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Guidance on international income tax issues raised by the COVID-19 crisis

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The COVID-19 crisis has resulted in the imposition of safety measures by governments around the world, including the Canadian government, to protect the health of their citizens. Similarly, businesses have imposed safety measures to protect their employees. These measures include restrictions on travel (the "Travel Restrictions"). The Travel Restrictions have resulted in certain taxpayers and their representatives expressing concerns regarding a number of potential Canadian income tax issues. This document describes each potential issue considered by the Canada Revenue Agency (the "Agency") thus far, and outlines the Agency's approach to address it.

It is possible that some of these income tax issues will arise from the Travel Restrictions instituted by another country independent of those instituted by Canada. As well, it is understood that, in some situations, particular

Travel Restrictions could have effect past the date on which they are officially lifted. Therefore, the Agency will consider whether a particular tax issue has arisen as the result of the Travel Restrictions on a case-by-case basis. Additionally, at the present time, it is uncertain how long it will be necessary for the Travel Restrictions to remain in place. Accordingly, the guidance described below will apply from March 16 until June 29, 2020, at which time the Agency may extend them if necessary, or rescind them if no longer required.

The administrative approach taken by the Agency in addressing these issues is intended to assist taxpayers during this time of crisis. It does not represent any interpretive position or intention to establish any broader policy by the Agency. Nor does it represent any change in Canada's ongoing commitment to combat international tax evasion and avoidance. In this regard, any taxpayer that engages in tax evasion or avoidance schemes that attempt to exploit the crisis or the temporary relieving Agency positions discussed below can expect that the Agency will pursue all compliance tools at its disposal to protect the integrity of Canada's tax system.

I. Income Tax Residency

A. **Individuals**

In general, an individual's residence for Canadian tax purposes is a common-law factual determination based on the individual's residential ties with Canada. In addition, an individual who sojourns (e.g., is physically present) in Canada for a period of, or periods the total of which is, 183 days or more in a tax year will be deemed to be resident in Canada throughout the year.

Potential Issue

Individuals visiting Canada at the time the Travel Restrictions were imposed may not have been able to return to their country of tax residence as they had intended and instead have been required to remain in Canada. Could this extended stay in Canada result in the individual being resident in Canada for Canadian tax purposes?

Agency position

Where the individual has remained in Canada solely because of the Travel Restrictions, that factor alone will not cause the Agency to consider the common-law factual test of residency to be met. In addition, as an administrative matter and in light of these extraordinary circumstances, the Agency will not consider the days during which an individual is present in Canada and is unable to return to their country of residence solely as a result of the Travel Restrictions to count towards the 183-day limit for deemed residency. This will be the Agency position where, among other things, the individual is usually a resident of another country and intends to return, and does in fact return, to his or her country of residence as soon as he or she is able to do so.

B. **Corporations**

Under the Canadian income tax system, corporations that have been established under foreign law will nevertheless be considered resident in Canada if their "central management and control" is located in Canada. One of the key factors typically considered in applying this common-law concept is the jurisdiction in which the meetings of the board of directors take place.

Potential Issue

A corporation that, prior to the implementation of the Travel Restrictions, was tax resident in a foreign jurisdiction may have one or more directors present in Canada. The Travel Restrictions might have resulted in these directors being unable to travel to the foreign jurisdiction to attend board meetings. If directors of such a corporation participate in board meetings while physically present in Canada, will the Agency consider the corporation's central management and control to be in Canada, such that it is resident in Canada for Canadian tax purposes and therefore a dual resident (i.e., a resident of Canada and a resident of the foreign jurisdiction)?

Agency Position

Some of Canada's income tax treaties will address the situation of the dual residency of a corporation by determining the corporation to be resident in the country under whose laws it was created. For example, where the corporation is an entity created under the laws of the United States as a "C-corporation" or "S-corporation", the Agency expects that the corporate residency tie-breaker rule contained in Article IV of the Canada - United States income tax treaty will address this issue.

Other tax treaties contain a residency tie-breaker rule that looks to the corporation's place of effective management, among other factors. For corporations covered by such income tax treaties, in light of the extraordinary circumstances resulting from the Travel Restrictions, as an administrative matter, where a director of a corporation must participate in a board meeting from Canada because of the Travel Restrictions, the Agency will not consider the corporation to become resident in Canada solely for that reason.

Determinations of corporate residency involving potential dual residency with non-treaty countries will be determined on a case-by-case basis.

This administrative approach will also be followed in respect of other entities established in foreign jurisdictions that are considered corporations under Canadian income tax law, such as limited liability companies. In addition, where appropriate, the Agency will consider adopting a similar approach in determining the residency of a commercial trust.

It is important to note that, notwithstanding that our comments above concentrate on the location of board meetings, there is more to where central management and control of a corporation, or where place of effective management (for income tax treaty purposes) is located than the location of board meetings. The determination of the central management and control of a corporation is based on a number of factors, of which the location of board meetings is only one element. Similarly, the location of board meetings is also only one element in determining the location of a corporation's place of effective management. The Agency may still conclude that a corporation is resident in Canada where the actual management and control of the corporation takes place in Canada even though the board meetings have taken place elsewhere.

