VOLUNTARY DISCLOSURE: WHY, WHEN AND HOW TO DISCLOSE GST, RST and CUSTOMS NON-COMPLIANCE

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INTRODUCTION

In Canada, taxation statutes such as the *Excise Tax Act*, the *Customs Act* and the various Provincial Retail Sales Tax statutes are premised on the principle of voluntary self-compliance. Under this regime, all taxpayers are expected to accurately account for and report their tax liabilities. To deter taxpayers from ignoring their duties, and from taking advantage of the voluntary self-reporting system, various audit and enforcement provision are in place to detect contraventions. Where non-compliance is detected, tax authorities generally require the taxpayer to repay the tax deficiency (plus interest) and, where considered appropriate, levy additional penalties to deter non-compliant behavior.

However, as Malcolm Sparrow has pointed out in his important book, I*mposing Duties: Government's Changing Approach to Compliance* **1**, there will never be enough money and resources available for tax authorities to achieve perfect compliance through audit and enforcement activities and senior tax administrators are increasingly realizing that more emphasis must be placed on encouraging voluntary compliance through non-enforcement activities such as public education. The increasing development to expand the compliance emphasis to voluntary disclosure programs can be seen in the following light: compliance being encouraged through "carrot" rather than "stick" measures. Under this approach, non-compliant taxpayers are generally encouraged to come forward voluntarily and disclose their contraventions. In this regard, tax authorities will usually forego punishing the taxpayer, by not imposing additional penalties, but will require the taxpayer to repay the deficient amount of tax plus interest.

When a taxpayer realizes that he or she has been non-compliant, he or she basically has two alternatives. Firstly, the taxpayer may decide to do nothing — and hope that he or she is not assessed for non-compliance — or secondly, the taxpayer may decide to voluntarily correct his or her past mistakes. With these two alternatives in mind, the purpose of this paper is to enable taxpayers (and their advisors) to make informed decisions on why, when and how to initiate a voluntary disclosure under the *Excise Tax Act* (the "ETA"), the *Customs Act*, and under the provincial retail sales tax ("RST") legislation.

The paper is divided three parts. The first part of the paper begins with an overview of the interest and penalty ramifications resulting from non-compliance with the ETA, and concludes by addressing Revenue Canada's evolving voluntary disclosure policy respecting the ETA, the risks and benefits to commencing a voluntary disclosure and how a taxpayer should initiate the disclosure. Part II begins with an overview of the various provincial RST interest and penalty provisions and concludes with an overview of each province's voluntary disclosure policy and a discussion on how to initiate the disclosure and what to disclose. Part III discusses an importer's now mandatory obligation to correct his or her customs declarations and addresses Revenue Canada's voluntary disclosure policy respecting other Customs contraventions, to the extent there are situations still remaining where importers are not under a positive obligation to correct.

PART I — THE GOODS AND SERVICES TAX

A. ETA'S INTEREST AND PENALTY PROVISIONS

(i) Overview of ETA

Division VIII of the ETA addresses the ETA's administration and enforcement provisions, with section 278 setting out a person's filing and remittance obligations. Where a person is late in filing his return or where his return is deficient (i.e. the person owes a tax debt to Revenue Canada), then section 280 imposes both interest (at the prescribed rate) and a penalty (at the rate of 6% per year) on the deficient amount, providing as follows:

> **280.**(1) **Penalty and interest —** Subject to this section and section 281, where a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay on the amount not remitted or paid
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> (a) a penalty of 6% per year, and
>
> (b) interest at the prescribed rate,
>
> computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

The amount of interest payable on the deficient amount is prescribed under the Interest Rate (*Excise Tax Act*) Regulations and generally reflects interest payable on the Government of Canada's T-bills.

In addition to the 6% yearly penalty, civil penalties may be levied under sections 283, 284 or 285 and in limited situations, criminal prosecution may be initiated under sections 326 to 329. Section 285 imposes the harshest civil penalty, namely 25% of the deficient amount, where any person "knowingly, or under circumstances amounting to gross negligence ... makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return ...". The 25% penalty imposed under section 285 will likely be increased, pursuant to proposed amendments contained in the February 16, 1999 budget (effective on Royal Assent), to a minimum of 50% and a maximum of 100% of the net tax. The proposed amendments also impose civil penalties on tax advisors where they "knowingly, or in circumstances amounting to gross negligence, make false statements or omissions in respect of another person's tax matters". A discussion as to what the amendments mean for advisors is discussed later.

For criminal prosecutions, a person who has made a false statement in a return or willfully evaded or attempted to evade compliance or remittance or net tax, may be liable under section 327, on summary conviction, to a fine of up to 200% of the net tax and imprisonment for a term of up to two years. As discussed below, under "Classification of Penalty Provisions", criminal prosecution generally requires the Crown to establish full *mens rea* (intent) before a conviction will be secured. With this stringent requirement, very rarely are criminal prosecutions initiated against non-compliant taxpayers.

(ii) Classification of Penalty Provisions and Availability of Due Diligence Defence

As articulated by the Supreme Court of Canada in *Sault Ste. Marie* (1978), 40 C.C.C. (2nd) 353, there are three distinct categories of offences, which result in varying degrees of penalties:

1. *Mens Rea*: Where some positive state of mind such as an intent, knowledge, or recklessness, on the part of the taxpayer in committing the offence must be proven by the Crown before penalties may be levied against the taxpayer.

2. Strict Liability: Where there is no need for the Crown to prove the existence of *mens rea*. The prohibited act prima facie is the offence, but the accused may avoid liability for any penalties by establishing that he took reasonable care (i.e. due diligence) in attempting to comply with the applicable legislation.

3. Absolute Liability: Where it is not open to the accused to exculpate himself from liability by showing that he was not at fault. Liability is automatic for these types of offences.

Offences contained in taxation statutes are generally not classified as *mens rea* offences. To determine an offence's classification, a detailed analysis of the specific statutory provision, its regulatory framework and an assessment of the overall importance of the penalty to the tax authority must be undertaken. Only if the offence is characterized as strict liability is the taxpayer able to absolve himself from penalties through the use of the due diligence defence. For offences classified as absolute liability, establishing non-compliance is sufficient justification for penalties to be levied.

The applicable test for due diligence is both objective and subjective **2**. Whether a taxpayer has satisfied the requisite due diligence is a question of fact and requires positive proof that all reasonable care was exercised by the taxpayer to ensure compliance. To satisfy this test, the taxpayer must have exercised the care and skill which an ordinary prudent person would have exercised in comparable circumstances, having regard to the personal knowledge, experience and background of the specific taxpayer.

The Federal Court of Appeal in *Consolidated Canadian Contractors Inc.* [1998] G.S.T.C. 91 (FCA) recently undertook the analysis of classifying regulatory tax offences with regards to the 6% yearly administrative penalty levied under section 280 of the ETA. In *Consolidated Contractors*, the Federal Court of Appeal, in starting with the presumption that the offence was characterized as strict liability, set out four relevant factors for the court to consider:

1. Precision of language used (i.e. use of words like "automatic" would imply absolute liability).

2. The importance of the penalty and its impact on taxpayers (i.e., balance between the consequences of the penalty on taxpayer and the importance of the penalty in deterring non-compliance). If the penalties are "inconsequential" or "trivial" then there is a presumption of absolute liability.

3. The subject matter of the legislation and its purpose (i.e. whether the penalties are designed to promote a public interest). Maintaining the integrity of the self reporting and self-assessing taxation system is not a sufficient purpose to warrant characterizing an offence as absolute liability.

4. The regulatory framework - a contextual analysis (i.e., determine whether incorporating the due diligence defence into the provision is consistent with the overall scheme of the Act).

Upon reviewing these factors, the court in *Consolidated Contractors* held that section 280 should be classified as strict liability, therefore enabling persons to absolve themselves of penalties by establishing that they acted reasonably in the circumstances.

Where a taxpayer may be imprisoned on conviction for an offence, the *Canadian Charter of Rights and Freedoms* guarantees, at a minimum, that the offence be characterized as strict liability. Where, however, the offending provision contains words such as "willfully", "with intent", "knowingly" or "intentionally" then the offence automatically requires full *mens rea* on the part of the taxpayer before he or she can be convicted on prosecution. Full *mens rea* implies a positive state of mind such as intent, knowledge or recklessness, which cannot be present if the taxpayer exercised "reasonable care".

(iii) Authority to waive Interest and Penalty

Notwithstanding the availability of the "due diligence defence", the interest and 6% yearly penalty, which are imposed under section 280, may be waived at the Minister's discretion under Section 281.1. Section 281.1 provides as follows:

281.1(1) **Waiving or cancelling interest —** The Minister may waive or cancel interest payable by a person under section 280.

(2) **Waiving or cancelling penalties —** The Minister may waive or cancel penalties payable by a person under section 280.

Circumstances where the Minister will invoke its section 281.1 discretion, and waive interests and penalties, are set out in Revenue Canada's administrative guidelines **3**. Revenue Canada will invoke section 281.1 if (i) the taxpayer's situation falls within Revenue Canada's Fairness Package; (ii) the underlying transaction constituted a "wash transaction"; or (iii) the taxpayer voluntarily discloses its infraction. The third situation, namely voluntary disclosures, has recently been incorporated into the Minister's Fairness Package pursuant to the Minister's 7-Point Fairness Plan released on February 9, 1999 and is discussed thoroughly under Part B.

