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REMISSION ORDERS AND THE EXERCISE OF DISCRETION

Introduction

Since 1952 the *Financial Administration Act*[1] has permitted the "Governor in Council" (which means the Governor General on the advice of the Federal Cabinet) to order that money owed to the federal government be remitted to the debtor. Originally, remission orders could be granted only in respect of taxes. In 1991 this was expanded to include all forms of debts.[2]

Remission orders are a valuable tool for tax practitioners. Although a remission order cannot be granted by the Tax Court of Canada or the Federal Court, several recent decisions reveal circumstances where such an order was considered by the Court to be appropriate. These decisions serve as a useful reminder that this remedy should not be forgotten when considering all possible relief available to a taxpayer.

At the same time, however, recent decisions of the Federal Court[3] and Federal Court of Appeal[4] make it clear that the Canada Revenue Agency ("CRA") has significant discretion in deciding whether to recommend a remission order. A review of the CRA's Remission Guidelines and these decisions is helpful in determining whether a remission order should be pursued.

These decisions confirm two encouraging facts for taxpayers. First, the scenarios where a remission order should be considered are broader than those contained in the CRA's Remission Guidelines; and second, the CRA cannot fetter its discretion and refuse to consider these scenarios by mechanically applying its Remission Guidelines.

Remission Orders

Subsection 23(2) of the *Financial Administration Act* provides that the Governor in Council may remit any federal tax or penalty where collection of the amount would be unreasonable or unjust,[5] or where forgiving the amount is otherwise in the public interest. Subsection 23(2.1) expands this discretion to all other debts owing to Her Majesty, including accrued interest.

A remission order is considered on the recommendation of the appropriate Minister. In the case of income or commodity taxes, there are two ways a recommendation for a remission order may be obtained: via the Minister of Finance or, more commonly, the Minister of National Revenue.

In the case of an application to the Minister of National Revenue, remission requests are first reviewed by the CRA Legislative Policy Directorate (for income tax) or Excise and GST/HST Rulings Directorate (for commodity taxes). Under the Remission Guidelines, an application for remission is first assigned to a rulings officer. That officer prepares a background paper, which is then considered by the Headquarters Remission Committee. The Headquarters Remission Committee is comprised of senior officers and/or managers from the Legislative Policy Directorate, the Excise and GST/HST Rulings Directorate, and

Revenue Collections Branch. The Headquarters Remission Committee is responsible for reviewing all cases presented and for making a recommendation to the Assistant Commissioner, Policy and Planning Branch, of the CRA.

The Assistant Commissioner, Policy and Planning Branch, reviews the recommendation from the Headquarters Remission Committee and makes a decision whether to deny the request or to forward a positive recommendation to the Minister. If the request is denied, the Assistant Commissioner informs the taxpayer in writing, providing the reasons for the denial.

In determining the merits of a request for a recommendation, the CRA has established the Remission Guidelines as internal administrative guidelines setting out the criteria to be considered. The CRA takes the position that a recommendation is "generally" limited to four situations: extreme hardship, incorrect action or advice by the CRA, financial setback combined with extenuating factors, or the unintended result of legislation. In determining whether a taxpayer has experienced the "unintended result of legislation", the CRA takes the position that a recommendation for remission can only be made with the concurrence of the Department of Finance. It should be noted that the *Financial Administration Act* does not give the Governor in Council the discretion to order interest payable to the taxpayer in the case of taxes assessed and paid, but later reduced by remission order.

If a remission order is granted, it must be published in the *Canada Gazette* Part II, pursuant to paragraph 11(3)(d) of the *Statutory Instruments Regulations*, C.R.C., c. 1509. The obvious purpose of this, similar to the rule in the United States, is to prevent the government from providing sweetheart deals to its supporters through a remission order. Not only is the order itself published, but an explanatory note is published explaining, at least broadly, why the order was granted. The amount of the remission is generally specified, although there are cases where a remission order is granted in advance, (that is, the order says that upon the application of the taxpayer a remission will be granted).

Remission orders can be granted to a single person or to a class of persons.

