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PENALTIES FOR TAX EVASION

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on Tax Evasion under the Income Tax Act (Canada) and the possible challenges to such assessments. Alpert Law Firm is experienced in providing legal services to its clients in tax dispute resolution and tax litigation, tax and estate planning matters, corporate-commercial transactions and estate administration. Howard Alpert has been certified by the Law Society as a Specialist in Estates and Trusts Law, and also as a Specialist in Corporate and Commercial Law.

A. SUBSECTION 239(1) PENALTIES

Tax evasion involves an illegal breach of specific statutory duties such as deliberately concealing or falsifying reported information. Pursuant to subsection 239(1) of the Income Tax Act (the "Act"), certain penalties may be levied against a person who is found guilty of tax evasion. Subsection 239(1) of the Act states that upon *summary* conviction for tax evasion, fines ranging from 50% to 200% of the amount sought to be evaded could be levied, as well as a possible imprisonment term of not more than two years.

Section 327 of the Excise Tax Act provides for similar penalties for HST evasion. However, there is a significant difference between the limitation periods of summary income tax offences and summary HST offences. Pursuant to subsection 786(2) of the Criminal Code, summary conviction offences, which includes summary Income Tax offences, have a limitation period of six months, such that no proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose. Interestingly, subsection 332(4) of the Excise Tax Act, allows for a significantly longer limitation period of eight years for HST related summary conviction offences. In other words, a complaint relating to HST summary convictions may be laid or made on or before the day that is eight years after the day the matter of the information or complaint arose.

Note, that pursuant to subsection 239(2) of the Act, the Crown, which is usually represented by the Federal Department of Justice, also has the option of prosecuting, a person charged with evasion of taxes, by *indictment*. If convicted by indictment, fines ranging from 100% to 200% of the amount sought to be evaded could be imposed, as well as a maximum imprisonment term of five-years.

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Pursuant to subsection 239(1) of the Act, fines or a term of imprisonment may be imposed if it is proven beyond a reasonable doubt that a person has *intentionally* performed, or conspired to perform, any of the following activities:

(a) made, or participated in, assented, or acquiesced to the making of a false or deceptive statement in a tax return, certificate, statement or answer filed or made in respect to a taxation year;

(b) evaded the payment of tax by destroying altering, mutilating, hiding or otherwise disposing of a record or book of accounts;

(c) made, or participated in, assented, or acquiesced to the making of a false return or deceptive statement in a record or book of accounts; or

(d) wilfully, in any manner evaded or attempted to evade compliance with the Act or payment of taxes imposed by the Act.

As such, a finding of wilful tax evasion requires that deliberate intention (*mens rea*) on the part of the accused must be proven by the Crown.

The Courts have clearly established that an individual can only be convicted for an offence under one of the subparagraphs in subsection 239(1) of the Act, because to punish a taxpayer for an offence, under more than *one* of the subparagraphs, would have the effect of unduly punishing the taxpayer twice for the same crime. This rule reiterates the general principle that individuals should not be put in jeopardy more than once for the same offence.

In addition to imposing fines and/or a term of imprisonment under subsection 239(1) of the Act, it is also possible that the Minister of National Revenue (the "Minister") could impose civil penalties under section 163 and 162 of the Act. However, a person who is criminally convicted under subsection 239(1) of the Act cannot be held liable to pay a penalty imposed under sections 162 or 163 of the Act for the same evasion, unless that person was assessed for that penalty under section 162 or 163 before the information, or complaint giving rise to the criminal conviction, was laid or made.

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B. ACTIVITIES WHICH CONSTITUTE TAX EVASION

The Courts have found that a variety of activities meet the requirements of tax evasion. Case law has indicated that an individual may be successfully prosecuted for the crime of tax evasion if he or she knowingly makes, acquiesces or is wilfully blind to omissions or false statements, including the falsifying of documents, inflating invoices, overstating losses, and understating sales.

Case law has also demonstrated that individuals who are charged with tax evasion are more likely to be found guilty if any of the following factors are present:

(i) the accused possessed a high degree of general business knowledge or experience in the preparation of taxes;

(ii) the amount of understatement of income was so high that it could not be easily overlooked by any taxpayer;

(iii) there was a large number of errors or omissions; or

(iv) there was a pattern of understating income (i.e. the errors spanned a number of taxation periods); and

(v) the amount of understatement of income increased over the course of several taxation years.

