



## Canadian Tax & Legal Alert

### CRA releases revised IC71-17R6 – Competent Authority Assistance under Canada’s Tax Conventions

September 28, 2021

On June 1, 2021, the Canada Revenue Agency (CRA) released its latest revisions to Information Circular 71-17R6 (IC71-17R6 or “revised IC”) replacing the former version R5 released in 2005.

The revised IC71-17R6 reflects updates and changes to the Canadian transfer pricing and competent authority policies since 2005.

#### Key updates

In addition to providing clarification of terminology and policies, the revised IC addresses several notable items including:

- Description of when downward transfer pricing adjustments can be accepted into the Mutual Agreement Procedure (MAP) program;
- Timelines for completion of MAP cases;
- Clarification of the purpose and application of the Accelerated Competent Authority Program (ACAP);
- Removal of United States limited liability corporations (LLCs) from the list of competent authority requests that will be automatically denied;

- Adjustments to the ability of competent authority to negotiate certain tax avoidance issues;
- Requirement to waive appeal rights after a competent authority settlement is reached;
- Confirmation that an audit settlement does not preclude the right to competent authority assistance;
- Updates on CRA policies in respect to Articles IV, VII, IX and XXVI of the Canada-United States Tax Convention (Convention);
- Additional discussion on non-MAP related issues involving Article XIII(8) and Article XXIX(5) of the Convention.

## Filing competent authority requests

In the context of filing competent authority requests, the CRA clarified that:

- It will consider multilateral MAP requests where a request is made in each of the applicable jurisdictions. The taxpayer will need to provide authorizations to exchange information amongst the competent authorities;
- Canada's tax conventions allow for the application of MAP principles in connection with Article 9 of the Organisation for Economic Co-operation and Development's (OECD) Model Tax Convention on Income and on Capital (OECD Model Convention) or equivalent issue;
- A request will only be considered complete once a reassessment related to the issues has been issued;
- The word "requests" replaces "notified" in respect to the required submission within the time limits specified in the applicable tax convention;
- A valid notice is not considered received if the nature of the issue or the amounts resulting from the contracting state's action vary significantly from information provided in a notice to the Canadian competent authority;
- Article IV(6) of the Convention now provides treaty benefits indirectly to United States resident LLC members;
- The OECD's Transfer Pricing Guidelines will be used as analogy to determine the business profits attributable to a permanent establishment;
- Cases with treaties containing an arbitration provision will be subject to the arbitration timelines of the applicable treaty.

In respect to the documents that must accompany a competent authority request, only minor changes were made to include the requirement that:

- The request includes an explanation of how taxation not in accordance with the treaty has arisen;
- Any Part XIII issues be specifically addressed;
- Waivers be included;
- The status of any objection or appeal be described.

## ACAP requests

There were no material changes. However, new wording clarifies that:

The objective of an ACAP is to streamline the MAP process. It is not intended to be a carryforward of a MAP settlement to subsequent years.

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This implies that where current years are under audit or near completion, they could be considered for an ACAP but where the years are not currently under review by the CRA they will not qualify.

An ACAP request may be included with the MAP request or made at any time prior to completion of the MAP negotiations.

## **Tax avoidance**

The CRA maintains its position on not negotiating cases involving the use of anti-avoidance provisions contained in the Income Tax Act. A change to this section of IC71-17R6 has created some concerns specifically with new wording which indicates that assessments under the transfer pricing recharacterization rule in paragraph 247(2)(b) of the Act will not be negotiated. This reference to paragraph 247(2)(b) as an anti-avoidance provision has led to significant discussions between the tax community and the CRA.

The CRA did add new wording for cases where an assessment is based on undefined treaty anti-avoidance rules. In those cases, the competent authority may negotiate the case “with a view to reaching a consensus on the application or non-application of the treaty anti-avoidance rules.”

## **Downward transfer pricing adjustments**

This is a new section that was added after years of confusion and lack of clarity on the subject. A downward transfer pricing adjustment request typically relates to instances where an amendment to a foreign tax return results in an upward adjustment requiring a downward adjustment in Canada to eliminate double taxation.

The revised IC clearly stipulates that downward transfer pricing adjustments will be accepted for consideration and/or negotiation by the competent authority in circumstances where:

- The upward adjustment has been accepted for consideration by the other tax authority;
- The other competent authority engages in the MAP process;
- The applicable time limits are respected; and
- This issue is not excluded as a matter of policy.

## **Appeals, collections, and waivers**

The changes to this section are mainly clarifying in nature. However, one change to note is that proceeding with an objection or appeal without notifying the competent authority should only result in a suspension of competent authority actions and not a “termination”. It is still recommended that all relevant parties be notified of any changes being made by the taxpayer.

In the revised IC, the amount of security required by the Collections Directorate is no longer stated and instead refers the taxpayer to contact them directly. Taxpayers are no longer provided with specific details about the application for a waiver of interest on reassessments but rather are referred to IC07-1R1.

## MAP timing and settlements

As publicly expressed for some time now, CRA will attempt to provide a position paper to the foreign competent authority within six months of receiving a complete MAP request. Competent authority will target a maximum of 24 months to complete a MAP case.

All MAP settlements require a waiver of appeals rights by the taxpayer prior to issuing final (re)assessments. However, as has been the policy for many years but not included in the former IC, an audit settlement involving the waiver of appeal rights does not affect the taxpayer's right to competent authority assistance.

## MAP and the Canada-US Tax Convention

The CRA advises that the Canada-US treaty does not have a time limit in Articles XXVI and IX like other Canadian treaties, but it does have a notification provision of six years from the end of the taxation year. The CRA explicitly refers to the term "sufficient information" as a condition for the notification to be valid.

More importantly, the CRA recognizes there is a difference between the time limit of the notification provision and the statute barred period in certain jurisdictions (*e.g.*, seven years from the date of original assessment in Canada). The CRA advises taxpayers to take steps to keep years open in both jurisdictions if they are aware of a pending adjustment which may exceed the six-year notification limit.

## Non-MAP issues and the Canada-US Tax Convention

The revised IC also deals with developments since the issuance of the previous IC in the application of the Canada-US Income Tax Convention to the residence of LLCs, attribution of profits to permanent establishments, MAP arbitration, deferral of gains, and treatment of United States "S" corporation income. In doing so, IC71-17R6 consolidates previously provided guidance.

## Multilateral Instrument

The revised IC mentions that Canada has ratified the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (Multilateral Instrument, or MLI) and that will result in an expected 21 jurisdictions where the tax arbitration provisions contained in the MLI will apply.

## Conclusion

IC71-17R6 provides welcome clarification of many policy changes made over the past 16 years by the CRA with respect to obtaining competent authority assistance to resolve taxation not in accordance with the provisions of the relevant tax convention.

## How can Deloitte help you?

Deloitte's Transfer Pricing professionals can help you understand how these policy changes may impact your business.

If you have questions on any of the above, please reach out to your Deloitte advisor or any of the individuals noted on this alert.



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