

Around the World

Canada

CRA Enhancing Due Diligence in APAs; Penalties Approved Increase in Latest Year

Canadian officials are seeking more information than ever before in the pre-file and submission stages of the APA process, practitioners and a CRA official said during interviews with BNA Tax Management in September.

Lucie Bergevin, head of the Agency's International and Large Business Directorate, addressed new APA procedures and other items in the CRA's latest report on mutual agreement procedure cases. Included in the discussion were the large number of non-negotiable withholding disputes resolved and the effects of arbitration on case processing.

Bergevin also gave an update on cases at the audit stage, noting an increase in the percentage of referrals to the transfer pricing penalty review committee between fiscal years 2009-10 and 2010-11.

APA Due Diligence. Asked about the latest developments in the CRA's APA program, Bergevin said the CRA has increased the due diligence required at the pre-filing and submission stages of APAs.

The increased due diligence "includes asking for more information on certain types of transactions, including transactions involving intangibles, to make an informed decision about whether to accept or reject an APA request," Bergevin said. "We are providing more feedback during and after the pre-file meeting to help taxpayers come up with a balanced and complete submission with which the CRA can work."

Chris Raybould of Baker & McKenzie in Toronto said Sept. 20 that the change will mean a substantial amount of effort on the taxpayer's part is expected much earlier in the process than may have been necessary in the past. Now, he said, "more complete and detailed presentations of the facts, proposed analyses, and proposed conclusions are expected at the pre-filing and filing stages."

A Welcomed Change? Kerwin Chung of Deloitte Tax LLP in Washington, D.C., said it has been helpful for taxpayers to receive "well-considered and constructive feedback from the CRA on the front end," noting that this allows companies to make more informed decisions about whether to proceed with the APA process.

However, Chung pointed out the risk that this feedback could discourage taxpayers with complex or novel transfer pricing issues from requesting an APA—a result that "would be disappointing because APA programs are intended to help taxpayers obtain certainty with these types of issues."

Raybould asserted that any attempt to exclude difficult cases "subverts the original purpose of the APA

program: specifically, to give taxpayers and tax administrations a means to identify and resolve difficult issues contemporaneously."

Practitioners said in January that arbitration may be causing the CRA's APA Program to be more selective in the cases it agrees to take on. Sean Foley of KPMG LLP in Washington, D.C., said the CRA declined to consider an APA for the buy-in part of a cost sharing transaction because it was a one-time transaction (19 *Transfer Pricing Report* 901, 1/13/11).

Arbitration. However, Bergevin focused on the beneficial effects of arbitration, noting an increase in communication between Canadian and U.S. tax authorities.

"The two competent authorities are clearly more inclined to hold frequent meetings and telephone conferences to expedite files," she said.

Competent authority analysts also have increased their monitoring of deadlines for receipt of information in their interactions with taxpayers, she added.

MAP Update. Regarding MAP cases overall, the CRA's latest report on mutual agreement procedure cases shows that completion times over the past few years have increased from 22.7 months in fiscal year 2009-10 to 32.16 in 2010-11 (20 *Transfer Pricing Report* 321, 8/11/11).

Bergevin said that while the CRA strives to complete cases within 24 months, generally case completion times have varied depending upon the complexity of the issues or transactions, the cooperation and timely receipt of relevant information from the taxpayers by both competent authorities, adequate staffing levels at the Canadian and other competent authorities to handle the cases, and the volume of those cases.

Non-Negotiable Cases. Asked to account for the large number of non-negotiable cases completed in 2010-11 compared with the previous year, Bergevin said the International Tax Services Office (ITSO) was able to secure funding to address the increasing number of applications from nonresidents for refunds of excess tax withheld under Part XIII of the Income Tax Act.

"ITSO has attempted to address this increased workload by finding ways to increase production. In the fourth quarter of the 2010-11 fiscal year, ITSO was able to secure one-time funding to increase staff to deal with the backlog of unprocessed applications, which led to a one-for-one increase in such cases being handled through the MAP program," Bergevin said.

Penalties. The statistics provided by Bergevin, who gave the CRA's first comprehensive update on Canadian penalty cases since 2008, reflect a 24 percent increase in penalties upheld between 2009-10 and 2010-11.

Asked to account for the jump in the percentage of penalties upheld by the transfer pricing penalty review committee between the two years, she said variations from year to year are to be expected.

For the fiscal year 2009-10—April 1, 2009, to March 31, 2010—the committee reviewed the referral of 39 transfer pricing penalties and eight recharacterizations, and recommended the penalty be upheld in 15 of the 39 penalty cases, or 38 percent.

For the fiscal year 2010-11, the committee reviewed 34 penalty referrals and 10 recharacterizations and recommended upholding the penalty in 21 of the 34 cases, or 62 percent.

Since its inception in 2003, the review committee as of June 1, 2011, has upheld the penalty in 138 of 263 transfer pricing cases submitted, or 52 percent, Bergevin said.

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