Global Guide to Criminalization of Tax Offenses - Canada

International Guide on Criminalization of Tax Offenses

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# 1. Please define provide details of criminal tax fraud offence in your jurisdiction

Subsection 239(1) of the *Income Tax Act* (the "**ITA**")1 governs criminal tax fraud by making it an offence to:

make, participate in making, or acquiesce to making a false statement on a return or other document filed as required by the ITA or regulations;

destroy, secret, alter, mutilate, or otherwise dispose of books or records of account of a taxpayer; 2

make, or acquiesce to making, false or deceptive entries, or omit a material entry, in the taxpayer's books and records;

willfully evade or attempt to evade compliance with the ITA or the payment of tax imposed by the ITA; or

conspire to commit any of the prohibited acts listed above.

It is also an offence to obtain a credit or refund to which the taxpayer is not entitled, or to obtain a larger credit or refund than that to which the taxpayer is entitled by means of the actions prohibited under subsection 239(1).  See ITA subsection 239(1.1).

The authorities may also seek to bring tax fraud charges under section. 380 of the Criminal Code, which is a general fraud statute prohibiting the defrauding of the public or another person of property, money, or valuable security by deceit, falsehood or other fraudulent means.

There are numerous other criminal offences set out in the ITA. Further criminal offences relating to providing incorrect identification numbers and misusing confidential information are also included under subsections 239(2.2), (2.21), and (2.3).

There are also a set of offences under section 238 that carry criminal penalties. These offences are centered on failures to file a return as required under statute or regulation or to otherwise comply with specified provisions of the ITA.

1 This summary is limited to the federal *Income Tax Act;* similar provisions (and others) appear under the *Excise Tax Act* which governs GST, and other federal or provincial acts.

2 See section 230 of the ITA and related regulations for details on what constitutes books and records of account.

# 2. What are the typical trigger points that could lead to criminal investigations? Can the application of certain tax penalties trigger criminal proceedings?

No, there is no threshold adjustment that will automatically trigger a criminal proceeding. Significant adjustments may attract further scrutiny and inquiry, and possible investigation for criminal violations, but the tax evasion or tax fraud offence is not tied to any threshold amount of tax evaded.

Typical trigger points for investigations include referrals from within the CRA (e.g. from auditors), tips from informants, tips from other law enforcement agencies, and information from public media sources.

# 3. Can a certain amount of tax adjustment trigger criminal proceedings for tax fraud?

There is no requirement that criminal charges be laid when penalties are applied. A taxpayer's behaviour, when scrutinized for penalty purposes, may trigger a potential criminal investigation, but there is no legal requirement that criminal charges be laid simply because particular penalties are levied.

# 4. Is criminal intention a requirement, or can mere negligence be the basis of a criminal offence?

The most serious criminal offences are those set out in subsections 239(1) and (1.1) of the ITA, and are commonly known as “tax evasion" offences. These offences (described above) include making false or deceptive statements, destroying books and records, etcetera.

These offences require both the *actus reus* and *mens rea*  on the part of the offender. If found guilty of one of these offences, in addition to any other civil penalty imposed, the offender may be liable to a fine and/or imprisonment.

Other offences are, such as those set out in s. 238(1) of the ITA (failing to file or make annual tax returns), are strict liability offences with no *mens rea* requirement.

# 5. Does the spontaneous filing of an amended tax return (either through a self-disclosure mechanism or not) have an impact on the initiation of criminal proceedings? Is full payment of tax required?

The CRA does have a Voluntary Disclosure Program (“**VDP**”) that provides certain incentives for taxpayers to identify errors and omissions in reporting and amend returns. Among the benefits of voluntary disclosure under the program, where the disclosure and remediation is made before the CRA discovers the error and/or takes action, is prosecution relief (if certain conditions are met).

# 6. Can the prosecutor, on their own initiative, prosecute the tax fraud offence?

Typically the Public Prosecution Service of Canada (“**PPSC**”) receive a report from the Criminal Investigation Program, analyze the information, and decide whether to prosecute.

