

## CEASING CANADIAN RESIDENCE

A person who is resident in Canada during a taxation year is subject to Canadian income tax on his or her worldwide income from all sources. A taxpayer who emigrates from Canada may be subject to a tax upon ceasing to be resident in Canada (referred to as “departure tax”).

Following departure from Canada, a non-Canadian resident may be subject to Canadian tax on Canadian source income. This may include employment income earned in Canada, income from carrying on a business in Canada, taxable capital gains from the disposition of taxable Canadian property and other Canadian source income such as interest, dividends, royalties, registered plan withdrawals and Canadian trust distributions. Special rules apply for an individual who is resident in Canada for only part of a taxation year.

Set forth below are general comments regarding tax consequences that may apply to an individual ceasing Canadian residence. Special rules, which are not covered in this Guide, may apply where an entity other than an individual ceases to be resident in Canada.

### CANADIAN RESIDENCE

The term “resident” is not defined in Canadian income tax legislation. The Courts have held that an individual is ordinarily resident in Canada for tax purposes if Canada is the place where the individual, in the settled routine of his or her life, regularly, normally or customarily lives. In making a determination of residence status (generally referred to as the “factual residence”), all of the relevant facts in each case must be considered, including residential ties with Canada and length of time, object, intention and continuity with respect to stays in Canada and abroad.

Apart from the factual residence, an individual may also be deemed to be resident in Canada or deemed not to be resident in Canada in certain situations.

### *Factual Residence*

In determining whether or not an individual leaving Canada remains resident or ceases to be resident in Canada for tax purposes, remaining residential ties with Canada while he or she is abroad are considered. Unless an individual severs all significant residential ties with Canada upon leaving Canada, the individual

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may continue to be a factual resident of Canada. The residence status of an individual can only be determined on a case by case basis after taking into consideration all of the relevant facts.

Useful information regarding various considerations that may be taken into account by the tax authorities when determining whether or not a taxpayer has significant residential ties in Canada for the purposes of the factual residency test can be found in the Canada Customs and Revenue Agency (“CCRA”) Interpretation Bulletin IT-221R3-(Consolidated), entitled “Determination of an Individual's Residence Status”, dated October 10, 2002.

According to CCRA’s views, primary residential ties for the purposes of determining residence status of an individual will generally include the following:

- ❖ Dwelling place or places (see IT-221R3-(Consolidated), par. 6):

*“Where an individual who leaves Canada keeps a dwelling place in Canada (whether owned or leased), available for his or her occupation, that dwelling place will be considered to be a significant residential tie with Canada during the individual’s stay abroad. However, if an individual leases a dwelling place located in Canada to a third party on arm’s length terms and conditions, the CCRA will take into account all of the circumstances of the situation (including the relationship between the individual and the third party, the real estate market at the time of the individual’s departure from Canada, and the purpose of the stay abroad), and may not consider the dwelling place to be a significant residential tie with Canada except when taken together with other residential ties.”*

- ❖ Spouse or common-law partner or dependants (see IT-221R3-(Consolidated), par. 7):

*“If an individual who is married or cohabiting with a common-law partner leaves Canada, but his or her spouse or common-law partner remains in Canada, then that spouse or common-law partner will usually be a significant residential tie with Canada during the individual’s absence from Canada. Similarly, if an individual with dependants leaves Canada, but his or her dependants remain behind, then those dependants will usually be considered to be a significant residential tie with Canada while the individual is abroad. Where an individual was living separate and apart from his or her spouse or common-law partner prior to leaving Canada, by reason of a breakdown of their marriage or common-law partnership, that spouse or common-law partner will not be considered to be a significant tie with Canada.”*

Secondary residential ties must be looked at collectively in order to evaluate the significance of any one such tie, so that a single secondary factor, taken in isolation, will not be determinative of an individual's residency in Canada while abroad. Secondary residential ties that will be taken into account in determining the residence status of an individual while outside Canada include the following (see IT-221R3-(Consolidated), par. 8):

- ❖ Personal property in Canada such as furniture, clothing, automobiles and recreational vehicles;
- ❖ Social ties with Canada such as memberships in Canadian recreational and religious organizations;
- ❖ Economic ties with Canada such as employment with a Canadian employer and active involvement in a Canadian business, and Canadian bank accounts, retirement savings plans, credit cards, and securities accounts;
- ❖ Landed immigrant status or appropriate work permits in Canada;
- ❖ Hospitalization and medical insurance coverage from a province or territory of Canada;
- ❖ A driver's license from a province or territory of Canada;
- ❖ A vehicle registered in a province or territory of Canada;
- ❖ A seasonal dwelling place in Canada or a leased dwelling place;
- ❖ A Canadian passport; and
- ❖ Memberships in Canadian unions or professional organizations.

The above list is not exhaustive, and various other considerations must also be taken into account. Determination as to the date an individual leaving Canada becomes a non-resident is a question of fact. Note that an individual who plans to leave Canada may consider submitting CCRA's Form NR73, *Determination of Residency Status (Leaving Canada)*, in order to obtain CCRA's opinion on the individual's residency status based on the information provided by the individual.

### ***Deemed Residence***

Apart from the factual residence, an individual may also be deemed, under the tax legislation, to be resident in Canada in certain situations. This may include persons sojourning in Canada for a total of 183 days or more in any calendar year and categories of persons specified in the tax legislation such as members of the Canadian Forces.

