



## COVID-19 Tax Update: Statute respecting suspension and extension of time limits enacted

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On July 27, 2020, Bill c-20 *An Act respecting further COVID-19 measures* was enacted. This legislation includes the *Time Limits and Other Periods Act (COVID-19)* (the “Act”), which provides for the extension and suspension of various time periods in tax audits, disputes and appeals. In particular, the Act suspends time limits relating to court proceedings and allows the Minister of National Revenue (the “Minister”) to issue an order extending certain time limits under the *Income Tax Act* (“ITA”) and *Excise Tax Act* (“ETA”).

The Act largely reflects the [draft legislative proposals](#) released by the Minister of Justice on May 19, 2020 (the “Proposals”). The [Explanatory Note](#) released with the Proposals states that the legislation aims to address the “need for flexibility in time limits and other periods under federal legislation because of exceptional circumstances due to COVID-19.”

This post highlights the main provisions of the Act and discusses their impact on taxpayers.

### *Suspension of time limits in relation to court proceedings*

The Act suspends the following time limits for the period that starts on March 13, 2020 and that ends on September 13, 2020 (the “Suspension Period”):

- (a) any limitation period for commencing a proceeding before a court;
- (b) any time limit in relation to something that is to be done in a proceeding before a court; and
- (c) any time limit within which an application for leave to commence a proceeding or to do something in relation to a proceeding is to be made to a court.

Courts may vary the suspension of a time limit so long as the commencement of the suspension remains the same and the duration of the suspension does not exceed six months. Courts may also make orders canceling or varying the effects of a prior failure to meet time limits.

Accordingly, taxpayers who, during the Suspension Period, missed deadlines to file Notices of Appeal before the Tax Court of Canada or the Federal Court of Appeal, seek leave from the Supreme Court of Canada, or complete any procedural step in relation to an existing tax appeal, will have an opportunity to do so prior to a revised deadline reflecting the Suspension Period. While some taxpayers will find relief from this concession by the Government, many will have already complied with the original filing deadlines to avoid the risk of losing their right to appeal, and will not be able to make use of such a concession.

Further, the extensions granted under the Act overlap with various administrative concessions already instituted by the various courts hearing tax matters. For example, the Tax Court had previously adopted the practice of treating Notices of Appeal filed during the pandemic as including an application for an extension of time to appeal brought on by the exceptional circumstances. The Act, by extending the statutory deadline to file a Notice of Appeal, rendered this administrative concession unnecessary. As such, the Tax Court released a Practice Order and Direction on August 14, 2020, reversing this concession and instead requiring taxpayers to file their Notices of Appeal within the extended deadlines as per the Act.

The extension of the time to file an appeal has revealed itself to be a double-edged sword for taxpayers; while it gives taxpayers additional time to dispute reassessments, it also gives the Crown additional time to appeal decisions favourable to taxpayers that would have otherwise reached a final conclusion.

Prior to the enactment of the Act, the Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada (the “**Joint Committee**”) made submissions to the Minister of Justice on the Proposals. The Joint Committee recommended that the proposed legislation be amended to provide certainty that the extension of time to file court proceedings would not, except with the taxpayers’ consent, have the effect of displacing taxpayers’ acquired rights and legitimate expectations by reopening proceedings which had achieved finality before the announcement of the Proposals. Regrettably, the Joint Committee’s recommendations were not incorporated into the Act.

### ***Extension and suspension of statutory time limits***

The Act also enables ministers responsible for certain statutes and regulations, including the Minister of National Revenue, to make orders suspending or extending time limits for up to six months, including on a retroactive basis to as early as March 13, 2020, and canceling or varying the effects of a prior failure to meet the time limits. Any suspension or extension must not have the effect of allowing a time limit to continue after December 31, 2020. The provisions which may be subject to such an order are listed in a schedule to the Act (the “**Schedule**”).

An extension will only apply if the relevant minister issues an order to that effect. The tax-related provisions listed in the Schedule which may be subject to a Ministerial order are the following:

- (a) subsection 37(11) of the ITA, which establishes the deadline to file Scientific Research and Experimental Development (“**SR&ED**”) claims;
- (b) paragraph (m) of the of the definition of *investment tax credit* in subsection 127(9) of the ITA, which provides for a period of one year after a taxpayer’s filing due date for a particular year for the taxpayer to file information pertaining to amounts to be included and added in computing the taxpayer’s investment tax credit;
- (c) subsection 152(3.1) of the ITA, which defines the normal reassessment period for income tax;
- (d) subsection 152(4) of the ITA, which establishes circumstances in which the Minister is authorized to issue income tax reassessments beyond the normal reassessment period;
- (e) subsections 166.1(7) and 166.2(5) of the ITA, which provide for the application to the Minister and to the Tax Court of Canada, for an extension of time to file Notices of Objection to income tax assessments/reassessments;

- (f) subsection 298(1) of the ETA, which defines the assessment period for GST/HST;
- (g) subsection 298(2) of the ETA, which defines the assessment period for GST/HST rebates; and
- (h) subsections 303(7) and 304(5) of the ETA, which allow taxpayers to apply to the Minister and to the Tax Court of Canada for an extension of time to file Notices of Objection to GST/HST assessments/reassessments.

