

APPLICATIONS FOR EXTENSIONS OF TIME FOR TAX APPEALS

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on the rules governing income tax appeals and administrative changes regarding notices of objection and reassessment periods.

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.

I. APPLICATIONS TO THE MINISTER

Under section 166.1 of the Income Tax Act (the "Act"), applications for extensions of the time limits for serving Notices of Objection under section 165 of the Act, or for making requests for GAAR adjustments in accordance with subsection 245(6) of the Act must be made to the Minister. The Tax Court of Canada has jurisdiction to grant such applications where the Minister either refuses or fails to do so.

Under section 167 of the Act, the Tax Court of Canada also hears applications to extend the time for instituting a Notice of Appeal to the Tax Court of Canada pursuant to section 169 of the Act.

Subsection 166.1(2) of the Act states that the application to the Minister must set out the reasons why the Notice of Objection or the request was not served or made within the normal time limits.

Under subsection 166.1(3) of the Act, the application is required to be addressed to the Chief of Appeals in a District Office or a CRA Taxation Centre. Service of the application on the Minister may be affected by delivery or by regular mail. The application for the extension must be accompanied by a copy of the Notice of Objection or the request.

Subsection 166.1(4) of the Act provides that the Minister has discretion to accept an application to extend the time for serving a Notice of Objection or requesting a GAAR adjustment in cases where the application is not made in accordance with subsection 166.1(3) of the Act.

The Minister is required to consider an application with all due dispatch and to notify the taxpayer of the decision in writing. In the event that the Minister grants the application, the Notice of Objection or the request will be deemed under subsection 166.1(6) of the Act to have been served or made on the day on which the Notice of the Minister's decision is sent to the taxpayer.

Subsection 166.1(7) of the Act provides that no application shall be granted by the Minister unless:

- (a) the application is made within one year of the expiration of the normal limitation period for serving the Notice of Objection or filing the request for a GAAR adjustment, and
- (b) the taxpayer demonstrates that:
 - (i) the taxpayer was unable to act or to instruct another to act in the taxpayer's name during the limitation period, or the taxpayer had a *bona fide* intention to object to the assessment or to make the request within that time;
 - (ii) it would be just and equitable to grant the application; and
 - (iii) the application was made as soon as circumstances permitted.

II. APPLICATIONS TO THE TAX COURT OF CANADA

1. Extension of Time for Serving Notice of Objection or Requesting GAAR Adjustments

If the Minister refuses to allow the application for extension of time under section 166.1 of the Act or fails to notify the taxpayer within 90 days following the date on which the application is served on the Minister, the taxpayer is permitted under subsection 166.2(1) of the Act to apply to the Tax Court of Canada to have the application granted. An application cannot be made to the Tax Court of Canada after the expiration of 90 days from the day on which notification of the Minister's decision under section 166.1 of the Act was mailed to the taxpayer.

Subsection 166.2(2) of the Act provides that the application shall be made by filing in the Registry of the Tax Court of Canada three copies of each of the following documents:

- (a) the application filed with the Minister under subsection 166.1(1) of the Act;
- (b) a Notice of Objection or the request for a GAAR adjustment, as the case may be; and
- (c) the Notice of the Minister's decision, if any, issued under subsection 166.1(5) of the Act.

The Tax Court of Canada may impose such terms as it deems just in granting an application made under subsection 166.2(1) of the Act. Subsection 166.2(5) of the Act imposes similar limits on the Tax Court's discretion as those placed upon the Minister under subsection 166.1(7) of the Act. The informal procedure of the Tax Court of Canada applies to the hearing of this application for an extension of time.

2. Extension of Time to Appeal Assessment Confirmation or Reassessment

Subsection 167(1) of the Act provides that a taxpayer may make an application for an extension of the time limit for appealing an assessment confirmation or reassessment to the Tax Court of Canada under subsection 169(1) of the Act. The Tax Court of Canada may impose such terms as it deems just in granting the application.

Subsection 167(2) of the Act requires an application made under subsection 167(1) to state the reasons why the Notice of Appeal to the Tax Court of Canada was not instituted within the applicable time limits. Three copies of the application must be filed in the Registry of the Tax Court of Canada together with three copies of the Notice of Appeal

Subsection 167(5) of the Act states that no application shall be granted unless:

- (a) the application is made within one year of the expiration of the normal limitation period for instituting an appeal under section 169 of the Act; and
- (b) the taxpayer demonstrates that:

- (i) the taxpayer was unable to act or to instruct another to act in the taxpayer's name during the limitation period, or the taxpayer had a *bona fide* intention to appeal within that time;
- (ii) it would be just and equitable to grant the application;
- (iii) the application was made as soon as circumstances permitted; and
- (iv) there are reasonable grounds for the appeal.

Subparagraph 167(5)(b)(iv) of the Act requires the taxpayer to demonstrate that there are reasonable grounds for the appeal. There is no similar duty on a taxpayer to demonstrate reasonable grounds for objection or making a request in either subsections 166.1(7) or 166.2(5) of the Act.

III. RELIANCE ON PROFESSIONALS

The Courts will generally grant extensions when taxpayers have relied in good faith on professionals, such as accountants and lawyers, to apply to the Courts for an extension of time to file their Notices of Appeal and these professionals have failed to do so. The failure to file on time may be due to: i) illness; ii) negligence or mishandling of the taxpayer's files; iii) miscommunication or misunderstanding; or iv) retention of a new accountant or new legal counsel. However, more recently, the Courts have held that in certain circumstances they may not grant an extension when the failure to file Notices of Appeal is due to negligence on the part of the professionals.

This issue of the Legal Business Report is designed to provide information of a general nature only and is not intended to provide professional legal advice. The information contained in this Legal Business Report should not be acted upon without further consultation with professional advisers.

Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.

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