



CESTNICK

TAX MATTERS

Trading in securities could jeopardize your CERB benefits

SPECIAL TO THE GLOBE AND MAIL
PUBLISHED AUGUST 13, 2020

This week, the fourth-longest game in NHL history was played between Columbus and Tampa Bay. At the end of the seventh period, the league put a message on the big screen: “It’s time for the seventh-period stretch.” It was hockey’s take on the old baseball tradition of the seventh-inning stretch. I love the seventh inning. It marks the twilight of the game, and all kinds of crazy things can happen as the contest winds down.

When it comes to the Canada Emergency Response Benefit (CERB), we’re in the seventh inning of that game. It won’t be long before the CERB is over. For those who have been collecting the benefit since mid-March, their final four weeks of coverage will end on Aug. 29, and for others the final eligibility period ends on Sept. 26.

As CERB benefits end, the Canada Revenue Agency’s review of Canadians who received the benefit will move into high gear. There are some recipients who may mistakenly think they’re

entitled to CERB, but the taxman might disagree and ask for repayment. I’m talking about frequent traders in securities, including day traders. Let me explain.

THE RISK

You might recall CERB is available if you had \$5,000 or more of employment or self-employment income in 2019, or in the 12 months leading up to the date you applied for the benefit, and you’ve stopped working because of COVID-19. Also, when submitting your first claim, you cannot have earned more than \$1,000 in employment and/or self-employment income for a period of at least 14 or more consecutive days within the four-week benefit period of your claim. When submitting subsequent claims, you cannot have earned more than \$1,000 of employment and/or self-employment income in the entire four-week benefit period of your new claim.

You won’t qualify for CERB, nor will you be disqualified, based on the amount of

any passive investment income you earn (interest, dividends, capital gains or royalties). This week, I met William, who lost his job in March because of COVID-19 and has been collecting CERB. He decided to spend his time at home day trading to make money while he's been off work. He's managed to make more than \$2,000 each month since being at home.

The problem? The CRA may very well consider William to have been earning business – that is, self-employment – income from his trading activities. Although William considers his profits to be capital gains, the taxman may take a different view. And if William's profits are considered business income, the CRA will argue he should not have qualified for CERB based on the level of his earnings and should repay the benefit.

THE RULES

It's not always clear when an individual's profits from trading in securities will be considered by the taxman to be a business – or what is referred to in our tax law as an “adventure in the nature of trade.” Typically, the courts have looked to an investor's intent and conduct to determine whether profits should be “on account of capital” (taxed as capital gains) or “on account of income” (taxed as business, or self-employment, income). Specifically, the following factors could cause the taxman to conclude you've earned business income:

- Frequency of transactions: a history of extensive buying and selling of securities, or quick turnover of properties;

- Period of ownership: you usually own securities for a short period of time;
- Knowledge of securities markets: you have some knowledge of, or experience in, securities markets;
- Business of trading: trading forms part of your ordinary business;
- Time spent studying: a substantial part of your time is spent studying securities markets and investigating potential purchases;
- Borrowing money to trade: your security purchases are financed primarily on margin or by some other form of debt;
- Advertising your trading: you have advertised or otherwise made it known that you're willing to purchase securities;
- Nature of the securities: you've purchased speculative securities, often those that don't pay dividends.

THE RECIPE

How do you avoid the taxman calling your profits business income and making you ineligible for CERB? The following tips can help:

Tip the balance in your favour: When looking at the factors above the taxman will consider, structure your trading activities to avoid as many of them as possible.

File the Canadian securities election: It's possible to file an election (using Form T123) to have all your trades in Canadian securities considered on account of capital (ensuring capital gains treatment). This election is

irrevocable. In William's case, electing for his Canadian securities trades to be on account of capital would reduce his monthly business income below the \$1,000 limit allowable, preserving his CERB.

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