Tax Topics®

September 8, 2016
Number 2322

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DIVORCING UNCLE SAM: THE TAX AND IMMIGRATION PROCESS OF RENOUNCING US CITIZENSHIP

— *Max Reed*[1]

Some people line up for years to marry Uncle Sam, but thanks to FATCA and onerous tax requirements, the divorce rate is on the rise.[2] In 2012, the Department of Homeland Security reported 932 renunciations, compared to 2,999 in 2013, 3,415 in 2014, and 1,355 in the **first quarter** of 2015 alone.[3] The final number for 2015 is thought to be 4,279 — a 43% increase from 2013.[4] Breaking up with Uncle Sam requires special attention to both the US federal tax consequences and the US federal immigration consequences. With proper planning, it should be possible for most people to renounce without tax or immigration consequences. Here, I discuss the tax aspects first, followed by the immigration aspects.

1. Renouncing Without Tax Consequences

In order to renounce US citizenship without tax consequences, a taxpayer must not be classified as a covered expatriate. A full discussion of the US exit tax and other consequences of "covered expatriate" ("CE") status is not the task here, as this topic has been very thoroughly covered elsewhere.[5] To put it simply, CE status includes a deemed disposition on all assets as well as possible future tax to US beneficiaries. CE status should be avoided where possible.

"Covered expatriates" are those individuals who meet one or more of the following criteria:

- A net worth exceeding US$2 million on the date of expatriation (the "asset" test);[6]

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[2] For a discussion of FATCA's application in the Canadian context, see Roy A. Berg and Paul M. Barba, "FATCA in Canada: The Restriction on the Class of Entities Subject to FATCA", 62 *Canadian Tax Journal/ Revue Fiscale Canadienne* 3 (2014) at 587-633 ["Berg and Barba"].

[3] Department of Homeland Security, *Report on Inadmissibility of Tax-Based Citizenship Renunciants*, November 30, 2015. Part of the Fiscal Year 2015 Report to Congress by the Department of Homeland Security ["DHS Report"].

[4] Barrie McKenna, "Delays, Costs Mount for Canadians Renouncing U.S. Citizenship," *Globe and Mail* February 9, 2016 (online at http://www.theglobeandmail.com/news/politics/delays-costs-mount-for-canadians-renouncing-us-citizenship/article28688026/) ["McKenna"].

[5] For greater detail, see: Kevyn Nightingale and David Turchen, "The American's Tax Experience in Canada", *Canadian Tax Journal/Revue Fiscale Canadienne*, 61:1 (2013) pp. 1-40 ["Nightingale and Turchen"].

[6] Internal Revenue Code of 1986, as amended ["IRC" or "Code"] §877(a)(2)(B).

- Average annual US income tax liability for the five years preceding the year of expatriation exceeding US$161,000 (indexed to inflation) (the "tax liability" test);[7] and
- Failure to certify full compliance with US tax obligations for each of the five years preceding expatriation, with tax obligations comprised of all tax and information returns and payment of all tax amounts on account of income, employment, estate, gifts, interest, and penalties (the "noncompliance" test).[8]

There are two exceptions to being a CE even if the US citizen has a net worth over US$2 million or an average annual tax liability of over US$161,000.

First, dual citizens since birth can in some cases be exempt from the exit tax regime. This applies if these individuals were resident in the US for no more than 10 years of the last 15 tax years ending with the year in which the renunciation occurs.[9] The individual must also be a tax resident of the country of their other citizenship at the time of renunciation. The dual citizen at birth exemption has become more powerful with recent retroactive grants of Canadian citizenship.

Second, there is an exception for individuals who renounce citizenship prior to attaining the age of 18.5 and who have been residents of the US for not more than 10 taxable years before the date of renunciation.[10] In both cases, the citizen must still certify on Form 8854, under penalties of perjury, that they have been US tax compliant for the past five years in order to renounce US citizenship on a "tax free" basis.

