VISITORS TO THE US (ESPECIALLY SNOWBIRDS) BEWARE!

There are serious consequences for Canadian taxpayers who spend so much time in the US that they are deemed to be resident there. This rule is known as the "substantial presence" test. Currently, the US tax authorities have difficulty tracking Canadian visitors, because there has been no tracking by US tax and immigration authorities of their departure. This is changing. The planned change announced in February 2011, the "Perimeter Security and Economic Competitiveness – Action Plan", came into effect on June 30, 2014.

According to the Action Plan the governments will "share Canada–United States entry data at the land border such that the entry information from one country could constitute the exit information from another through an integrated entry and exit system".

The US authorities, either through exchange of information with their Canadian counterparts or by having visitors to the US record their departure, will track movement into and out of the US of every Canadian visitor.

How is the number of days spent in the US calculated?

A "day" is defined as any part of a day. Leaving the US at one minute after midnight counts as one more "day" spent in the US. Exceptions include a day spent in the US while traveling between two countries outside the US. For example, a plane change in the US, with a same day connection to Europe or Mexico or a Caribbean country, will not count. Generally, if you were not sick when you entered and you become sick while in the US and were then unable to depart, your sick days will not count.

How is your "Substantial Presence" determined?

For any calendar year, you add together:

- The number of days you spent in the US in that year (e.g. 2014);
- One third of the number of days you spent in the US in the previous year (e.g. 2013); and
- One sixth of the number of days you spent in the US in the next previous year (e.g. 2012).

If the total is 183 days or more *and* you have spent at least 31 days in the US in the calendar year, you are a deemed resident of the US for that year under the US *Internal Revenue Code*, because you are "substantially present" in the US for the year.

As a rule of thumb, if you spend no more than four months each year in the US in three consecutive years, you will not trigger this "183-day rule", but you must always make the calculation above.

Is there a solution for Canadians who exceed the limit?

Happily, there is. If you exceed the limit explained above, but spend no more than 182 days physically present in the US in a calendar year, then under the *Internal Revenue Code* you may claim not to be deemed a US resident because of the "closer connection" test, meaning that you have a closer connection to Canada than to the US during that calendar year.

To make this claim, you must complete IRS Form 8840, "Closer Connection Exception Statement for Aliens".

It is essential to file the form on a timely basis. The instructions on that form state: "If you do not timely file Form 8840, you will not be eligible to claim the closer connection exception and may be treated as a U.S. resident".

The due date for Form 8840 is the same as the due date for filing US Form 1040NR. If filing that form, Form 8840 must be attached. If not filing Form 1040NR, Form 8840 must be mailed separately to the US Department of the Treasury by the due date for filing Form 1040NR.

Remember, if you are present in the US for more than 182 days in the calendar year, you are not eligible to file Form 8840.

Is there a solution for a Canadian who spends *more* than 182 days physically present in the US? The good news is that the tax treaty between Canada and the US has a provision which prevents a Canadian taxpayer from being resident in both countries for tax purposes. However, attempting to claim non-US residence using this treaty provision is complicated and beyond the scope of this article. Consult a US tax specialist who works in this area to see if there is a possibility of successfully claiming non-US residence under the tax treaty. The IRS may be reluctant to give up the prospect of taxing your worldwide income and may resist the claim, so a court battle may even ensue.

However, even though the US will not tax you on your worldwide income if you are successful in your treaty-based argument, you will still have all the same *filing* obligations as a US citizen for that year. In the US tax game, it is not the taxes that are the killer, but the penalties for failure to file, which can be as high as $10,000 per omitted form per year.

It is certainly preferable to ensure that you are physically present in the US for less than 183 days under the calculation above.

What are the consequences of deemed US residence?

If you are unsuccessful in making your treaty-based argument, you will be deemed a US resident. A deemed US resident is subject to US personal income tax on worldwide income from all sources. A foreign tax credit may be available for Canadian tax paid on the same income, but there can be serious complications. For example, since US tax is based on the US *Internal Revenue Code*, RRSP and RESP contributions may not be deductible in calculating US taxable income and Tax Free Savings Account (TFSA) income will be subject to US tax. These are just examples of potential taxation problems.

Furthermore, if you are deemed to be a US resident, your entire worldwide estate may be subject to the US estate tax, based on the fair market value of your worldwide assets at the date of death. Tax rates are very high, so US estate tax may substantially exceed the Canadian capital gains tax payable on death. "Residency" for US estate purposes is a different test than "residency" for income tax purposes. For estate tax purposes, residency is determined by examination of all of the facts and circumstances. As a result, it is possible that you would *not* be resident for income tax purposes but *would be* resident for estate tax purposes (and vice versa).

A potential US immigration problem, should your stay in the US exceed the six months normally permitted on a tourist visa, is the risk of being prohibited from re-entering the US for a minimum of three years and a maximum of 10 years. A snowbird owning a winter home in the US might find this very disconcerting!

One more problem, this time a Canadian one: if you become tax resident in the US and consequently are deemed to be a non-resident of Canada, then for Canadian tax purposes there will be a deemed disposition of almost all of your worldwide assets at the date you were deemed non-resident, with a consequential liability to pay Canadian capital gains tax on deemed gains. And if you are not a US citizen, the Canada Revenue Agency can use the IRS to collect the Canadian tax debt from you!

Canadian provinces each have their own rules about how long an individual must be resident in the province to remain eligible for provincial health coverage. Too much time spent in the US may cause a problem. This (unrelated) factor needs to be considered if you are a snowbird.

What to do?

Although it has always been necessary, it is now *essential* for Canadians who visit the US, whether for business or for pleasure, to keep detailed records of the number of days spent in the US in each calendar year. It may be advisable to retain documentation (such as copies of plane tickets, hotel bills and gas or store receipts) to prove the accuracy of the information in case of an error in the immigration records.

Conclusion

Canadians may no longer take a casual approach to keeping track of the days spent each year in the US. Accuracy is now very important.

Snowbirds, as well as Canadians travelling frequently to the US for business, shopping, family visits or other reasons, must be very careful to keep meticulous records of the number of days (as defined) spent there. Should the total for the year to date approach the danger level, appropriate action must be considered; once the limits are exceeded, it is too late.

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