CRA ROUNDTABLE

SPEAKER:

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MODERATORS:

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Question 1: Meaning of "Habitual Abode" in Canadian Tax Treaties

As you know, Canada's extensive treaty network contains residency "tie-breaker" provisions – usually in Article IV:2 of most of the treaties. For example, in the Canada-US treaty, the residency "tie-breaker" rule is indeed in Article IV:2. Paragraph (b) of the provision states:

> *"…if the Contracting State in which he has his centre of vital interests cannot be determined, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;"*

Can the CRA comment on its views of what an habitual abode is of an individual and what factors the CRA reviews to make a determination?

Question 2: Apportionment of a Royalty Payment for the Purposes of Subparagraph 212(1)(d)(vi)

Should the application of the exception in subparagraph 212(1)(d)(vi) be based on an apportionment of a royalty payment between copyrights and trademarks agreed to by arm's length parties to a mixed contract?

Question 3: Meaning of "Goods" in Paragraph 95(3)(b)

Consider a situation where marketing services are provided by a wholly-owned foreign affiliate ("FA") of a corporation resident in Canada ("Canco") in respect of the sale of residential condominiums located in Canada.

The residential condominiums are owned either by Canco or entities that do not deal at arm's length with Canco.

The following is assumed:

- Canco and non-arm's length entities are subject to Canadian tax in relation to income earned on the sale of the residential condominiums; and
- Reasonable consideration is paid for the provision of the marketing services and that these costs are deductible against income earned in Canada.

Does real estate inventory, such as residential condominiums, held for sale in the regular course of business, qualify as "goods" for purposes of paragraph 95(3)(b)?

Question 4: PLOI Late-Filed Penalties and Administrative Relief

Where subsection 15(2) or the foreign affiliate dumping rules under section 212.3 would otherwise apply to an amount owing to a corporation resident in Canada (CRIC) or certain partnerships, subsections 15(2.11) and 212.3(11) allow for a pertinent loan or indebtedness (PLOI) election to be filed in respect of that amount. Where there is more than one amount owing between the two parties, the CRA has indicated in technical interpretation 2014-053454I7 that a separate PLOI election is required for each amount owing, notwithstanding that a taxpayer may prepare and file a single written communication containing each such PLOI election. At the May 26, 2016 IFA CRA Roundtable, the CRA stated (2016-0642031C6) that, based on the language of subsections 15(2.13) and 212.3(13), the late-filing penalty calculations must be applied separately for each amount that is elected to be a PLOI. However, the CRA also stated

Question 4: PLOI Late-Filed Penalties and Administrative Relief

that it was exploring whether an administrative position could be taken to aggregate certain amounts for purposes of the PLOI election late-filing penalty calculation.

Could you please provide an update on the status of this review?

Question 5: Surplus Account Maintenance

At the 2019 IFA Conference, the CRA commented on the requirement to prepare detailed surplus account calculations to support a deduction under subsection 113(1). It was also mentioned that in situations where calculations are not provided, it is the CRA's general practice to deny any deduction under subsection 113(1).

Given that surplus account calculations are relevant in various situations, and in order to give better clarity to taxpayers, can the CRA provide additional guidance on the required documentation and on the best practices to adopt in respect of the preparation of surplus account calculations?

Question 6: Exempt Earnings and Residency Information

A corporation resident in Canada (Canco) receives a dividend from a wholly-owned foreign affiliate (FA). Canco claims a full deduction under paragraph 113(1)(a) in respect of the dividend. Canco prepares a complete calculation of the FA's exempt surplus account.

FA is incorporated in a country (Country A) with which Canada has entered into a comprehensive agreement for the elimination of double taxation on income (the "Treaty"). FA has been carrying on an active business in Country A since its incorporation. The Treaty includes a dual residency tie-breaker rule based on the place of incorporation. Canco considers the FA to be a resident in Country A for purposes of the Treaty.

Should Canco maintain any other information, in addition to the surplus calculation, to support a deduction claimed under paragraph 113(1)(a)?

Question 7: Compliance Requirements for Taxpayer Owning Cryptocurrencies and Situs of Cryptocurrencies

Section 233.3 imposes the requirement for a "specified Canadian entity" to disclose its ownership of any "specified foreign property" on CRA form T1135 - Foreign Income Verification Statement. This obligation generally arises in respect of a taxation year if the total cost of such property exceeds $100,000 at any time during that taxation year. "Specified foreign property" includes (among other things) "funds or intangible property, or for civil law incorporeal property, situated, deposited or held outside Canada."

