

## **Voluntary Disclosure Program – Troubled Times**

**By Charles M. Rotenberg and Susan G. Tataryn**

Readers of The Canadian Taxpayer will no doubt be aware of a Canada Revenue Agency (CRA) program called the Voluntary Disclosure Program (VDP) (see Vol. xxvii, No. 15, July 26, 2005). As stated in Information Circular IC 00-1R:

*The purpose of the Canada Customs and Revenue Agency's (CCRA) Voluntary Disclosures Program (VDP) is to promote voluntary compliance with the accounting and payment of duty and tax provisions under the Customs Act, Customs Tariff, Income Tax Act, and Excise Tax Act. The VDP encourages clients to come forward and correct deficiencies to comply with their legal obligations. It is a fairness program that is aimed at providing clients with an opportunity to correct past omissions, thus rendering themselves compliant.*

Clearly, the program is designed to encourage taxpayers to become compliant going forward, while paying their fair share of taxes that might have been “overlooked” in the past. Sometimes a taxpayer has simply not filed for one reason or another, and sometimes a taxpayer might have filed, but neglected to declare income.

A valid Voluntary Disclosure can only be made where there is no ongoing audit of the taxpayer, at least to the taxpayer’s knowledge. Thus, the date of one’s disclosure can be critical.

In order to expedite matters, it is possible to make a “no names” disclosure which will at least stop the race between the disclosure and the audit. Once a no names disclosure is made, a file number is assigned, and the taxpayer is given a period of time to make a full disclosure which, includes his or her identity. All relevant financial information must be disclosed and then it is necessary to make arrangements for the payment of the taxes and interest.

As the program has been explained to us, once a disclosure is made, the returns and other information are forwarded from the Voluntary Disclosure group to audit for verification. It was represented by an official of the CRA that the fact that a voluntary disclosure was made would

only be relevant if penalties were to be imposed. If that were the case, then the penalties would be waived under the VDP.

Our experience over many years of using the VDP on our clients' behalf, has been that, in the normal course, a taxpayer who has not filed at all would be required to file for 7 years, including the current year, and that a taxpayer who has filed but failed to fully declare, would be required to file for only years that are not otherwise statute barred. In any event, upon filing a no names disclosure, agreement could generally be reached as to what years would be required to be filed, based upon discussions between the advisors and the CRA.

The times, as they say, are a' changin – and not for the better.

We recently filed a no names disclosure on behalf of a taxpayer and her deceased spouse. After discussions with the CRA official who, until recently, was responsible for the running of the VDP in Ottawa, an agreement was reached as to what years would need to be filed. It should be noted that in this situation, the total tax liability in the 2001 year, which was the last year filed, was the princely sum of \$3500.00, and all indications are that very little has changed.

There has now been a change of personnel and all bets are off. We have now been told that since the previous commitment as to the years to be filed was only verbal, we cannot rely on it. Never mind that we have operated with the same representatives of the CRA on this basis for years. Never mind that they now expect the taxpayer's estate to file information that is probably not available. And never mind that the amount of tax for any given year will be small. The taxpayer is now expected to make a disclosure without any idea of how many years might be required to be filed. And, of course, once the disclosure is made, the taxpayer runs the risk of having it invalidated , by not filing for additional years that were not originally contemplated.

More disturbing is a second matter. In this matter, a taxpayer made a voluntary disclosure. CRA used the fact of the disclosure to open, audit and assess statute barred years, under the authority of subparagraph 152(4)(a)(i), which states that the Minister may assess tax, interest or penalties, after the taxpayer's normal reassessment period in respect of the year only if the taxpayer  
:

*(i) 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 this Act.*

Using the fact of the voluntary disclosure to assess a statute barred year is outrageous. The CRA official involved in the file acknowledged that the CRA had no basis to assess the statute barred year other than the fact of the voluntary disclosure having been made. The CRA considered the disclosure to be an admission of misrepresentation due to the enumerated grounds. The Audit section certainly has no business using the disclosure as a basis to assess a statute barred year. And, if the VDP is designed to induce taxpayers to come forward and to become compliant, one is hard-pressed to understand how such an outrageous action is likely to enhance the success of the program. This is not a suggestion that CRA should be unable to open a statute barred year if the disclosure is not complete and therefore doesn't meet the tests of a valid disclosure.

The VDP has been used successfully by many taxpayers – successfully for the taxpayers themselves, for the CRA, and for taxpayers in general. It has led many taxpayers to come clean and to become compliant. However, if recent experiences become the norm, tax advisors will not be able to confidently advise clients to take advantage of this program. If the result is that more taxpayers continue to pay less than their fair share, then the CRA will have nobody to blame except themselves.

*Susan Tataryn is a tax lawyer in Ottawa. Charles M. Rotenberg is a partner in the Ottawa law firm, Drache, LLP.*

This article was published in the Canadian Taxpayer, Volume xxvii No.18, September 26, 2005