



## How to Appeal a Notice of Assessment – For Individuals and Businesses

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The Canadian income tax system is a self-reporting one. The taxpayer (whether it be an individual, a corporation or a trust) has the responsibility to file an Income Tax Return every year. Canada Revenue Agency (“CRA”), in turn, evaluates the Return and issues a Notice of Assessment, giving the taxpayer its position on the return and detailing any amounts that are outstanding or to be refunded. Many taxpayers believe that CRA’s Notice of Assessment is the last word on their tax obligations. In other words, if CRA disallows a particular deduction, assesses a penalty, or issues a refund much smaller than you were anticipating, then nothing else can be done.

In reality, however, the taxpayer can appeal assessments and penalties. Fortunately for the taxpayer, the last word does not rest with CRA but, ultimately, with the Tax Court of Canada; a body which, like all courts in Canada, is independent from the Canadian Government.

The Tax Court of Canada is a superior court and has the jurisdiction to hear appeals under the *Income Tax Act* (Canada) (the “ITA”), the *Excise Tax Act* (Canada) (which provides for the goods and services tax now harmonized with Provincial sales taxes in Ontario and referred to as “HST”), the *Employment Insurance Act* (Canada) and the *Canada Pension Plan* (Canada), among others. It bases its decisions on the facts before it, applicable legislation and the governing case law.

### Procedure

The procedure to appeal a Notice of Assessment is relatively straightforward. The taxpayer has 90 days from the day the Notice Assessment is mailed by CRA, to file a written appeal (or Notice of Objection) to CRA. If the 90<sup>th</sup> day falls on a weekend, the taxpayer has until the following business day to file its Notice of Objection. The nature of a Notice of Objection need not adhere to any strict form, but can simply be a letter outlining the basis of the objection to the Notice of Assessment and all the relevant facts. The taxpayer must attach their Notice of Assessment to their letter. The formal filing requirements and forms may vary depending on whether the Notice of Objection is being filed by an individual, a corporation, a trust or a partnership.

CRA recommends that a taxpayer call and discuss their Notice of Assessment before filing a written appeal. CRA has released a brochure which, among other things, states that it has representatives who will respond to such calls and try to work out any assessment issues with the concerned taxpayer. This can offer a quick and inexpensive way to resolve an assessment dispute, should it be resolved in favour of the taxpayer. However, the taxpayer should consider

the fact that they are responsible for protecting their own position. CRA representatives who discuss these disputes with taxpayers have no responsibility to the taxpayer for mistaken or misleading advice. Taxpayers are not entitled to rely on advice of CRA representatives if the dispute escalates to a court hearing. Furthermore, CRA representative will make notes of your conversation and will use these notes, should the need arise at a later date. For example, if a taxpayer had a dispute centred on whether a particular expense was a legitimate business expense, the manner in which the taxpayer describes that expense will be noted by the CRA representative. It will then be difficult to retreat from that explanation at a later date, if the situation changes or the taxpayer first described the expense incorrectly. For these reasons, taxpayers should be clear on their tax position, have consistent answers and take notes of all conversations with CRA. Preparation for these kinds of calls with legal or tax counsel is a good idea.

The Minister of National Revenue, the Canadian Minister responsible for CRA, must respond to a Notice of Objection in writing providing the response and decision of CRA. Upon receipt of a decision which supports CRA position taken in the original Notice of Assessment, the taxpayer has yet a further option to appeal. The taxpayer can file an appeal to the Tax Court of Canada within 90 days of either: (a) the date of the confirmation or reassessment, or (b) from the date the taxpayer filed their Notice of Objection if the Minister does not respond within 90 days. The ITA provides for the extension of this 90-day limitation period if the statutory requirements are met. It is best not to rely on the availability of an extension, and to ensure any filing with the Tax Court of Canada is made within the initial 90 day period.

The Tax Court of Canada, unlike many other superior courts in Canada, allows for e-filing directly from its website. Rule 21(2)(c) of the *Tax Court of Canada Rules* specifically allows for a Notice of Appeal to be filed by sending a single copy of the Notice by fax or by electronic filing to the Registry (which is the Tax Court administrative office in Ottawa). This makes it an efficient process without the requirement, like that found in other court procedures, of having to personally serve multiple parties at considerable expense.

