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CRA releases new guidelines for GST voluntary disclosures

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Background

On December 13, 2017, the Canada Revenue Agency (CRA) released a revised update of its memorandum on the GST/HST voluntary disclosure program (VDP). The new document, GST/HST Memorandum 16-5 "Voluntary Disclosures Program" (the Revised VDP Policy), replaces a draft memorandum released June 16, 2017 (the June Draft) that had attracted considerable criticism. The Revised VDP Policy is definitely an improvement on the June Draft, though it is substantially similar in effect to the June Draft, still has many problems, and will likely be of limited benefit to large corporations or sophisticated registrants.

What has improved

As with the June Draft, in the Revised VDP Policy, the CRA has created three categories for VDP applicants:

1. Wash Transactions (100% interest and penalty relief);

2. General Program (50% interest and penalty relief); and

3. Limited Program (no interest relief and no penalty relief except from gross negligence).

One major improvement from the June Draft is the shortened number of years that must be disclosed to participate under the General Program. Under the June Draft, applicants were required to disclose information on their previous six calendar years, and the CRA stated that it would assess for this six-year period. The six-year period was problematic because the general limitation period under the *Excise Tax Act* (absent fraud, wilful neglect, etc.) is only four years. Thus, in order to make a voluntary disclosure, some registrants would be required to pay tax, plus 50% of interest and penalties for six years, whereas on audit they would only face four years plus interest and penalties, assuming an audit and assessment happened right away. Since a voluntary disclosure can only be made if the registrant is not under audit, and has not been informed of an upcoming audit, in practice even if the CRA started an audit the next day, several additional months (and likely much longer) would almost certainly be statute-barred before an assessment was completed. As a result, there was only a limited incentive to take advantage of the General Program; in fact, in most cases, a would-be applicant would likely have been better served waiting for an audit rather than making a voluntary disclosure.

It is thus a welcome change that the Revised VDP Policy now only requires applicants in category 2 (General Program) to disclose the previous four calendar years, the same period as is applicable for registrants in category 1 (Wash Transactions). That said, while it will often be advantageous for registrants that were parties to Wash Transactions to make voluntary disclosures, registrants in the General Program will need to examine whether a voluntary disclosure will make sense in their particular circumstances.

What has not significantly improved

It continues to be a significant weakness of the Revised VDP Policy that registrants do not have any certainty as to which of the three categories the CRA will decide that they belong. The CRA notes that "the determination of whether an application should be processed under category 1, 2 or 3 will be made on a case-by-case basis."

The Limited Program continues to remain overly broad

VDP applicants face the risk that they may be considered under the Limited Program (category 3), under which many of the historical benefits of making a voluntary disclosure disappear. Specifically, registrants in this category are not entitled to any interest relief and only to very limited penalty relief, *i.e.,* they are only relieved from gross negligence penalties. Further, they are expected to disclose information about "all relevant years." Critics of the draft memorandum pointed out that the limited benefits under the Limited Program made it unlikely that anyone would apply under this category unless they had committed fraud, or were otherwise not protected by the general four-year limitation period and were likely subject to gross negligence penalties. Even then, some registrants may find the costs of making a voluntary disclosure (penalties, total number of years assessed, interest, etc.) outweigh the potential benefits.

A second issue with the Limited Program was that the Draft Policy stated it would apply where there were:

- "large dollar amounts";
- "multiple years of non-compliance"; and
- "a sophisticated registrant."

In other words, most large corporations would fall within the Limited Program by default. Critics of the draft memorandum questioned why large corporations should be singled out for less beneficial treatment even though their conduct is not necessarily more culpable.

While there are some improvements in the Revised VDP Policy, these issues persist.

The CRA appears to have attempted to mitigate the concerns of critics by recharacterizing the situations listed above, along with how quickly the registrant tries to fix the issue, as "factors" that may be considered in determining the category into which a registrant will fall. The CRA has also said that no single factor is determinative. It has also revised the memorandum to emphasize the need for "an element of intentional conduct" and to clarify that "a sophisticated registrant may still correct a reasonable error under the General Program."

In spite of these changes, it is likely that most large companies will find themselves in the Limited Program simply by virtue of the likely large dollar amounts, years of non-compliance, and perceived sophistication of the registrant. Further, the CRA has added a paragraph explicitly stating that "generally, applications by corporations with gross revenue in excess of $250 million in at least two of their last five taxation years, and any related entities, will be considered under the Limited Program." As such, a corporation with revenue in excess of $250 million in at least two of its last five taxation years will almost never be better off making a voluntary disclosure (except in rare cases where gross negligence penalties are likely to apply).

It is unfortunate that the Limited Program sweeps in large, sophisticated registrants given that these are the very persons most likely to have complicated GST/HST issues, making compliance difficult in the first place. Further, unlike for income tax voluntary disclosures where the registrant would generally have benefited from any underpaid tax, for GST, most applicants are expected to be merely collection agents for the government, and are unlikely to have benefited from their inadvertent failure to collect GST/HST.

Pre-disclosure discussions provide insufficient protection

Finally, the Revised VDP Policy does not improve on the "pre-disclosure discussion" framework laid out in the Draft Policy. Critics had pointed out that, in the past, it was possible for registrants to be protected after making a "no-name" disclosure, which gave them an opportunity to determine whether they might be accepted under the VDP, and how far back the CRA would go on assessment. The Revised VDP Policy, like the Draft Policy before it, makes clear that the CRA will not be bound by pre-disclosure discussions (despite adding that "these discussions…are for the benefit of the registrant"). Further, the voluntary disclosure does not formally begin until the registrant provides its name, meaning that registrants will have to decide whether or not to file a disclosure even before the CRA has determined which category they are in. This will create a significant risk for large corporations that are considering making a voluntary disclosure under the General Program and may dissuade them from making a disclosure at all, due to a concern that they may ultimately be considered under the Limited Program.

Conclusion

The Revised VDP Policy does improve on its predecessor in concrete ways — such as shortening the number of years of required disclosure under the General Program. However, many of the issues raised by critics persist. These weaknesses will likely limit the number of voluntary disclosures that take place and may ultimately limit the VDP's effectiveness at its stated objective — promoting compliance with Canada's tax laws.

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