When Should the Courts Allow Reassessments Beyond the Limitation Period?

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P R É C I S

La Loi de l’impôt sur le revenu interdit au ministre d’établir une nouvelle cotisation pour un contribuable après l’expiration de trois ou quatre années à compter de la date de la première cotisation; toutefois, le sous-alinéa 152(4)a)(i) permet au ministre d’établir une nouvelle cotisation en tout temps lorsque le contribuable ou la personne ayant rempli la déclaration a fait une présentation erronée des faits par négligence, inattention ou omission volontaire en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la Loi.

Les auteurs du présent article sont de l’avis que l’Agence du revenu du Canada (ARC) a soutenu avec une plus grande régularité que le sous-alinéa 152(4)a)(i) pouvait s’appliquer aux années prescrites lorsque la présumée présentation erronée des faits découle de l’adoption par le contribuable d’une interprétation juridique reposant sur des conseils juridiques qui, bien que manifestes dans la déclaration, sont contraires à l’interprétation privilégiée par l’ARC sur la question. Le présent article traite de la portée de la disposition sur les nouvelles cotisations lorsque le motif présumé de son application repose essentiellement sur une différence d’opinion entre l’ARC et le contribuable concernant la position qu’il a choisie de prendre dans sa déclaration.

Les auteurs expliquent pourquoi le sous-alinéa 152(4)a)(i) ne devrait pas s’appliquer lorsqu’un contribuable a reçu des conseils soigneusement choisis de la part d’un conseiller en fiscalité, a adopté une interprétation pouvant de façon réaliste être soutenue par un tribunal de révision, et a entièrement divulgué cette position qu’il a prise dans sa déclaration de revenus. Les auteurs montrent que cette affirmation est étayée par la jurisprudence, de même que par l’objet de la disposition elle-même; que celle-ci est en outre soutenue par les normes qui sont invoquées à l’appui de l’imposition de pénalités aux spécialistes en déclarations; et qu’il s’agit de l’approche raisonnable à adopter compte tenu du cadre judiciaire actuel concernant l’interprétation des lois. Ils traitent également de la raison pour laquelle le sous-alinéa 152(4)a)(i) ne peut être utilisé à l’appui d’une cotisation en application de la règle générale anti-évitement.

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Les auteurs concluent leur article en y allant de leurs suggestions sur la réforme législative et administrative qui donnerait aux contribuables plus de certitude dans la poursuite de leurs entreprises financières et qui contribuerait à faire en sorte que le pouvoir d’établir une nouvelle cotisation en vertu du sous-alinéa 152(4)(a)(i) soit limité aux situations pour lesquelles il doit s’appliquer à bon droit.

A B S T R A C T
The Income Tax Act generally prohibits the minister from reassessing a taxpayer after the expiry of three or four years from the date of the original assessment; however, subparagraph 152(4)(a)(i) allows the minister to reassess a taxpayer at any time where the taxpayer or person filing the return has made a misrepresentation attributable to neglect, carelessness, or wilful default in filing the return or supplying information under the Act.

The authors of this article are of the view that the Canada Revenue Agency (CRA) has been asserting with more regularity that subparagraph 152(4)(a)(i) could apply to statute-barred years where the alleged misrepresentation arises as a result of the taxpayer adopting a legal interpretation, based on tax advice, that, although evident in the return, is contrary to the CRA’s preferred interpretation of the issue. This article considers the scope of the reassessment provision where the basis alleged as grounds for its application is essentially a difference of opinion between the CRA and the taxpayer regarding the taxpayer’s chosen filing position.

The authors make the case that subparagraph 152(4)(a)(i) should not apply where a taxpayer has received carefully considered advice from a competent tax adviser, has adopted an interpretation that has a realistic possibility of being upheld by a reviewing court, and has fully disclosed its filing position in its tax return. The authors show that this assertion derives support from the jurisprudence, as well as the purpose of the provision itself; that it is further bolstered by the standards invoked to support the application of the tax preparer penalties; and that it is the fair approach to take in light of the current judicial framework for statutory interpretation. They also discuss why subparagraph 152(4)(a)(i) cannot be used to support an assessment under the general anti-avoidance rule.

The article concludes with suggestions for legislative and administrative reform that would provide taxpayers with more certainty in the conduct of their financial affairs and help to ensure that the reassessment power in subparagraph 152(4)(a)(i) is limited to those circumstances where it should properly apply.

KEYWORDS: REASSESSMENT • LIMITATIONS • TAX RETURN • ADVISERS • PENALTIES • GAAR

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INTRODUCTION

Limitation periods serve an important function in the area of taxation, allowing taxpayers a degree of certainty and finality as to the state of their financial affairs and the ability to plan and organize accordingly. In the context of the ability of the Canada Revenue Agency (CRA) to assess or reassess a taxpayer for any given taxation year, the Income Tax Act limits the time period in which this may be done to either three or four years (depending on the type of taxpayer involved) from the date of mailing of the original notice of assessment under part I (“the normal reassessment period”). Parliament, however, occasionally provides exceptions to these prescriptions, so as to preserve the proper balance between taxpayer certainty and the need to ensure honest and accurate reporting in a system based on self-assessment. Subparagraph 152(4)(a)(i) is one such exception. It permits the minister to make an assessment, reassessment, or additional assessment of tax under part I after a taxpayer’s normal reassessment period if the taxpayer or person filing the return has made a misrepresentation that is attributable to neglect, carelessness, or wilful default, or has committed a fraud in filing the return or in supplying information under the Act. Thus, some level of culpable conduct is required.

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this article are to the Act.
2 Subsection 152(3.1).
3 It is noted that subparagraph 152(4)(a)(i) is not a penal provision, and “culpability” is thus not engaged in this respect (see, for example, the comments of the court in College Park Motors, infra note 10, discussed below). However, the limiting words circumscribing the type of misrepresentation required for the provision to apply establish the responsibility of the taxpayer to account for his conduct only in circumstances where that conduct, or the conduct of the person preparing or filing the return, has fallen below an acceptable level of care. It is in this sense that we use the term “culpable.” (In this regard, see the comments of the court in Bisson, infra note 22, discussed below.)
From our review of the decided cases under subparagraph 152(4)(a)(i), the jurisprudence is clear that a reassessment after the normal period cannot be based on a difference of opinion as to the interpretation of the law or its application to the facts where the taxpayer’s position is bona fide and reasonably held. It appears, however, that the tax courts have not yet expressly discussed the degree of certainty that an opinion must provide before a taxpayer will be considered to have a reasonable and bona fide belief in his filing position. This article is intended to show why, in our opinion, subparagraph 152(4)(a)(i) should not support an otherwise statute-barred reassessment where a taxpayer has received and considered researched advice as to the viability of his filing position, has been given an opinion that the position has a “realistic possibility of success,” and has filed a return that fully and accurately discloses the position taken. In our recent experience, the CRA has been conducting reassessments in exactly this situation.

Of particular concern to us with respect to this apparent CRA practice is the possibility of late reassessments based solely on differing legal interpretations where the taxpayer is a “large corporation,” since such taxpayers are more likely to be involved in complicated transactions and to file in reliance on a legal opinion. Large corporations are also required to remit 50 percent of the disputed tax liability up front even if they object to the reassessment. Accordingly, not only would a loss of certainty arise for all taxpayers if late reassessments could proceed on the basis of a differing interpretation, but in addition, the requirement that large corporations remit 50 percent of the tax up front could cause additional hardship by making it difficult for these taxpayers to carry on their business for the duration of any objection or appeal.

We begin the article with a discussion of subparagraph 152(4)(a)(i) generally, and how its application and interpretation have developed over time to the current understanding of the scope of protection that the provision affords. We then address why we believe that the provision should not apply where a taxpayer has openly taken a realistic filing position based on appropriate advice. We intend to show that this

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4 As defined in subsection 225.1(8). In general terms, a large corporation is a corporation that, alone or together with any related corporations, employs in excess of $10 million in taxable capital in Canada at the end of its tax year. Where a related corporation is involved, its taxable capital is computed as at the end of its last tax year that ended at or before the end of the first-mentioned corporation’s tax year.

5 Subsection 225.1(7). This is to be contrasted with most other types of taxpayers, who generally do not have to pay an assessment until 90 days after the assessment becomes final; if the taxpayer files an objection, the assessment does not become final until it is confirmed by the minister or, if such confirmation is appealed, until it is upheld by the reviewing court.

6 Although the provision is an exceptional measure, we note that the courts appear to allow its application more readily in cases where the alleged misrepresentation is an outright error or oversight rather than a differing legal interpretation, presumably because the analysis of neglect in these circumstances is more straightforward (for example, involving consideration of whether the return was carefully and properly reviewed). This article is limited to a discussion of the circumstances required to justify reassessment where the alleged misrepresentation is based on a difference of opinion regarding legal interpretation rather than a mathematical error or oversight.
assertion derives support from the jurisprudence, as well as the purpose of the provision itself; that it is further bolstered by the standards invoked to support the application of the tax preparer penalties; and that it is the fair approach to take in light of the current judicial framework for statutory interpretation. We then discuss why we believe that subparagraph 152(4)(a)(i) cannot be used to support an assessment under the general anti-avoidance rule (GAAR). We conclude with some suggestions for legislative and administrative reform that would enhance certainty and ensure that the reassessment power in subparagraph 152(4)(a)(i) is invoked only in those circumstances in which, in our view, it was intended to apply.7

THE STATUTORY AUTHORITY TO REASSESS AN OTHERWISE STATUTE-BARRED YEAR

In the absence of a waiver or another specific provision of the Act permitting the CRA to reassess a taxpayer in particular circumstances after the regular time limit for reassessment has expired, the CRA must be able to show, at the very least, that the taxpayer has made a misrepresentation attributable to neglect, carelessness, or wilful default. Subparagraph 152(4)(a)(i) provides:

(152)(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
(a) the taxpayer or person filing the return
(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act.

Subsection 152(3.1) provides that the “normal reassessment period” for a mutual fund trust or a corporation (other than a Canadian-controlled private corporation) is four years after the earlier of the day of mailing of the original assessment or original notification that no tax is payable under part I. In the case of any other taxpayer, the normal reassessment period is three years after the earlier of those two occurrences.

Subsection 152(4.01) provides that a reassessment made under subparagraph 152(4)(a)(i) is permissible only to the extent that it can reasonably be regarded as relating to a misrepresentation attributable to neglect, carelessness, or wilful default

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or to any fraud committed by the taxpayer. Accordingly, even where the provision is properly invoked, the CRA may not reassess the taxpayer with respect to elements of the return not affected by the misrepresentation or fraud.

HISTORY OF THE PROVISION

The Act has not always contained a time limit on reassessment. Until 1944, the CRA was permitted to assess or reassess a taxpayer without constraint. In that year, the Income War Tax Act was amended so as to limit the CRA’s right to reassess to six years except in the case of misrepresentation or fraud. The provision continued to be replicated in various amendments and revisions of the Income War Tax Act, and later in the Income Tax Act when it replaced the earlier statute in 1948. In 1957, the six-year limit was reduced to four years; however, the Act still made no reference to “neglect, carelessness or wilful default.”

The express qualification to the type of misrepresentation capable of supporting an otherwise statute-barred reassessment was added with the adoption of the new Act on December 31, 1971. Although the four-year limit has since been reduced (to three years, in 1984) and then increased again (to four years for corporations other than Canadian-controlled private corporations and mutual fund trusts effective 1989), the requirement for neglect, carelessness, or wilful default has remained constant.

Thus, the ability to reassess based on misrepresentation has now existed in Canada’s income tax legislation in some form for over 60 years. Throughout this time, however, the Act has never contained a definition of “misrepresentation”; accordingly, it has been left to the courts to give meaning to that term.

JUDICIAL INTERPRETATION OF THE PROVISION

Purpose of the Provision

The purpose of subparagraph 152(4)(a)(i) cannot be viewed in isolation from that of the limitation period itself, since it is only in the context of the general prescription on reassessment that the exception provided for in subparagraph 152(4)(a)(i) derives its meaning.

Courts have long recognized the role of limitation periods generally as encouraging legal certainty and finality, and the Supreme Court of Canada has also endorsed this underlying purpose in the tax context specifically. In an appeal considering and upholding the application of statutory limitation periods provided for outside the Act to the CRA’s collection procedures, the Supreme Court noted that limitation periods “are meant to promote certainty, avoid stale evidence, encourage diligence, and bring repose.”

Likewise, in the context of the statutory limitation on reassessment in the Act, the Tax Court of Canada has noted that “[t]he purpose of setting limitation periods is to ensure proper legal relations and legal peace,” and that these prescriptions are thus not to be taken lightly. It is in this general landscape of promoting

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8 *The Queen v. Markovich et al.*, 2003 DTC 5185, at paragraph 17 (SCC).
9 *Produits Forestiers St-Armand Inc. v. The Queen*, 2004 DTC 2494, at paragraph 59 (TCC).
certainty and finality that the exception to the statutory limitation on reassessment must be considered.

The purpose of subparagraph 152(4)(a)(i) has been described on a number of occasions. The courts have noted that the provision is not penal but remedial, and have held that it is intended to allow the minister to open up returns for statute-barred years where, for a variety of reasons, items of income have been omitted or misrepresented—that is, where the facts have been deliberately or negligently omitted, suppressed, or misstated.

In a recent judgment, the court expressed the purpose of the reassessment provision in the following terms:

[I]t is important to remember that the purpose of subparagraph 152(4)(a)(i) is simply to preserve the Minister’s right to reassess a taxpayer in circumstances where the taxpayer has not divulged all that he should have, as accurately as he should have, and thereby has denied the Minister the opportunity to assess correctly all of the appellant’s liability under the Act in the first instance. . . .

[Subparagraph 152(4)(a)(i)] balances the need for taxpayers to have some finality in respect of their taxes for the year with the requirement of a self-reporting system that the taxing authority not be foreclosed from reassessing in those instances where a taxpayer’s conduct, whether through lack of care or attention at one end of the scale, or willful fraud at the other end, has resulted in an assessment more favourable to the taxpayer than it should have been.

Thus, the courts have clearly recognized that the extended right to reassess provided by subparagraph 152(4)(a)(i) is an exception to the general policy of providing taxpayers with a degree of certainty and finality in their financial affairs. By limiting the availability of otherwise statute-barred reassessments to those circumstances where the misrepresentation is attributable to neglect, carelessness, or willful default, the legislation seeks to strike a proper balance between the promotion of careful and accurate reporting and the right of a taxpayer to advance his position

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10 College Park Motors Ltd. et al. v. The Queen, 2009 DTC 1469, at paragraph 20 (TCC). Penalties are addressed in subsection 163(2), and apply where a person has knowingly, or in circumstances amounting to gross negligence, made a false statement or omission in a return. “Gross negligence” is a higher threshold than that imposed under subparagraph 152(4)(a)(i), and has been described as conduct tantamount to intentional acting, or an indifference as to whether the law is complied with or not. For a discussion of the standard, see Venne, infra note 32 and the related text.

11 Farm Business Consultants Inc. v. The Queen, 95 DTC 200, at 205 (TCC); aff’d. 96 DTC 6085 (FCA); and DaCosta v. The Queen, 2005 DTC 1436, at paragraph 10 (TCC).

12 Ver v. The Queen, [1995] TCJ no. 593 (TCC). Also see the discussion of this case in the text below at note 56 and following.