II. Carrying on business in Canada/permanent establishment

Under the Canadian income tax system, non-residents of Canada are liable to pay tax on their income from "carrying on business in Canada." In general, where Canada has entered into an income tax treaty with another country, a resident of that country will only be required to pay tax in Canada on that income if their activities in Canada meet the threshold of a "permanent establishment" under the relevant income tax treaty.

Potential Issue

A non-resident entity may employ individuals to work outside of Canada. As a result of the Travel Restrictions, the only way for some of these individuals to fulfil their employment duties might be by performing them in Canada. Will employees who regularly work outside of Canada but, due to the Travel Restrictions, exercise their employment duties in Canada result in the non-resident entity carrying on business in Canada or create a permanent establishment in Canada for the non-resident entity?

Agency Position

Non-resident entities that are resident in a jurisdiction with which Canada has an income tax treaty and that are carrying on business in Canada but whose activities in Canada do not meet the threshold of permanent establishment are required to file a return for that year in order to claim an exemption from Canadian income tax. This filing obligation continues to apply in respect of tax years of non-resident entities that overlap with the period while the Travel Restrictions are in place. However, as an administrative matter and in light of the extraordinary circumstances resulting from the Travel Restrictions, the Agency will not consider a non-resident entity to have a permanent establishment in Canada solely because its employees perform their employment duties in Canada solely as a result of the Travel Restrictions being in force. Similarly, the Agency will not consider an "agency" permanent establishment to have been created for the non-resident entity solely due to a dependent agent concluding contracts in Canada on behalf of the non-resident entity while the Travel Restrictions are in force, provided that such activities are limited to that period and would not have been performed in Canada but for the Travel Restrictions. Where Canada has not entered into an income tax treaty with the country in which the non-resident entity is resident, if the non-resident entity carries on business in Canada, it is required to file a return for that year, and if it can be demonstrated to the Agency that the non-resident entity has satisfied the Canadian income tax threshold of "carrying on business in Canada" only because of the Travel Restrictions, the Agency will consider whether administrative relief is appropriate on a case-by-case basis.

Finally, the Agency will exclude, in determining whether an individual meets the 183-day presence test in a "services permanent establishment" provision of Canada's tax treaties (such as Article V(9)(a) of the Canada-United States income tax treaty), any days of physical presence in Canada due solely to Travel Restrictions.

III. Cross-border employment income

Many individuals residing on either side of the Canada-US border may be employed and perform their employment duties in the other country.

A. **US Resident Employees**

Under the Canada-United States income tax treaty, Canada is permitted to tax salary, wages and other similar remuneration derived by a resident of the United States in respect of employment services provided in Canada, where the employment is exercised in Canada. Notwithstanding the above rule, such remuneration is not taxable in Canada if:

- it does not exceed CAD$10,000; or
- the person is present in Canada for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned and the remuneration is not borne by:
    - an employer who is a resident of Canada, or
    - a permanent establishment, which the employer has in Canada.

A reciprocal rule applies in respect of residents of Canada exercising their employment in the United States.

Potential Issue

Some US residents who regularly exercise their employment in Canada and who are normally not present in Canada in excess of 183 days (and, for that reason alone, are not taxable in Canada on their employment income) may now be exercising their duties in Canada for an extended period of time as a result of the Travel Restrictions. In these situations, will the employees' taxation in Canada be changed?

Agency Position

Where such individuals are present in Canada, and are exercising their employment duties in Canada, solely as a result of the Travel Restrictions, those days will not be counted toward the 183 day test in the Canada-United States income tax treaty. As such, these individuals will continue to benefit from the treaty relief provided under the Canada-United States income tax treaty.

B. **Other resident employees**

The Agency will also take this same approach in applying the days of presence test in Canada's other tax treaties.

C. **Canadian Resident Employees**

Under Canadian rules, a non-resident employer is required to deduct withholdings at source from the salary that it pays to an employee who is a resident of Canada, regardless where the services are rendered. Where appropriate, the Agency will issue a "letter of authority" to the employee authorizing the non-resident employer to reduce the Canadian deductions at source to take into account the foreign tax credit available to the employee in respect of their foreign tax liability.

Potential Issue

A non-resident entity may employ Canadian residents to work outside of Canada. As a result of the Travel Restrictions, the only way for some of these Canadian resident employees to fulfil their duties might be by performing them in Canada on an exceptional and temporary basis. Will the performance of employment duties from Canada affect the withholding obligations of the non-resident entity?

Agency Position

If a Canadian resident employee of a non-resident entity is forced to perform their employment duties in Canada on an exceptional and temporary basis as a result of the Travel Restrictions and that employee has been issued a letter of authority applicable to the tax year including that period, the letter of authority will continue to apply and the withholding obligations of the non-resident entity will not change in Canada as long as there are no changes to the withholding obligations of the non-resident entity in the other jurisdiction.

