



The Joint Committee on Taxation of
The Canadian Bar Association

and

Chartered Professional Accountants of Canada

Chartered Professional Accountants of Canada, 277 Wellington St. W., Toronto ON, Canada M5V3H2
The Canadian Bar Association, 66 Slater St., Suite 1200, Ottawa, ON, Canada K1P 5H1

June 1, 2020

The Honourable David Lametti
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Subject: COVID-19 Measures

This submission sets out comments of the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada (“Joint Committee”), together with the Canadian Bar Association Section on Commodity Tax, Customs and Trade, with respect to certain aspects of the Draft Legislative Proposals Regarding Time Limits and Other Periods in Circumstances Due to COVID-19 and Explanatory Notes, released for public comment on May 19, 2020 (the “Proposals”).

Members of the Joint Committee and others in the tax community participated in the discussion concerning this submission and contributed to its preparation, including:

- Bruce Ball – CPA Canada
- Catherine Brayley – Miller Thomson LLP
- Wendy Brousseau – McCarthy Tétrault LLP
- Ian Crosbie – Davies Ward Phillips & Vineberg LLP
- Ken Griffin – PwC LLP
- Amanda Heale – Blake, Cassels & Graydon LLP
- Greg Kanargelidis – Blake, Cassels & Graydon LLP
- Alan Kenigsberg – Osler, Hoskin & Harcourt LLP
- Robert Kreklewetz – Millar Kreklewetz LLP
- Hugh Neilson – Kingston Ross Pasnak LLP
- Anu Nijhawan – Bennett Jones LLP
- Angelo Nikolakakis – EY Law LLP
- Carmela Pallotto – KPMG Canada
- David Robertson – EY Law LLP
- Jeffrey Trossman – Blake, Cassels & Graydon LLP
- Carrie Smit – Goodmans LLP
- Anthony Strawson – Felesky Flynn LLP

We trust that you will find our submission helpful. We would be pleased to discuss it further at your convenience.

Yours very truly,



David Bunn
Chair, Taxation Committee
Chartered Professional Accountants of Canada



Angelo Nikolakakis
Chair, Taxation Section
Canadian Bar Association



Randall Schwartz
Chair, Commodity Tax, Customs and Trade Section
Canadian Bar Association

Cc:

- The Honourable Diane Lebouthillier, Minister of National Revenue
- Bob Hamilton, Commissioner of Revenue
- Ted Cook, Director General, Tax Legislation Division, Tax Policy Branch, Department of Finance Canada
- Ted Gallivan, Assistant Commissioner, Compliance Programs Branch, Canada Revenue Agency

This submission addresses certain aspects of the Draft Legislative Proposals Regarding Time Limits and Other Periods in Circumstances Due to COVID-19 and Explanatory Notes, released for public comment on May 19, 2020 (the “Proposals”). In particular, we address considerations arising in relation to the federal *Income Tax Act* (the “ITA”) and the federal *Excise Tax Act* (the “ETA”).

Background

The Explanatory Note relating to Legislative Proposals Regarding Time Limits and Other Periods in Circumstances Due to COVID-19 (the “Explanatory Note”) describes the context and background of the Proposals, as well as their purpose. In particular, we note the following statements:

The legislative proposals would aim to address the need for flexibility in time limits and other periods under federal legislation because of exceptional circumstances due to COVID-19.

Their purpose would therefore be to temporarily suspend some time limits and allow others to be suspended or extended where these circumstances may make compliance difficult or impossible, and to extend other periods so that their expiration does not produce unfair or undesirable effects.

The legislative proposals would indicate that they should be interpreted in a manner that would bring certainty to proceedings and respects both the rule of law and the Canadian Charter of Rights of Freedoms.

These important principles are reflected not only in the Explanatory Note but also in section 5 of the Proposals, rendering them both relevant in general as guidance for the interpretation of the Proposals as well as directly applicable as statutory parameters regulating the exercise of the exceptional powers that are granted to responsible ministers.