13 College Park Motors, supra note 10, at paragraphs 13 and 20. See also the comments of Strayer J in Nesbitt v. The Queen, 96 DTC 6588, at 6589 (FCA); aff’g. 96 DTC 6045 (FCTD); leave to appeal to the Supreme Court of Canada refused [1996] SCCA no. 610, where he noted that one purpose of subparagraph 152(4)(a)(i) is to promote careful and accurate completion of income tax returns.
reasonably and in good faith, notwithstanding that the position might ultimately be found to be in error. Recently, in *Chaumont v. The Queen*, in circumstances where the taxpayer had advanced a reasonably considered position, the Tax Court commented that to permit the minister to reassess under subparagraph 152(4)(a)(i) would affect the right of every taxpayer to challenge the validity of an assessment, and would render the time limit imposed by the legislature essentially theoretical.\(^\text{14}\)

Accordingly, where it is a lack of reasonable care on the part of the taxpayer that has prevented a proper assessment in the first instance, the purpose of the provision is served by allowing the minister to reassess after the normal reassessment period has elapsed. Where, however, the taxpayer has acted honestly, prudently, and with reasonable care, the system is better served by preserving certainty and denying the minister’s ability to reassess beyond the normal reassessment period.

**Onus of Proof**

The question of onus of proof on appeals from otherwise statute-barred reassessments based on an alleged misrepresentation was settled in *MNR v. Taylor*.\(^\text{15}\) In that case, the court held that contrary to a regular objection to an assessment, where a taxpayer has the onus of disproving the minister’s assumptions, where the minister seeks to reassess an otherwise statute-barred year he bears the initial burden of proving his entitlement to do so.\(^\text{16}\)

This position was recently confirmed by the Federal Court of Appeal in *Lacroix v. The Queen*, where Pelletier J stated:

> Although the Minister has the benefit of the assumptions of fact underlying the reassessment, he does not enjoy any similar advantage with regard to proving the facts justifying a reassessment beyond the statutory period. . . . The Minister is undeniably required to adduce facts justifying these exceptional measures.\(^\text{17}\)

The Federal Court of Appeal has also held, however, that the onus on the minister to prove the validity of a late reassessment is limited to those cases where the taxpayer has raised the statutory limitation as a defence.\(^\text{18}\) Where the taxpayer does not challenge the validity of the late reassessment in the notice of appeal or at trial of the matter, the minister has no duty to raise facts justifying the application of subparagraph 152(4)(a)(i), and the taxpayer cannot appeal the court’s decision on the

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\(^{14}\) 2009 TCC 493, at paragraph 18. Also see the discussion of this case below at note 71 and following.

\(^{15}\) 61 DTC 1139 (Ex. Ct.). The court noted that the burden of proof in these circumstances was the civil standard of a balance of probabilities.

\(^{16}\) Ibid., at 1141.

\(^{17}\) 2009 DTC 5625, at paragraph 26 (FCA).

\(^{18}\) *Naguib v. The Queen*, 2004 DTC 6082 (FCA); leave to appeal to the Supreme Court of Canada refused 332 NR 397n.
ground that the minister has not shown a misrepresentation attributable to neglect, carelessness, or wilful default.

**The Meaning of Misrepresentation**

In the absence of any clear statutory definition of “misrepresentation,” early decisions interpreting the predecessor provision to subparagraph 152(4)(a)(i) focused on the meaning to be given to this term.

The *Taylor* case referred to above was the first decision of the Exchequer Court of Canada to address this question. At the time *Taylor* was decided, the statutory threshold for invoking the right to reassess an otherwise statute-barred year was either fraud or misrepresentation, without further qualification. In this context, and in the absence of a definition in the Income War Tax Act, the court held that the words “any misrepresentation” were to be given their ordinary meaning.

The court noted that a misrepresentation may be fraudulent or innocent, the former being a representation made with the knowledge that it is false, or without an honest belief in its truth, or recklessly without caring whether it is true or false, and the latter being a false statement made in the honest belief that it is true. The court referred to a leading English authority and cited a passage that placed honestly held beliefs arrived at through negligence or incompetence in the category of innocent misrepresentation.

The appellant had argued that the right of the minister to reassess after the lapse of the statutory limitation period should be confined to cases where the taxpayer has made a fraudulent misrepresentation or committed a fraud. The court rejected this submission, stating that if it were correct, it would mean that the words “has made any misrepresentation” would be totally redundant, and that if Parliament had intended to exclude innocent misrepresentation, it would have been a simple matter to have used the phrase “made any fraudulent misrepresentation.” In an oft-quoted passage, the court held that in the absence of any qualifying language, it would be improper to construe the provision as excluding a particular sort of misrepresentation and, accordingly, the words “any misrepresentation” in the reassessment provision meant “any representation which was false in substance and in fact at the material date,” including both innocent and fraudulent misrepresentations.

Although courts applying subparagraph 152(4)(a)(i) continue to cite *Taylor* for the proposition that misrepresentation means any representation that is false in both substance and fact at the material date, the idea that the reassessment provision encompassed purely innocent misrepresentations was soon brought into question. Even before the express addition of the neglect requirement, the courts came to

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19 Supra note 15.
20 Ibid., at 1144.
21 See, for example, *Nesbitt* (FCTD), supra note 13, at 6049; or more recently, *Ridge Run Developments Inc. v. The Queen*, 2007 DTC 734, at paragraph 93 (TCC); and *H. Grasbuk Professional Corporation v. The Queen*, 2003 TCC 419, at paragraph 7 (TCC).
appreciate that some level of balance and certainty must be maintained and that Parliament did not intend that the minister be permitted to reassess a taxpayer in the absence of some element of culpable conduct. In this context, it was decided that the word “misrepresentation,” for the purposes of the reassessment provision, did not include purely innocent representations made without negligence.

In MNR v. Bisson,22 the taxpayer and a third party, Thorn, had incorporated a company as equal shareholders. The taxpayer was responsible for managing the business while Thorn received a salary for acting as financial adviser. At a later date, Thorn borrowed money from the taxpayer personally and pledged his interest in the company’s shares as security. Thorn later defaulted on the loan and the taxpayer invoked his security interest without demanding payment. Thorn maintained that the taxpayer had improperly appropriated his shares, and these circumstances eventually led to a settlement whereby the taxpayer, in addition to relinquishing payment of the loan, caused the company to undertake to employ Thorn and pay him for past and future advice to the company. The settlement was recorded in an agreement signed by Thorn and the taxpayer under which Thorn transferred the shares to the taxpayer for $60,000. The day before the agreement was signed, the directors of the company passed a resolution to continue paying Thorn an annual fee for a number of years until such time as $60,000 had been paid. On the basis of the signed agreement, the minister considered the payments from the company to Thorn to be in the nature of shareholder benefits to the taxpayer, and reassessed him for his failure to include the same in his income. A number of years under the reassessments were statute-barred, and the minister sought to invoke his authority to reassess on the basis that the taxpayer had made a misrepresentation in filing his return.

The court held that the taxpayer had in fact received taxable benefits from the company and thus had failed to declare amounts of taxable income in his returns in the years under appeal. However, the court found that the taxpayer had erred in good faith, in that he did not know that the sums paid by the company formed part of his income, and (noting that the circumstances were not clear) held that the taxpayer had not been negligent in this regard.

In concluding that the provision justifying reassessment outside the normal period did not apply, the court acknowledged earlier decisions, such as Taylor, that held that the provision encompassed any misrepresentation, whether fraudulent or innocent, but it noted that in all those cases there had been actual negligence on the part of the taxpayer. Accordingly, the question of whether a misrepresentation made without fraud or negligence could support an otherwise statute-barred reassessment remained unanswered. In the court’s opinion, a purely innocent misrepresentation could not:

If, as appellant’s counsel maintained, even errors committed by a taxpayer entailing no negligence justified the Minister in proceeding with a reassessment at any time, s. 46(4)

22 72 DTC 6374 (FCTD).
[the predecessor of subparagraph 152(4)(a)(i)] would provide wholly illusory protection to the taxpayer, since the only case in which he would benefit from it, undoubtedly very rare, would be where the re-assessment was designed to correct an error attributable solely to the Department itself. If this had been the purpose Parliament had in mind when it enacted s. 46(4)(a)(i), it is not clear why it provided that the Minister may proceed with re-assessments at any time if the taxpayer “has made any misrepresentation or committed any fraud in filing the return.” In effect, any fraud necessarily presupposes a “misrepresentation,” and if the latter word covered every type of inaccurate representation, the reference to fraud in the provision would be totally unnecessary. In my view, the fact that the legislator referred not only to “misrepresentation” but to “fraud” indicates that, by the first word, he meant innocent misrepresentation[s] which, without being fraudulent, are still culpable in the sense that they would not have been made if the person committing them had not been negligent. I therefore conclude that a taxpayer who, without any negligence on his part, commits an error in declaring his income, does not make a misrepresentation within the meaning of s. 46(4)(a)(i). When the Minister seeks to rely on this provision to proceed with a re-assessment after four years, he must therefore not only show that the taxpayer committed an error in declaring his income but also that that error is attributable to negligence on his part.

Bisson thus provides an early example of the courts’ recognition that a reasonable interpretation by the taxpayer as to the characterization of a transaction, even if ultimately wrong, is not a misrepresentation sufficient to justify reassessing an otherwise statute-barred year.

Cases decided since Taylor and Bisson have further defined the meaning to be given to misrepresentation in this context. In Jet Metal Products Limited v. MNR, the Tax Review Board stated that “misrepresentation is fundamentally a false statement made, or a true statement omitted.” Accordingly, a misrepresentation includes not only a statement that is false, but also a return filed containing incomplete information owing to the omission of material facts.

Hudson Bay Mining and Smelting Co., Limited v. The Queen, a decision dealing with the application of penalties, also provides insight into what might properly constitute a false statement or omission. In Hudson Bay, the taxpayer company caused its subsidiaries to sell certain shares and assets to the Manitoba Hydro-Electric Board (MHEB). The letter of intent contained a provision that the taxpayer would make a gift of $2.85 million to the purchaser. The taxpayer took the position that there were two separate transactions, and in filing its tax return for the year, it treated the $2.85 million amount as a gift to the provincial Crown and claimed a deduction as such. The taxpayer had been advised by its auditors and legal counsel that the amount was deductible. The minister assessed the taxpayer to deny the deduction.

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23 Ibid., at 6380.

24 79 DTC 624, at 637 (TRB).

25 86 DTC 6244 (FCTD); aff’d. 89 DTC 5515 (FCA).
on the basis that the $2.85 million was not a gift but rather part of the consideration paid by the taxpayer for MHEB’s purchase from its subsidiaries, and a penalty was imposed under subsection 163(2) for the making of a false statement. Although the court found that there was one transaction and the payment was not a gift, it refused to uphold the penalty.

The court did not consider that what had transpired constituted the making of a false statement:

I have considerable difficulty in acceding to the defendant’s position. Here is a reputable firm given an opinion by its auditors and a legal opinion from its outside counsel that it is possible to give a non-refundable gift to a Provincial Crown Corporation and that the circumstances in this instance warrant such an interpretation. Further, no attempt was made to hide it from the Minister of National Revenue. The “gift” is found in the income tax return, and the tax benefit is claimed. . . .

Whether a gift or partial consideration, is really a legal characterization to be determined by the Court. As counsel for the plaintiff put it, “The Ministry would have a distinct advantage if he [sic] could levy a penalty everytime it disagrees with a taxpayer.” Each case must be looked at carefully to determine if there is an omission or a false statement upon which to base a penalty. That is not the case here.

Something more than mere disagreement must be determined.26

On appeal, the Federal Court of Appeal expressly adopted the lower court’s reasons for denying the penalty. The decision in Hudson Bay thus established that a legal characterization based on a considered interpretation does not of itself constitute a false statement or omission. The CRA has taken the position that a misrepresentation under subparagraph 152(4)(a)(i) includes more than a false statement or omission “since a partial truth can often obfuscate the correct tax treatment of a transaction more than a false statement or omission.”27 While we suggest that this is primarily a difference of semantics, since “a partial truth” by its nature implies that some part of the truth has been omitted or falsely presented, it is interesting to note that in Angus v. The Queen, the Tax Court commented that the taxpayer’s improper characterization of a gain as being on capital rather than income account was a misrepresentation but did not in the circumstances amount to a false statement for the purposes of applying a penalty.28 In the result, however, it was not the taxpayer’s incorrect characterization, but rather the taxpayer’s withholding of material facts from its accountant and its provision to the accountant of other patently false information, that justified the application of subparagraph 152(4)(a)(i). Accordingly, while application of the provision will ultimately turn on the taxpayer’s prudence in putting forth its position, there may indeed be some circumstances where an incorrect legal interpretation could be viewed as a misrepresentation without also being considered a false statement.

26 Ibid., at 6250-51 (FCTD).
27 CRA document no. 9230080, October 9, 1992.
28 96 DTC 1823, at paragraph 39 (TCC); aff’d. 98 DTC 6661 (FCA).
In Nesbitt v. The Queen, the Federal Court Trial Division gave “misrepresentation” a very broad meaning. In that case, the taxpayer had realized a capital gain of $711,394.25 in 1981 on the sale of a shopping centre in which he had a partial interest. The total amount of the gain was shown correctly in his return; however, owing to an error in calculation, the taxpayer’s accountant had reported the amount of his share of the capital gain as $71,139.42. The minister reassessed the taxpayer for 1981 after the statutory limitation period had lapsed.

The taxpayer argued that a representation is a statement of fact, and that since the product of a mathematical calculation was not a fact, it could not be a representation or, if incorrect, a misrepresentation. The court disagreed with the premise that a number arrived at through mathematical calculation is not a fact, and held that any incorrect statement amounts to a misrepresentation for the purposes of subparagraph 152(4)(a)(i). In the court’s view, mathematical miscalculations and errors were clearly encompassed by the language of the provision. On appeal, the Federal Court of Appeal confirmed that for the purposes of subparagraph 152(4)(a)(i), a misrepresentation has occurred if there is an incorrect statement in the return that is material to the purposes of the return and to any future reassessment, and that it remains an error even if the minister could have detected it by reviewing the accompanying calculations.

Although the Federal Court of Appeal did not comment on the matter, we suggest that the reference to a misrepresentation being “material” to the return or reassessment was not intended to imply that the error must meet some quantitative threshold before a “misrepresentation” is found to exist. Rather, in our view, the court’s reference to materiality is better viewed as a reflection of subsection 152(4.01), which, as discussed above, limits the reassessment under subparagraph 152(4)(a)(i) to matters that are affected by the misrepresentation raised as the basis for invoking the provision’s authority—that is, the error must be material in the sense that it relates to the issue raised in the reassessment itself. When the return contains incorrect information, the misrepresentation component of subparagraph 152(4)(a)(i) should be met regardless of the size or degree of error involved, and the only consideration would be whether the error was attributable to neglect, carelessness, or wilful default.

The Requirement of Neglect, Carelessness, or Wilful Default

In addition to proof of a misrepresentation, subparagraph 152(4)(a)(i)—unlike former subparagraph 46(4)(a)(i)—expressly requires a finding that the misrepresentation is attributable to neglect, carelessness, or wilful default in supplying the incorrect information. There can no longer be any doubt that a misrepresentation alone, without evidence establishing the latter component, will not suffice.

29 Supra note 13.
30 Ibid. (FCA), at 6589.
31 Boucher v. The Queen, 2004 DTC 6084, at paragraph 5 (FCA).
The statement consistently referred to for the threshold required for reassessment under subparagraph 152(4)(a)(i) is that of Strayer J in *Venne v. The Queen*, where he established the minimum threshold for application of the provision to be a lack of reasonable care:

I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words “misrepresentation that is attributable to neglect” must mean, particularly when combined with other grounds such as “carelessness” or “wilful default” which refer to a higher degree of negligence or to intentional misconduct. Unless these words are superfluous in the section, which I am not able to assume, the term “neglect” involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort.  

The Federal Court of Appeal has recently confirmed that the lack of reasonable care described in *Venne* is the standard that must be met to demonstrate that a misrepresentation is attributable to neglect or carelessness for the purposes of subparagraph 152(4)(a)(i).  