In a technical interpretation issued in April 2015 (CRA document no. 2014-0561061E5), the CRA took the position that cryptocurrency constitutes funds or intangible property and would be specified foreign property of a person or partnership to the extent that it is situated, deposited or held outside of Canada and is not used or held exclusively in the course of carrying on an active business.

Question 7: Compliance Requirements for Taxpayer Owning Cryptocurrencies and Situs of Cryptocurrencies

In the context of the 2021 APFF Financial Strategies and Instruments Roundtable held on October 7, 2021, the CRA was asked to provide its view on the situs of cryptocurrency (CRA document no. 2021-089602). At that time, the CRA responded that the question of where a cryptocurrency is located, deposited or held within the meaning of section 233.3 was under review.

Could the CRA provide an update?

Question 8: Foreign Entity Classification

In Income Tax Technical News No. 38 (Sept. 22, 2008), the CRA updated its two-step approach to foreign entity classification and also confirmed how the CRA would classify a number of specific foreign entities. Given the CRA's recent announcements on the classification of certain US LLLPs and the introduction of anti-hybrid mismatch rules in countries like Luxembourg, which may apply depending on how Canada treats a particular Luxembourg entity for tax purposes (e.g., a Luxembourg special limited partnership), will the CRA publish and maintain an online list of foreign entities that the CRA has classified for reference purposes?

Question 9: Subsection 247(4) – Contemporaneous Documentation and COVID-19

Canada's contemporaneous documentation ("CD") rules in subsection 247(4) require the completion of CD meeting statutory requirements within six months of the end of the relevant taxation year, a shorter time limit than is found in the analogous rules of most of Canada's G7 contemporaries (typically one year). Meeting the required standard involves finding suitable comparables and determining appropriate transfer pricing methodologies and documenting the various relevant items within the statutory six-month deadline from year-end. Many taxpayers are finding it particularly challenging to meet the CD standards set out in subsection 247(4) in a COVID-19 environment, due to significant business disruptions that make finding genuine comparables harder and staff shortages that reduce taxpayers' capacity for generating and documenting this analysis.

Question 9: Subsection 247(4) – Contemporaneous Documentation and COVID-19

Has the CRA considered providing relief to taxpayers making good faith efforts to produce satisfactory CD within the six-month time limit comparable to administrative relief for other cross-border COVID-related tax issues previously announced (e.g., permanent establishment status, residency, etc.)? The binary nature of subsection 247(4) compliance (i.e., one either meets the standard and gets the resulting penalty protection, or does not and gets no protection) makes this an area where administrative relief is particularly necessary for affected taxpayers.

Question 10: Changes to Corporate Residence Approach

It was raised at the 2021 United Nations climate change conference (COP26) that the corporate residency rules are not only out of date in the age of video conferencing but potentially also not in sync with Environmental, Social and Governance (ESG) concerns. In particular, too much focus on the location of board meetings encourages both waste of time and energy in that motivated taxpayers will simply fly where they need to and distracts from ensuring board composition is based on good governance. In light of the developments of the last two years is the CRA considering changes to its approach to corporate residency?

Question 11: Employee Equity Incentive Notice Requirements Under New Non-Qualified Securities Rules

Under the recent amendments to the employee stock options rules in section 110, if a non-resident corporation agrees to issue securities to its Canadian employees or employees of a Canadian subsidiary, the new non-qualified securities rules in section 110 will generally apply if the issuer is a specified person because the $500 million gross revenue threshold is exceeded.

Under these new rules, the employee deduction under paragraph 110(1)(d) is subject to the $200,000 annual vesting limit and in certain cases an issuer may be eligible for a deduction under paragraph 110(1)(e) in respect of the non-deductible portion of the benefit realized by the employee. These rules also contain employee and Minister of National Revenue notice requirements in subsection 110(1.9).

Question 11: Employee Equity Incentive Notice Requirements Under New Non-Qualified Securities Rules

"If a security to be issued or sold under an agreement between an employee and a qualifying person is a non-qualified security, the employer of the employee shall (a) notify the employee…and (b) notify the Minister…"

If the employer does not comply with the notice requirements, then no employer deduction can be claimed because of subparagraph 110(1)(e)(vi).

