

# When Do Payroll Mistakes Justify Waiver of Tax Penalties?



## **SITUATION**

An employer is required to remit source deductions to the CRA through a bank. On the day the remittance is due, it sends a courier to the bank with a cheque for the full remittance amount (\$105,000) and a remittance form. But the courier misplaces the remittance form and the teller refuses to accept the cheque. So, the courier makes a mad dash to the CRA Tax Services Office and explains the situation to the cashier. She agrees to accept the cheque without a remittance form and issues a receipt, which the courier gives to the company's payroll administrator. Everybody heaves a sigh of relief. But a week later, the CRA hits the company with a \$10,500 penalty for not remitting payment to a bank. The company explains what happened and asks the CRA to waive the penalty in the interest of fairness. When the agency refuses, the company appeals.

## **QUESTION**

**Should the company win the appeal?**

1. No, because courts can't reverse a CRA decision not to grant a waiver
2. No, because failure to remit through a bank is a "strict liability" offence for which there are no excuses
3. Yes, because the company's failure to remit was clearly the result of "extraordinary circumstances"
4. Yes, but only if the company can show that it exercised reasonable care and that the failure to remit was the result of an unforeseeable accident

## **ANSWER**

4. **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**

This scenario, which is based on an actual case called [McNaught Pontiac Buick Cadillac Ltd. v. Canada \(Customs and Revenue Agency\)](#), illustrates the rules governing CRA's discretion to waive or cancel tax penalties under Section 220(3.1) of the *Income Tax Act*. CRA Information Circular [IC07-1R1](#) sets out 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 the self-assessment system.”

The issue in this case whether the company exercised “reasonable care.” There was evidence it did and evidence it didn’t. However, the court said, the agency didn’t even consider the question in refusing the waiver. As a result, it set aside the waiver refusal and ordered the CRA to reconsider its decision in light of how reasonably the company behaved. So D is the right answer

#### **WHY WRONG ANSWERS ARE WRONG**

**A is wrong** because courts *are* allowed to review CRA decisions on waivers under Sec. 220(3.1). The standard of review is “reasonableness.” In other words, a court can reverse a decision that it finds to be unreasonable. And that is what happened in this case.

**B is wrong** because the failure to remit to the CRA through a bank is not a “strict liability” offence, i.e., an offence 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 acting the way it did. The *McNaught* court criticized the CRA for not weighing the company’s explanation before deciding not to grant the waiver.

**C is wrong** because while it is one of the factors the CRA considers when waiving penalties, “extraordinary circumstances” includes mostly external events such as disasters, postal strikes and serious injuries or illnesses. It does not include simple human error.