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INTERNATIONAL TAX LAW UPDATE

JUNE 2016

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Non-Resident Employer Certification Regime: Withholding Relief for Non-Resident Employers and Employees

On June 23, 2016, *Budget Implementation Act, 2016, No. 1* received Royal Assent, which among other things, enacts a non-resident employer certificate regime that may be of interest to employers sending employees to Canada.

In general, (i) resident and non-resident employers have the same withholding, remitting, and reporting obligations with respect to work performed in Canada by their employees (e.g., income tax, Canada Pension Plan contributions, and Employment Insurance premiums in addition to applicable provincial payroll taxes), and (ii) withholding for Canadian income tax is required even if the non-resident employee is exempt from Canadian income tax under a tax treaty (unless a waiver of the withholding requirement is obtained from the Canada Revenue Agency (the "CRA")).

Under the non-resident employer certificate regime, non-Canadian employers that are resident in a country with which Canada has a tax treaty, and are certified by the CRA, are not required to make withholdings on account of Canadian income tax on payments made to a non-resident employee in respect of employment services performed in Canada if the employee (i) is exempt from Canadian income tax in respect of the payment because of a tax treaty, and (ii) is either (A) not in Canada for 90 or more days in any 12-month period that includes the time of the applicable payment, or (B) not in Canada for 45 or more days in the calendar year that includes the time of the applicable payment.

While the definition of "qualifying non-resident employer" generally requires the employer to be a resident of a country with which Canada has a tax treaty, it also includes a corporation that would be a resident of a country with which Canada has a tax treaty if the corporation were treated, for the purpose of income taxation in that country, as a body corporate. This allows US limited liability companies (LLCs) to qualify (the CRA has consistently taken the position that a fiscally transparent US LLC is not a resident of the US for purposes of the Canada-US tax treaty because it is not itself liable to US income tax). This helpful element of the "qualifying non-resident employer" definition was added subsequent to the original release of the proposals.

Furthermore, an employer that is a partnership will be a qualifying non-resident employer if at least 90 per cent of the partnership's income or loss for the fiscal period that includes the time of the payment to the "qualifying non-resident employee" is allocated to members that are resident in a country with which Canada has a tax treaty.

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As to whether the non-resident employee is exempt from Canadian income tax in respect of Canadian employment income because of a tax treaty, an exemption from Canadian income tax is generally available for treaty-resident employees if (i) the employee 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 paid by, or on behalf of, a person who is a Canadian resident and is not borne by a permanent establishment in Canada, or (ii) in the case of a US resident employee entitled to benefits under the Canada-US tax treaty, the remuneration to the non-resident employee in respect of employment exercised in Canada does not exceed C$10,000.

To qualify for the exemption, the non-resident employer must make certain filings with the CRA to become certified and be so certified at the time of the applicable payment. Even if the employer is so certified, it will generally continue to have reporting obligations with respect to amounts paid to its qualifying non-resident employees and, subject to a due diligence defence, will be liable for withholdings to the extent that the non-resident employees were not in fact qualifying non-resident employees.

An important exception to the reporting requirement is that income tax reporting will generally not be required for an amount that is exempt from withholding under this regime if the employer, after reasonable inquiry, has no reason to believe that the employee's total taxable income earned in Canada under Part I of the Income Tax Act (Canada) in the calendar year during which the payment is made is more than C$10,000.

Certification Process

To become certified, the non-resident employer must file Form RC473 with the CRA and thereafter receive an approval letter from the CRA certifying that it is a qualifying non-resident employer. Generally, the exemption will only apply to payments after the approval letter has been granted. The CRA has indicated that Form RC473 should be received at least 30 days before a qualifying non-resident employee starts providing services in Canada.

Form RC473 requires a non-resident employer to provide detailed information regarding its anticipated business activities in Canada. To become certified, the employer must also agree to comply with certain specified obligations and requirements and to inform the CRA immediately of any changes to the information provided in Form RC473 or if the employer no longer meets the conditions to be a qualifying non-resident employer.

Among other things, the obligations and requirements of a qualifying non-resident employer include:

- determining if the applicable employee is resident in a country with which Canada has a tax treaty;
- evaluating and documenting if the applicable employee's remuneration is expected to be exempt from tax in Canada under the tax treaty;
- determining if the applicable employee either works in Canada for less than 45 days in the calendar year that includes the time of the payment, or is present in Canada for less than 90 days in any 12-month period that includes the time of payment; and
- proactively tracking and recording the number of days that each qualifying non-resident employee is either working or is present in Canada and the income attributable to such days (or any other criteria relevant to applying the applicable treaty exemption).

The CRA has indicated that certification will generally be valid for up to two calendar years (to qualify for the exemption after this period, the employer would need to reapply for certification). However, the CRA can revoke an employer's certification earlier if, for example, the employer does not comply with the specified obligations and requirements of a qualifying non-resident employer.

Certain Considerations

When a non-resident sends one or more employees to Canada the issue arises whether the employees' activities result in the non-resident carrying on business in Canada for tax purposes. A non-resident carrying on (or deemed to be carrying on) business in Canada in a year is required to file a Canadian federal income tax return (and possibly provincial returns) in respect of that year even if an exemption under a treaty is available with respect to the income earned by the non-resident (i.e., if the non-resident did not have an actual or deemed permanent establishment in Canada).

The certification process under this new regime will put such non-residents (who make an application for certification) on the CRA radar and provide a mechanism to identify non-residents that may be carrying on business in Canada (i.e., the CRA may be more likely to flag such non-residents for audit purposes to determine if they are carrying on business in Canada, whether they are entitled to treaty benefits and whether they have an actual or deemed permanent establishment in Canada).

To avoid the carrying on business issue in a multinational company context, foreign members of the group have often seconded their non-resident employees to a Canadian member on a cost-recovery basis. The non-resident employer certification regime would appear not to apply to secondment arrangements. Accordingly, multinational groups will generally need to weigh the benefits of entering into a secondment arrangement versus the benefits of falling under the non-resident employer certification regime.

We Can Help

We regularly advise clients with respect to tax considerations applicable to non-resident employees working in Canada. Please call your WeirFoulds lawyer or the author below if you would like to discuss your Canadian tax compliance obligations or if you require assistance in structuring a non-resident employee work assignment.

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Ryan Morris is Co-Chair of the Tax Group at WeirFoulds LLP. He regularly advises clients on various areas of domestic and international taxation, including advising on mergers and acquisitions, financings, transfer pricing, non-resident withholding tax and a broad range of corporate tax matters. Ryan also represents clients with audits, voluntary disclosures and appeals and has represented clients as lead counsel at every level of court, including Canada's highest court, the Supreme Court of Canada. Ryan is the Tax Editor of *Ontario Corporate Law & Practice* and is also the co-editor and a frequent contributor to the Current Cases feature of the *Canadian Tax Journal*, the flagship research publication of the Canadian Tax Foundation.

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