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PANAMA PAPERS FALL-OUT
TAX LAW UPDATE

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Panama Papers and Offshore Accounts: Window of Opportunity to Make a Voluntary Disclosure Closing

Canadian residents are required to report worldwide income. Furthermore, Canadian residents are generally required to annually file a special information return for any year that they held, at any time in that year, "specified foreign property" that had a cost exceeding $100,000. A failure to report such income or file any such return makes the Canadian resident liable to significant penalties (for which interest accrues daily) and potentially open to criminal prosecution. For example, monetary penalties can include 10% of the amount of unreported income (or 50% of the taxes owed on such unreported income if the taxpayer was grossly negligent) and 200% of any taxes that were sought to be evaded. In many instances there is no limitation period in respect of errors and omissions relating to offshore accounts and the Canada Revenue Agency (CRA) can assess a taxpayer at any time.

Through the CRA's voluntary disclosure program (VDP), taxpayers can avoid penalties and prosecution and may also be entitled to partial interest relief in respect of past non-compliance with tax obligations. However, the opportunity to obtain the relief provided by the VDP is foreclosed once the CRA uncovers the non-compliance or undertakes an enforcement action that *might* lead to uncovering the non-compliance.

The Minister of National Revenue has confirmed that the CRA is scouring the Panama Papers and there is no doubt that it will take enforcement action against taxpayers who have not correctly reported their income or failed to file required information returns. A searchable database of the Panama Papers has recently surfaced on the Internet. Accordingly, it is crucial that taxpayers who might be named in the Panama Papers consult with a tax advisor as to their exposure to potential penalties and prosecution and the prospects of making a voluntary disclosure. To help ensure independent and unbiased advice, taxpayers may wish to consult with an independent tax advisor who was not involved in the potential non-compliance.

Canadian residents who have an offshore account but who are not in the Panama Papers should still consider making a voluntary disclosure on a timely basis. A specific threat of the CRA acquiring sensitive information is not generally as public as the Panama Papers affair. Taxpayers should not expect a final warning that their offshore tax information may be uncovered by the CRA.

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Indeed, while the VDP is not new, there has been a number of recent developments that will increase the chances of the CRA detecting the non-compliance or taking other actions that could foreclose the possibility of a taxpayer making a valid voluntary disclosure.

These developments include:

1. *Increased funding to combat tax evasion and tax avoidance*. Budget 2016 announced the government's intention to invest $444.4 million over five years for the CRA to enhance its efforts to crack down on tax evasion and combat tax avoidance.

2. *The Offshore Tax Information Program ("OTIP")*. Launched in January 2014, OTIP allows the CRA to make financial awards to individuals who provide information related to international tax non-compliance that leads to the collection of at least $100,000 of federal taxes.

3. *Reporting requirements for electronic transfers of funds*. As of the start of 2015, certain entities (generally financial intermediaries) are required to report to the Minister of National Revenue certain electronic transfers of funds of $10,000 or more into or out of Canada.

4. *The continued negotiation with foreign countries of Tax Information Exchange Agreements and Tax Treaties with exchange-of-information provisions*. These agreements permit, and in some cases require, the sharing of information between Canada and foreign jurisdictions for purposes of verifying tax compliance. In this connection, the *Canada-United States Enhanced Tax Information Exchange Agreement* was brought into law in Canada as of June 27, 2014 and, among other things, requires the U.S. to provide the CRA with information on Canadian residents who hold accounts at U.S. financial institutions. With the OECD (of which Canada is a member) developing a global standard for the automatic exchange of financial account information, these sorts of agreements are expected to become more common.

These developments add to, and do not replace, existing mechanisms at the CRA's disposal to uncover non-compliance, such as audits. The CRA also continues to encourage "whistleblowing" through its Informant Leads Program.

Conditions for a Valid Disclosure

In order for a voluntary disclosure to be accepted by the CRA:

1. The disclosure must be *voluntary*. Where the CRA uncovers the non-compliance or undertakes an enforcement action that *might* lead to uncovering the non-compliance, the opportunity to access the voluntary disclosure program is generally foreclosed because the CRA would likely not view the disclosure as voluntary.

2. The disclosure must be *complete*. The taxpayer must provide full and accurate facts and documentation for all taxation years where there was previously inaccurate, incomplete or unreported information relating to *all* tax accounts with which the taxpayer is associated.

3. The disclosure must relate to an offence for which there is a *penalty*.

4. The disclosure must generally relate to information that is at least *one year overdue* (unless the information that is less than one year overdue is included with other information that is more than one year overdue).

Further, disclosures under the VDP are subject to limitations periods. For instance, income tax related disclosures are eligible for the program to the extent that they relate to a taxation year that ended in the previous 10 years before the submission was filed.

How to Participate in the VDP

A taxpayer can make a disclosure under the VDP on either a "named" or "no-name" basis. Under the "no-name" process, a taxpayer's representative is able to have preliminary discussions with the CRA without identifying the taxpayer. This process may be particularly attractive where a taxpayer has incomplete information or is otherwise unsure whether a named disclosure will ultimately meet the validity requirements. Provided the identity of the taxpayer and all other information and documentation required to complete the disclosure are submitted to the CRA within 90 days of the initial disclosure, the protection afforded by the VDP is effective from the date of the initial disclosure.

VDP communications between taxpayers and their lawyers are subject to solicitor-client privilege. With that in mind, early consultation with a tax lawyer is recommended so that the relevant facts may be reviewed to assess whether the VDP is a viable option in advance of any CRA action that might compromise access to the VDP.

We Can Help

We have made many successful voluntary disclosures on behalf of clients reporting offshore accounts. Despite the aforementioned 10-year limitation period and the requirement that the disclosure be complete, we have successfully made voluntary disclosures for clients who have not complied with their obligations for 30 or more years and who have incomplete records. Please call your WeirFoulds lawyer or the author below to confidentially discuss your situation.

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Ryan is Co-Chair of the Tax Group at WeirFoulds LLP. He regularly advises clients on various areas of domestic and international taxation, including advising on mergers and acquisitions, financings, withholding tax, employment issues and a broad range of corporate tax matters. Ryan also represents clients with audits, voluntary disclosures and appeals and has represented clients as lead counsel at every level of court, including Canada's highest court, the Supreme Court of Canada. Ryan is also the co-editor and a frequent contributor to the Current Cases feature of the *Canadian Tax Journal*, the flagship research publication of the Canadian Tax Foundation.

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