

Canada Updates Policy on Accessing Working Papers

by Steve Suarez

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HIGHLIGHTS

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The working papers of a taxpayer's accountants or auditors can be a treasure trove of information for tax officials. The extent to which the Canada Revenue Agency is entitled to demand access to these materials as part of the audit process has been a contentious issue for some time. At a recent conference, the CRA indicated that it is very close to releasing an updated policy for obtaining access to these materials.

At the Canadian Life & Health Insurance Association's annual tax conference in May, the CRA reiterated its position that the law entitles it to request access to accountants' and auditors' working papers. However, it said it is close to finalizing a new policy after consulting with professional accounting associations and the Tax Executives Institute.¹ In fact, a final prepublication draft of the new policy reportedly is circulating for comment, meaning that the final version will likely be released soon.

Canada's Income Tax Act allows the CRA to "inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books and records of the taxpayer or to any amount payable by the taxpayer under this Act" for any purpose related to the administration or enforcement of the ITA. Because accountants (unlike lawyers) generally are not entitled to any kind of legal privilege under Canadian law, documents in the files of a taxpayer's accountants or auditors may not be protected from CRA access.

The CRA has always taken the position that it is entitled under the law to the working papers of a taxpayer's accountants and auditors. In 2004, however, the agency publicly acknowledged the sensitivity of the issue and initiated consultations with the tax, accounting, and business communities.² Subsequent comments from the CRA in 2006 suggested that the Canadian Institute of Chartered Accountants was particularly concerned about CRA access to working papers dealing with the analysis of the tax provisions, about liability for current and future income taxes, and about audit working papers and tax advice to clients.³

In many cases, accountants' and auditors' working papers contain information and analysis that was developed with an expectation of confidentiality. There is a natural tension between the need for open and complete communication between auditors and their clients to produce accurate financial statements and the legitimate desire of taxpayers to ensure that advice provided in confidence remains confidential.

One approach being considered is that the CRA agree in its revised policy not to ask for working papers on a "routine" basis, but only if particular circumstances make the documents especially relevant. It remains to be seen whether this will end up being the CRA's final policy, and if so, how frequently CRA personnel in the field will determine that access to accountants' and auditors' working papers is warranted.

Taxpayers with a Canadian presence should watch for future developments in this area. ♦

♦ *Steve Suarez is with Osler, Hoskin & Harcourt LLP in Toronto.*

¹The CRA's comments are contained in CRA document 2009-0316711C6, May 1, 2009.

²2004 annual conference, Canadian Tax Foundation. The CRA's remarks were formalized in *Income Tax Technical News*, No. 32, July 15, 2005.

³*Income Tax Technical News*, No. 34, Apr. 27, 2006.