Canadian-based multinationals generally have a range of commercial choices for financing their foreign affiliates — for instance, they can borrow in Canada and contribute the funds to the foreign affiliate or borrow directly in the foreign jurisdiction with credit support from the Canadian parent in the form of a loan guarantee. There are numerous tax issues to factor in: Where is the interest deduction most needed? What are the withholding tax consequences? How will the interest and principal payments be funded? And if there is a parent guarantee, what are the transfer pricing consequences?

The CRA’s Positions

The December 21, 2012 draft legislation proposes to add subsection 247(7.1) to the General Income Tax Act (Canada) (the “ITA”) in order to clarify that, at least for certain borrowings by a controlled foreign affiliate, the Canadian parent guaranteeing the debt does not necessarily need to receive an arm’s length guarantee fee from the foreign affiliate. This will provide a helpful safe harbour from transfer pricing adjustments and the expense of preparing contemporaneous documentation, and, in many cases, will remove a tax non-neutrality from the financing question.

However, this article suggests that the scope of the transfer pricing relief in proposed subsection 247(7.1) is perhaps too narrow from a policy perspective. In most commercial situations, a Canadian parent guarantee of a debt of its controlled foreign affiliate arguably should not result in a transfer pricing adjustment for the Canadian parent corporation, regardless of whether (and in what amount) a guarantee fee is received from the foreign affiliate. At the very least, given its positions in the recent General Electric cases, the Canada Revenue Agency (“CRA”) should not be assessing transfer pricing adjustments or penalties against Canadian parent guarantors who have not received a guarantee fee from their foreign affiliates, even where the borrowed funds were not deployed in or traceable to an active business as required by proposed subsection 247(7.1).

Transfer Pricing Requirements and Proposed Subsection 247(7.1) Relief

The transfer pricing rules in subsection 247(2) effectively require that transactions between a Canadian taxpayer (such as a Canadian parent corporation) and non-arm’s length non-resident persons (such as its controlled foreign affiliate) be carried out on arm’s length terms, subject to several exceptions (including under proposed subsection 247(7.1)). Where any such cross-border non-arm’s length transactions are found not to be on arm’s length terms, subsection 247(2) empowers the CRA, among other things, to adjust amounts for purposes of the ITA to amounts that would have applied if the parties had dealt at arm’s length. A guarantee by a Canadian parent...
corporation of the debt of its controlled foreign affiliate is a cross-border non-arm’s length transaction that, at first blush, is subject to the transfer pricing rules that would require the parent to receive an arm’s length guarantee fee, unless the guarantee transaction is exempt under proposed subsection 247(7.1).

Generally, if a taxpayer’s aggregate transfer pricing adjustments for a taxation year exceed $5 million (or 10% of the taxpayer’s gross revenues for the year if that is less than $5 million), then, unless the taxpayer made “reasonable efforts to determine arm’s length prices”, the taxpayer is liable under subsection 247(3) to a penalty equal to 10% of the amount of the transfer pricing adjustments. Subsection 247(4) deems a taxpayer not to have made “reasonable efforts to determine arm’s length prices” if the taxpayer has not prepared certain specified records or documents (generally described as “contemporaneous documentation”) with respect to the cross-border non-arm’s length transaction on or before the taxpayer’s tax filing due date for the year. Thus, if a taxpayer has not prepared contemporaneous documentation, the taxpayer is potentially exposed to transfer pricing penalties if the transfer pricing adjustments for a taxation year exceed $5 million (or 10% of gross revenues).

The proposed relief in subsection 247(7.1) deals with the specific case of a guarantee fee where a Canadian parent corporation has guaranteed the debt of a controlled foreign affiliate (as defined for purposes of section 17). If, and only if, the funds borrowed by the controlled foreign affiliate have been used in the specific “active business” manner described in paragraph 17(8)(a) or (b), which includes borrowed funds used directly in an active business of the controlled foreign affiliate or that are traceable to a paragraph 95(2)(a) loan, then subsection 247(2) will not apply to adjust the amount of any guarantee fee payable to the Canadian parent corporation. The transfer pricing relief in subsection 247(7.1) is proposed to apply to taxation years beginning after 1997.

