global picture of an MNE's entire operations as a high-level risk assessment tool and allows sharing of information with other countries to facilitate their tax enforcement and collection.

At first glance, section 6038 may appear to furnish a more particular and solid statutory foundation for CbC reporting regulations. That provision requires information reporting by U.S. persons controlling foreign entities or by U.S. shareholders of CFCs, and broadly delegates authority to Treasury to prescribe the form and content of disclosure. But the required information must be ''similar or related in nature'' to that specified in the statute, and CbC reporting does not appear to fit that criterion. To go beyond the specific kinds of information items contemplated by the statute, Treasury must determine that requiring the disclosure is ''appropriate to carry out the provisions of this title,'' a phrase that does not readily comport with the development of a high-level risk assessment tool for worldwide use.

Perhaps more important than whether Treasury can mandate CbC reporting would be the notion that it may not succeed in penalizing noncompliance. Generally, penalties for failure to file cannot be imposed by regulation but must be congressionally sanctioned. Thus, no penalties applied for failing to comply with section 6011 reporting requirements for abusive transactions until Congress added them to the code in the American Jobs Creation Act of 2004. Fortunately for Treasury, section 6038 itself prescribes the onerous penalties for failure to comply with its reporting requirements.

But even if they decide not to seek imposition of monetary penalties, Treasury and the IRS would presumably retain an important compliance tool — the argument that the statute of limitations does not begin to run until CbC reporting requirements are met. In that case, any challenge to CbC reporting regulations may have to wait for the IRS to adjust the income or expense items of a U.S.-based MNE or a U.S. subsidiary of a foreign MNE for a tax year that would have been closed but for noncompliance with the CbC reporting requirements. Because it is inconceivable that a taxpayer would try to force that outcome (or succeed in trying) simply to test the regulations' validity, they may well remain unchallenged for a long time. Perhaps realizing that, Ryan, joined by Hatch, wants to throw down the gauntlet at this early stage.

Conclusion

Ryan has a well-deserved reputation as a serious conservative policy wonk. His intention to enact international tax reform may have been stymied by Congress's reluctance to grapple with difficult issues. But in embracing an innovation box proposal and in warning Treasury against toeing the OECD's line on BEPS, he runs the risk of being seen as a mouthpiece for the organized domestic business lobby.

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NEWS ANALYSIS

Mexico's Improved Ombudsman Program Breaks New Ground

by Marie Sapirie

Mexico's 2014 tax reform has substantially changed the landscape for taxpayers who have disagreements with the tax authority by granting new settlement authority to the taxpayer ombudsman program, the Procuraduría de la Defensa Contribuyente.

The ombudsman program was formally established in 2011, but the 2014 tax reform strengthened it substantially. The ombudsman department may now facilitate a settlement process between taxpayers and the Mexican Tax Administration Service (SAT) before litigation begins. That change is important for taxpayers because concluding agreements that may result from the settlement process are binding on both the taxpayer and the SAT, which gives taxpayers certainty and a potentially speedier resolution of disagreements.

The settlement procedures are still new, but practitioners say that they are working well so far and that they hold the promise of greater efficiencies, particularly for multinational taxpayers. Practitioners also report that taxpayers and the SAT have executed agreements with the ombudsman's assistance, although the settlements themselves are not public. Representatives from the ombudsman program have been working to ensure that taxpayers are aware of the new resolution option.

History of the Ombudsman Program

Before the 2014 tax reform, taxpayers under audit by the SAT couldn't settle disputes after a final assessment unless they chose to litigate. Following an audit, taxpayers may file evidence with the SAT that contradicts the audit findings. Unless the audit team agrees with the taxpayer, a final assessment is issued and the taxpayer then may appeal to the tax court. Seeking relief from the tax court is not necessarily a simple decision because the court has been unwilling to take an intermediate position between the taxpayer and the SAT, said Rodrigo Gómez of Jones Day. Along with incurring the risk and expense of litigation, taxpayers must post a bond as warranty for the tax assessment during the court proceedings. From a taxpayer's perspective, the new settlement procedures ''are a good tool to try to avoid the costs of litigation and the all-or-nothing approach of the tax court,'' said Gómez. Since 2005, taxpayer interest in avoiding litigation has grown following a turn in tax court and Supreme Court jurisprudence toward protecting the fisc, he said.

