

Leaked Documents Heighten Need For Canadians to Consider Voluntary Disclosure

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On April 3 several media outlets throughout the world, including the Canadian Broadcasting Corp. (CBC),¹ reported that financial documents apparently showing that more than 130,000 people worldwide have placed funds in offshore tax havens had been leaked. The leaked documents originated from the Washington, D.C.-based International Consortium of Investigative Journalists. Reportedly, more than 450 Canadians were among those who had placed funds in tax havens. As of April 13, the CBC had revealed the name of only one of the Canadians on the list but indicated that it continues to review the leaked materials. Similar revelations have occurred in other countries.²

Canadian Minister of National Revenue Gail Shea and the Canada Revenue Agency have announced that they are exploring their legal options for obtaining access to the documents and have made requests of both the consortium and the CBC.³ On April 12 CRA Rev-

enue Commissioner and CEO Andrew Treusch wrote an open letter to the CBC requesting the leaked materials so that the CRA “may review and take action according to its mandate” to combat offshore aggressive tax avoidance and tax evasion.⁴ The CRA has assured the CBC that the CRA is not requesting the source of the information and that it will treat any information provided by the CBC “with strict confidentiality in the same manner it treats all taxpayer information it receives.”

Of course, there is nothing illegal about investing money offshore. It is, however, an offense not to report income to the tax authorities. Canadian residents are taxed on their worldwide income, and it is obvious from the tone of the public discourse that has been occurring in Canada’s press over the leaked documents that there is an expectation that the documents will reveal that many Canadians have been hiding money offshore. The Canadian government and the CRA have taken increasingly aggressive measures to crack down on international tax evasion, including several measures that were contained in the recent federal budget

¹See Frédéric Zalac, Alex Shpritsen, Zach Dubinsky, and Harvey Cashore, “Senator’s Husband Put \$1.7M in Offshore Tax Havens,” CBC News, Apr. 3, 2013, available at <http://www.cbc.ca/news/canada/story/2013/04/03/merchant-offshore-trust.html>.

²See “Countries Rattled by Tax-Haven Data Leak,” CBC News, Apr. 7, 2013, available at <http://www.cbc.ca/news/world/story/2013/04/07/offshore-data-leak-reaction.html>.

³See CRA, “Statement From the Canada Revenue Agency,” Apr. 4, 2013, available at <http://www.cra-arc.gc.ca/whtsnw/tms/sttmt130404b-eng.html>; CRA, “Statement From the Honourable Gail Shea, Minister of National Revenue,” Apr. 4, 2013, available at <http://www.cra-arc.gc.ca/whtsnw/tms/sttmt130404-eng.html>; CRA, “Minister Shea Highlights New Initiatives to

Crack Down on International Tax Evasion,” Apr. 9, 2013, available at <http://www.cra-arc.gc.ca/nwsrm/r1ss/2013/m04/nr130409-eng.html>; “Revenue Minister Explores ‘Legal Options’ to Get CBC Tax Haven List,” CBC News, Apr. 9, 2013, available at <http://www.cbc.ca/news/canada/prince-edward-island/story/2013/04/09/tax-haven-shea-cra-cbc-request.html>.

⁴Letter from Andrew Treusch of the CRA to the CBC, Apr. 12, 2013, available at <http://www.cra-arc.gc.ca/nwsrm/r1ss/2013/m04/nr130412-eng.html>.

(Footnote continued in next column.)

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for 2013.⁵ Indeed, on April 15 the Minister of National Revenue issued a news release pointing out that the number of audit positions in the CRA's International Audit Program has increased by almost 40 percent since 2006.⁶

These events have raised many interesting issues, including privacy concerns, the extent to which the leaked materials can be used to prosecute tax offenses (which may turn at least in part on how the documents were obtained), and the legal means that can be used by tax authorities to access the documents. For example, in Canada there is a line of authority⁷ that confirms that the CRA may not use its civil powers (such as the power to compel documents from third parties in the course of a civil audit) to conduct criminal investigations. Criminal investigations engage rights enshrined in Canada's Charter of Rights and Freedoms,⁸ including the right to privacy and the right to be secure against unreasonable search and seizure.

For Canadian taxpayers, however, the recent revelations will have heightened the need to consider making

⁵See *Jobs, Growth and Long-Term Prosperity, Economic Action Plan 2013* (2013 federal budget), Annex 2, "International Tax Evasion and Aggressive Tax Avoidance," pp. 365-369, available at <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

⁶CRA, "Minister Shea Highlights the Harper Government's Efforts at Cracking Down on International Tax Evasion and Aggressive International Tax Avoidance," Apr. 15, 2013, available at http://www.cra-arc.gc.ca/nwsrm/rlls/2013/m04/nr130415-eng.html?utm_source=mediaroom&utm_medium=eml.

⁷See especially *R. v. Jarvis*, 2002 SCC 73; *R. v. Ling*, 2002 SCC 74.

⁸Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), c. 11.

voluntary disclosures when there are unreported amounts that have been invested offshore. The CRA implements a so-called voluntary disclosure program that allows affected taxpayers to avoid penalties and criminal prosecution if the taxpayers reveal the unreported amounts to the CRA before the initiation of enforcement action being undertaken by the CRA or other authorities or administrations. Affected taxpayers will then pay the outstanding tax and interest on the unreported amounts.

For a voluntary disclosure to be considered valid, the disclosure must meet several conditions that are outlined in the CRA's relevant policy statements.⁹ Valid voluntary disclosures must be voluntary in the sense that the taxpayer initiates the disclosure before the CRA initiates enforcement action that is likely to have uncovered the information being disclosed. Valid voluntary disclosures must also be complete (that is, the disclosing taxpayer must reveal omissions for all tax years and all tax accounts with which the taxpayer is associated), involve the application or potential application of a penalty (cases of unreported amounts secretly invested offshore will involve penalties), and include information that is at least one year past due.

It will be interesting to see how the ongoing public discourse between the CRA and the CBC plays out in the press and, potentially, in Canada's courts. In the meantime, Canadian taxpayers who feel that they might benefit from the voluntary disclosure program should contact their professional tax advisers soon to ensure that a valid disclosure is possible. ◆

⁹See especially *Income Tax Information Circular IC00-1R3* (Mar. 21, 2013), "Voluntary Disclosures Program." See more generally, Patrick Lindsay and Salvatore Mirandola, "Resolving Tax Disputes in Canada," *Tax Notes Int'l*, June 11, 2012, p. 1043.