It is not clear why, from a policy perspective, the transfer pricing relief for downstream guarantees is conditioned on the active business use of the funds borrowed by the foreign affiliate. Perhaps it is merely the result of its history. The technical notes indicate that the relief in subsection 247(7.1) for downstream loan guarantees is based on, and intended to parallel, the relief in subsection 247(7) for downstream low- or non-interest bearing loans to a controlled foreign affiliate, which is similarly conditioned on the use of the borrowed funds by the controlled foreign affiliate in an “active business” manner described in subsection 17(8). After subsection 247(7) was introduced consequential to the 1998 changes to section 17, several taxpayers requested further amendments to the ITA exempting downstream loan guarantees from the transfer pricing rules. Finance comfort letters were issued in 2003, 2004, and 2005, accepting the policy rationale for exempting downstream loan guarantees and recommending relief on terms similar to subsection 247(7). This culminated in the December 21, 2012 version of proposed subsection 247(7.1), complete with its required active business use of the borrowed funds, similar to subsection 247(7).

The proposed subsection 247(7.1) relief from transfer pricing requirements will, of course, be very helpful in many foreign affiliate financings guaranteed by the Canadian parent company. However, the “active business” conditions of subsection 17(8) are strict and not always possible to satisfy. For instance, a foreign affiliate borrowing used to pay a dividend would not qualify for the relief nor would a loan used to refinance a prior borrowing not directly traceable to a qualifying purpose (e.g., a prior borrowing incurred by the foreign affiliate before it was acquired by the Canadian parent, when the Canadian rules were not relevant to it). Commercial realities do not always permit the clean tracing of borrowed funds to an active business use. It will, therefore, often be the case that a foreign affiliate borrowing guaranteed by the Canadian parent will require a determination of the appropriate arm’s length guarantee fee.

**Commercial Context of Canadian Parent Guarantees**

In a typical foreign affiliate financing scenario, the controlled foreign affiliate requires funds but the lender insists on the protection of a Canadian parent guarantee in order to lend at a commercially reasonable rate. The alternative is a borrowing by the Canadian parent itself followed by an advance of the borrowed funds to the foreign affiliate. If that advance is made on an interest-bearing basis at the same rate at which the Canadian parent borrowed (plus a small spread), the effect is essentially the same as if the foreign affiliate borrowed at that rate under a Canadian parent guarantee. That advance to the foreign affiliate could also be made as a non-interest-bearing loan or as equity (a capital contribution or share subscription).

If the Canadian transfer pricing rules insist on payment of a guarantee fee where the borrowing is made directly by the foreign affiliate with credit support from the parent, the Canadian parent would suffer an additional income inclusion that would not be incurred if the borrowing were made in Canada and advanced to the foreign affiliate. In many cases, the guarantee fee requirement would lead the Canadian parent to prefer a borrowing in Canada followed by an
advance to the foreign affiliate. In this way, the constrained scope of the exemption in subsection 247(7.1) leads to a
distortion, or non-neutrality, in the financing decision and may discourage borrowings in the foreign country in favour
of borrowings in Canada.

Conceptually, the credit support provided by a Canadian parent corporation when it guarantees the debt of its foreign
affiliate is analogous to a capital contribution. It is a one-way, downstream conferral of a benefit by the parent on its
subsidiary. By providing the guarantee, the parent ensures that the foreign affiliate can borrow on effectively the same
commercial terms as would be available to the parent itself. The transfer pricing rules do not apply to capital
contributions and, arguably, should also not apply to downstream guarantees, which have a similar effect. Unlike other
typical cross-border related party transactions, where there is a potential erosion of the Canadian tax base resulting
from the inflation of a deductible expense of the Canadian parent corporation, a guarantee of a foreign affiliate debt
does not entail any outlay that need be policed by the transfer pricing rules.

These aspects of downstream guarantees are properly recognized by the relief in subsection 247(7.1), but that relief is
restricted to foreign affiliate borrowings that are deployed in an active business (as described in subsection 17(8)). To
see that this condition is arguably unnecessary, consider the opposite situation of a borrowing by a wholly owned
controlled foreign affiliate that is used to purchase an investment portfolio that earns foreign accrual property income
(“FAPI”).

• Suppose that, without a Canadian parent guarantee, the foreign affiliate can borrow from third-party lenders at a 5%
interest rate. Further, suppose that the foreign affiliate earns a yield of 8% on the investments, so that the net annual
FAPI amount included in the Canadian parent’s income under subsection 91(1) is 3% of the borrowed amount.

• Suppose instead, that with a Canadian parent guarantee, the lenders reduce the interest rate on the foreign affiliate
borrowing to 4%. If the subsection 247(7.1) relief were expanded to apply to this guarantee (i.e., notwithstanding
the use of the borrowed funds to earn FAPI and not in an active business manner described in subsection 17(8)), and
no guarantee fee was actually paid to the Canadian parent, the net FAPI of the foreign affiliate would increase to 4%
of the borrowed amount, and this would correspondingly increase the subsection 91(1) income inclusion for the
Canadian parent corporation.

