

May 13, 2019

VIA EMAIL

**Re: Edge Highshare Tax-Related Dispute with the Canada Revenue Agency
Dispute Resolution Process**

As per our previous discussions, please find herein a memorandum regarding our approach to handling the Edge Highshare tax-related disputes with the Canada Revenue Agency (the “CRA”). Please note that the explanation that follows is based on our previous experience dealing with the CRA regarding this matter and based on our clients’ experiences thus far.

For the purposes of this letter, we have reviewed a substantial amount of documentation shared by other clients dealing with this issue. We have clients currently in tax court for this dispute and various others currently in the early, and late, stages of audit with the CRA. As each client has come along, we have revised and improved our approach to the dispute and hope the following information is useful for you, your colleagues, and any clients who might read this.

Important to note, this is not legal advice. Rather, this is information we believe to be true based on our previous experience and work, as mentioned above.

Audit Stage

We have seen a variety of correspondence from the CRA audit division, mainly the coordinator of this project – Andre Freve. The CRA typically outlines their position in a proposal letter, has sent a questionnaire, requested the statement of business activities (T2125). In doing so, they are attempting to gather further information regarding the taxpayer’s tax obligations and financial circumstances.

Audits can range in specificity and issues, but for the majority of clients being audited due to their relationship with Edge/Highshare, these audits are concerning information related to deductions claimed by the business and other intricate legal workings associated with the alleged tax shelter that is the Edge/Highshare program. We have gone through this stage with various clients previously and have developed our strategy and framework for dealing with the CRA on this front.

During the audit stage, we ensure that we maintain regular and continuous communication with our clients and the CRA. During this stage, we act as a liaison in dealing with the requests from the CRA auditors. We review every document and ensure the appropriate workings are shared with the CRA. We prepare and submit substantive, legal and factual, representations on behalf of our client and ensure all supporting documentation are enclosed.

Beyond this, we work to make the audit process move as efficiently as possible. Most importantly, we ensure that the CRA auditors are treating the taxpayer fairly and that they are not acting outside the scope of their powers.

Once the auditor has completed their work, one of two things happens. The CRA may decide that a taxpayer's tax return was accurate and that they agree with the person's reporting. On the other hand, the CRA could decide that they disagree with what was reported on the taxpayer's tax return. If this is the case, the CRA will issue the taxpayer a "proposal letter" which outlines the CRA's position and provides details about how they propose to reassess the taxpayer in question, including their justifications.

From the date of this proposal letter, we typically have thirty (30) days to make further representations or submissions to the auditor in response to the "proposal letter".

With respect to the Edge/Highshare audit, the auditors have been fairly lenient with this deadline, as they know this is a more complex scenario. We have been successful in obtaining extensions for clients who need them, but if a client retains us early enough, we have not had issues with completing submissions by the stipulated deadline.

That said, we also represent clients who were involved with the Edge/Highshare program before they receive a "proposal letter". As you know, proposal letters have not been sent to all franchisees. That said, there are hundreds of people involved, so the CRA is taking their time with auditing people. Our practice has been to prepare representations for clients who are awaiting their proposal so that they will be ready to submit when the proposal letter arrives. We believe it is important to be proactive and ensure the CRA's eventual audit is met with strongly reasoned arguments defending our position and clients from liability. This expedites the process and if necessary, allows us to move to the next stage of the dispute resolution process in a more efficient manner.

Further to this, allowing us to complete this work during the audit stage, the taxpayer is setting themselves up for an efficient filing of their Notice of Objection to the CRA Appeals Division (this will be discussed later). By working with one law firm, the client allows the firm to manage the tax dispute process and maneuver the inner workings of the system to produce the most efficient and expedited resolution.

As mentioned above, we have worked with various clients already. This has allowed us to build up our expertise on the matter and it has allowed us to compile a large number of documents and evidence regarding the Edge Highshare program. Previous clients have given us consent to use all materials that does not include their personal information in any other potential clients' representations. We believe this knowledge pays dividends for us efficiency wise concerning the preparation of representations, but it also pays dividends for the clients as we split costs for general Edge Highshare research across all clients.

Reassessment

Should the results from the audit be unfavourable, the CRA will issue a notice of reassessment in the manner prescribed in the final audit letter. The reassessment will reflect a taxpayer's new tax liability.

It is important to note the date of the Notice of Reassessment because we have ninety (90) days to file a notice of objection with the CRA. Note, it is not the date you receive the Notice of Reassessment, rather the 90-day clock begins on the date the Notice of Reassessment is issued.

The Notice of Reassessment, the proposal letter and the auditor's working papers are the documents that will be used to dispute a taxpayer's tax obligation.

Dispute Resolution

Once the Notice of Reassessment is issued, a taxpayer has options to dispute the tax obligations associated. Our recommendation for our clients is to bypass the CRA's appeals process and go straight to tax court, as per s.169(1)(b) of the *Income Tax Act*.

This recommendation is predicated on the basis that the matters are controversial, have large policy considerations for the CRA and in consideration of our client's finances.