We note that it is not clear from the Proposals and the Explanatory Note whether these measures are intended only to be relieving to taxpayers *versus* also to permit extensions of the powers of governmental authorities. If the latter is intended, we recommend that it be more clearly stated in the Explanatory Note, which can be read to suggest that the Proposals are intended only to be relieving – where the circumstances of COVID19 make “compliance” difficult or impossible.

Considerations arising in relation to the ITA and ETA

Responsible Minister

The ITA and the ETA are administered by the Canada Revenue Agency (the “CRA”). The governance structure for the CRA, as set out in the *Canada Revenue Agency Act*, is unique in Canadian government, consisting of the Minister of National Revenue (the “Minister”), the Board of Management, and the Commissioner. The Minister is responsible to Parliament for the CRA, the Commissioner is the Agency's Chief Executive Officer and responsible for its day-to-day management and direction, and the Board of Management oversees the organization and administration of the CRA.

Section 6

Section 6 of the Proposals would have the effect of suspending, for the period that starts on March 13, 2020, and that ends on September 13, 2020, or on any earlier day fixed by order of the Governor in Council made on the recommendation of the Minister of Justice,

- (a) any limitation or prescription period for commencing a proceeding before a court;
- (b) any time limit in relation to something that is to be done in a proceeding before a court; and
- (c) any time limit within which an application for leave to commence a proceeding or to do something in relation to a proceeding is to be made to a court.

This provision would, for example, suspend the time limit set forth in subsection 169(1) of the ITA, within which a taxpayer may appeal to the Tax Court of Canada to have an assessment made by the Minister either vacated or varied. Under subsection 169(1), no appeal may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 of the ITA that the Minister has confirmed the assessment or reassessed.

Our reading of the effect of section 6 of the Proposals in this regard is that, in counting the 90 days from the day notice has been sent to the taxpayer under section 165 of the ITA, days would not be counted if they are between March 13, 2020, and September 13, 2020, or on any earlier day fixed by order of the Governor in Council made on the recommendation of the Minister of Justice. Thus, for example, for any such notice sent to the taxpayer on March 13, 2020, the taxpayer would have until the expiration of 90 days from September 13, 2020, within which to appeal to the Tax Court of Canada.

A similar effect would arise with reference to appeals to the Federal Court of Appeal regarding the status or registration of certain organizations or plans, as contemplated by section 172 of the ITA, as well as any other provision of the ITA, or of any other federal statute, that provides for any limitation or prescription period for commencing a proceeding before a court, including an application for leave to appeal a decision of the Federal Court of Appeal to the Supreme Court of Canada.

However, one important difference is that, while only a taxpayer can appeal to the Tax Court of Canada or the Federal Court of Appeal under sections 169 and 172 of the ITA, either the taxpayer or the Crown can appeal a decision of the Tax Court of Canada to the Federal Court of Appeal or seek leave to appeal a decision of the Federal Court of Appeal to the Supreme Court of Canada. Thus, in this respect, the effect of section 6 of the Proposals would not necessarily be limited to providing relief to taxpayers, and could have the effect of extending the powers of the Crown in a way that displaces acquired rights and legitimate expectations. For example, there may be cases in which the Crown failed to appeal a decision of the Tax Court of Canada to the Federal Court of Appeal within a period that ended on or after March 13, 2020, such that the decision of the Tax Court of Canada would have become final. If section 6 of the Proposals would now resurrect the Crown's expired rights of appeal, this would displace the taxpayer's legitimate expectation of acquired rights of finality, and would be inconsistent with our understanding of the manner in which the Minister may exercise the powers to be granted under section 7 of the Proposals, as discussed below, in order to balance the interests of avoiding unfair or undesirable effects and preserving certainty in proceedings and the rule of law.