• If a deductible guarantee fee was paid by the foreign affiliate to the Canadian parent equal to the 1% interest rate
savings resulting from the guarantee, the FAPI net of both the 4% interest charge and the 1% guarantee fee charge
would be 3%, and the Canadian parent would include in income the subsection 91(1) FAPI amount of 3% plus the
guarantee fee amount of 1%, for a total of 4% of the borrowed amount — the same result applies where there is
no guarantee fee.

In other words, with the Canadian parent guarantee of a controlled foreign affiliate borrowing to earn FAPI, the
corporate group as a whole is economically better off by virtue of the interest rate savings, and these savings are
captured in the Canadian tax base with or without payment of a guarantee fee to the Canadian parent. Accordingly, it
is not clear why the relief in subsection 247(7.1) should be constrained so as to effectively force the payment of a
guarantee fee when the borrowed funds are not deployed in an active business. In any circumstance where a guarantee
fee is still required, the Canadian parent will undoubtedly incur costs to prepare the necessary contemporaneous
documentation, and there may also be foreign withholding tax on the guarantee fee — all costs for the Canadian
parent corporation, which could be avoided by expanding the scope of the subsection 247(7.1) relief.

The CRA’s Positions in the General Electric Cases

Unfortunately, the preceding policy-based discussion does not change the fact that the current version of
subsection 247(7.1), likely to be enacted with retroactive effect (to taxation years beginning after 1997), does not
relieve downstream parent guarantees from the transfer pricing requirements when the funds borrowed by the foreign
affiliate are not used in an active business manner under subsection 17(8). However, as a practical matter, and based
on the CRA’s positions in General Electric, there arguably should be no transfer pricing penalties for any historical
Canadian parent guarantees outside the scope of the relief in proposed subsection 247(7.1), even if the Canadian
parent has not received a guarantee fee and there is no contemporaneous documentation.

The first General Electric case4 involved the inverse situation: a foreign parent guarantee of debt issued by its Canadian
subsidiary. The US parent company provided an explicit guarantee of third-party debt issued by its Canadian subsidiary,
and for the years 1988 through 1995, no guarantee fee was paid to the US parent in consideration for this guarantee.
Starting in 1996, the Canadian subsidiary began paying a guarantee fee to the US parent equal to 1% of the amount borrowed under the guarantee, based in part on quotes obtained from several banks indicating the likely credit rating of debt issued without any US parent guarantee, and the incremental interest rate that would likely have been charged on a stand-alone borrowing by the Canadian subsidiary without the benefit of the US parent guarantee. The Canadian subsidiary sought to deduct the amount of this guarantee fee paid to its US parent.

The CRA challenged this deduction under the transfer pricing rules. It argued that the Canadian subsidiary benefited in any event from an implicit guarantee of the US parent, such that the explicit guarantee was superfluous. In particular, the CRA argued that the credit rating of the Canadian subsidiary would be equalized with the credit rating of the US parent by reason of affiliation, in the absence of an explicit guarantee, so that the Canadian subsidiary could have borrowed the same amount at the same interest rate without an explicit guarantee as it did with the guarantee.

Consequently, the CRA took the position that the arm’s length price for the guarantee was nil. This theory of “implicit support” was also summarized in the later General Electric proceeding as follows:

1. The US parent would not have allowed the Canadian subsidiary to default on its debt regardless of the formal guarantee.
2. The credit rating agencies and borrowers in the market understood this and would have treated the Canadian subsidiary the same way regardless of the formal guarantee.
3. Therefore, the formal guarantee had little or no value to the Canadian subsidiary and the arm’s length price for the guarantee fee would be negligible or nil.

The Tax Court of Canada decision was rendered on December 4, 2009 in favour of the taxpayer. The implicit support argument of the CRA was accepted as a relevant factor in valuing the guarantee, but the Court did not conclude that it led to a merely nominal value for the guarantee. The Court applied the “yield approach” in upholding the taxpayer’s position that the US parent guarantee had value to the Canadian subsidiary and allowed the taxpayer to deduct the guarantee fee claimed by it, without adjustment under the transfer pricing rules.

