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CRA's Audit Powers Have Limits: Challenging Excessive Requests for Information

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In three recent decisions, the courts have curtailed the Canada Revenue Agency's (CRA's) broad interpretation of its audit powers and, in so doing, have armed taxpayers with the legal means to push back against excessive or unreasonable requests for information (RFIs) by the CRA.

First, in *Canada (National Revenue) v Hydro-Québec*, the Federal Court (FC) rejected a request by the Minister for authorization to obtain information about the business customers of Hydro-Québec – including their names, addresses and hydro account information. The FC held that the Minister failed to meet the statutory prerequisite that the target group of taxpayers was "ascertainable," and that the information sought would not allow the CRA to verify compliance with a duty or obligation under the *Income Tax Act* (ITA) since the information was being collected merely in anticipation of an eventual tax audit. The FC found that the Minister's request was an improper "fishing expedition," and concluded that the court's intervention was necessary to avoid the unjustified invasion of privacy of a large number of taxpayers.

Second, in *Canada (National Revenue) v Cameco Corporation* (Cameco), the Federal Court of Appeal (FCA) concluded that the CRA does not have the power to compel oral interviews in the context of an audit (see our detailed analysis of Cameco). The CRA published a response to Cameco, wherein it claimed that it will "continue to seek interviews where necessary and expects that the vast majority of taxpayers will continue to comply." The CRA also threatened that if a taxpayer declines to participate in an interview, the CRA "will use alternative means to carry out its obligations in verifying a taxpayer's level of compliance," including "the use of assumptions about the nature of a taxpayer's business activities and tax planning to form the basis of an assessment." This response appears to contradict the spirit of the FCA's clear ruling that there is no statutory authority for the CRA to conduct oral interviews.

Third, in *Canada (National Revenue) v Lin*, the FC dismissed an application by the Minister for a court order to obtain information from two individuals, one of whom was arguably a non-resident and thus not required to respond to a RFI (on this point, the FC noted that it did not have jurisdiction to determine residency status for purposes of the ITA, raising questions about how the Minister could seek compliance orders with respect to RFIs from individuals alleged to be non-residents). Although the request for information was addressed to the individuals, the FC found that it was also addressed to their "related or associated entities." Since the identity of those connected entities was unknown, it was unclear whether they were required under the ITA to provide information to the CRA. Consequently, the first requirement for obtaining a compliance order was not satisfied and the Minister's application was unsuccessful.

These three decisions demonstrate that taxpayers can push back against an unreasonable RFI by the Minister during audits. For instance, if a RFI is vague or overly broad, or unduly compromises the privacy of unnamed persons, taxpayers are empowered to propose that the CRA clarify or narrow its requests. If the CRA refuses to do so, taxpayers may have reasonable grounds to challenge the validity of the RFI. With respect to CRA requests to interview taxpayers' employees, in addition to being able to object to such requests in accordance with Cameco, taxpayers are now in a stronger position to propose the particular employees to be interviewed where they believe the CRA's selection to be excessive or misguided. If the CRA refuses a reasonable proposal, then the taxpayer might point to the offer of cooperation as a factor to negate any adverse assumptions drawn by the CRA.

In light of these judicial developments, taxpayers should scrutinize RFIs to ensure that the CRA has not exceeded the limits of its audit powers.

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