International Tax ADVISORY ■

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ICAP: It's (Not) a TRAP

An IRS official recently stated that the United States will participate this fall along with several other countries in a pilot of the "international compliance assurance program" (ICAP). ICAP is a "tax risk assessment program"—though the acronym "TRAP" has been avoided, wisely. The program is intended to help countries coordinate their risk assessment efforts for multinational companies. Australia, Canada, Germany, Italy, the Netherlands, Spain, and the United Kingdom have also expressed interest in participating in the program.

Officials are quick to caution that the ICAP will not give taxpayers "total tax certainty," but that the program hopes to minimize cross-border squabbles. The ICAP builds on the Organisation for Economic Co-operation and Development's (OECD) country-by-country reporting initiative, which requires companies to report their income and assets broken down by jurisdiction. The hope is that cooperative assessment will allow participating countries to understand where there is risk (and where there is not) and to identify and discuss any disagreements about taxpayers' level of risk.

Broadening the ICAP's appeal, a country does not need to have its own domestic cooperative compliance initiative to join the ICAP, per the head of the OECD's International Cooperation and Tax Administration Division. The United States has relatively robust cooperative compliance efforts, such as advance pricing agreements, but the ICAP could offer more feedback to inform those efforts. Multinational taxpayers may derive some benefit from having successfully run the ICAP gauntlet before facing challenges by nonparticipating countries.

The IRS has already begun contacting taxpayers, whose participation is voluntary, about the ICAP. Potential candidates will include headquarters companies from each participating jurisdiction. Tax authorities of the participating countries will confer in June to prepare for the program's anticipated October start.

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Untimely Claimed Overpayments May Not Offset Tax or Penalty in OVDP

A recent Chief Counsel Advice (CCA 201719026) determined that an overpayment attributable to one year cannot offset tax or the miscellaneous offshore penalty due in a different year of the period covered by the Offshore Voluntary Disclosure Program (OVDP) *unless* the taxpayer files a timely refund claim pursuant to Section 6511. Otherwise, Section 6514 bars the IRS from crediting or refunding the overpayment.

Section 6511 generally requires that a claim for credit or refund be filed within three years from the time the original return was filed or within two years from the time the tax was paid, whichever is later. Under Section 6511(b), the amount of refund or credit is also limited by the corresponding three-year or two-year lookback period.

When a taxpayer consents to extend the statute of limitations on assessment, as required by the OVDP, the period for filing a claim for credit or refund is extended. However, the amount of the credit or refund is limited to the amount of tax paid after execution of the extension plus tax paid within the Section 6511(b) lookback period that would apply had the claim been filed on the date the extension was executed. An extended period could also apply under Section 6511(d) in certain circumstances, for example if the claim for credit or refund relates to a net operating loss (NOL) carryback or a foreign tax credit.

Whether a taxpayer will be able to offset additional tax or penalty in the OVDP with overpayments during the disclosure period will depend on their particular facts—when they filed original returns, whether and when they paid the tax, and whether an extended statute rule applies. But generally speaking, the sooner a taxpayer initiates the OVDP, the better!

For more information, please contact Edward Tanenbaum at 212.210.9425 or Heather Ripley at 212.210.9549.

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