

Le Comité mixte sur la fiscalité
de l'Association du Barreau canadien
et
de Comptables professionnels agréés du Canada

Comptables professionnels agréés du Canada, 277, rue Wellington Ouest, Toronto (Ontario) M5V 3H2
L'Association du Barreau canadien, 865, avenue Carling, bureau 500, Ottawa (Ontario) K1S 5S8

Le 18 mai 2018

Monsieur Brian Ernewein
Directeur général (législation)
Direction de la politique de l'impôt
Ministère des Finances
90, rue Elgin
Ottawa (Ontario) K1A 0G5

Objet : Exigences de déclaration pour les sociétés étrangères affiliées

Monsieur,

Le budget fédéral de 2018 comprend une proposition visant à harmoniser l'échéance de la déclaration de renseignements des sociétés étrangères affiliées d'un contribuable avec celle de la déclaration de revenus des sociétés en exigeant la production d'une déclaration de renseignements dans les six mois suivant la fin de l'année d'imposition du contribuable. Actuellement, le délai est de 15 mois après la fin de l'année d'imposition du contribuable. Cette mesure ne s'appliquera qu'après l'année d'imposition 2019 afin de laisser aux contribuables le temps de s'adapter.

Étant donné l'importance du rôle des déclarations des sociétés étrangères affiliées dans l'administration du système fiscal canadien et l'ampleur des répercussions qu'aura une échéance raccourcie sur de nombreux contribuables, le Comité mixte sur la fiscalité de l'Association du Barreau canadien et de Comptables professionnels agréés du Canada (le **Comité mixte**) souhaite soumettre les observations qui suivent au ministère des Finances.

Il appert que le ministère des Finances est ouvert aux commentaires portant sur certains points soulevés à la table ronde de la conférence de l'Association fiscale internationale canadienne du 16 mai 2018, notamment en ce qui a trait à l'échéance de la production d'une déclaration de renseignements dans d'autres pays, à la concordance de cette échéance avec celle de la production d'une déclaration de revenus des sociétés dans ces mêmes pays et, le cas échéant, à la façon dont les contribuables de ces pays réussissent à se conformer à cette obligation. Dans un souci de soumettre un mémoire dans des délais raisonnables, ce dernier point ne sera pas traité dans le présent document, car il nécessiterait une

analyse approfondie des exigences de déclaration d'autres pays, y compris en ce qui concerne la nature et la teneur des informations à divulguer. Si, après avoir examiné notre mémoire, vous croyez qu'un autre document abordant ce point serait nécessaire, nous nous ferons le plaisir d'en préparer un.

Plusieurs membres du comité mixte et autres acteurs du domaine fiscal ont participé aux discussions dont s'inspire ce mémoire et ont contribué à sa préparation, notamment :

- David Bunn – Deloitte
- Erin Foote – Deloitte
- Bettina Charpentier – Wheaton Precious Metals
- Rose Cross – BDO Canada
- Grace Chow – Cadesky and Associates
- Pier Fiorino – Telus
- Ian Hunter – Banque Scotia
- Pierre Lafontaine – Bombardier
- Jean-François Lemoine – Bombardier
- Siobhan Monaghan – KPMG cabinet juridique
- Ian Crosbie – Davies
- Bruce Ball – CPA Canada

Nous espérons que nos commentaires vous seront utiles et nous serions heureux d'en discuter plus amplement avec vous, selon votre convenance.

Veillez agréer, Monsieur, l'expression de nos sentiments les meilleurs.



Ken Griffin
Président, Comité sur la fiscalité
Comptables professionnels agréés du Canada



Jeffrey Trossman
Président, Section du droit fiscal
Association du Barreau canadien

Reporting Requirements in Respect of Foreign Affiliates

Broadly speaking, Canada's foreign affiliate reporting requirements are intended to provide the CRA with sufficient information to determine compliance with Canadian taxation of foreign-based income. The information returns filed by taxpayers (and certain partnerships) contain, among other things, information about amounts included in FAPI as well as the nature of any dividends received on the shares of a foreign affiliate. These items are relevant in computing the taxpayer's income tax liability (assuming, in the case of FAPI, the foreign affiliate is a controlled foreign affiliate of the taxpayer). The information returns also contain financial and other information that allows for a more efficient administration of the *Income Tax Act* in respect of income arising in connection with foreign affiliates, but which has no direct impact on the taxpayer's income tax liability.

The Government is proposing to bring the information return deadline in respect of foreign affiliates in line with the corporate income tax return deadline by requiring the information returns to be filed within six months after the end of the taxpayer's taxation year.

As support for the new measure, the following observations were included in the budget papers:

- Most taxpayers that file information returns are corporations.
- With the current filing period, much of the information required to evaluate income of a taxpayer arising in connection with its foreign affiliates is not sent to the CRA until up to nine months after the submission of the taxpayer's tax return.
- The Government believes that a taxpayer must have most of the information needed for the information returns before filing its income tax return in order to properly compute its income tax liability.

