United States

Varley: U.S. to Consider Reciprocity In Country-by-Country Data Exchanges

Once the country-by-country reporting system recommended by the Organization for Economic Cooperation and Development is underway, the United States might consider withholding information—using the reciprocity principle currently in use through information exchange agreements—to countries that do not supply the U.S. with similar information, according to David Varley, the current acting director of the Internal Revenue Service’s Transfer Pricing Operations group.

Varley spoke April 23 at a transfer pricing conference at the University of San Diego School of Law.

“Some people may not recognize, there’s reciprocity built into the exchange of information,” Varley said. With the new recommendations close to being finalized, he said, the IRS currently is asking itself, “If other countries aren’t prepared to reciprocate or don’t have proper laws in place to use it, is that a reason to not send it to them?”

Varley noted that the U.S., as the tax residency for many of the world’s largest suppliers, would likely be a “supplier more than a taker.”

If the country in question “were a sophisticated country, a European country, one of the major trading partners where you’d expect them to have some multinational enterprises that would make the threshold, it would be important for them to be ready to exchange with us, before we would exchange with them,” Varley said.

2020 Review. Varley also said he hopes a 2020 review, currently included in the OECD guidance on country-by-country reporting, would give the U.S. a chance to review the system and respond to potential misuse of the information (23 Transfer Pricing Report 1547, 4/16/15).

“Hopefully, that 2020 backstop, there’ll be a pause, a look—‘How was it implemented, is it working, if not, then maybe we could take some corrective action at this point as the U.S. government,’” he said.

On the potential for leaking of the tax data, Varley said transmissions through tax information exchange agreements (TIEAs) are more concerning than transmissions through the traditional information exchange provisions of double tax agreements.

“Between the two, the one that causes me more concern is the TIEA network, because there you don’t have a MAP provision, and you don’t have Article 9 oftentimes, to try to resolve disputes that come in,” Varley said.

Varley’s comments were made during a panel discussions of the OECD’s Action Plan on Base Erosion and Profit Shifting (BEPS). While he was not on the panel, but rather spoke from the audience.

Not Waiting. Some of the practitioners on the panel said that countries and companies aren’t waiting for the OECD to finalize its recommendations before beginning work on country-specific data.

Marc Levey of Baker & McKenzie in New York said the IRS recently asked, during an audit, for transfer pricing studies for all of the dozens of countries the taxpayer did business in.

Levey said tax authorities will try to use the country-by-country reporting data, and the master file included in the OECD’s new reporting requirements, to make assumptions about why profits and losses exist in jurisdiction—disregarding the many non-tax reasons behind them.

“There are a hundred different reasons why that may exist,” Level said.

David Ernick of PricewaterhouseCoopers LLP in Washington, D.C., reiterated concerns that the new reporting requirements indicate a move toward formulary apportionment and away from the arm’s-length standard—as well as an emphasis on “results-based” proposals over “principles-based” ones.

He also said the overall BEPS project can be an avenue for foreign countries to pursue protectionist aims against U.S. companies.

“There does seem to be a little protectionism involved, protecting local competitors against U.S. multinationals,” Ernick said.

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