The CRA then appealed this decision using the same arguments, namely, that the value of the US parent guarantee was nil because the Canadian subsidiary already benefited in any event from an implicit guarantee of the US parent. The decision of the Federal Court of Appeal rendered on December 15, 2010 affirmed the decision of the Tax Court in favour of the taxpayer.

Despite losing this case at both the Tax Court of Canada and at the Federal Court of Appeal, the CRA continued to assert effectively the same position against other Canadian subsidiaries in the General Electric group, in respect of other taxation years. These Canadian subsidiaries had also borrowed from third-party lenders under explicit guarantees from the US parent and sought to deduct their payment of guarantee fees to the US parent. The deductions were denied by the CRA under the transfer pricing rules, based on the same implicit support theory as had previously been advanced by the CRA (and also based on a further theory relying on the status of the Canadian subsidiaries as Nova Scotia unlimited liability companies). The Canadian subsidiaries challenged the assessments on the grounds the same issues had already been litigated successfully in favour of the other Canadian subsidiary of General Electric in the prior case. In a decision rendered on December 19, 2011 on the narrow matters of res judicata and estoppel, the Tax Court of Canada refused to grant the relief sought by the Canadian subsidiaries and allowed the CRA to continue asserting its same and similar arguments in the subsequent proceeding, to the effect that the amount of the guarantee fee payable to the US parent and deductible in Canada should be negligible or nil.

The significance of these General Electric cases is that throughout this period, and despite losses at the Tax Court of Canada and the Federal Court of Appeal, the CRA has continued to aggressively assert its position that the US parent guarantee of the debt of the Canadian subsidiaries had at most nominal value, because the Canadian subsidiaries already benefited in any event from the implicit guarantees of the US parent.

In light of the CRA’s consistently advanced position with respect to the negligible or nil value of parent guarantees, it would be inconsistent for the CRA to assert transfer pricing adjustments or penalties where there is no contemporaneous documentation, against any Canadian parent corporation that has guaranteed the debt of its foreign affiliate, even if the guarantee is outside the scope of the exemption in proposed subsection 247(7.1). At the very least, a “stay” is warranted for historical downstream guarantees in effect while the CRA continued to litigate General Electric.

Moreover, given the CRA’s historical positions in the General Electric cases and the questionable rationale for the
restrictions on the transfer pricing relief in proposed subsection 247(7.1), there would appear to be justification for a more general administrative policy not to require the payment of guarantee fees to Canadian parent corporations that guarantee the debt of their foreign affiliates, and not to impose penalties for failure to prepare contemporaneous documentation, even in circumstances where the downstream guarantees fall outside the scope of proposed subsection 247(7.1) because the borrowed funds are not used in the strict active business manner required by subsection 17(8).

— This article first appeared in the CCH newsletter International Tax No. 70 (July 2013).

Notes:
1 R.S.C. 1985, c. 1 (5th Supp.), as amended. All statutory references are to the ITA.
3 The article by my partner, Brian Bloom, “A Policy of Disengagement: How Subsection 247(2) Relates to the Act’s Income Modifying Rules”, Tax Topics [CCH] 1–4 (Sept 10, 2009), provides interesting historical background behind the subsection 247(7) amendment. The article is critical of the CRA’s position in a 2003 technical interpretation (2003-0033891E5) to apply subsection 247(2) to impute interest on a non-interest bearing loan to a foreign affiliate that would not have been caught by subsection 17(1). The article argues that the subsection 247(7) relief for loans to controlled foreign affiliates that are described in subsection 17(8) should not be read to imply that all such loans are necessarily subject to subsection 247(2) if they are not expressly exempted by subsection 247(7). A similar argument could be made with respect to proposed subsection 247(7.1).
4 General Electric Capital Canada Inc. v. The Queen, 2010 DTC 1007 (TCC); the Tax Court’s decision in favour of the taxpayer was affirmed, 2011 DTC 5011 (FCA).
5 General Electric Canada Company and GE Capital Canada Funding Company v. The Queen, 2012 DTC 1045 (TCC).
6 This further argument was that the guarantee by the US parent was superfluous because, as a member of the unlimited liability company, the US parent was already liable for the debts of the Canadian subsidiary without any limit by virtue of the inherent corporate structure, so that the guarantees had little or no value to the Canadian subsidiaries.
7 This is the subsequent proceeding referred to above, 2012 DTC 1045 (TCC).
8 Effectively, the Court held that the case against the other General Electric Canadian subsidiaries could proceed, because although the transfer pricing issues with respect to the value of the parent guarantee were the same as in the prior case, the new case involved different Canadian taxpayers and different taxation years.