As regards the “reasonable care” standard, in the context of proving negligence in the law of tort, the courts have consistently held that what is required is the care expected of a wise and prudent person in the circumstances. To this end, it is recognized that wisdom is not infallible and prudence is not perfection.  

A recent application of the “wise and prudent” standard is found in *McKellar v. The Queen*, where a taxpayer who relied on the advice of a chartered accountant with in-depth tax knowledge, as well as the assurances of an individual intimately connected with the arrangement in issue, was considered to be outside the reach of subparagraph 152(4)(a)(i). In *McKellar*, the taxpayer was a partner in a Bahamian partnership, which held certain international bonds. When the partnership disposed of the bonds, losses were calculated in its financial statements using the maturity value of the bonds as cost, a treatment that was consistent with Bahamian generally accepted accounting principles. The partnership’s financial statements received an unqualified audit opinion. After receiving the financial statements and his statement of partnership losses, the taxpayer inquired into the propriety of the position taken and relied on the assurances he received in deducting his stated share of the losses.

32 84 DTC 6247, at 6251 (FCTD).
33 *Gebhart Estate v. The Queen*, 2008 DTC 6581, at paragraph 19 (FCA).
34 *Angus*, supra note 28, at paragraph 7 (FCA); *The Queen v. Regina Shoppers Mall Limited*, 91 DTC 5101, at 5105 (FCA); aff’d g. 90 DTC 6427 (FCTD); and *Froese v. MNR*, 81 DTC 240, at 245 (TRB).
35 *Reilly Estate v. The Queen*, 84 DTC 6001, at 6018 (FCTD); and *Central Interior Incorporated v. The Queen*, 2005 DTC 144, at paragraph 44 (TCC).
36 2007 DTC 1007 (TCC)
The CRA later reassessed the taxpayer after the normal reassessment period had lapsed. By this time, it had been determined that the losses claimed were not available, and the taxpayer thus admitted to having made a misrepresentation in his return; accordingly, the only issue before the court was neglect.

The court asked, “What would a wise and prudent person have otherwise done?” and found that the taxpayer’s course of conduct was consistent with that of a wise and prudent investor. The taxpayer had consulted a professional, as well as other persons whose expertise and opinions he respected. Accordingly, the minister had not established on the balance of probabilities that a wise and prudent person, on the facts of the case, would have done anything other than what the taxpayer had done. In allowing the taxpayer’s appeal, the court held that he had taken the steps that a wise and prudent person would have taken, and thus his conduct was neither careless nor neglectful.

O’Dea et al. v. The Queen is a very recent case decided on a similar basis. In O’Dea, the taxpayers were limited partners in a partnership and had deducted partnership losses that were not in fact available. In so doing, they had relied on the partnership’s offering memorandum, which included various professional opinions regarding the tax consequences and the validity of the deductibility of the partnership expenses. The taxpayers had also received partnership statements informing them of the amount of loss that they could deduct in their personal returns. The court noted that the taxpayers were not the directing minds of the arrangement, nor were they involved in the initial structuring details. In allowing the appeal, the court found that the taxpayers had acted in a reasonable and prudent manner in placing reliance on the various professional opinions before deciding to invest, and that they should not be held to a higher standard because “[i]o do so would be to insist that they must personally investigate the technicalities of the various structures and arrangements of public offering documents.” Accordingly, the taxpayers’ reliance on the statements received from the partnership did not amount to a failure to exercise reasonable care in filing their returns, and consequently, the minister was not permitted to apply subparagraph 152(4)(a)(i) to reopen the statute-barred years.

The cases make it clear that there is indeed a real threshold to be met before invoking subparagraph 152(4)(a)(i) in the face of an incorrect return. As the Tax Court of Canada stated recently, the burden is not a mere formality such that simply showing that the return does not meet the provisions of the Act is enough, since the CRA would otherwise be permitted to go back in time without constraint. If the minister cannot also show that the taxpayer acted without the care that a wise and prudent person would have exhibited in the circumstances, the authority to reassess is not validly invoked.

37 Ibid., at paragraph 33.
38 2009 DTC 912 (TCC).
39 Ibid., at paragraph 104.
40 Chaumont, supra note 14, at paragraph 8.
Application of the Provision to Disputed Filing Positions

While the courts in some instances conclude that an honestly held and reasonable filing position is not a misrepresentation at all, and in other instances resolve the issue on the basis that the filing position is not a misrepresentation attributable to neglect, carelessness, or wilful default, the outcome remains the same: where the taxpayer has filed on a basis that is both bona fide and reasonable, subparagraph 152(4)(a)(i) does not apply.41 A selection of representative cases is discussed below.

M.D. Glazier Ltd. v. MNR42 is an early case dealing with the availability of reassessment under subparagraph 152(4)(a)(i) on the basis of a contested filing position. In Glazier, the Tax Review Board held that the taxpayer’s classification of an amount as a business loss in circumstances where the minister believed it to be capital was not “anything approximating a ‘misrepresentation’” since the approach taken by the taxpayer, including its interpretation of any possible problems, was clearly laid out in the schedule to its return.43 This finding was made notwithstanding the board’s opinion that the taxpayer’s approach was unusual and possibly even bizarre.

In Glazier, the disposition at issue was of an option to acquire real property. The board noted that this was an unusual situation and that this factor could not be disregarded as possibly contributing to the tax problem. The board commented that the question of correctness regarding the taxpayer’s treatment of the sale remained in doubt, and it was not satisfied the taxpayer was clearly wrong. However, what evidently did satisfy the board was that the taxpayer was neither careless nor negligent in attempting to describe the circumstances of the transaction for the CRA, and the reassessment was accordingly statute-barred:

[T]here remains the view in my mind that what happened in this instance should not be characterized as misrepresentation. A mistake it may have been, but I am prepared at this stage of the development of the law on section 152(4) to believe that a mistake is different from misrepresentation, as it is applied to the facts in this case. I cannot see from the evidence presented that there was neglect or carelessness to the degree that one might not expect to find in the work of a normally cautious and wise taxpayer.44

In Reilly Estate v. The Queen,45 a decision rendered shortly after Glazier, subparagraph 152(4)(a)(i) was found inapplicable where the accountant who had prepared the return had made a conscious decision not to report a transaction, after careful research and consideration had led him to the firm belief that this was not required.

41 There appears to be one judgment where the court could potentially be seen as permitting late reassessment in the face of a bona fide filing position, although we suggest that the better view is that the position, although honestly believed to apply, was in fact unreasonable since it was contrary to clear requirements of the Act: see Chartwell, infra note 82 and the related text.
42 83 DTC 48 (TRB).
43 Ibid., at 50.
44 Ibid.
45 Supra note 35.
The deceased taxpayer had signed a letter of agreement to sell certain land in 1972, and a formal agreement was signed in 1973 covering the original land as well as additional acreage. The deceased did not report the disposition in either year, and his estate was subsequently reassessed for the 1972 tax year after the normal reassessment period had expired.

At issue was whether the disposition took place in 1972 and, if so, whether the reassessment was statute-barred. The court found that the land referenced in the 1972 letter had been disposed of in that year, and thus proceeded to address the question of the limitation period. The minister asserted that notwithstanding the absence of any capital gain in 1972, the reassessment was valid since the non-reporting of a capital disposition was a misrepresentation.

The court stated that in order to determine whether there has been any misrepresentation attributable to neglect, carelessness, or wilful default in filing the return or supplying information under the Act, it is necessary to have direct evidence of the state of mind and intention of the taxpayer or person filing the return, or other evidence upon which reasonable inferences of the same could be drawn. The court accepted that at the time the return was filed, the accountant, after careful research and consideration, was clearly of the opinion that a disposition resulting in no taxable gain or loss was to be ignored. He had, in fact, testified that he had not since come to conclude that such transactions must be reported, but that the “best wisdom” had since led him to change his practice and report them for information purposes.

The court noted, however, that the issue was not whether the accountant was wrong, but whether his omission was attributable to neglect, carelessness, or wilful default. In concluding that the minister’s assessment was statute-barred, the court stated that because the accountant, upon a careful and attentive reading of the tax department’s guide, concluded that the disposition was not reportable, then in not reporting it he made no default, and accordingly no wilful default, because he intended no such thing. The court further held that the accountant’s demonstrated diligence and care in perusing the guide was “clearly the very antithesis of neglect and carelessness, even if his firmly held conclusions, upon which he acted in filing Reilly’s return, were wrong.”

This case thus demonstrates that where the misrepresentation alleged is not an outright error but rather a matter of interpretation, the question of whether the position is correct is of no consequence when the taxpayer can show that it was carefully arrived at and honestly held.

We note, however, that in Reilly the question considered by the accountant was a technical issue as to whether the Act required reporting a transaction, rather than the proper interpretation of a provision or characterization of a transaction in a given legal and factual context. The type of situation encountered in Reilly is a relatively rare circumstance, and is distinguishable from the more common occurrence

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46 Ibid., at 6018.
where a taxpayer’s filing position involves matters of interpretation or characterization that would be evident on the return as filed. In the latter situation, the minister is able to audit the return during the initial assessment with knowledge of the taxpayer’s reasoned position. In contrast, in the former situation, the return as filed does not disclose the position taken or the existence of the transaction at all, and the minister’s ability to challenge the return within the normal reassessment period is accordingly significantly restrained. Given this distinction, it is arguable that the holding in Reilly is too lenient, and that the minister should be given greater scope to reassess where the amount at issue is not disclosed at all. That said, the courts have endorsed the same principles as applied in Reilly when the filing position under scrutiny involved a reasoned legal interpretation or characterization of a particular set of facts.

An important case in the progression, where the Federal Court of Appeal pronounced on the use of subparagraph 152(4)(a)(i) to reassess a contested filing position, is Regina Shoppers Mall v. The Queen. In Regina Shoppers, the taxpayer had reported a gain on the disposition of land as a capital gain and claimed capital gain reserves in 1976, 1977, and 1978. In 1980, the CRA reassessed on the basis that the profit was on income account. The taxpayer objected and the matter was finally settled by the Federal Court of Appeal in the CRA’s favour. During the intervening period after the reassessment in 1980 but before the Federal Court of Appeal’s decision in 1989, the taxpayer continued to file for years ending after 1978 on the basis that the gain was capital in nature, and continued to claim capital gain reserves. Ultimately, the CRA reassessed the 1979 year after the normal reassessment period had expired.

At the Federal Court Trial Division, Addy J followed the earlier decisions in holding that there can be no misrepresentation as contemplated by subparagraph 152(4)(a)(i) where a taxpayer “thoughtfully, deliberately and carefully” assesses the situation and files using what he believes in good faith to be the proper method. The CRA had asserted that since the taxpayer’s agent knew that the sale proceeds had been reassessed in the previous years as being on income account, he should have reported the later years on this basis. The court noted, however, that the agent continued to file as he did in the belief, held honestly and in good faith, that his view of the gain was the correct one.

The CRA had suggested two avenues of conduct open to the taxpayer, both of which were forcefully rejected by the court. Under the first option, the taxpayer

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47 See, for example, 1056 Enterprises Ltd. v. The Queen, 89 DTC 5287, at 5293 (FCTD), where the court likewise held that a taxpayer’s deliberate non-reporting of an association was the “absolute antithesis of neglect.” The court further commented that “[s]ubsection 152(4) protects such conduct, and perhaps only such conduct, where the taxpayer thoughtfully, deliberately and carefully assesses the situation as being one in which the law does not exact the reporting of that which the taxpayer bona fide believes does not exist. Otherwise, no meaning can be attributed to the subsection, which clearly does open that avenue of conduct to the taxpayer.”

48 Supra note 34.

49 Ibid. (FCTD), at 6428.
would be expected to report income according to the way the CRA would apparently be viewing the matter at that time; when the CRA agreed and assessed accordingly, the taxpayer should then object to the assessment and claim on a completely different basis than that originally reported. Addy J stated that it was difficult to conceive of a more illogical and improper way of proceeding.

In rejecting the CRA’s first suggested method, Addy J focused on the incompatibility of such an approach with a self-assessment system in which a taxpayer is under no obligation to file on the basis of the minister’s position:

The system of declaring revenue and assessing tax provided for in our Act is a self-assessing one. Where the taxpayer reports that an item of revenue is to be treated in a certain manner, after having carefully considered the matter, is not negligent in doing so and does not in any way intend to deceive the Department, the law under a self-assessing system cannot be taken as imposing on that taxpayer the duty of reporting receipts in a manner which the Department views as the correct one and which the reporting taxpayer bona fide believes to be incorrect.  

The second approach suggested by the CRA was for the taxpayer to file according to his own position but submit a waiver with the return allowing the CRA an indefinite time to reassess. Addy J again rejected the suggested approach, finding it wholly inconsistent with the CRA’s position that filing on the basis of the taxpayer’s preferred interpretation was a misrepresentation within subparagraph 152(4)(a)(i):

I honestly feel that the suggestion that the filing of a waiver would relieve against an obligation to file in one manner as opposed to another, is hardly worthy of comment. If, as suggested by the defendant, the plaintiff was acting improperly in filing as it did, I fail to see how the filing of a waiver allowing the Department more than four years to reassess would somehow add validity to the report.

In the result, the taxpayer’s appeal was allowed because the reassessment was made out of time. The CRA then appealed to the Federal Court of Appeal, which again sided with the taxpayer. The Court of Appeal endorsed the reasons of Addy J and added some further considerations. In particular, the court commented on the reporting standard expected of a taxpayer, noting that the obligation is to file a return according to the provisions of the Act. The court then held that where the Act is unclear, or the characterization of the facts doubtful, the care exercised must be that of a wise and prudent person and the report must be made in a manner that the taxpayer truly believes to be correct.

Following the release of the Court of Appeal’s reasons in Regina Shoppers, the CRA issued a decision bulletin. In it, the CRA acknowledged the court’s holdings

50 Ibid., at 6429.
51 Ibid., at 6430.
52 Ibid. (FCA), at 5105.
that there can be no misrepresentation if taxpayers file using what they believe to be the proper method of reporting, and that the self-assessment system cannot impose a duty on taxpayers to report in a manner that they believe to be incorrect and are contesting before the courts; however, the CRA stated that the judgment did not concur with its understanding of the self-assessment system and that the application of the decision should be limited to those situations where the minister has issued an assessment that is known to affect subsequent taxation years.\footnote{Ibid. The CRA commented that in that regard the Current Amendments Division had been notified of the possible elimination of the limitation period for reserves.}

Despite the CRA’s opinion that \textit{Regina Shoppers} should have narrow application, the courts have continued to endorse its principles in situations beyond the specific limits that the CRA described.\footnote{The courts have continued to apply these principles not only by direct reference to \textit{Regina Shoppers} but also on the basis of other authorities or on their own statements of principle. A number of these cases are discussed below.}

One such instance is \textit{Ver v. The Queen}.\footnote{Supra note 12.} The taxpayer spouses were immigrants to Canada who had become involved as distributors in a distribution network, entailing the purchase and resale of household goods. In the course of becoming distributors, the taxpayers were encouraged to attend seminars on various business matters, including the preparation of their financial results and incorporating those results into their tax returns. Having no knowledge as to how financial statements or tax returns should be prepared, the taxpayers retained an adviser to prepare the documents. In the year under appeal, the profit for the distribution business before expenses was \$306.66, and the expenses totalled \$17,888.66. The adviser allocated the resulting loss between the taxpayers, who reviewed the returns with the adviser and were assured that the reporting was accurate and complied with reporting requirements.

After the normal reassessment period had passed, the minister reassessed the taxpayers, disallowing the losses on the basis that the expenses were personal or living expenses and were not laid out to earn income, and that the operation had no reasonable expectation of profit. In allowing the taxpayers’ appeals, the court commented that had the merits of the assessments been before the court, the taxpayers might have had difficulty in challenging the assessments; however, the court noted that even if the minister’s assertions on merit had been proven, that would have been insufficient in itself to justify the reopening of an otherwise statute-barred year.