By doing so, the taxpayer will avoid unnecessary legal fees, undue delay in obtaining a resolution and increased stress from dealing with the CRA's appeals stage. The Edge Highshare matter is a complex legal situation, and we believe it best to get these issues in front of a tax court judge instead of CRA's appeals officers. In our experience, the Tax Court of Canada's judges specialize in tax disputes and are highly knowledgeable in this realm. They are an independent and objective third party that will view both parties' position with only the law in mind.

To do so, we file a Notice of Objection immediately after receiving a taxpayer's Notice of Reassessment. Once filed, we prepare the Notice of Appeal for the Tax Court. On the 91st day after the Notice of Reassessment was issued, we file the Notice of Appeal with the tax court. This allows the taxpayer to bypass the unnecessary workings of the CRA Appeals Division.

Subsection 169(1)(b) of the *Income Tax Act* provides us with the right to do the above. The provision states that,

ss.169(1) Where a taxpayer has served a notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

- (a) ..., or
- (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

But no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

Although we believe this is the best route, we have outlined the dispute resolution processed below for your convenience and understanding.

Objection and Appeal

The taxpayer can dispute the Reassessment by objecting to the CRA's Appeals Division. As mentioned above, the taxpayer has ninety (90) days from the date the Notice of Reassessment was issued to file their Notice of Objection to the Chief of Appeals. If possible, it is most beneficial to hire an experienced lawyer well-before this deadline so the lawyer can meet the deadline and provide a persuasive and substantive objection.

If the 90-day deadline is missed, the taxpayer can apply for an extension of time to file late. An extension to file a Notice of Objection can be filed up to one (1) year after the previous deadline.

The CRA has discretion to allow these extensions, and such requests are generally granted in certain circumstances.

If you decide to go the objection route, and you file on or before the required date, an appeals officer from the CRA Appeals Division will be assigned to your file. The appeals officer reviews the information submitted in your Notice of Objection in an impartial manner. They will also review the information provided by the CRA auditor who prepared everything for your reassessment. Then, you or your representative will correspond back-and-forth with the appeals agent in an effort to advance our position. This could require further representations or additional documents to be submitted to the appeals agent.

In the end, the CRA appeals officer can decide to vacate the reassessment, vary the obligations assigned by the reassessment or confirm the reassessment. In almost all cases, the appeals agent will provide you and your representative with a written decision.

It is worthwhile to note, during the above noted dispute resolution process or the below Tax Court procedure – all legal and enforcement action is held in abeyance pending a resolution. This means that the CRA cannot register liens against your property, garnish wages or freeze your bank account. However, interest continues to accrue on the alleged liability.

Appealing to Tax Court

If the taxpayer decides to go the CRA Appeals Division route, and they receive a final decision from the appeals officer, they have ninety (90) days from the date of the decision letter to file a Notice of Appeal with the Tax Court. If a taxpayer missed their 90-day deadline, they may apply for an extension of up to one (1) year from the original due date. Same as above, generally an application hearing will be scheduled but if the requisite legislative conditions are met, the extension will likely be granted. In our experience, the Department of Justice – the lawyers for the CRA – often consent to the aforementioned request.

As mentioned above, the taxpayer can also file the Notice of Objection with the CRA and then wait ninety-one (91) days to file a Notice of Appeal with the Tax Court, thus bypassing the CRA appeals stage (as per s.169(1)(b) of the *Income Tax Act*).

The taxpayer, the Appellant in the appeal, commences an appeal by filing with the Tax Court of Canada a Notice of Appeal and paying the applicable filing fee, if necessary. As an aside, the taxpayer must file within 90 days from the receipt of the Notice of Confirmation if they receive one from the CRA.

The Tax Court appeal process follows one of two avenues, them being the General Procedure, or the Informal Procedure. Which avenue you take for your appeal depends on the amount of federal tax in dispute. The Informal Procedure is for smaller disputes, and the General Procedure is for larger disputes.

The Notice of Appeal is prepared and filed with the court, and provides two (2) copies of the Notice of Appeal. The Tax Court then serves the Notice of Appeal on the Department of Justice (the “DOJ”), the lawyers representing the CRA. The Notice of Appeal will establish the relevant facts, issues in dispute, the reasons for the appeal, the legislative provisions relied one and the relief sought.

A Department of Justice lawyer will review the information in the Notice of Appeal, and in turn file and serve a Notice of Reply. The DOJ must file their Reply, on behalf of the CRA, with the Tax Court of Canada within 60 days after service of the Notice of Appeal, and they must serve it on the Appellant (the taxpayer or their representative) within 5 days after the 60-day deadline. The Reply sets out which facts in the Notice of Appeal that the CRA admits, which facts in the Notice of Appeal that the CRA denies, which facts in the Notice of Appeal that the CRA claims no knowledge of, and the CRA’s facts and assumptions that form the basis of the assessment. These two documents set out the basis for both sides concerning the tax dispute.

