with the assistant commissioner of CRA's appeals branch within 90 days of the date of the decision's mailing (in income tax matters, objections are filed with the local chiefs of appeals). The notice of objection should identify the decision objected to, the reasons for the objection and all relevant facts. If the objection relates to a suspension of tax-receipting privileges, a charity may also apply for a postponement of the suspension to the Tax Court of Canada. The notice of objection will be reviewed by an officer in the appeals branch of CRA, separate from the Charities Directorate, and the officer will have the authority to maintain, vary or disagree with the original decision.

Tax court

If a charity disagrees with CRA's decision resulting from an objection, appeals in respect of decisions concerning refusals to grant registered charitable status and revocation of registered chari-

table status will continue to be made to the Federal Court of Appeal. However, with respect to the imposition of the new monetary penalties and/or the revocation tax or suspension of its tax receipting privileges, a charity may now appeal the decision to the Tax Court of Canada under either the informal procedure (expected to apply if the amount of penalties or tax is less than \$12,000) or general procedure. The Tax Court of Canada must receive the notice of appeal within 90 days of the date of mailing of the decision on the objection (or after 90 days from the day of filing of a notice of objection if CRA has not yet provided a decision). In order to resolve informal procedure appeals as quickly as possible, the Tax Court of Canada does not have to follow technical rules of evidence. However, such judgments will not be treated as precedents for other cases. Appeals under the general procedure will follow the usual litigation process, including an exchange of lists of documents, examinations for discovery and trial. It is important to note that the burden of proof is generally on the appellant in procedures before tax court. Lawyers for the Department of Justice, who act for CRA in such matters, will entertain settlement discussions throughout the litigation process.

Additional new provisions

The changes with respect to new intermediate sanctions and penalties for registered charities were previously outlined in an article entitled "New Sanctions and Penalties for Charities" in the July 22 issue of *The Lawyers Weekly*. These changes were introduced as an alternative to the revocation by CRA of a charity's registration for minor or unintended infractions and include suspension of tax-receipting privileges, monetary penalties and taxation of transfers to other registered charities. Some sanctions are progres-



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sive, increasing in severity for repeat infractions within a period of five years.

In addition, CRA may now release additional information to the public, including grounds for revocation or annulment; financial statements; decisions of CRA regarding notices of objection; identification of registered charities which are subject to sanctions, the type of sanction imposed as well as grounds for the sanction; information to support an application by a registered charity for special status or an exemption under the Act (e.g. request for permission to accumulate assets); and reasons for denying the registration of organizations.

The new intermediate sanctions and appeals regime are important changes for charities, providing more appropriate recourse for unintended or incidental breaches. However, the regulation of charities is ever increasing in scope and complexity, and will require careful review by charities and their advisers.

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More procedural issues raised

CHALLENGES

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(*Minister of National Revenue - M.N.R.*) [2005] F.C.J. No. 1249. In the Tax Court of Canada, taxpayers have been raising procedural issues, which until recently, have been more commonly raised within the domain of the superior courts. For example, decisions are now being rendered by the Tax Court of Canada regarding the need for nominees in a discovery to answer questions. Until recently, such dogfights over procedure were not common in proceedings before the Tax Court of Canada. Cases involving complex matters such as transfer pricing are now

only making their way into the Tax Court of Canada, given the passage of relatively recent legislation, and involve arguments about the production of documents, previously not a regular feature of tax court litigation.

Therefore, in light of all of these factors, one should expect to continue to see an increasing amount of work for tax professionals in the tax litigation/tax dispute resolution process. Cases will still involve questions of mixed fact and law and will still require professionals to diligently assist taxpayers to assemble facts based on available oral and documentary evidence. Taxpayers who find themselves the subject of a tax

audit must diligently prepare for what they might otherwise perceive to be an exercise without value added. Nevertheless, if taxpayers wish to be successful in such disputes, they must understand that they will have to spend both time, effort and funds on combating tax authorities who are now becoming better prepared to protect the interests of the federal and provincial treasuries.

Ed Kroft is a tax partner in the Vancouver office of McCarthy Tétrault LLP. He is a member of the Rules Committee of the Tax Court of Canada, and has appeared before the Supreme Court of Canada, Tax Court of Canada, Federal Court of Canada and B.C. Supreme Court and Court of Appeal.