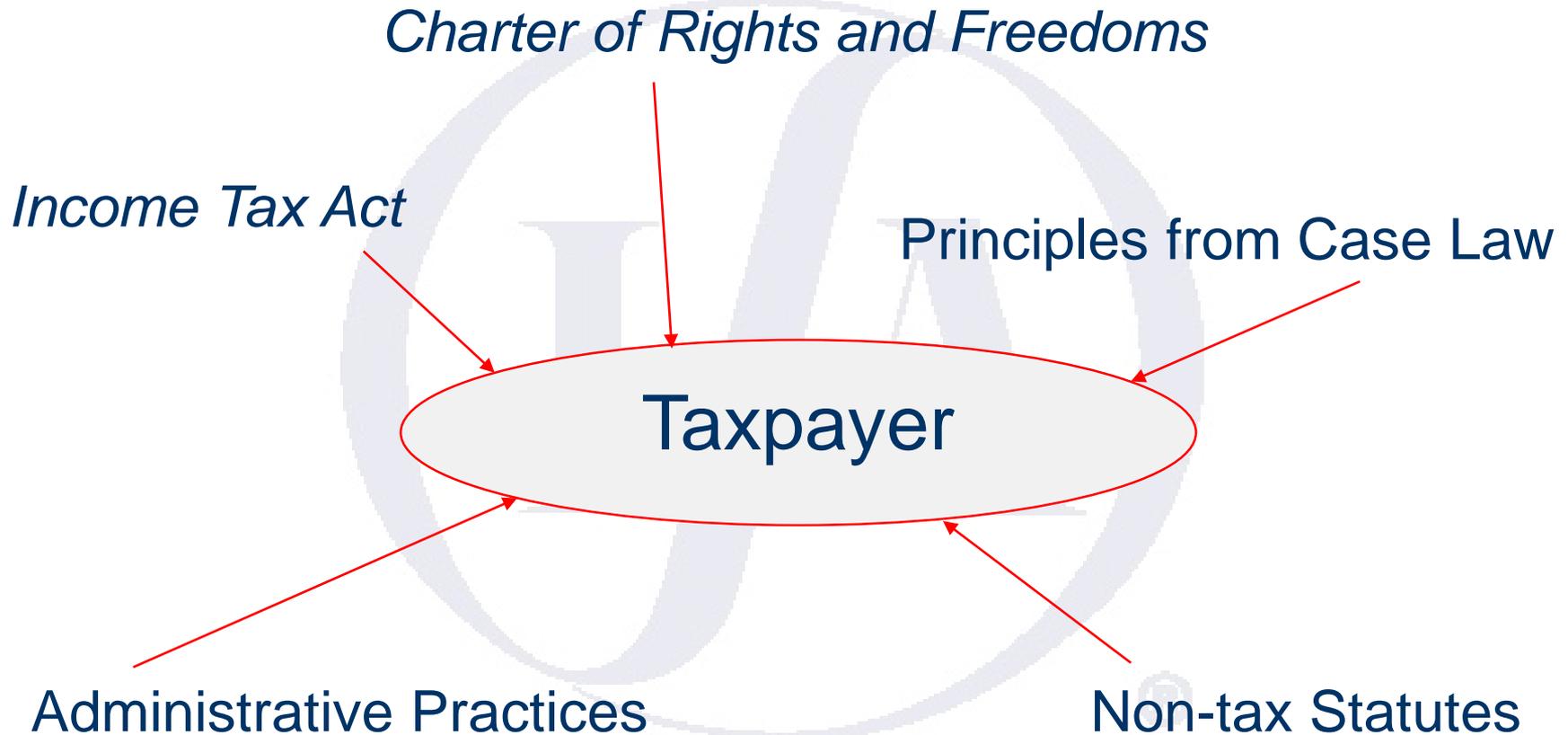

2015 IFA International Tax Conference
Thursday May 28-Friday May 29, 2015

TELUS Convention Centre
Calgary, AB

**The Practical Protection of
Taxpayers' Fundamental Rights**

Salvatore Mirandola
Borden Ladner Gervais - Toronto

Where do we find the protections?



Overview

- Issuance of tax assessments
- Confidentiality of taxpayer information
- "More intensive" audits
- Development of tax legislation
- Revenue practice and guidance
- Institutional framework for protecting taxpayers' rights

Issuance of Tax Assessments

- CRA has substantial discretion in relation to the issuance of tax assessments, and courts have had little influence regarding the process by which assessments are issued
- CRA must assess “with all due dispatch”
 - Within a reasonable period of time
 - In *Ficek*, 2013 FC 502, the Court decided that the Minister had failed to assess with all due dispatch when assessments were delayed in order to discourage participation in tax shelters

Issuance of Tax Assessments

- With certain exceptions (e.g. taxpayer relief/"fairness", voluntary disclosures), CRA cannot issue assessments based on compassionate or discretionary grounds
- CRA generally not bound by previous assessments or by treatment of other taxpayers
- CRA must generally assess within the normal reassessment period ("NRP") or within a certain period of time following the end of this period (one exception: waiver of NRP, which taxpayers often feel compelled to provide to avoid arbitrary assessments)

Issuance of Tax Assessments

- CRA has a duty to disclose the "precise findings of fact and rulings of law which have given rise to the controversy" (*Johnston v. MNR*, [1948] S.C.R. 486) since taxpayers usually have the burden of proof in tax controversies – in practice, extent of quality of disclosure varies from auditor to auditor

