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Rights and Rulings: Understanding the Decision

An examination into the sufficiency of information in ruling letters from the CPP/EI Rulings Division of the Canada Revenue Agency

March 2017

Taxpayers'
Ombudsman

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"Rights and Rulings: Understanding the Decision"

TAXPAYER BILL OF RIGHTS

1. You have the right to receive entitlements and to pay no more and no less than what is required by law.
2. You have the right to service in both official languages.
3. You have the right to privacy and confidentiality.
4. You have the right to a formal review and a subsequent appeal.
5. You have the right to be treated professionally, courteously, and fairly.*
6. You have the right to complete, accurate, clear, and timely information.*
7. You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an impartial review.
8. You have the right to have the law applied consistently.
9. You have the right to lodge a service complaint and to be provided with an explanation of our findings.*
10. You have the right to have the costs of compliance taken into account when administering tax legislation.*
11. You have the right to expect us to be accountable.*
12. You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances.
13. You have the right to expect us to publish our service standards and report annually.*
14. You have the right to expect us to warn you about questionable tax schemes in a timely manner.*
15. You have the right to be represented by a person of your choice.*
16. You have the right to lodge a service complaint and request a formal review without fear of reprisal.

**Service rights upheld by the Taxpayers' Ombudsman*

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The role of the Taxpayers' Ombudsman

The position of Taxpayers' Ombudsman (the Ombudsman) was created to support the government priorities of stronger democratic institutions, increased transparency within institutions, and the fair treatment of all Canadians. As an independent and impartial officer, the Ombudsman handles complaints about the service provided to taxpayers by the Canada Revenue Agency (CRA).

As outlined in the *Order in Council P.C. 2007-0828*, the Ombudsman's mandate is to assist, advise, and inform the Minister of National Revenue (the Minister) about any matter relating to services provided to a taxpayer by the CRA.

As a part of this mandate, the Ombudsman is responsible to address any request for a review of a service matter or matter arising from upholding the eight taxpayer service rights (articles 5, 6, 9, 10, 11, 13, 14, and 15 of the Taxpayer Bill of Rights). These service issues are reviewed at the request of the Minister, on receipt of a complaint from a taxpayer or their representative, or on the Ombudsman's own initiative.

The Ombudsman also identifies potential systemic service issues that may negatively affect a large number of taxpayers or a segment of the population. The findings of these systemic examinations are reported to the Minister, with or without recommendations for corrective action. The Ombudsman also facilitates access to the proper redress mechanisms within the CRA to address service matters, and provides information to taxpayers about the mandate of the Ombudsman.

Summary

The Canada Pension Plan (CPP) and Employment Insurance (EI) are social programs designed to provide financial support against a loss of income due to a loss of employment, retirement, disability, or death. These programs are jointly administered by Employment and Social Development Canada (ESDC) and the Canada Revenue Agency (CRA).

The responsibilities of determining an individual's eligibility to receive CPP or EI benefits and the processing of their claims belong to ESDC. The CRA's CPP/EI Rulings program issues rulings that determine whether a worker is an employee or is self-employed, and whether the worker's employment is pensionable under the CPP or insurable for EI purposes. A ruling can also determine the amount of pensionable or insurable earnings a worker has and whether the worker or payer has to pay CPP contributions and EI premiums. It may also determine the number of insurable hours an employee has in insurable employment.

The CRA's ruling on a worker's or payer's requirement to contribute to CPP and/or EI may affect the worker's ability to receive these benefits in the future. For this reason, the CRA's decisions must be explained to the worker or payer in a clear and effective way that allows them to understand the CRA's reason(s) for its decisions.

Worker: An individual that may be employed or self-employed. This term is used to represent the individual when the employment relationship (employer-employee or business-contractor) has not yet been determined.

Payer: An employer, a trustee, an estate executor, a liquidator, an administrator, or a corporate director who pays types of income related to an employment including, but not limited to, salaries, wages, self-employed commissions, pension or superannuation.

The Office of the Taxpayers' Ombudsman received complaints from workers and payers stating that the CPP/EI rulings letters did not provide a sufficient explanation to understand the CRA's decision. These workers and payers claimed the letters only gave them references to the applicable legislation, not the specific facts that led to the rulings officer's decision. Without a complete explanation, they were uncertain as to why the CRA made the ruling and whether they should appeal it.

