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Dear Mr. Ernewein:

On November 10, 2011, the Minister of Finance released proposals to amend both the Tax Court of Canada Act and the Income Tax Act of Canada, to improve the caseload management of the Tax Court of Canada. Tax Executives Institute is pleased to submit the following comments and recommendations in respect of the proposals.

Tax Executives Institute (TEI) is the preeminent association of business tax executives worldwide. The Institute's 7,000 professionals manage the tax affairs of 3,000 of the leading companies in North America, Europe, and Asia. Canadians constitute 10 percent of TEI's membership, with our Canadian members belonging to chapters in Montreal, Toronto, Calgary, and Vancouver, which together make up one of our nine geographic regions, and must contend daily with the planning and compliance aspects of Canada's business tax laws, including appeals of tax issues and potential litigation in the Tax Court. Many of our non-Canadian members (including those in Europe and Asia) work for companies with substantial activities in Canada. The comments set forth in this letter reflect the views of the Institute as a whole, but more particularly those of our Canadian constituency.

TEI commends the government for proposing legislation to accord the Tax Court greater flexibility in managing its caseload. Specifically, we endorse and support:

- Increasing the monetary limits for access to the informal appeal procedure.¹
- Allowing the Tax Court to dispose of issues raised in an appeal of an assessment separately so that issues can be resolved independently from others and to permit the Minister of National Revenue to give effect to the decision of the Court in respect of those discrete issues.² Having a process for disposing of a particular issue (a “pro-tanto judgment”) that resolves part, but not all, of an appeal will permit the Tax Court to streamline its workflow and case consideration and afford both taxpayers and CRA the opportunity to better manage their appeals and caseloads.³
- Permitting the Tax Court to hear a question affecting a group of two or more taxpayers that arises out of substantially similar transactions, thereby providing a judicial determination that is binding across the group.

In addition to the foregoing proposals that were released on November 10, TEI recommends that legislation be developed to authorize the Canada Revenue Agency and the Department of Justice to enter into settlements at the appeals, pre-trial, and trial stages based on a “risks (or hazards) of litigation” approach. The adoption of such a provision would significantly reduce the number of cases, especially large complex cases where the taxpayer is well advised and the legal outcome uncertain, that must be addressed at all. This change, by itself, would improve caseload management.

Under current law, the Minister of National Revenue “has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement.”⁴ In effect, CRA is prohibited from settling a matter where it believes that its position

¹ Currently, the monetary limit for access to the informal appeals procedures is \$12,000 in income and \$24,000 for losses. The proposals would increase the income limit to \$25,000 and the loss limit to \$50,000. TEI believes the proposal would be improved by permitting large corporations, as defined for purposes of Notices of Objection, to use the informal procedures where a dispute over a particular issue involves less than \$250,000 in taxable income.

² Currently, where an assessment involves more than one issue, all issues must be dealt with in a single appeal. The proposed amendments would permit the Tax Court to dispose of a particular issue where both the parties to the appeal and the Tax Court agree that a particular issue should be dealt with separately.

³ The proposal can be improved by permitting taxpayers to litigate single issues separately from the balance of the issues in an assessment or reassessment, subject to CRA’s objection. Should CRA object to severing an issue from the balance of the assessment or reassessment, CRA should have the burden of proving why the issue should be addressed together with the other issues in the taxpayer’s case. The proposed change would permit taxpayers to adjudicate issues more swiftly so that access to records and witnesses are not lost during the lengthy period required to audit and resolve issues in large corporate cases.

⁴ *Frank H. Galway v. Minister of National Revenue* (1974), 74 D.T.C. 6355 at 6357 (F.C.A.).

is correct as a matter of law — even in cases where CRA and the Department of Justice recognize that the prospects for success in court are uncertain, especially in terms of the amount of the assessment.

This shortcoming in the Act was recognized in the 1997 Report of the Technical Committee on Business Taxation. “The present system . . . does not adequately recognize the inherent uncertainties of statutory interpretation. Given the costs, delays and uncertainties involved in resolving issues at trial, it can be of benefit to all parties to achieve compromise settlements in such situations.”⁵ As a result, the Technical Committee recommended that

. . . settlement of disputes regarding taxpayers’ liability for tax be further encouraged by introducing a legislative mechanism that would authorize Revenue Canada, in appropriate circumstances, to enter into compromise arrangements on the basis of “risks of litigation.” The terms of any such compromise should be approved by senior officials.⁶

TEI agrees with the Technical Committee. Taxpayers are frustrated by the current system because they are unable to resolve disputes about uncertain issues without resort to litigation. Under a “risks (or hazards) of litigation” approach, the objective of an appeal is to reach a fair and impartial resolution, one that “reflects on an issue-by-issue basis the probable result in event of litigation, or one which reflects mutual concessions for the purpose of settlement based on relative strength of the opposing positions where there is substantial uncertainty of the result in event of litigation.”⁷

The recommended approach is similar to that employed successfully by other tax administrations, especially the United States where it has been used for decades to the satisfaction of both the Internal Revenue Service and taxpayers. To be sure, litigation can be a useful tool to fill interstices in the law as well as to resolve disputed facts. At the same time, it is expensive and time-consuming and not every dispute between taxpayers and CRA need be resolved by the courts, even where both parties believe they have sound legal positions. With the enactment of enabling legislation, CRA and the Department of Justice can work together with taxpayers to develop appropriate administrative guidelines, systemic checks and balances, and appropriate reviews (as recommended by the Technical Committee) to ensure that cases that should be settled are settled, while issues that present novel legal questions meriting further legal interpretation and development or that require significant factual determinations are retained for disposition by the courts. TEI would be pleased to consult with CRA and the Department of Justice on the development of such guidelines.

⁵ See, *Report of the Technical Committee on Business Taxation* (1997) at page 10.8.

⁶ *Id.*

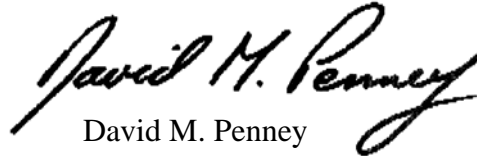
⁷ Internal Revenue Manual, section 8.6.4.1 (October 26, 2007); available at http://www.irs.gov/irm/part8/irm_08-006-004.html.

Conclusion

TEI's comments were prepared under the aegis of the Institute's Canadian Income Tax Committee, whose chair is Carmine A. Arcari. If you should have any questions about the comments or recommendations in the submission, please do not hesitate to call Mr. Arcari at 416.955.7972 (or carmine.arcari@rbc.com) or David V. Daubaras, TEI's Vice President for Canadian Affairs, at 905.858.5309 (or david.daubaras@ge.com).

Respectfully submitted,

Tax Executives Institute


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International President

cc: Gérard Lalonde, Director, Tax Legislation, Finance Canada
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Carmine A. Arcari, 2011-2012 Chair, TEI's Canadian Income Tax Committee