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Tax Topics®

February 10, 2011
Number 2031

Conjecture and The Voluntary Disclosure Program

The Canada Revenue Agency's Voluntary Disclosure Program (the "Program") encourages taxpayers to voluntarily disclose unreported income. As set out in Information Circular IC00-1R2, a taxpayer who voluntarily discloses unreported income will not be prosecuted for tax evasion and will not have any civil penalties imposed if the Agency's four Program conditions are met. The four Program conditions are: (1) the disclosure must be voluntary; (2) the disclosure must be complete; (3) the disclosure must involve the application, or potential application, of a penalty; and (4) the disclosure must include information that is at least one year past due.

Paragraphs 32 to 34 of Information Circular IC00-1R2 describe situations that may put the "voluntary" nature of the submission offside. In many cases, the Minister will not accept a taxpayer's disclosure submission under the Program, citing any type of enforcement action. The CRA appears to have defined "enforcement action" as any real or contemplated, direct or indirect, action that could have revealed the information that the taxpayer sought to disclose under the Program. In the Federal Court's reasons for judgment in *Amour International Mines d'Or Ltée v. Attorney General of Canada* ("AIMO") (2011 DTC 5013), the Court considered the Minister's decision to deny the taxpayer's disclosure on the basis that, prior to the disclosure, the CRA initiated some enforcement action.

On two occasions, AIMO had withheld but had not remitted tax on dividends paid to foreign shareholders. AIMO submitted a request under the Program respecting its failure to remit these amounts. The request was denied by the CRA in both the initial and second level review, citing enforcement action that had already been taken with regard to AIMO's shareholders or persons associated with AIMO.

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AIMO applied for judicial review of the Minister's decision to not accept AIMO's disclosure under the Program. AIMO argued that the CRA's alleged enforcement action was not sufficiently linked to the subject disclosure. Counsel for the respondent submitted that the Minister's decision was reasonable on the basis that the CRA initiated an audit of a corporation with which AIMO was associated ("Greymount") and that the Greymount audit constituted enforcement action that would have revealed the information that AIMO sought to disclose under the Program.

The Court noted that the respondent's argument did not appear to be supported by any evidence or legal inference capable of establishing that the Greymount audit would have, in fact, uncovered the AIMO information. In these circumstances, the Court asked counsel for the respondent to explain how the CRA would have allegedly uncovered the AIMO information. In response, counsel for the respondent posited that "mere mortals would find it difficult to understand the thought process of a tax collector".

The Court did not accept the respondent's argument and supported its conclusion by referring to Lord Macmillan's reasons for judgment in *Jones v. Great Western*

Railway Co. In *Jones*, Lord Macmillan held that "[t]he dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof". The Court held that the standard of review is reasonableness and the Minister could not purport to justify his decision with mere conjecture. Unsurprisingly, the Court granted AIMO's application for judicial review.

It would seem that *AIMO* represents a victory for "mere mortals", providing support for the position that the Minister should adopt a narrower definition of enforcement action and that the Minister is required to establish a real connection between the enforcement action and the tax information disclosed.

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Parliament Returns from Winter Break

On January 31, 2011, the House of Commons resumed sitting after the winter break and the Senate returned on February 1, 2011. While the date for the 2011 federal Budget has not yet been announced, it has been noted in the media as being sometime in March.

Currently, there is a great deal of draft income tax legislation that has not yet been introduced in a Bill. A summary of income tax legislative proposals that have been released and are still in draft form is listed below in reverse order by date of release. The proposed amendments and explanatory notes are reproduced in CCH's *Income Tax Act* product online and on DVD. The 91st edition of CCH's *Income Tax Act with Regulations, Annotated* will be available in March 2011.

- December 16, 2010 – Draft income tax legislation to amend the provisions relating to the tax treatment of real estate investment trusts;
- December 7, 2010 – Draft legislation to amend the *Income Tax Act*, consequential to changes to the Saskatchewan Pension Plan;

TAX TOPICS

Published weekly by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

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PUBLICATIONS MAIL AGREEMENT NO. 40064546
RETURN UNDELIVERABLE CANADIAN ADDRESSES TO
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330-123 MAIN ST
TORONTO ON M5W 1A1
email circdept@publisher.com

© 2011, CCH Canadian Limited
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Toronto, Ontario M2N 6X1