

Wills, Trusts & Estates

Cross-border estate administration: U.S. beneficiaries

By **Susannah Roth and Margaret O'Sullivan**



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(August 28, 2018, 9:09 AM EDT) -- When a deceased person had cross-border connections to the United States and Ontario or any province or territory in Canada, many issues can arise which can complicate the administration of their estate. In this series of articles, we discuss common issues that can arise when estates have connections on both sides of the border.

We use the term "estate trustee," the term used for the legal representative of an estate under the Ontario *Rules of Civil Procedure*. The term executor (where the deceased died with a will) or administrator (where the deceased died without a will) are the traditional terms used for this role.

An Ontario estate with U.S. connections can face complications due to the presence of any of the following: the deceased was a U.S. person (defined below); one or more beneficiaries are U.S. persons; or the deceased owned U.S.- situs assets. Our last article discussed the complexities that can arise for the Ontario estate of a U.S. person. We discuss below the complexities that can arise for an Ontario estate with beneficiaries who are U.S. persons.

A U.S. person for the purposes of this series of articles is a U.S. citizen, including a dual citizen of the U.S. and another country, or a person who is domiciled in the U.S. Domicile is considered to be the place where a person has a settled intention to make his or her permanent home.

Estate distributions

If one or more beneficiaries of an Ontario estate are resident in the U.S., most complications arise from tax matters. There may be filing requirements or the necessity to obtain a clearance certificate under s. 116 of the *Income Tax Act* (Canada) each time a distribution is made to a beneficiary who is not a resident of Canada for income tax purposes. Section 116 applies to dispositions of "Taxable Canadian Property," which includes:

- Real property located in Canada;
- Assets used in a business in Canada;
- Shares in a private Canadian corporation where more than 50 per cent of the value of the shares is derived from Canadian real property or certain Canadian resource property;
- An interest in a trust (which under the *Income Tax Act* includes an estate), where more than 50 per cent of its fair market value was derived, directly or indirectly, from Canadian real property (or certain Canadian resource property) in the 60 months prior to the disposition.

For the purposes of an estate or trust, the disposition of an interest in the estate or trust happens whenever the estate or trust makes a distribution to a non-resident beneficiary. If it is a disposition of Taxable Canadian Property to a non-resident, a clearance certificate must be obtained prior to the disposition, or in certain circumstances, a filing regarding the disposition may be made instead within 10 days of the disposition date.

Withholding tax

Non-residents of Canada are subject to withholding tax on payment of certain types of income earned in Canada, including rental income, dividends, royalties and income from an estate or trust. The payor of the income must withhold the tax and remit it to Canada Revenue Agency, although the payee may file a Canadian tax return for a partial or full refund of the tax paid (assuming such a refund is available to them). The usual withholding tax rate is 25 per cent, however the Canada-U.S. Income Tax Treaty reduces the withholding tax rate on some types of income, including to 15 per cent on dividends and estate or trust income and 10 per cent for royalties (although certain royalty payments are exempt from withholding tax).

In kind distributions

If the estate trustee wishes to distribute assets in kind to beneficiaries, this may create negative ongoing repercussions for U.S. tax residents regarding certain assets, such as shares in an Ontario private corporation. If shares are held by a U.S. person in a foreign corporation, certain punitive tax rules may apply which may necessitate more complex post-mortem tax planning by the estate or the distribution of different types of assets to beneficiaries, depending on their residency status.

If a separate trust is to be set up under the deceased's will with U.S. trustees and beneficiaries, it is important to consider special planning to avoid the trust being deemed to also be resident in Canada for tax purposes. Since the trust may also be considered to be resident in the U.S. for tax purposes, this would create tax complications and additional filing requirements.

In certain circumstances, U.S. inheritance tax may be payable by U.S. persons on an inheritance from a non-U.S. person who previously was a U.S. citizen, but who renounced his or her citizenship.

This is the second of a series. Part one can be read here. Our next article will discuss the complications which can arise for the Ontario estate of an individual who dies owning U.S.-situs assets.

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