We recommend that, with reference to any proceedings involving the ITA, the Proposals and Explanatory Note be modified in order to provide certainty that, without the consent of the affected taxpayer(s), their effect would not include displacing acquired rights and reopening proceedings which have achieved finality before the announcement of the Proposals. Such certainty would be important in many ways – including with regard to allowing taxpayers to plan their financial affairs and to make

appropriate and reliable arrangements with their employees, their creditors and other stakeholders during these difficult times. A lack of certainty could also impact financial statement disclosure.

Our comments regarding section 6 of the Proposals apply equally to the corresponding provisions under the ETA, namely sections 301 and 306 of the ETA. We also note the need for relieving measures with respect to the one-year limitation period in subsections 303(7), 304(5) and 305(5) of the ETA.

Section 7

Section 7 of the Proposals would grant the Minister the exceptional power to, among other things, make an order suspending or extending a time limit, or extending any other period, that is established by or under any provision of the ITA or the ETA that is set out in column 2 of the Schedule. With reference to the ITA, the only provisions set out in column 2, currently, are described as follows: “subsection 37(11), paragraph (m) of the definition investment tax credit in subsection 127(9) and subsections 152(3.1) and (4) of the Act”. The federal *Income Tax Regulations* (the “Regulations”) are not mentioned, currently, either in column 1 or in column 2. With respect to the ETA, the only provisions set out in column 2, currently, are described as follows: “subsection 298(1) and (2) of the Act.”

Scope

Both the ITA and the Regulations set out numerous time limits and other periods in respect of various things that may or must be done by taxpayers. Some of these have already been extended effectively through existing discretions provided to the Minister under the ITA. However, many of these time limits and other periods are not susceptible of such ministerial discretionary relief. These include those under subsection 37(11) and paragraph (m) of the definition investment tax credit in subsection 127(9) of the ITA, but are not limited to those provisions.

Accordingly, and in light of the urgency of finalizing the Proposals, we recommend that column 2 should be populated in a manner that is more descriptive rather than prescriptive. More specifically, our recommendation is to replace the reference in column 2 to “subsection 37(11), paragraph (m) of the definition investment tax credit in subsection 127(9)” with a reference to “any provision of the Act or the Income Tax Regulations that requires or permits a taxpayer or a partnership to do something by a particular time or date or within or during a particular period, or that provides for consequences arising if something is not done by a particular time or date or within or during a particular period”. This would permit the Minister to make orders from time to time with reference to any relevant time limit or period as requirements for relief may be identified and prioritized in consultation with stakeholders. We have put together a preliminary illustrative list of various time limits and periods that have been identified to date, which we will forward to the Minister under separate cover.

We also note that the relationship between subsections 7(1) and (2) of the Proposals is not entirely clear, given that subsection 7(1) refers to both Acts and regulations, whereas subsection 7(2) only refers to regulations. Thus, it is not clear whether the Regulations must also be set out in column 1, although that does not appear to us to be necessary – in light of paragraph 7(1)(c) of the Proposals.

Finally, we note that subsection 7(4) of the Proposals might be read as allowing the Minister to order that the normal effect of “a failure to meet the time limit or the expiry of the period” that occurred before the order (for example, the failure to assess prior to the end of a normal reassessment period that ended March 31, 2020) is simply “cancelled”, which might suggest that the Minister then has

unlimited time in which to issue a reassessment. This is another point on which clarification would be welcomed.

Approach with reference to reassessment periods

With reference to subsections 152(3.1) and (4) of the ITA, and based on informal discussions with CRA officials, we understand that the current expectation is that the Minister would likely exercise the authorities provided under section 7 of the Proposals in a manner that would not displace acquired rights by reopening administrative proceedings which had achieved finality before the announcement of the Proposals, nor in a manner that could be duplicative or inordinately disruptive of certainty in proceedings and the rule of law, or not justified by the need to avoid unfair or undesirable effects of the COVID-19 crisis. We understand that this should also be the case for subsections 298(1) and (2) of the ETA. More specifically, to give some shape to these important principles, we offer the following observations reflecting our understanding of the current expectation as to how the Minister would likely exercise these authorities:

- Where the normal reassessment period contemplated by subsection 152(3.1) of the ITA and any reassessment period contemplated under subsection 152(4) of the ITA, and subsections 298(1) and (2) of the ETA, have expired before the announcement of the Proposals, any order issued by the Minister would not have the effect of permitting an assessment or reassessment to be made without the consent of the affected taxpayer, nor would an order include a provision, pursuant to subsection 7(4) of the Proposals, that would cancel or vary the effect of the Minister's failure to assess or reassess prior to the expiry of a normal reassessment period that ended prior to the announcement of the Proposals.
- In cases where the COVID-19 crisis has not materially disrupted the CRA's audit activity with reference to a particular taxpayer (i.e., the CRA has in fact continued to undertake audit activity with reference to the particular taxpayer), an order issued by the Minister would not have the effect of suspending or extending the normal reassessment period contemplated by subsection 152(3.1) of the ITA or any assessment or reassessment period contemplated under subsection 152(4) of the ITA, or subsections 298(1) and (2) of the ETA, with reference to the particular taxpayer, without that taxpayer's consent. To avoid uncertainty, parameters regarding the interpretation of "materially disrupted" should be provided.
- Any order issued by the Minister would not have the effect of resulting in any duplication of a suspension or extension of the normal reassessment period contemplated by subsection 152(3.1) of the ITA and any assessment or reassessment period contemplated under subsection 152(4) of the ITA, or subsections 298(1) and (2) of the ETA; that is, any order(s) would not result in a total prolongation exceeding six months.
- Any order issued by the Minister would not have the effect of suspending or extending the normal reassessment period contemplated by subsection 152(3.1) of the ITA or any assessment or reassessment period contemplated under subsection 152(4) of the ITA, or subsections 298(1) and (2) of the ETA, which would otherwise expire within a reasonable amount of time after September 13, 2020.

These observations are guided by our understanding of the policy objectives and principles underlying the Proposals – to permit flexibility which may be required by the CRA in the administration of the ITA without displacing acquired rights or being inordinately disruptive of certainty in proceedings and the rule of law or permitting suspensions or extensions not justified by the need to avoid unfair or undesirable effects of the COVID-19 crisis. We recommend that the Proposals and Explanatory Note be clarified in order to provide certainty along the lines more specifically set out above. As noted above in connection with section 6 of the Proposals, the preservation of acquired rights, and other elements of certainty, would permit taxpayers to plan their financial affairs (including financial statement disclosures) and to make appropriate and reliable arrangements with their employees, their creditors and other stakeholders during these difficult times. In addition, with respect to section 7, if the intent was to provide the CRA with the ability to suspend or extend the time periods for assessment, it should be more clearly stated in the Explanatory Note as the Proposals are described in the Explanatory Note as being for the purpose of providing relief where the circumstances of COVID19 “make compliance difficult or impossible” or to extend other periods “so that their expiration does not produce unfair or undesirable effects”.

We acknowledge that many normal functions of the CRA have been disrupted by the onset of the COVID-19 crisis – and that many of the CRA’s resources have been diverted to the objective of delivering a broad range of benefits to millions of Canadians, in many cases under unprecedented programs developed and implemented within unprecedented timelines, which to date the CRA has accomplished (in coordination with the Department of Finance and many other stakeholders) in a manner of which all Canadians should be very proud. Nevertheless, it would not be consistent with the policy objectives and principles underlying the Proposals to permit suspensions or extensions with reference to time limits and periods in particular cases where audit activities have not in fact been disrupted, or where the normal time limits or periods are far enough beyond September 13, 2020, such that the effects of any actual disruptions can reasonably be expected to be overcome without any suspensions or extensions.

Finally, we would note that the Proposals would not affect time limits involving offenses, and that subsection 152(4) of the ITA already permits a reassessment at any time where the taxpayer or person filing the return has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under the ITA, so the interests of justice are already adequately protected in this regard.