

Business & Careers

Taxpayer Bill of Rights won't speed up dispute process



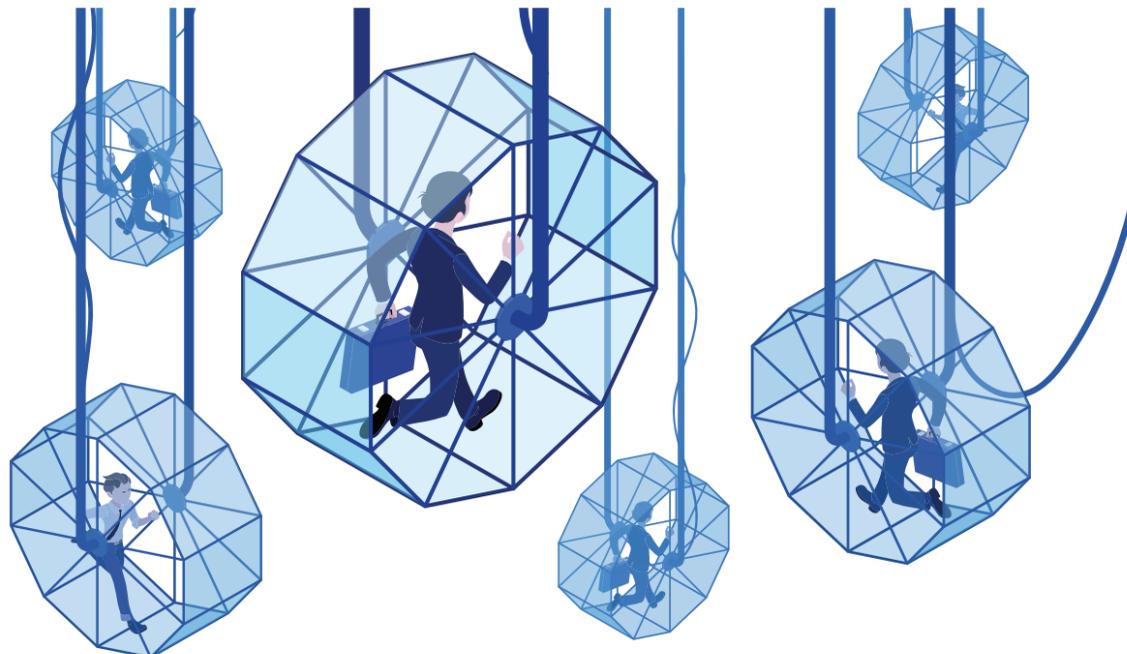
Vern Krishna
Tax Views

Canadian taxpayers can be excused for thinking that when the government proclaims a bill of rights that they actually have rights under it. In fact, as many taxpayers discover, they must learn to wait, and then, wait some more.

There are three principal steps for resolving income tax disputes with the Canada Revenue Agency (CRA). The first is to file a proper and coherent notice of objection. Although the mechanics of this step are fairly simple (identify the taxpayer, the assessment objected to, the years involved, and the reasons for the objection), it is important to set out the relevant provisions and a brief statement of the reasons for the department to review.

The deadline is tight: the taxpayer must generally file the objection within 90 days of the date that it is mailed, or within one year of the due filing date. The deadline is strictly enforced even if Canada Post fails to deliver the notice to the taxpayer. There is no requirement for the CRA to send the notice by secure mail or courier. If it is lost, the taxpayer pays the price for non-receipt.

The next step involves an independent and impartial administrative review of the objection by the CRA, which staffs its appeals branch with its own employees. The statutory obligation of the minister of National Revenue on receiving the objection is to reconsider the assessment *with all due dispatch* and then either vacate, confirm, or vary it, and notify the taxpayer in writing. The Taxpayer Bill of Rights gives taxpayers the right to a formal review, and a



ANDREW_RYBALKO / ISTOCKPHOTO.COM

right to receive timely information. The bill, however, is a feel good public relations document. It has no legal status whatsoever, and is administered by an ombudsman who has absolutely no authority over the CRA.

In fact, the administrative review is a slow and long drawn out process, which can drag on for years, during which time the taxpayer is charged non-deductible interest on the disputed tax, at 5 per cent (2016) compounding daily, if they do not pay in advance.

As the auditor general's report tabled in Parliament on Nov. 29, 2016 confirms, the CRA interpretation of timeliness and the statutory mandate of processing "*with all due dispatch*" is flexible. The impression that it conveys is an image of speed and efficiency. The reality is otherwise. In 2014, for example, the CRA processed approximately 29.6 million income tax returns. Taxpayers filed objections to 66,864 of the returns for income taxes totalling \$4.8 billion. However, as of March 2016 there was a backlog of 171,744 objections

“

The bill, however, is a feel good public relations document. It has no legal status whatsoever, and is administered by an ombudsman who has absolutely no authority over the CRA.

Vern Krishna
Tax Chambers LLP

for personal and corporate returns, representing more than \$18 billion of federal taxes, which was an increase of 300 per cent from \$6 billion in 2005.

After filing an objection on a low or medium complexity file, a taxpayer can expect to wait up to a year for initial contact by an appeals officer. Thereafter, it takes an average of 143 days to resolve low com-

plexity objections, which represent approximately 60 per cent of the yearly objection intake. The CRA resolves about 65 per cent of these objections in favour of the taxpayer, and had to cancel almost \$1.1 billion in penalties and interest in 2016. However, any interest that the CRA pays the taxpayer (3 per cent in 2016) is taxable as income. In the result, the taxpayer pays non-deductible interest at 5 per cent on unpaid taxes, and is taxable on interest refunded at 3 per cent.

The average resolution time for medium and high complexity objections is staggering: 431 days for medium, and 896 days for high complexity files. Add in the initial contact time from an appeals officer, and medium complexity files can take more than two years to resolve; high complexity files can take up to three-and-a-half years.

In theory, the taxpayer can apply to the federal court to have his or her assessment considered with all due dispatch. In practice, the probability of success is minimal to non-existent. The court follows its precedents from over 60 years, before

the advent of electronic technology or even calculators, that allow the CRA almost complete discretion in considering timely resolution. As the Exchequer said in *Provincial Paper Ltd. v. Minister of National Revenue* 1954 DTC 1199:

“...There is no standard in the act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the minister must do to make a proper assessment. It is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer.”

And again six years later in *Jolicoeur v. Minister of National Revenue*:

“There is no doubt that the minister is bound by time limits when they are imposed by the statute, but, in my view, the words ‘with all due dispatch’ are not to be interpreted as meaning a fixed period of time. The ‘with all due dispatch’ time limit purports a discretion of the minister to be exercised, for the good administration of the act, with reason, justice and legal principles...”

Canadians also pay for the inefficiencies of tax administration in other ways. In 2015, for example, the CRA employed the equivalent of 1,138 full-time employees and spent \$148 million on salaries and associated costs. In the result, Canadian taxpayers end up paying both ways, for their own dispute and the costs of government administration.

Canadian taxpayers deluded by government public relations into believing that they actually have rights under the Taxpayer Bill of Rights accept, as did John Milton, that “they also serve who only stand and wait.”

Vern Krishna CM, QC, FRSC is professor of law, University of Ottawa, and counsel, Tax Chambers LLP (Toronto). Vern.Krishna@taxchambers.ca, www.Vernkrishna.com.