

Do record keeping time limits mean anything anymore?

One of the most common questions asked by the lay taxpayer is for how long they need to keep their tax records. And while there is a legislated answer for this, one wonders whether it is ever safe to destroy records.

Paragraph 27 of IC 78-10R5 summarizes the retention periods as follows:

- for a corporation, two years from the date of the dissolution of the corporation (in the case of corporations that amalgamate or merge, books and records have to be retained on the basis that the new corporation is a continuation of each amalgamating corporation);
- for any non-incorporated business, six years from the end of the tax year in which the business ceased;
- for the duplicate donation receipts of a registered charity or registered Canadian amateur athletic association, other than receipts for donations of property which are to be held for a period of not less than ten years, two years from the end of the calendar year in which the donations were made;
- for other specified records of registered charities and registered Canadian amateur athletic associations, two years from the date the registration is revoked; and
- for records relating to political contributions, two years from the end of the calendar year to which they relate.
- There are no similar provisions in the Employment Insurance Act or Canada Pension Plan.

For purposes of understanding the rest of the discussion it is important to understand what the CRA calls ‘exceptions’ to the general rule.

- The Minister may exempt a person or class of persons from the requirement to keep records electronically according to subsection 230(4.2) of the Act.
- Books and records may be destroyed at an earlier time than outlined elsewhere in this circular if the Minister gives written permission for their disposal. To get such permission, a person can use Form T137, Request for Destruction of Records, or can apply in writing to the director of his or her tax services office. A written request, signed by the person or an authorized representative, should provide the following information:
 - a clear identification of books, records, or other documents to be destroyed;
 - the tax years for which the request applies;
 - details of any special circumstances which would justify destroying the books and records at an earlier time than that normally permitted; and
 - any other pertinent information.
- The Minister may, by registered letter or by a demand, served personally by a representative of the CRA, require specific records to be kept for an additional period of time that will be stipulated in the letter or demand.

- If a return required by section 150 of the Act is filed late, the books and records referred to in paragraph 26 above must be kept for six years from the day the return is filed.
- Every book and record necessary for dealing with a notice of objection or appeal must be kept until the notice of objection or appeal is disposed of and the time for filing any further appeal has expired.
- In the case of [the preceding paragraph] only the books and records of a deceased taxpayer or a trust can be destroyed upon receipt of a clearance certificate issued according to subsection 159(2) concerning the distribution of all property.
- When the CRA gives permission to destroy books and records, this permission applies only to information required to be kept under the legislation administered by the CRA, and does not imply permission to destroy any books and records required to be kept under any other legislation, or by any other department or government agency.
- 29. The minimum retention period for the records referred to [...] above is generally determined by the last tax year when a record may be required for purposes of the Act, and not the year when the transaction occurred and the record was created. For example, documentation relating to long-term transactions such as records supporting the acquisition and capital cost of investments and other capital property held by a person (including registered charities and registered Canadian amateur athletic associations), should be maintained until the day that is six years from the end of the last tax year in which such a transaction could enter into any calculation for income tax purposes.

Tax professionals will know that there are many provisions of the Act which allow the CRA to engage in an assessment and which do not limit the CRA in time. Assessments under sections 159, 160, and 227.1 (with exceptions) are the most obvious. These are examples of derivative assessments which allow the CRA to assess a non-arm's length person for the tax owed by another taxpayer. The law generally allows for the assessed individual to dispute the underlying assessment. While, theoretically, there should be no negative inference drawn from the fact that records were destroyed by a non-party to the litigation, particularly if it took place after the required retention period, the fact remains that the burden to disprove the underlying assessment generally falls on the person reassessed and the lack of records can make it impossible to prove that point.

Indeed, in our tax litigation practice, we are often faced with delays on matters such that in 2018 we are still litigating matters which arose in the early 2000s. Clearly, records should not be destroyed after a dispute over the tax has arisen, but given the proliferation of large-scale tax plans, it could take many years before a tax dispute about a new program arises and taxpayers would be adversely affected if the records were already destroyed.

Another, more direct problem, exists when the filing position adopted by the taxpayer is justified based on a record that is beyond the document retention period. Again, the burden of proof is inarguably on the taxpayer and is relevant for the tax dispute which has arisen. This simply reinforces the argument that records should likely be kept in perpetuity.

Also of note is the fact that many Canadians have holdings or inheritances from abroad. Generally speaking this brings the individual under the legal jurisdiction of a foreign document retention regime which has different requirements. For example, the British Inheritance Tax requires records to be kept indefinitely if there is deliberate non-submission of the tax (although one wonders why someone who deliberately did not submit the tax would keep the evidence of the misdeed).

The usual argument for the disposal of records relates to the cost and inconvenience of keeping documents. Those are, of course, clear and valid reasons but the ongoing creation of digital records – and their acceptability by the tax authorities – means keeping records is less costly and more efficient. Given the dangers of a destroyed record coming back to haunt a taxpayer one would imagine that it is cheap insurance to simply scan copies of old documents and keep them for much, much longer than the CRA suggests.