The Appellant has 30 days after service of the Reply to file with the Tax Court of Canada the Answer. It is not mandatory to file an Answer, but the Answer identifies new facts that must be provided in light of the Reply by the CRA. If filed, the Answer usually sets out which facts in the Reply that the Appellant (taxpayer) admits, which facts in the Reply that the Appellant denies, which facts in the Reply that the Appellant claims no knowledge and additional relevant facts that will be advanced by the Appellant in the upcoming proceedings.

If the Appellant does not file an Answer, then they are deemed to have denied all allegations of fact put forward in the Reply.

At this point, the pleadings are closed. Within 30 days of the close of pleadings, both the Appellant and the CRA file and serve a list of relevant documents.

In the “real world” of practice, the exchange of lists of documents can take longer at times. The list of documents is simply a list of the documents that will be exchanged, and not the documents themselves. Both the Appellant and Respondent prepare a list of all relevant documents known to the party at the time which may be used in the proceedings as evidence by the party.

Either side may later ask for the production of any documents that were listed by the other side. Typically, the Appellant will review the Respondent's List of Documents and ask for the production of documents that are not contained in the Appellant's List of Documents. Likewise, the Respondent will request the same. Full disclosure and understanding of all documents provide for the greatest understanding, and in turn, arguments available to both sides.

The positive of working with the same law firm throughout these stages is that your evidence and documentation that may be relevant to the tax dispute is already almost prepared when you reach the Tax Court process. This is beneficial because the Tax Court rules require a process called "discovery" to be completed.

Examinations for Discovery, Undertakings, the Hearing Date Application and the Hearing Dates are all set out in a timetable, agreed upon by both parties to the proceeding (taxpayer and the CRA).

Examinations for Discovery provides both the Appellant and the Respondent with the opportunity to ask questions to discover what testimony may be provided in the case by the other side to attempt to narrow the issues to be decided in the case.

Discovery requires both parties to exchange documents, and each side has an opportunity to examine the other party, whether that be orally or in writing. This process allows each party to learn about the other side's case and assess the strengths and weaknesses in the matter.

Often, the DOJ asks to examine the Appellant, or the key personnel involved with the entity in question. Sometimes, accountants or advisors are examined. The Appellant normally examines the auditor, the CRA's appraiser, an appeals officer, or another person who was heavily involved in the CRA's workings on the related file. A court reporter records the examination in its oral form. As an aside, sometimes the examinations will proceed by way of written questions. This testimony is given under oath and there is no timeline for the examinations for discovery.

If one of the parties are unable to answer a question during the examination for discovery, or if a document is discussed that was not exchanged, the examiner will ask for an Undertaking for the answer to be provided in writing or a document be provided.

A list of Undertakings is exchanged shortly after the examinations for discoveries. The parties are responsible for ensuring that the Undertakings are satisfied.

During the process, a date for the taxpayer's hearing in the Tax Court will be set. The Appellant and Respondent jointly apply for a hearing date to be set after the examination for discoveries and the satisfaction of Undertakings has occurred. At this time, the parties must indicate the number of days that will be required for the hearing. In practice, the parties discuss the witness lists at this time, and the Appellant's counsel creates a litigation plan.

At the hearing, the taxpayer has the right to call witnesses, they have the right to introduce documents or other supporting documentation as evidence, and they get to explain their version of events by testifying before the court. At the hearing, the CRA is represented by the Department of Justice and the taxpayer is almost always represented by their legal counsel. Both sides argue that their position is correct and that the other side is wrong. In the end, the Tax Court judge will render a decision. Further, during the hearing, the Appellant and Respondent are required to file documents and books of authorities.

At any time, settlement discussions may, and likely will, occur.

If the taxpayer feels the decision at Tax Court is wrong, they have a limited right to appeal to the Federal Court of Appeal within thirty (30) days of the issuance of the decision by the Tax Court judge.

Final Points

As mentioned throughout the above paragraphs, our goal as representatives of clients involved with Edge Highshare is to avoid a seven-year battle with the CRA. We believe it to be the best practice to by-pass the CRA's appeal process and go straight to tax court, as per s.169(1)(b). By doing so, we avoid unnecessary costs, wasted time and stress dealing with appeals agents at the CRA.

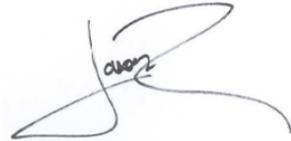
This overview is a very basic explanation of the tax dispute system in Canada. It is intended to explain the process briefly, while providing you with our established plan of action to address the issues. The tax dispute system is quite complex and is filled with various deadlines, requirements and other issues of the sort. The Edge Highshare program is also a fairly complex legal issue that further complicates the process. That said, we believe we have established a working plan of action that has worked out for our clients so far, and we believe would work for any client who has been involved with the program.

ROSEN KIRSHEN

If you have any further questions, please do not hesitate to contact me at my direct line or email.

Yours truly,

ROSEN KIRSHEN TAX LAW

A handwritten signature in black ink, appearing to read 'Jason Rosen', written over a light blue rectangular background.

Jason Rosen, BComm, JD
Partner
JCR/ks