

# Civil Penalties Against Tax Advisors under the *Income Tax Act*

## BACKGROUND

- The 1999 Federal Budget proposed civil penalties against third parties who make false statements that could be used for tax purposes.
- In Fall 1999, the Joint CBA/CICA Committee on Taxation told Finance Canada that the civil penalties proposals were too broad. In particular, they could apply where there was an honest difference of opinion between the Canada Customs and Revenue Agency and a tax professional exercising reasonable professional judgment in good faith. Further, they could inhibit a tax professional's ability to advance aggressive or novel interpretations of the law on behalf of their clients.
- As a result of the Joint Committee's work, Finance removed "gross negligence" as a circumstance giving rise to liability, substituting the concept of "culpable conduct", which focuses on intentional misconduct rather than honest differences of opinion. It also expanded the scope of the "good faith" defense, protecting tax professionals who rely in good faith on information provided by their clients. Finance Canada also clarified that the legislation would not be retroactive.
- The civil penalties legislation was introduced by a Notice of Ways and Means Motion in December 1999 and adopted February 2000. The required legislative amendments were in Bill C-25, which was given Royal Assent in June 2000. (S.C. 2000, c.19)
- The Joint Committee and the Sales and Commodity Tax Section provided input into the first draft of proposed guidelines for the administration of civil penalties, which were published for public comment in January 2001. The federal government issued the Third Party Civil Penalties guidelines in October 2001 (IC 01-1).

## CURRENT STATUS

- CBA President Rod Snow wrote to Finance Minister Flaherty in September 2010, objecting to proposals to have tax advisors report aggressive tax planning, as it would force lawyers to breach solicitor-client privilege.
- Taxation Section representatives met with the Finance Minister in November 2010 to discuss how best to support the government's efforts to make the tax system fairer, while ensuring that lawyers are able to fulfill their duties to clients with undivided loyalty. The Minister assured CBA that the regime was not intended for disclosure of privileged information and undertook to consider a change to state that a lawyer or Quebec notary is not required to report any specific information that the lawyer believes, on reasonable grounds, is subject to solicitor-client privilege.

## **NEXT STEPS**

- The Joint Committee and the Commodity Tax, Customs and Trade Section will monitor the implementation of the legislation and the Guidelines.