In reviewing the complaints, we identified a secondary issue. We noted the workers and payers were unaware of the consequences that resulted from a change to the definition of their employment relationship. As a result, we included this issue as a part of our examination.

For our examination to accurately comment on the sufficiency of the content in the rulings letters, we reviewed the information made available by the CRA to workers and payers regarding CPP/EI rulings. We also considered Article 11 of the Taxpayer Bill of Rights, which states that taxpayers have the right to expect the CRA to be accountable. This means that it must explain its decisions and inform workers and payers about their rights and obligations.

Article 11: You have the right to expect [the CRA] to be accountable.

During our examination, we looked at how the CRA provides explanations of its CPP/EI rulings and whether feasible options exist to improve its accountability. We found that the rulings letters do not provide a sufficient explanation to understand the CRA's decision. We also found that the rulings letters do not explain that adjustments and assessments may result from the CRA's rulings. During our preliminary discussions, the CRA agreed that service could be improved by adding information in its rulings letters. In November 2015, the CRA added a reference to its webpage "Have you received a CPP/EI ruling?" in its rulings letters. This webpage explains the employer's and payer's responsibilities, how to claim a refund of over-contributions, and the special rules concerning the CPP, EI, and income tax that apply to self-employed individuals. But, we found that

for payers, the obligations arising out of the rulings letter are still not clear.

We found that there are only two ways to receive an explanation of a CPP/EI ruling: the worker or payer can call the officer who issued the ruling and request a verbal explanation; or they can request a copy of the CPP/EI Rulings Report. However, both of these options are dependent upon the worker or payer being aware that this request for an explanation is available. Our examination of the rulings letters found that they contained the name and telephone number of the CPP/EI rulings officer, and indicated that if the worker or payer had any questions about the content of the letter they could contact directly the officer who made the ruling. However there was no indication that the worker or payer could request a copy of the CPP/EI Rulings Report.

The Taxpayers' Ombudsman (the Ombudsman) is partially satisfied with the CRA's action to address the issues identified during this examination, and finds that the addition of the "Have you received a CPP/EI ruling?" web address in the rulings letters is an improvement. To satisfy the issues raised during this systemic examination, the Ombudsman recommends that the:

- CRA's CPP/EI rulings letters inform the parties to a ruling of their right to request a copy of the Rulings Report and how to request it;
- CRA's CPP/EI rulings letters, where applicable, inform the parties to a ruling that an amount owing or over-contribution may result from the decision;
- CRA clearly communicates with the parties to a CPP/EI ruling about the steps they need to take following the receipt of a rulings letter, including the steps required by the parties to pay any outstanding CPP contributions and/or EI premiums, and updates the relevant sections of its publications and webpages accordingly;
- CRA continues to include in the CPP/EI rulings letters the contact information of the rulings officer for an explanation of the decision as well as reference to the "Have you received a CPP/EI ruling?" website; and,

- CRA review the CPP/EI rulings program to determine whether efficiencies can be made that would allow for the inclusion of an explanation of the relevant factors within each rulings letter.

Introduction

Sharing the Responsibility of Administering Benefits

The Canada Pension Plan (CPP) and Employment Insurance (EI) are social programs designed to provide Canadians with financial support against a loss of income due to a loss of employment, retirement, disability, or death.

With a few exceptions, every person in Canada who earns a salary must contribute to EI premiums, and if over the age of 18, must also pay into the CPP, until the annual maximums for contributions are reached. An employee's CPP contributions and EI premiums are paid by the employee and employer. All self-employed workers are responsible to pay both the employee and the employer portions of their CPP contributions. They do not pay EI premiums unless they opt into the EI program. If they do opt in, they pay the same EI premium rates as employees. Both the CPP contributions and EI premiums are due when self-employed workers file their T1 income tax return.