(a) Fairness Package

In March of 1998, the Minister launched its Fairness Initiative (the "Initiative") to inform Canadians about the fairness measures currently in place at Revenue Canada and to seek feedback on how its Initiative may be improved. In conjunction with the Initiative, the Minister announced its 7-Point Fairness Plan in February 1999. The seven points include:

1. Developing a comprehensive guide on the rights of clients;
2. Publishing standards for service;
3. Doing a better job communicating with clients;
4. Better equipping employees to respond to client needs;
5. Identifying unclaimed credits, benefits, and overpayments for clients;
6. Providing clients an opportunity to correct omissions in past dealings without penalty (Voluntary Disclosures); and
7. Improving the fairness provisions.

Currently, situations where Revenue Canada will invoke its discretion under section 281.1, out of fairness, are expressed in GST Memorandum 500-3-2-1: *Cancellation or Waiver of Penalties and Interest*. Before Revenue Canada will invoke its discretion, noncompliance must result from "extraordinary circumstances beyond a person's control". The following situations are considered by Revenue Canada to be "extraordinary":

(a) natural or human-made disasters, such as flood or fire;

(b) civil disturbances or disruptions in services, such as a postal strike;

(c) a serious illness or accident; or

(d) serious emotional or mental distress, such as death in the taxpayer's immediate family.

Where these "extraordinary" circumstances are present, Revenue Canada will consider the taxpayer's history of compliance, how quickly the taxpayer responded in remedying any omission and whether the taxpayer acted with reasonable care and diligence, before deciding whether to waive all interest and penalties. Currently, there are no measures in place for the Minister to invoke its discretion under the Fairness Initiative to refund or waive tax payable, there is only discretion to waive interest and penalties.

In addition to "extraordinary" circumstances, interest and penalties (but not taxes) may be waived if non-compliance resulted from any actions/assurances on the part of Revenue Canada. Such actions/assurances may include:

(a) processing delays that resulted in the person not being informed within a reasonable amount of time that he or she owed money to Revenue Canada;

(b) errors in departmental publications, which caused the person to file returns or make payments based on incorrect information;

(c) incorrect written information being provided in an interpretation or notice given to a specific person by the Revenue Canada;

(d) errors were made by Revenue Canada in processing GST returns or information; or

(e) Revenue Canada was delayed in providing information necessary for the person to comply with the ETA

(b) Wash Transactions

Due to the GST being a value added tax, which generally allows registrants who paid GST to recover it through the ETA's input tax credit ("ITC") mechanism, a supplier's failure to charge and collect GST may not result in any revenue loss to the government. A "wash transaction" occurs where a 7% taxable supply is made (i.e. a taxable supply which is not zero-rated), the supplier mistakenly fails to collect the GST payable on the supply, and the recipient was a registrant who would have been entitled to claim a full ITC had the tax been correctly charged, collected and remitted. For example, consider a wholesaler who mistakenly fails to charge its registered retailer GST, on the assumption that the supply is zero-rated or exempt. If the wholesaler had properly charged GST, then the registered retailer would have recovered it through an ITC and Revenue Canada would not have suffered any revenue loss.

It should be noted that even where the recipient, such as a listed financial institution, charity, non-profit organization, or municipality is able to claim a rebate for GST paid, the transaction will not qualify (or partially qualify) as a "wash transaction". The recipient must have been able to recover the tax through an ITC. Recovery through a rebate is not sufficient.

As discussed in GST/HST Bulletin B-074, the Minister will consider waiving all interest and 2% of the penalty for "wash transactions", leaving only a 4% penalty **4** if the following conditions are satisfied:

> (a) It must be demonstrated that the supply in question was made to a registrant who would have been entitled to a full input tax credit if the tax had been correctly applied.
>
> (b) The supplier must not have been previously assessed for the same mistake and must have a satisfactory history of voluntary compliance.
>
> (c) The supplier must have remedied the situation to ensure that the tax is collected on all future supplies of a similar nature; and
>
> (d) The supplier must have exercised reasonable care and diligence without being negligent or careless in conducting its affairs.

A formal request by the taxpayer to have interest and 2% of the penalty waived is usually not required. Generally, the Minister will automatically consider whether the transaction is a "wash transaction" during the audit process and decide then whether to only impose the 4% penalty.

(iv) Caution to GST Advisors

(a) Proposed Amendments to Section 285

As mentioned above, the February 1999 budget contained various amendments to section 285 which potentially subject GST advisors to civil penalties. As of writing, these amendments have not been released in draft form, leaving it difficult to determine how exactly the proposed penalties will fit within the overall scheme of the ETA.

Under the proposed amendments, an advisor who makes or participates in the making of a statement or admission, used for GST purposes by or on behalf of another person, which the advisor knows (or but for his gross negligence should have known) is incorrect then the advisor will be liable to pay a penalty equal to the greater of $1,000 and 50% of the net tax avoided by the advisor's client. The proposed amendment was considered necessary by the Minister since under the current regime, an advisor could only face criminal prosecution, which requires full *mens rea*, and not any civil penalties, where he or she participated in a person's tax evasion.

Generally, "gross negligence" amounts to conduct similar to willful blindness, including conduct referencing an indifference as to whether a client is complying with the law. Gross negligence involves conduct which is more egregious than simply failing to exercise "reasonable care". Under the proposed amendment, advisors will now be required to make some sort of reasonable inquiry into their client's affairs. As to what level of inquiry or expertise (or lack thereof) is sufficient for Revenue Canada to levy penalties on advisors, for conduct tantamount to "gross negligence", will likely require some clarification by Revenue Canada and the Courts. For further reference as to what amounts to "gross negligence" see Justice Strayer's Income Tax decision in *Venne v. The Queen* [1984] C.T.C. 223.

Concerns regarding the scope of "gross negligence" were recently expressed to the Department of Finance by the CICA/CBA Joint Committee on Taxation. The Minister's response **5** indicated that advisors would not be liable to a penalty for honest errors of judgment or an honest difference of opinion. Nevertheless, the Minister was "prepared to recommend an alternative approach to the gross negligence standard", by implementing a "culpable conduct" test. This amendment clarifies the requisite conduct, requiring conduct tantamount to "intentional acting, show[ing] an indifference as to whether the tax law is complied with".

(b) *Deloitte & Touche* Negligence Case

In a unrelated GST case dealing with simple "negligence", the British Columbia Supreme Court in *Phelps Appliances Ltd. v. Deloitte & Touche* [1999] G.S.T.C. 13 addressed the issue of negligent advise *vis-à-vis* two contracting parties. Phelps was in the business of leasing coin operated laundry machines to landlords for use in residential apartment buildings. There was some concern over who was required to remit the GST received from the operation of these coin laundry machines (the landlord or Phelps). To alleviate the concern, Phelps' advisors, Deloitte & Touche, recommended that a ruling from Revenue Canada be obtained. Phelps prepared the ruling request (to save expenses) and had Deloittes review it. Revenue Canada issued a nonbinding ruling stating that the landlord, and not Phelps, was the person required to remit GST. Phelps relied on Revenue Canada's ruling, and did not collect/remit the tax. Revenue Canada subsequently denied the ruling on the basis that the facts mentioned therein were incorrect.

Having believed that Revenue Canada's ruling was binding, Phelps sued Deloittes for providing negligent advise in not advising of the ruling's non-binding effect and for not familiarizing itself with Phelps' business so as to ensure that the facts stated in the ruling request were correct. The court did not believe Phelps' claim that it did not know the ruling was non-binding. In addressing whether Deloittes

should have ensured that the facts in the ruling request were correct, by asking the appropriate questions or by visiting Phelps' premises, the court determined that Deloittes was under no obligation to undertake these activities and was "justified in accepting the facts concerning Phelps operation as provided by ... [Phelps' employee], and that consequently she [Deloitte's employee] was not negligent in accepting those facts".

With the proposed amendments to section 285, it is unlikely that advisors will be able to rely entirely on their client to provide the relevant facts disclosed in GST returns and voluntary disclosures (and possibly binding GST ruling requests). Some level of inquiry must be made by advisors to ensure that their clients are complying with the ETA (and are not receiving and relying upon non-binding rulings). Although advisors will likely not be negligent *vis-à-vis* their client, civil penalties may be levied if they perform their duties in an eyes wide shut manner.

B. REVENUE CANADA'S GST/HST VOLUNTARY DISCLOSURE POLICY

With the addition of voluntary disclosure to Revenue Canada's Fairness Initiative (point 6 of the 7 Point Fairness Plan), Revenue Canada is taking active steps in encouraging voluntary compliance through non-enforcement activities such as public education. By simultaneously removing voluntary disclosures from the Investigation/Audit Division to the Appeals Division, tax administrators will change their focus from the narrow minded view of enforcement to the larger objective of obtaining higher overall compliance with the tax laws.

The importance of VD programs to facilitating compliance can be evidenced by the following data: for the year ended March 31, 1998, Investigations processed approximately 1,200 VDs resulting in an estimated GST and federal tax of $59 million. An additional 900 GST and income tax VDs were processed by other divisions resulting in an additional $14 million to Revenue Canada. Even by ignoring the yearly increments resulting from having these additional persons paying tax on a go-forward basis, overall, VDs resulted in an excess of $73 million to Revenue Canada in 1998.

As mentioned above, where a person fails to remit or pay an amount on account of GST/HST the person shall pay, on assessment, in addition to the amount not remitted or paid, a yearly penalty equal to 6% of the tax plus interest at the prescribed rate. Generally, a person will not be assessed for net tax owing (plus interest and penalties) more than four years after the day the person was required to remit the tax with its regular GST/HST return **6**. Where the registrant has committed fraud or made a misrepresentation that is attributable to neglect, carelessness or willful default then there is no four-year limitation period for GST/HST assessments. In this situation, the Minister's assessment authority is limitless and it may assess the registrant for contraventions committed beyond the four years.