If they do, the following steps are taken:

(i) the Canada Revenue Agency (“**CRA**”) investigators lay charges;

(ii) the accused is summoned to court to stand trial; and

(iii) the accused receives full disclosure of the case against them.

At the conclusion of a prosecution that results in a conviction, the CRA will publically release available details, including the identity of the taxpayer, the nature of the tax evasion, the court-imposed fine and applicable jail sentence by issuing an enforcement notification.

# 7. What is the statute of limitation period applicable to the tax offences in your country?

Per subsection 244(4) of the *ITA*, an information or complaint under the provisions of the Criminal Code relating to summary convictions, in respect of an offence under the ITA, may be laid or made at any time within but not later than 8 years after the day on which the matter of the information or complaint arose.

# 8. When does the statute of limitation period start to run e.g., filing of a tax declaration, failure to pay tax by deadline, tax assessment as a result of a tax audit, etc.?

For criminal offences, see the answer to question 7, above.

Most other limitation periods in the ITA start to run as of the date that the CRA issues an initial assessment of a taxpayer's taxation year.

For individuals, the normal reassessment period is three years from the date that the CRA first sent a notice of assessment with respect to taxation year (subject to the qualifications below).

The normal reassessment period for a corporate taxpayer depends on whether or not the taxpayer was a Canadian-controlled private corporation ("**CCPC**") at the end of the tax year. The CRA can usually reassess a return for a tax year either :

(i) within three years of the date that the original notice of assessment for the tax year was sent, if the corporation was a CCPC at the end of the year; or

(ii) within four years of the date that the original notice of assessment for the tax year was sent, if the corporation was not a CCPC at the end of the year.

Extended reassessment periods are also provided under other specific rules in the ITA. Transfer pricing reassessments, for example, may be issued for up to 7 years for many taxpayers.

Proposed legislation has recently been tabled that would also allow the CRA to reassess up to 7 years after initial assessment where the transactions are abusive and caught under the General Anti-Avoidance Rule in section 245 of the ITA.

The CRA can reassess a return at any time for any of the following reasons:

the taxpayer has made a misrepresentation because of neglect, carelessness, willful default, or fraud in either filing the return or supplying information required by the ITA;

the taxpayer has filed Form T2029, “Waiver in Respect of the Normal Reassessment Period or Extended Reassessment Period”, with a tax services office (provided the waiver meets other relevant conditions);

the reassessment is to carry back losses or certain tax credits and deductions where a prescribed form requesting the amendment has been filed on time;

a court instructs the CRA to reassess; or

the reassessment is issued pursuant to a particular provision that has no limitation period (e.g. tax debtors transferring property to non-arm's length parties for less than fair market value - section 160 of the ITA).

# 9. What criminal sentences [e.g., custodial, criminal fines or others ] may be incurred in case of a conviction for tax offenses in your jurisdiction?

Conviction of a failure to file or similar offence under section 238 of the ITA carries a sentence of not more than 12 months imprisonment and/or a fine ranging from CAD 1,000 to CAD 25,000. Conviction for a tax evasion or fraudulent credit/refund claim under s. 239 of the ITA on a summary offence information carries a sentence of no more than 2 years imprisonment and/or a fine between 50% and 200% of the tax evaded or credit/refund improperly claimed. A tax evasion or fraudulent credit/refund claim under section 239 of the ITA may also be charged via indictment, in which case conviction can result in a sentence of up to 5 years imprisonment and/or a fine of between 100% and 200% of the tax evaded or credit/refund improperly claimed.

Tax offences may also be considered, and charged as fraud under the general *Criminal Code* prohibition of fraud (section 380). Section 380 fraud carries a maximum sentence of up to 14 years imprisonment.

# 10. Can having a compliance or risk mitigation program in place mitigate criminal liability for a Company in your jurisdiction?

Generally, no. A compliance or risk mitigation program will not decrease liability for a criminal offence under section 239 of the ITA or section 380 of the *Criminal Code*. A compliance or risk mitigation program could, however, serve as the part of a due diligence defense against the regulatory offences under ITA section 238.

A risk mitigation or compliance program may also be considered at the sentencing phase if the taxpayer is convicted of a criminal offence.

