

CANADA REVENUE AGENCY POISED TO LIMIT ACCESS TO THE VOLUNTARY DISCLOSURES PROGRAM

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The Canada Revenue Agency (the “**CRA**”) currently administers a “Voluntary Disclosures Program” that permits taxpayers to disclose past tax reporting and payment deficiencies in exchange for potential penalty and interest relief and exemption from prosecution (the “**VDP**”). However, recent recommendations call for the scope of the VDP to be narrowed.

It is expected that the VDP will be modified in 2017 and taxpayers that are currently eligible to make a voluntary disclosure may be precluded from securing penalty and interest relief in the future. Taxpayers that are considering the possibility of making a voluntary disclosure may wish to accelerate their plans in advance of the introduction of new restrictions under the VDP.

"Offshore Compliance Advisory Committee" Report

On April 11, 2016, the Minister of National Revenue (the “**Minister**”) announced the creation of an independent advisory panel, the Offshore Compliance Advisory Committee (the “**OCAC**”), to provide the Minister and the CRA with guidance on how to better address offshore tax evasion and aggressive tax planning,

On December 8, 2016, the OCAC recommended changes to the VDP to address what it perceives to be unduly preferential treatment of voluntary disclosures involving cross-border transactions.

While the OCAC has endorsed the continuation of the VDP as an integral part of the CRA’s enforcement regime, the committee suggests that the structure and administration of the VDP needs to be adjusted to strike a more appropriate balance between generating additional tax revenue from delinquent taxpayers and treating taxpayers that diligently satisfy their tax obligations fairly. In this regard, the OCAC has made the following notable recommendations:

Greater Limitations on VDP Relief

The VDP currently offers substantially the same relief, and applies the same assessment criteria, in respect of all voluntary disclosures.

However, the OCAC asserts that certain voluntary disclosures are worthy of a lesser amount of penalty and interest relief. For instance, the committee suggests that sophisticated taxpayers, who “sought expert advice and used complex offshore structures to evade significant amounts of tax over several years”, should not be granted the same level of interest and penalty relief as disclosing taxpayers under other circumstances. The OCAC also questions whether taxpayers that make a “completely voluntary disclosure” should be treated the same as taxpayers whose disclosures are motivated by CRA audit activity, broad-based CRA compliance programs, or knowledge of the CRA’s receipt of data leaked from other sources.^[1]

The OCAC specifically identified the following circumstances that, in its view, should result in a reduction of the relief offered to a disclosing taxpayer under the VDP:

- (a) Deliberate or wilful default or carelessness amounting to gross negligence in respect of the matters being disclosed;
- (b) Active efforts to avoid detection through the use of offshore vehicles or others means;
- (c) Large dollar amounts of tax avoided;
- (d) Multiple years of non-compliance;
- (e) Repeated use of the VDP by the taxpayer;
- (f) Disclosures involving a sophisticated taxpayer;
- (g) Disclosures motivated by CRA statements announcing new compliance priorities or broad-based CRA correspondence or campaigns;
- (h) Avoidance transactions undertaken or continued after implementation of the Common Reporting Standard; or
- (i) Any other circumstances in which a high degree of taxpayer culpability contributed to the failure to comply.

Incomplete Information

Taxpayers have long expressed concern when making a voluntary disclosure under the VDP that they may be unable to obtain complete information regarding the subject matter of the disclosure. For example, in many instances, records have been destroyed or the disclosure dates back a decade or more.

The OCAC commendably recommends that the CRA’s Information Circular on the VDP be revised to clarify when a taxpayer may make a valid voluntary disclosure even in the absence of complete information. However, the OCAC also recommends that where “no legitimate reasons exist for a taxpayer’s failure to provide

full and complete information”, the CRA should compel taxpayers to provide or “develop” the information. It is unclear what the OCAC believes constitutes a “legitimate reason”, or how taxpayers can “develop” information that cannot be accessed. The OCAC's potentially contradictory recommendations may inadvertently create more uncertainty for taxpayers that wish to disclose deficiencies that span over a lengthy period of time or relate to matters where records are imperfect.

Transfer Pricing Penalties

Of significant concern to multinational enterprises, the OCAC has recommended that relief under the VDP should not be available to multinational enterprises in respect of “related-party transfer-pricing issues”, including transfer pricing penalties assessable under subsection 247(3) of the *Income Tax Act* (Canada). This recommendation marks a fundamental departure from the historical, broad-based foundation of the VDP and, if accepted, would significantly restrict the ability of multinational enterprises to rectify past cross-border filing and payment deficiencies without the potential imposition of sizable penalties.

Disclosure of Advisors

The OCAC believes that the CRA's ability to combat abusive tax avoidance or evasion involving cross-border transactions would be materially enhanced if the CRA were provided with information identifying the advisors that promote and enable certain modes of offshore non-compliance. The OCAC has recommended that taxpayers making a disclosure under the VDP should be required to disclose the identity of their advisors as a condition to the acceptance of their disclosures.

Level of Internal Approval

Currently, all disclosures under the VDP are required to be approved by designated “team leaders” within the CRA. The OCAC has recommended that a higher level of “sign-off” be required in respect of voluntary disclosures involving “substantial amounts of evaded taxes, complex arrangements, or new issues of law”, as well as in respect of disclosures involving “high-profile cases”. Such heightened approval requirements may result in delays in processing voluntary disclosures and could potentially give rise to two distinct assessment standards based upon the nature of the matters being disclosed.

T1135 Information Returns

Taxpayers have historically been required to make a voluntary disclosure in order to rectify past failures to file so-called T1135 foreign property returns, even where the taxpayer has reported and paid all required income taxes.

The OCAC has questioned whether such T1135 filing deficiencies should be addressed through the VDP. As an

alternative, the OCAC has suggested that such filing deficiencies could be managed through other audit channels; however, it is unclear whether alternative audit procedures would grant taxpayers the same level of protections as afforded by the formal VDP.

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The general theme of the recommendations made by the OCAC is to limit access to the VDP, and to grant reduced relief to taxpayers who deliberately and wilfully evade taxes.

The recommendations of the OCAC were preceded by recommendations made by the Finance Committee of the House of Commons in October, 2016, which recommended that the CRA conduct a comprehensive review of the VDP by the end of the first quarter of 2017.

The increasing and repeated emphasis on restructuring the VDP strongly suggests that material changes to the program are on the horizon.

At the 2016 CTF Ontario Tax Conference, we delivered the message that the VDP is in a period of transition. (A copy of our full [paper](#) and [presentation](#) can be assessed here.) The pressures for substantive change continue to mount and it is reasonable to assume that the VDP will experience a material transformation in 2017.

Taxpayers that are contemplating a potential voluntary disclosure involving cross-border matters, particularly those relating to transfer pricing, should carefully consider initiating such a disclosure at the earliest opportunity to avoid the possibility of being precluded from making such a disclosure by future changes to the VDP.

If you should require assistance with a potential voluntary disclosure, or have other questions regarding the VDP, please contact any member of our National Tax Group.

by Michael Friedman and Ehsan Wahidie

[1] The commentary of the OCAC in this regard is questionable. Under the CRA's current administrative policies, ongoing audit activity will generally render a voluntary disclosure invalid. Conversely, several CRA compliance programs, including the CRA's "letter campaign", are specifically designed to promote voluntary disclosures.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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