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Tax Alert – Canada

Highlights from the CRA's 2021 Mutual Agreement Procedure Report

EY Tax Alerts cover significant tax news, developments and changes in legislation that affect Canadian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor or EY Law advisor.

On 30 May 2023, the Canada Revenue Agency (CRA) released its Mutual Agreement Procedure (MAP) Program Report for the calendar year ended 31 December 2021. The report provides an overview of the operations of the MAP program, including statistical analyses of cases completed and in progress, covering cases dealing with resolution of double taxation or taxation not in accordance with a bilateral tax treaty.

The report follows a statistical framework standardized by the Organisation for Economic Co-operation and Development (OECD) in 2016.

The following are highlights from the MAP report.

Increased case closures of negotiable cases; increased pension cases result in high ending inventory

The report indicates that the Canadian Competent Authority completed 81 accepted negotiable MAP cases in 2021. This is up from 2020, when 74 cases were closed, and 2019, when 60 cases were closed, but is still significantly below 2018, when 126 cases were closed.

Negotiable MAP cases are generally related to transfer pricing issues, with permanent establishment, residency and other issues comprising a small percentage of completed negotiable cases. Non-negotiable cases do not require involvement or negotiation with another competent authority.

The closing inventory of accepted MAP cases stood at 851 cases at the end of 2021, up significantly from the 481 cases at the end of 2020 and the 240 cases at the end of 2019. This is largely a result of a significant intake of non-negotiable cases — 656 such cases were accepted, but only 318 were completed in the year. The report indicates that a large number of these cases involve elections by Canadian taxpayers under the *Canada-United States Income Tax Convention* to defer taxation of undistributed accrued pension income, and these cases increased significantly after the CRA published Income Tax Folio S5-F3-C1, *Taxation of a Roth IRA*, in January 2021 indicating that elections for certain types of US pensions would be accepted retroactively.

Percentage of Canadian and foreign-initiated cases stabilize

The percentage of Canadian-initiated cases completed during 2021 was 79%, which was consistent with 2020 at 81%, 2019 at 80% and 2018 at 77%. Although this high percentage reflects continued high levels of audit coverage by the CRA, it is lower in recent years than it had historically been, where in years past it had tended to fluctuate around 90%. This long-term shift likely reflects the ramping up of transfer pricing audit efforts by other countries. Given the inherent time lag between transfer pricing audits and cases making their way to completion in the MAP resolution process, the high percentage of foreign-initiated cases reported in the 2018 to 2021 period likely reflects the increased emphasis placed on transfer pricing by many countries starting in the early 2010s.

We expect that these historically high levels of foreign-initiated cases may become the norm in the future.

Timelines

The average time required to complete Attribution/Allocation (i.e., transfer pricing) cases in 2021 was 25.36 months, although cases submitted after 2015 averaged 20.61 months. The average time to complete other (non-transfer pricing) cases was 19.21 months. The average time to completion for Canadian-initiated cases submitted after 2015 was 17.31 months, while that for foreign-initiated cases was 21.98 months.

Case outcomes

Of the 74 resolved negotiable post-2015 MAP cases that were resolved in 2021, 48.65% (36 cases) of taxpayers who sought assistance obtained full relief from double taxation, 14.86% (11 cases) obtained unilateral relief, 2.7% (2 cases) resulted in partial relief, and 8.1% (6 cases) were considered under the MAP but did not obtain relief (either the case was denied MAP access, the competent authorities reached agreement that there was no taxation warranting relief, or no agreement to provide relief was reached). In 19 cases, or 25.68%, the request was dismissed — either rejected by the competent authority in the first instance or withdrawn by the taxpayer, or otherwise addressed via a domestic remedy.

The full relief percentage is roughly in line with overall statistics reported by OECD members in 2021 (53%). Nonetheless, the Canada rate of cases that were considered but did not obtain full relief at 29.62% is of concern.[1] The prevalence of these cases underscores the need for taxpayers to pay close attention to the process and technical requirements of the *Income Tax Act* and applicable tax treaties as they move through the dispute resolution process, in order to ensure the highest probabilities of obtaining double tax relief and to fully protect their rights in the event that the MAP does not satisfactorily resolve their issues.

Implications

As the primary dispute resolution mechanism for taxpayers to resolve their international disputes, the continued effectiveness of the Canadian MAP program is of interest to all Canadian taxpayers. Higher rates in 2021 of cases not receiving full relief is of concern and may reflect the increasing contentiousness of transfer pricing disputes globally. It may also contribute to Canadian taxpayers choosing domestic dispute resolution avenues more frequently in the future.

Learn more

To view the full MAP Program Report, visit:
Mutual Agreement Procedure - Program report - 2021 - Canada.ca

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[1] Per Mutual Agreement Procedure Statistics 2021 - Canada (oecd.org): Of 81 completed cases: 6 were denied MAP access; 3 determined the objection was not justified; 3 were withdrawn by the taxpayer; 2 received partial relief; 1 agreed no taxation not in accordance with the treaty; 5 reached no agreement, or agreed to disagree; and 4 had other outcomes.

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