Examples in Recent Case Law Where Remission Was Suggested

Many recent decisions of the Tax Court of Canada make reference to the option of a remission order as an alternative form of taxpayer relief. Although these comments are *obiter*, they provide an illustration of the types of scenarios where a remission order may be appropriate:

- In *Schoenne v. The Queen*[6] the taxpayer's ex-husband requested his employer to prepare T4 slips showing the taxpayer as the individual who earned income in each year. The taxpayer failed to file a Notice of Objection for several of the years in question within 90 days of the reassessments, and failed to request an extension of time to do so within the prescribed one-year period after receiving the reassessments. The Court stated that although it was bound by the *Income Tax Act* and could not grant a further extension, a remission order may be appropriate as there was a "strong case" that collection of the tax in question was unreasonable and unjust.
- In *Courtney v. M.N.R.*[7] the taxpayer applied to the Tax Court of Canada seeking relief from the CRA's collection efforts in respect of an Employment Insurance debt that was extinguished by the taxpayer's discharge from bankruptcy. The Tax Court lacked the jurisdiction to hear the matter, but noted that the taxpayer should not be forced to repeat the same application to the Court of Queen's Bench of Alberta, and that continued enforcement efforts would be both unreasonable and unjust. The Tax Court suggested that a remission order be considered.
- In *Skripkariuk v. The Queen*[8] the taxpayer was denied a deduction for spousal and child support, as the CRA took the position that the taxpayer's documentation of the agreement was insufficient to constitute a "written agreement" as required by the *Income Tax Act*. The Tax Court considered that delay by the Minister was a contributing factor in the failure to correct this documentary shortfall, and that the taxpayer had complied with the spirit, if not the letter, of the law. The Tax Court "strongly recommended" that the taxpayer apply for a remission order.

These factual scenarios do not fall neatly into one of the CRA's guideline categories when considering whether a recommendation for remission will be made. The question of how closely the CRA's Remission Guidelines are to be followed has been considered in two recent applications for judicial review.

Judicial Review of CRA Decision Making

Background

In *Axa Canada v. The Queen* the taxpayer received management services from its parent corporation. As a part of this arrangement the taxpayer assessed itself for GST purposes in respect of the services. The taxpayer was later reassessed and, for income tax purposes, deductions were not permitted for some of the services provided by its parent. GST in

the amount of approximately $380,000 was self-assessed in respect of the denied deductions. As part of its agreement with the CRA to resolve the dispute, the taxpayer was to apply to the Minister of Revenue for Quebec ("MRQ") for a GST rebate (as the MRQ administers the collection of GST in Quebec).

The application to the MRQ for a refund of GST was denied, as a rebate was possible only within two years of the overpayment. The MRQ did, however, suggest to the CRA that a remission order be recommended. The CRA refused, taking the position that although the agreement between the CRA and the taxpayer gave rise to "false expectations", it did not constitute misinformation. The taxpayer applied for judicial review, but was ultimately unsuccessful.

A similar application was made in *Waycobah v. The Queen*. The Waycobah First Nation was reassessed for failure to remit HST on sales of taxable products to non-natives. The question of whether this was appropriate under the governing treaty was litigated over the course of the years 2000 to 2003.[9] The taxpayer continued to refuse to collect HST until the matter was conclusively settled when leave to appeal was denied by the Supreme Court of Canada. It then began collecting and remitting HST as required.

The Waycobah First Nation applied for a remission order on the basis of financial hardship due to a serious deficit and crumbling infrastructure, and that the constitutional challenge was an extenuating circumstance. The CRA refused to make a recommendation, as the treaty litigation confirmed, rather than overturned, existing CRA policy. Further, the CRA cited the Waycobah First Nation's continued non-compliance as a factor in refusing a recommendation. This refusal was upheld upon judicial review.

Standard of Review

As a starting point in the consideration of these applications, each court considered the appropriate standard of review. In *Axa Canada*, significant weight was given to the relative expertise of the decision maker, suggesting "great restraint with respect to the CRA decision". The Court found that the CRA has an "undeniable expertise" in implementing its internal Remission Guidelines and that the discretionary nature of the legislation also requires great judicial restraint. It was concluded that the appropriate standard of review was "patent unreasonableness".

This standard of review was reviewed in *Waycobah*, where the Federal Court cited the reasoning of *Axa Canada* with approval. The Federal Court made the point that, post-*Dunsmuir*,[10] the correct standard of review was simply reasonableness, but in all other respects confirmed *Axa Canada*.