If a US citizen cannot qualify for one of these options, then some pre-expatriation tax planning may be necessary. The tax liability test is generally not a concern for Canadian-resident US citizens. They in most cases should not have a high average annual US tax liability, because the US will grant a foreign tax credit for every dollar of tax paid to Canada on Canadian-sourced income.

The asset test is a different matter. While other planning may be available, the simplest way to be below US$2 million on the date of expatriation is to make a pre-expatriation gift to a spouse. This means that a potential renunciant who has a net worth of up to US$7.45 million may be able to renounce without being classified as a CE, by gifting up to US$5.45 million to his/her spouse (the 2016 amount of the US lifetime estate and gift tax exemption). Such gifts would not attract Canadian tax because of the spousal rollover available under the Canadian *Income Tax Act*.[11]

The US tax consequences of pre-expatriation gifts will depend on the immigration status of the spouse in question. Gifts to a US-citizen spouse are unlimited and require no reporting. Conversely, gifts from a US-citizen to a non-US-citizen spouse in excess of US$148,000 may trigger the US estate and gift tax. This may reduce a US citizen's lifetime estate and gift tax exemption and require disclosure on Form 709.[12] Any reduction in a lifetime estate and gift tax exemption would not be tremendously important to a person about to expatriate, because once an individual terminates their US citizenship, that individual no longer has US estate and gift tax exposure on their non-US assets.[13]

There are some risks to making pre-expatriation gifts to a spouse or other family members. First, the tax advisor should consider whether a gift to a spouse would change the nature of the asset for family law purposes and make it divisible upon divorce when it might not otherwise be.

Second, the instructions to Form 8854 need to be considered. Those instructions request that, "if there have been significant changes in your assets and liabilities for the period that began 5 years before your expatriation and ended on the date that you first filed Form 8854, you must attach a statement explaining the changes."[14] This request lacks legal foundation and may not have to be followed, though the cautious taxpayer may not want to rock the boat.

The requirements of the Internal Revenue Code ("Code") section 8854 are set out in Code section 6039G. Changes in net worth over the past 5 years are not included. Section 6039G(b)(7) provides that "such other information as the

[7] IRC §877(a)(2)(A).

[8] IRC §877(a)(2)(C).

[9] IRC §877A(g)(1)(B)(i)(I).

[10] IRC §877A(g)(1)(B)(i)(II).

[11] *Income Tax Act* ["ITA"] s. 73(1).

[12] IRC §2523(i) and Rev. Proc. 2015-53.

[13] Note that any individual has potential US gift and estate tax exposure on their US-situs assets, including U.S. stocks and real estate.

[14] Department of Treasury, Internal Revenue Service, *Instructions for Form 8854 - Initial and Annual Expatriation Statement*, last issue October 29, 2015, (online https://www.irs.gov/pub/irs-pdf/i8854.pdf).

Secretary may prescribe," may be required on Form 8854. The word "[p]rescribe," according to case law, is not the power to make law but is instead merely the power to carry out the will of Congress.[15]

Regulations prescribed by the Treasury are intended to clarify existing substantive law rather than to make new rules. Treasury has not developed any regulations under Code section 6039G; arguably nothing is prescribed, and thus there are no other legal requirements under Code section 6039G. As such, the IRS' instructions to Form 8854 are not in line with Congressional intent nor are they in line with the Secretary's prescriptions. This would then indicate that the instructions both go beyond the law and beyond the regulations, and are therefore not binding on the taxpayer.

The fact that the instructions to a particular Form request certain information does not convey a legal requirement. In general, Forms and their instructions are not authoritative in and of themselves. They facilitate tax reporting but do not themselves prescribe tax consequences.[16] As the US Tax Court noted in *Zimmerman v. Commissioner*, "authoritative sources of Federal tax law are in the statutes, regulations, and judicial decisions and not in [. . .] informal [IRS guidance]."[17] Most importantly perhaps, IRS notices and announcements (including instructions) cannot modify existing statute or affect the plain meaning of any given statute.[18] Thus, the instructions to Form 8854 cannot be said to modify the plain meaning of Code section 6039G, which does not set out the requirement to disclose pre-expatriation changes in net worth.

