Do Payroll Remittance Errors Justify Waiver of CRA Tax Penalties?

Threshold 2 employers that don't remit payroll deductions to the Canada Revenue Agency (CRA) through a bank are subject to strict penalties under the *Income Tax Act*. However, the Act authorizes the agency to waive tax penalties in special situations, such as when an employer exercises "reasonable care" to comply. Consider the following scenario, which comes from an actual case.

Situation

A Threshold 2 employer sends a courier to the bank with a cheque for the full remittance amount ($105,000) on the day it's due. But the courier misplaces the remittance form, and the teller refuses to accept the cheque. The courier then rushes to the CRA Tax Services Office. He explains the situation to the cashier who agrees to accept the cheque without a remittance form and issues a receipt. The courier gives the receipt to the company's payroll administrator who heaves a sigh of relief. A week later, CRA assesses the company a $10,500 penalty for not remitting payment to a bank. The company explains what happened and asks CRA to waive the penalty. CRA refuses. So, the company appeals.

Question

Should the company win the appeal?

1. No, because a court can't reverse CRA's decision not to grant a waiver.
2. No, because failure to remit through a bank is a "strict liability" offence.
3. Yes, because the company's failure to remit was due to "extraordinary circumstances".
4. Yes, if the company can show it exercised reasonable care to comply.

Answer

1. **The company should win the appeal and get a waiver if it can persuade CRA that it acted with reasonable care to prevent the violation.**

Explanation

Section 220(3.1) of the Act gives CRA discretion to waive or cancel all or any portion of a tax penalty. CRA Information Circular IC07-1R1 lists guidelines the agency considers in deciding whether to grant a waiver. One factor is whether the employer "exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under a self-assessment system." In this case, it was unclear if the company did exercise "reasonable care." There was evidence it did and evidence it didn't. However, the agency didn't even consider the issue in refusing the waiver. Consequently, the court reversed the decision and ordered CRA to reconsider in light of how reasonably the company behaved. So, D is the right answer [*McNaught Pontiac Buick Cadillac Ltd. v. Canada (Canada Customs and Revenue Agency*), 2006 FC 1296 (CanLII)].

Why Wrong Answers Are Wrong

A is wrong because courts are allowed to review CRA decisions on waivers under Sec. 220(3.1) under a standard of "reasonableness." Thus, a court can reverse a decision it finds was unreasonable. That's what happened in *McNaught*.

B is wrong because failure to remit to CRA through a bank is not a "strict liability" offence, that is, one for which the mere commission of the act or omission is enough to establish guilt. A taxpayer can avoid liability by giving a satisfactory explanation for its behaviour. The *McNaught* court criticized CRA for not weighing the company's explanation before rejecting the waiver request.

C is wrong because while "extraordinary circumstances" is one of the factors CRA considers when waiving penalties, it includes mostly external events such as disasters, postal strikes, and serious injuries. "Extraordinary circumstances" doesn't include simple human error, like forgetting to bring a remittance form to a bank.