While not specifically stated in the budget papers, we understand the rationale for aligning the information return deadline with the corporate income tax return deadline is the belief that it will result in more accurate income tax returns on the basis that a taxpayer will be required to collect, assess and report information for all foreign affiliates in advance of filing its income tax returns.

We note that when the requirement to file information returns was first introduced in 1996, it was initially proposed that the due date align with the corporate income tax return deadline. However, in response to input from the tax community, a 15-month deadline was ultimately adopted. The concern raised at the time, which continues to be the case today, is that in many foreign jurisdictions the preparation and filing of the information that forms the basis for the information returns is not carried out until later in the year.

For the reasons outlined below, we question whether many taxpayers will be able to comply with a six-month filing deadline. We also question whether aligning the information return deadline with the corporate income tax return deadline will in fact result in more accurate income tax returns. Many corporate groups undertake a comprehensive two-stage compliance process. Within six months of year-end, a detailed assessment is undertaken to determine whether any income, activities or transactions involving foreign affiliates have resulted in amounts that must be included in the relevant corporate income tax return(s). Subsequent to filing the corporate income tax return(s), a separate process is undertaken to identify and obtain any additional information that has no direct impact on taxable income, but that is required to be disclosed in the information returns. The current 15-month deadline

provides sufficient time for corporate groups to obtain this additional information and populate the information returns.

i. Ability to comply with a six-month deadline

We caution that for some taxpayers – especially those with a large number of foreign affiliates – a six-month deadline will be extremely difficult to comply with because of the significant time and resources required to prepare the information returns, as well as the fact that certain financial and other information that must be included in the information returns is often not available in the foreign jurisdictions within the proposed six-month deadline.

There are many situations in which circumstances beyond the control of a taxpayer will prevent the taxpayer from gathering the relevant financial and other information within six months of the taxpayer's year end.

For example, for those foreign affiliates that are not controlled by the taxpayer (i.e., the taxpayer cannot influence its accounting and tax compliance practices), the required information may simply not be available in time. Many foreign corporations take the full amount of time available to comply with their local accounting and tax obligations, which often extend beyond six months. Of particular note is our largest trading partner, the United States, where the filing deadline for corporations with calendar year-ends can be – and very commonly is – extended to October 15. Similarly, in the United Kingdom, income tax returns for corporations with calendar year-ends are not due until December 31 of the following year, and in Germany the filing deadline can be extended to December 31 of the following year. These are but a few examples. We also note that the process for obtaining information in multi-tiered structures is often iterative. As the number of levels grows, the chances of running into an information barrier increases substantially.

For those foreign affiliates that are controlled by the taxpayer, a six month deadline will compress the global tax compliance process into a shorter period that may be beyond the capability of the group to handle. Taxpayers with diverse international operations will often have hundreds – and in some cases even thousands – of foreign affiliates in respect of which information returns need to be filed. Given the seasonal nature of tax compliance, many corporate groups seek to use the varying tax deadlines for different obligations in different countries to spread out the compliance workload to the maximum extent possible to reduce costs. Tighter deadlines with seasonal time pressures may force more reliance on outside advisors or contractors and result in higher costs. The level of effort that is required to prepare the relevant financial and other information in respect of each foreign affiliate cannot be overstated.¹

¹ Often, this includes a significant number of information returns for foreign affiliates that have little or no activity. In the past, an administrative concession was available for dormant or inactive foreign affiliates which meant an information return was only required for those affiliates with gross receipts of \$25,000 or more in the year or with assets of more than \$1,000,000 at any time in the year. This concession has been significantly narrowed and now requires an information return to be filed in respect of all foreign affiliates, including those that are dormant or inactive, if the total cost of investment in all foreign affiliates is \$100,000 or more. Thus, although there may be a limited degree of activity for many foreign affiliates, a significant number of information returns may still be required.

Also, as discussed below, some of the information required to be reported on the information returns is based on non-consolidated financial statements or foreign tax returns. This could mean that tax compliance work in the foreign country has to be sufficiently advanced so that this information is available for purposes of the information returns. Using a US corporation with a calendar year-end as an example, while the filing deadline is April 15, it is almost invariably extended to October 15. This extra time is often used to finalize the return. Consequently, the proposed change to the information return deadline could have a significant impact on tax compliance processes in other countries. It seems unreasonable that a US foreign affiliate cannot take full advantage of US tax filing extensions in the same way as a US corporation owned by US residents.

ii. Alignment with the corporate income tax return deadline

We do not believe that aligning the information return deadline with the corporate income tax return deadline will result in more accurate income tax returns. Most corporate groups have a good understanding of the particular information that is needed to complete their corporate income tax returns without reviewing in detail all the information that will be disclosed in the information returns. As discussed above, it is common for corporate groups to undertake a two-stage compliance process. Within six months of year-end, an assessment is undertaken to determine whether any income, activities or transactions involving foreign affiliates have resulted in amounts that must be included in the relevant corporate income tax return(s). Subsequent to filing the corporate income tax return(s), a separate process is undertaken to identify and obtain any additional information that must be disclosed in the information returns.