In order for the Crown to prove an offence under the Act, there are often two elements each of which must be proved beyond a reasonable doubt: (i) *actus reus* and (ii) *mens rea*. *Actus reus* is the guilty, wrongful or prohibited act or omission. *Mens rea* refers to a "guilty mind", that is, the knowledge that the act committed is wrongful or prohibited, or that the person intended to commit the prohibited act. The *mens rea* for tax evasion, for example, may be satisfied by proof that the taxpayer intentionally made statements knowing they were false.

The Courts have consistently distinguished between the tax planner and the tax evader. The former intends to avoid owing tax under the Act, whereas the latter intends to avoid the payment of tax that is owed under the Act. The Courts have restated that it is perfectly legitimate for a person to structure his affairs to minimize tax liability. Recent case law has also noted that in certain circumstances, mistake or ignorance regarding tax liability may negate the *mens rea* requirement.

1. *The Queen v. Nagda and Nagda*, 2002 DTC 7158

In this Ontario Superior Court of Justice case, the taxpayers were charged with attempting to wilfully evade taxes, pursuant to subparagraph 239(1)(d) of the Act. The Crown claimed that the taxpayers, who were successful real estate agents, wilfully omitted the income they earned from approximately 24 of the 30 house sales they brokered over a two-year taxation period. Millions of dollars were unreported.

In their defence, the taxpayers claimed that they did not have the requisite intent for tax evasion given that: (i) they mistakenly but honestly believed that in order to take advantage of the capital gains exemption it was not necessary to disclose all of the property sales; and (ii) in the alternative, they did not know that errors were made as they heavily relied on their accountant who had prepared their tax returns and it was the accountant who failed to report their income.

The Court found the taxpayers guilty of tax evasion. In coming to this decision, the Court placed emphasis on: (i) the taxpayers high degree of business astuteness given their successful business; (ii) the large number of errors made (the taxpayer made approximately 24 omissions); (iii) evidence which indicated that there was a course of erroneous conduct as the taxpayers continually made omissions over a two year periods; and (iv) the amount unreported was in the millions and as such would have been hard for any taxpayer to overlook. The taxpayers appealed.

The Ontario Court of Appeal dismissed the appeal and upheld the summary conviction of tax evasion. The taxpayers then made an application for leave to appeal from the judgment of the Ontario Court of Appeal, but the Supreme Court of Canada dismissed the application.

2. *R. v. Breakell*, [2009] DTC 5133

In this Alberta Court of Appeal case, the taxpayer, who was a chartered accountant and the president of a company was selected for an audit of his returns for the 1998 and 1999 taxation years. The auditor noted that the amount of capital gains and losses on the taxpayer's returns did not match the information forwarded by brokerage houses on the sales or dispositions of shares conducted by them on behalf of the taxpayer. The taxpayer had engaged in numerous stock market transactions throughout the 1998 year but he only reported a capital gain realized from a single transaction involving one company. In 1999, he had unreported income of over $1,000,000 in addition to failing to disclose capital gains from share dispositions. The taxpayer was charged under paragraphs 239(1)(a) and 239(1)(d) of the Act with: (i)

making false and deceptive statements in his 1998 and 1999 returns by failing to report taxable income; and (ii) wilfully evading or attempting to evade compliance with the Act and payment of taxes by failing to report taxable income for the 1998 and 1999 taxation years.

At trial, the taxpayer advanced the defence that he failed to report taxable income because: (i) he had been pre-occupied with his business; (ii) he did not open mail from his brokerage firms; (iii) he kept poor records; (iv) he procrastinated and did not have enough time to complete the returns properly; (v) the calculations were complex; and (vi) he drank and partied too much. He also claimed there had been some problems with a stock trading computer program he had been using to help him track his securities.

The trial judge at the Alberta Provincial Court found the taxpayer guilty of wilfully evading the payment of income tax for the 1998 and 1999 taxation years, contrary to s.239(1)(d) by failing to report taxable income. The trial judge also found the taxpayer guilty of two counts of making false or deceptive statements on his T1 income tax return for 1998 and 1999 contrary to paragraph 239(1)(a).

The convictions were upheld by the Alberta Court of Appeal. The taxpayer did not provide any credible reason for not properly reporting his capital gains from so many of his transactions. The taxpayer was an accountant and had extensive stock market investment experience, more so than the average taxpayer. The trial judge found, at a minimum, the taxpayer was guilty of the offences because he was wilfully blind. The taxpayer had: (i) failed to open the mail from the brokerage firms; (ii) failed to make use of that information in filing his return; and (iii) failed to make further inquiries into his capital gains because he wanted to stay ignorant.