The ombudsman program provides settlement mediation only at the taxpayer's request. Once the taxpayer has made a request and filed a supporting petition indicating its view of the facts and legal

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arguments, the ombudsman notifies the SAT and facilitates the settlement. As an independent entity focused on protecting taxpayer rights, the ombudsman has other functions, including identifying systemwide problems and making recommendations regarding regulations and tax administration issues. Those functions give the ombudsman a perspective that could help in its role as mediator.

Although the initial group of taxpayers to enter the ombudsman's settlement procedure seems to have been composed largely of individuals or smaller-value cases, the program is expected to pave the way for a broader use of alternative dispute resolution. Larger cases may be more challenging for the tax authority in agreeing to a settlement, because of the need for revenue and the reluctance to be perceived as giving away the store early in the settlement procedure.

Benefits for Taxpayers

Multinational taxpayers have much to gain from the implementation and expansion of settlement procedures. Arturo Tiburcio of Hogan Lovells said that the large taxpayer department of SAT has qualified officials, but not enough to handle all the issues associated with multinational taxpayers, such as transfer pricing, income tax, and VAT. He said that the SAT needs more resources. Also, taking into account the BEPS program initiated by Mexico, in some tax cases, the current administration sometimes ignores previous rulings on transfer pricing and VAT, he said. ''This is a problem, because there is no legal certainty for taxpayers when SAT ignores the rulings issued by previous administrations,'' he said. The prospect of certainty in the ombudsman settlement procedures is a welcome relief to taxpayers.

However, taxpayers should carefully consider their negotiating position when seeking a concluding agreement under the ombudsman's settlement procedure, Tiburcio said. The SAT has discretion in entering a concluding agreement, and it is likely to reject taxpayer positions that it perceives as aggressive. Tiburcio said he had seen taxpayers succeed in mediation and that the joint participation of the ombudsman program and the tax authority was promising.

The ombudsman program's power to issue recommendations to the SAT can help taxpayers, even if an audit continues and ends in an unfavorable assessment, because the recommendations can be used as evidence in tax court proceedings, said Tiburcio. He added that the tax court generally accords great weight to the ombudsman's recommendations, making them particularly valuable to taxpayers. For example, the ombudsman program might issue a recommendation that a fine not be triggered in a case, he said.

The benefits for taxpayers from the introduction of the alternative dispute resolution forum were a bright spot in an otherwise generally unfavorable tax reform package for multinational taxpayers. The reform also included limits on deductions, a dividend withholding tax, and changes to the maquiladora regime that were viewed as unfavorable for businesses.

Effect of BEPS

The 2014 tax reform included Mexico's first adoption of policies that are based on the OECD's base erosion and profit-shifting project, although the proposed anti-base-erosion provisions were diluted during the legislature's discussions. ''The message there was that the government wants to keep working on BEPS,'' said Enrique Hernandez-Pulido of Procopio, Cory, Hargreaves & Savitch LLP. Hybrid entities are the primary target of the new BEPS-related rules, and the changes affect common outbound planning structures, he said.

Although not as direct as the effect of BEPS on hybrids, the emphasis in the BEPS project on dispute resolution has implications for the development of the ombudsman program. Action item 14 is focused on increasing the efficacy of dispute resolution mechanisms for treaty-related disputes. The ombudsman program's expanded role as settlement arbiter creates a domestic model that could be applied to resolving treaty-related questions. If the ombudsman program proves to be effective in resolving disputes, the SAT and the Mexican government could be more open to including mandatory arbitration clauses in future tax treaties.

Future Prospects

Early reports on the ombudsman's expansion into mediation show that it has been highly successful, but that there is room for improvement. ''I would like to see it include features like the offer in compromise program [in the United States] that would allow more negotiation between the tax authority and taxpayers,'' said Hernandez-Pulido. The program is a good start toward reducing the volume of cases going into litigation, he said.

The evolution of the settlement procedure and its effectiveness will depend on circumstances beyond the ombudsman's control. ''For this reform to work, the tax authority needs to be willing to accept settlements,'' said Gómez. At only a year and a half after the introduction of the settlement program, it is too early to know what positions the tax authority will take, he said. If the SAT proves willing to enter reasonable settlement agreements, the program could produce substantial benefits for taxpayers and the government.

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