# 11. Is there a formal or informal program allowing individuals or entities to self-disclose criminal conduct and block prosecution? If not, does such a disclosure mitigate the likelihood of prosecution or reduce the potential sentence and fines?

The Voluntary Disclosures Program provides for relief on a case by case basis to taxpayers and registrants who voluntarily come forward to fix errors or omissions in their tax filings before CRA knows or contacts them about it. See the Tax Folio IC00-1R6 for more detail.3

3 [IC00-1R6 - Voluntary Disclosures Program - Canada.ca](https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1/ic00-1r6-voluntary-disclosures-program.html)

# 12. Once the criminal proceeding has been initiated is there an impact in terms of liability in case of full payment of a tax assessment issued by the tax authorities (first-time offender rule)?

No, there is no first-time offender rule.

# 13. Does criminal prosecution of a tax offence have an impact on the tax authorities' statute of limitation period?

There is no such impact in Canada.

# 14 Can the tax authorities assess and collect underpaid taxes even if the case becomes criminal

Yes. There is no limitation on the ability of authorities to assess and collect underpaid *taxes* in the case of criminal fraud or other offence.

Pursuant to subsection 239(3) of the ITA,  certain *penalties* may not be payable where a taxpayer has been convicted of a criminal offence (unless the penalty was assessed prior to the information or complaint was laid or made).

# 15. Is it possible to reach a tax/criminal settlement with the tax authorities/public prosecutor/judge?

Generally, the Appeals Branch has the mandate to manage and resolve formal disputes arising from decisions made under legislation administered by the CRA. Appeals Branch staff are encouraged to make every effort to settle disputes.

Moreover, where a taxpayer is charged with a criminal tax offence and does not wish to go through a lengthy litigation process, the taxpayer can attempt to seek an early resolution of the criminal charges. In some other jurisdictions this is referred to as a plea bargain.

The early resolution of criminal charges involves an agreement between the Crown Prosecutor and the taxpayer in which the taxpayer agrees to plead guilty to the offence (or offences) in exchange for a particular proposal on sentencing. In some instances, the taxpayer may plead guilty to a less serious charge, or to only one of several charges (in exchange for the dismissal of the other charges), or alternatively, the taxpayer may plead guilty to the original charge in exchange for a more lenient sentence. The agreement will then be put before a judge as a sentence jointly recommended by the Crown and the taxpayer. The judge can agree with the joint proposal or reject it. More often than not, if it is a reasonable proposal, a judge will accept a joint sentencing proposal.

# 16. Who can be prosecuted: just individuals/directors or also companies?

Both - Corporates and Individuals

Any taxpayer, whether corporate or individual, can be subject to criminal prosecution. In the case of corporations, an officer, director, or agent of the corporation who authorized, assented to, acquiesced in, or participated in the commission of the offence is also liable to prosecution.

# 17. Can foreign employees/directors be prosecuted?

Yes, though the practicality of attempted prosecution may vary depending on where the employee or director is located.

# 18. In case of an employee / director being prosecuted in connection with the lack of payment of Company's taxes, is the Company liable for the amounts claimed to such individual?

The ITA provides that officers, directors, and agents that are prosecuted for actions connected to a criminal offence by the corporation are parties to the offence and individually liable for any fines imposed as a result of the prosecution.

However, the corporation would remain liable for any tax due following a reassessment stemming from the criminal conduct, and may face its own fines or penalties.

# 19. Have you seen an increase of criminal prosecution for tax offenses over the last five years in your jurisdiction? If so, in relation to what topics?

Yes; the CRA reports an increase in the number of convictions for tax fraud and tax evasion over the last five years, increased rates of sentences including jail time, and increases in the average fines being imposed.

The number of criminal prosecutions is similarly expected to increase. Recent federal budgets have meaningfully increased spending in order to increase compliance, including additional funding for investigation of tax evasion, prosecutions, and collections efforts. Announcements in 2001 earmarked over CAD 500 million of future spending in this area, and announcements in 2022 announced over CAD 1 billion of increased spending over the next five years.

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