CRA AUDIT REQUIREMENTS: CAN A TAXPAYER CONTEST UNREASONABLE DEADLINES?

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The *Income Tax Act* (Canada) ("***Tax Act***") empowers the Minister of National Revenue (the "**Minister**"), for the purpose of administering or enforcing the Tax Act, to send a notice to a person requiring them to provide information or documents "within such reasonable time as is stipulated in the notice".[1] Such a notice is commonly known as a "requirement". Because the time period for compliance with a requirement must be stipulated in the notice, "[e]xtensions of time in a requirement are not permitted, as that would invalidate the requirement."[2] Failure to comply with a valid requirement can lead to compliance proceedings[3] and/or criminal prosecution.[4]

But what if the Minister issues a requirement that stipulates an *unreasonable* time for compliance? Is such a requirement still valid? Does the recipient still have to comply and, if so, within what time frame?

The case law on unreasonable compliance periods in requirements has been surprisingly sparse. However, in the case of *Ghermezian v. Canada (National Revenue),*[5] the Federal Court of Appeal recently provided some guidance on how the Courts should treat such requirements and how recipients may potentially defend themselves in any subsequent compliance order proceedings.

Background

In *Ghermezian*, the Canada Revenue Agency ("**CRA**") issued a series of demands for information and documents. Most of the demands were made under section 231.1 of the Tax Act—which empowers the Minister to inspect a taxpayer's books and records[6]—while others were issued as requirements under section 231.2 of the Tax Act.

All of the requirements issued under section 231.2 stipulated a 30-day period for compliance. When the recipients of the requirements did not comply to the CRA's satisfaction, the CRA instituted compliance order proceedings in the Federal Court. The recipients opposed the compliance orders on a variety of grounds, including that the period for compliance stipulated in the requirements was objectively unreasonable in light of the scope of information and documents demanded. While neither the Federal Court nor the Federal Court of Appeal provided particulars in their respective judgements on the scope of the requirements, the Court

records show that they included, among other things, demands for banking information involving multiple entities constituted in foreign jurisdictions dating back over two decades, including explanations for all cash inflows and outflows over that time period.

The Federal Court did not dispute that "many of the Requirements, on their face, appear to seek large volumes of documentation and information"[7] and that "when serving a Requirement, the Minister is to perform an assessment of the time required for compliance and provide the recipient with an objectively reasonable period to reply, based on the volume and details of the demand and circumstances then known to the Minister".[8]

However, the Federal Court declined to find the requirements invalid, on the grounds that *the recipients*—not the CRA—had to affirmatively adduce evidence to prove that a 30-day compliance period was unreasonable. The Court noted that:

[159] [...] the Court does not have a sufficient evidentiary foundation to understand with any precision how much material is sought or, more importantly, how challenging or time-consuming the assembly of that material would be. It may be that the task would be a very significant one or, as the Minister's counsel submits hypothetically, it may be that the information exists or has already been assembled on one USB drive. The point is that the answers to these questions are available to the Respondents, but they have adduced no evidence on this issue.

The Federal Court also expressed its discomfort with the proposition that "if the time for compliance stipulated in a Requirement is not objectively reasonable, a taxpayer is under no obligation to even attempt to comply".[9]

The Federal Court of Appeal upheld the reasoning of the Federal Court, ruling that, although the Minister must "consider an objectively reasonable time for compliance based on the information in his or her hands at the time the requirement was served",[10] the Minister has no obligation to prove that she actually did so when seeking to enforce the requirement. Rather, any challenge to the validity of a requirement based on the unreasonability of the period stipulated for compliance must be affirmatively raised by the recipient and supported with evidence.

Analysis

Both the Federal Court and the Federal Court of Appeal refer to "objective" and "subjective" unreasonableness with respect to compliance periods, although neither Court defines the terms. Presumably, "objective" unreasonableness refers to what a disinterested third party might determine to be a feasible compliance period for a given requirement, given the scope of information and documents requested and any other pertinent facts known at the time. "Subjective" unreasonableness presumably refers to other factors specific to

a particular recipient that may prevent compliance with an otherwise reasonable compliance period. For example, if the Minister issues a requirement with an objectively reasonable compliance period, but unbeknownst to the Minister, the recipient has been hospitalised and cannot comply in a timely manner, the compliance period may be subjectively unreasonable.