The CPP and EI programs are jointly administered by Employment and Social Development Canada (ESDC) and the Canada Revenue Agency (CRA). The decision of who receives CPP or EI benefits is the responsibility of ESDC. The CRA's CPP/EI Rulings program is responsible for determining whether a worker is considered an employee or self-employed, and whether the work conducted is pensionable under the CPP and/or insurable for EI purposes. The CRA determines the amount of pensionable or insurable earnings a worker has, whether the worker or payer has to pay CPP contributions and EI premiums, and the number of insurable hours an employee has in insurable employment. The CRA is also responsible for making sure that CPP contributions and EI premiums are deducted from employees' pay, and that the employee and employer portions are

submitted and reported by employers (or self-employed individuals) as required by the legislation.

How is a Worker's Status Assessed?

Making decisions as to whether a worker's employment and earnings are pensionable or insurable are the responsibility of the CRA's CPP/EI Rulings program. The program consists of approximately 375 personnel across Canada. It completed 42,782 of the 43,137 (99.2%) rulings requests it received in 2014-2015, and 44,091 of the 44,341 (99.4%) it received in 2015-2016. On average, it takes 55 days for the CRA to complete a CPP/EI ruling, depending on the source of the request.

The CRA receives these requests from three main sources:

1. Employment and Social Development Canada (ESDC), after it receives an application for benefits;
2. other areas of the CRA; or
3. a worker or payer submitting a form CPT1 - *Request for a Ruling as to the Status of a Worker under the Canada Pension Plan and/or the Employment Insurance Act.*

In addition, if a business has a payroll account and is registered on My Business Account, it can use the "Request a CPP/EI ruling" service.¹ An authorized representative for the payer can also request a ruling electronically through the "Represent a Client" section of the CRA's website.²

To determine whether the relationship between the worker and payer is a business-contractor or employer-employee relationship, the CPP/EI rulings officers interview the worker and payer, and review supporting documents, such as copies of timesheets or contracts, invoices, payroll records, or pay cheques. Once CPP/EI rulings officers complete their analysis, they create a Rulings Report and send a rulings letter to all

¹ Canada Revenue Agency, My Business Account, *Request a CPP/EI ruling*, online: <www.cra-arc.gc.ca/esrvc-srvce/tx/bsnss/myccnt/wht/cpprlng-eng.html>.

² Canada Revenue Agency, *Represent a client*, online: <www.cra-arc.gc.ca/representatives/>.

parties. These rulings are binding and cannot be changed by the rulings officers once issued. If the worker or payer disagrees with the ruling, they must file an appeal within 90 days after being notified of the ruling.

Issue – Understanding the Impact of the CRA’s Rulings

When a worker, payer, or ESDC requests a ruling from the CRA, it responds by issuing a rulings letter. These rulings letters provide the determination of whether the worker is an employee or self-employed and whether their earnings are pensionable and/or insurable. We received complaints from workers and payers alleging that the rulings letters they received from the CRA did not contain enough information for them to understand the CRA’s decision or the potential consequences.

The consequences of these rulings impact both workers and payers. For example, if a worker considers that they are self-employed, but the ruling determines that they are an employee, their income tax return may be adjusted to remove the expenses related to their business and claimed against their income. This may create a large amount owing which may be further subject to interest.

The CRA’s rulings affect the worker’s right to CPP and/or EI benefits. For example, if the CRA determines that the work was not pensionable under the CPP and not insurable for EI purposes, the hours and income earned cannot be used toward the calculation of CPP and EI benefits.

For payers, if the CRA determines that the payer is an employer, the CRA reassesses the employer for the amounts they should have deducted from the employee’s pay and submitted to the CRA, as well as the employer’s portion of CPP and EI contributions during the period specified by the ruling, plus interest.

Furthermore, if the payer deducts CPP contributions and/or EI premiums and submits them to the CRA when they are not required to do so, this results in an over-contribution. The rulings letters do not include instructions on how a worker can request and receive a refund.

The rulings letters do not offer an explanation of the CRA’s decision. Even though the decisions may have significant implications to the worker and payer, they are not made aware of these potential consequences.

Scope of our Examination

Our examination focused on whether the content of the rulings letters sufficiently communicate an explanation of the decisions and the consequences of these decisions.

Of the eight service rights listed in the Taxpayer Bill of Rights, the three most relevant rights for this systemic examination are:

- the right to be treated professionally, courteously, and fairly (Article 5);
- the right to complete, accurate, clear, and timely information (Article 6); and
- the right to expect the CRA to be accountable (Article 11).

