DISCLOSURE IN INCOME TAX MATTERS

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The basic administrative principle of the Income Tax Act[1] was, and of the Tax Reform Act[1a] is, self-assessment. Disclosure to the Revenue of all facts material to tax liability is at the core of the statute and requirements that facts relevant to tax collection and tax offences also be disclosed flow naturally from its scheme.

In the Income Tax Act itself, the same machinery is in the hands of the Minister of National Revenue in both civil and criminal cases in which he wishes to use it. The special rights to compel disclosure which the Minister has are available both before and during such proceedings. However, an analogy to discovery is probably not appropriate because his rights are ordinarily invoked before any legal proceeding exists, and are, as a matter of practice, in the hands of investigators, assessors and tax collectors in the Department of National Revenue. Their use is part of an investigative process and not ordinarily of a legal proceeding.

Once a legal proceeding has been commenced, National Revenue may continue to make demands for information or to conduct searches and seizures and inquiries, although their right to do so was questioned without being decided in the case of *Re Steven Low*.[2] In addition to provisions of the Income Tax Act, all the applicable provisions of the Criminal Code apply to a prosecution under the Income Tax Act by virtue of the Interpretation Act.[3]

Further, normal civil discovery is available in proceedings by way of appeal to the Federal Court of Canada in income tax matters by virtue of Rule 800 of that court. But the process of disclosure normally starts long before anyone has thought of proceeding in any way in any court, when a tax return is filed or when a decision is made to investigate the affairs of a taxpayer. The decision is, of course, not made by counsel.

A tax return is required by section 150 of the statute, formerly section 44 of the Income Tax Act. A corporation must make a

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[1] R.S.C., 1952, c. 148.

[1a] S.C., 1970-71, c. 63.

[2] (1967), 67 DTC 5060.

[3] R.S.C., 1970, c. I-23, s. 27. The version of the Income Tax Act in R.S.C., 1970, c. I-5 is *not* in force — see S.C., 1970-71, c. 43.

return within six months of the end of its year, and an individual must do so if tax is payable. There are no other exceptions. For example, an argument that the rule did not apply to native Indians failed in *Regina* v. *Point*.[4]

In addition the Minister may require an individual or corporation to file a tax return on demand, whether or not a return has already been filed. This demand may be made either under section 150(1), formerly section 44(2), or under section 231(3), formerly section 126(2). The penal consequences of failure to comply with each of the two sections are different, and the provision of section 231(3), formerly section 126(3), for a demand return is embedded in provisions for requiring information as a part of an investigation.

A prerequisite to the more particular powers to compel disclosure contained in the Income Tax Act is the requirement in section 230, a modified version of the former section 125, imposed on each taxpayer to keep accurate books and records.

The prime investigative provision is section 231, a severely modified version of section 126 of the former Income Tax Act. Its first subsection provides for entry on the strength of Ministerial authorization for auditing purposes, but in its closing paragraph permits records which may be required as evidence of violations to be taken away if they are turned up in the course of an audit. This is quite separate and apart from the full scale income tax search and seizure under section 231(4), which requires judicial approval.

However, under the new Act, the Minister will have to return documents taken as a result of an audit within one hundred and twenty days or obtain judicial approval *ex parte* for their further retention.

Then, under section 231(3), the Minister may, as has been noted in dealing with returns, require additional information including a return or supplementary return or the production, if thought necessary on oath, of documents within such reasonable time as he may stipulate. This is a tool which appears to be widely used to secure relevant factual information in the ordinary case.

It was, however, held at one time that there is no offence committed in failing to comply with a requirement under section 231(3), unless the Department has an investigation under way into the affairs of a taxpayer. This has ordinarily arisen where all that is asked is a return, which could have been required under section 150(1), formerly section 44(2), and reference is made to section 231, formerly section 126 in the requirement. Then, when there is non-compliance, a prosecution is instituted under section

[4] (1957), 57 DTC 1200.