In a compliance order proceeding, if a recipient claims that the stipulated time in a requirement is *subjectively* unreasonable, logic suggests that they should bear the onus of proof, given that the essential facts lie almost entirely within the recipient's knowledge. Similarly, one might expect that the Minister—as the party that actually determined the compliance period stipulated in a requirement—to be best positioned to explain how she selected it and to defend its *objective* reasonability.

However, in *Ghermezian*, the Court declined to impose this onus on the Minister. Rather, the Federal Court held that "if the Respondents wish to assert that the time afforded for compliance with the Requirements was either objectively or subjectively unreasonable, they bear the burden of proof on that issue."[11] The Federal Court of Appeal confirmed that to challenge the validity of a requirement on the basis that a stipulated compliance period is unreasonable, the recipient must lead evidence with respect to "what actions were required to comply with the requirements".[12]

While the Court does not say so expressly, *Ghermezian* apparently stands for the proposition that even if a stipulated time for compliance in a requirement is unreasonable on its face, the recipient must still adduce evidence to show that compliance was not reasonably possible. In other words, objective unreasonableness alone is not sufficient to invalidate a requirement; the recipient must also show that compliance was not reasonably possible *for them* (*i.e.*, that the time period was also subjectively unreasonable).

Takeaways

Ghermezian is a troubling decision insofar as it makes it difficult—if not impossible in some cases—to hold the CRA accountable for a breach of its obligation to make a serious and good-faith effort to ascertain how much time it should reasonably take for a person to answer a requirement. This said, the decision does provide a potential roadmap to how a taxpayer might effectively respond in the face of a requirement that stipulates an unreasonable period for compliance.

It bears emphasis that *Ghermezian* does **not** stand for the proposition that such a requirement is valid. However, if the period stipulated for compliance in the requirement is objectively unreasonable—or even absurd or abusive (as, one might think, would be a demand to produce 20 years of banking information for multiple entities with narrative explanations of all inflows and outflows on 30 days' notice)—the recipient should nevertheless undertake a good-faith assessment of whether compliance with the stipulated period is reasonably possible. If the answer is "no", the reasons should be documented.

Depending on the circumstances, it may also be advisable for the recipient to advise the CRA of its position that the stipulated period for compliance is objectively unreasonable and, accordingly, the requirement is invalid and will not be answered. It might also be useful to indicate what might constitute a reasonable period should the CRA elect to re-issue the requirement. Taking such measures in a timely manner may help support a defence in any subsequent enforcement proceedings, or even avoid them altogether. In most cases, even if the CRA does not agree with the recipient's position, the CRA may well reason that it would be faster to simply re-issue a requirement with an extended compliance period rather than institute proceedings in the Federal Court that may take months, if not years, to resolve.

[1] Subsection 231.2(1) of the Tax Act. The Minister enjoys a similar power under subsection 289(1) of the *Excise Tax Act* (Canada), in respect of GST/HST matters.
[2] CRA Audit Manual, section 10.8.6.
[3] Section 231.7 of the Tax Act.
[4] Section 238 of the Tax Act.
[5] *Ghermezian v. Canada (National Revenue)*, 2023 FCA 183, reversing 2022 FC 236 ("***Ghermezian***"). The author of the bulletin acted as co-counsel in *Ghermezian* before the Federal Court and the Federal Court of Appeal.
[6] *Ghermezian* also considered in some detail the nature and extent of the Minister's powers under section 231.1 of the Tax Act, as the provision read prior to December 15, 2022 (when it was significantly amended).
[7] *Ghermezian,* paragraph 159 (FC), paragraph 48 (FCA).
[8] *Ghermezian*, paragraph 153 (FC).
[9] *Ghermezian*, paragraph 153 (FC); paragraph 57 (FCA).
[10] *Ghermezian*, paragraph 50-51 (FCA).
[11] *Ghermezian*, paragraph 159 (FC).
[12]*Ghermezian*, paragraph 52 (FCA).

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A Cautionary Note