These rights were considered in every aspect of our examination and analysis to determine the CRA’s ability to uphold these service rights and to be accountable for the decisions of its rulings officers.

Analysis of the CPP/EI Rulings Letters

History of Changes to CPP/EI Rulings Letters

Prior to 2005, the CRA determined a worker’s employment status based on a “four-fold test”, using four key elements (control, ownership of tools and equipment, salary, and integration). The CRA included an explanation of these four elements and the decision made in each rulings letter.

In 2005, following the Supreme Court of Canada’s analysis in various court decisions,³ the CRA developed a “total relationship

³ 671122 Ontario Ltd v Sagaz Industries Canada Inc, 2001 SCC 59; Wiebe Door Services Ltd v Canada (Minister of National Revenue – MNR), [1986] 3 FC 553; Wolf v Canada,

approach” (TRA) where the analysis of the facts was expanded to allow for a more in-depth decision-making process when considering the relationship between workers and payers, including consideration of the common intention of the parties involved. The seven elements of the TRA are:

- the level of control the payer had over the worker’s activities;
- the provision of tools and/or equipment to perform the services;
- the worker’s ability to subcontract the work or hire assistants to finish the agreed service;
- the worker’s risk of financial loss in the performance of his or her tasks;
- the worker’s responsibility for investment and management;
- the worker’s opportunity to profit in the performance of his or her tasks; and
- any other relevant factors.

In November 2005, the CRA changed its decision letters to reflect the new TRA. However, the CRA subsequently decided that continuing to provide an explanation in the rulings letters to address a relatively complex decision, especially given the additional elements of the TRA, did not guarantee the worker’s or payer’s understanding, or that their needs would be met. Therefore, the CRA removed the explanation and now gives only the decision and applicable legislation in its rulings letters.

Examining the Content of CPP/EI Rulings Letters

The rulings letters generally contain the following information:

- who initiated the request for a ruling (ESDC, internal CRA, worker, payer, etc.);
- why the request for a ruling was made (to determine insurability/pensionability of employment, amount of insurable earnings, hours, etc.);
- the period of time that the ruling covers;
- the ruling decision;

2002 FCA 96; *Royal Winnipeg Ballet v Canada (Minister of National Revenue – MNR)*, 2006 FCA 87.

- the applicable legislation;
- an explanation of the recipients’ right to appeal;
- contact information for CPP/EI Ruling Officer; and
- information for other enquiries.

The CRA informed us that CPP/EI rulings officers are encouraged to verbally provide an explanation of their decision verbally. As such, they are to ensure their name and telephone number are included in each rulings letter. The letter informs the worker or payer to contact the rulings officer to receive the rationale behind his or her decision.

The worker or payer may also request a copy of the CPP/EI Rulings Report. The Rulings Report is the formal documentation of the rulings officer’s decision-making process. It includes all contact information, actions taken by the officer, relevant facts and their source(s), the analysis, and legislative provisions.

If the CRA determines, in its CPP/EI ruling, that the earnings and work is pensionable and/or insurable, the payer will be assessed for both the worker’s and payer’s portions that were required to be submitted for that period.

The CRA informed us that in the context of its review of all external correspondence, it will be reviewing whether changes are needed to improve the letters. This review is one of the priorities of the Minister, as highlighted in the CRA’s *Summary of the Corporate Business Plan for 2017-2018 to 2019-2020*, under the Minister’s Message and Section 2 – Core responsibilities Tax, Written correspondence.⁴

Information Included on the CRA’s Website and in Publications

The CRA provides general explanations about CPP/EI rulings on its website.⁵ It offers various interpretive articles under “CPP/EI

⁴ Canada Revenue Agency, *Summary of the Corporate Business Plan 2017-2018 to 2019-2020*, online: < www.cra-arc.gc.ca/gncy/bsnss_plns/2015/smry-vrvw-eng.html >.

⁵ Canada Revenue Agency, *Canada Pension Plan (CPP) and Employment Insurance (EI) Rulings*, online: < www.cra-arc.gc.ca/tx/hm/menu-eng.html >.

Explained”.⁶ On this webpage, workers and payers can find information about specific employment types (such as barbers and fishers), the administration of the CPP and EI, employment outside Canada, as well as the CRA’s guide RC4110, *Employee or Self-employed*.⁷ This guide provides an overview of the factors the CRA considers when making a ruling.

