

2022 TAX DISPUTE RESOLUTION MONTHLY UPDATE

SESSION 4

25 JANUARY 2022

LEGAL DISCLAIMER

- Today's session will be a high level overview, for general information purposes, and does not constitute legal advice
- For specific advice relating to the topics discussed today, please contact your legal counsel
- Information in this presentation reflects laws and other relevant standards that are in effect as of the date of the presentation

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DISCUSSION TOPICS

- GST/HST audits: How CRA gets started
- Suing CRA: Does CRA owe taxpayers a duty of care?
- How to effectively resolve tax disputes – part two

GST/HST AUDITS

- **CRA is secretive about audit criteria**
- **Experience shows GST/HST audits will be triggered for one reason**
- **Scope of Presentation:**
 - What triggers certain GST/HST audits?
 - What is CRA auditing for?
 - How should those audits be addressed?
 - How can those audits be avoided?

GST/HST AUDITS

- **GST/HST returns are filed on a periodic basis.**
- **Three main lines to a GST/HST return:**
 - GST/HST collected and collectible.
less
 - input tax credits claimed
equals
 - net tax
- **Positive net tax must be remitted, and negative net tax results in a refund owing.**

GST/HST AUDITS

- **Net tax refund returns are almost always selected for audit.**
- **Audit of a single periodic return is undertaken by Refund Integrity Unit of CRA.**
- **Goal of Refund Integrity Unit to ensure refund is valid, by testing two aspects:**
 - Refund is not fraudulent.
 - Invoicing requirements met.
 - Increasing information requirements at \$100 and \$500.
- **Scope of information request and review determined by goal.**
- **But, Refund Integrity Audits can lead to full audits of multiple years of returns.**

GST/HST AUDITS

- **Goal of Refund Integrity Audit should shape approach to submissions.**
 - Who is the taxpayer?
 - What does the taxpayer do? What does the taxpayer supply?
 - Why has the taxpayer filed a net tax refund return?
 - Change in GST/HST collected or collectible vs. purchase supporting increased input tax credits?
 - Refund Integrity Audit is triggered by net tax refund.
 - Net tax refund can be avoided by deferring input tax credit claim.

SUING THE CRA

- **Does CRA owe taxpayers a duty of care?**
 - Leroux v. CRA decision (BC) in 2012 ruled in favour of taxpayer
 - Courts in various provinces have examined the issue since
 - Recent decisions may finally have brought clarity
- **Duty of care analysis (Cooper/Anns test)**
 - Was the harm that occurred the reasonably foreseeable consequence of the defendant's act?
 - Are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?
 - If first part is established: are there policy considerations outside the relationship of the parties that may negate the imposition of a duty of care.