(i) Benefits to initiating a Voluntary Disclosure ("VD")

Under section 281.1, the Munster has the authority to waive both interest and the six-percent yearly penalty imposed under section 280. Under the Minister's VD policy as expressed in GST Memorandum 500-3-4: *Voluntary Disclosure*, the 6% yearly penalty is still due and owing on a VD, however "there will be no application of civil penalties for gross negligence nor will criminal prosecutions be undertaken". As stated in Memo 500-3-4, there was little incentive for a registrant to voluntarily disclose its non-compliance when his or her conduct was not so egregious to amount to "gross negligence". Instead, the non-complying registrant would generally benefit from holding off on disclosing his or her contravention, and hope that the four year limitation period lapses before Revenue Canada realized the registrant's mistake and issued an assessment.

As expressed in Memorandum 500-3-4, Revenue Canada's VD policy only benefited a limited number of persons, namely those who would have been subject to civil penalties or criminal prosecution for their non-compliance. With its apparent shortcomings, Revenue Canada extended the benefits of a VD through a news release issued on November 28, 1996. The news release announced the elimination of the full 6% yearly penalty for all taxpayers who voluntarily come forward and correct their deficient GST/HST accounts. Now, a taxpayer who voluntarily discloses its contraventions will only be liable for the tax deficiency plus interest.

Where a registrant realizes that a GST/HST contravention pertained to a "wash transaction", Revenue Canada has informally indicated that they will waive all penalties (recall, that under a wash transaction no tax or interest is owing since there is no revenue loss). In this situation, the benefits of a VD are quite obvious since there is no down side (other than a potential cash flow issue) to the disclosure. No tax is owing and no interest or penalties will be levied. **7** As Revenue Canada has yet to release a public statement waiving all penalties for a "wash transaction", before initiating a VD for a "wash transaction", advisors should call the Appeals Division to ensure that this is in fact their policy. The alternative to not disclosing a wash transaction is the possibility of a 4% yearly penalty.

(ii) Costs of Initiating a VD

Due to the four year assessment limitation period (applicable to mistakes which are not the result of fraud or a misrepresentation attributable to neglect, carelessness or willful default), taxpayers may wish to forego voluntarily disclosing their contraventions and hope that no assessment is issued within the four year limitation period. Generally, on a VD, the taxpayer is required to repay all tax deficiencies (plus interest) accruing over the last four years (assessment period). Where the taxpayer decides not to initiate a VD, the taxpayer would save itself the requirement of having to pay the deficient tax amount plus interest which is due at the time of initiating a VD. If the limitation period has not expired, or if it is not applicable based on the taxpayer's conduct, the taxpayer will face, on an assessment, a minimum penalty of 6% per year and depending on the circumstances, possibly a 100% penalty under section 285 **8** for

knowingly or under circumstances amounting to gross negligence making a false statement. In addition, criminal sanctions and hefty fines may be levied if the taxpayer is prosecuted under section 327.

Although we recommend taxpayers to only disclose contraventions occurring within the applicable assessment limitation period, Revenue Canada's VD policies do not indicate how far back the disclosure should go. As such, advisors should be cautious as it is apparently open to Revenue Canada to require further disclosure if they are of the view that the assessment limitation period is inapplicable.

(iii) How to initiate a VD

Once a taxpayer has decided that it wants to initiate a VD, it should act quickly in disclosing its contraventions. For a VD to be considered valid, the disclosure must be:

1. Complete, meaning that a full disclosure of past deficiencies is being made.

2. Voluntary, meaning that it is made before Revenue Canada and/or its partners initiate an audit, investigation or other enforcement action; and

3. Paid in full, either immediately, or within terms acceptable by Revenue Canada.

Where a disclosure occurs as a result of an audit or other enforcement action, it will not be considered voluntary. For example, all disclosures initiated after being notified that it will be subjected to an audit are not voluntary but are premised on an enforcement action being taken by Revenue Canada. With this requirement, once a taxpayer decides that it wants to disclose its contraventions, it should initiate the VD as quickly as possible so as to eliminate the possibility of an intervening enforcement action. In addition, a disclosure is only complete if the registrant discloses substantially all of the information which was previously not reported and provides enough detail for the disclosure to be verified by Revenue Canada on audit. If material omissions are discovered on verification then the disclosure will not be considered complete and will not constitute a valid VD.

Presently, as indicated in GST Memorandum 500-3-2-1, to initiate a disclosure the registrant can either disclose its infraction by completing and submitting a normal adjustment GST return or by writing a letter, declaring the infraction and submitting it to the local GST Office. Currently, there is no expressed mechanism in place for initiating a VD over the telephone, however, we suggest that advisors call the Appeals Division before initiation to ensure that the VD policy applies and to put Revenue Canada on notice that a VD is forthcoming from your client. Should an issue later arise as to the timing or validity of the VD, having obtained a direct contact at Appeals can only help in resolving any potential problems which may arise.

(iv) Revenue Canada's New VD Policy

As previously indicated, jurisdiction over voluntary disclosures was transferred from the Investigations/Audit Division to the Appeals Division on April 6, 1999. In the Fall of 1999 a working group consisting of 4 members of the Appeals Advisory Committee, Finance Department experts, Investigation representatives and Appeals Branch representatives will gather to discuss and formulate new VD policies.

The Appeals Branch's VD policy is to be made public no later than March 31, 2000. Under the new system, and based on the Appeal Branch's VD Guidelines **9** each Appeals office will assign at least one person (a "VD Officer") to handle all voluntary disclosures (historically, a VD was the Investigations Officer's responsibility). Upon receipt of a VD request, the VD Officer will contact Investigations to ensure that no enforcement action has been commenced. Even where enforcement action has been commenced, the disclosure may still be considered voluntary, if the VD Officer determines, based on the specific enforcement action undertaken, that the contraventions would not have been detected (i.e., the enforcement action must have been of a kind which would have detected the contravention). Additionally, taxpayers are to be given the "benefit of any doubt" as to whether the disclosure was voluntary.

After the VD Officer determines that the disclosure is voluntary, the VD Officer will contact Collections to determine the necessary terms of payment. The VD Officer also has the discretion to forward the disclosure to the Verification and Enforcement division to determine whether the VD is complete. This decision will likely be based on the complexity of the disclosure and the quantum of deficient tax involved.

Based on the Appeals Branch's VD Guidelines, the VD process will be fundamentally different from the current VD policies/procedures once the new VD policies are formulated and released. Some of the fundamental differences include:

1. Enhanced Client Interaction

Before a VD is initiated the VD Officer will educate the taxpayer on the implications of making a VD. This implies that the VD process may be initiated over the telephone or in person (currently, as stated in Memorandum 500-3-4, a VD is initiated in a "normal adjustment return" or a "written declaration").

2. Acceptance of VD Information & Quicker Initiation

After the taxpayer has been explained the ramifications of making a VD, the VD Officer may then accept the client's disclosure documentation. Where the taxpayer expresses his or her intent on initiating a VD (simply by disclosing his or her name to the VD Officer) the client is given 60 days to finalize the VD by disclosing the necessary information. With the new process, the VD may be initiated immediately, without providing the details of the VD beforehand. This 60 day period, presumably also gives the taxpayer time to determine the quantum of liability and to negotiate appropriate collection/payment terms.

3. Four Step Validation Process

Similar to the current validation process, the VD Officer will ensure:

(i) Acceptable payment terms made with Collections

Where payment terms are broken, the disclosure will become invalidated and any waived penalties will be charged.

(ii) VD Must be Voluntary

The VD Officer will need to consider whether any enforcement action has been commenced against the taxpayer. An important change/concession to the VD policy will result in all enforcement actions not invalidating the disclosure. Previously, any enforcement action precluded the disclosure from being considered voluntary, and this caused a significant degree of uncertainty and concern to taxpayers who wanted to initiate a VD. Under the new policies, the VD Officer must now determine whether (a) Revenue Canada would have uncovered the disclosure based on the enforcement action taken and (b) was any direct contact made with the taxpayer or was the taxpayer likely aware of the enforcement action.

(iii) Determine Whether VD is Complete

For a GST VD to be valid, the disclosure must be substantially complete. Partial disclosure will not constitute a valid disclosure.

(iv) Communication of Result & Rights of Redress

Where the VD is not accepted, the client should be given sufficient reasons and notified of his or her rights to file a Notice of Objection. As the taxpayer does not have any legal rights to redress Revenue Canada's non-acceptance of a VD (as the policy is not statutory based), without an appeal/objection right, there is a greater chance for taxpayers to believe that they have been treated unfairly and this will result in less taxpayers voluntary coming forward to disclose their contraventions.

PART II — PROVINCIAL RETAIL SALES TAXES

A. OVERVIEW OF RST INTEREST AND PENALTY PROVISIONS

Similar to the ETA, each RST province also imposes penalties for non-compliance. Common situations where penalties are imposed include a vendor's failure to correctly charge, collect or remit RST on its taxable sales.

