Risk of Deemed US Residence

A Canadian resident who overstays visits to the United States now runs a much greater risk of being deemed a US resident. Since July 1, 2014, US and Canadian immigration authorities share Canada-US entry data; thus, the United States usually knows exactly how many days a Canadian resident spends in the United States annually. However, the United States may be unaware of a Canadian resident's cruises or other trips from a US port and therefore may have incorrect information about the number of days that a Canadian resident spent in the United States in a year.

The US days-present residence calculation is purely arithmetical. For each calendar year, the number of relevant days present is the sum of (1) days spent in the United States in the current year (say, 2015); (2) one-third of the days spent in the United States in the previous year (say, 2014); and one-sixth of the days spent in the United States in the next previous year (say, 2013).

If the total is 183 days or more, and if the individual has spent at least 31 days in the United States in the current year, the Code deems him or her to be a US resident for the year; consequences include US taxation on worldwide income, significant reporting requirements, and severe penalties for failure to report foreign (non-US) bank accounts and other matters. An individual should ensure that he or she has correctly calculated the number of days present if there is any doubt about the adequacy of travel records. If the IRS later arrives at a different figure that results in US residence for the year, it is probably too late to file form 8840, "Closer Connection Exception Statement for Aliens," discussed below. The formula calculates part of a day as a whole day, with few and limited exceptions. For example, if an individual becomes sick while in the United States and cannot leave, the period during which he or she is forced to remain in the United States after the 183-day threshold is excluded from the calculation. However, the exception does not apply if at the time of entry the individual was sick or aware of the condition that ultimately precluded departure from the United States (regardless of whether he or she was under treatment).

In general, spending 126 days in the United States in each of three consecutive years results in deemed US residence: 126 + 42 + 21 = 189, which of course is more than 183. However, if the individual spends fewer than 183 days in the United States in a calendar year, an exception to deemed US residence applies if he or she can claim a closer connection with another country, such as Canada. Form 8840 must be filed by the due date for filing US form 1040NR ("U.S. Nonresident Alien Income Tax Return") or form 1040NR-EZ ("U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents") (whether or not the individual must file either form). Form 8840 says, "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." As noted above, the deadline for

filing form 8840 may be missed if the individual miscalculated the number of days present in the United States—for example, because of inadequate travel records.

A person who spends 183 days or more in the United States in a calendar year is automatically a deemed US resident and cannot claim the closer-connection exception. However, treaty tiebreaker rules in article IV of the Canada-US treaty may result in a dual resident being treated as a Canadian resident only. The treaty rule is complicated and requires a step-by-step approach to determine the jurisdiction of deemed residence. The first test—the location of a permanent home in only one state—is usually not helpful. The next test—the centre of vital interests, the place where the taxpayer has closer personal and economic relations—may be problematic, especially for a retiree who spends a good deal of time in the United States and no longer has any business interests in Canada. If the centre of vital interests is not determinable, the next test is the place of habitual abode; there is some interesting jurisprudence on this complex concept in which the number of days spent in a jurisdiction has been held to be just one factor. If each of the earlier tests is inconclusive, the next test—citizenship—may provide a favourable answer.

However, using article IV of the treaty to establish Canadian residence is not a perfect solution. The individual is treated as a non-resident for tax purposes, but he or she still has all of the tax filing obligations of a US citizen or resident (including the onerous failure-to-file penalties).

If the individual qualifies for the closer-connection exception but fails to file form 8840 by its due date, he or she may be able to late-file the form. However, the individual must "show by clear and convincing evidence that [he or she] took reasonable actions to become aware of the filing requirements and significant steps to comply with those requirements."

A treaty tiebreaker claim for deemed US residence may be problematic under Canadian law. Deemed US residence under the treaty means that the individual is deemed not to be a resident of Canada (subsection 250(5) of the Act). Negative Canadian tax consequences may follow—for example, Canadian departure tax (subsection 128.1(4)). Treaty article XXVI A allows the CRA to engage IRS assistance to collect a Canadian tax debt if the taxpayer owns US-located property or has US income sources. These problems can be avoided if the Canadian resident keeps accurate records of the number of days that he or she is present in the United States in each year—and is in fact present there no more than 182 days in a year—and files form 8840 by the due date to claim a closer connection to a foreign jurisdiction.

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Published in Canadian Tax Highlights, Volume 23, Number 3, March 2015