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Decision deals blow to crackdown on tax schemes

By JEFF GRAY

Judge rules CRA's civil penalty so severe that lawyer deserves criminal law protections, higher burden of proof for conviction

The Canada Revenue Agency faces new roadblocks in its investigations of lawyers or tax advisers who lure clients into unlawful tax-dodging schemes, thanks to a recent tax court ruling that threw out a \$547,000 penalty against an Ottawa lawyer.

In a decision released earlier this month, a federal tax court judge ruled that the civil penalties the CRA can demand of third-party advisers under the Income Tax Act are so severe that those facing them deserve the protections of the Charter of Rights and Freedoms that typically apply to criminal cases.

This includes the need to secure search warrants and the imposition of a higher burden of proof – "beyond a reasonable doubt" – for a conviction, potentially making future CRA investigations more difficult and expensive.

"If the decision stands, it will certainly tie the hands of the Canada Revenue Agency," said Vern Krishna, a prominent tax lawyer with Borden Ladner Gervais LLP and a professor at the University of Ottawa's law school.

A CRA spokeswoman declined to comment on the case or whether the agency has decided to appeal. It must make that decision by Nov. 1.

The ruling comes as the CRA continues to crack down on so-called "donation tax shelters." The often convoluted schemes involve offshore entities and see participating taxpayers receive grossly inflated receipts for charitable donations.

The CRA has warned that anyone who participates in such a shelter will be audited, and has clawed back more than \$5-billion in taxes and penalties from tens of thousands of taxpayers over the past decade. Dozens of groups have been stripped of their charitable status for getting mixed up in the schemes.

The CRA has also started targeting promoters and advisers behind such shelters and other "aggressive" tax programs. And lawyers who allegedly promoted or provided legal opinions blessing donation tax shelters have faced civil litigation from participants in these schemes, including lawyers at major Bay Street firms such as Cassels Brock & Blackwell LLP and Fraser Milner Casgrain LLP.

This latest tax court case involves a lawyer from Ottawa, Julie Guindon. According to the Oct. 2 tax court judgment of Mr. Justice Paul Bédard, Ms. Guindon, who practises family and estate law, became involved in a charity tax-donation scheme run by her cousin and former financial adviser.

Despite ruling that the \$546,747 penalty and the "stigma" that it would bring with it were harsh enough to merit criminal-law protections, the judgment is also harshly critical of Ms. Guindon.

In 2001, she wrote what Judge Bédard calls a "flawed and misleading" opinion letter endorsing the complex scheme, despite having no expertise in tax law and despite failing to first review key documents about the shelter. The scheme involved the donation to charity of the proceeds from timeshare units in the Turks and Caicos Islands. But the timeshare units "never existed," the judgment says.

Ms. Guindon was the president of a charity called *Les Guides Franco-Canadiennes District d'Ottawa*, the only charity to participate in the scheme. According to the ruling, she "participated in, assented to or acquiesced in the making of 135 tax receipts that she knew or would reasonably be expected to have known, constituted false statements."

"Her conduct is indicative either of complete disregard of the law and whether it was complied with or not, or of wilful blindness," the judgment reads, adding that Ms. Guindon "lied to authorities" during a CRA investigation of her own donation.

Ms. Guindon's lawyer, Adam Aptowitzer, said his client did not stand to benefit from the scheme and was "under pressure" when she signed off on her legal opinion.

"The way the judgment is written makes her look like a nefarious mastermind, when in fact she was out of pocket from this, never stood to gain, tried to do her cousin a favour," Mr. Aptowitzer said.

He also suggested that the result could hamper the CRA's other current investigations: "I suspect that this is a huge, huge problem for them. And I suspect that they will have to look at an appeal in order to get the rest of those investigations on track."

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