Cross-Border Tax Issues: Withholding Obligations

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Given the cross-border nature of the investment management industry, it is common for marketing representatives and employees to straddle international markets. Therefore, it is important to understand the tax implications where non-resident employees and contractors provide services in Canada to ensure that withholding and reporting obligations are satisfied and waivers are obtained, where available, in respect of these obligations. This bulletin focuses on the issues related to employees traveling between the United States and Canada but are similar for all countries.

Employment Income

Withholding Obligations

The *Income Tax Act*(Canada) ("Tax Act") imposes withholding obligations on any person paying salary, wages or other remuneration in a taxation year to a person who is either resident in Canada or performs services in Canada (even just for a day). Such withholdings must be deducted in accordance with the prescribed rules and remitted to the Receiver General for Canada in respect of the tax liability of the person to whom salary, wages or other remuneration is paid.

Withholding obligations apply regardless of the residency of the employee or the employer or the actual tax liability of the employee. However, these obligations can be waived by the Canada Revenue Agency ("CRA") where an employee would otherwise be exempt from paying taxes under a relevant tax treaty. One such treaty, which is often applicable given Canada's proximity to the United States ("U.S.") is the *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* ("U.S. Tax Treaty").

Withholding Obligation Waiver

Pursuant to the U.S. Tax Treaty, a U.S. resident employee will be exempt from taxation in Canada in either of the following two circumstances:

1. the employee's remuneration earned in respect of employment in Canada does not exceed C$10,000 in a calendar year; or

2. the employee is in Canada for a period (or periods) not exceeding, in the aggregate, 183 days in any twelve month period and the remuneration is not paid by or on behalf of a person who is resident in Canada and is not borne by a permanent establishment ("PE") in Canada (the definition of a PE is explored in greater detail below).

Similar relieving provisions in respect of income from employment are found in Canada's network of tax treaties with other countries.

A non-resident employee can apply on an individual basis for a waiver of the payor's obligation to withhold taxes where the employee meets the above criteria. Alternatively, a non-resident employer can obtain certification from the CRA as a Qualifying Non-Resident Employer to waive withholding requirements in respect of payments made to any of its Qualifying Non-Resident Employees. Generally this will be an efficient, low-cost solution for a non-Canadian, treaty resident employer with employees who come to Canada for short periods of time.

Where neither a waiver nor certification is obtained, withholding is required. Provided a non-resident employee can obtain relief from Canadian taxation under a tax treaty, a refund of the withheld amount can subsequently be obtained through the filing of a Canadian tax return.

For employees that exceed the 183 day threshold, employers should consider the availability of a secondment to reduce administrative compliance.

Reporting Obligations

Every employer with an employee who performs services in Canada in a year is required to issue and file a T4 with the CRA other than certain employees earning limited amounts. It is important to note that neither waivers nor certifications exempt an employer from T4 reporting requirements.

Contractors/Cross-Border Services

Withholding Obligations

Similar withholding obligations and waivers apply in respect of services of a non-employment (independent contractor) nature provided by non-resident persons in Canada. In particular, where a non-resident person receives a fee, commission or other amount for services rendered in Canada, a 15 per cent tax must be withheld and remitted to the Receiver General under the prescribed rules in the Tax Act by the payor.

A non-resident's tax obligation is established by the Tax Act. Under section 2(3) of the Tax Act, where a non-resident of Canada "carried on business in Canada" at any time in the year or previous year, the person will be taxed on the person's taxable income earned in Canada. The effect of this provision is restricted, however, in respect of U.S. residents by operation of the U.S. Tax Treaty.1Particularly, Article VII(1) of the U.S. Tax Treaty provides that a U.S. resident's business profits are taxable in Canada only if the non-resident carries on business in Canada through a PE situated in Canada, and only to the extent of the income attributable to the PE.

Withholding Obligation Waiver

Where services are not provided through a PE, a non-resident person can apply to obtain a waiver to reduce the amount of tax that must be withheld and remitted. If the application is approved, the CRA will authorize the payor to withhold at a reduced rate or not to withhold at all, depending on the applicable Canadian tax rate. Without this waiver there is no exception from the withholding and remitting requirement.

Reporting Obligations

A waiver does not apply to reporting obligations. Any payor making a payment to a non-resident for services provided in Canada must report these payments to the CRA. The payee may also have a parallel obligation to file a Canadian income tax return and report this income.

Definition of "Permanent Establishment"

In order to assess a non-resident person's tax and withholding obligations, it is necessary to determine whether or not the person provided services through a PE. A PE is defined in Article V of the U.S. Tax Treaty and generally includes: (i) a fixed place of business in Canada through which the business of the U.S. resident is wholly or partly carried on (the definition of a PE does not include a Canadian subsidiary, but can, in certain situations, include a client site); (ii) a U.S. company where employees of the U.S. company have certain signing rights in Canada; and (iii) a U.S. company that exceeds a specific threshold for the number of days it has employees and/or contractors in Canada performing services for Canadian clients.2

If a non-resident person carries on business through a PE in Canada, the person will be required to file a tax return and will also be subject to tax on the income earned in Canada. However, if the non-resident person's business situation and/or activities do not rise to the level of creating a PE in Canada, only a tax return filing requirement applies and no tax has to be paid.

A Word of Caution: Transfer Pricing

A non-resident conducting business through either a Canadian subsidiary or a PE must take transfer pricing rules into consideration. Transfer pricing rules require, very generally, that where there are non-arm's length transfers across the border, these must be conducted at fair market value.

Comment

Where cross-border services are being offered by a corporation, it is important to assess reporting and withholding obligations to ensure compliance with all statutory requirements. The obligation to withhold taxes is mandated by the Tax Act in respect of non-residents regardless of whether or not a tax treaty provides relief from a Canadian tax liability. Where a tax treaty exempts a non-resident from taxation in Canada, the necessary waivers should be obtained in advance to reduce the possibility of double taxation and relieve the parties from the onerous burden of withholding.

1Similar provisions are included in Canada's network of tax treaties with other countries.

2Canada's other tax treaties contain similar provisions with the inclusions described in (i) and (ii). However, the inclusion described in (iii) is currently unique to the U.S. Tax Treaty.

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