NEW CRA ONLINE MAIL SERVICE ANNOUNCED

On September 6, 2013, the Honourable Kerry-Lynne D. Findlay (Minister of National Revenue) and Ryan Leef (Member of Parliament — Whitehorse) announced a new Canada Revenue Agency (“CRA”) online mail service designed to aid Canadian small businesses. The service, which utilizes and functions via the CRA’s online My Business Account secure function, will enable Canadian businesses to receive notices of assessment and reassessment, as well as some CRA letters pertaining to corporate income tax and GST/HST accounts. The new initiative is designed to help businesses eliminate unnecessary paperwork and manage CRA correspondence more quickly and efficiently.

RECENT CASES

Tax Court did not have jurisdiction to determine that section 163.2 created an offence, which opened up Charter rights to the taxpayer

The Minister appealed a decision of the Tax Court of Canada, which set aside a penalty assessed against the taxpayer under section 163.2 (2012 DTC 1283). The Tax Court judge held that section 163.2 created an “offence” within the meaning of section 11 of the Canadian Charter of Rights and Freedoms (the “Charter”) and therefore in the ensuing proceedings against the taxpayer she was entitled to rights guaranteed by section 11 of the Charter, which were not provided to her. The underlying facts centred on a charitable donation scheme for which the taxpayer, as a lawyer, provided a legal opinion as to its merits. The arrangement was later determined not to qualify its participants for charitable donation credits.

The Minister’s appeal was allowed. The Tax Court did not have jurisdiction to find that section 163.2 created an offence and, therefore, triggered Charter rights under section 11. Such a finding would require a ruling that, as a constitutional matter, some or all of section 163.2 was invalid, inoperable, or inapplicable. Moreover, the jurisdiction to make that ruling is present only when a notice of constitutional question has been served and in this matter no such order was served. Finally, even if assertions can be made regarding the constitutionality of section 163.2, the Wigglesworth/Martineau test for criminality was not met.
Court refused to grant Minister’s motion dismissing taxpayer’s application

The taxpayer’s 2010 return involved the question of whether a charitable donation involved a tax shelter. The Minister’s Winnipeg office initiated a policy (the “Policy”) under which the taxpayer’s and other donors’ assessments would be deferred pending a Canada Revenue Agency (“CRA”) audit of the tax shelter itself. By way of judicial review, the taxpayer sought an order by way of mandamus compelling the Minister to examine and assess her return for 2010, and to issue a notice of assessment and an order declaring that the Minister’s Winnipeg office had no authority to initiate the Policy in view of the Minister’s obligation under subsection 152(1) to assess with “all due dispatch”. In fact, the Minister assessed the taxpayer’s 2010 return one month after the hearing of her judicial review application. The Minister accordingly moved for an order dismissing the taxpayer’s application for judicial review as being moot.

The Minister’s motion was dismissed. The issue involving the mandamus order was clearly moot as both parties agreed, since the Minister did in fact assess the taxpayer’s 2010 return. Conversely, the issue surrounding the Policy was not moot, since that Policy could apply to the taxpayer’s and other donors’ returns for 2011 and following years, and could very well be in breach of the Minister’s duty to assess with “all due dispatch”. It was therefore appropriate for the Federal Court to exercise its discretion and dismiss the Minister’s motion.

¶48,490, Ficek, 2013 DTC 5115

Minister justified in refusing corporate taxpayer refund when corporate return not filed

The Minister refused to refund to the corporate taxpayer an overpayment of tax it made for 1996 because it had not filed its 1996 T2 return within three years after the end of 1996. In the Minister’s view, paying a refund under these circumstances would be contrary to the intent of subsection 164(1). The Minister stated, however, that any unappropriated balance in the taxpayer’s 1996 tax account would be a tax asset that could be applied against any future tax indebtedness the taxpayer might incur. The Minister also refused to reappropriate the 1996 overpayment to 1999 under subsection 221.2(1), creating a tax credit for 1999, which could then be refunded under subsection 164(1). The taxpayer applied to the Federal Court for judicial review.

The taxpayer’s application was dismissed. The taxpayer was the author of its own misfortune by failing to file its 1996 T2 return in a timely fashion. As a matter of statutory interpretation, moreover, the Minister’s position based on subsection 221.2(1) was the correct one. While this outcome resulted in the Canada Revenue Agency retaining a tax overpayment to which it was not entitled, which was offensive, if any tax did at any time become payable by the taxpayer, there was the possibility that it would realize the value of its 1996 overpayment.