In contrast, consider Code section 6038(a), which sets out the requirements for another form, Form 5471.[19] The Code section lists a few mandatory items and allows the Secretary to prescribe regulations. Treasury has actually done so in this case, and the list of information required on Form 5471 is lengthy.[20] However, in the context of Code section 6038G and Form 8854, the Treasury has not prescribed regulations, and therefore not prescribed the information requested by the instructions to Form 8854. It is therefore arguable that the "requirement" on Form 8854 to disclose material changes in assets is not legally required.

Third, the anti-avoidance doctrine of economic substance must be analyzed. Under Code section 7701(o), a gift must have economic substance (a change of ownership would likely satisfy that) and a "substantial purpose" (other than US federal tax purposes).[21] The desire to be generous to a spouse is, in many cases, a substantial purpose. After all, a taxpayer is allowed to make gifts, hence the purpose of the gift tax regime. If done in conjunction with Canadian estate planning, this may also provide a substantial purpose outside of US tax.

Finally, the economic substance doctrine may not apply to the transaction at all. Code section 7701(o)(5)(B) reads, "[i]n the case of an individual, paragraph 1 shall apply only to transactions entered into in connection with a trade or business or an activity engaged in for the production of income." It is unlikely that a gift of assets to a spouse meets this threshold. The purpose of the transfers should be documented. A successful application of the economic substance doctrine may result in the IRS ignoring the gift and asserting that the renunciant is a covered expatriate.

In short, one way to avoid CE status is to make gifts to a spouse. Such gifts generally should not attract either Canadian or US tax in many cases. While there are some risks to making pre-expatriation gifts, these risks are largely manageable. Next, consider the immigration risks.

2. Renouncing Without Immigration Consequences

In 1996, Representative Jack Reed drafted and had passed an amendment to the Immigration and Nationality Act ("INA") that made any individual renouncing their citizenship for tax reasons potentially inadmissible into the United States. This piece of legislation, known colloquially as the "Reed Amendment," is found at section 212(a)(10)(E) of the INA and reads as follows:

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[15] See *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96 at 129 (2006) rev'd 515 F.3d 162, citing *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 at 134-5 (1936).

[16] *Ibid.*

[17] *Zimmerman v. Commissioner*, 71 T.C. 367 (1978) at 371.

[18] See *United States v. Josephberg*, 562 F.3d 478 (2nd Cir. 2009) and *Rezazadeh v. Commissioner* T.C. Memo, 1996-245 which states "Internal Revenue IRS Publications [. . .] are merely guides published by the IRS to aid taxpayers [. . .] Petitioners may not rely on such publications to the extent the information in them conflicts with the law."

[19] IRC §6038(a).

[20] See treasury regulations section 1.6038-2(f).

[21] IRC §7701(o).

> Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States Citizenship for the purpose of avoiding taxation by the United States is excludable.[22]

The risk of the Reed Amendment applying to someone who has renounced US citizenship is low. There is no formal process to guide its application and, even if there was, it would be difficult to implement for a variety of administrative reasons. The fact that it has been applied fewer than 5 times in the last 20 years is evidence that this is the case. The technical barriers to its application and the history of its application are discussed in turn below.

First, the statute refers to the purpose of "avoiding taxation" rather than avoiding the onerous tax reporting requirements. Even if a US citizen pays the exit tax, he or she is unlikely to be considered to have "avoided taxation" because all taxes due were paid.

Second, the Reed Amendment lacks regulations to guide its application and so there are no details on how it should be applied.

Third, the Attorney General does not have the authorization to obtain the necessary tax information in order to make the required determination.[23] Section 6103 of the Code prohibits the IRS from disclosing "return information" unless an exception applies.[24] Currently, return information can only be disclosed to federal officers or employees for the administration of non-tax-related federal law only where it is relevant to an investigation of criminal or terrorist activities, or in emergency circumstances.[25] Indeed, such unauthorized disclosure is subject to criminal prosecution under Title 18 of the US Code. Absent a signed waiver of an individual's rights under IRC §6103, the Department of Homeland Security ("DHS") cannot examine an individual renunciant's tax returns.