238(2), formerly section 131(1), rather than section 238(1), formerly section 131(1), and the reluctant recipient of the requirement is threatened with more severe penalties. The need to prove an investigation was under way was successfully argued in *A. G. Canada* v. *Belanger*,[5] and arguably approved in *obiter* in *Regina* v. *O'Donnell*,[6] the latter a decision of the Court of Appeal for Ontario. However, the opposite view of the Quebec Court of Queen's Bench in *A. G. Canada* v. *Cossette*,[7] would appear to prevail in light of the decision of the Supreme Court of Canada in *Canadian Bank of Commerce* v. *A. G. Canada*.[8]

The information required may be as broad and as comprehensive as the Department thinks appropriate and it may be in relation to any person or persons and not merely to the person to whom it is directed, and may be for any purpose connected with the administration of the Income Tax Act. Thus, it is irrelevant that a great deal of information will be disclosed in regard to a number of persons whom the Department may not even have had in mind. The broad scope of the section is emphasized in the decision of the Supreme Court of Canada in *Canadian Bank of Commerce* v. *A. G. Canada*,[9] which affirms decisions of the Court of Appeal[10] for Ontario and Morand J.[11] In this case, the Department issued a very general requirement of the bank to produce everything in any way related to all transactions with one customer, a Swiss bank, and this was held to be within the section.

There are some limits on the right of the Minister to require returns. For example, he cannot require a 1962 return before any return is due for 1962 in the ordinary way, even if he is proceeding under section 231, formerly section 126. This was decided in *Regina* v. *Robinson*,[12] a decision of the Court of Appeal for Ontario. There are numerous evidentiary provisions which assist the Crown in prosecuting those who fail to make returns as required and provisions which enable them to be prosecuted separately for each day in which they fail to comply.

Presumably, information returns under section 231(3), formerly section 126(2), which constituted admissions against interest could be used in evidence once it was proved by handwriting evidence or otherwise that the person making the return made the admission contained therein.

The compulsory disclosure provision which has been most

[5] (1962), 62 DTC 1075.
[6] (1957), 57 DTC 1287.
[7] (1966), 66 DTC 5468.
[8] (1962), 62 DTC 1236.
[9] *Ibid.*
[10] (1962), 62 DTC 1014.
[11] (1961), 61 DTC 1264.
[12] (1964), 64 DTC 5117.

productive of traumatic experiences for taxpayers has been that providing for search and seizure contained in section 126(3) of the former Income Tax Act and in modified form in section 231(3) of the new Act. It provides that with the *ex parte* approval of a judge, officers of National Revenue, with Royal Canadian Mounted Police members on hand to keep the peace, may enter and seize evidence of violations of the Act. The old statute provided that the search might be for any purpose related to the administration and enforcement of the Act, while the new one restricts the extraordinary power to situations where the Minister has reasonable and probable grounds to believe that a violation of the Act or Regulation has been committed or is likely to be committed.

Apart from the thoroughness with which these searches are conducted, in practice the only really noteworthy feature of the provision is the lack of any requirement for the return of the documents after ninety days or any other limited time.

The new Act does add requirements that an affidavit be filed with the judge granting authority, as was already the practice, and that the person from whom documents are seized may inspect his own documents and make copies thereof at his own expense. This too, is understood to have been the present practice in any event.

By analogy to the *Canadian Bank of Commerce* case[13] it has been held in *Bathville* v. *Atkinson*,[14] a decision of the Ontario Court of Appeal, that the authorization for search and seizure need not specify particular persons or documents. In addition, it has been held that the judge giving authority for the search is acting as *persona designata*, and the court will not entertain an application to review and set aside his order.[15] The position may be different in light of the Federal Court Act,[16] which has already been held to provide for review of decisions by a judge acting as *persona designata* under a federal statute.[16a]

The documents seized may be used at trial if proved in the ordinary way, but section 231(9), formerly section 126(5),[17] provides that copies are admissible in evidence and have the same probative force as the original document would have if it had been proved in the ordinary way. Presumably, section 30 of the Evidence Act[18] will ordinarily be available to circumvent highly tech-

[13] *Supra*, footnote 8.
[14] (1964), 64 DTC 5330.
[15] See *Biggs* v. *M.N.R.* (1955), 55 DTC 1061, a decision of Cameron J. in the Exchequer Court of Canada.
[16] S.C., 1970-71, c. 1.
[16a] *Lavell* v. *A.G. Canada*, decided in the Federal Court of Appeal, on October 8th, 1971, unreported.
[17] S. 231(9) of the Bill.
[18] R.S.C., 1970, c. E-10.

nical problems of proof in relation to seized business records provided it can be established that they are kept in the ordinary course of business.