The court stated that a misrepresentation within the meaning of subparagraph 152(4)(a)(i) means a misrepresentation of fact, and there was no evidence and no suggestion that any of the figures in the statement of income and expense were falsified. Rather, the minister’s criticism of the reporting of the loss was based on an interpretation of law or mixed law and fact. The court held that, while these points might be arguable in support of the merits of the assessments themselves,
matters of judgement such as allocation of expenses between business and personal are one thing that the Minister ought to pick up in the normal assessment process. . . . [They] are not the subject of misrepresentation within the meaning of subparagraph 152(4)(a)(i).  

The court held that subparagraph 152(4)(a)(i) was not applicable in the circumstances before it, and found support for its conclusion in the comments of the Federal Court of Appeal in Regina Shoppers.

The CRA has since acknowledged the broader application of Regina Shoppers and the inapplicability of subparagraph 152(4)(a)(i) where the taxpayer’s filing position was reasonable at the time. In a 2005 technical interpretation, the CRA opined that a late reassessment could not be made where a taxpayer failed to amend its return to reflect the application of provisions that it reasonably believed did not apply at the time the return was filed.

In the particular scenario considered, a taxpayer had filed on the basis that subsection 94.1(1) did not apply to its foreign investments, and it continued to do so notwithstanding that the CRA disputed the propriety of its position. The taxpayer was reassessed in 2002 for its 1995-1997 tax years and did not object to the assessments, although this decision was allegedly based on extraneous factors not related to any acceptance of the CRA’s preferred interpretation. The taxpayer was later reassessed by the provincial authority for its 2000-2002 years, applying the provincial equivalent of subsection 94.1(1). Upon receiving notice from the provincial authority, the minister proposed to reassess the taxpayer for the same years notwithstanding that the normal reassessment period for the 2000 tax year had since expired. The question posed in the technical interpretation was whether the taxpayer’s failure to amend its 2000 tax return following the 2002 reassessments, to reflect the application of subsection 94.1(1), was a misrepresentation permitting reassessment after the normal period had expired.

The CRA stated that such failure would not suffice to enable an otherwise statute-barred reassessment, since the misrepresentation required to reopen a statute-barred year must be made at the time of filing the return, and it was acknowledged that this was not the case in the circumstances described. The CRA commented that the situation at hand was closest to that in Regina Shoppers, and it believed that a court would apply the same reasoning to the present case.

However, notwithstanding its apparent acceptance of the principles enunciated in Regina Shoppers, the CRA has continued to issue late reassessments based on disagreement with a taxpayer’s interpretation of the law, or application of the law to the facts, as the basis for its filing position.

A relatively recent example is found in the case of Petric et al. v. The Queen, where Regina Shoppers was again followed to vacate a statute-barred reassessment.

57 Ibid., at paragraph 13.
59 2006 DTC 3082 (TCC).
In Petric, the CRA reassessed the taxpayers on the basis that they had negligently misrepresented the fair market value of land in a transaction whereby the corporate taxpayer (Mont-Bleu) conveyed the land to its sole shareholder (Petric). The taxpayers had obtained a valuation of the land for mortgage purposes, and Mont-Bleu filed using this amount to calculate its gain. When the valuation was obtained, the taxpayers had not informed the appraiser of negotiations under way concerning a lease. The appraiser had used a “direct comparison” approach in valuing the property, and the CRA contended that an “income-earning” approach should have been used, taking into account the pending lease. The CRA first issued reassessments in 2000 against Mont-Bleu to reflect additional proceeds, and against Petric to include a shareholder benefit. The appeals officer then obtained a valuation report in 2001, which was based on the income-earning approach and reflected a higher value than that used in the 2000 reassessments. The CRA proceeded to issue new reassessments against the taxpayers in 2002, notwithstanding that the limitation period for both taxpayers had since passed.

At trial, the taxpayers contended that since the lease was still subject to conditions at the time of the sale, they had considered it irrelevant for valuation purposes and had thus not been negligent in failing to mention the lease to the appraiser. The appraiser had also testified that in his opinion the lease, not being absolute, would not have factored into his valuation and he would have appraised on a direct comparison approach even if he had known about the lease. The CRA and its expert appraiser contended that the lease was effectively final and so should have been factored in, using an income-earning approach.

The court reproduced the Federal Court of Appeal’s reasons in Regina Shoppers at length, and also referred to 1056 Enterprises Ltd. v. The Queen60 and Nesbitt, before concluding that the situation before it was more akin to Regina Shoppers and 1056 Enterprises than to the clear-cut mathematical error in Nesbitt. The court noted that the matter of fair market value was a controversial issue to be settled on the basis of the interpretation of the facts in evidence, much like the questions in the earlier cases of whether proceeds of disposition should be characterized as income or capital gain, or whether corporations are associated.

The court allowed the appeals, holding that the fact that the appellants had not divulged the lease negotiations to their appraiser was not something that could be characterized as a misstatement by the taxpayers in filing their tax returns. The court noted that the taxpayers were of the opinion that the conditional lease agreement was a factor that should not be considered in determining the property’s fair market value, and that the taxpayer’s appraiser had confirmed the validity of that approach. Although the CRA’s expert did not agree with the taxpayers’ opinion, the court felt that if the two experts diverged in that regard, it was plausible that the taxpayers judged the method used by their appraiser to be the proper one. Since the taxpayers’

60 Supra note 47.
view was not so unreasonable that it could not have been honestly held, the court found that there was no misrepresentation justifying an otherwise statute-barred reassessment:

Although fair market value is ultimately a question of fact to be resolved by the trier of fact, it is mostly a question of opinion. . . . Certainly the Minister is entitled to disagree with a taxpayer’s view of fair market value and can reassess, within the limitation period, on the basis of his own evaluation. However, where the issue is whether the Minister should be allowed the benefit of an exception to the application of the limitation period, it must be shown that the taxpayer made a misrepresentation in filing his or its tax return. In the case at bar, I am of the view that unless it can be said that the appellants’ view of fair market value was so unreasonable that it could not have been honestly held, there was no real misstatement. . . . Although I am not sure I agree with the appellants’ analysis of the fair market value of the property at that date, . . . I can certainly see that they believed bona fide that that agreement, being conditional on future events, did not affect the value of the property at the time of disposition. There is definitely an argument to be made along those lines.61

It is interesting to note that shortly after the judgment in *Petric* was released, the CRA issued a technical interpretation involving statute-barred reassessments and share valuation methodology,62 in which it stated that a taxpayer who did not take into account the CRA’s published policy on valuation could be open to reassessment under subparagraph 152(4)(a)(i). The interpretation addressed a question that had been posed at a 2006 round table of l’Association de planification fiscale et financière (APFF).63 The situation presented was as follows. For the purposes of determining the fair market value (FMV) of a share of a public corporation disposed of in favour of a family holding corporation by way of a rollover, Mr. X uses a valuation method that is not consistent with the policy expressed in *Information Circular* 89-3.64 Mr. X makes the valuation, and the difference between the FMV of the shares and their value reported on the prescribed form for the rollover is substantial. The “normal reassessment period” applicable to Mr. X for the taxation year in which the shares were disposed of has expired.

The CRA was asked whether the fact that Mr. X did not use the valuation method expressed in the circular would constitute a misrepresentation attributable to neglect, carelessness, or wilful default or a fraud in supplying information under subparagraph 152(4)(a)(i), resulting in loss of the benefit of the taxation year being statute-barred. The CRA replied as follows:

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61 Supra note 59, at paragraph 40.
For the CRA to issue a reassessment concerning the tax payable beyond the “normal re-
assessment period” pursuant to subparagraph 152(4)(a)(i) of the ITA, it is not necessary
that penalties can be imposed. The CRA only has to prove that the taxpayer has made a
misrepresentation of the facts by “neglect,” “carelessness” or “wilful default” (or that the
taxpayer “has committed any fraud”), and not that he committed gross negligence. The
burden of proof is therefore less demanding in the case of an assessment under subpara-
graph 152(4)(a)(i) of the ITA than to impose a penalty under subsection 163(2) of the ITA.

As to the matter of establishing that there was misrepresentation of the facts, the
CRA has to, at least, prove that the taxpayer made an error and, although the error may
have been made in good faith, that it was an error that a prudent and conscientious
person would not have made.

The issue as to whether or not a person made a misrepresentation of the facts by
“neglect,” “carelessness” or “wilful default” can be resolved only in light of all the
pertinent facts.

In the situation submitted, it seems possible that the CRA can prove that Mr. X
made a misrepresentation of the facts by “neglect,” “carelessness” or “wilful default”
given the substantial difference between the value attributed to the shares by Mr. X
and their FMV, for example, without taking into consideration, amongst other things,
the CRA’s valuation principles, practices and policies in Information Circular 89-3,
while a prudent and conscientious person exercising due diligence would have done it.
In this case, the CRA could, without a doubt, issue a reassessment for Mr. X’s taxation
year in which the shares of the public corporation were disposed of, pursuant to sub-
paragraph 152(4)(a)(i) of the ITA.65

As can be seen, the interpretation makes no reference to Petric, or to any other
jurisprudence considering the provision. It also gives no indication as to what a
“substantial” departure from FMV might be, or the particular valuation methodology
that the taxpayer employed, or the taxpayer’s rationale for employing the chosen
method. The CRA’s confidence that it could reassess beyond the normal reassess-
ment period “without a doubt” in this type of situation is, in our view, overreaching.
Valuation is an art, not a science. We submit that the CRA’s position would be valid
only if there was one and only one generally accepted valuation method and if the
taxpayer did not use that method. Although the CRA initially appears to say that it
would be “possible” to prove a misrepresentation attributable to neglect in the cir-
cumstances posed, and that a failure to take into account a published policy would
be evidence of neglect, its ultimate assertion that it could reassess in this case “with-
out a doubt” is somewhat troubling. On the facts presented, while the taxpayer did
not apply the published approach to valuation, there is no indication that the tax-
payer did not consult this policy in the process of arriving at his valuation and, in
any event, there is no basis for a hard-and-fast rule that in the face of a “substantial”
error, a failure to consult the CRA’s policy is undoubtedly grounds for applying sub-
paragraph 152(4)(a)(i). In light of the court’s reasoning in Petric, the question of
whether a taxpayer would be open to reassessment under subparagraph 152(4)(a)(i) in

65 Supra note 62.
these circumstances should be answered by considering the valuation methodology that the taxpayer did apply, the taxpayer’s basis for its application, and the reasonableness of using that method notwithstanding the ultimate error in the value attributed to the shares.

In addition to Ver and Petric, other cases have arrived at similar conclusions even without recourse to Regina Shoppers.

From our review, Louis Sheff (1984) Inc. et al. v. The Queen66 comes closest to addressing the degree of certainty that a legal opinion must provide in order to support a taxpayer’s bona fide and reasonable belief in its filing position. The facts in Sheff are rather complicated, but in essence are as follows.

The individual taxpayer (“S”), his son, and his nephew each owned an equal interest in a business started by S (“Sco”). The relationship faltered, and in September 1985 the parties signed an agreement by which the son and the nephew purchased S’s interest. The agreement provided for lump-sum payments to S and his estate of $120,000 and $325,000, respectively, and for additional annual payments of $90,000 ($7,500 monthly) to the corporate taxpayer—S’s wholly owned company (“LSI”)—for the duration of the lives of S and his wife, subject to a minimum term of 10 years. After an actuarial evaluation of his shares, S reported a capital gain of $869,416. (For some reason, this was not done until 1987.) The taxpayers were audited and the CRA asserted that the monthly payments were for services and not part of the gain; however, after negotiation, the CRA agreed in a settlement to treat the yearly payments from 1985 to 1995 as proceeds from the disposition of S’s shares taxable in 1987. At some point after the settlement and before 1995, the taxpayers sued the original purchasers, who had ceased making monthly payments on the basis that S, through the settlement with the CRA, had defaulted under the agreement. The taxpayers were successful in this suit and obtained a judgment requiring the purchasers to continue making the payments. In 1994, the taxpayers obtained the following legal advice:

Since, however, Revenue Canada has accepted in respect of the 1987 taxation year (and subsequent years) to include in the calculation of the capital gain the $90,000 annual payments and the lump sum payment, an argument can be made that subsection 4(4) of the Income Tax Act will preclude Revenue Canada from including such amounts in income in the future since they have already been included in calculating the amount of the taxable capital gain included in your income in 1987 and subsequent taxation years by use of the reserve. We are of the view, therefore, based on this analysis that no amount already included by you in proceeds of sale of the Sco shares should be included in your income in the future.67

When October 1995 came, the taxpayers continued to treat the monthly payments as proceeds from the original share sale and accordingly did not include them in income for tax purposes. The CRA disagreed and notified the taxpayers of

66 2003 DTC 1120 (TCC).
67 Ibid., at paragraph 19.
its position in 1996; however, the taxpayers continued to file without including the payments in LSI’s income. The CRA eventually reassessed the 1995–1998 taxation years at a time when the normal reassessment period for 1995 had passed. (S was taxed under subsection 15(1).) The court found in favour of the minister for the open years, stating that the taxpayers’ argument under (former) subsection 4(4) “[did] not hold water.”

The 1995 year, however, was statute-barred. The court noted that S had obtained legal advice in 1994 that no amount already treated as proceeds should be included in LSI’s income in the future, and was therefore under the impression that LSI did not have to report the yearly payments, and that S did not agree with the position taken by the CRA in 1996. The court held that in those circumstances, it could not be said that the taxpayers had made misrepresentations attributable to neglect, carelessness, or wilful default. Although there was no discussion on the point, the court clearly accepted that the taxpayers had not been negligent in relying on legal advice that, on the basis of an analysis of provisions in the Act, “an argument can be made” to support their filing position.

This clear line of judicial opinion refusing to uphold out-of-time reassessments where the return was made on a carefully considered, honest, and reasonably held belief has continued in a number of recent cases, in particular where the misrepresentation alleged by the CRA was essentially a difference of opinion regarding a taxpayer’s bona fide filing position.

In Savard v. The Queen, the taxpayer’s spouse was originally assessed as having received a shareholder benefit when the taxpayer’s corporate employer, all the shares of which were held by the spouse, paid certain legal fees on the taxpayer’s behalf. Upon receipt of the spouse’s objection and the taxpayer’s employment contract, which provided that professional fees incurred by him for legal proceedings involving him personally would be paid by the company, the CRA vacated the assessments against the spouse and reassessed the taxpayer. This series of events was repeated in a later year, after the statutory period had expired. The taxpayer asserted that he had not received any benefit, the payments being primarily for the benefit of his employer. While the court ultimately disagreed and found that the taxpayer had in fact received taxable benefits, it vacated the assessments as being made out of time.

In the court’s opinion, the situation was not entirely clear. While the CRA’s conclusion that the taxpayer should have included the amounts was a reasonable interpretation justified by the facts, it was also entirely reasonable to say that in failing to do so, the taxpayer was not guilty of any wrongdoing or neglect. The court found that there was enough information to justify the interpretation adopted by

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68 Ibid., at paragraph 64.
69 2008 DTC 5026 (TCC).
70 The first reassessment had never been paid because the taxpayer had made an assignment of his property and the assessment had been included in his liabilities thereunder.
the taxpayer, and he thus had no obligation to declare the payments of fees by his employer as taxable benefits.

In reasons reminiscent of Addy J’s decision in Regina Shoppers nearly 20 years before, the court held that when filling out a tax return, a taxpayer does not have to include everything that might be income, based not on his or her own analysis but on speculation as to what the CRA might want to attribute to him or her. The court characterized the CRA’s position as requiring the taxpayer to declare the amounts that his employer paid as part of his income, under protest and in advance, and held that there was no duty on the taxpayer to do so. Savard thus provides a recent affirmation that a taxpayer is entitled to file according to his or her preferred interpretation, provided that such interpretation is reasonable and bona fide, without risking exposure to reassessment for an unlimited amount of time.