3. ***R. v. McNeil*, [2007] N.S.J. No. 227**

In this Nova Scotia Provincial Court case, a medical doctor did not keep adequate books of accounting and supporting documentation but rather used estimates for his annual income and expenses. In computing his professional income, he also claimed to have paid a salary to his spouse for the year when she was not assisting in doing any work for his practice, even though on his tax return he showed that she earned no income and claimed the maximum spousal non refundable credit.

The Court found the medical doctor guilty of filing false and deceptive statements contrary to section 239(1)(a) of the Income Tax Act. The Court held that (i) he knew or ought to have known that he could have obtained his income particulars from the

healthcare system database and from his bank statements; and (ii) he knew or must have known that he did not pay his spouse the amounts that he indicated and as a result did not incur those expenses. Since he must have known that the CRA would rely upon those statements to assess his tax liability, the statements he made on his tax returns were false and deceptive.

C. NET WORTH ASSESSMENT

Pursuant to the provisions of subsection 152(7) of the Act, the Minister may use a net worth assessment (also known as an arbitrary assessment) as a method of estimating an individual's annual income where (i) no tax return has been filed; (ii) the Minister considers that the tax return which has been filed is inaccurate; or (iii) the taxpayer has not maintained adequate records of the taxpayer's income.

Even if the Minister cannot prove the exact amount of tax owing based upon a net worth assessment, a taxpayer may still be found guilty of tax evasion if it can be proved beyond a reasonable doubt that the taxpayer wilfully evaded or attempted to evade compliance with the Act or payment of taxes imposed by the Act.

1. *R. v. Hunter*, [2008] O.J. No. 467

The taxpayer was charged pursuant to subsection 239(1) of the Act for tax evasion and making false or deceptive statements on his income tax returns in 1996 and 1997. The taxpayer was involved in high volume stock trading. On his income tax returns, the taxpayer declared “nil” income for the years in question but had spent hundreds of thousands of dollars. The Minister produced a net worth assessment to determine the tax owing, as the taxpayer had not kept the necessary records.

The Ontario Superior Court of Justice acquitted the taxpayer on both charges. The Court held that the evidence in this case indicated beyond a reasonable doubt that the taxpayer was guilty of both tax evasion and making false or deceptive statements on his income tax returns. However, the opening net worth statement could not be established with reasonable certainty. As a result, the estimated increase in net worth by the Minister was not reliable. The taxpayer was acquitted on the basis that it was not possible to determine the amount of tax owing.

However, the Ontario Court of Appeal overturned the acquittal and convicted the taxpayer. The Court stated that while the burden of proof remained on the Crown, the taxpayer was required to keep proper books and records. The Crown tendered

evidence that the taxpayer had a certain amount of assets as of a particular date and had increased his net worth as a result of taxable income that had not been disclosed. The taxpayer offered no evidence by way of explanation. Since the opening net worth statement of his assets and the value of the shares he owned at the time were peculiarly within the knowledge of the taxpayer, the Court held that the Crown was not required to negate every possibility respecting the amounts put forward.

D. IMPACT ON TAX-PREPARING PROFESSIONALS

While subsection 239(1) of the Act is usually used to convict taxpayers who wilfully perform any of the above activities, any persons who are intentionally involved in the making of an erroneous tax return can also be subject to punishment under this subsection. As case law has indicated, tax preparing professionals, such as accountants, can be charged under this subsection.

Specifically, accountants have been found guilty of tax evasion on the basis that given their high degree of tax knowledge, at the very least, they must have been wilfully blind to the error. However, case law has indicated that accountants have successfully defended against charges of tax evasion on the grounds that they were duty bound by professional standards to act as they did.

1. *The Queen v. Jones*, 2001 DTC 5689

In this Provincial Court of Alberta case, an accountant and taxpayer were jointly charged with wilfully evading the payment of taxes. The Crown claimed that the accountant, for three consecutive taxation years, had concealed the taxpayer's control and ownership of a corporation and failed to report transactions regarding the sale of shares of the corporation. These omissions resulted in tax returns which erroneously failed to report income the taxpayer obtained from capital gains and interest.

While the taxpayer pleaded guilty to tax evasion, the accountant claimed that he was not guilty as he was only the conduit or correspondent who merely followed the taxpayer's instructions to make such omissions. The accountant testified that he did not know about the sale of such shares and the income that resulted.