Section 232, formerly section 126A of the statute, contains a detailed scheme for claiming solicitor and client privilege in seized documents, which has been the subject of much litigation. All that is relevant for the purpose of this series of articles is to note that the privilege is carefully preserved and limits the rights of the Revenue to disclosure. The issues which arise are definition of the privilege in relation to documents passing, for example, between accountants and solicitors, and the mechanics of claiming it, which must be strictly complied with.

The disclosure provision most radically changed in the new Act is former section 126(4) which provided for inquiries to be conducted at the instance of the Minister with reference to anything relating to the administration or enforcement of the Act by any person, whether an officer of the Department of National Revenue or not. These inquiries might be held in relation to assessment, prosecution or collection matters. If a prospective accused were interviewed, he would of course ordinarily refuse to answer questions except under the compulsion of the Canada Evidence Act,[19] and his answers would, therefore, not be usable against him. The statements of witnesses made at such inquiries were naturally not admissible as such, but if they were called as Crown witnesses and depart from their previous evidence, presumably the previous inconsistent statement before the inquiry might be evidence of hostility itself and once they were found to be hostile, they might be cross-examined and brought back to what was stated at the inquiry, just as with any other previous inconsistent statement. Under the former provision, the accused has no right to counsel at the inquiry, which is not determining his rights. This was decided by the Supreme Court of Canada in *Guay* v. *Lafleur*.[20] In practice, the witness being examined was allowed to have counsel at the inquiry who was not permitted to do more than take notes; if the witness were a "third party", the taxpayer whose affairs were under investigation was unrepresented.

Under the new section 231, which provides by subsection (7) for inquiries in the same terms as section 126(4), it is provided by a whole series of new subsections that the presiding officer be named by the Tax Review Board, that the witness be entitled to counsel and to a copy of the transcript of his examination, and that any person whose affairs have been investigated be entitled to be present and to be represented by counsel unless the hearing officer, at

[19] *Ibid.*
[20] (1964), 64 DTC 5218.

the request of the Minister or the witness, orders otherwise on the ground that this would be prejudicial to the inquiry. If the statements are made in the presence of the accused or someone who is subsequently charged, I suppose interesting problems as to the admissibility of what was said may arise. Presumably, a right to counsel may involve giving counsel a greater role at the inquiry than need be permitted when he attends on sufferance where he has no legal right to admittance.

Because there is no provision for discovery by either party at the Tax Review Board stage of civil proceedings, it is an obvious course for the Department to attempt to use their powers to compel disclosure to obtain further information to buttress contested assessments. It was argued that use of an inquiry as a substitute for discovery in a Tax Review Board case, if such was the fact, was an abuse in *Re Steven Low*,[21] but the point was not decided, as indicated above. In civil proceedings the Minister's assumptions are presumed correct, and must be displaced by the appellant, while additional facts relied upon by the Minister must be proved by him. Since the assumptions must predate the assessment, subsequent inquiry could lead to disclosure of new facts which would then have to be proved by the Minister, without reference, for example, to the transcript of an examination, which could not itself be used. However, in order to displace the assumptions themselves, the taxpayer ordinarily has to give evidence and could be effectively cross-examined if he refused to repeat any admissions he had made at an examination or to acknowledge any damaging documents.

The provisions outlined above contemplate primarily, therefore, steps to obtain disclosure in an investigation leading to assessment, collection action or prosecution, and even if they can occasionally be utilized to give something like discovery, they should not, in my submission, be confused with discovery in an existing legal proceeding.

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[21] *Supra*, footnote 2.