Confidentiality of Taxpayer Information

- While privacy breaches have occurred, confidentiality of taxpayer information is generally well protected in Canada
- Section 241 of the *Income Tax Act*: protection from disclosure of taxpayer information except with taxpayer's consent or in certain enumerated circumstances
 - *Slattery* [1993] 3 SCR 430: section 241 balances privacy interest of taxpayer regarding his/her financial information against Minister's interest in enforcing/administering the *Income Tax Act*

Confidentiality of Taxpayer Information

- International Tax Agreements: double tax conventions and tax information and exchange agreements include limitations on disclosure of information and use of information
 - Protections for privileged information, for example
 - Canada currently in negotiations to amend exchange of information provisions in tax treaties and TIEAs

Confidentiality of Taxpayer Information

■ Privacy Laws

- Federal *Privacy Act* (personal information under control of a government institution to be disclosed only with consent or in certain enumerated circumstances)
- Federal *Access to Information Act* (information not covered under the *Privacy Act*) and related orders

■ Administrative Measures – security screening for CRA employees, CRA internal audits, disciplinary measures against workers who violate confidentiality rules, etc.

"More Intensive" Audits

- Two spheres of tax administration and enforcement
 - Penal: more rigorous *Charter* rights protections
 - Regulatory: fewer protections – for example, *McKinlay Transport Ltd.* [1990] 1 SCR 627: lower reasonable expectation of privacy in the regulatory sphere, balanced against the State's interest in ensuring tax compliance

"More Intensive" Audits

■ How do we know when CRA has crossed the line into the penal sphere?

- Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- Had the auditor transferred his or her files and materials to the investigators?
- Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
- Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

Jarvis [2002] 3 SCR 757 and *Ling* [2002] 3 SCR 814

"More Intensive" Audits

■ Protections in the regulatory sphere

- Solicitor-client privilege
 - Substantive right of law; not just a rule of evidence
 - Engaged when legal advice is sought from a professional legal advisor and communications are intended to be confidential
- Litigation Privilege
 - Where communication is for the dominant purpose of assisting counsel in actual or contemplated litigation
 - Includes communications with third parties
- No privilege in respect of accountant-client communications, unless litigation privilege can be claimed or unless the accountant is an intermediary between the taxpayer and the taxpayer's lawyer for the purpose of seeking/receiving legal advice (*Susan Hosiery*, 69 DTC 5278)

"More Intensive" Audits

- Protections in the regulatory sphere (continued)
 - Valid Purpose: power must be exercised for a valid (civil) purpose – i.e., related to the administration or enforcement of the *Income Tax Act*
 - A demand for documents must relate to a "genuine and serious inquiry into the tax liability of some specific person or persons" (*CIBC* [1962] SCR 729)
 - *RBC Life Insurance* 2013 FCA 50: conducting an "audit blitz" to discourage participation in "10-8" plans was not a valid audit purpose
 - Reasonability: demands for documents or information must be reasonable – eg., taxpayer must be given a reasonable period of time within which to comply with the demand
 - Relevance: a number of enforcement powers are expressed to be "for any purpose related to the administration or enforcement of the [*Income Tax Act*]"
 - This is a low threshold – met if the documents demanded "may" (not "must") be relevant to the determination of tax liability; also, there is no requirement that the documents be relevant to any particular issue under audit

Development of Tax Legislation

- Consultative process involving:
 - Department of Finance (Tax Policy Branch, Tax Legislative Division)
 - Department of Justice
 - Other government departments and agencies
 - Provincial government officials
 - House of Commons and Senate
 - Government appointed expert committees, advisory panels or parliamentary committees
 - Advice from the private sector
 - Advice from independent organizations (e.g. Joint Committee on Taxation of the CBA and CPA)
 - Etc.

Revenue Practice and Guidance

- Canada is relatively well served with respect to availability of administrative guidance
 - Technical pronouncements: Interpretation Bulletins, Information Circulars, Folios, ITTN, technical interpretation letters, manuals, etc.
 - CRA website
 - Advance Income Tax Rulings
- Administrative guidance "entitled to weight" (*Nowegijick* [1983] 1 SCR 29), but does not override the law
 - CRA generally permitted to take positions relating to interpretation of the law that are contrary to its administrative pronouncements 
 - There may be greater scope to bind CRA to its representations of fact or representations regarding the procedures it will follow (see *Ludmer*, 95 DTC 5311 (FCA) and *Karia*, 2005 FC 639)

Institutional Framework for Protecting Taxpayers' Rights

■ Taxpayer Bill of Rights

- 16 "rights", including rights to privacy and confidentiality; to have the law applied consistently; and to complete, accurate, clear, and timely information
- Does not have the force of law in Canada, and likely does not generally create "legitimate expectations" for taxpayers

■ Taxpayers' complaints process

- If taxpayer cannot resolve the service level complaint directly with the CRA employee or his/her supervisor, taxpayer can file a prescribed complaint form
- If still not resolved, taxpayer can file a complaint with the Taxpayers' Ombudsman

■ Taxpayers' Ombudsman

- Reviews and assesses service related complaints and is charged with upholding the Taxpayer Bill of Rights with regard to service matters