There are two streams through which appeals to the Tax Court of Canada travel and they are both governed by sets of rules that bear some resemblance to other superior court rules, such as the Ontario *Rules of Civil Procedure* or the *Family Law Rules*.

The first is often called the Small Claims Court of the Tax Court of Canada, and uses an informal and cost effective procedure. This procedure applies where the dollar amount in dispute under the ITA is \$12,000 or less, or where the loss under section 152(1.1) of the ITA is \$24,000 or less (slightly different amounts govern the informal procedure under the *Customs Act* (Canada) and Part IX of the *Excise Act* (Canada)). Under this procedure, governed by section 18 of the *Tax Court of Canada Act* (Canada), the Minister has 60 days to respond to a taxpayer's Notice of Appeal, and a hearing date must generally be set within 180 days of the last day of the Minister's time limit to file a reply. There are no examinations for discovery and the hearings are governed by rules of evidence that are not as strict as those used in most other court proceedings.

All of the cases that do not fit within the informal procedure are governed by the general procedure. Under this procedure, appeals are instituted in the same way as under the informal procedure, by way of a Notice of Appeal. The Notice of Appeal is the taxpayer's pleadings, or their written application in which they set out their argument. These documents must be properly and concisely written, and must set out all relevant facts supportive of the taxpayer's appeal and plead the grounds of appeal. If a particular ground of appeal is not pleaded, the taxpayer will not be permitted to argue that ground at a hearing.

Unlike the informal procedure, the general procedure allows for pre-hearing Motions, Discovery of Documents and Examinations for Discovery. These are all procedures that allow each side of a dispute to learn the strengths and weaknesses of their respective cases by, for example allowing a taxpayer's lawyer to question witnesses from CRA about their position on the relevant case, including the basis for the decisions they have made.

If after the exchange of documents containing the pleadings is complete, discoveries are complete and no settlement has occurred, at the request from the parties the Tax Court may set the time and place for the hearing. Before the hearing, the Tax Court or either party may also request a pre-hearing conference, which is designed to explore the possibility of settlement and various ways to simplify and thus shorten the hearing.

The hearing is the taxpayer's trial. The appellant taxpayer is generally responsible for leading their case first. Unlike the informal procedure, the normal rules of evidence will apply at a general procedure hearing. The taxpayer is required to lead evidence (either from witnesses or affidavits, if the Tax Court so orders) that supports their case, and this may include expert evidence. The Minister is represented by lawyers from the Tax Litigation section of the Department of Justice Canada. They too, can lead evidence disputing or refuting the taxpayer's evidence. In the appropriate case, the taxpayer will be permitted to lead further evidence in rebuttal. The Judge will then make a decision, either at the end of the hearing or some time shortly thereafter. As part of the Judge's decision on the case, he or she can, as in most civil disputes in Canada, order the losing party to pay the winning side's legal costs.

Importantly for the taxpayer, whether they win or lose an appeal in the Tax Court of Canada, the taxpayer's legal fees associated with their appearance are tax deductible.

The type of case you could expect to bring to the Tax Court of Canada ranges from individual taxpayers with straightforward issues, to small businesses arguing over whether a person is either an employee or an independent contractor, the former of which would require the business to pay employment insurance, to large, multi-national corporations arguing complicated cases.

### **Privilege**

When a taxpayer retains legal counsel for the purposes of appealing a Notice of Assessment, any communications between the taxpayer and their lawyer are privileged. In other words, the lawyer cannot generally be forced to disclose confidential client information (including communications) to CRA or other governmental bodies. Sections 231 and 232 of the

ITA, provide for exceptions to this rule of privilege. Those Sections lay out detailed procedures which explain how CRA and its agents can seize documents from a taxpayer (including from their lawyer's office), how search warrants are obtained, how the taxpayer's lawyer can assert privilege over any seized document and how that assertion is to be litigated. Apart from those sections, however, the law provides a significant protection between a lawyer and a client that the client cannot obtain from their accountant.

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