The Court found the taxpayer guilty of tax evasion, weighing the accountant's high degree of tax knowledge very heavily in coming to this conclusion. The Court stated that even if the accountant had been 'tricked' by the taxpayer, the fact that the accountant had a high degree of knowledge, education and training to appreciate the

situation, the accountant was at the very least *deliberately ignorant* of the scheme to hide income from the Minister. Thus, it is very difficult for an accountant, who possesses a high degree of tax knowledge, to claim that he is unaware of the errors in the tax return as a defence against tax evasion charges.

2. ***R. v. Simons*, 77 DTC 5232**

In this Provincial Court of British Columbia case, a chartered accountant was charged with the making of false statements in a tax return, pursuant to subparagraph 239(1)(a) of the Act. The Crown claimed that the accountant, when making a tax return for his corporate client, grossly understated the value of the inventory owned by the corporation.

The accountant defended against these charges. The accountant claimed that during the course of his tax-preparing activities he became concerned that the inventory figures the taxpayer had given him were overstated. This caused him to conduct a thorough investigation on the inventory and place a lower value on the inventory as a result. The accountant argued that he was not attempting to be deceptive in reporting a lower inventory figure, rather he was fulfilling his duty, imposed by professional standards, to review the valuation of the inventory and, if incorrect, to use a professionally endorsed calculation method to impose an estimated figure. The accountant also drew attention to (i) the fact that he himself had nothing to gain from underestimating the inventory and (ii) that the inventory valuation in the tax return was clearly identified as purely an estimate.

The Court acquitted the accountant on the basis that the defendant was duty bound to act as he did, as per professional standards. The Court found that at the very most, the accountant's actions were the result of a judgement call that was in accordance with accounting standards, rather than a deceptive attempt to reduce tax payable.

E. APPLICATION TO THE VOLUNTARY DISCLOSURES PROGRAM

Pursuant to subsection 220(3.1) of the Act, the Canada Revenue Agency has wide discretion to give equitable relief to taxpayers by cancelling or waiving penalties and interest that would otherwise be payable under the Act. This discretion is exercised partly through the Voluntary Disclosures Program. If a voluntary disclosure is found to satisfy all the requisite conditions, relief will be provided from penalties and prosecution that may otherwise have been imposed.

For income tax submissions made on or after January 1, 2005, the Minister cannot grant relief to any taxation year beyond 10 years from the calendar year in which the submission was filed. This 10 year limitation period for relief rolls forward every January 1. An exception to this 10 year limitation period applies where the initial submission to the Minister was made prior to January 1, 2005, when the 10 year limitation rule came into effect. Unless an initial request for relief was filed by the taxpayer before January 1, 2005, the Minister will not accept submissions for the 1985 to 1994 taxation years.

Despite the foregoing limitation period for tax relief from penalties and prosecution, there is currently no limitation period on the ability of the Minister to examine unreported income kept in offshore accounts. The Minister can assess back taxes and interest for an infinite number of years while only offering relief for the most recent 10 years.

In June 2010, there were indications that the CRA was working towards a more lenient and consistent approach for the repatriation of offshore income taxes. In order to encourage voluntary disclosures, under the new CRA rules, where voluntary disclosures are made, auditors would only go back a maximum of 10 years when assessing offshore unreported income and it would be unnecessary for the taxpayer to explain the initial capital.

F. FACTORS IN SENTENCING AN OFFENDER

Upon finding a person guilty of tax evasion, either summarily or by indictment, the Court will decide upon the amount of fines and/or the term of imprisonment to be levied. Courts impose such fines and imprisonment terms according to the particular facts of each case.

In general, case law has indicated that, when deciding on the appropriate sentence to impose, Courts consider factors such as:

(i) the gravity of the offence (i.e. the amount involved in the evasion);

(ii) the degree of deliberation shown by the offender;

(iii) the offender's age and character; and

(iv) deterrence to the taxpayer and to other taxpayers.

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1. *Galloway v. The Queen*, 69 DTC 5023

In this Alberta District Court case, the taxpayer was a successful farmer who pleaded guilty to evading $14,000 of taxes over an eight-year period. The Court imposed a fine of $10,000 and, in default of payment, a one year term of imprisonment. The taxpayer appealed the harsh sentence submitting that the sentence should be reduced to a $1,500 fine.

