Canada Revenue Agency Proposes Sweeping Changes To Voluntary Disclosures Program

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Introduction

On June 9, 2017, Canada's Minister of National Revenue and the Canada Revenue Agency ("CRA") announced consultations on proposed changes to the Voluntary Disclosures Program ("VDP") that is administered by CRA. The announcement follows reports from the House of Commons Standing Committee on Finance (October 2016) and the Offshore Compliance Advisory Committee (December 2016) recommending, respectively, a comprehensive review of the VDP and various specific changes to the VDP to tighten the criteria for acceptance into the program. The changes are largely described in draft Information Circular IC00-1R6 (for voluntary disclosures relating to income tax) and in draft GST/HST Memorandum 16.5 (for voluntary disclosures relating to other taxes, including GST/HST and excise duties and taxes).

Stakeholders are encouraged to provide input on the proposed changes within the 60-day consultation period which began on June 9, 2017. It appears that the final changes are intended to have effect after December 31, 2017.

The Existing VDP

The VDP is a form of amnesty program that allows taxpayers to come forward to report various tax omissions to CRA in order to avoid penalties and prosecution and, in many cases, to obtain some interest relief. Currently, the VDP is generally available to all taxpayers regardless of the reasons for the tax non-compliance, so long as the following four conditions are met:

1. the disclosure is voluntary — the disclosing taxpayer must commence the process before becoming aware of compliance action;
2. the disclosure involves the application (or potential application) of a penalty;
3. the disclosure includes information that is at least one year overdue; and
4. the disclosure is complete, in the sense of providing full and accurate facts for all taxation years or reporting periods for which there was tax non-compliance, across all accounts with which the disclosing taxpayer is associated.

A disclosure can be commenced as a "named" disclosure by providing the name of the disclosing taxpayer at the time the process is initiated, or as a "no-name" disclosure by providing general information at the time the process is initiated and revealing the name of the disclosing taxpayer within 90 days. In either case, disclosing taxpayers generally receive protection from penalties and prosecution from the time the disclosure process is commenced.

Some Key Proposed Changes

It is clear that CRA intends to narrow the availability of the program and to restrict its benefits in large part as a response to what CRA perceives as the growth of tax evasion and aggressive tax avoidance. Among the most important of these proposed changes are the following:

1. Limited Benefits for Disclosures Involving "Major Non-compliance"

For disclosures involving income tax, CRA is proposing to introduce two "tracks": the "General Program" and the "Limited Program". Under the General Program, a valid voluntary disclosure will normally result in the elimination of penalties, relief from criminal prosecution, and interest relief in the amount of 50% of the otherwise applicable interest for years preceding the three most recent years of returns required to be filed.

Under the Limited Program, a valid voluntary disclosure will normally result in the elimination of gross negligence penalties (*i.e.*, other penalties will still be imposed) and relief from criminal prosecution, but no interest relief will be granted.

The Limited Program is proposed to be implemented for disclosures that that involve what CRA is calling "major non-compliance", which is described as circumstances that include one or more of the following situations:

- active efforts to avoid detection through the use of offshore vehicles or other means;
- large dollar amounts;
- multiple years of non-compliance;
- a sophisticated taxpayer;
- the disclosure is made after an official CRA statement regarding its intended focus of compliance or following CRA correspondence or campaigns; and/or
- any other circumstance in which a high degree of taxpayer culpability contributed to the failure to comply.

Accordingly, many of the income tax omissions that are currently eligible for full relief under the VDP will, under the proposed changes, be eligible for a narrower range of relief.

Similar changes are proposed for non-income tax voluntary disclosures.

2. Additional Condition for a Valid Voluntary Disclosure

CRA is proposing to add a fifth condition for a valid voluntary disclosure — the payment of the estimated tax owing. If the disclosing taxpayer cannot pay the estimated tax at

the time of making the disclosure, a payment arrangement supported by adequate security "may" be considered "in extraordinary circumstances with approval from CRA Collections officials."

3. No VDP Relief for Larger Corporations

For disclosures involving income tax, CRA is proposing that the VDP will not be available for a corporation with gross revenue in excess of $250 million in at least two of its last five taxation years. This restriction is not proposed to apply for non-income tax voluntary disclosures (eg. disclosures involving GST/HST).

4. No Protection During the "No-name" Period

It appears that CRA is proposing to eliminate the protection of the VDP during the period before which a disclosing taxpayer reveals their identity. Disclosing taxpayers are provided with the opportunity to participate in no-name, general, informal and non-binding preliminary discussions to gain "insight into the VD process, a better understanding of the risks involved in remaining non-compliant, and the relief available under the VDP". However, it appears that the protection of the VDP is proposed not to apply during this period. In particular, CRA indicates that the preliminary disclosures do not constitute acceptance into the VDP and have no impact on CRA's ability to audit, penalize or prosecute the non-compliance.

Based on the proposals to date, in many cases it will be difficult to see the benefit of these no-name preliminary discussions.

5. Disclosure of Advisors

For both income tax and non-income tax disclosures, CRA is proposing that where a disclosing taxpayer received assistance from an advisor in respect of the subject matter of the disclosure, "the name of that advisor should generally be included in the application". It is unclear whether disclosure of the name(s) of advisors is proposed to rise to the level of a precondition for making a valid voluntary disclosure, but CRA also takes great pains to point out that disclosing taxpayers who do not co-operate by providing requested documentation risk becoming ineligible for voluntary disclosure relief.

6. More Limited Rights of Objection

Under the current VDP, a disclosing taxpayer who disagrees with an assessment or reassessment that results from a voluntary disclosure is free to file an objection from the assessment or reassessment. There are no general restrictions on this entitlement that are set out in the current public administrative pronouncements for the VDP.

CRA is now proposing to limit rights of objection for voluntary disclosures involving "major non-compliance", such as income tax voluntary disclosures in the Limited Program track. For these disclosures, CRA will require the disclosing taxpayer to waive their right to object in relation to the specific matter disclosed and any related assessment of taxes. The restriction does not apply if (i) the assessment includes a calculation error, (ii) the assessment relates to a characterization issue (*e.g.*, income

versus capital gain treatment, or taxable versus exempt supply for GST/HST purposes), or (iii) the assessment relates to an issue other than the matter disclosed.

These changes, among others, reflect a significant narrowing of the benefits of a voluntary disclosure, particularly for disclosures that involve "major non-compliance". Many of the proposed changes are vague and imprecise, which would create uncertainty for taxpayers that might otherwise initiate a disclosure. Other changes (such as the requirement for up-front payment of the estimated tax owing) can lead to harsh results in many circumstances, which may discourage many taxpayers from coming forward at all.

In the meantime, taxpayers and their advisors should follow these developments closely. Taxpayers with current unreported non-compliance may wish to consider initiating voluntary disclosures before the finalized VDP changes take effect.

By

Salvatore Mirandola

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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