Finally, Chaumont71 is another very recent case where the court was asked to permit late reassessment on the basis of a contested legal interpretation. In Chaumont, the taxpayer was reassessed for two taxation years for a failure to pay tax on certain interest income received from a source in France, one such reassessment being made after the statutory limit had passed. The provision at issue was an article of the Canada-France income tax convention ("the treaty").

The taxpayer, an engineer by training, was a dual citizen of France and Canada, born in France but residing permanently in Canada, and a Canadian resident for income tax purposes. Part of the taxpayer’s investment income was sourced in France and was exempt from tax in France. The taxpayer argued that pursuant to the non-discrimination article of the treaty, he should not be subject to a heavier burden in Canada on that income than the tax burden imposed by France; that is, because his France-sourced interest income was not subject to tax in France, it should not be subject to tax in Canada. Although the court easily found in favour of the minister for the open year, the statute-barred assessment was vacated.

The court noted at the outset that the burden imposed on the minister under subparagraph 152(4)(a)(i) is substantially less demanding than the burden required by the Act to justify the imposition of a penalty; however, it is a real burden, requiring more than merely showing a failure to comply with the provisions of the Act. The minister sought to highlight the taxpayer's experience, knowledge, and education with a view to establishing evidence of neglect or wilful default. The court rejected the minister’s position, finding that the evidence established exactly the opposite. In the court’s opinion, the taxpayer had drawn on his knowledge and skills to argue the merits of his assertions, not to avoid or evade his tax obligations, and he had obtained information that, in his opinion, validated his interpretation.

Although the taxpayer’s submissions were “unusual and even surprising,”72 they were neither far-fetched nor unreasonable enough for it to be concluded that he had

71 Supra note 14.
72 Ibid., at paragraph 15.
made a wilful default or mistake in an attempt to evade his Canadian tax obligations. First, he had expressed his opinion, and second, he took initiatives to show that his allegations had merit, relying on the services of a professional business to which he had provided all the information and documents concerning his France-sourced income. In the court’s opinion, the case involved a legitimate question and a principled concern that had a modicum of foundation; moreover, the taxpayer did not simply express his objection, but took serious initiatives to approach serious entities in order to assert his approach. The court stated that

[t]o conclude that the [taxpayer’s] conduct was a wilful default or that it constituted a sufficient error to permit the Minister to assess beyond the normal period, would affect any taxpayer’s right to contest the merits of an assessment, and would cause the limitation period imposed by Parliament to be essentially theoretical.73

In addition to the cases where statute-barred reassessments have been vacated on the basis that subparagraph 152(4)(a)(i) does not apply, the view that a reasonable and bona fide filing position does not amount to a misrepresentation within the meaning of the provision is further supported by jurisprudence where the court has allowed a late reassessment to stand. These cases also provide insight into the boundaries of such protection.74 An early example is Froese v. MNR,75 which involved a taxpayer’s decision to file on a cash rather than an accrual basis. The taxpayer had been engaged in farming for 23 years. In 1968, he sold his farm and invested in land with a view to subdividing and selling lots, and in 1971, he sold a number of these lots. Prior to 1968, the taxpayer had reported his farming income on a cash basis, and when he sold the lots in 1971, he reported this income on a cash basis as well. After the normal reassessment period had passed, the minister reassessed on the basis that the income from the taxpayer’s land sales should have been reported on an accrual basis. (It was also asserted that the taxpayer had not accurately reported this income even on the cash basis of accounting.) The taxpayer’s position was that he considered that a sale was made only when cash was received. The Tax Review Board found in favour of the minister, holding that the taxpayer’s accounting method was clearly not what the Act required and that the taxpayer should have sought professional advice:

There can be no doubt that although the recording of land sales on a cash basis may be acceptable for purposes of accounting, it is not the method which the Income Tax Act requires of taxpayers in reporting their income from a business of selling land.

73 Ibid., at paragraph 18.
74 In addition to the cases discussed below, other examples include Dalphond v. The Queen, 2009 DTC 1395 (TCC); Breslaw v. AG of Canada, 2005 DTC 5683 (FCA); Snowball v. The Queen, 97 DTC 512 (TCC); Précost v. Minister of National Revenue, [1996] 1 CTC 2701 (TCC); and Fukushima et al. v. The Queen, 99 DTC 553 (TCC).
75 Supra note 34.
Notwithstanding that the appellant, as a farmer, may have been accustomed to reporting his income on a cash basis and, as innocently as it may have been done, reporting subsequent land sales in his tax return on a cash basis rather [than] on an accrual basis, distorts the amount of income earned by the appellant in the taxation year in which it was earned and constitutes a “misrepresentation” within the meaning of Section 152(4) of the Act.

It is not necessary to determine here whether the appellant’s “misrepresentation” was the result of wilful default or fraud in filing his return; it is sufficient in my view that the misrepresentation be attributable to neglect or carelessness. It is very difficult for me to conceive that the appellant could not or would not reasonably obtain professional advice, if necessary, and proceed with the same care in accurately reporting his income from the sale of land, as he evidently did in having the land surveyed and subdivided, in order to realize the greatest possible income from their sales. On that basis alone the appellant in my opinion misrepresented his income for 1971 due to neglect and carelessness in reporting his income on the cash method of accounting.76

*Farm Business Consultants Inc. v. The Queen*77 is a case where the court found that the taxpayer had filed in a manner that it either knew did not accord with the true legal relationships between the parties, or would have known had any inquiry been made. In this case, the taxpayer company was engaged in the business of providing financial, accounting, and tax services to farmers. In 1982, the taxpayer along with its parent company (together “FBC”) purchased the assets of two companies carrying on the same type of enterprise (“Agricultural”). The only asset of significant value to FBC was goodwill, which consisted substantially of Agricultural’s approximately 3,200 customers. In the purchase and sale agreement, the goodwill was assigned a value of $1, and the contract provided that Agricultural was to receive $96,000 per year for a term of seven years pursuant to a consulting contract. By the time of closing, the consulting agreement had been amended to provide that the consultants would only be required to devote a maximum of five days’ service per year to FBC. In actual fact, other than two telephone calls and one meeting, no consulting services were ever performed.

Each year the taxpayer deducted the consulting fees in calculating its tax. The minister reassessed to disallow these deductions. By the time of reassessment, some of the years had become statute-barred and the taxpayer objected. The court found that the agreements did not reflect the true legal relationships, in that the “consulting agreement” was never intended to be acted upon but was rather an attempt by FBC’s president to turn payments for goodwill into currently deductible expenses.

The court acknowledged that the taxpayer’s president may have believed that where parties to a transaction choose to describe or misdescribe it by a particular formula of words, the description is conclusive, and that he may have failed to recognize that such arrangements, however prevalent they may be, were ineffective.

76 Ibid., at 244.
77 Supra note 11.
The court stated, however, that “[h]ad he taken the trouble to speak to a moderately competent tax lawyer or accountant he would unquestionably have been told that the scheme did not work.”\textsuperscript{78} The court had no difficulty in concluding that the minister was justified in opening up the statute-barred years. The decision was upheld on appeal without further discussion.

Pearlman et al. v. The Queen\textsuperscript{79} is a case where the taxpayer adopted a characterization that, given the facts, was so unreasonable that could not realistically have been considered possible. Briefly, the taxpayer, a long-time lawyer and investor in land, was sued by a company for specific performance of a purchase and sale contract for real estate, which he had refused to complete on the assertion that the purchaser’s cheque, despite not having been presented for payment, was NSF. The taxpayer did not counterclaim (and could not recall whether he had filed a statement of defence) and settled by conveying his property to the purchaser in exchange for the original contract price of $900,000. The taxpayer did not include this sum in his tax return, and when the minister discovered the disposition after the statutory period had lapsed, the taxpayer was reassessed pursuant to subparagraph 152(4)(a)(i).

The taxpayer’s position was that the sum represented general damages from settling the lawsuit, and the amount was paid to him as compensation for his aggravated health problems, which were exacerbated by the purchaser’s conduct. He maintained that the sale was abortive and that he did not sell the land to the purchaser but merely agreed to transfer it to the purchaser as part of a settlement. He asserted that he had spoken with someone at the CRA, had explained that he had received a bad cheque for some property and would be receiving a payment in the form of general damages, and had been advised that general damages were not taxable (although the CRA employee apparently would not put that opinion in writing). He purported to have relied on the CRA employee’s advice (notwithstanding that the question posed assumed that the amount was general damages), and did not consider obtaining legal advice in this regard.

The court considered the taxpayer’s reasoning to be entirely irrational and held that there could be no doubt that the minister had the right to reassess the taxpayer, finding that “[h]is nexus with reality [was] so tenuous that those who reside in the Kingdom of the Wilfully Blind can, by comparison, be heralded as clairvoyants.”\textsuperscript{80} The court characterized the taxpayer’s misrepresentation as being made by wilful default.

A case closer to the line than Pearlman is Produits Forestiers St-Armand,\textsuperscript{81} where the taxpayer cited case law to support its filing position that certain expenses were current rather than capital. The court nevertheless found that the taxpayer’s position

\textsuperscript{78} Ibid., at 204.

\textsuperscript{79} 97 DTC 565 (TCC). Both Mr. Pearlman and his wife were appellants in this case; however, because the wife’s negligence was considered to arise from relying on her husband, the discussion will be limited to his circumstances.

\textsuperscript{80} Ibid., at 572.

\textsuperscript{81} Supra note 9.
was contrary to clearly settled law. The court concurred with certain passages in the case law cited by the taxpayer but stated that the principles they expressed, rather than providing any support for the taxpayer’s position, confirmed the assessment.

The taxpayer in this case operated a lumber company and had deducted the following items as running expenses: costs associated with building and decorating a house for its principal; costs of paving a new yard; costs of a zoning application and legal fees relating to the purchase of land for the business; costs for the construction, assembly, and improvement of machinery and equipment; and costs for the purchase of additional equipment such as a truck scale, a 3,000-gallon reservoir, a hydraulic press, and a snowplough. The taxpayer’s position was that the expenses either related to repairs or had been considered current because the amounts were not large or because an asset that should otherwise have been capitalized, such as the snowplough, was used for only a short time.

The court held that the evidence revealed a certain carelessness in the reporting of expenses and that the classification of the expenses as current showed an indifference as to the accuracy of the return. (The individuals responsible for accounting had not testified and their absence was not explained.) The law was settled and there was no ambiguity: the actual repair costs had already been accounted for as current expenses, and the evidence clearly revealed that the expenses at issue were to provide a lasting benefit to the taxpayer. The court did not believe that the taxpayer’s external accountant could have seriously entertained the idea that the cost of a capital asset becomes a current expense because the asset is of little use at the end of the year. *Produits Forestiers St-Armand* thus confirms that a filing position that is contrary to settled law will permit reassessment beyond the normal period. It is not enough to merely assert jurisprudential support for your position; its application must also be reasonable in light of the underlying facts.

From our review, *Chartwell Management Inc. et al. v. The Queen*\(^{82}\) appears to be the one judgment in the context of subparagraph 152(4)(a)(i) where the court could potentially be seen as permitting reassessment in the face of a bona fide filing position, although we suggest that the better view is that the court’s decision was made on the basis that the taxpayers’ accountants, upon whom the taxpayers relied, did not “thoughtfully, deliberately and carefully” assess the law applying to the amounts in issue. The taxpayer’s position was also not disclosed in the return as filed.

In *Chartwell*, the taxpayer companies had invoiced another company for various services and equipment they had provided, but did not include the invoiced amounts in their tax returns.\(^{83}\) At the time the invoices were issued, the recipient company was not in any position to pay them; in fact, they were never paid, and eventually the amounts owing were cancelled. The decision not to report the invoiced amounts, and also to not reflect them in the companies’ financial records, had been made on

\(^{82}\) 2004 DTC 3638 (TCC).

\(^{83}\) There was no suggestion that the companies employed a cash basis of accounting, and this was not argued.
the advice of a major international chartered accounting firm. The firm had relied on the *CICA Handbook*, which stated that recognition of revenue required the amounts to be reasonably assured of collection and suggested that it might be appropriate to defer recognition of revenue where there was uncertainty as to ultimate collection. When the taxpayers were reassessed to include the invoiced amounts, the normal reassessment period for one of the years had passed.

The court found that the failure to include the invoiced amounts was directly contradictory to the requirement in paragraph 12(1)(b) of the Act, and noted that for income tax purposes the Act overrode the *CICA Handbook*. Although the court found that the debts were already bad debts at the time the invoices were issued, the requirements of paragraph 12(1)(b) were clear; accordingly, the taxpayers should have included the amounts under that provision and then reflected them as bad debts. While the court declined to impose gross negligence penalties since the taxpayers had relied on a major accounting firm, the late reassessments were permitted on the basis of wilful default.

The court did not refer to any jurisprudence under subparagraph 152(4)(a)(i), and there was no discussion other than to say that the non-reporting was “in direct violation of paragraph 12(1)(b).” We suggest that the court’s decision should be read as allowing reassessment on the basis that the taxpayers’ treatment of the invoiced amounts was clearly not acceptable for tax purposes, given the unequivocal language of paragraph 12(1)(b). That is, this was not a situation where the filing position was taken after a thoughtful, careful, and deliberate assessment of the law; rather, the filing position was based on an accounting treatment that, while possibly appropriate for accounting purposes, was clearly inconsistent with the Act. To the extent that this decision can be read otherwise, it was made without any reference to the standards set in the earlier cases, and would be anomalous and inconsistent with prior and subsequent jurisprudence under subparagraph 152(4)(a)(i).

*Sidhu v. The Queen* is a case where the CRA was permitted to reassess after the normal period because the taxpayer had not taken proper steps to consider the propriety of his filing position and had withheld information from his tax preparer. The taxpayer had acquired a rental property in 1983, which he sold in 1993 without reporting the gain. According to the taxpayer, he had moved into the property sometime in 1992 and thus believed that the sale proceeds were not reportable because the home was his principal residence. The taxpayer had apparently arrived at this filing position in reliance on information from fellow longshoremen. Counsel asserted, citing *Regina Shoppers* and *Reilly*, that since the taxpayer believed that he did not have to report the gain, there could be no misrepresentation.

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84 Canadian Institute of Chartered Accountants, *CICA Handbook* (Toronto: CICA) (looseleaf).

85 It seems odd to us that the court would characterize the taxpayers’ conduct as wilful default but nevertheless decline to uphold penalties under subsection 163(2).

86 Supra note 82, at paragraph 16.

87 2004 DTC 2540 (TCC).
The court noted that the fact that there was an issue of whether there was a gain to report lent to the appearance that the asserted honest belief was credible as such;\(^88\) however, on the facts, the position was simply not sustainable. The taxpayer was asking the court to accept that at the time he filed his return, he believed that the principal residence exemption applied to his entire gain, without regard to the fact that he had used the property as a residence only for a short period (if at all) prior to the sale, after holding it as a rental property for nine years. The taxpayer had an accountant prepare his return for the year, relying on the accountant to compute his tax liabilities on his real estate holdings and trucking business, yet had not mentioned the disposition. The court noted that there was no reasonable, diligent pursuit of determining a correct reporting position at the time of filing, and a prudent (or even reasonable) person in the taxpayer’s circumstances would have discussed the filing position with the adviser upon whom reliance was placed for other reporting issues. In the court’s view, the taxpayer’s behaviour showed a wanton disregard of compliance obligations in a self-assessment system, and the subparagraph 152(4)(a)(i) requirements had clearly been met.