The CRA’s webpage “Have you received a CPP/EI ruling?” offers information on topics of interest for workers or payers who received a CPP/EI ruling, including how to request a refund of CPP and/or EI over-contributions.⁸

Findings

In 2015-2016, the Canada Revenue Agency (CRA) completed 44,091 Canada Pension Plan (CPP) and Employment Insurance (EI) rulings requests. For each ruling, there were at least two parties: the worker and the payer. As such, each request for a ruling resulted in the creation of at least two letters, for a total of at least 88,182 letters being issued. During that same period, the CRA received 182 requests for information (including informal requests and formal Access to Information and Privacy requests) related to the decisions in the CPP/EI rulings letters. This accounted for 0.4% of all the rulings requests the CRA received.

Our examination found that although the CPP/EI rulings letters provide the recipient with information about their right to appeal, they do not include any reasons for the CRA’s decision or an explanation of any potential consequences the workers or payers could expect as a result of a change to their employment relationship. If the CRA determines that the earnings and work is pensionable and/or insurable, the payer will be assessed for both the worker’s and payer’s portions

⁶ Canada Revenue Agency, *CPP/EI Explained*, online: <www.cra-arc.gc.ca/tx/hm/xplnd/menu-eng.html>.

⁷ Canada Revenue Agency, *Employee or Self-employed? (Guide)* (Ottawa: Canada Revenue Agency, 2015), online: <www.cra-arc.gc.ca/E/pub/tg/rc4110/README.html>.

⁸ Canada Revenue Agency, *Have you received a CPP/EI ruling?*, online: <www.cra-arc.gc.ca/tx/hm/rcvd-eng.html>.

that were required to be submitted for that period. However, the rulings letter does not inform the payer to expect such an assessment. Also, the rulings letter does not provide an explanation to the worker or payer concerning the refund of over-contributions, if applicable.

The CPP/EI rulings officers include their name and telephone number in each rulings letter, and the worker or payer are encouraged to contact the rulings officer to receive the rationale behind his or her decision. During our examination, the CRA informed us it would replace the reference to the general CRA website in its rulings letters with the web address for the “Have you received a CPP/EI ruling?” webpage.⁹ By accessing this web address, workers and payers can obtain some information regarding the outcome of a CPP/EI ruling.

The Taxpayers’ Ombudsman (the Ombudsman) finds that having the rulings officer’s telephone number and the addition of a link to a more specific web page in the CPP/EI rulings letters is important but only partially sufficient in satisfying the rights to complete, clear, accurate, and timely information; and that the CRA is accountable.

While the webpage provides information for workers and payers on the steps to prepare for a ruling and how receive a refund if there has been an excess of CPP contributions and/or EI premiums paid, it does not clearly address the process to make a payment of any outstanding contributions or premiums. For example:

- the “Payer’s responsibilities” hyperlink on the webpage takes payers to the same webpage as the “Employer’s responsibilities” hyperlink. This may be confusing for payers that are not involved in an employer-employee relationship. More clarity on the interchange between terms such as payer/employer and worker/employee would also be beneficial.
- the section of the webpage titled “CPP and/or EI Refund” and the information that immediately follows states that, “As an employer or as a payer, you may be entitled to a refund for contributions and/or premiums that were remitted”, but does

⁹ Canada Revenue Agency, *Have you received a CPP/EI ruling?*, online: <www.cra-arc.gc.ca/tx/hm/rcvd-eng.html>.

not indicate that this section also contains information on what the employer or payer should do in the case of an under-contribution or under-deduction.

Furthermore, even if workers and payers receive a verbal explanation from the rulings officer, they may still require an explanation in writing. They may find the verbal explanation provided by the rulings officer is insufficient or unclear, or they may disagree with the ruling and intend to file a formal appeal. In order to receive a written explanation of the relevant factors that led to the CRA's decision, the worker or payer must request a copy of the Rulings Report from the rulings officer. However, neither the CPP/EI rulings decision letters nor the website make payers aware of the option to ask for the Rulings Report.

