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DOCNUM 2014-0538901E5

REFDATE 141105

SUBJECT Refund Sought/Notices of Objection, ss. 164(1)

SECTION 164(1), 164(4.1), 164(7), 221.1(1), 225.1(7)

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: A corporate taxpayer does not file returns of income within three years of the end of the taxation year. The Minister assesses the taxpayer using subsection 152(7). The taxpayer then pays the balance shown on the assessment and files a Notice of Objection. If the taxpayer's objection is allowed, can the Minister refund the resulting overpayment?

POSITION: No.

REASONS: Subsection 164(1) only permits the Minister to refund the overpayment if the corporation's return of income was filed within three years from the end of the taxation year.

XXXXXXXXXXXX

2014-053890

J. Ouimet, CPA, CA

November 5, 2014

Dear XXXXXXXXXXXX:

Subject: Subsection 164(1) - Refund after successful objection,

We are writing in response to your letter dated June 26, 2014, requesting our views regarding whether the application of subsection 164(1) of the Income Tax Act (the "Act") would deny a refund of disputed amounts paid in the situation described. We also acknowledge our various telephone conversations (Young / XXXXXXXXXXXX).

You have advised us that your client XXXXXXXXXXXX (the "Taxpayer"), a non-resident of Canada, carried on business in Canada during its XXXXXXXXXXXX, XXXXXXXXXXXX, XXXXXXXXXXXX and XXXXXXXXXXXX taxation years. You advised us that the Taxpayer did not file corporate returns of income ("T2 return(s)") for these taxation years because it was not aware that it was required to do so. Throughout the period in question, the Taxpayer had income tax deducted pursuant to section 105 of the Income Tax Regulations (the "Regulations") from various payments that it received for services provided in Canada. Since the Taxpayer had not filed T2 returns, the CRA issued assessments dated XXXXXXXXXXXX, for the above taxation years pursuant to subsection 152(7) of the Act, each assessment indicating that the Taxpayer owed Part I tax. The total assessed in respect of the above taxation years less amounts tax previously withheld was \$XXXXXXXXXX.

You indicated to us that your firm advised the Taxpayer to pay the \$XXXXXXXXXX owing in order to mitigate interest. By way of wire transfer, the Taxpayer made a payment of \$XXXXXXXXXX to the CRA on XXXXXXXXXXXX. On review of the Taxpayer's situation, your firm concluded, based on XXXXXXXXXXXX (the "Treaty"), that the Taxpayer was not carrying on business

in Canada through a permanent establishment situated in Canada (in respect of the above taxation years), and was, therefore, not subject to income tax in Canada. On XXXXXXXXXXXX, the Taxpayer filed T2 returns and Notices of Objection for each of the taxation years in question claiming an exemption under the Treaty. The CRA acknowledged the receipt of returns and Notices of Objection on XXXXXXXXXXXX. The acknowledgement letter in respect of the Notice of Objection filed included the following statement:

"Although you do not have to pay the amount in dispute now, you can minimize interest charges by making a payment on your account. If you choose to pay the amount outstanding, the payment does not imply agreement with the assessment."

On XXXXXXXXXXXX, the CRA informed the Taxpayer that the Notices of Objection in respect of the above taxation years were being allowed with respect to the issue at hand. However, in allowing the appeal, the CRA notice indicated that:

"...the corporation...was, in accordance with section 164 of the Act: (a) not eligible for a refund in respect of any overpayment for the XXXXXXXXXXXX, XXXXXXXXXXXX, XXXXXXXXXXXX and XXXXXXXXXXXX taxation years as the tax returns were filed more than three years after the end of the applicable taxation year...".

You state that that in the context of subsection 164(1), you agree with the CRA's decision not to refund the amounts withheld pursuant to section 105 of the Regulations is correct. However, you do not agree that subsection 164(1) should apply to deny a refund of the \$XXXXXXXXXX of Part I tax that was paid by the Taxpayer in good faith pending the

outcome of the Notices of Objection.

Specifically, you asked for our views regarding whether subsection 164(1) of the Act would deny a refund of monies remitted by the Taxpayer while Notices of Objection were under consideration.

Our Comments

All taxpayers, whether resident of Canada or non-residents operating in Canada are required to be aware of and comply with their obligations under the Act. In the instant case, the Taxpayer was required to file an income tax return in accordance with clause 150(1)(a)(ii)(B) of the Act given that it was carrying on business in Canada, notwithstanding the application of the Treaty.

This obligation is clearly stated on the CRA website and in the guide, T4012 Rev. 2013, T2 Corporation - Income Tax Guide, 2013 (the "T2 Guide"), which states:

"A non-resident corporation has to file a T2 return if, at any time in the year, one of the following situations applies:

- * it carried on business in Canada;
- * it had a taxable capital gain; or
- * it disposed of taxable Canadian property, unless the disposition meets all the criteria listed below in the section "Dispositions of taxable Canadian property (certificates of compliance)".

This requirement applies even if any profits or gain(s) realized are claimed by the corporation to be exempt from Canadian income tax due to the provisions of a tax treaty." (emphasis added)

and:

"Note

You must file a return no later than three years after the end of a tax year to receive a tax refund."

It is also noteworthy that the Taxpayer received XXXXXXXXXXXX requests to file its T2 returns for the above taxation years prior to the issuance of the arbitrary assessments.

The statement contained in the acknowledgement letter that the Taxpayer, although not obligated to do so, could pay the amount in dispute to minimize interest charges is general in nature and intended to provide taxpayers with information that may be helpful.

In our view, it is the taxpayer's responsibility to determine whether paying the amount in dispute is appropriate in their particular circumstances.

Nonetheless, it seems unlikely that the Taxpayer relied on the statement in the acknowledgement letter to voluntarily pay the amount in dispute given that the Taxpayer made the payment prior to filing the Notices of Objection and prior to receiving the letter containing the comment.

In conclusion, the **Minister is unable to refund the Taxpayer's**

overpayment for the taxation years in question because the Taxpayer did not file the applicable T2 returns within three years of the end of the respective taxation years.

We trust our comments will be of assistance.

Yours truly,

Terry Young, CPA, CA
Manager, Administrative Law Section
International Division
Income Tax Rulings Directorate
Legislative Policy and Regulatory Affairs Branch