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Determining Residency

Is it as simple as it seems?

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All individuals are required to determine their country of residence for income tax purposes when filing their personal tax returns. In most countries, including Canada, an individual is subject to tax on their worldwide income in the country in which they reside. While an individual's residency is a simple determination for many, residency can be difficult to determine if one studies abroad, owns foreign personal property, has family and friends living around the world, and where one spends significant time in multiple countries.

A taxpayer's residency status can also be challenged by the Canada Revenue Agency ("CRA") or another foreign government agency, so it is important that the taxpayer consider all of the facts to appropriately determine their country of residence for income tax purposes. Below, we will briefly outline when the CRA may consider an individual to be a resident of Canada. We will also outline the implications where Canada and another country take the view that an individual is resident of each of the respective countries under each country's domestic rules.

Under Canada's domestic rules, an individual can be factually resident of Canada or deemed to be resident of Canada:

Factual Residence

An individual will typically be considered a resident of Canada where they have "significant" residential ties to Canada. The CRA considers the following residential ties to be "significant":

- A dwelling place in Canada;
- A spouse or common-law partner living in Canada; and
- Children or other dependents living in Canada.

If, for instance, an individual owns or rents a home in Canada for personal use, and their family resides in Canada, that individual would normally be considered a factual resident of Canada for income tax purposes.

The CRA may also consider secondary ties (i.e., employment in Canada, personal property in Canada, a Canadian passport, a Canadian driver's license, Canadian medical coverage, etc.) in determining whether an individual is factually a resident of Canada. However, these secondary ties are of less importance. Typically, one single secondary tie to Canada is usually not enough to establish that a taxpayer is factually resident of Canada.

Deemed Residence

An individual who is not factually resident of Canada, may still be deemed to be resident of Canada. An individual would typically be deemed to be resident of Canada if they spend 183 days or more in Canada in a given year.

The Tiebreaker Rules

In instances where an individual is considered to be a factual or deemed resident of Canada in a year under Canada's domestic rules and is also considered to be resident of another country under that country's domestic rules, the tiebreaker rules in the applicable tax treaty between Canada and the other country will need to be reviewed to determine the individual's country of residence.

For example, the tax treaty between Canada and the United States of America (the "**US**") provides that an individual's country of residence is determined as follows:

- The individual will be deemed to be a resident of the country in which the individual has a permanent home available to him.
- If the individual has a permanent home available to him or her in both countries, or in neither country, the individual shall be deemed to be resident in the country with which his or her personal and economic relations are closer (“**centre of vital interests**”).
- If the country in which the individual’s centre of vital interests cannot be determined, the individual shall be deemed to be a resident of the country in which he or she has a habitual abode.
- If the individual has a habitual abode in both countries or in neither country, the individual shall be deemed to be a resident of the country of which he or she is a citizen.
- If the individual is a citizen of both countries or of neither of them, the competent authorities of the countries shall settle the question by mutual agreement.

The tests are applied in order. Once a test determines an individual’s residency, the remaining tests are ignored.

The tests noted above are not always a simple determination, and usually require further guidance. There have been a number of court cases along with commentary that has been provided by the Organization for Economic Co-operation and Development (“OECD”) that aid in the interpretation of the above noted tests.

The tax treaty between Canada and the US therefore ensures that individuals are not subject to worldwide taxation in both Canada and the United States, as this would otherwise result in double taxation.

Note that the tests also vary amongst different tax treaties.

Emigrating from Canada and ceasing factual residency

Instances where a Canadian resident decides to move abroad may not always signify a change in residency status. To understand whether an individual has ceased to be resident of Canada, it is necessary to determine whether the individual has severed their significant residential ties to Canada, such as if a primary Canadian residence was sold or rented out, or if the departing individual’s spouse or family also moved with the individual abroad.

If it is not clear whether the individual’s significant residential ties have been severed, the secondary ties (as noted above) will also need to be considered to determine if the individual has severed enough ties to no longer be considered a resident of Canada, under Canada’s domestic rules.

Immigrating to Canada and establishing factual residency

Similarly, where an individual moves to Canada, their residency would depend on whether the individual has established significant residential ties to Canada.

For example, if an individual leaves the US to start a new job in Canada, and the individual moves with their spouse and children to Canada and purchases a new home in Canada to live in, the individual would be establishing significant residential ties with Canada. Under Canada’s domestic rules, the individual would therefore likely be considered to become a resident of Canada.

Obtaining the CRA's opinion on residency status

If a taxpayer is unsure about their residency status, the taxpayer can formally request for the CRA's opinion. Taxpayers entering Canada would complete form NR74 Determination of Residency Status (Entering Canada) and taxpayers leaving Canada would complete form NR73 Determination of Residency Status (Leaving Canada). Various information will need to be provided on these forms to assist the CRA with forming their opinion. It is important to note that any

opinions provided by the CRA is not considered to be binding, and a taxpayer's residency status can be subject to a more detailed review by the CRA at a later time.

Conclusion

An individual's residency status is determined on a case-by-case basis and is dependent on a variety of factors. We have noted some of the general factors to consider above, but often, the analysis requires a thorough review of the facts and a detailed analysis of the various tests noted above. If you have questions surrounding determining your own residency

status or income tax reporting obligations, we encourage you to reach out to Crowe Soberman's Tax Group.

This article has been prepared for the general information of our clients. Specific professional advice should be obtained prior to the implementation of any suggestion contained in this article. Please note that this publication should not be considered a substitute for personalized tax advice related to your particular situation.

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