

## TAX

BY JAMIE GOLOMBEK

## No more one-chance policy

Late filing of the T1135 can be very costly.

A full seven more cases have landed in Federal Court concerning the late filing of the much-maligned *Form T1135* — the *Foreign Income Verification Statement*.

I first wrote about this topic this past spring (“Don’t be late!” *Advisor’s Edge Report*, April 2010), but since then, taxpayers continue to get hit with severe penalties for not filing the form on time, notwithstanding that all their foreign income was fully declared and taxed on their personal tax returns.

To recap, Form T1135 must be filed annually if the total cost of all your foreign investments, including foreign stocks (but not Canadian mutual funds with foreign holdings) held in non-registered Canadian brokerage accounts, is over \$100,000.

On the form, you’re asked to state the types of foreign investments you own and the cost of those investments, along with geographical locations. You’re then asked to identify the total income you reported on your tax return from the identified foreign investments.

### Harsh penalties

The penalty for failing to file this form is \$25 per day, to a maximum of \$2,500. If you knowingly, or under circumstances amounting to gross negligence, fail to file the form, the penalty jumps to \$500 for each month the form is not filed, to a maximum of 24 months.

While historically the CRA used to waive these harsh penalties for first-time, non-filing offences, in the past few years it has changed its administrative policy and has been assessing penalties even on first-time occurrences.

A group of seven related cases involving applications for judicial review from companies in the Asper Group serve as examples of this (see *Canwest Communications Corporation v. AGC, 2010 FC 897*).

Specifically, the Judge was asked in each one of the cases to review the decision of Doug McLean, Director of the Winnipeg Tax Services Office of the Canada Revenue Agency, who denied the seven companies’ requests for relief from penalties and arrears interest assessed because of late filing of T1135 forms concerning foreign investment property held by each of the seven companies.

The Asper companies had applied for relief under the “fair-



GOLOMBEK

ness” provisions of the *Income Tax Act*, which give the CRA the discretion to waive penalties and interest.

Their request was refused by the CRA, however, and the companies consequently took their cases to federal court.

All seven Asper Group companies used the same Winnipeg accounting firm, Brooke & Partners, which prepared the corporations’ financial statements and corporate tax returns. All foreign investments owned by the Asper companies are administered through professional money managers, which report investments and related income on a monthly basis. They also report trading activity to the CRA through the T5008 slips and investment income to the CRA through T5 slips.

### The penalty for failing to file [Form T1135] is \$25 per day, to a maximum of \$2,500. If you knowingly fail to file the form, the penalty jumps to \$500 for each month the form is not filed.

In 1998 and 1999, T1135 forms were filed for the Asper companies’ foreign holdings, but for whatever reason, the accounting firm concluded that the T1135 forms were not required where an investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements.

As a result, no T1135 forms were filed for the seven companies from 2000 to 2004. It should be emphasized, however, that during these five years, the Asper companies fully reported and paid tax on all their foreign income.

In April 2005, the CRA advised the Asper companies that no T1135 forms had been filed since 2000, and asked for access to the companies’ accounting records detailing the types of investments the companies owned during the 2000 through 2004 taxation years.

The companies filed the missing T1135 forms in June 2005, and in December 2005, the CRA processed the forms, charging penalties and arrears interest for each taxation year for which each company’s T1135 forms were filed late.

### No more one-chance policy

The Asper companies wrote to the CRA’s Fairness Committee, asking that the penalties and interest be waived. In September 2008, the CRA denied the companies’ request for relief from penalties and interest, claiming their situations “did not fall within the scenarios contemplated by the taxpayer-relief guidelines.”

While the CRA used to have a “one-chance policy” that applied when the taxpayer demonstrated a misunderstanding of the law and subsequently filed voluntarily, that policy is no longer in effect.

And in the Asper companies’ case, even though this policy may have been in effect for the tax years in question, it was deemed only available to taxpayers who filed the forms “voluntarily.”

In July 2009, the companies once again asked the CRA to reconsider the penalties and interest charged, stating the penalties “were not fair and reasonable.”

The following month, the CRA’s Mr. McLean denied this second-level fairness request, writing: “While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when

## TAXPAYER RELIEF GUIDELINES

There are some situations that will be taken into account by the CRA when relief from penalties and interest is sought due to a late filing of the T1135 form. The guidelines include:

1. Extraordinary circumstances beyond the taxpayer’s control;
2. Actions of the CRA; or
3. Inability to pay/financial hardship.

a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines.”

When the Federal Court is asked to review a decision of the CRA, the main issue is whether the CRA’s decision was “reasonable.”

In this case, the Judge quoted a Supreme Court of Canada decision that commented on what reasonableness means:

“In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

The CRA, defending its decision to assess penalties and interest, made the following points:

- › The Asper companies had made a conscious decision not to file the T1135 forms;
- › The companies used a professional accountant in the tax return preparation; and
- › The forms were only filed after the CRA notified the companies of their non-compliance.

### No obligation to provide relief

The Judge agreed, concluding the CRA’s decision not to waive

the penalties and interest “was within the range of possible outcomes defensible on the facts. Moreover, since (the Act) . . . does not obligate the Minister to provide relief, the decision was clearly defensible in respect of the law as well as the facts.”

Accordingly, the Judge dismissed the companies’ applications for judicial review, effectively upholding the penalties and interest charged.

These seven cases, along with similar decisions in *Leclerc*, *Seabrook* and *Sandler*, now bring the total to ten reported federal court cases in the past twelve months dealing with failed attempts by taxpayers to get relief from penalties and interest for late-filed T1135 forms.

With this in mind, I’d say it might just be high time this legislation was reformed to either formally introduce a one-chance policy or at least to carve out foreign securities held in Canadian brokerage accounts from the definition of “specified foreign property” required to be reported on Form T1135. <sup>AER</sup>

**JAMIE GOLOMBEK, CA, CPA, CFP, CLU, TEP** is the Managing Director, Tax & Estate Planning with CIBC Private Wealth Management in Toronto.  
Jamie.Golombek@cibc.ca

BY MIKE GEORGE

## Funding education

Business owners have some interesting tax-efficient alternatives to RESPs.

In my experience, clients are always looking for innovative ways to fund their children’s and grandchildren’s education. So what are the options?

Most advisors and clients are typically well versed on the benefits and restrictions of Registered Education Savings Plans (RESPs), including the lifetime savings



GEORGE

limits and the ever-popular Canada Education Savings Grant. But there are alternative ways to fund post-secondary education (either

in addition to, or as an alternative to, RESPs). So today, I’d like to concentrate on some of the opportunities available to incorporated business owners.

### Paying a salary

The simplest way clients can fund their children’s education, if they have an operating company and their child works in the business, is to consider paying them a reasonable salary. Just over \$10,000 a year is an amount that’s often used because this is sheltered by the child’s basic personal amount (in 2009, the basic personal amount was \$10,320, and for 2010, it has been raised to \$10,382).

Salaries are also good for providing the child with Canada Pension Plan credits and future RRSP contribution room. But you must always remember salaries must be