Fourth, even with the taxpayer's consent, the Reed Amendment cannot function. On November 30, 2015, the DHS issued a report on the implementation of the Reed Amendment.[26] The DHS Report contains a number of insights. The DHS Report notes:

> Even if a renunciant were to waive Treasury confidentiality provisions, such that DHS and DOS might review specifics of an individual's Internal Revenue Service filings, DHS lacks the expertise and resources to review tax filings meaningfully or engage in complicated tax liability analysis, involving both domestic and foreign tax law to determine whether a section 212(a)(10)(E) inadmissibility presumption could be rebutted.[27]

This is assuming a rebuttable presumption exists in the first place. Currently, it does not. The DHS Report also notes that such a presumption is ultimately undesirable and likely either over-inclusive or under-inclusive. In short, the DHS notes that such a presumption would not be proportional to the ends it seeks to achieve.[28]

Fifth, bureaucratic obstacles make the law difficult to enforce even if there were regulations in place. INA section 212(a)(10)(E) outlines that there must be an actual finding of US tax avoidance purposes. This implies an official process undertaken by the Attorney General's office or its delegate.[29] As noted above, the IRS is statutorily barred from sharing the tax return information necessary to make such a determination. The DHS, which has the authority to establish a rebuttable presumption based on that information, has deemed it undesirable to do so.[30] The Department of State, which processes the actual renunciation, has neither the access to the requisite tax information nor the authority to make the determination of "a tax avoidance purpose."

Therefore, even if a renunciant were to affirmatively state a tax avoidance purpose at their renunciation interview, the Department of State must forward this information onto either the Department of Justice or DHS for the Reed Amendment to be enforced. Absent that, coordination would be required between the IRS, Department of State, and either the Department of Justice or DHS as well as the sharing of information that the IRS is in fact prohibited from

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[22] 8 United States Code ["U.S.C" or "U.S. Code"] § 1182(a)(10)(E).

[23] Charles M. Bruce, Lewis Saret, Stéphane Lagonico, and Steve Trow, "The Exit Tax – A Perfectly Bad Idea," *Tax Notes International* 867, March 13, 2006 at 869 ["A Perfectly Bad Idea"].

[24] IRC §6103.

[25] *Ibid*.

[26] DHS Report, *supra* note 2 at 3.

[27] *Ibid*.

[28] *Ibid*.

[29] Very generally, this process has been delegated to any immigration officer, as they have the authority to take and consider evidence concerning the privilege of any person to enter the United States, or concerning any matter which is material or relevant to the enforcement of the Immigration and Nationality Act see - INA § 103(a)(4) and 8 CFR 287.5(a)(2).

[30] DHS Report, *supra* note 2.

disclosing. This kind of inter-agency cooperation, aside from being (at the current time) legally impossible, is difficult, costly, and ultimately unlikely to be particularly effective as a function of attempting to coordinate up to four separate bureaucracies. The cost of this, combined with the fact that the Reed Amendment is not actually a revenue-raiser, seems out of proportion compared to the desired effect of this legislation, especially where an individual renunciant has no exit tax liability in the first place (as is often the case).

Here is a scenario to illustrate these difficulties. Assume Mr. Doe goes to the US consulate in Vancouver to renounce his citizenship because he is worried about having to pay US tax on the sale of his house that has increased in value substantially. Assume he does not mention tax issues as a motivation during the interview. It would be almost impossible for the consular officer to determine that he has renounced US citizenship for tax reasons. There is no investigative process which follows or which is part of the renunciation process. The consular officer cannot have access to Mr. Doe's tax returns. The consular officer cannot invoke the Reed Amendment on his own. He has to get the Attorney General's office or its delegate to do so. Even if Mr. Doe unwisely confesses to a tax motivated expatriation during his interview, it would still be difficult to legally invoke the Reed Amendment. First, there is no official process set out for the consular officer to follow. Second, the consular officer has no unilateral authority. Third, the unwieldy inter-agency collaboration described above must the followed.