It should also be noted that in the situation where the CRA denies a remission order or other relief on the basis of law, rather than fact, the standard of review is significantly less deferential. Decisions of law are reviewed on a standard of correctness.[11]

Discretion

Applying the patent unreasonableness standard of review to the facts, the Court in *Axa Canada* considered whether the taxpayer had received bad advice from the CRA. The Court took the position that the concept of advice must at a minimum involve words originating from the CRA. The Court found that this was not the case, and that the CRA was not under a duty to act as a tax adviser. This was somewhat surprising, in light of the fact that the CRA conceded that the agreement between the parties gave false expectations to the taxpayer.

The Court also made a questionable comment when it stated that even if the CRA had advised that a rebate was possible, the taxpayer would not be able to receive a remission order. The Court's logic was that the CRA's Remission Guidelines establish that a remission order is appropriate where a taxpayer has paid additional tax due to bad advice. Because the GST was paid before speaking to the CRA, the CRA's comments did not result in the payment of "additional tax". With all due respect to the Court, this is not a requirement found within section 23 of the *Financial Administration Act*, which requires only that the payment of the tax was unjust or unreasonable or otherwise in the public interest. The legislation expressly states that remission may occur after a payment of tax, and may take the form of a refund.[12]

Given the comments in *Waycobah* regarding the fettering of discretion by the CRA, discussed below, it is uncertain whether this statement by the applications judge in *Axa Canada* accurately reflects the present law.

In *Waycobah*, the CRA ultimately rejected the Waycobah First Nation's request for a recommendation. Among the reasons cited by the CRA was the history of non-compliance by the taxpayer, as well as the possible precedential value of such a ruling to further Waycobah First Nations. The Trial Court held that these reasons were valid for the CRA to

consider. It was noted that the *Financial Administration Act* requires a consideration of the "public interest", and that precedential value is a factor in assessing the broader implications of a remission order. The CRA's decision was held to be reasonable.

The Waycobah First Nation appealed this finding to the Federal Court of Appeal, arguing that the extreme financial hardship of the Waycobah First Nation was not given sufficient weight by the CRA. The Federal Court of Appeal dismissed the appeal, holding that the factor was considered, and that there was no evidence that hardship must be given "almost decisive weight" in considering whether a recommendation would be made. Absent some sort of indication that this was to be the case, the appeal was simply an invitation to reweigh the evidence taken into account by the CRA in making a decision.

Fettering of Discretion

An alternative argument raised by the First Nation in *Waycobah* was that the CRA had fettered its discretion by applying its internal Remission Guidelines mechanically. This likely arose from the written reasons of the Assistant Commissioner, who stated that the facts did not "conform to the CRA's remission guidelines" and that relief was not warranted.[13] Although this wording was concerning, each level of court concluded that the CRA had not in fact fettered its discretions, albeit using different reasoning.

At the judicial review application, the Court noted that the Remission Guidelines, when read as a whole, require the decision maker to consider more than the enumerated criteria. It was, therefore, concluded that the Remission Guidelines did not constrict the application of the *Financial Administration Act* and did not fetter the decision maker's discretion. The Federal Court of Appeal agreed that the Remission Guidelines are not exhaustive. The Court cautioned the CRA not to be tied so closely to the Remission Guidelines that it might lose sight of special or unusual circumstances. The Court stated that the CRA had not done that:

> [28] . . . It is not unlawful for an administrative decision-maker to base a decision on valid, non-exhaustive guidelines, formulated as a decision-making framework to promote principled consistency in the exercise of a discretion.However, the decision-maker cannot treat guidelines as if they were law, and exhaustive of the factors that may be considered in the exercise of a broader statutory discretion. In my opinion, this is not what the Assistant Commissioner did.

It is notable that the Court held that the Remission Guidelines are intended to promote consistency. It should also be noted that when the CRA is reviewing a remission application it often looks at previous applications to determine if they have been denied in similar circumstances. Presumably, a taxpayer may base a remission application, or an application for judicial review of a denied application, on remission applications that have been granted in similar circumstances.

Conclusion

The CRA is given broad discretion in determining whether an application for a remission order will be recommended to the Minister, for recommendation to the Governor in Council. Courts will be deferential to the CRA's expertise in administering tax law and policy. However, this deference is contingent on the CRA considering properly all relevant factors, not simply those enumerated in the CRA's internal Remission Guidelines. It would be incorrect for the CRA to fetter its discretion by failing to consider relevant factors. As recent decisions demonstrate, courts are aware of the types of unfairness that may best be resolved by a remission order. Taxpayers and tax professionals are justified in requesting remission orders in circumstances that may fall outside the CRA's Remission Guidelines, and can take comfort in the knowledge that the CRA is obligated to give those unique circumstances fair consideration. As well, the CRA is required to treat all taxpayers consistently and not apply the Remission Guidelines differently to different taxpayers unless the circumstances warrant.