The final case we will discuss is *Ridge Run Developments Inc. v. The Queen*\(^89\). In *Ridge Run*, the minister took the position that the taxpayer, in calculating its income for the 1997 taxation year, misrepresented its total income by including a non-capital loss carried forward from the 1994 taxation year, and that the misrepresentation was attributable to wilful default or, alternatively, to carelessness or neglect.

The facts are rather complicated, but the essence is that the taxpayer was involved in a failed real estate project; after much negotiation, and threatened litigation, the taxpayer executed a settlement agreement and mutual release in 1994. The taxpayer’s accountant prepared the taxpayer’s 1994 income statement for financial statement purposes, identifying a $1.7 million gain on debt forgiveness to reflect the result of the release. In preparing the taxpayer’s tax return for that year, the accountant backed out the debt forgiven from taxable income on an income adjustment schedule, but did not reduce the company’s loss carryforward position. The 1994 financial statements were filed with the return. In 1997, the taxpayer then applied the loss carryforwards against taxable income. The taxpayer’s officer who signed the 1994 and 1997 returns had neither reviewed them nor supervised any aspect of their preparation, and had not questioned the accountant as to the treatment of the $1.7 million. Relying on the 1994 financial statements, the minister reassessed the 1997 taxation year and reduced the 1994 carryforward to reflect the section 80 treatment of debt forgiveness. The taxpayer objected and there followed a period of discussion between the taxpayer and the CRA, which was apparently fraught with confusion because the CRA had not been provided with complete information. The CRA eventually issued the reassessment under appeal after the statutory limit had expired.

\(^{88}\) The taxpayer also argued that there had been a change in use and a deemed disposition in 1992 (which year was not reassessed), stepping up the cost base and eliminating any gain, even if reportable. The court suspected that the asserted change in use was contrived as an afterthought.

\(^{89}\) Supra note 21.
The minister’s position was that the mutual release had discharged the taxpayer’s liability, and that the taxpayer had made a misrepresentation by carrying the non-capital losses forward without making the reduction for debt forgiveness required by subsection 80(3). The taxpayer’s officer had been negligent in not reading the 1994 and 1997 returns before signing them, and in not making any effort to question the accountant or supervise any aspects of the tax returns.

The taxpayer argued that it had given up a number of rights in the settlement agreement such that there was a setoff, and therefore no forgiven amount. The court rejected the taxpayer’s characterization of the facts, finding that the taxpayer’s evidence was nothing more than conjecture or supposition. The accountant had himself recorded the amount as a gain on debt forgiveness. The court noted that the taxpayer’s witness admitted that no analysis had been done of the loans made and debts owing to prove that any of the loans were actually in the amount reflected in the release.

The taxpayer made an additional argument that subsection 80(3) did not apply to its 1997 taxation year based on an interpretation of the language in subparagraph 80(3)(a)(ii), and noted that the clause in issue had not been subject to judicial interpretation. The taxpayer argued that a non-CRA accountant might have determined that the amounts were not to be included in computing taxable income, and asserted that if there was any misrepresentation, it was a misrepresentation of the interpretation of the law, which is not included in the definition of misrepresentation permitting reassessment under subparagraph 152(4)(a)(i). The taxpayer’s position was that the case involved a professional accounting decision to treat the amounts as they were treated, and that this was done in a way that both professional practice and the provisions of the Act support. The taxpayer’s submission further maintained that there was no carelessness or neglect since the accountant had actively made the calculations, directing his mind to the very matter.

The minister disputed the taxpayer’s interpretation of subsection 80(3), arguing that the legislation was clear in its application to the taxpayer, and the Crown’s witness rejected the suggestion that a non-CRA accountant might have concluded that the carryforward reduction was not required. Regarding the taxpayer’s argument that any misrepresentation was only a mistake of law, the minister’s position was that the taxpayer should have presented the accountant’s evidence as to what his interpretation of the law was, since without such evidence there was nothing more than the same type of calculation error as in Nesbitt. It was not enough to say that the minister could have seen the error from a careful analysis of the accompanying documents, and without any evidence from the taxpayer’s officer or accountant to explain why the $1.7 million was being ignored, there was a prima facie case of negligence.

Regarding the interpretation of subparagraph 80(3)(a)(ii), the court found that the taxpayer’s position did not fit within the scheme of the Act. The court could see nothing in the wording of the provision that would cause it to conclude as the taxpayer did, and the words used in the provision did not lend themselves to the taxpayer’s interpretation. Turning to subparagraph 152(4)(a)(i), the court noted the taxpayer’s position that its treatment of the amounts in issue was not a misrepresentation in fact, but rather was based on the opinion of a professional who determined that it was the
proper way to make the required adjustment. The court then referred to the minister’s position that a professional accountant should note all sections of the Act and their application, and that the taxpayer’s accountant had not done so. The court accepted the minister’s argument that in the absence of evidence of the accountant or officer to give an explanation as to why the $1.7 million was just being ignored, there was a prima facie case of negligence on behalf of both the accountant and the taxpayer. The court noted that the taxpayer might have avoided a finding of negligence had its officer questioned the accountant regarding the $1.7 million and been given an explanation, but he had not done so. There was no evidence to support the taxpayer’s position that a professional accounting decision had in fact been made to file as it did, and the minister had led evidence to the contrary. The court was satisfied that the minister was entitled to make the assessment after the normal period.

*Ridge Run* provides support for the idea that a carefully considered and reasonable filing position, made on the advice of a competent professional, protects against the application of subparagraph 152(4)(a)(i). However, it is not enough for a taxpayer to merely assert after the fact that the return was filed in reliance on a considered opinion, or to show that there might have been a legal interpretation available to support a particular income treatment at the time of filing, where there is no evidence that any such legal basis was actually considered and any decision actually taken thereon.

**Where Are We Now?**

Since each situation is ultimately driven by its own facts, there is no clear bright-line test available for predicting whether a court will uphold or vacate a reassessment made under subparagraph 152(4)(a)(i). That said, some guidelines and governing principles can still be derived from reviewing the outcomes in the cases considering reassessments based on a disputed legal interpretation or characterization of the facts.

The following circumstances were found by the courts not to justify late reassessment:

- The taxpayer filed on the basis of an honestly held belief after careful consideration of the statutory reporting requirements, or in circumstances where the particular factual characterization adopted was intended, and was carefully and thoughtfully planned.

- The taxpayer believed that an amount should not be included as income and had received legal advice that there was an argument under the Act to support its position.

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90 *Reilly*, supra note 35.

91 *1056 Enterprises*, supra note 47.

The taxpayer adopted a reasonable interpretation of the Act where the proper application of the provisions was not entirely clear,93 or adopted an interpretation of the Act or a treaty where there was a legitimate question as to its application and some foundation for the position taken.94

The taxpayer filed on the basis of a reasonable interpretation of the facts given the state of the law at the time of filing,95 or adopted a filing position that was reasonable and bona fide where the characterization of the transaction or its effects was not clear.96

The taxpayer was reassessed on the basis of a “misrepresentation” that was effectively a judgment call and was not so unreasonable that it could not have been honestly held.97

The taxpayer used a valuation method that the CRA did not endorse, where there was legitimate disagreement as to the proper valuation method to be used in the circumstances.98

In the following circumstances, the courts have upheld the reassessment under subparagraph 152(4)(a)(i):

- The taxpayer’s filing position was inconsistent with clear law, either as to the application of a particular provision of the Act or as to the characterization to be given to a particular transaction or expenditure.99
- The taxpayer’s filing position was divorced from reality and entirely unreasonable in light of the facts,100 or was based on a transaction that was actively

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93 Can-Am Realty Limited et al. v. The Queen, 94 DTC 6293 (FCTD); and Bondfield Construction Company (1985) Limited v. The Queen, 2005 TCC 78. Bondfield was decided under the parallel provision of the Excise Tax Act, RSC 1985, c. E-15. Paragraph 298(4)(a) of that statute provides that “[a]n assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter, made a misrepresentation that is attributable to the person’s neglect, carelessness or wilful default.” There appear to be very few cases where this provision has been considered other than for actual errors in failing to remit tax. (That is, the taxpayer collected the tax, but because of some oversight in accounting or otherwise, it did not remit; in these cases, there was no decision by the taxpayer not to remit the tax.) The few cases involving legal interpretation have generally followed the cases decided under subparagraph 152(4)(a)(i), or have otherwise not referred to any authority but have applied the same principles.

94 Chaumont, supra note 14.

95 Donato v. The Queen, 2009 DTC 2111 (TCC).

96 Bisson, supra note 22; Savard, supra note 69; Glazier, supra note 42; Regina Shoppers, supra note 34; and Gauthier v. MNR, 93 DTC 758 (TCC).

97 Ver, supra note 12; Petric, supra note 59; and Regina Shoppers, supra note 34.

98 Petric, supra note 59.

99 Produits Forestiers St-Armand, supra note 9; Froese, supra note 34; and Srougi v. The Queen, 2008 DTC 3793 (TCC).

100 Pearlman, supra note 79.
structured so that it could be reported in a way that clearly did not reflect the reality of the situation.\textsuperscript{101}

- The taxpayer failed to take any, or adequate, steps to understand the relevant provisions or their proper application.\textsuperscript{102}
- The taxpayer withheld facts from the tax preparer that would have affected the filing position taken, or withheld the existence of the transaction entirely.\textsuperscript{103}
- There was no true ambiguity in the characterization to be given on the basis of the existing facts.\textsuperscript{104}
- The taxpayer’s filing position was not taken in good faith, since the taxpayer either knew that the position he was adopting was not supported by the facts or law, or the taxpayer would have known had he not chosen to avoid inquiry.\textsuperscript{105}
- There was no indication that the taxpayer had even considered the statutory basis asserted before the court at the time the return was actually filed.\textsuperscript{106}

What appears from this review is that the courts have upheld late reassessments in circumstances where the taxpayer’s filing position was not supportable in the legal landscape existing at the time of filing, either because the position taken was contrary to clear law, or because it would have been had unambiguous facts been properly characterized, and where diligent and careful consideration would have made this evident at that time. Assessments have also been upheld where the taxpayer claimed reliance on a professional adviser but had not provided the professional with the relevant details to properly consider the issue, or where there was no evidence that any professional judgment had in fact been made.

On the other hand, where the taxpayer was conscientious in his approach to filing, and had at least some basis to support his bona fide position that was not unreasonable given the facts and law, the courts have refused to find that there has been any misrepresentation within the scope of subparagraph 152(4)(a)(i), whether or not they would ultimately have agreed with the taxpayer’s treatment. From our review of the decided cases, the tax courts have never permitted a late reassessment to stand where a taxpayer has carefully and deliberately considered its position and has filed a return that fully and accurately discloses the position being taken.

\textsuperscript{101} Farm Business Consultants, supra note 11; and Prévost, supra note 74.

\textsuperscript{102} Fukushima, supra note 74; Boyer v. The Queen, 2008 DTC 4891 (TCC); Sobolev v. The Queen, 2002 DTC 1217 (TCC); and Edible What Candy Corp. v. R, [2002] 1 GSTC 33 (TCC).

\textsuperscript{103} Can-Am, supra note 93; Sidhu, supra note 87; and Angus, supra note 28.

\textsuperscript{104} Pearlman, supra note 79; and Produits Forestiers St-Armand, supra note 9.

\textsuperscript{105} Prévost, supra note 79.

\textsuperscript{106} Breslaw, supra note 74.

\textsuperscript{107} Dalphond, supra note 74; and Sidhu, supra note 87.

\textsuperscript{108} Ridge Run, supra note 21.
THE PURPOSE REVISITED

In our opinion, the CRA’s recent assertion that subparagraph 152(4)(a)(i) can apply in circumstances where a taxpayer has adopted a legally supported filing position that is clearly and accurately disclosed in its return is not only contrary to the jurisprudence but also inconsistent with the purpose of the provision itself.

As discussed earlier, the courts have characterized the purpose of the reassessment power in subparagraph 152(4)(a)(i) as remedial, holding that this provision is intended to apply where the taxpayer’s neglect, carelessness, wilful default, or fraud has denied the minister the opportunity to correctly assess the taxpayer’s liability under the Act in the first instance. Where a taxpayer has sought and considered researched advice and has taken a filing position that is adequately disclosed in the tax return, there is no need for any such remediation.109

Early cases such as Taylor established that a “misrepresentation” must be a statement that is false in both fact and substance at the material time. Where a taxpayer files on the basis of a considered legal opinion, provided that all the relevant facts are themselves clearly and properly placed before the adviser and are presented accurately in the tax return, and provided that there is a foundation in law for the filing position taken, the interpretation of the law as it applies to the facts, even if ultimately incorrect, should not properly be viewed as a misrepresentation that would engage the application of subparagraph 152(4)(a)(i). Recall, for example, the comments of the Tax Review Board in Glazier. Notwithstanding that the board characterized the taxpayer’s approach as unusual and possibly bizarre, it held that it was not “anything approximating a ‘misrepresentation’” since the taxpayer’s approach, including its interpretation of any possible problems, was clearly laid out in the schedule to its return.110 A similar proposition is seen in the court’s reasoning in Ver, where the court found it “impossible to accept” that the taxpayer’s differing view of the application of various provisions could constitute a misrepresentation, noting that there was no indication that the amounts reported had themselves been falsified.111

109 Contrast the decision in Nesbitt, supra note 13 (FCA), at 6589, where it was stated that the ability of the minister to perceive the error by assessing the supporting documents would not relieve against reassessment. It should be remembered that Nesbitt involved an incorrect amount on the return attributable to a calculation error, and the court’s expressed foundation for its statement was the concern that a taxpayer could then be careless in completing the return provided that accurate basic data in working papers were attached. In the situation considered here, we are not dealing with computational errors that would require the CRA to review and verify calculations; instead, we are dealing with an accurate presentation of the amounts and a reasoned interpretation as to their legal treatment.

110 Supra note 42, at 50.

111 Supra note 12, at paragraph 13. A similar sentiment is also evident in Hudson Bay, supra note 25 (FCTD), at 6250-51, where it was held that a particular tax treatment that was evident in the taxpayer’s return did not constitute a false statement or omission. It should be remembered, however, as was exemplified in Angus, supra note 28, that a misrepresentation may involve
We note, however, that there may be situations where a taxpayer’s position would not be evident on the return as filed. One such situation would be akin to the Pearlman case, where the taxpayer’s decision to treat an amount as general damages in the nature of a windfall rather than as income from the sale of real property led him to omit any reference to the sum in his return. Other examples would be the non-reporting of an amount that is arguably employment income on the basis that it is a non-taxable benefit, or a decision such as the one made in Chartwell not to recognize certain sums as revenue. In these circumstances, absent some other disclosure of the amount or transaction, the minister would have no ability to challenge the taxpayer’s interpretation at the initial audit stage, and there should accordingly be greater scope for the remediation afforded by subparagraph 152(4)(a)(i). Even if the taxpayer had sought out and received a legal opinion to support his position, it would not be reasonable in many circumstances to consider that the minister should be precluded from reassessing when the relevant transaction or state of affairs is brought to light only after the normal reassessment period has expired.

While there are cases such as Reilly and Savard where the court has refused to uphold late reassessments notwithstanding the absence of any disclosure in the return as filed, these have all been cases where the taxpayer maintained no doubt that the filing position was correct. A taxpayer who has taken an uncertain position that is not clearly evident on the return as filed may wish to consider disclosing additional information with the return so that the minister will be suitably alerted to the issue.\[^{112}\] Provided that such disclosure is made and the disclosure is consistent with the actual legal transactions, which are not themselves shams, there should be no need for the minister to rely on the remedial powers afforded by subparagraph 152(4)(a)(i), since the minister will have the opportunity to properly review the return in the first instance.

In our opinion, this approach should be sufficient to protect a taxpayer who has been careful in obtaining legal advice and has adopted a position that has a realistic possibility of success.