Perhaps understanding the difficulties in enforcement, Senator Reed originally attempted to strengthen the Reed Amendment — unsuccessfully. In Senate Report 113-98 on the subject of the Department of Homeland Security Appropriations Act, Senator Reed included language specifically to create regulations enforcing INA 212(a)(10)(E).[31] This was not included in the bill eventually passed,[32] which indicates an unwillingness on behalf of both the legislature and the executive insofar as enforcement of the Reed Amendment is concerned. Of course, future legislative changes are impossible to predict. It should be noted that, even if a determination of a tax avoidance motive is made for an individual and that individual is initially deemed inadmissible, they may nonetheless be granted a waiver to enter the US on a temporary basis.[33]

The difficulty of applying the Reed Amendment is evidenced by the few times it has been applied. There have only been two documented invocations of the Reed Amendment to actually deny entry to an individual between 2002 and 2015.[34] The two times the Reed Amendment was actually applied were both cases where the individuals had admitted specifically to expatriating to avoid taxation.[35] Recall that there were over 11,000 renunciations from 2012 to 2015 alone. Though the incidence of renunciation between 2002 and 2012 was nowhere near as frequent as between 2012 and 2015, the scarce application of the Reed Amendment is certainly indicative of an unwillingness to enforce on behalf of the government.

There are several caveats of which to be aware. While there are few documented cases of the Reed Amendment being enforced and no regulations for its enforcement, there is still some risk at the border. A foreign passport may identify a US birthplace, which is a telltale sign of US citizenship. Because a US passport is required under US law for a US citizen to enter the United States,[36] a border agent might then inquire as to a former US citizen's passport. This would open that individual to a line of questioning about their renunciation. This discussion is best avoided by having an answer ready that does not mention tax considerations.

With some care, it should be possible for an individual to renounce US citizenship without worry about tax or immigration risks. A prospective renunciant would want to:

- Make sure that he or she is fully caught up on US tax returns for the past 5 years;
- Unless they qualify for one of the exceptions, ensure that their average annual US tax liability is less than US$161,000 over the past 5 years and that his or her net worth is under US$2 million; and
- Make sure to avoid mentioning anything related to tax to authorities during the entire renunciation process.

In short, it should be possible to divorce Uncle Sam with no tax or immigration consequences, but it may take some time and planning.

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[31] S. 2534 sec. 546.

[32] H.R. 83.

[33] 8 U.S.C § 1182(d)(3)(A).

[34] DHS Report, *supra* note 2 at 3.

[35] DHS Report, *supra* note 2 at 2.

[36] INA § 215(b).

CURRENT ITEMS OF INTEREST

New Income Tax Folios Released by the CRA

The CRA released three new income tax folios on Friday, September 2, 2016:

- S3-F10-C1, Qualified Investments — RRSPs, RESPs, RRIFs, RDSPs and TFSAs (effective September 2, 2016);
- S3-F10-C2, Prohibited Investments — RRSPs, RRIFs and TFSAs (effective September 2, 2016); and
- S5-F4-C1, Income Tax Reporting Currency (effective December 2, 2016).

Each folio contains the CRA's latest interpretation of the tax rules pertaining to the subject area. The folios can be relied upon as of their application dates (mentioned above).

RECENT INCOME TAX INTERPRETATIONS

Medical Expenses — Modifications to Segway, Bicycle, or Tricycle

The CRA confirmed that the cost of modifications made to a segway, bicycle, or tricycle will only qualify as an eligible medical expense to claim the medical expense tax credit if they are made exclusively to allow a person with a mobility impairment to operate the device in question. For example, the cost of installing levels, knobs, or handles on a segway, bicycle, or tricycle to help the disabled person steer, speed, brake, and signal is an eligible medical expense and may be used to claim the credit. The purchase cost of the device itself does not qualify for the credit.