Mike Harris, Associate in the Tax Department with the Edmonton Office of Fraser Milner Casgrain LLP.

A number of tax lawyers from Fraser Milner Casgrain LLP write commentary for CCH's Canadian Tax Reporter and sit on its Editorial Board as well as on the Editorial Board for CCH's Canadian Income Tax Act with Regulations, Annotated. Fraser Milner Casgrain lawyers also write the commentary for CCH's Federal Tax Practice reporter and the summaries for CCH's Window on Canadian Tax. Fraser Milner Casgrain lawyers wrote the commentary for Canada–U.S. Tax Treaty: A Practical Interpretation and have authored other books published by CCH: Federal Tax Practice; Charities, Non-Profits and Philanthropy Under the Income Tax Act; Corporation Capital Tax in Canada; and Canadian Transfer

Pricing. Tony Schweitzer, a Tax Partner with the Toronto Office of Fraser Milner Casgrain LLP, and a member of the Editorial Board of CCH's Canadian Tax Reporter, is the editor of the firm's regular monthly feature articles appearing in Tax Topics.

Notes:

[1] R.S.C. 1985, c. F-11, as amended.

[2] For an in-depth review prior to the 1991 amendments, see H.A. Sherman and J.D. Sherman, "Income Tax Remission Orders: The Tax Planner's Last Resort or the Ultimate Weapon?", 86 CTJ (4) 801-27. For a short, recent comment, see Neil E. Bass, Chia-yi Chua, Wendy A. Brousseau, and Angelo Gentile, "Trends in Sales Tax Litigation," Report of Proceedings of Sixtieth Tax Conference, 2008 Tax Conference (Toronto: Canadian Tax Foundation, 2009), 35:1-41 at 35:34-35.

[3] *Axa Canada Inc. v. M.N.R.,* 2006 FC 17 ("*Axa Canada*").

[4] *Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191, affirming 2010 FC 1188 ("*Waycobah*").

[5] The grounds of unjustness or unreasonableness were added in 1991. It is not perfectly clear what they were intended to add to the concept of public interest. It may be that they were added to deal with an individual's specific circumstances, as opposed to a general public interest. Or it may have been that they were added to tie in to the Fairness Package that was added to the *Income Tax Act* in 1991. A review of the *Hansard* material that accompanied the amendment does not disclose a specific reason for the addition of these two grounds, except that they were for "humanitarian" reasons.

[6] 2011 DTC 1144 (T.C.C.).

[7] 2011 UDTC 34 (T.C.C.).

[8] 2007 DTC 2092 (T.C.C).

[9] See *Pictou v. Canada*, 2003 FCA 9.

[10] 2008 SCC 9.

[11] See, for example, *Abraham v. Canada*, 2011 FC 638.

[12] Paragraphs 23(3)(*b*) and 23(4)(*e*), respectively.

[13] 2011 FCA 191 at para. 24

PRESCRIBED INTEREST RATES — FOURTH QUARTER OF 2011

The prescribed interest rates for the fourth quarter of 2011 were released by the Canada Revenue Agency on September 9, 2011. They are unchanged from the third quarter of 2011 and are noted below.

- 1% to calculate a deemed interest taxable benefit on subsidized employee and shareholder loans;
- 1% on refunds of income tax overpayments paid to corporate taxpayers;
- 3% on refunds of income tax overpayments paid to non-corporate taxpayes; and
- 5% on payments of overdue income taxes, insufficient income tax instalments, unremitted employee source deductions, CPP contributions or EI premiums, and unpaid penalties.

These rates will be in effect from October 1, 2011 to December 31, 2011.

A listing of the prescribed interest rates for each quarter, dating back to 1994 is reproduced in Volume 1 at ¶300, and under "Quick Links" in the *Canadian Tax Reporter* on DVD and online.

