Take Advantage of The Existing voluntary Disclosure program While you Can

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Introduction

On June 9, 2017, the Canada Revenue Agency ("CRA") released proposed changes to the Voluntary Disclosure Program ("VDP") that are expected to take effect January 1, 2018. These changes, if implemented, will significantly narrow the benefits provided by the VDP for many taxpayers. Taxpayers who are non-compliant with their tax obligations should strongly consider taking advantage of the current program before the changes come into effect.

Income Tax VDP Two Track System

The VDP is proposed to change from a one track system to a two track system by introducing a "General Program" and a "Limited Program." A taxpayer who is processed under the General Program will be eligible for interest relief at a maximum of 50% for the years preceding the three most recent taxation periods and full penalty relief, including relief from criminal prosecution. Taxpayers who do not qualify for the General Program will be processed under the Limited Program, which will offer no interest relief, penalty relief only with respect to gross negligence, and relief from criminal prosecution. This is a stark difference compared to the current program, which could grant substantial interest relief for the years preceding the three most recent taxation periods and full relief from penalties and prosecution for all voluntary disclosures.

A participant will be subject to the Limited Program if they are considered to be involved in "major non-compliance," which includes the following situations:

- Active efforts to avoid detection through the use of offshore vehicles;
- Large dollar amounts unreported;
- Multiple years of non-compliance;
- A sophisticated taxpayer;
- Disclosures made after an official CRA statement regarding its intended focus of compliance, or following CRA correspondence or campaigns; or
- Circumstances in which a high degree of taxpayer culpability contributed to the taxpayer's failure to comply.

If a taxpayer is processed under the Limited Program, the taxpayer will be required to waive their right to object in relation to the specific matter disclosed in their VDP application and any specifically related assessment of taxes, which is a right that is enjoyed by all participants under the current program. Certain limited objection rights will remain.

Changes to the Conditions for a Valid Disclosure

Currently, a VDP application will not qualify for relief if the CRA determines that there is an enforcement action relating to the subject matter of the VDP by the CRA. The proposed changes broaden what the CRA considers to be an 'enforcement action' by including any request related to "other affairs of the taxpayer" and "trusts in which the taxpayer is a settlor, trustee or beneficiary". Thus, if the taxpayer is the beneficiary of a trust that is subject to an enforcement action, the taxpayer himself/herself may have difficulty accessing the VDP. However, not every CRA action will cause a VDP application to be denied, as the CRA plans to send letters inviting taxpayers to use the VDP to correct their tax affairs.

Under the proposed policy, if you do not have books and records, you must still estimate the income that was unreported. In our experience with the existing VDP process, there are many circumstances where the CRA does not require estimates of unreported income where books and records are not available.

Furthermore, there is a proposed condition mandating participants to include payment of estimated taxes owing in order for their application to be considered. The existing VDP program does not have this condition in place.

No VDP Relief for Large Corporations, Proceeds of Crime and Transfer Pricing Adjustments

The proposed changes provide new situations where relief will not be granted. These situations include:

- Applications that report income from proceeds of crime;
- Applications that relate to transfer pricing adjustments or a penalty under section 247 of the *Income Tax Act* (Canada); and
- Applications that are from corporations that have gross annual revenues in excess of $250M in at least 2 of their past 5 taxation years.

Disclosure of Advisors & Financial Institutions

The proposed changes suggest that participants in the VDP may be required to turn over names of financial institutions and advisors in relation to the participants' non-compliance. Presumably, the CRA will use this information to consider whether additional enforcement action is appropriate in the circumstances.

Reduced Protection for No-Name Participants

Finally, the proposed changes appear to reduce the usefulness of the no-name voluntary disclosure. In the current program, a no-name voluntary disclosure participant can engage in preliminary discussions with a VDP officer and request that the CRA

official review their application and administer a non-binding view on the possible tax implications upon disclosure, all without disclosing the identity of the applicant. This presents an opportunity for a taxpayer considering the VDP to determine whether or not it would be beneficial for them to proceed with an application without having to disclose their identity.

The proposed changes would allow a no-name participant to engage in preliminary discussions with a CRA official, but appear to eliminate the availability of a non-binding view on the possible tax implications. Under the existing VDP, a taxpayer receives protection should an audit be commenced. It is yet to be seen whether the proposed VDP will offer the participants 90-day protection from a CRA audit, should an audit be commenced while the taxpayer is preparing the voluntary disclosure submissions.

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