— *Red Deer Conference Roundtable*, ¶13,536

Medical Expenses — No Tax Relief for Cost of Organic Food and Natural Products

The CRA confirmed that there were no tax relief provisions in the tax legislation to compensate taxpayers for the additional cost of buying organic food and natural products instead of buying cheaper regular food and products. The CRA noted that persons with celiac disease may treat the additional cost associated with buying gluten-free products as an eligible medical expense provided their physician confirms their need for such a diet. However, this favourable treatment is not available to individuals who decide, on their own initiative, to buy more expensive organic food and natural products instead of cheaper equivalent products.

— *Ministerial Correspondence*, ¶13,537

Medical Expenses — Cost of Service Dog for PTSD Patient

The CRA confirmed that the expenses incurred by a person suffering from post-traumatic stress disorder ("PTSD") to buy and care for a service dog are not eligible medical expenses to claim the medical expense tax credit. These expenses will only qualify for the credit if incurred for a person who is profoundly blind or deaf; who has severe autism, diabetes, or epilepsy; or who has a severe and prolonged impairment restricting the use of his/her arms or legs. The dog must also be specially trained to help the person with the impairment. A request for a ruling would not be of any use since the CRA would not change its opinion. However, the CRA agreed to send the person's letter to the Minister of Finance for their consideration to modify the legislation and add PTSD to the list of diseases or illnesses qualifying for the cost of a service dog.

— *Ministerial Correspondence*, ¶13,538

RECENT CASES

Canada cannot assess charges against US corporation relating to softwood lumber duty refunds

The appellant, a US corporation, provided reload, repackaging, and remanufacturing services for softwood lumber products ("SLP"), produced and sold by Canadian lumber producers. The products were imported to the United States

where the services were rendered and then delivered to customers. The appellant was considered an "importer of record" and under two USA orders between 2002-2006 paid duty deposits to the USA on its SLPs. Canada and the USA were involved in a major trade dispute involving Canadian SLPs concerning the legality of anti-dumping and countervailing duties applied to Canadian SLPs. From 2002-2006, the USA collected $5.4 billion in duties, mostly from Canadian lumber producers but also from US corporations such as the appellant. This dispute was resolved in 2006 with the passage of the *Softwood Lumber Products Export Charge Act, 2006* ("SLPECA") under which the USA retroactively revoked its US orders and refunded all duties previously paid and Canada was to pay $1 billion to specified US parties. The Minister of National Revenue levied an 18.06% charge totalling $927,700 on the refunds paid to the appellant. It sent two letters to the taxpayer in 2008 seeking payment and threatening penalties if payment was not made. The appellant did not pay the levy and appealed the assessment.

The appeal was allowed. The appellant argued that the MNR had no jurisdiction to assess it under the SLPECA. The letters sent by the MNR were an attempt to exercise enforcement jurisdiction against a foreign state. That can only be done if the foreign state consents, which the USA did not do. Had Canada wanted to enforce the SLPECA extra-territorially it could have done so through tax treaties or negotiations. The application of the softwood legislation to the appellant cannot be justified on the grounds of international territoriality law as there was no real and substantial link between Canada and the activities giving rise to Canada's claim for taxes. The respondent argued that there was a real and substantial link as there was an alignment of interest between Canada and the US in having the lumber dispute resolved and there was a monetary benefit received by the appellant due to Canada's efforts. Such factors were not enough for a real and substantial link especially given the facts that the appellant had no assets or operations in Canada, all services were done in the USA, and all duties were paid to the USA. There were express instances in the softwood legislation that evinced Parliament's intent to have the legislation extend beyond Canada's borders but no such intention was manifest in the taxing provisions. There was no intent on the part of Parliament to have the taxing provisions of the softwood legislation to apply to parties outside Canada.