Inherent in this two-stage approach is the fact that much of the information required for the information returns is not needed for the corporate income tax return(s). In the case of a controlled foreign affiliate, this includes (in Part I, Section 3) information about the organizational structure of the group (including trusts and partnerships). It also includes (in Part II, Section 3) information from the foreign affiliate's unconsolidated financial statements such as total assets, accounting net income before tax, and income or profits tax paid or payable on income. In situations where there has been a reorganization, amalgamation, merger, winding-up, liquidation, dissolution, division, or an issuance, redemption or cancellation of shares, it also includes (in Part II, Section 4) a summary description of each transaction or event, even if it occurred on a tax-deferred basis for Canadian tax purposes.

Where a foreign affiliate has an active business, there have not been any distributions in the year, and there is no property income, then the results of the affiliate will generally not affect the taxpayer's income. For these affiliates, the information returns can be (and often are) completed after the six-month deadline given it is known in advance that there will be no impact on the corporate income tax return. Similarly, where a foreign affiliate has income from sources other than an active business, has been involved in a reorganization during the year, or has made a distribution during the year, the impact on the corporate income tax return can be determined in advance of preparing the information return.

iii. Alignment with the country-by-country reporting deadline

Under the new rules for country-by-country reporting that were recently introduced in Canada, a country-by-country report must generally be filed by a multinational enterprise group ("MNE") within 12 months of year-end. Given that there is some overlap between the information required for the country-by-country report and the information required for the information returns, it is unclear why the deadline for the information returns would be in advance of the deadline for the country-by-country

report. If the Government wishes to accelerate the filing deadline for information returns, a 12-month deadline rather than a six-month deadline may be more appropriate given that it would allow a taxpayer that is a member of an MNE the ability to run one process to collect the relevant information from their foreign affiliates and to complete the necessary reporting in a more effective and efficient manner.

iv. Other considerations

We are concerned that accelerating the information return deadline from 15 months to six months could have negative repercussions. In particular, it could impact the quality of both the information returns and the corporate income tax returns. As discussed above, an accelerated timeline for information returns will compress the tax compliance process for a corporate group into a shorter period that may be beyond the capability of the group to handle and in circumstances in which the necessary information simply may not be available at that time. This could result in less accurate information returns (due to a lack of available information) and less accurate corporate income tax returns (due to less resources being devoted to the corporate income tax returns).

Part IV of the information return asks whether any information requested in the return is not available and then asks the taxpayer to specify. It is fair to conclude that this question should be read based on information that is reasonably available as of the filing deadline. This could yield a much different answer six months after year-end as compared to 15 months after year-end. As such, the CRA may receive far more incomplete information returns than it receives now. Filing incomplete information returns within six months and then refiling them later when the information becomes available would result in significant costs to taxpayers, as well as the CRA. Similar issues will arise when information returns are filed based on preliminary information that changes as local financial statements and tax returns are finalized.

We are also concerned about the additional administrative burden that will be placed on taxpayers to avoid penalties for incomplete information returns. To avoid penalties, taxpayers must show that they exercised due diligence in attempting to obtain the information and that any information that subsequently became available was filed with the Minister not more than 90 days after it became available. Given that much of the required information will not be available to taxpayers within the six month deadline, this will almost certainly result in additional compliance efforts to document that due diligence was in fact exercised and to carefully monitor any additional information as it becomes available so that an amended information return can be filed within 90 days. This could be both a complicated and burdensome exercise where a high volume of information returns are filed.

Recommendation

For the reasons outlined above, we believe that a six-month filing deadline for information returns is inappropriate. It will be extremely difficult for many taxpayers to meet this deadline. In many cases, the necessary information will not be available within six months, meaning there will be an increase in the number of information returns that are filed with incomplete information, or with preliminary information that needs to be amended once final information becomes available. This will unreasonably increase the compliance burden for taxpayers. It will also compress the global tax compliance process into a shorter period which could result in less accurate information returns and less accurate corporate income tax returns.

We believe that aligning the information return deadline with the corporate income tax return deadline is unnecessary from an accuracy point of view given that most corporate groups have a good understanding of the particular information that is needed to complete their corporate income tax returns without reviewing in detail all the information that will be disclosed on the information returns.

As such, we strongly recommend that the Government abandon the proposal to change the information return deadline from 15 months to six months. We believe the current deadline of 15 months is reasonable given that accurate corporate income tax returns can be prepared in advance of completing the information returns, and given that much of the information that must be disclosed in the information returns is not available to taxpayers until later in the year.

If the Government moves forward with an accelerated filing deadline, we believe that 12 months is more appropriate than six months, as it would align with the filing deadline for country-by-country reports. However, a 12 month deadline would still pose challenges since certain foreign jurisdictions (such as the UK and Germany) allow tax returns to be filed 12 months after year-end, meaning the relevant information is often not provided to the Canadian shareholder until after 12 months.