**THE TAX ADVISER’S ROLE**

The case law has typically been more supportive of the argument that the taxpayer has taken a bona fide and reasonable filing position arrived at without neglect in circumstances where the taxpayer has received tax advice from a fully informed,

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\[^{112}\] For a very conservative approach (the strictness of which is not mandated by the jurisprudence), see Stanley E. Edwards, “How Much Detail About a Transaction Is Required To Be Set Out in a Tax Return?” in *Income Tax Enforcement, Compliance, and Administration*, 1982 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1983), 242-45.
What Level of Opinion Should Be Required To Support a Reasonable and Bona Fide Filing Position?

If the taxpayer has received and considered competent advice, the question becomes whether there is any particular standard of certainty that the advice must meet. Although we believe that generally this should not matter, provided that the taxpayer’s position is adequately disclosed in the return, we have distilled our views on what we believe would constitute advice that a taxpayer should properly be able to rely on.

There are various levels of comfort that tax advice may provide. At one end of the spectrum is a so-called “will” level of opinion, which is essentially regarded as representing 100 percent certainty of success. At the other end of the spectrum is an opinion that the filing position is not frivolous but that there is no realistic possibility of success if that position is challenged. In the latter situations, taking the filing position is akin to engaging in an audit lottery and is unlikely to constitute a reasonable basis for arguing that the position is bona fide. On the other hand, we submit that a taxpayer should be entitled to rely on an opinion that is below the “more-likely-than-not” standard, so long as there is a realistic possibility that the taxpayer’s position will be successful. This is especially so given the current approach to statutory interpretation.

The law surrounding statutory interpretation has developed considerably over the years, and in its wake so too has the potential for legitimate disagreement. At a
time when the “plain meaning” approach to statutory interpretation was widely endorsed and applied, there was less opportunity for ambiguity to arise with respect to the application of particular provisions of the Act. While there was still potential for disagreement over the proper characterization of a transaction based on any given set of facts, the function and application of any particular provision were less uncertain.

In the new era of “textual, contextual and purposive” interpretation of statutes, the opportunity for divergent but reasonable interpretations is considerably expanded. It is a relatively rare occasion where there is jurisprudence directly on point, or a statutory provision with a complete lack of ambiguity, and in the absence of case law on the same or directly analogous facts, it is often not clear how a court will ultimately interpret a provision or transaction. A particularly good example of this can be seen from the statistics on GAAR cases. A recent review puts taxpayer success on appeals from GAAR assessments at over 60 percent. In this context, it is evident that there is room for legitimate disagreement with the CRA as to the proper application of the Act to a given transaction. Accordingly, we suggest that the level of opinion required for a filing position to be considered “bona fide,” and thus protected against reassessment under subparagraph 152(4)(a)(i), should reflect this reality.

As noted above, it appears that the tax courts have not yet expressly considered the level of opinion that a taxpayer can reasonably rely upon to support a bona fide belief, and very few instances have indicated the strength of the opinion given; however, the court’s decision in Sheff, that subparagraph 152(4)(a)(i) did not apply where the taxpayer believed in its position and had obtained legal advice that an argument could made in support of that position, implies that a taxpayer is able to rely on an opinion below the more-likely-than-not standard without contravening subparagraph 152(4)(a)(i). That is, the fact that a taxpayer has not been assured that his preferred interpretation is correct, but merely that it is realistically viable, should be sufficient grounds for an honest and reasonable belief.

The more interesting question, perhaps, arises where a taxpayer openly acknowledges that his position might not be correct, or has been given an opinion that expressly acknowledges that it might not be correct, but he honestly believes, either on his own review or on the basis of the opinion, that it realistically could be. Again, it seems that the tax courts have not confronted this situation, although Sheff came

116 See, for example, the Supreme Court of Canada’s landmark decision in Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, at paragraphs 10–13.
118 We note that this assertion is not novel. According to Gartner and Skingle, supra note 7, at 8:8–9, “[a] misrepresentation does not describe, or in any way relate to, the taxpayer’s position or view on a matter of law, provided the position is a considered one and not specious”; in their view, it would only be in circumstances where there is virtually no chance of success in sustaining a particular filing position that the position would likely constitute a misrepresentation.
close. (It would be interesting to know what was contained in the remainder of the opinion letter in that case.) It is also noted that cases such as Produits Forestiers St-Armand and Pearlman make it clear that there must be a reasonable basis for taking a particular position that is based on an honest characterization of the facts; merely invoking authority, without showing how it actually supports the taxpayer’s view in the circumstances, will not suffice.

From our review, where there has been any direct discussion, the cases have involved taxpayers who allegedly maintained no doubt that their position was the correct approach at the time of filing; accordingly, the outcome has turned on whether the taxpayer had properly informed himself of the law and had carefully assessed the situation, or whether the taxpayer was to be believed. In the latter situation, the cases appear to involve absolute findings either that the taxpayer believed that his position was undoubtedly correct, or that the taxpayer actually knew that it was not at all supportable or would have known had he not chosen to remain uninformed. Accordingly, the cases have not expressly developed an approach where the taxpayer has an honest belief that his legal interpretation could be correct, but not that it necessarily is correct. In our opinion, however, the remedial purpose underlying the provision, as well as the courts’ comments, especially in more recent decisions such as Ridge Run, Savard, and Chaumont, support the idea that a reasonable and considered filing position, advanced openly by a taxpayer in good faith, should be sufficient to protect against the application of subparagraph 152(4)(a)(i).

Although the cases at times speak of a taxpayer filing in the manner that he “truly believes to be correct,” we submit that such an absolute test was not intended to apply, and would not be appropriate, where a taxpayer has adopted a filing position that he believes has a realistic possibility of success. In this situation, the taxpayer may not “truly” believe any position to be correct, but he does honestly believe that the position he has adopted has a real chance of being found correct by a reviewing court. Such a taxpayer certainly does not believe that his approach is incorrect, since this would be incompatible with any honest belief in potential success.

As noted recently in Savard, our self-assessment system puts no duty on a taxpayer to file in the manner that would attract the greatest tax burden where the taxpayer has a reasonable foundation to justify his interpretation. We submit that a taxpayer who has obtained advice and honestly believes that his filing position has a realistic possibility of success meets this threshold. To take a page from Chaumont, concluding that a taxpayer in such circumstances has made a misrepresentation sufficient to permit reassessment under subparagraph 152(4)(a)(i) would affect any taxpayer’s right to contest the merits of an assessment, and would render the statutory limit essentially theoretical. Were this not the case, the only means by which a taxpayer could advance a reasonable, though admittedly uncertain, filing position, without effectively waiving the limitation period and exposing himself to indefinite uncertainty, would be to file in the most onerous way possible and then to object to his

119 See, for example, Regina Shoppers, supra note 34 (FCA), at 5105.
own assessment as filed. Although it is recognized that a taxpayer is permitted to do so, this approach is inconsistent with a system based on self-assessment and has been expressly rejected as inappropriate in cases decided under subparagraph 152(4)(a)(i), including the decision of the Federal Court of Appeal in Regina Shoppers.\textsuperscript{120}

It is interesting to note that even the minister has objected to the inconvenience that would be created by such a process. In \textit{Imperial Oil Limited et al. v. The Queen},\textsuperscript{121} the taxpayers were assessed in accordance with their returns as filed. The taxpayers then objected to the assessments, asserting for the first time that they were entitled to foreign exchange losses; and when the minister had neither confirmed the assessments nor reassessed within 90 days, the taxpayers filed notices of appeal. The taxpayers’ course of action had apparently been prompted by a Finance news release accompanying proposed amendments to the Act, which said that parties involved in outstanding litigation would be entitled to argue on the basis of the existing law, but that the changes would prevent other taxpayers from seeking to benefit from the perceived deficiency. (The “perceived deficiency” was the ability to reclassify certain expenditures as Canadian exploration expenses or Canadian development expenses, with the result of higher rates available for writeoffs and greater resource allowance deductions.) The taxpayers evidently anticipated that the CRA would object to their foreign loss claims, did not want to wait a possible three years for an audit and reassessment, and believed that their rights would be better protected if they were involved in outstanding litigation.

The minister brought motions to have the appeals dismissed or stayed. Among the arguments advanced by the minister was an assertion that proceeding in this manner would complicate the orderly and deliberate progress of the audit process. The Tax Court held that the Act did not foreclose the taxpayers’ approach, and while it may be inconvenient for the CRA, this was not a reason to deprive a taxpayer of its statutory rights. The minister’s motions were dismissed and the minister appealed to the Federal Court of Appeal, which affirmed the lower court’s judgment. The Court of Appeal noted that the minister had adopted a practice of issuing initial assessments very quickly, basing them on a mechanical review or arithmetical check. While there were sound policy reasons for this, the Act does not require the minister to make an initial assessment of every income tax return prior to a full examination. The court noted that the minister’s statutory obligation to assess “with all due dispatch” is an elastic standard that gives the minister sufficient discretion to determine that a particular return should not be assessed until after a more detailed review.\textsuperscript{122} The court also noted that the minister’s ability to audit and reassess continues throughout the normal reassessment period.

We believe that \textit{Imperial Oil} supports the idea that, provided that there is sufficient information in the return to enable the CRA to determine whether there are

\textsuperscript{120} Supra note 34 and the discussion above at notes 49 to 52. See also Savard, supra note 69.

\textsuperscript{121} 2003 DTC 179 (TCC); aff’d. 2003 DTC 5485 (FCA).

\textsuperscript{122} The “all due dispatch” requirement arises out of the introductory words to subsection 152(1).
issues requiring further consideration, the minister has ample time within the normal reassessment period to challenge a taxpayer's differing interpretation should he wish to do so. A practice of adopting the CRA's preferred interpretation and then objecting to the return as filed would be onerous for all parties involved; it should not become a precondition to a taxpayer's ability to advance an uncertain filing position with a realistic possibility of success, without losing the protection of the statutory prescription in subsection 152(4).

**What Is a Sufficient Basis for a “Realistic Possibility”?**

In order to support a “realistic possibility” opinion, there must be a reasonable basis for the filing position that is taken. The courts have recently refused to uphold reassessments under subparagraph 152(4)(a)(i) where there was sufficient information to justify the interpretation adopted (Savard); where there was a legitimate question that had a modicum of foundation (Chaumont); and where, in light of the jurisprudence existing at the time of filing, the filing position was not an unreasonable view to take (Donato v. The Queen). Accordingly, we believe that a reasonable basis exists where there is some authority for the filing position taken, and no obvious authority to the contrary. Among other things, authority may include

1. a reasoned interpretation of a statutory provision;
2. a reasonable interpretation of judicial authorities that provide support for the filing position, whether or not they are directly on point;
3. published guidance from the CRA including interpretation bulletins, published advance tax rulings, and technical interpretations;
4. explanatory notes prepared by the Department of Finance relating to the enactment of particular provisions of the Act;
5. in the case of tax treaty interpretation, commentary from the Organisation for Economic Co-operation and Development or other similar organizations; and
6. reasoned analysis contained in treatises and legal periodicals.

The filing position should take into account the relative strength of authorities that are contrary to the taxpayer’s filing position. Contrary published positions of the CRA that are adverse to the taxpayer’s position should be considered if the law clearly supports that position; however, it should be recognized that the CRA cannot use its own administrative policy to support an adverse position against a taxpayer in court. A taxpayer should independently determine whether the CRA’s adverse position is clearly supported by the law; in a case where there is no clear authority on point, a reasoned analysis from a qualified tax adviser should, in our view, constitute

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123 Supra note 95.
124 Canadian Occidental US Petroleum Corporation v. The Queen, 2001 DTC 295, at paragraph 30 (TCC).
a sufficient basis to file in a manner that is inconsistent with the CRA’s adverse published position. This proposition derives support from cases such as Regina Shoppers, Savard, and Sheff, where express knowledge of the CRA’s contrary position at the time of filing did not preclude a finding that the taxpayer’s considered filing position was both reasonable and bona fide, and we believe that it is further bolstered by the standards imposed on advisers under the tax preparer penalties in section 163.2.

The Relevance of the Tax Preparer Penalties

As discussed above, it is our opinion that where a taxpayer has received and considered tax advice from a competent adviser acting without negligence, the taxpayer should be able to substantiate that he had a reasonable and honestly held belief. To this end, the tax preparer penalties in section 163.2 offer further insight into the scope of advice upon which a taxpayer should reasonably be permitted to rely without being subject to the indefinite possibility of reassessment.

The third-party civil penalties for tax preparers took effect on June 29, 2000. Until then, the Act did not contain any provision applying civil penalties to those who counsel others to file their returns on the basis of false or misleading information, or who knowingly or recklessly rely on false information provided by their clients for tax purposes. The CRA’s stated objective in enacting the penalties was “to deter third parties from making false statements or omissions in relation to income tax or goods and services tax/Canada sales tax (‘GST/HST’) matters.”

Section 163.2, entitled “Misrepresentation of a Tax Matter by a Third Party,” contains two distinct penalty provisions, both premised on the third party’s participation in the making of a false statement or omission to be used by another person for purposes related to the Act.

Subsection 163.2(2), “Penalty for misrepresentations in tax planning arrangements,” authorizes penalties against third parties who make or cause another person to make a statement that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is false. Culpable conduct is defined as conduct that “is tantamount to intentional conduct . . . shows an indifference as to whether the Act is complied with . . . or shows a wilful, reckless or


128 “False statement” is defined in subsection 163.2(1) to include a statement that is misleading owing to an omission from the statement.
wanton disregard of the law.”129 The CRA’s position is that this provision, “the planner penalty,” is intended to apply to planning and valuation activities.130

The second type of penalty, “the preparer penalty,” is found in subsection 163.2(4), “Penalty for participating in a misrepresentation.” Under this provision, third parties can be subject to penalties if they make, participate in, assent to, or acquiesce in the making of a statement to, by, or on behalf of another person that the third party knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of that other person for a purpose of the Act. The CRA has stated that this provision is intended to apply to compliance activities.131

The CRA has provided guidance on the intended application of the provisions.132 In particular, the CRA has stated that the legislation is not intended to apply to differences of interpretation or opinion where there is bona fide uncertainty—for example, where the issue is not well settled in the jurisprudence.133 In the same vein, one of the factors that the CRA considers in deciding whether penalties will be assessed is whether the position taken is obviously wrong, unreasonable, or contrary to well-established case law.134

At the 2006 APFF round table, the CRA was asked whether the tax preparer penalties would apply to the professional preparing the tax return where, contrary to the CRA’s published position, a taxpayer takes the view in his return that GAAR does not apply because the CRA’s position is not supported by the jurisprudence.135 The CRA reiterated that the legislation is not intended to apply to differences of interpretation or opinion where there is bona fide uncertainty, and that in the absence of jurisprudence clearly supporting the CRA’s position, it was probable that the section 163.2 penalties would not be applicable.

The CRA’s approach seems appropriate in that the tax preparer penalties are aimed at preventing third parties from making or counselling the use of “false statements” for the purposes of the Act, and in Hudson Bay, the court held that “[s]omething more than mere disagreement” is required to constitute a false statement or omission.136

Although it is recognized that the statutory standard for applying the penalties to an adviser is higher than the threshold for invoking subparagraph 152(4)(a)(i), we suggest that the standards imposed on advisers under the Act are relevant in determining the advice that a taxpayer should safely be able to rely on without being

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129 Subsection 163.2(1), the definition of “culpable conduct.”
130 Carr and Pereira, supra note 125, at 1747-48.
131 Ibid.
133 Ibid., at paragraph 16.
134 Ibid., at paragraph 17.
135 Leblond, supra note 63, at 53:20, question 9; and CRA document no. 2006-0196021C6, October 6, 2006.
136 See supra note 26 and the related text.
considered negligent and attracting the possibility of late reassessment. To this end, given that the actions of a tax preparer are generally considered by the CRA to be acceptable in circumstances where the law is unclear and the tax preparer’s position, though contrary to that of the CRA, is reasonable, we suggest that it would be inconsistent to consider that a taxpayer, in relying on such advice in filing, had somehow made a misrepresentation attributable to neglect, carelessness, or wilful default. In other words, if the position of the adviser is considered reasonable (and provided that it is reasonable in light of the factual circumstances and the jurisprudential landscape), then the filing position of the taxpayer who relies on the adviser should also be reasonable, whether or not it is consistent with the CRA’s preferred interpretation.