MEDICAL EXPENSE TAX CREDIT — ELIGIBILITY OF FOUR-WHEEL SCOOTER

The CRA was asked whether an individual unable to drive a car or walk long distances because of partial vision reduction could claim the medical expense tax credit under s. 118.2(1) of the Act for the purchase of a four-wheel scooter. The CRA confirmed that the credit could only be claimed for the purchase of a four-wheel scooter if the scooter was purchased in place of a conventional wheelchair and the purchase thus qualified as an eligible medical expense under s. 118.2(2)(*i*) of the Act. The CRA confirmed that this would only be the case if the individual had difficulty or was unable to walk, which was not the case here. As indicated in paragraph 37 of IT-519R2, the expression "wheelchair" is not limited to a conventional arm-powered or battery-powered wheelchair, but includes also scooters and wheel-mounted geriatric chairs. In this particular situation, the purchase of the scooter would not qualify for the credit.

— External Technical Interpretation, Business and Partnerships Division, March 2, 2011, Document No. 2010-0378071E5 (French document)

CROSSOVER UTILITY VEHICLES

The CRA was asked whether a crossover utility vehicle ("CUV") is considered similar to a pickup truck or van for the purposes of paragraph(e) of the definition of "automobile" in s. 248(1) of the Act.

"Automobile" is defined in s. 248(1) to mean a motor vehicle that is designed or adapted primarily to carry individuals on highways and streets and that has a seating capacity for not more than the driver and eight passengers. Automobile does not include an ambulance, a clearly marked emergency medical response vehicle, a taxi, a bus, or a funeral hearse. Also, under paragraph (*e*) of the definition, "automobile" does not include a pickup truck, van, or similar vehicle that is (primarily or substantially) used for transporting goods, equipment, or passengers in the course of gaining or producing income.

A vehicle that is an automobile under the Act is subject to certain negative tax consequences, including limited capital cost claims (s. 13(7)(*g*)), limited interest expense deductions (s. 67.2), limited leasing costs deductions (s. 67.3), and GST (and/or HST and QST).

The CRA stated that a sport utility vehicle ("SUV") is a generic term describing a vehicle that has increased passenger or cargo-carrying space similar to that of a van, but also has enhanced performance features similar to a pickup truck. SUVs are typically built on light-duty truck chassis, have four-wheel drive, and may also have the ability to tow heavy loads. The category of CUV may include some SUVs, but typically CUVs are built on lighter platforms with performance and fuel-efficiency similar to that of a car. CUVs may have larger cargo capacity than a car, but may not have the same towing or off-road capability as an SUV.

The CRA considers an SUV to be similar to a pickup truck or van for the purposes of the definition of automobile in paragraph (*e*) of the definition of "automobile". The CRA understands that CUVs may include vehicles previously marketed as SUVs, but the category could also include vehicles similar to station wagons, which are not excluded from the definition of "automobile".

The CRA stated that, in the present case, a CUV will be considered a similar vehicle to a pickup truck or van only to the extent that the CUV has the same utility and function of an SUV.

See also CRA Document No.2004-0073791E5, "Emergency response vehicles", (July20, 2004); CRA Document No. 2001-0069053, "Station wagon as automobile", (February26, 2001); and CRA Document No. 2001-0095565, "Similar vehicle — Definition auto", (October 1, 2001).

— *Technical Interpretation, Ontario Corporate Tax Division, June 29, 2011, Document No. 2011-0408171I7*

RECENT CASES

Stop-loss rules did not apply since exchange shares and foreign shares were not identical

The taxpayer was reassessed for 1999, 2000, and 2004. The Minister disallowed the taxpayer's claim of an allowable capital loss in 2002 on a disposition of "exchange shares", which were exchanged for foreign shares ("ADS"), where the cost base of the exchange shares exceeded that of ADS. The taxpayer applied the allowable capital loss in 2002, and carried it back to 1999 and forward to 2004. The Minister argued that the stop-loss rules found in s. 40(3.3), (3.4), and (3.5) of the *Income Tax Act* applied, as the share exchange undertaken resulted in the taxpayer simply acquiring identical property.

The taxpayer's appeal was allowed with costs. The exchange shares were not identical to the shares of the foreign company, despite the two having approximately the same value. While the foreign shares provided rights to the exchange shares, those rights did not form the property that was exchanged.