SUING THE CRA

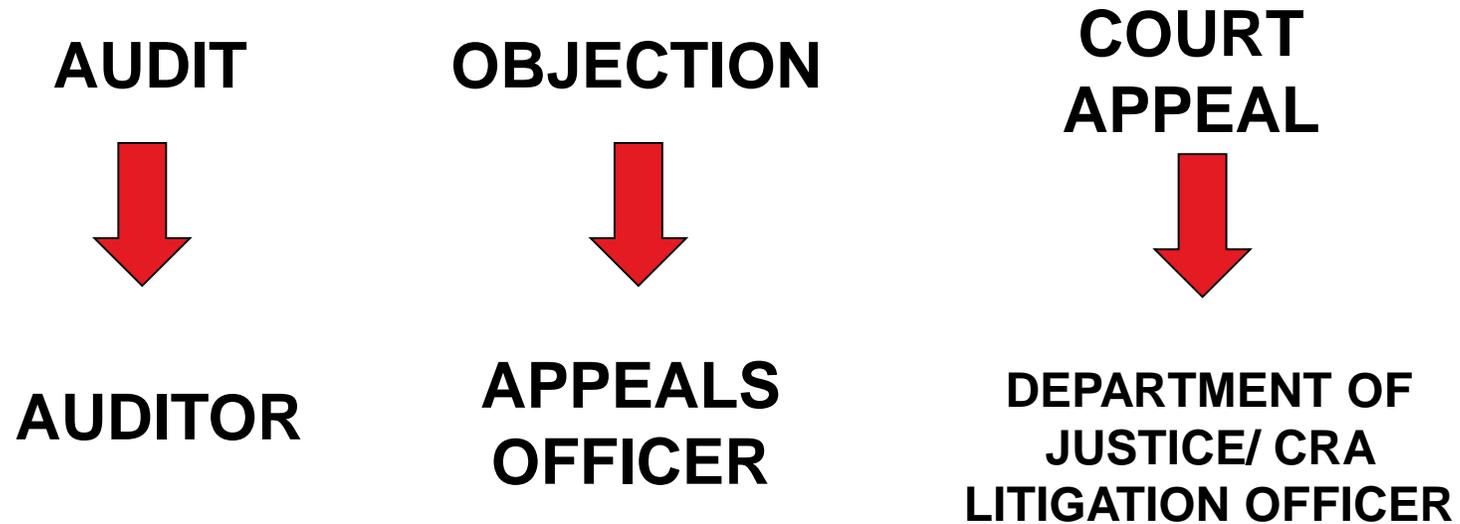
- **Grenon v. CRA (2017 – Court of Appeal of Alberta)**
 - Regulator does not owe a private law duty of care to plaintiffs
 - Inherently adverse relationship between auditors and taxpayers
 - No sufficient proximity to ground a private law duty of care
- **Jayco Inc. v. Her Majesty The Queen (2021 – Ontario Superior Court)**
 - Government has no duty to indemnify plaintiff for costs incurred in an audit
 - No sufficient proximity to formulate private law duty of care between CRA and taxpayer
 - Duty of care exists in CRA criminal investigations
 - Leroux decision was mentioned favourably by Ontario Court of Appeal (McCreight – 2013)
 - Will Jayco be reversed on appeal?

SUING THE CRA

- **Signal Hill Manufacturing v. CRA (2021 – Alberta Court of Queen’s Bench)**
 - Leroux case was rejected in Grenon and Jayco
 - Grenon case (and not Leroux) sets out the law in Alberta
- **How will the courts rule going forward?**
 - Alberta appears to be settled law
 - Less clarity in other provinces, but very few wins for taxpayers since Leroux
 - This avenue should likely only be considered if CRA actions are especially egregious

EFFECTIVELY RESOLVING TAX DISPUTES

Overview of TDR Process Audit, Objection and Court Appeal



Approaching Settlement

- Likely auditor will raise assessment
- Waive right to object and avoid additional costs of objection and Court appeal
- Is auditor's position entrenched?
- Might new information, case law or arguments persuade auditor to reduce proposed assessment or not reassess?
- Would it be preferable to present submissions to an appeals officer?

OBJECTION

Overview of TDR Process Audit, Objection and Court Appeal



OBJECTION

- Appeals Officer mandated to conduct complete, professional and impartial review

Strategy – Two Options: Negotiate or Appeal

- Make submissions to Appeals Officer and try to negotiate a resolution
- Appeal directly to Court (typically 90 days after notice of objection filed (e.g. para. 169(1)(b) ITA))
- Optimal strategy should be determined in each case

Reasons to Negotiate with Appeals Officer

- Majority of objections resolved
- Is there an opportunity to settle?
- Avoid significant delay and costs of Court appeal
- Might new information, case law or arguments persuade Appeals Officer to reduce assessment?
- Opportunity to resolve at least some issues

Reasons to Negotiate with Appeals Officer

- Certain arguments tend to be compelling to an Appeals Officer (e.g. statute barred years, penalty assessments)
- Possible opportunity to address deficiencies in notice of objection
- Is there public disclosure sensitivity?
- More conciliatory and less confrontational approach may be advantageous for future dealings with the CRA