Like the ETA, the RST statutes generally have three district penalty provisions. Firstly, most provinces impose an administrative penalty equal to the amount of deficient tax plus interest and a nominal amount, such as 10%, to deter non-compliance. Secondly, where default occurs as a result of willful neglect or carelessness, additional civil penalties equal to a minimum of 25% of the tax and a maximum of 100% of the tax are generally levied. Finally, in the more egregious situations, such as intentional tax evasion or fraud, fines sometimes equaling 200% of the tax evaded and a prison sentence of up to 2 years may be imposed upon conviction.

As discussed in Part I above, under "Classification of Penalty Provisions and Availability of Due Diligence Defence", a taxpayer may be able to avoid penalty assessments if he or she can establish that they exercised reasonable care (due diligence) in attempting to comply with their statutory obligations. Where the statutory provision providing the offence contains words such as "willfully", "knowingly" or "intentionally", the Crown has the burden of establishing full mens rea on the part of the taxpayer. Since the RST provisions which impose criminal sanctions generally contain these words, the Crown is usually required to establish full mens rea before a criminal conviction will be granted. Due to this stringent requirement, criminal prosecution is very rarely initiated under these provisions, with criminal prosecution generally reserved for the more egregious taxpayers.

(i) British Columbia

Subsections 115(1) to (3) of the *Social Services Tax Act* enables the tax authority to assess the purchaser, for the amount of tax that should have been paid plus interest, up to six years after default, providing as follows:

> **115. Assessment for taxes owing —** (1) If it appears that an amount of tax should have been but was not paid by a purchaser, lessee or other person liable for tax under this Act, the commissioner may assess the purchaser, lessee or other person for the amount of tax payable.
>
> (2) If it appears from an inspection, audit or examination of the books of account, records or documents that this Act or the regulations have not been complied with,
>
> (a) the person making the inspection, audit or examination must calculate the tax collected or due in a manner and form and by a procedure the commissioner considers adequate and expedient, and
>
> (b) the commissioner must assess the person for the amount of the tax calculated.
>
> (3) The commissioner must not make an assessment under this section in respect of a tax liability or an obligation to collect or remit tax that arose, or an excess refund that was paid, more than 6 years before the date of the first notice of assessment.

Where the purchaser's failure to pay the tax resulted from the purchaser's "willful default or fraud" then there is no 6-year limitation period on the tax authority's assessment powers. Under subsection 115(5), the tax authority may also impose a penalty on the vendor for failing to collect the tax, up to three years after the day the tax should have been collected, providing as follows:

> 115(5) If it appears that an amount of tax should have been but was not collected, the commissioner must impose a penalty, which forms part of the lien provided for in section 103, against the person who should have collected the tax, consisting of both
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> (a) the amount of tax that should have been collected, and
>
> (b) interest at a rate prescribed by the Lieutenant Governor in Council.

(6) In imposing a penalty under subsection (5), the commissioner must not consider a period greater than 3 years.

In addition to its authority under section 115, the tax authority may impose additional civil penalties on either the vendor or purchaser under section 117.

117. Penalty and interest — (1) In addition to any other penalty, the commissioner may, if satisfied that

(a) a person willfully failed to remit tax collected as required by this Act or the regulations, assess against the person a penalty equal to 100% of the amount not remitted,

(b) a person evaded the payment of tax by willfully making a false or deceptive statement or by willfull default or fraud, assess against the person a penalty equal to 25% of the amount evaded, or

(c) in any case, a person failed to remit or pay any tax as required by this Act or the regulations, assess against the person a penalty equal to 10% of the amount not remitted or paid.

(2) The commissioner may, at any time,

(a) whether or not a penalty has been assessed under subsection (1), and

(b) in respect of any period during which tax under this Act or the regulations ought to have been remitted or paid,

assess interest, at a rate prescribed by the Lieutenant Governor in Council, on the amount of taxes not remitted or paid as required under this Act or the regulations.

Section 117 allows the tax authority to assess penalties equal to 100% of the tax collected but not remitted, 25% of the amount of tax evaded by fraud, willful default or the willful making of a false statement, and in all other cases, a penalty equal to 10% of the amount of tax which was not paid or remitted.

As indicated in Consumer Taxation Branch Bulletin No. 63 "*Penalty Assessments of Tax Due*", the Consumer Taxation Branch administers its penalty provisions rather kindly, and will not charge the 10% penalty, unless the facts indicate that the taxpayer had knowledge of the liability, was previously advised of the proper application of tax, or if the taxpayer consciously decided not to pay or remit the tax. Additionally, criminal prosecution may also be initiated under section 123 for making a false statement, evading tax or willfully attempting to evade compliance with the Act which imposes additional penalties (fines) ranging from a minimum fine of $200 to imprisonment for a term of up to two years on conviction.

(ii) Saskatchewan

Under section 49 of the *Revenue and Financial Services Act* ("RFSA"), a vendor of taxable tangible personal property or a taxable service is deemed to have collected the RST due under the *Education and Health Tax Act*. Where tax has not been paid on a taxable sale, the vendor may be directed to pay the uncollected tax under section 60 of the RFSA or the purchaser may be assessed for the unpaid tax under section 50 of the RFSA at any time up to six years after default. Vendors and purchasers are also charged interest, at a prescribed rate, on RST which is not remitted or paid on time.

In addition to recovering the tax which should have been paid, collected and remitted, a vendor who failed to collect the tax, or the purchaser who failed to pay the tax, may be assessed, pursuant to section 57, a 10% penalty (up to a maximum of $500) on the unpaid amount. Where non-compliance is discovered on audit, the penalties are still 10% of the unpaid tax but the maximum penalty is significantly increased to $25,000. Section 57 and 58 provides as follows:

57. Penalty for Failure to Forward or Pay Tax — (1) A collector who fails to forward tax collected or deemed to be collected by him as required pursuant to this Part or any revenue Act or a taxpayer who fails to pay tax payable by him as required pursuant to this Part or any revenue Act is liable to pay to Her Majesty, in addition to any other penalty:

(a) a penalty of 10% of the amount of the tax not forwarded or not paid to a maximum penalty of $500 per return period; and

(b) interest, at the rate and applied in the manner prescribed in the regulations, on the amount of tax not forwarded or not paid from the day on which it was required to be forwarded or paid.

(2) Sections 60 to 64 apply *mutatis mutandis* for the purpose of recovering the amount of the penalty and interest imposed pursuant to this section.

58. Penalty for Tax not Forwarded and Discovered by Audit — (1) Notwithstanding section 57, where:

(a) an audit is performed on a collector or taxpayer pursuant to this Part or a revenue Act; and

(b) as a result of that audit, the collector or taxpayer is assessed for tax collected, deemed to be collected or payable pursuant to this Part or any revenue Act;

the collector or taxpayer is liable to pay to Her Majesty, in addition to any other penalty:

(c) a penalty of 10% of the tax assessed to a maximum penalty of $25,000; and

(d) interest, at the rate and applied in the manner prescribed in the regulations, on the amount of tax assessed, from the day on which the tax was required to be forwarded or paid.

(2) Sections 60 to 64 apply *mutatis mutandis* for the purpose of recovering the amount of the penalty and interest imposed pursuant to this section.

As with the other RST provinces, on conviction for certain offences, including failure to remit tax which is deemed collected, additional penalties (fines) ranging from a minimum fine of $1,000 to imprisonment for a term of up to three months may be levied under section 73. Where the fine levied under section 73 results from the vendor's failure to file a return or its failure to collect or remit tax, then an additional penalty equal to 100% of the tax may be levied under section 74. Under section 80, no person may be prosecuted for any

violations more than six years after the date the violation occurred provided the violation did not occur as a result of intentionally making false or misleading statements. Where the violation resulted from a false or misleading statement, then there is no assessment limitation period.

(iii) Manitoba

Under section 10 of the *Retail Sales Tax Act*, the vendor of taxable tangible personal property or services is deemed to have collected any tax owing by the purchaser. By deeming the vendor to have collected the RST, the tax authority may recover any unpaid RST (plus interest) pursuant to section 13 from either the vendor or the purchaser and assess an additional penalty equal to 5% of the unpaid tax. **10** Where non-compliance is the result of a person's neglect or carelessness, the taxing authority may also assess an additional penalty not exceeding 50% of the unpaid amount pursuant to subsection 13(5.1). Section 13 provides as follows:

> **13.**(1) **Recovery of Tax from Vendors —** The amount of any moneys payable by a vendor to the minister under section 9 is a debt due from the vendor to Her Majesty in right of Manitoba until paid and is recoverable as such in a court of competent jurisdiction.
>
> (2) **Recovery of Tax from Purchasers —** The amount of the tax that any purchaser becomes liable to pay under section 2 is a debt due from the purchaser to Her Majesty in right of Manitoba until paid and is recoverable as such in a court of competent jurisdiction.
>
> ...
>
> (4) **Interest —** From and after the date on which, under this Act or the regulations, any debt due to the government under this Act is to be paid or remitted
>
> (a) by a vendor to the minister, or
>
> (b) by a purchaser to Her Majesty in right of Manitoba;
>
> the debt bears interest at a rate or rates prescribed in the regulations, but where no rate or rates have been prescribed in the regulations, the debt bears interest at 3/4 of 1% for each full month after the date that the debt was due and payable; and the interest accrued on any such debt from time to time is a debt due to Her Majesty in right of Manitoba, and is recoverable as such in a court of competent jurisdiction.
>
> (5) **Penalty —** In addition to any other penalty, the director shall assess a penalty equal to 5% of the amount due, but not in any case less than $5., against any person who fails to remit to the minister tax collected or deemed to be collected under this Act within the time required or who fails to pay any tax which he is required to pay under this Act; and any such assessment is a debt due to Her Majesty in right of Manitoba and is recoverable as such in a court of competent jurisdiction.
>
> (5.1) **Additional Penalties for Failure to Remit Tax —** Where a person fails to remit to the minister tax collected or deemed to be collected under this Act within the time required or fails to pay any tax which the person is required to pay under this Act and the director is satisfied that the failure was attributable to the person's neglect or carelessness, the director may, in addition to any other penalty under this Act, assess a penalty against the person in an amount not exceeding 50% of the amount of tax not remitted or paid.