According to the CRA, raising awareness of a worker's or payer's right to request the Rulings Report within the rulings letter would likely result in an increased number of reports being requested, whether or not the worker or payer has the intention to appeal the ruling. The CRA must redact any personal information relating to anyone other than the requestor from the Rulings Report before a copy of the Rulings Report can be sent. The CRA informed our Office that it takes an average of two hours to review, redact, and release the information to the requestor; and the potential increase in requests for Rulings Reports may impact the CRA's ability to efficiently respond to these requests as well as process new ruling requests in a timely manner.

It is the Ombudsman's opinion that the Government of Canada's priority of Open Government¹⁰ and improving transparency and accountability, applies to the information contained in the rulings letters, and the CRA should include an explanation of the factors leading to its decision in every rulings letter. However, at this time, the Ombudsman finds it is not feasible to recommend that the CRA include an explanation or a copy of the Rulings Report with each rulings letter. This decision is due to the CRA's reports of the

¹⁰ Government of Canada, *Third Biennial Plan to the Open Government Partnership – Introduction*, online <open.canada.ca/en/content/third-biennial-plan-open-government-partnership#toc2>.

relatively low demand for this information, the amount of time it would add to the process, and the impact it may have on the service available to workers and payers. However, the Ombudsman does find that the CRA needs to continue to review the CPP/EI Rulings program to determine if changes can be made to increase the efficiency to allow explanations of the relevant factors to be included with each decision letter.

Conclusion

Article 11 of the Taxpayer Bill of Rights states that taxpayers can expect the Canada Revenue Agency (CRA) to be accountable. This means that when the CRA makes a decision about a taxpayer's tax or benefit obligations, it must explain that decision and tell the taxpayer about his or her rights and responsibilities.

The Government of Canada is taking steps to become more open and transparent, as announced in the December 2015 Speech from the Throne and the March 2016 federal budget. If the CRA clearly communicates throughout its publications and rulings letters information related to requesting a Canada Pension Plan (CPP) and Employment Insurance (EI) ruling, the factors that lead to its decision, and what to do as a next step after receiving the ruling, it will contribute to supporting these priorities. However, considering the factors involved in providing these explanations, the Taxpayers' Ombudsman finds it may not be feasible to provide a written explanation of the decision within each rulings letter at this time.

In the absence of receiving a written explanation of the relevant factors of the decision in the rulings letter, the CRA will, upon request, provide the worker or payer an explanation of its decision verbally and/or provide them a copy of the Rulings Report. However, this requires that the worker or payer know that they are entitled to request an explanation.

As such, it is important that the option to receive a copy of the Rulings Report is communicated to workers and payers in the rulings letter. By communicating this information, the CRA will take a positive step

toward satisfying the right to expect the CRA to be accountable and lead workers and payers to a better understanding of its decisions.

Recommendations

Based on the findings and conclusions of this examination, the following recommendations are made to the Minister of National Revenue:

1. The Taxpayers' Ombudsman recommends that the Canada Revenue Agency provide information in the Canada Pension Plan (CPP) and Employment Insurance (EI) rulings letters that workers and payers have the right to request a copy of the CPP/EI Rulings Report, and provide instructions on how to request it.
2. The Taxpayers' Ombudsman recommends that, where applicable, the Canada Pension Plan and Employment Insurance rulings letters inform the workers and payers that an amount owing or over-contribution may result from the decision.
3. The Taxpayers' Ombudsman recommends that the Canada Revenue Agency updates the relevant sections of its publications and webpages to clearly communicate with the workers and payers involved in a Canada Pension Plan (CPP) and Employment Insurance (EI) ruling about what they need to do after a ruling is made, including the steps required by workers and payers to pay any outstanding CPP contributions and/or EI premiums.
4. The Taxpayers' Ombudsman recommends that the Canada Revenue Agency continue to include in their Canada Pension Plan (CPP) and Employment Insurance (EI) rulings letters:
 - (a) the name and telephone number of the rulings officer and an invitation to contact the rulings officer to receive an explanation of the rationale behind the decision; and
 - (b) reference to the "Have you received a CPP/EI ruling?" website.
5. The Taxpayers' Ombudsman recommends that the Canada Revenue Agency determine whether changes can be made to increase efficiencies to allow for the inclusion of an explanation of the relevant factors within each rulings letter.