47,796, *10737 Newfoundland Limited*, 2011 DTC 1255

Business investment loss could not include legal fees

The taxpayer and his wife were shareholders in a corporation (the "Business"), which was sold in 2002 when a creditor dispute arose. The taxpayer later settled with the creditor for $30,600 plus $9,981 in legal fees in 2007. Another creditor claim was settled for $3,500 plus $500 in legal fees in 2006. The taxpayer later filed a T1 adjustment request for 2002, claiming business investment losses for amounts paid to creditors. The Minister reassessed him for 2007, allowing a business investment loss of $15,325, but also reassessed 2001, 2002, and 2006. The taxpayer filed objections to 2001, 2002, and 2006, and requested a loss determination for 2007. He argued that the business investment loss should include legal fees incurred for the Business in 2002.

The taxpayer's appeal was dismissed. Legal fees incurred were personal in nature and not to preserve income from the Business. Moreover, the taxpayer's 2006 assessment was nil, which could not be objected to. Also, the 2001 and 2002 assessments were made by the Canada Revenue Agency to reduce tax under the taxpayer relief program and could not be appealed.

47,798, *Woloshyn*, 2011 DTC 1260

Equipment was class 43 asset eligible for capital cost allowance and qualified property eligible for investment tax credit

The corporate taxpayer acquired five pieces of equipment (the "Equipment"), which it characterized as class 43 assets for capital cost allowance ("CCA") purposes and as "qualified property" for investment tax credit ("ITC") purposes. The Minister disallowed the ITC claim, and recharacterized the equipment under class 8 for CCA purposes. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was allowed. The issue was whether the Equipment was being used "primarily for the purpose of manufacturing or processing goods for sale or lease" within the meaning of the definition of "qualified property" in s. 127(9) of the *Income Tax Act* (the "Act"). The parties disagreed as to whether the Equipment was being used by the taxpayer to manufacture anything "for sale". However, the taxpayer used the Equipment to manufacture steel, which it then made available to a related corporation ("Séma"). The asset (i.e., the steel) manufactured by the taxpayer to Séma's specifications was also being transferred to Séma, so that all of the requirements for a "sale" in article 1708 of the *Quebec Civil Code* were being met, despite the Minister's arguments to the contrary. Therefore, the Equipment fell within the definition of "qualified property" in s. 127(9) of the Act. The Minister was therefore ordered to reassess, on the basis that the taxpayer was entitled to the ITCs claimed and to the CCA claimed under class 43.

47,799, *Les Ateliers Ferroviaires de Mont-Joli Inc.*, 2011 DTC 1261

Taxpayer entitled to deduct some but not all subcontractor fees claimed for tax purposes

In his business as a computer consultant, the taxpayer hired subcontractors, such as B. On reassessment, the Minister disallowed the deduction of subcontractor fees allegedly paid to B in the respective amounts of $44,500 and $42,500 for 2004 and 2005. On the taxpayer's appeal to the Tax Court of Canada, the Minister conceded that the taxpayer was entitled to respective deductions of $18,245 and $8,125 for 2004 and 2005, since B acknowledged receiving those amounts as subcontractor fees from the taxpayer.

The taxpayer's appeal was allowed in part. The evidence the taxpayer produced indicated that he was entitled to deduct more than the $18,245 and $8,125 amounts conceded by the Minister, but not the full amounts of $44,500 and $42,500 claimed. The amounts deductible by the taxpayer should therefore be arbitrarily set at $36,490 and $16,250 for 2004 and 2005, respectively.

47,800, *Brenneur*, 2011 DTC 1262

Time extension to appeal granted because filed as soon as circumstances permitted

The taxpayer relied on a group known as Fiscal Arbitrators that had prepared his tax returns to file all the documentation needed to appeal to the Tax Court of Canada from reassessments dated July 29, 2009, and ratified by the Minister on March 12, 2010. After Fiscal Arbitrators' failure to prepare and file the documentation, the taxpayer applied through a lawyer on December 30, 2010, for an extension of time to file a notice of appeal from the reassessments in issue.

The taxpayer's application was granted. The taxpayer had the requisite intention to appeal, and filed his extension application as soon as the circumstances permitted. It was also just and equitable to grant the extension, and the taxpayer complied with all of the requirements for an extension set out in s. 167(5)(*b*) of the *Income Tax Act*.

47,801, *Chénard*, 2011 DTC 1263

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For CCH Canadian Limited

Susan Peart, C.A., LL.M.
(416) 224-2224, ext. 6434
e-mail: Susan.Peart@wolterskluwer.com

Natasha Menon, Content Product Manager
Tax, Accounting and Financial Planning
(416) 224-2224, ext. 6360
e-mail: Natasha.Menon@wolterskluwer.com

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