¶48,491, Clover International Properties (L) Ltd., 2013 DTC 5116

Taxpayer could not deduct under subsection 20(12) its share of US income tax paid by limited partnership of which it was member

This was an appeal of a decision of the Tax Court of Canada as to whether the taxpayer could deduct under subsection 20(12) its share of US income tax paid by a limited partnership of which it was a member against dividend income earned in 2002 (2012 DTC 1052). The issue was the requirement in subsection 20(12) that the US tax sought to be deducted “in respect of that income” (first condition) but not be reasonably regarded as having been paid “in respect of income from a share of the capital stock of a foreign affiliate” (second condition). The taxpayer argued that the lower court erred in finding that it did not meet the second condition. The Tax Court judge determined that the result accords with the purpose of subsection 20(12), which was to provide relief from foreign taxes paid in respect of income that was included in a taxpayer’s income in Canada.

The appeal was dismissed. A dividend is included in income not on the basis of a computation of profit from property in accordance with the relevant accounting principles and statutory rules, such as subsection 9(1), but by reason of specific inclusion, specifically paragraphs 12(1)(j) and (k) and subsection 90(1). Moreover, subsection 20(12) is a provision of general application, which on its face applies to all taxpayers and there were no words which expressly exclude the application of subsection 20(12) in the foreign affiliate provisions. If there was such an exclusion, it was only by implication.

¶48,492, FLSmith Ltd., 2013 DTC 5118
Application for extension of time to file appeal denied

An application for an extension of time to file a notice of appeal of reassessments was filed by the taxpayer’s lawyer on November 12, 2012. It was opposed by the respondent as it was filed a week beyond the 90-day filing period. In the application, the taxpayer’s lawyer stated it was filed late as the taxpayer had not provided the filing fee earlier. The taxpayer’s affidavit stated that she had given instructions to her lawyer to file on time and she did not address the filing fee issue. The respondent had requested that the taxpayer appear at the hearing but she failed to appear.

The application was dismissed. Applications for extensions of time to file appeals will be granted if there is a genuine intention to appeal, if it would be just and equitable to grant the extension, and if there are reasonable grounds for appeal. The taxpayer’s lawyer argued the taxpayer had a genuine intent to appeal, but there were conflicting reasons given for the delay in applying. Given the inconsistencies, the taxpayer should have made herself available to testify. There was no opportunity for the respondent to cross-examine and there was no clear reason given for the delay in filing the appeal. The taxpayer failed to give a reason for her failure to appear and no weight was to be given to her affidavit. In the circumstances, it was not just or equitable to allow the application for an extension of time.

¶48,493,  Hamilton, 2013 DTC 1157

Taxpayer did not act diligently in filing appeal and application for extension of time to file denied

Applications were made on behalf of two individual taxpayers and two corporations for an extension of time to appeal from reassessments. The legislation provides that taxpayers have 90 days from the date a reassessment is issued to file an appeal with the Tax Court Registry and a further year to bring an application to extend the 90 days. The applications were well beyond the one-year period. The individual taxpayer, K, who acted on behalf of all four taxpayers, argued that he mistakenly filed their appeals with the Canada Revenue Agency (“CRA”) instead of the Tax Court of Canada Registry. He produced letters purporting to be appeals for the corporations that were received by the Penticton office of the CRA in May 2011. He argued that the one-year period can be suspended in certain circumstances. He also argued that the CRA had an obligation to tell him that he had wrongly filed with them, that the Tax Court of Canada Rules (General Procedure) (the “Rules”) gave leeway to ignore the time constraints, and that the requirement to file with the Tax Court Registry included the CRA.

The applications were dismissed. The Tax Court is not bound by any improper advice the taxpayer may have received from the CRA. The Tax Court Registry is a defined term and does not include the CRA. The Rules give no leeway with respect to time constraints. The legislation is clear that the one-year period is a strict requirement, although another case held that the one year may be suspended if the applicant reasonably believed they had validly filed an appeal. K did not act reasonably or diligently. He claimed he had no prior dealings with the Tax Court but in fact had been an appellant and agent in prior proceedings. He was uncooperative and obstructive, failing to reply to CRA calls or attempts to communicate with him. Had he responded to the CRA, he would have discovered that he had wrongly filed the appeals. There was no evidence that he ever filed the personal appeals with the CRA. He never attempted to file with the Tax Court and his mistaken belief that he had validly filed appeals was not reasonable.

¶48,494,  Gidda, 2013 DTC 1158
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