¶49,454, *Oroville Reman & Reload Inc v. The Queen*, 2016 DTC 1147

Claimants under charitable donations tax scheme subject to capped liability for costs

Assessments were issued against the individual appellants with respect to claims made for charitable donation tax credits in connection with a charitable donation scheme. They appealed from those assessments, but the minister was entirely successful on appeal. The minister was awarded costs at Tariff. The order as to costs provided that any party who disagreed with that order could make submissions. The appellants did make such submissions, arguing that costs payable should be borne by the promoter of the scheme or, in the alternative, should be allocated among the thousands of taxpayers who were similarly assessed under the same tax donation scheme.

An order allocating costs among the appellants and the promoter was issued. The Court held that Rule 147 granted it complete discretion in determining the amount of costs, their allocation, and the persons required to pay them. In making its determination, the Court was entitled to consider the result of the proceedings, the amounts in issue, the importance of the issues under consideration, the complexity of those issues, and the volume of work and the conduct of the parties The Court agreed with the arguments made by the respondent with respect to those factors which, in the Court's opinion, would have justified an award of costs higher than the Tariff costs claimed and awarded. The Court went on to consider who should be liable for costs and the proper allocation of such costs among them. It concluded that both the appellants and the promoter of the charitable donation tax scheme should be liable for costs, but not to the same extent. The Court concluded that while liability for costs should be joint and several, the liability imposed on the appellants should be capped to reflect the extent of their participation in the scheme. The Court directed that each of the appellant's liability for costs would be limited to the proportion that their total charitable donation tax credit claims was to the total charitable donation claims made. The promoter's liability for costs was, however, unlimited.

¶49,453, *Mariano et al. v. The Queen*, 2012 DTC 1222

Taxpayer not entitled to judicial review of minister's second-level decision denying him relief from all interest and penalties assessed

The taxpayer, a self-employed consultant, failed to file his returns for 2005, 2006, 2009, 2011, 2012, and 2013 when requested to do so. He applied under subsection 220(3.10) of the ITA and section 281.1 of the ETA for relief from the resulting interest and penalties based on a series of extraordinary events which included personal health issues and family tragedies such as his mother-in-law's breast cancer, his wife's hospitalization for two months associated with an appendectomy, and his own high cholesterol, irregular heartbeat, and double hernia surgery. In a first level decision,

the minister granted partial relief, and in a second level decision further relief was granted. The minister's second level decision-maker determined, however, that not all of the extraordinary events cited by the taxpayer necessarily impacted his ability to comply with his tax obligations. In an application to the Federal Court for judicial review, the taxpayer sought full relief from all of the interest and penalties assessed for the periods from 2005 to 2013. His position was that: (a) the second-level decision maker failed to review all of the documentation which the taxpayer had provided; (b) there were certain inconsistencies in the reasons provided by the minister's second level decision-maker; and (c) the second level decision-maker did not give weight to all of the taxpayer's special circumstances.

The taxpayer's application was dismissed. The standard of review for ministerial discretionary tax relief applications under subsection 220(3.1) of the *Income Tax Act*, and under section 281.1 of the *Excise Tax Act* is reasonableness. The reasonableness analysis, moreover, will be concerned with "the existence of justification, transparency, and intelligibility within the decision-making process", and will also require a determination as to "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (see *Dunsmuir v. New Brunswick* 2008 UDTC 101, and *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12). In the present proceedings, the taxpayer's arguments were not supported by the evidence. Any documentation overlooked during the first-level decision making process was certainly taken into account at the second level. At the second level, moreover, the taxpayer was asked to provide additional documentation but failed to do so. In addition, there were adequate reasons given by the second-level decision maker for the fact that penalties only were forgiven for certain years, and interest only was forgiven for other years, and these distinctions did not amount to inconsistencies justifying the taxpayer's entitlement to judicial review. Nor was there anything to support the taxpayer's allegation that certain relevant factors were overlooked by the minister's second-level decision maker. In conclusion, therefore, the taxpayer simply failed to establish that the minister's second-level decision was unreasonable.

¶49,458, *Price v. MNR*, 2016 DTC 5090

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