The Court, instead of imposing a lighter sentence, opted to levy a heavier sentence of $15,000 in fines and, if the taxpayer defaulted payment, an eighteen month term of imprisonment. The Court came to this conclusion on the grounds that a penalty that was large enough to deter the taxpayer from evading taxes again as, despite previous warnings by the Minister, the taxpayer deliberately continued to conceal large amounts of income and evade taxes. In addition, the Court also noted that the age and character of the offender should be taken into account. Thus, in sentencing an offender Courts focus on the principle of deterrence, the degree of deliberation shown by the offender, and the offender's age and character.

2. *R. v. DiGiuseppe*, [2010] O.J. No. 426

Between October 1, 1996 and August 31, 1999, the taxpayer operated two adult entertainment clubs. As a consequence of the intentional suppression, concealment and non-reporting of income generated from various cover charges and "services" and the under-reporting and/or non-reporting of G.S.T., the tax authority was deprived of income tax and G.S.T. totaling at least $3,492,415.

Following a trial, the offender was convicted of fraud over $5000 contrary to section 380(1)(a) of the *Criminal Code*. He had been charged with tax evasion as well, but all charges other than fraud were eventually dropped.

The Court sentenced the offender to six years imprisonment and a fine of $2 million, with a period of one year consecutive imprisonment to be imposed in default of payment. Among other factors, the judge considered the offender's ability to pay the fine. Due to the duration and magnitude of the fraud, the Court was convinced that the offender controlled a significant financial empire and hence still had the necessary financial resources to fund a significant monetary sanction.

On appeal, the Ontario Court of Appeal upheld the fine and the six years imprisonment, stating that the sentence was within the appropriate range given the very significant fraud.

3. ***R. v. Breakell*, [2009] A.J. No. 1167**

In this Alberta Court of Appeal case, the taxpayer, an accountant who traded extensively, was convicted of three counts of tax evasion. He was sentenced to two year less one day in jail as well as a fine of $404,257, which was 100% of the amount of the tax evaded. The taxpayer appealed the sentence in the Alberta Court of Appeal on the grounds that the trial judge: (i) erred in concluding the principles of denunciation and deterrence would not be served by a conditional sentence; (ii) did not follow binding precedent; and (iii) erred in applying the necessary specific intent.

The Court of Appeal found that the trial judge did not err with respect to the second and third issues. The Court also agreed with the trial judge in finding that a term of incarceration was necessary for general deterrence however they found that a reduced sentence of 12 months was sufficient to meet all the necessary sentencing objectives. The Court of Appeal gave weight to the following factors: (i) the taxpayer had no prior criminal record; (ii) he had lost his chartered accountant designation; and (iii) he was also remorseful and willing to make restitution. This was balanced against the fact that as a chartered accountant, the taxpayer was in a position of: (i) helping others with their taxes; (ii) trust; and (iii) understanding of the importance of the tax system. The amount of taxes evaded also was a factor.

4. ***Viccars v. The Queen*, 2010 DTC 5184**

In this Provincial Court of Alberta case, the taxpayer, who was a lawyer, pleaded guilty to a charge of evading payment of taxes. The taxpayer had devised a plan under which he would, through a corporate entity, acquire computer software and sell it to a partnership at an inflated price. The purpose of the scheme was to obtain the benefits of the 100% capital cost write off then in effect for computer software acquisitions. Parties that invested in the partnership, including the taxpayer, would then be allocated their proportionate share of the resultant partnership write-off. Through this series of transactions, the total loss allocated by the partnership in 1994 and 1995 was around $3,400,000, and the total income tax evaded was approximately $704,000.

The Provincial Court sentenced the taxpayer to three and a half years of imprisonment and a $704,000 fine, which was equal to 100% of the tax evaded. In imposing a lighter sentence than the maximum sentence of five years incarceration, the Court took into account the following factors: (i) the taxpayer had no criminal record; (ii) the taxpayer was 63 years old and suffered from a variety of health problems; and (iii) the taxpayer had resigned his membership in both the Law Society of British Columbia and the Law Society of Alberta, which resulted in him losing his profession and all that

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goes with it. The Court also considered the fact that a guilty plea was entered, but did not consider it a mitigating factor as it was only offered by the taxpayer eight years after the commencement of the trial. These considerations were balanced against a number of aggravating factors, including: (i) the fact that the scheme was complex, well thought out, and involved a significant sum of income tax evaded; (ii) the involvement of innocent people, who suffered the loss of the expected tax credit; and (iii) the breach of trust by a highly educated person taking advantage of his position and professional status.