Continuing Developments in Tax Law

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As tax-reporting season nears, millions of tax returns will be filed. At the same time, a similar number of criminal type offences will be committed with little or no appreciation of their implications and often even unwittingly. The criminal offence in question is tax evasion. Increasingly in the eyes of international, federal and provincial authorities tax evasion is a serious problem with serious consequences for the economy. Tax evasion is the most widespread economic crime in the world.

There is nothing wrong with arranging one's personal or corporate tax affairs in the most advantageous manner. Tax avoidance (or tax mitigation) is therefore to be distinguished from tax evasion. Similarly, tax evasion is very different from civil non-compliance with the law, such as failing to pay taxes on time or claiming through error or mis-allocation a deduction (which may of course result in more or less tax payable).

Tax evasion at the national and international levels has reached a point where the International Monetary Fund and other international organizations such as the Organization for Economic Cooperation and Development refer to tax evasion as a multibillion dollar problem on a global and unprecedented scale. The law accordingly wants to make sure that the government has every tool at its disposal to make a tax evader pay as tax evasion impacts upon the public treasury. If convicted in Canada, you have to pay the full amount of the tax owing plus interest. In addition, you will have to pay penalties as high as 50 per cent of the unpaid tax and, in all likelihood, a fine of between 50 per cent and 200 per cent of the tax evaded. A prison term of up to five years on top of the fines could also be part of the punishment. A conviction of this type also gives you a criminal record.

What Exactly is Tax Evasion?

Tax evasion as defined in Canada's federal *Income Tax Act* (ITA) is, broadly speaking, any wilful omission to pay tax (or, in the words of an old court case, "the intentional commission of a fraud on the public purse" through some affirmative act or omission that intends to evade or defeat a tax or the payment of a tax). "Affirmative act(s) or omission(s)" refers to things such as deceit, subterfuge, camouflage, concealment, attempts to colour or obscure events or make things appear other than they are. In addition, all related "conspiring" activity, whether active or passive, direct or indirect, is also considered tax evasion. There is effectively no limitation period. The CRA has the ability to prosecute no matter when the alleged offence was committed.

Tax evasion cases are limited only by human ingenuity. They can range from under-reporting income or failing to report income to failing to file, filing more than a year late if tax is owed, or failing to declare taxable income from any source. They include simple as well as complex schemes involving a single taxpayer or a group engaged in related businesses trying to lower their tax by taking deductions or credits they are not entitled to, or by using corporations to expense items of a personal nature, concealing sales or income, making false declarations on a return, failing to report income on questionable transactions, failing to accurately record retail sales tax, destroying records, making deceptive statements or declarations, evading customs duty by under-invoicing and by mis-declaring quantity and product-description.

Trends – Technology and the Globalization of the Financial World

Two recent manifestations of these trends have been referred to as "The End of Bank Secrecy." After a series of complex legal proceedings in Europe and the US, as well as threats from their national governments, a number of international banks were compelled to disclose customer data to authorities.

This trend isn't abating. There is a "harmful tax practices" initiative at the international level that seeks to put an end to preferential tax regime jurisdictions, or "tax havens," such as the Turks and Caicos. In addition, investigations into big scale sport franchises as vehicles for tax evasion have had some newsworthy successes and becoming commonplace. The internationalization of commerce and finance means that these kinds of developments will affect every major country.

The massive increases in e-commerce and self-employment opened another tax evasion front. A celebrated case involving E-Bay is an example of the dissolution of international borders in this area. A U.S. company was forced by a Canadian court order to release identifying customer information. The data that the Canadian court order forced into the open were held in servers located in the U.S. CRA alleged that the customer wasn't reporting his online income.

Not surprisingly, there are now requirements at the corporate level to certify corporate tax systems and controls working in tandem with new requirements to report "uncertain tax positions". We are also seeing tax risk management becoming an integral part of the overall risk management systems of businesses. Since no one is immune from this type of risk, and the reputational as well as monetary hit involved if convicted are serious, no one can afford not to be attuned to the issue nor to fail to have in place some sort of risk-management measures focused on this type of activity.