The most notable provisions potentially subject to an extension are subsections 152(3.1) and 152(4) of the ITA, and subsections 298(1) and 298(2) of the ETA (together, the “**(Re)Assessment Periods**”).

For most taxpayers, the normal reassessment period for income tax under subsection 152(3.1) of the ITA is generally three years or four years after the Minister sends a notice of assessment or notification that no tax is payable by the taxpayer for the year. The period of assessment for GST/HST under subsection 298(1) of the ETA is four years after the later of the deadline to file a return for the period and the day the return was filed. The period for assessment of a rebate under 298(2) of the ETA is four years after the day the application for the rebate was filed.

Upon the expiration of the applicable (Re)Assessment Period for a tax year (commonly referred to as the year becoming “statute-barred”), the Minister is no longer able to (re)assess taxpayers for income tax or GST/HST debts or rebates, except in specific circumstances, such as when a taxpayer has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing a return or application for rebate. An order made under the Act extending the (Re)Assessment Periods may be extremely detrimental to taxpayers by giving rise to taxes, penalties and interest in taxation years that would have gone statute-barred on or after March 13, 2020.

In some circumstances and for some specific transactions, the normal reassessment period is already extended under existing legislation. For example, under clause 152(4)(b)(iii)(A) of the ITA the three-year normal reassessment period is extended by three years for transactions involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm’s length (commonly referred to as the extended reassessment period). An order issued under the Act could potentially extend this extended reassessment period to six and a half years.

To be clear, not all deadlines to assess or reassess taxpayers may be extended pursuant to the Act. Examples of deadlines not affected by the Act include:

- (a) the six-month deadline to reassess a taxpayer following the revocation of a waiver;
- (b) the one-year deadline to issue a consequential reassessment resulting from an assessment or a decision on an appeal following the day on which all rights of objection and appeal expire or are determined; and
- (c) the three-year deadline to issue a notice of determination for a partnership following the later of the filing of partnership return or the deadline to file.

Should the Minister choose to issue an order extending the (Re)Assessment Periods, individuals and corporations that relied on taxation years becoming statute-barred in order to plan their financial affairs (including financial statement disclosures) will be detrimentally affected. On this point, the Joint Committee recommended, among other things, that the Minister’s order extending the (Re)Assessment Periods should not be issued:

- (a) for taxation years or periods that became statute-barred before the announcement of the Proposals, except with the taxpayer's consent;
- (b) in cases where the COVID-19 crisis has not materially disrupted the CRA's audit activity with reference to a particular taxpayer (i.e., the CRA has in fact continued to undertake audit activity with reference to the particular taxpayer), except with the taxpayer's consent; and
- (c) in cases where the (Re)Assessment Periods would otherwise expire within a reasonable amount of time after September 13, 2020.

These recommendations were not incorporated into the Act. While representatives of the CRA have stated that any order issued under the Act would likely not extend (Re)Assessment Periods in relation to periods that became statute-barred before the announcement of the Proposals, the specifics of any order, and its final application any taxpayer, remain to be seen.

***Where we are now and what comes next***

Taxpayers who, after March 13, 2020, missed the deadlines to file Notices of Appeal to the Tax Court of Canada or the Federal Court of Appeal, or seek leave to the Supreme Court of Canada now have an opportunity to do so. Similarly, the Minister has an opportunity to revisit her position of not appealing Tax Court or Federal Court of Appeal decisions favourable to taxpayers, including decisions that became unappealable before the announcement of the Proposals. For matters already before the courts, both taxpayers and the Minister have extended timelines to complete steps in the litigation process.

The suspension and extension of time limits in relation to the tax-related provisions, including the (Re)Assessment Periods, require a Ministerial order to become effective. Predicting the extent of the order the Minister may issue is a purely speculative exercise at this time. One can only hope that such an order, if issued, will follow the recommendations of the Joint Committee and be in line with the spirit of the Act which, as stated in the Explanatory Note, should be interpreted in a manner that brings certainty to proceedings and respects both the rule of law and the *Canadian Charter of Rights of Freedoms*.

The date on which a Ministerial order might be made is also unknown at this time. Taxpayers and their advisors will have to wait and see, and in the meantime plan for all possible scenarios.

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