In addition to the penalties levied under section 13, where a person willfully evades the remittance or payment of tax collected (or deemed to be collected), a fine of up to 100% of the amount evaded and imprisonment for a term of up to two years may be levied on conviction under section 24. Except in the case of fraud, no fines levied under section 24 can be levied more than four years after the date the offence was committed. Pursuant to its internal administrative practice, Manitoba will only assess a vendor for not collecting tax if the contravention occurred within the last three years, however under the legislation, they are entitled to assess the vendor or purchaser up six years after default.

(iv) Ontario

Sections 18 and 20 of the *Retail Sales Tax Act* enable the Minister of Finance to assess either the purchaser or vendor for any unpaid/uncollected RST **11**. Provided non-compliance did not result from a misrepresentation attributed to neglect, carelessness, willful default or fraud, then neither the purchaser nor the vendor will be assessed four years after default. Section 32 imposes an automatic 10% penalty on vendors who fail to remit taxes collectible (i.e. for failure to charge tax). In addition to the 10% penalty and the amount of tax which should have been collected plus interest, where the tax authority is satisfied that the vendor's failure to collect the tax was attributed to neglect, carelessness, willful default or fraud, a penalty equal to 25% of the tax may be levied under subsections 20(4) and (7) which provide as follows:

> 20(4) **Penalty for Willful Non-Collection of Tax —** Where the Minister is satisfied that a vendor's failure to collect tax that the vendor is responsible to collect under this Act or the regulations is attributable to neglect, carelessness, willful default or fraud, the Minister may assess a penalty against such vendor,
>
> (a) in an amount equal to the greater of $25 or 25 per cent of the tax that the vendor failed to collect, where a penalty has been assessed against the vendor under subsection (3) in respect of the failure to collect; and
>
> (b) in an amount equal to the greater of $25 or one and one-quarter times the amount of tax that the vendor failed to collect where no penalty has been assessed against the vendor under subsection (3).
>
> ...
>
> (7) **Penalty —** Where, under section 18, the Minister has assessed a vendor for tax collected or a purchaser for tax payable, the Minister may further assess such vendor or purchaser a penalty equal to the greater of $100 or 25 per cent of the tax so assessed under section 18, but no penalty shall be assessed under this subsection unless the Minister is satisfied that the non-compliance with the Act or regulations by such vendor or purchaser that gave rise to the assessment made under section 18 was attributable to neglect, carelessness, willful default or fraud.

Additionally, where a person makes a false statement or willfully evaded or attempted to evade compliance with the *Retail Sales Tax Act*, then criminal prosecution may be initiated. On conviction, an additional fine of up to 200% of the tax evaded plus imprisonment for a term of up to two years may be imposed.

(v) Prince Edward Island

RST is levied under the *Revenue Tax Act*, however, penalties for non-compliance are levied under the *Revenue Administration Act*. There are only four penalty provisions in the *Revenue Administration Act*, sections 21, 22, 22.1 and 22.2. Under section 21, any violation of the *Revenue Tax Act* (such as a vendor's failure to collect tax or a purchaser's failure to pay tax) results in a fine of not less than $250 and not more than $5,000. Where the infraction relates to failure to pay tax, an amount equal to the tax may be levied against the purchaser in addition to any other penalties.

Where a vendor failed to charge or remit tax collectible, section 22 imposes a penalty equal to the amount of tax collectible plus 5% (up to an additional of $250). Surprisingly, unlike the other provinces, there are no additional civil penalties (fines or imprisonment) levied in situations where the vendor willfully (or fraudulently) neglected to remit tax collected or evaded tax. Under section 23, a prosecution for a violation of the *Revenue Tax Act* must be commenced by the tax authority within four years of the infraction, regardless of whether the infraction was the result of willful neglect, carelessness or fraud. Section 22.1 and 22.2 pertain to director's liability and is beyond the scope of this paper.

(vi) Quebec

The Quebec Sales Tax ("QST") is a value-added tax levied under *An Act Respecting Quebec Sales Tax*, and generally parallels the GST. Generally, the QST's interest and penalty provisions are identical to the GST's, however, the quantum of penalties are different. Pursuant to section 25 of the *Ministry of Revenue Act* (the "MRQ"), the Minister may assess a person, within four years of default, the amount of tax owing. In addition to having to repay the deficient tax plus interest, section 59.2 of the MRQ imposes a penalty ranging from 7% to 15% of the deficient tax, providing as follows:

> **59.2 Penalty —** Every person who fails to deduct, withhold or collect an amount he was required to deduct, withhold or collect under a fiscal law, incurs a penalty of 15% of that amount. Every person who fails, within the time prescribed by law or by an order of the Minister, to pay or remit an amount he was required to pay or remit under a fiscal law incurs a penalty equal to
>
> (a) 7% of that amount, where the delay does not exceed seven days;
>
> (b) 11% of that amount, where the delay does not exceed 14 days; or
>
> (c) 15% of that amount, in other cases.
>
> ...

In addition to the 7-15% penalty, civil penalties, equaling 25% of the tax, may be levied under section 59.3 where the taxpayer, in circumstances equivalent to gross negligence, makes a false statement or omission in a filed document (including a return). Where the person willfully evades the payment, collection or remittance of tax, the penalty is equal to 50% of the tax under sections 59.4 and 59.5.

For the more egregious taxpayers, criminal prosecution may be initiated under section 62. Offences listed in section 62 include willfully, in any manner, attempting to evade compliance with any fiscal law. When convicted for an offence under section 62, a fine of up to $25,000 and imprisonment for a term of up to two years may be imposed. Like the GST, the assessment period for contraventions is limited to four years. Where, however, the infraction resulted from misrepresentations attributed to carelessness, voluntary omission or fraud, then the four year limitation period may not apply.

As the QST, like the GST, is a value-added tax, some contraventions do not result in any revenue loss. For these "wash transactions", as indicated in LMR. 94.1-1/R3, Revenue Quebec follows the GST and may only impose a 4% penalty versus the regular penalty of 7-15%.

B. PROVINCIAL RST VOLUNTARY DISCLOSURE POLICIES

A taxpayer who is in non-compliance with his or her obligations under any taxing statute generally has two alternatives, firstly he or she may decide to do nothing or secondly they may decide to voluntarily disclose their contraventions to the pertinent tax authority. Before making this decision, the taxpayer should become fully informed of the benefits and costs to each alternative.

Under the first alternative, by doing nothing, the taxpayer risks being assessed for the deficient amount of tax plus interest within the applicable assessment limitation period and in addition to having to repay the tax deficiency (plus interest), various penalties will also likely be levied. Generally, where the taxpayer decides to initiate a VD it will be obligated to correct its tax deficiency together with interest, however no additional penalties will likely be levied. Under a VD, the taxpayer generally only has to disclose contraventions, and correct deficiencies, occurring within the applicable legislation's limitation period (6 years in B.C, Saskatchewan and Manitoba; 4 years in Ontario, Quebec and PEI), however, the VD policies do not address this issue and conceivably the tax authority may take the position that the assessment limitation periods are inapplicable. Nevertheless, our experience indicates that taxpayers should limit their disclosure to the assessment limitation periods.

The following is a brief synopsis of each RST province's VD policy, highlighting the factors which a taxpayer should consider - namely assessment limitation periods, risk of being audited and assessed for the infraction, and applicable penalty provisions - before deciding on whether to initiate a VD.

1. British Columbia

Similar to Revenue Canada's VD policy, a person who voluntarily discloses their tax liabilities will not be subject to any penalties or criminal prosecution. As indicated in Bulletin No. 063 and at R6 of the *Tax Interpretation Manual*, the taxpayer will, however have to pay

their full tax liability plus interest. As the penalty provisions in British Columbia are administered rather kindly - namely no additional penalties being levied for most first-time assessments against taxpayers who have a history of compliance, and who were not assessed for the same error in the past, and provided there is no indication that the taxpayer was aware of the tax liability - there appears to be very little incentive for this type of non-complying taxpayer to come forward and voluntarily disclose its RST liabilities. Besides achieving a sense of comfort in knowing that they are complying with their RST obligations by "doing the right thing", the otherwise compliant taxpayer may be better off by not disclosing its liabilities and have the six and three year limitation periods run their course **12**. Although advisors cannot encourage non-compliant behavior, they are under no obligation to require their clients to initiate a VD. Advisors should advise their clients of the VD policies which are in effect and allow their clients to assess whether they wish to initiate the VD. The decision is ultimately the client's to make. Advisors should, however, on a go-forward basis ensure that their client's are proceeding according to the law.

Where, however the taxpayer has a history of non-compliance or where the taxpayer's non-compliance was the result of fraud or willful non-compliance then the monetary benefits of a VD could be enormous. If these taxpayers do not initiate a VD then they risk, on assessment, the possibility of additional penalties being levied and criminal prosecution being initiated.

