Cassels

New CRA Guidance on International Income Tax Issues

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On May 19, 2020, the Canada Revenue Agency (CRA) published guidance on the tax matters below relating to restrictions on travel (Travel Restrictions) because of the COVID-19 pandemic:

- Income tax residency – corporations and individuals
- Carrying on business in Canada and permanent establishment
- Cross-border employment income
- Waiver requests – payments to non-residents for services provided in Canada
- Disposition of taxable Canadian property by non-residents of Canada

The guidance described below will apply from March 16 until June 29, 2020, and the CRA may extend them, if necessary, or rescind them, if no longer required. The CRA has noted that the administrative approach taken to address these issues are only intended to assist taxpayers during the pandemic and not intended to establish a broader policy.

Income Tax Residency

Individuals

Where an individual has remained in Canada solely because of the Travel Restrictions, the CRA has said this factor alone will not cause the common-law test of residency to be met.

In addition, the CRA will not consider the days during which an individual is present in Canada and is unable to return to their country of residence solely because of the Travel Restrictions to count towards the 183-day limit for deemed residency. However, this will only be CRA's position where, amongst other things, that individual is usually a resident of another country and intends to return, and does in fact return, as soon as he or she is able to do so.

Corporations

Under Canadian common law, corporations formed outside of Canada may be resident in Canada if their "central management and control" is exercised in Canada. One of the key factors in applying the common law residency test is the jurisdiction in which the meetings of the board of directors take place.

With respect to Canada's tax treaties that contain a residency tie-breaker rule that looks to the corporation's place of effective management, among other factors, the CRA will not consider the corporation to be a resident in Canada solely because the director of a corporation participated in a board meeting from Canada as a result of the Travel Restrictions.

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

This approach will also be followed in respect of other entities established in foreign jurisdictions that are considered corporations for Canadian tax purposes, such as limited liability companies. Also, the CRA will consider adopting a similar approach in determining the residency of a commercial trust.

Carrying on Business in Canada and Permanent Establishment (PE)

Carrying on Business in Canada

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 does not have a PE in Canada) are required to continue filing a return for the tax years that overlap with the period while the Travel Restrictions are in place. The filing of the tax returns allows for the non-resident entity to claim an exemption from Canadian income tax.

Non-resident entities that are resident in a jurisdiction with which Canada does not have an income tax treaty and that are carrying on business in Canada are required to file a return. However, if the non-resident entity can demonstrate to the CRA that the reason it has met the threshold of "carrying on business in Canada" is only because of the Travel Restrictions, the CRA may provide administrative relief on a case-by-case basis.

PE

The CRA will not consider a non-resident entity to have a PE in Canada as a result of its employees performing their employment duties in Canada solely because of the Travel Restrictions.

The CRA will not consider an "agency" PE 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.

The CRA will exclude, in determining whether an individual meets the 183-day presence test in a "services PE" provision of Canada's tax treaties, any days of physical presence in Canada solely because of the

Travel Restrictions.

Cross-border Employment Income

US Resident Employees

The CRA will not count the days towards the 183-day presence test in the Canada-United States income tax treaty where individuals who are exercising their employment duties in Canada solely because of the Travel Restrictions. These individuals will still be afforded treaty relief under the Canada-United States income tax treaty.

Other Resident Employees

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

Canadian Resident Employees

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). The CRA may issue a "letter of authority" to the employee authorizing the non-resident employer to reduce the Canadian deductions at source by taking into account the foreign tax credit available to the employee in respect of their foreign tax liability.

Where a Canadian resident employee of a non-resident entity performs 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.

Waiver Requests – Payments to Non-residents for Services Provided in Canada

As a result of the temporary interruption (Interruption) of processing waiver requests in respect of Regulations 105 or 102 (Wavier Request) and the Travel Restrictions, urgent Waiver Requests may be submitted electronically on a temporary basis. More information will be provided by the CRA.

Where a Waiver Request has been submitted to the CRA and, due to the Interruption it was unable to

process the request within 30 days, the CRA will not assess a person who fails to deduct, withhold or remit any amount as required under Canadian tax law as it relates to payments to non-resident persons. Relief will only be available where the reason a non-resident person could not obtain a Waiver Request from the CRA 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 under an income tax treaty with Canada. Additionally, 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.

The CRA will also review other situations on a case-by-case basis to determine if non-compliance can be directly attributable to the effects of the COVID-19 crisis.

Disposition of Taxable Canadian Property by Non-residents of Canada

Where a vendor has requested a section 116 certificate in resect of a disposition of taxable Canadian property and the certificate has not been issued by the time a purchaser's remittance is due (i.e., within the deadline of 30 days after the end of the month in which the property was acquired), the purchaser or vendor can request a comfort letter from the CRA.

As a result of the Interruption, urgent requests for comfort letters may be submitted on a temporary basis.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.