We therefore believe that the CRA’s approach to the tax preparer penalties provides additional support for our proposition; that is, a taxpayer who has been given a researched opinion that his filing position has a realistic possibility of success and who discloses the filing position in his return should be able to file on that basis without being considered to have waived the statutory protection of the limitation period.

The Legal Opinion and Privilege

A related issue arises where the CRA proposes to reassess a taxpayer under subparagraph 152(4)(a)(i) on the basis of a disputed filing position, and in so doing seeks information as to the specific advice received and considered by the taxpayer in a legal opinion. The opinion, as a communication between the lawyer and the taxpayer client for the purpose of providing legal advice, is a confidential document covered by solicitor-client privilege, the production of which cannot be compelled unless the client waives the privilege. In a relatively recent judgment, the Federal Court opined on the sanctity of protecting privileged information that would reveal the nature of confidential legal advice, noting that the concept was not new—it had been held in the income tax context more than 40 years earlier that the minister was not entitled to use his powers to require a lawyer to disclose information covered by the privilege. Indeed, the CRA itself acknowledges that it cannot compel production of material that is subject to solicitor-client privilege. However, if the CRA requests access to the opinion at the audit stage in order for the taxpayer to avoid a proposed reassessment, the taxpayer is put in a difficult situation. What is a taxpayer to do in these circumstances?

If the taxpayer were to provide the actual opinion to the CRA, this would clearly constitute a waiver of solicitor-client privilege; the same would be true if the taxpayer

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138 *MNR v. Welton Parent Inc.*, 2006 DTC 6093, at paragraph 87 (FC).

were to disclose to the CRA the contents of the opinion while retaining the document itself.\textsuperscript{140} It is also probable that if only part of the advice contained in the opinion were to be disclosed, the doctrine of implied waiver would apply such that the taxpayer would be taken to have waived privilege over the opinion in its entirety.\textsuperscript{141} Further, should the taxpayer be forced to affirmatively assert his reliance on the legal opinion on appeal from a reassessment, this too could be taken as a waiver of the privilege on the basis that the taxpayer had put his state of mind in issue.\textsuperscript{142}

This is, in our view, an unacceptable result. Solicitor-client privilege has long been recognized as fundamental to the effective operation of the legal system; without the privilege, people would not feel free to make full and frank disclosure to their lawyer, and as a result, the accuracy of the legal advice obtained would be compromised.\textsuperscript{143} In order to preserve and respect the sanctity of solicitor-client privilege, we believe that the taxation system should recognize as sufficient the fact that an opinion has been received from a competent legal adviser addressing the issue under dispute, without the acknowledgment of that fact being treated as a waiver of privilege either during the audit stage or later if an assessment follows and an appeal is ultimately taken to court. One possible solution in difficult cases would be for the taxpayer and the CRA to agree to a procedure whereby an independent qualified third-party reviewer selected by the taxpayer and the CRA would determine whether the taxpayer had received the requisite level of advice on the issue under dispute.\textsuperscript{144} The independent person could be a judge or a retired judge of the Tax Court of Canada or a practising lawyer from the Department of Justice (for example, a Justice lawyer in another city and in a different department).

\textbf{CAN A FILING POSITION CHALLENGED UNDER GAAR CONSTITUTE A MISREPRESENTATION?}

Related to our primary thesis is the question of whether subparagraph 152(4)(a)(i) could apply to open an otherwise statute-barred year on the basis that GAAR applies to a particular filing position. That is, can a taxpayer’s position that a particular transaction or series of transactions is not abusive constitute a misrepresentation within the meaning of subparagraph 152(4)(a)(i)? We suggest that this cannot be the case, since the application of GAAR is based on technical compliance with the provisions of the Act.

\textsuperscript{140} Hubbard et al., supra note 137, at paragraph 11.220.40.
\textsuperscript{141} Ibid., at paragraph 11.220.90.
\textsuperscript{142} Ibid., at paragraphs 11.220.50, 11.220.55, and 11.220.60.
\textsuperscript{143} Ibid., at paragraph 11.50.
\textsuperscript{144} The reviewer would sign an undertaking never to discuss the matter with anyone and never to be involved in any matter relating to the opinion; he or she would simply review the opinion to see if it met the taxpayer’s claim.
The recent case of *Copthorne Holdings Ltd. v. The Queen*145 provides support for the proposition that subparagraph 152(4)(a)(i) cannot be used to support a reassessment under GAAR. In *Copthorne*, the CRA assessed the taxpayer on the basis that a series of transactions was subject to GAAR. In essence, the effect of the contested transactions was to artificially increase paid-up capital and then repatriate cash from Canada without withholding tax under part XIII of the Act. In addition to imposing GAAR, the CRA assessed penalties against the taxpayer for failure to withhold the tax.

The Tax Court of Canada found that the transactions were indeed subject to GAAR but allowed the taxpayer’s appeal from its assessment with respect to the penalties. The court first noted that it was only because of the application of GAAR that the liability to pay withholding tax arose. Accordingly, the question was whether the taxpayer was liable to pay a penalty for failure to withhold tax when it was not technically required to do so under the relevant provisions of the Act.

The taxpayer asserted that taxpayers self-assess on the basis of compliance with the technical provisions of the Act, and since the application of GAAR can only be initiated by the CRA, a penalty should not be imposed as a consequence of the successful application of GAAR by the minister. That is, a taxpayer cannot file or pay anything on the basis that GAAR applies without the minister’s first initiating such application.

The court stated that there is nothing in the GAAR provisions that would allow a taxpayer to self-assess on the basis that GAAR applies, and expressly agreed with the taxpayer’s comments. The taxpayer could thus not be subject to penalties for taking a position at the time of filing that was later determined to be a contravention of section 245.

The holding in *Copthorne* is relevant to a reassessment under subparagraph 152(4)(a)(i) where the issue with respect to the filing position asserted as a misrepresentation is whether a particular transaction or series of transactions is subject to GAAR. Since the court in *Copthorne* explicitly stated that a taxpayer cannot self-assess under GAAR, there can be no obligation on a taxpayer to file on this basis and thus no foundation on which to assert a misrepresentation at the time of filing.146 It would

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145 2007 DTC 1230 (TCC); aff’d. 2009 DTC 5918 (FCA); leave to appeal to the Supreme Court of Canada allowed 2010 CarswellNat 142.

146 See also Michelle Chan and Charles Taylor, “Provincial General Anti-Avoidance Rules and Governments’ Responses to Interprovincial Tax Planning,” in *Report of Proceedings of the Sixtieth Tax Conference*, Conference Report 2008 (Toronto: Canadian Tax Foundation, 2009), 7:1-35, at 7:33-34. We note the decision of the Federal Court of Appeal in *STB Holdings Ltd. v. Canada* (2002 FCA 386, at paragraphs 20-23; aff’g. 2002 DTC 1254 (TCC); leave to appeal to the Supreme Court of Canada refused (2004) 319 NR 193 (note)). In that case, the court found that subsection 245(7) applies to third parties and does not prohibit a taxpayer from self-assessing on the basis that GAAR applies to a transaction once that transaction has already been assessed under GAAR; however, the context for the comment was a self-assessment after GAAR had already been applied to a particular transaction. That is, the court’s comment was to the effect that a taxpayer who has already been subjected to the application of GAAR is not precluded from self-assessing in reliance upon the original GAAR assessment of the same transaction,
be illogical to consider a misrepresentation as arising in the GAAR context, since the whole purpose of GAAR is to deny tax benefits associated with a transaction that otherwise complies with the technical provisions of the Act. In a case where GAAR applies, subsections 245(2) and (5) require the tax consequences to be redetermined in such manner as is reasonable in the circumstances. Unless and until such a redetermination takes place, a taxpayer has no basis for adopting a filing position that is different from the original filing position. In other words, absent the application of GAAR, the taxpayer’s position would be valid as filed. It is therefore our opinion that subparagraph 152(4)(a)(i) cannot be used to support a reassessment under GAAR.147

WHERE DO WE GO FROM HERE?

Given the substantial uncertainty and commercial difficulty that can arise from the potential for late reassessment, we suggest that certain changes should be made to the administrative and legal framework within which these reassessments are made. We believe that if one or more of the following measures are adopted, there will be a minimized potential for the unexpected application of subparagraph 152(4)(a)(i) and the resulting litigation, and a consequent increase in certainty for taxpayers in organizing their affairs.

Administrative Reform Is Needed To Enhance Taxpayer Certainty

The administrative framework should be updated to include measures aimed at providing taxpayers with increased certainty and protecting the taxpayer’s right to advance a reasonable and bona fide filing position without exposure to reassessment ad infinitum. To this end, we offer a number of possible suggestions that alone or together might achieve this result.

To start, we recommend that the CRA clarify, and if necessary modify, its position regarding the application of subparagraph 152(4)(a)(i) where the asserted misrepresentation is based on differing legal interpretations.

As noted earlier, the CRA at one point acknowledged, in a published interpretation, the invalidity of reassessing on the basis of a bona fide filing position.148 The CRA opined that a late reassessment could not be made where, at the time of filing,
the taxpayer had a reasonable belief that a particular provision did not apply, notwithstanding that the provision was determined to be applicable at a later date. To the extent that the CRA still endorses the view that a bona fide difference of opinion is not a misrepresentation made at the time of filing, confirmation of this position would be welcome. To the same end, clarification would also be welcome with respect to the CRA’s position regarding late reassessment where a taxpayer does not file in accordance with a published policy, since the comments in the technical interpretation discussing the issue are inconsistent.\textsuperscript{149} If the CRA’s position is that consideration of all reasonable approaches is necessary to a bona fide filing position, this statement is certainly not unreasonable. However, if the CRA is indeed asserting (as appears to be the case) that where the taxpayer makes an error and has not applied (or necessarily consulted) a published policy, the taxpayer will, without a doubt, be open to reassessment under subparagraph 152(4)(a)(i), this position should be reconsidered in light of the existing jurisprudence.

At the 2009 British Columbia Tax Conference, the CRA was asked for a summary of the criteria applied and the process involved in determining whether a reassessment can be raised beyond the normal period under subparagraph 152(4)(a)(i). The CRA provided only a general response that statute-barred years may be opened so long as the auditor can substantiate neglect, carelessness, willful default, or fraud in filing a return or supplying information, and that this requires a lower degree of participation or knowledge than “gross negligence.”\textsuperscript{150}

We suggest that taxpayers and professionals would benefit from more detailed guidelines as to the factors considered and the process taken when determining whether a reassessment under subparagraph 152(4)(a)(i) will be made, and that such guidance should reflect a taxpayer’s right to advance a reasonable position in good faith, recognizing the uncertainty inherent in the current judicial approach to statutory interpretation. To this end, we suggest that a committee should be established to review the legal requirements of subparagraph 152(4)(a)(i) and develop a clear framework for its application; and, in addition, an interpretation bulletin or information circular should be published similar to those provided for GAAR and the tax preparer penalties,\textsuperscript{151} including specific examples of circumstances where the CRA would seek to apply the reassessment provision. Such a publication would assist both taxpayers and professionals in properly considering all perspectives when determining the basis on which to file. This exercise would also provide a standardized

\textsuperscript{149} Supra note 62.


framework for the CRA to consult when determining whether to reassess in circumstances where the “misrepresentation” relates to a difference of opinion rather than to a faulty calculation or unintentional oversight in preparing the return.

As a complementary measure, we suggest that the committee established to review the law and develop guidelines should also function, in certain limited circumstances, in a manner akin to the GAAR committee. When GAAR was enacted in 1988, the government recognized that it was an extreme measure that should be applied only in exceptional circumstances. In order to promote fairness and consistency across the country on how and when the CRA would attempt to apply GAAR, a specialized GAAR committee was established, comprising representatives of the CRA, the Department of Finance, and the Department of Justice. Each case is thoroughly considered by the committee before any assessing action is taken, and according to the CRA’s policy, the approval of the committee is required before the CRA can issue an assessment that has GAAR as its primary assessing position.

As discussed earlier, the courts have recognized that the reassessment power in subparagraph 152(4)(a)(i) is also an exceptional measure. Accordingly, we submit that an approach similar to the procedure for GAAR would be appropriate in certain circumstances where subparagraph 152(4)(a)(i) is involved. In particular, we recommend that the committee discussed above should also be engaged to consider and approve proposed reassessments where the potential “misrepresentation” is based on a taxpayer’s legal interpretation of a provision or characterization of the facts, unless there was clear and unequivocal jurisprudential authority adverse to the taxpayer’s position at the time the return was filed. Because the onus is on the CRA to adduce evidence justifying the application of subparagraph 152(4)(a)(i), taxpayers who reasonably and honestly advance their position should be provided with this additional measure of protection.

Legislative Reform Is Needed To Provide for Fair and Even Application of the Reassessment Provision

In addition to the administrative changes suggested, we submit that the legislation should be revised to reflect the recognition that reassessment under subparagraph 152(4)(a)(i) is an exceptional measure and to ensure that when the provision is invoked, it affects all taxpayers in a fair and consistent manner. To this end, we suggest that the rules regarding large corporations should be amended to provide for a

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modified approach where the reassessment is made after the normal statutory period has elapsed.

As noted earlier, large corporations are required to remit 50 percent of the disputed tax liability when faced with an assessment or reassessment, whether or not they file an objection. The 2010 federal budget has now also reduced the rate of refund interest payable to large corporations from 2 percent over the average rate in effect for 90-day treasury bills (T-bills) sold in the first month of the preceding quarter, to the base T-bill rate,\(^{154}\) while non-corporate taxpayers still receive interest at the higher rate.\(^{155}\) Since there is generally no opportunity for a direct appeal to the Tax Court in the face of a reassessment,\(^ {156}\) we submit that the Income Tax Regulations should be modified to increase the interest rate payable to a large corporation on the return of its security where the minister is ultimately unsuccessful in a reassessment made pursuant to subparagraph 152(4)(a)(i) after the normal reassessment period has passed.

**CONCLUSION**

The system established by the Act is based on self-assessment and accordingly relies on honest reporting. Every taxpayer has an obligation to report income honestly, in compliance with the relevant provisions of the Act and in light of the relevant facts. However, the interpretation of the applicable provisions or the existing case law is not always clear, nor is the application of the facts to the law always beyond doubt. The position of the courts is that in such circumstances, a taxpayer’s obligation is to proceed with the care of a wise and prudent person and to report in a manner that the taxpayer believes applies. Notwithstanding that the CRA may have a preferred interpretation, the case law shows that a taxpayer has no absolute obligation to file on the basis that the CRA would apply, whether the CRA’s position is known to him or not.

Where a taxpayer has acted reasonably and in good faith in deciding on the appropriate tax treatment to be applied to a particular amount or transaction, has obtained tax advice from a competent professional, and has fully and clearly set out the relevant factual context in his return, the CRA, while undoubtedly permitted to disagree within the normal reassessment period, should not reassess once the statutory limit has expired.

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155 Contrast this as well with the interest rate of 4 percent over the T-bill rate that is payable by taxpayers on late remittances.

156 The only exception is where a subsequent reassessment is made after the taxpayer has filed a notice of objection to the original assessment (subsection 165(7)). Where the CRA has originally assessed on the basis of the return as filed and then issues a reassessment at a later date, the taxpayer must first object to this reassessment before he has any right of appeal to the Tax Court (subsection 169(1)).