Where a taxpayer decides that it wants to comply with the self-assessment system by disclosing its tax liabilities and avoiding the possibility of penalty and criminal repercussions, the following conditions must be satisfied:

1. The taxpayer must make a complete disclosure of the tax due;

2. The taxpayer must pay the amount overdue plus interest or make satisfactory payment arrangements; and

3. The disclosure must be voluntary, meaning the taxpayer must not have been contacted by the Consumer Taxation Branch for audit, inspection, or tax collection purposes prior to disclosing the contraventions. .

To initiate a VD, the taxpayer must disclose its contraventions in writing and provide the full amount of tax owing (plus interest) at the time of initiating the disclosure. When initiating the VD by delivering a letter, we recommend that the taxpayer or their advisor first telephone the local taxation branch to confirm that the VD policy is still in effect and that it applies to the taxpayer's specific situation, and to put the VD officer on notice that the VD is forthcoming (i.e. the letter and finds will be delivered by the end of the day). Since the disclosure will not be valid until it is complete, advisors should be cautious when disclosing information over the telephone and only disclose their client's name if they know that the disclosure is in fact forthcoming. Attached at Appendix 1 is a generic form of letter which may be used in all RST provinces to initiate the VD.

2. Saskatchewan

Section 58.1 of the *Revenue and Financial Services Act* grants Saskatchewan Finance the authority to waive any interest or penalty payable under the *Education and Health Tax Act*. Through Saskatchewan's internal undisclosed VD policy, both interest and penalty will normally be waived on a VD (Saskatchewan is the only jurisdiction which waives both interest and penalties on a VD). Situations where interest and penalty will continue to apply on a VD include:

1. Repeat situations.

2. It is felt the taxpayer deliberately withheld the tax. An example might be a situation where the taxpayer collected tax for 5 years, accumulated it in his records as tax collected and did not report it.

3. The taxpayers reported the tax and it is determined that similar types of businesses or businesses in a particular geographic area were notified recently that tax, penalty and interest are being assessed on a particular item.

4. In case of a verification audit, it is apparent that the taxpayer deliberately withheld the tax for several months or remitted the tax only because he anticipated a forthcoming audit.

To constitute a valid VD, the VD must be complete, voluntary and accompanied by the deficient tax amount. As indicated by point 3 above, where "similar types of businesses ... were notified", the VD may not be accepted. This can result in a significant degree of uncertainty to a taxpayer who wishes to come forward voluntarily, as the tax authority is essentially attributing enforcement actions taken against similar businesses to your client's business.

VD's are initiated by letter disclosing the amount of tax liability and by providing the tax deficiency with the disclosure. When initiating the VD, we recommend that the taxpayer or their advisor first telephone the local taxation branch to confirm that the VD policy is still in effect, that the disclosure applies to the client's fact situation (particularly with respect to issue 3 above regarding similar businesses) and to put the VD officer on notice that the VD is forthcoming (i.e. the letter and funds will be delivered by the end of the day). Since the disclosure will not be valid until it is complete (which requires payment in full), advisors should be cautious when disclosing information over the telephone and only disclose their client's name if they know that the disclosure is in fact forthcoming. Attached at Appendix 1 is a generic form of letter which may be used to initiate the VD.

3. Manitoba

Under Manitoba's internal VD policy, penalties may be waived on a VD. To constitute a valid VD, the disclosure must be voluntary and complete. Even where the VD satisfies these requirements, waiver of penalties is not automatic. Manitoba's Taxation Division will review the circumstances surrounding the infraction and then consider on a specific factual basis whether the taxpayer's conduct warrants penalties being waived.

Manitoba's approach obviously focuses more on the enforcement side and ignores the underlying policy reasons for implementing the VD policy in the first place (to achieve higher overall compliance due to monetary and resource restrictions). Based on Manitoba's current VD policy (not being automatic), a taxpayer wanting to initiate a VD, should telephone the Audit department at the Taxation Division, on a no-names basis, and determine whether this unknown, undisclosed VD policy will apply to their specific fact situation. Once the taxpayer gets an indication that the VD policy applies, the taxpayer should disclose all information to initiate the VD. In Manitoba the VD may be initiated via telephone, letter or in person. Attached at Appendix 1 is a generic form of letter which may be used to initiate the VD.

Under Manitoba's "Better Systems Initiative", Manitoba's RST guides will likely be available over the Internet by year 2001 and at that time, we have been advised that Manitoba may formulate its secret VD policy in writing for public distribution. At this time, hopefully a more definitive indication as to when penalties will be waived under a VD will be provided to taxpayers who are left with the difficult decision of whether or not to initiate a VD.

4. Ontario

As expressed in Tax Information Bulletins Nos. 2106 and 2112, the Ontario Minister of Finance will not impose any penalties or initiate any criminal prosecutions respecting contraventions voluntarily disclosed. If non-compliance is not disclosed and the taxpayer is subsequently assessed, the deficient amount of tax plus interest and penalties will be levied. At a minimum, section 32 imposes a 10% penalty on a vendor who failed to collect tax. Unlike British Columbia, Ontario does not waive this penalty for a taxpayer who has a history of compliance, the 10% penalty is automatic. As discussed above, under the interest and penalty provisions, there are also harsher civil penalties which may also be levied for non-compliance.

Since the limitation period for assessments has a direct bearing on a taxpayer's potential liability, a taxpayer should be aware of the dates the contraventions occurred before deciding to initiate a VD. In Ontario, the assessment period is limited to four years (the other provinces, except PEI and Quebec generally have an assessment periods of 6 years) unless the infraction resulted from neglect, carelessness, willful default or fraud. With the assessment limitation period in mind, the taxpayer will obviously have a different view pertaining to a VD depending on when the infraction occurred. For example, if the infraction occurred three and one half years ago, and was not the result of neglect, carelessness, willful default or fraud on the part of the taxpayer then the taxpayer may wish to rely on the four-year assessment period and risk the possibility of being assessed within the next six months. By not voluntarily disclosing its contraventions, the taxpayer may save having to repay the deficient tax plus interest which is owing on initiating a VD.

Where a taxpayer decides to voluntarily disclose its contraventions, the disclosure must satisfy the following requirements:

1. The disclosure must be voluntary in that it is not motivated by an upcoming audit or investigation;

2. The disclosure must be complete, disclosing a full and accurate account of all information relating to the infraction;

3. Payments of the total amount plus interest must be accompanied with the disclosure. Only in exceptional circumstances will installment payments be considered.

Our experience with Ontario indicates that they are quite concerned about the disclosure being "voluntary" and not being motivated by other factors. For example, where a taxpayer has received a simple requirement to file an RST return, the Minister has concluded that subsequent disclosures are not voluntary and are motivated by an upcoming investigation even though the RST return would not have detected the contravention. More certainty as to what constitutes an "upcoming audit or investigation" would be helpful for taxpayers faced with the difficult decision of whether to initiate a VD.

To initiate the VD, the taxpayer should either attend the relevant local taxation branch in person and disclose its contraventions (cap in hand approach), or disclose the infraction by letter and deliver the letter together with payment to the local RST taxation branch. When initiating the VD by delivering a letter, we recommend that the taxpayer or its advisor first telephone the local taxation branch to confirm that the VD policy is still in effect and to put the VD officer on notice that the VD is forthcoming (i.e. the letter and funds will be delivered by the end of the day). Since the disclosure will not be valid until it is complete, advisors should be cautious when disclosing information over the telephone and should only disclose their client's name if they know that the disclosure is in fact forthcoming. In the past, we have run into some difficulties following this procedure in Ontario, with the tax officers being reluctant to accept any information over the telephone. Attached at Appendix 1 is a generic form of letter which can be used to initiate the VD.

5. Prince Edward Island

As of writing, PEI does not have a voluntary disclosure policy. We have been advised that the adoption of a formal VD policy is being considered and may be available some time in 2000. PEI's April 6, 1999 budget announced that various fairness measures are to be implemented, however VDs were not mentioned. Although nothing pertaining to VD was indicated in the budget, an information circular on fairness is forthcoming which may provide a VD policy.

6. Quebec

As the QST is a value-added tax, like the GST/HST, not every infraction results in revenue loss. Identical to Revenue Canada's policy pertaining to "wash transactions", Quebec will only impose a 4% penalty on those transactions which have no fiscal effect. **13** Where a wash transaction is disclosed voluntarily, no penalties will be assessed. In this situation there are no costs to initiating a voluntary disclosure (other than potential cash flow issues) since no tax, interest or penalties will be owing. For voluntary disclosures relating to the ETA, Revenue Quebec applies the policies which are in force at Revenue Canada.

For an infraction which does not pertain to a "wash transaction", the Minister will not impose penalties, even where the infraction resulted from fraud, gross negligence or failure to file a return. In addition to waiving penalties, criminal prosecution will not be commenced against the taxpayer. The taxpayer is required, however, to remit the deficient tax plus interest.

As indicated in ADM.4/R1 *Voluntary Disclosure*, a VD may be initiated by telephone, written correspondence or in person at one of the local tax branches. When initiating the VD, the taxpayer does not have to provide a detailed account of the infraction immediately, rather he or she has until an agreed date (provided to taxpayer on initiation) to provide the necessary details with the requisite funds.

PART III — CUSTOMS PENALTIES AND INTEREST

A. CUSTOMS OVERVIEW

(i) Administrative Monetary Penalties

As a result of NAFTA and other tariff reduction measures, many Customs contraventions result in no revenue loss to Canada Customs. Nonetheless, Canada Customs is increasing its mandate to ensure compliance by implementing an Administrative Monetary Penalty System ("AMPS"). As recently stated in *Importweek*, AMPS will not be implemented until legislative amendments have been made which likely won't occur until year 2001. AMPS will supplement the new penalty structure under section 109.11 and the new "informed compliance" provisions under the *Customs Act* which requires importers to correct declarations where they have "reason to believe" that their declarations are incorrect. Under AMPS, civil penalties will be expanded and will be used as the principal means of sanctioning customs contraventions. Seizures, Ascertained Forfeitures and criminal sanctions will only be used for the more serious offences.