### ***Deemed Non-Resident***

It should be noted that an individual who is a resident of Canada for tax purposes may also be a resident of another country for tax purposes under the laws of the other country. In such a case, the tax treaty between Canada and that country may provide "tie breaker rules" to determine in which country the individual will be resident for purposes of the other provisions of the treaty. If, at any time, such "tie breaker rules" apply and it is determined that an individual is a resident of another country for purposes of a tax treaty between Canada and that country, then the individual who is otherwise resident in Canada (whether factual or deemed) will be deemed not to be resident in Canada at that time. Departure tax may apply in such circumstances where an individual ceases to be resident in Canada under such deeming provisions.

### **DEPARTURE TAX**

Canadian tax legislation treats a taxpayer that ceases to be resident in Canada as having disposed of his or her property for proceeds equal to fair market value. For individuals who emigrate from Canada after October 1, 1996, the departure tax applies to all property, other than:

- ❖ Real property situated in Canada, a Canadian resource property or a timber resource property;
- ❖ Property of a business carried on by the taxpayer, at the emigration time, through a permanent establishment in Canada;
- ❖ Property of a returning former resident who has elected to unwind the deemed disposition on departure; and
- ❖ An excluded right or interest (as defined below) of the taxpayer.

An excluded right or interest (excluded from the deemed disposition by individuals) is defined to include:

- ❖ Rights under or an interest in a trust governed by a registered plan and other plans providing specified pension and similar payments (including for example, RPPs, IPPs, RRSPs, RRIFs, RESPs, DPSPs, and RCAs.);
- ❖ Certain rights under an employee benefit plan;
- ❖ Stock option rights for shares of the employer corporation (or a related corporation) or units of a mutual fund trust;
- ❖ A retiring allowance;

- ❖ Rights under certain trusts such as an employee trust, an amateur athlete trust and an eligible funeral arrangement;
- ❖ Rights to benefits under the Canada Pension Plan, the Quebec Pension Plan, the Old Age Security Act and the Saskatchewan Pension Plan and benefits under foreign social security arrangements;
- ❖ Interests in certain personal trusts resident in Canada;
- ❖ Interest in certain non-resident testamentary trusts; and
- ❖ Interests in life insurance policies in Canada, other than certain interests in segregated fund policies.

The departure tax will, therefore, apply to the following assets upon departure from Canada (this list is not intended to be exhaustive):

- ❖ Real estate outside Canada;
- ❖ Unincorporated businesses outside of Canada;
- ❖ Private or public company shares in Canada or outside Canada;
- ❖ Mutual funds units in Canada or outside Canada;
- ❖ Partnership interests;
- ❖ Interests in non-resident inter vivos trusts;
- ❖ Other portfolio investments; and
- ❖ Personal use property as well as listed personal property (such as works of art, jewelry, stamps, coins, and rare manuscripts).

### **SECURITY FOR DEPARTURE TAX**

Departure tax could potentially pose a severe hardship to an individual, where there is a deemed sale but no actual sale proceeds in connection with the assets subject to departure tax. An individual is allowed to elect, on giving security acceptable to the tax authorities, to defer payment of departure tax that is owing as a result of the deemed disposition of a particular property until the property is actually disposed of. If such an election is made, interest does not start to accrue on the amount secured until such time as the amount becomes unsecured and relief is provided from penalties as they relate to the unpaid tax. The election has to be made in a prescribed manner to defer the amount of the tax owing. The tax authorities will review the amount of security on an annual basis and determine whether it continues to be adequate.

An individual is not required to furnish acceptable security for the first \$100,000 of capital gains as an individual is deemed to have furnished acceptable security for the tax on up to \$50,000 of taxable capital gains in the top tax bracket.

### **INFORMATION REPORTING**

An individual who ceases Canadian residency must file with the tax authorities, in prescribed form, a list of all the reportable properties that the individual owned at emigration time. This reporting requirement only applies where an individual owns reportable properties at emigration time having a fair market value greater than \$25,000. Reportable property of an individual includes most property other than:

- ❖ Money that is legal tender in Canada and deposits of such money;
- ❖ Most (but not all) property that is an excluded right or interest defined above; and
- ❖ Any item of personal-use property the fair market value of which is less than \$10,000.

### **PLANNING FOR THE DEPARTURE TAX**

Potential departure tax exposure has to be determined at the appropriate time in light of all of the facts. Planning strategies may be considered in certain circumstances prior to departure from Canada. As well, planning strategies may be considered following departure from Canada. For example, post-departure losses may, in certain circumstances, be carried back against deemed gains from the date of emigration. Qualified professional assistance is highly advisable when departure from Canada is considered.

### **IMPACT ON CANADIAN PLANNING STRATEGIES**

Various tax planning strategies may be implemented in order to provide benefits to Canadian resident taxpayers from a Canadian tax perspective. When a Canadian resident taxpayer is considering ceasing Canadian residence in the future, Canadian departure tax considerations as well as tax considerations in the new taxing jurisdiction after departure may significantly impact on the advisability of implementing such planning strategies. Therefore, the opportunity to implement Canadian tax planning strategies must be reviewed in light of an individual's specific future plans with respect to Canadian residency.