



FISCALLY TRANSPARENT U.S. LLC ENTITLED TO CANADA-U.S. TREATY BENEFITS

In *TD Securities (USA) LLC v. The Queen*, Canada's Tax Court considered for the first time whether a fiscally transparent U.S. LLC (TD LLC) was a "resident" of the U.S. and therefore entitled to the 5% reduced rate of Canadian branch profits tax under the *Canada-U.S. Income Tax Convention* ("Treaty"). Under Article IV of the Treaty, TD LLC would qualify as a resident of the U.S. for the years in question if, under U.S. law, it was liable to U.S. tax by reason of its domicile, residence, citizenship, place of management, place of incorporation or "any other criterion of a similar nature". TD LLC, which had a permanent establishment in Canada and was subject to Canadian branch profits tax on its Canadian earnings, was an indirect wholly-owned subsidiary of the Toronto-Dominion Bank (TD). TD LLC's income was included for U.S. tax purposes in the income of its sole member, Holdings II, which income in turn was consolidated and subject to U.S. tax with the income of its direct parent (and wholly-owned direct subsidiary of TD), TD USA. The taxation years in question preceded the Fifth Protocol amendments adding the look-through rule in Article IV(6) for determining treaty benefits in respect of income derived through fiscally transparent entities. Historically, Canada had denied treaty benefits to fiscally transparent LLCs and their members, while applying a look-through approach to granting treaty benefits for U.S. partnerships and S Corporations based on the U.S. residence of their member(s).

The Tax Court reviewed a wealth of supplementary material presented to it, including the history of amendments to Article IV, the OECD Model Convention and Commentary on Article IV (and particularly, Commentary revised subsequent to the date of the Treaty based on the OECD Partnership Report which Canada had endorsed), and both Canadian and U.S. interpretation and administrative practice in this area. The Court held that TD LLC was entitled to treaty benefits on the basis that its income was subject to full and comprehensive U.S. tax at the member level and, as such, it was liable to tax in, and therefore a "resident" of, the U.S. for purposes of the Treaty. The Court emphasized that its decision "stands for no more than the proposition that, properly interpreted and applied in context in a manner to achieve its intended object and purpose, the Treaty's favourable tax rate reductions apply for years prior to the Fifth Protocol Amendments to the Canadian-sourced income of a US LLC if all of that income is fully and comprehensively

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taxed by the US to the members of the LLC resident in the US on the same basis as had the income been earned directly by those members”.

The full implications of the Court’s decision, including its interaction with the Fifth Protocol amendments to Article IV, will undoubtedly be the subject of much lively debate. It is likely that the Crown will appeal the decision to the Federal Court of Appeal.

To read the full text of the Court’s decision, please [click here](#).

If you have any questions on this topic or would like to discuss any other tax matters, please do not hesitate to contact one of the professionals in the **Tax Group**.

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