Reasons to Appeal Directly to Court

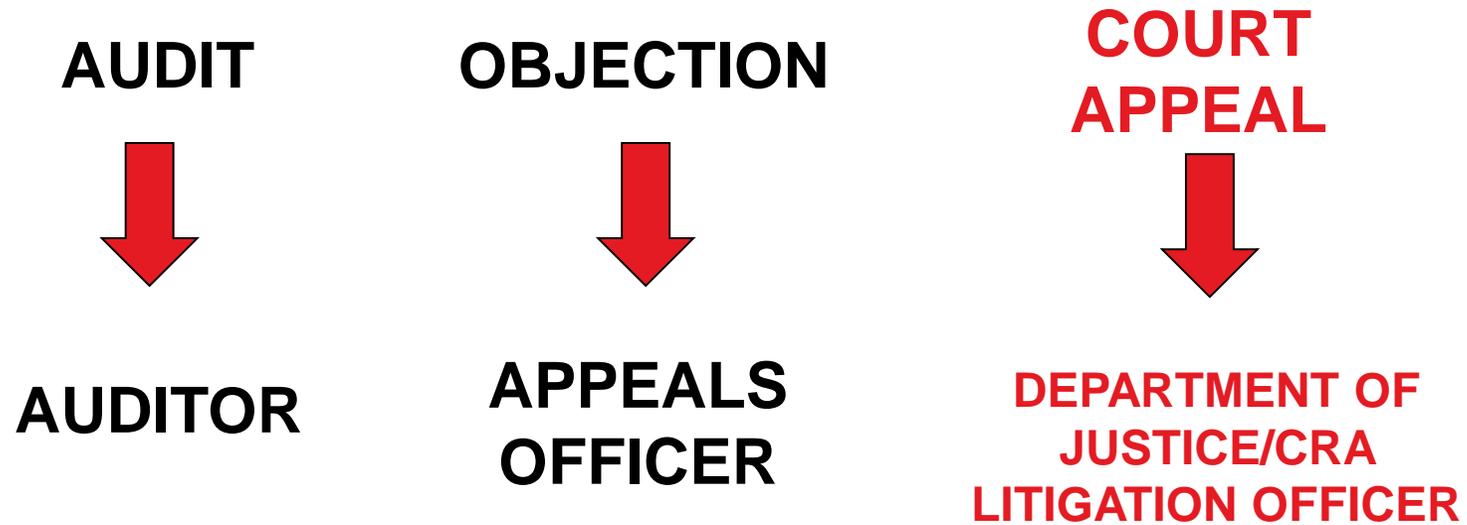
- May be tendency to “circle the wagons”, especially if the auditor obtained input from other levels
- Is the position well entrenched (e.g. a published administrative policy)?
- Clear signal that matter is being pursued vigorously, which may enhance atmosphere conducive to settlement
- May be more effective to negotiate with Department of Justice counsel

Reasons to Appeal Directly to Court

- Avoid delay associated with dealing with Appeals Officer
- Further assessments could be raised for later years before the dispute gets resolved
- Interest on disputed assessments
- Should the costs associated with negotiating be applied towards litigation and at least potentially recoverable?