(ii) Informed Compliance

Newly amended section 32.2 requires the importer or owner of goods to correct the goods' declaration of origin, tariff classification (including subsequent diversions) and value for duty, providing as follows:

> **32.2**(1) **Correction to declaration of origin —** An importer or owner of goods for which preferential tariff treatment under a free trade agreement has been claimed or any person authorized to account for those goods under paragraph 32(6)(a) or subsection 32(7) shall, within ninety days after the importer, owner or person has reason to believe that a declaration of origin for those goods made under this Act is incorrect,
>
> (a) make a correction to the declaration of origin in the prescribed manner and in the prescribed form containing the prescribed information; and
>
> (b) pay any amount owing as duties as a result of the correction to the declaration of origin and any interest owing or that may become owing on that amount.
>
> (2) Corrections to other declarations — Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6)(a) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in subsection (1)), declaration of tariff classification or declaration of value for duty made under this Act for any of those goods is incorrect,
>
> (a) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and
>
> (b) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount.

Under the new "informed compliance" regime, importers must continually monitor whether they are in compliance with their customs obligations. If, after a particular importation, the owner or person accounting for the goods "has reason to believe" that the origin, tariff class, or value for duty specified is incorrect, then they are under a positive obligation to correct, the errors.

Obviously, before a correction can be made, the importer or owner must realize that it has made a mistake. Section 32.2 is premised on the importer/owner having a "reason to believe" that an error has occurred. Once an importer obtains this reasonable belief it must correct the error (T151 adjustment) and pay any resulting duties owing plus interest. Although what amounts to "reasonable belief' has not been decided by the Courts, Customs has provided some guidance in Memorandum D11-6-6, stating: "Reasons to believe" that the original declaration is incorrect would include the following situations:

(a) notification by the exporter that the Certificate of Origin contains not correct;

(b) the declaration was contrary to departmental written advice, precedent decisions, or published directives and policies;

(c) diversion of goods to a non-qualifying use or user; or

(d) the value for duty was incorrect at the time of accounting (e.g., subsequent proceeds were estimated at the time of accounting and a correction is required after information that is accounting).

Based on Canada Customs' position, as expressed under paragraph (b) above, the importer has a positive obligation to know all published materials and anything short of having this "actual knowledge" will amount to reasonable belief. Whether this high standard will be upheld by the Courts remains to be seen, however, based on non-Customs jurisprudence and the ordinary dictionary definition of "believe", it appears unlikely that such conduct is sufficient. "Reasonable Belief" generally requires a person to have some level of

information (actual knowledge versus imputed knowledge) so that he or she can have an opinion on the matter and not be simply guessing or hoping. See for example *Aumann v. McKenzi*e [1928] 3 W.W.R 233.

The requirement on the importer/owner to correct its declarations generally only exists for four years after the goods are imported. Where however, the obligation to make the correction arises between "the first day of the 37th month and the last day of the 48th month" subsection 59(1)(b), extends the obligation to a total of five years.

(iii) Penalties and Fines for Non-Compliance

(a) Informed Compliance/AMPS

Under the informed compliance provisions, penalties are levied, pursuant to section 109.11, on the duties which should have been paid on importation. The penalties range from a low of 5% of duties payable plus interest to a possible high of 50% plus interest. There are two different rates of interest which may apply. Firstly, there is the prescribed rate which approximates interest payable on Government of Canada T-bills and secondly, the specified rate which equals the prescribed rate plus 6%. Generally, interest at the specified rate is applied to unpaid duties.

The penalties levied under section 109.11 are as follows:

> 109.11(2) **Contravention relating to release —** Every person who fails to comply with section 31, 32.2 or 80.2 of this Act or subsection 95(1), 118(1) or (2), 121(1) or 122(1) of the *Customs Tariff* is liable to a penalty equal to the total of
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> (a) an amount equal to 5% of the duties payable, and
>
> (b) an amount equal to the product obtained when 1% of the duties payable that were unpaid when the amount was required to be paid, is multiplied by the number of complete months, not exceeding 12, from the day on which the amount was required to be paid to the day on which the amount was paid.
>
> (3) **Repeated failures —** Every person who fails to comply with section 31, 32.2 or 80.2 of this Act or subsection 95(1), 118(1) or (2), 121(1) or 122(1) of the *Customs Tariff* and by whom, at the time of failure, a penalty was payable under this subsection or subsection (2) in respect of a failure to comply in any of the three preceding years is liable to a penalty equal to the total of
>
> (a) an amount equal to 10% of the duties payable, and
>
> (b) an amount equal to the product obtained when 2% of the duties payable that were unpaid when the amount was required to be paid, is multiplied by the number of complete months, not exceeding 20, from the day on which the amount was required to be paid to the day on which the amount was paid.

Where the infraction is revenue neutral, resulting in no additional "duties payable", the person is still required to correct its declarations, however, penalties are limited to $100 under section 33.1.

(b) Ascertained Forfeitures and Seizures

In addition to AMPS, the *Customs Act* contains a regime of civil and criminal penalties for contraventions. The civil penalties take the form of seizures and ascertained forfeitures and can be triggered on simple non-compliance. There is no requirement for willful default or neglect on the part of the taxpayer. Unlike the four-year limitation period for informed compliance, ascertained forfeitures can be conducted at any time up to six years after default. The Minister's authority to seize goods is contained in section 110 and is premised on an officer's belief that the Act or the regulations "have been contravened", providing as follows:

> **110.**(1) **Seizure of goods or conveyances —** An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of goods, seize as forfeit
>
> (a) the goods; or
>
> (b) any conveyance that the officer believes on reasonable grounds was made use of in respect of the goods, whether at or after the time of the contravention.
>
> (2) **Seizure of conveyances —** An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of a conveyance or in respect of persons transported by a conveyance, seize as forfeit the conveyance.

Ascertained forfeiture is used as an alternative to seizure where the goods cannot be found or if seizure would be impractical, and allow the Minister to demand payment of up to the value of the goods plus applicable duties. The authority to conduct an ascertained forfeiture is contained in section 124 and provides as follows:

> **124.**(1) **Ascertained forfeitures —** Where an officer believes on reasonable grounds that a person has contravened any of the provisions of this Act or the regulations in respect of any goods or conveyance, the officer may, if the goods or conveyance is not found or if the seizure thereof would be impractical, serve a written notice on that person demanding payment of
>
> (a) an amount of money determined under subsection (2) or (3), as the case may be; or
>
> (b) such lesser amount as the Minister may direct.
>
> (2) **Determination of amount of payment in respect of goods —** For the purpose of paragraph (1)(a), an officer may demand payment in respect of goods of an amount of money of a value equal to the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto
>
> (a) at the time the notice is served, if the goods have not been accounted for under subsection 32(1), (2) or (5) or if duties or additional duties have become due on the goods under paragraph 32.2(2)(b) in circumstances to which subsection 32.2(6) applies; or
>
> (b) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case.

Administratively, under an ascertained forfeiture, Customs will only demand payment equal to three times the applicable duties and will not seek payment equal to the good's full value plus duties.

(c) Criminal Sanctions

Similar to the ETA, and some of the province's RST statutes, the *Customs Act* imposes hefty fines and possible imprisonment for certain offences. Section 160 provides as follows:

> **160. General offence and punishment —** Every person who contravenes section 12, 13, 15 or 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(1) or section 153, 155 or 156 or commits an offence under section 159 or 159.1
>
> (a) is guilty of an offence punishable on summary conviction and liable to a fine of not more than fifty thousand dollars or to imprisonment for a term not exceeding six months or to both that fine and that imprisonment; or
>
> (b) is guilty of an indictable offence and liable to a fine of not more than five hundred thousand dollars or to imprisonment for a term not exceeding five years or to both that fine and that imprisonment.

B. REVENUE CANADA'S CUSTOMS VOLUNTARY DISCLOSURE POLICY

Under the new "informed compliance" regime, for many contraventions, the importer/owner of goods is under a positive obligation to correct his or her Customs declarations. For these contraventions - namely incorrect tariff class, origin or value for duty - disclosure is not "voluntary" but required under section 32.2. Where a person fails to correct these declarations, after having reasonable belief that a mistake has occurred, additional penalties are levied under section 109.11. To disclose these contraventions and avoid the additional penalties the taxpayer must complete and deliver Form B2, *Canada Customs - Adjustment Request*, accompanied by the duties owing plus interest at the prescribed rate.

For contraventions not covered by section 32.2, such as failure to obtain an export or import permit, or for more serious contraventions which can result in a seizure, ascertained forfeiture or possible criminal prosecution under section 160, disclosure of non-compliance is not mandatory and can be initiated on a voluntary basis.

(i) Benefits to Initiating a Voluntary Disclosure

Under subsection 3 .3 (1) of the *Customs Act*, the Minister may at any time waive or cancel all penalties or interest. As Customs is administered by Revenue Canada - and on November 1, 1999 by the new Customs and Revenue Agency - the same fairness provisions governing the ETA (which now includes voluntary disclosure) apply to Customs contraventions. Persons making voluntary disclosures will only have to pay what they owe plus interest at the prescribed rate (and not at the higher specified rate). No prosecution under section 160 will be initiated and civil penalties such as those owing on an ascertained forfeiture will not be levied.

