



IRS enters into initial country-by-country reporting exchange agreements

Global Transfer Pricing Alert 2017-025

The IRS has started signing its initial bilateral country-by-country (CbC) reporting competent authority arrangements (CAAs), the government-to-government agreements under which CbC reporting information will be exchanged. CAAs have been signed with the Netherlands, Norway, and other yet-to-be-named countries.¹ The text of the [CAA between the United States and the Netherlands](#) has been posted on the IRS's website.

Typically, CAAs like these are published in full by the IRS and the treaty or tax information exchange agreement (TIEA) partner, as long as both competent authorities agree to do so. It is expected that all CbC CAAs, including the ones already signed, will contain language similar to that in section 3(2) of the model CAAs that the IRS released on April 18, 2017. That section of the model CAAs appears to address potential concerns regarding whether voluntary filings with the IRS for 2016 tax years that begin before the effective date of Treas. Reg. §1.6038-4 (the 2016 gap year) will be respected by the other country. As long as that language has been included in a CAA, voluntary filing for the 2016 gap year should be respected.

US-Netherlands CAA observations

¹At the time of writing, other CbC CAAs were being released; however, this alert examines only the US-Netherlands CAA. The CAA with Norway follows the US model CAA even more closely than the US-Netherlands CAA.

The text of the CAA between the United States and the Netherlands is very similar to the text of the US model CAA (on the basis of a double tax convention). There are a few differences, however, as well as an expected clarification regarding voluntary filing for the 2016 gap year. Each of these issues is discussed below.

Definition of “constituent entity”: Same in substance as US Model CAA but different for US MNE groups and Dutch MNE groups

One difference between the US model CAA and the US-Netherlands CAA is the definition of “constituent entity.” For US MNE groups, both the US model and the US-Netherlands CAA refer to the definition in the US Treasury regulations. With respect to MNE groups in the other jurisdiction, the US model duplicates the definition found in the OECD Model Legislation and Model Multilateral Competent Authority Agreement.² The US-Netherlands CAA, in contrast, refers directly to the “relevant Netherlands tax law.” Given that the relevant Netherlands tax law is based on the OECD definition, there is no substantive difference between the two formulations.

However, there appears to be a different definition of constituent entity when comparing the definition in U.S. Treasury regulations compared to the definition used in the OECD and Dutch rules. Specifically, the definition of “constituent entity” in the Dutch rules is based on accounting consolidation rules, consistent with the BEPS Action 13 final report. In contrast, the definition of “constituent entity” under the US Treasury regulations excludes foreign corporations or foreign partnerships for which there is insufficient control under I.R.C. §6038(a).

Therefore, the definition of “constituent entity” for Dutch MNE groups is potentially broader than the definition of “constituent entity” for US MNE groups. This could make a difference in the types of entities that would have to be reported on the CbC report for each country. For example, under the US Treasury regulations, certain variable investment entities (VIEs) need not be reported on the US MNE group’s CbC report if the group’s ownership of such VIEs was 50 percent or less.

Definition of “fiscal year”: Same in substance as US Model CAA and same for US MNE groups and Dutch MNE groups

The definition of the term “fiscal year” in the US-Netherlands CAA is slightly different from that in the US model CAA, but the substance appears to be the same. In addition, the substance of the definition for both US and Dutch MNE groups appears to be the same, as discussed below.

Under the US model CAA, the term “fiscal year” is defined as “the annual accounting period with respect to which the Reporting Entity prepares its financial statements.” Under the US-Netherlands CAA, the definition of the term “fiscal year” defers to the relevant Netherlands tax law. These definitions are in substance the same, because they both base the

² <http://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf>.

relevant reporting period on the ultimate parent entity's fiscal year end.

With respect to US MNE groups, the definitions of "fiscal year" in the US model CAA and the US-Netherlands CAA are the same. Both defer to the definition of the "reporting period" as defined in the relevant US Treasury regulations. Furthermore, because the US CbC regulations are generally based on the ultimate parent entity's fiscal year end, as well, the definition of "fiscal year" under the US CbC regulations, the OECD model legislation, and Dutch tax law are all generally the same.

As a result, even though the definition of "fiscal year" in these different sections appears to be different, the substantive definition is still the same both for US MNE groups and Dutch MNE groups. As noted above, this is in contrast to the definition of the term "Constituent Entity," which is potentially narrower for US MNE groups than for Dutch MNE groups.

Voluntary filing for 2016 gap year: Should be respected

As noted above, the US-Netherlands CAA addresses potential concerns regarding voluntary filings with the IRS for the 2016 gap year. Section 3(2) of the US-Netherlands CAA mirrors the language in the corresponding section of the US model CAA, and provides that the United States and the Netherlands intend to exchange CbC reports with respect to fiscal years beginning on or after January 1, 2016. This would include reports filed voluntarily with the IRS for the "gap years" beginning on or after January 1, 2016, but before the effective date of the final US regulations on June 30, 2016.

The US-Netherlands CAA states that it becomes operative on the date when the second competent authority signs the CAA. This suggests that the Netherlands does not need to submit the CAA to Parliament or undertake further ratification procedures for it to become operative.³ Taken together with the language in section 3(2), this appears to support the expectation that 2016 gap year voluntary filings with the IRS will be respected under the US-Netherlands CAA.

Conclusion

These developments are promising news for US multinationals, as CAAs will permit taxpayers to file their 2016 CbC reports with the IRS rather than with foreign governments (via either local or surrogate filings). US multinationals whose tax year begins before June 30, 2016, and who file on extension, will generally be able to file their first CbC reports with the IRS when they file their 2016 tax return.⁴ US multinationals whose tax year begins before June 30, 2016, and who do not file on extension, will generally need to file the CbC report using the amended return option described in Rev. Proc. 2017-23.⁵

The IRS has stated that negotiating additional CbC CAAs is a top priority over the next few months. As agreements are

³ Other countries that enter into future CAAs with the United States may adopt a different approach.

⁴ For example, C corporations now have an extended due date of October 16, 2017, and Rev. Proc. 2017-23 states that the IRS will not start accepting CbC reports until September 1, 2017. As a result, calendar-year US multinational C corporations will be able to file their first CbC reports when they file their 2016 tax return in October 2017. For questions concerning due dates and tax returns for other types of entities or C corporations with a fiscal year, please contact a member of Deloitte Tax LLP's Washington National Tax.

⁵ This will be the case, for example, for calendar-year C corporations and C corporations whose fiscal year ends on March 31, 2017. However, because of Rev. Proc. 2017-23's permissive rule for amending a taxpayer's 2016 income tax return, the IRS has effectively extended the deadline for Form 8975 to December 31, 2017, for calendar-year C corporations, at least for the first early reporting period. For more information on Rev. Proc. 2017-23 and the permissive rule for amending a taxpayer's 2016 income tax return for CbC purposes, see [Global Transfer Pricing Alert 2017-005](#), dated March 21, 2017.

concluded, the IRS will update the [CbC page](#) on irs.gov to provide a list of the jurisdictions with which it has entered into CAAs. We will continue to provide updates as more CAAs are entered into and as more details about individual CAAs are made public.

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