TAX LITIGATION

Overview of TDR Process Audit, Objection and Court Appeal



Approaching Resolution

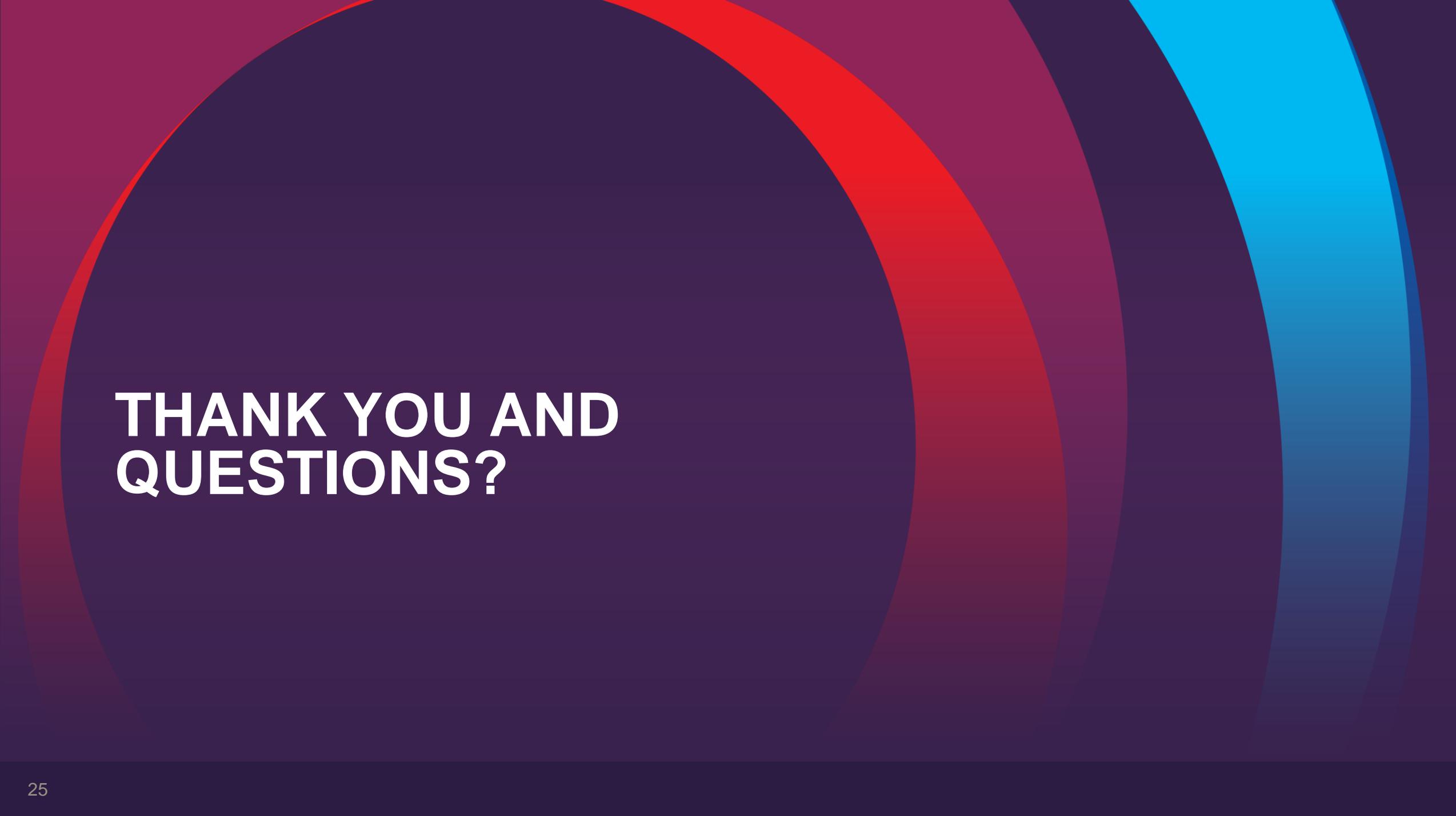
- Atmosphere conducive to settlement
- Costs for Court judgment only
- Main procedural stages
 - ✓ Before reply
 - ✓ After documentary and oral discovery
 - ✓ At settlement conference
 - ✓ Near start of trial

Offer to Settle

- Where judgment more favourable than terms of offer, entitled to party and party costs to offer date and substantial indemnity costs after offer date, where:
 1. written offer of settlement;
 2. is served no earlier than 30 days after close of pleadings and at least 90 days before trial start date;
 3. is not withdrawn; and
 4. does not expire earlier than 30 days before trial start date
- ✓ *Minister can only accept offers to settle on a principled basis (only offers that could possibly be accepted by Minister, that would result in assessments supportable on facts and law, can trigger potential cost consequences)*

CONCLUSION

- Tax dispute resolution versus tax litigation



**THANK YOU AND
QUESTIONS?**

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