If a non-resident corporation (or any other specified person) issues restricted stock units to an employee that can only be settled for shares, and therefore are effectively treated as section 7 stock options with no exercise price, and the shares to be issued are non-qualified securities, one could argue that in policy terms, the non-resident corporation should not have to comply with the notice requirements in subsection 110(1.9) because

Question 11: Employee Equity Incentive Notice Requirements Under New Non-Qualified Securities Rules

no deduction can be claimed under paragraph 110(1)(e). However if the non-resident corporation does not comply with the notice requirements, there is arguably a risk of penalty under the general non-compliance provision in subsection 162(7).

The question: Will the CRA provide administrative relief to the subsection 110(1.9) notice requirements if no amount is deductible under 110(1)(d) or (e)?

Question 12: Principal Purpose Test

Could CRA please comment on the following:

1. (1) The number of matters in which CRA has recommended applying the principal purpose test (PPT) and examples of situations in which it has done so. Please also indicate if GAAR is being applied.
2. (2) Has CRA received any PPT ruling requests?

Question 13: Current Statistics on Mutual Agreement Procedures

Could the CRA give current statistics on Mutual Agreement Procedures (MAPs)?

Question 14: Partnership and Subsection 90(3) Election

A distribution made by a foreign affiliate of a taxpayer in respect of a share of its capital stock will be a qualifying return of capital pursuant to subsection 90(3) where the following conditions are met: (i) the distribution is a reduction of the paid-up capital of the foreign affiliate in respect of the share, (ii) the distribution would otherwise be deemed under subsection 90(2) to be a dividend paid or received on the share, and (iii) an election is made in respect of the distribution in accordance with prescribed rules.

Assume the following facts (see figure 1):

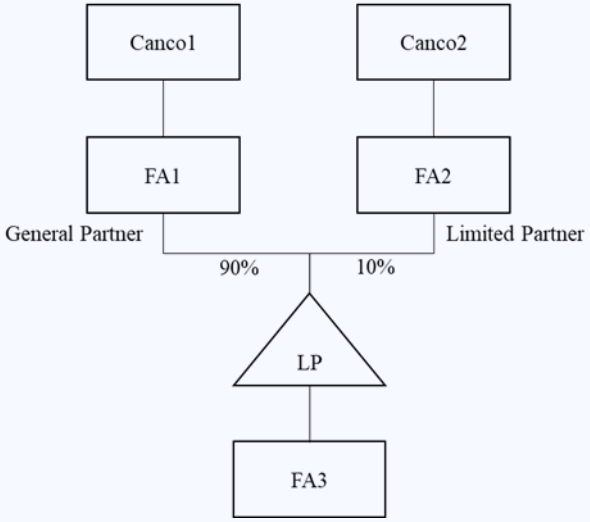
1) A Canadian corporation (Canco1) owns 100% of a foreign affiliate (FA1);
2) A related Canadian corporation (Canco2) owns 100% of a foreign affiliate (FA2);
3) LP is a partnership for purposes of the Act;
4) FA1 is the general partner of LP, is the only member that has authority to act for LP and has a 90% partnership interest in LP;

Question 14: Partnership and Subsection 90(3) Election

5) FA2 is a limited partner of LP and has a 10% partnership interest in LP;
6) LP owns 100% of a foreign affiliate (FA3);
7) Canco1 and FA1 each has a taxation year ending November 30; each of Canco2, FA2 and FA3 has a taxation year ending December 31; LP has a fiscal period ending December 31; and
8) On July 1, 2021 FA3 reduced its paid-up capital and made a distribution to LP (the "**Distribution**").

Question 14: Partnership and Subsection 90(3) Election

Figure 1



Question 14: Partnership and Subsection 90(3) Election

FA3 is a foreign affiliate of LP, and for purposes of (*inter alia*) section 90 is a foreign affiliate of both Canco1 and Canco2 pursuant to subsection 93.1(1).

Our questions are:

(i) Would the CRA agree that only LP is required to make a subsection 90(3) election in respect of the Distribution?

(ii) If a joint election is required to be made, or is made, by LP, Canco1 and Canco2, can LP file the election on behalf of itself, Canco1 and Canco2?

(iii) Would the election, if a joint election, be required to be filed by the earliest of the filing-due dates for Canco1 and Canco2 for their taxation years that include December 31, 2021?