IV. Waiver Requests – Payments to non-residents for services provided in Canada

Canadian income tax rules require that amounts must be deducted or withheld and remitted in respect of:

- payments for services rendered in Canada by non-residents, other than those paid in respect of an office or employment ("Regulation 105"), and
- remuneration paid to a non-resident officer or employee in respect of an office, or employment services, provided in Canada ("Regulation 102").

In certain circumstances, an application to the Agency may be made for a waiver of the withholding requirement in respect of Regulation 105 or Regulation 102 (a "Waiver Request"). Most often, this will be the case where the recipient is exempt from Canadian income tax in respect of the payment because of an income tax treaty that Canada has with the recipient’s country of residence.

Potential Issue

As a result of the COVID-19 crisis, the processing of Waiver Requests was temporarily interrupted (the "Interruption"). Consequently, while we have continued to accept Waiver Requests during the Interruption and processing has resumed in a limited capacity, processing times have been longer than usual. How should a payor proceed?

Agency Position

As a result of the Interruption and the Travel Restrictions, urgent Waiver Requests may be submitted electronically on a temporary basis. More information is under development.

Additionally, where a Waiver Request in respect of Regulation 105 and/or Regulation 102 has been submitted to the Agency and, due to the Interruption, the Agency was unable to process the request within 30 days, the Agency will not assess a person who fails to deduct, withhold or remit any amount as required by Regulations 102 and 105, in respect of an amount paid to a non-resident person covered by the particular Waiver Request.

This relief will be available where the sole reason a non-resident person could not obtain a waiver of Regulation 102 or 105 withholdings from the Agency was due to the Interruption, and the person paying the amount can demonstrate they have taken reasonable steps to ascertain that the non-resident person was entitled to a reduction or elimination of Canadian withholding tax by virtue of an income tax treaty with Canada. Both the non-resident and the person paying the amount must otherwise fulfil their Canadian reporting and remitting obligations in respect of the waiver application.

Other situations may arise where a Waiver Request could not be submitted to the Agency due to the Travel Restrictions, or other consequences of the COVID-19 crisis, and yet no amounts were withheld pursuant to Regulations 102 and 105. The Agency will review these situations on a case-by-case basis to determine if the non-compliance can be directly attributable to the effects of the COVID-19 crisis. In those cases, the Agency will not assess a person who fails to deduct, or withhold or remit any amount as required by Regulations 102 and 105, in respect of an amount paid to the non-resident person.

V. Disposition of taxable Canadian property by non-residents of Canada

Under Canadian income tax rules, a non-resident vendor who disposes of certain taxable Canadian property must notify the Agency about the disposition either before they dispose of the property or within ten days after the disposition. When the Agency has received either an amount to cover the tax on any gain the vendor may realize upon the disposition of property, or appropriate security for the tax, the Agency will issue a certificate of compliance to the vendor (a "Section 116 Certificate"). A copy of the certificate is also sent to the purchaser.

If the purchaser does not receive a Section 116 Certificate, the purchaser is required to remit a specified amount to the Receiver General for Canada and is entitled to deduct the amount from the purchase price. Any payments or security provided by the vendor and/or purchaser will be credited to the vendor's account. A final settlement of tax will be made when the vendor's income tax return for the year is assessed.

Potential Issue

As a result of the COVID-19 crisis, the processing of requests for a Section 116 Certificate was temporarily interrupted (the "Interruption"). While the Agency has continued to accept requests for a Section 116 Certificate during the Interruption and processing has resumed in a limited capacity, processing times have been longer than usual. How should a vendor and purchaser proceed?

Agency Position

Where a vendor has submitted a request for a Section 116 Certificate and the certificate has not been issued by the time a purchaser's remittance is due (i.e., within 30 days after the end of the month in which the property was acquired), the purchaser or vendor may request that the Agency provide a comfort letter.

The comfort letter advises the purchaser/vendor/representative to retain the funds they have withheld (even though technically, the amounts are due) until the Agency's review is complete and the Agency requests the purchaser to remit the required tax. As long as the tax is remitted when requested, the Agency will not assess penalty and interest on the amount.

As a result of the Interruption, urgent requests for comfort letters may be submitted on a temporary basis. A comfort letter may be requested by contacting the CRA's Individual tax enquiries line at 1-800-959-8281.

Further information

If a taxpayer has specific questions regarding how the above guidance will apply or have a situation that is not addressed above, please contact [PERESCOVIDG@cra-arc.gc.ca]. [1]

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1 Use of this mailbox is to allow the CRA to receive residency and permanent establishment questions related to the COVID-19 travel restrictions which may include information up to Protected B. Please include a phone number that you would like to be reached at. The CRA will contact you at either the number you provided should the request include protected or personal information, or via the email you provided should the request be generic in nature. The CRA will not respond to any other enquiries that are not related to residency and permanent establishment questions related to the COVID-19 travel restrictions submitted through this mailbox.

The CRA does not provide assurance with respect to the protection, confidentiality, or security of unsecured emails. Using this mailbox, you accept the risks inherent in sending information by unsecured email and understand all such email messages may be considered as being accessed and disclosed to unknown third parties somewhere in the world. You agree not to hold the CRA or its employees liable for any damage or loss arising from the communication of personal information by this unsecured email.

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