In addition to the penalty provisions, there can be significant interest rate repercussions for non-compliance. Under the *Customs Act*, there are two different rates of interest which may be applied: (i) the prescribed rate; and (ii) the specified rate which equals the prescribed rate plus 6%. Generally, under subsection 33.4, interest at the specified rate is applied to any duties which are owing.

(ii) Costs of Initiating a VD

By complying with section 32.2 and correcting declarations of tariff class, origin and value for duty, the taxpayer is not initiating a voluntary disclosure *per se*. By doing this however, the benefits of a VD are obtained as the administrative penalties levied under section 109.11 will be avoided and the lower interest rate will apply to the deficient amount. For other contraventions, namely those which the taxpayer is not under a positive obligation to correct, all penalties will be waived on a voluntary disclosure, however, the taxpayer is required to remit duties payable plus interest at the prescribed rate.

Before initiating a VD, the taxpayer must be made aware of his or her potential liability for non-disclosure. If errors are detected on investigation, the taxpayer will be required to pay any duties owing plus interest at the specified rate (extra 6%) and may be assessed additional penalties (AMPS/informed compliance, ascertained forfeiture (civil penalties) or criminal prosecution). An ascertained forfeiture can occur at any time within six years from date the infraction occurred and criminal prosecution may be initiated under section 160 usually within three years. Where Customs commences criminal prosecution by way of "summary conviction", they are limited to offences committed within the last three years. Where criminal prosecution is initiated by way of an indictment, there is no limitation period.

CONCLUSION

Initiating a voluntary disclosure is not without its costs. The taxpayer must pay the tax avoided through non-compliance plus applicable interest (Saskatchewan is the only tax authority which will, in certain circumstances, waive both interest and penalties). In considering the options, the taxpayer must be apprised of the tax authority's assessment powers, the possible penalties and the risks involved if a VD is not undertaken.

A taxpayer who chooses not to voluntarily disclose its contraventions, risks the possibility of being assessed for the deficient tax amount plus interest (the total costs of initiating a VD) and, depending on the taxpayer's specific situation, additional penalties which can be quite significant.

Advisors should fully explain to their clients the risks (especially on the issue of what may or may not be viewed as "voluntary"), the benefits and the costs involved in initiating a VD and should obtain clear instructions from the client whether a disclosure is or is not to be initiated. Advisors are not required to ensure that their clients initiate a VD, the decision ultimately remains with the client. Once the client has been informed and has decided to go ahead, the VD should be initiated quickly, otherwise the taxpayer risks enforcement action being undertaken in the interim, thereby prejudicing, if not precluding, the disclosure being considered voluntary. We generally recommend advisors to contact the pertinent tax authority (on a no-names basis) to confirm the VD policy and ensure that the policy applies to the client's specific factual situation. Only after obtaining this confirmation should the taxpayer's name be disclosed, thereby initiating the voluntary disclosure process. The VD initiation letter should then should then be sent to the official contacted.

As alluded to throughout the paper, tax authorities and their officers who administer the applicable VD policies, must become more cognizant of the underlying purpose of VD policies. Tax authorities will never possess the budget nor the resources to ensure complete compliance through audit and enforcement procedures. With this basic reality in mind, enlightened tax authorities have shifted (or at least expanded) their focus from obtaining compliance exclusively through enforcement proceedings to encouraging voluntary compliance through public education and VD programs.

In the past, Canadian tax authorities have - to greater and lesser extents - ignored these self-assessment realities and have not encouraged taxpayers to come forward and disclose their contraventions. Currently, PEI has indicated they do not have a VD policy. Manitoba, and to a lesser extent Saskatchewan, while they have VD policies do not have their policies readily available in published form. To make matters worse, in Manitoba waiver of penalties is not automatic, leaving the taxpayer's situation entirely to the discretion of Manitoba's Audit Division. Under these "stick" only approaches many non-compliant taxpayers have decided not to voluntary come forward to correct their mistakes. These tax authorities are missing the opportunity to encourage voluntary compliance - not to mention limiting their overall tax revenues, allowing better use of their limited resources and improving taxpayer relations.

Recently, Revenue Canada has taken the initiative to improve its VD policy, first by transferring jurisdiction from Investigations/Audit Division to the Appeals Division, and second, by highlighting its importance through emphasizing VD in the Minister'[s] Seven Point Fairness Plan. By transferring jurisdiction to Appeals, the officials processing the disclosure (designated VD Officers) will possess the requisite knowledge and, hopefully, the proper attitude for implementing and encouraging use of the program. Further, Revenue Canada is moving to reduce the traditional uncertainties surrounding the availability and application of their VD policy. Such actions will provide taxpayers with greater certainty and will result in more taxpayers voluntarily coming forward to correct their mistakes.

Without transparent and clear-cut published VD policies, tax authorities are essentially asking non-compliant taxpayers who wish to come forward to put their heads in the lion's mouth - such a "caveat disclosure" approach is no longer tolerable or acceptable public policy.

APPENDIX 1

GENERIC VD INITIATION LETTER

VIA COURIER

PRIVILEGED AND CONFIDENTIAL

Date

[Contact]
TAX AUTHORITY

Dear Official:

Re: Client
Re: Voluntary Disclosure

Further to our telephone conversation this morning, we are writing to initiate a [type of tax] ("TAX") voluntary disclosure on behalf of [Client].

We were recently retained by [Client] and have advised the [Client] that, in our view, it was required to [pay/charge/collect] TAX on ... The [Client] was not aware that TAX applied to [purchase sales/rentals/supplies of product or service] ... and has not been [paying/charging/collecting/remitting] TAX on ... [Provide brief explanation of reason for non-compliance] We advised [Client] of the [TAX AUTHORITY]'s voluntary disclosure policy and were instructed to immediately proceed with this voluntary disclosure. [Add where necessary] In this regard, we have also attached a completed registration form so TAX can be properly accounted for on an ongoing basis.

[CONTACT & CONFIRMATION OF POLICY]

Further to our discussion, we wish to confirm your indication that the [TAX AUTHORITY]'s voluntary disclosure policy set out in [applicable Bulletin or Guide] dated ... is in effect and applies to [Client]'s fact situation. We are informed by [Client] that no audit, investigation or other enforcement action has been initiated by the [TAX AUTHORITY]. Based on this and the other conditions set out in the [TAX AUTHORITY]'s voluntary disclosure policy, we have advised [Client] that it will be required to pay an amount equal to the TAX not [paid/collected/remitted] plus applicable interest ... for in the last [xx years] (the limitation period involved). We have also advised [Client] based on your voluntary disclosure policy that, because it has voluntarily come forward in this matter, no further assessment or enforcement action will be taken.

[DETAILS OF DISCLOSURE]

EG. Based on the financial statements and information provided by the [Client's] public accountants, the [Client's] [revenues/purchases] for the period [limitation period] from the [purchase/sale/supply] of ... was as follows:

Fiscal Year Ended	**Total [Purchases/ Revenues]**	**Net [Purchases/ Revenues]**	**TAX Not Paid/ Collected/Remitted**
Current Year 1998 1997 1996 Totals			

[PAYMENT PROCEDURES]

EG. [Client's] [purchases/revenues], ... during the limitation period were $..., meaning that TAX of $... was erroneously not [paid/collected/remitted]. Please find enclosed a cheque in the amount of $... representing $... on account of TAX .... In terms of the balance, we propose ... Please advise as to the precise amount of interest which is due, so that arrangements can be made for payment as well.

[NEXT STEPS]

We look forward to hearing from you and to providing whatever additional information may be required to complete this voluntary disclosure. Thank you.

Yours very truly,

Advisor

Footnotes

1 Malcolm Sparrow, *Imposing Duties: Government's Changing Approach to Compliance* (Westport, Conn.: Praeger, 1994).

2 See *Soper v. the Queen* 97 DTC 5407 (FCA).

3 The Minister's Policy is currently under review, however, as at the date of writing see: GST Memo 500-3-2-1: *Cancellation or Waiver of Penalties and Interest*; GST Memo 500-3-4: *Voluntary Disclosure*; and Bulletin B-074: *Guidelines for the Reduction of Penalties and Interest in "Wash Transactions" situations*.

4 The imposition of a 4% penalty, where there is no revenue loss, is considered necessary to maintain the integrity of the system.

5 See August 19, 1999 edition of *Tax Topics*.

6 The general four-year limitation period is provided in section 298 of the ETA.

7 Revenue Quebec announced in Interpretation Bulletin ADM. 4/R1 "*Voluntary Disclosure*" that all interest and penalties will be waived for wash transactions. Revenue Canada's policy to the same effect should be released by April 2000.

8 Pursuant to February 16, 1999 Budget, penalties increase from the current rate of 25% to between 50% and 100% of the deficient tax amount.

9 VDP Guidelines dated May 17, 1999 were obtained pursuant to a request under the *Access to Information Act*.

10 Under subsection 23(19) a vendor who has remitted tax which was not collected may recover the remitted tax from the purchaser but not the 5% penalty.

11 Under subsection 20(3), the Minister shall not assess the vendor if it has already assessed the purchaser for not paying the tax.

12 Under section 115 of the *Social Services Tax Act*, purchasers may be assessed within 6 years and vendors within 3 years after default.

13 See LMR 94.1-1/R2 *Waiver of Cancellation of Interest, Penalties or Charges*.