

Special Issues Arising When an Estate has Foreign Beneficiaries or Legal Representatives

Margaret R. O'Sullivan, Principal, O'Sullivan Estate Lawyers

Foreign Beneficiaries

A number of tax-related considerations arise during an estate administration which has foreign beneficiaries, including:

- Withholding tax on income paid to a non-resident beneficiary.
- Obtaining a clearance certificate under s. 116 of the *Income Tax Act* (ITA) in respect of certain capital distributions.
- Loss of a tax-free rollover on a distribution of certain capital property by a trust to a non-resident beneficiary.
- If an estate distribution involves an interest in a Canadian tax-resident corporation, beneficiaries may be exposed to double taxation on the corporation's earnings due to a mismatch of foreign tax credits and be subject to certain filing requirements. U.S. resident beneficiaries may also be exposed to the U.S. controlled foreign corporation and passive foreign investment company rules. If a corporation is a Canadian-controlled private corporation, it may lose its status upon a change of control.
- Multiple taxation on death: tax may be levied on the estate (or the deceased) or, less commonly, on the beneficiary, on various bases such as citizenship, domicile, residency or the location of inherited assets. Certain countries impose an inheritance tax where the beneficiary pays tax based on the value of the inheritance received. Most Ontario wills have debts and death taxes clauses which provide that all taxes arising on death are paid by the estate with the result that all beneficiaries receive the same amount after all taxes, notwithstanding local taxation. Inheritance tax rates are high in certain jurisdictions (such as France), and can cause unintended results.

Non-Resident Legal Representatives

The following sets out a few issues that arise when an



estate has foreign legal representatives:

- Legal representatives who are not Ontario or Commonwealth residents are required to obtain an administration bond in order to receive a grant of probate, generally set at twice the value of the estate assets in Ontario. In certain cases, the court may dispense with the bond, or reduce its amount.
- If a grant of probate has already been obtained in another jurisdiction, it will often be necessary to have the grant resealed by an Ontario court or to apply for an ancillary grant in order for the legal representative to have authority to administer the Ontario assets.
- If the non-resident executor is a U.S. person, and if the deceased held investment assets with Canadian

financial institutions, there may also be limitations on the U.S. person providing instruction on the estate's accounts due to the impact of U.S. securities regulation governing securities dealers. A Canadian investment advisor may be unable to take instructions from a non-resident legal representative.

- It is important to consider tax reporting, disclosure and compliance requirements. Generally, legal representatives are responsible for paying taxes from the estate and related compliance if they are proper enforceable debts of the estate. The increasing number of bilateral treaties between jurisdictions, as well as multijurisdictional agreements, have created enforceable information exchange obligations to better fight tax evasion and improve tax compliance, as well as in some cases assist in the collection of taxes (e.g., the *Canada – United States Tax Convention*).

- Consideration should also be given to the tax residence of the estate and any trusts under it so that tax and estate administration matters can be properly addressed. The residence of a trust for Canadian income tax purposes is where the central management and control of the trust actually takes place, the determination of which involves a factual inquiry. In addition, the ITA prevents the avoidance of Canadian taxes by certain non-resident trusts with particular Canadian connections by deeming them to be Canadian resident for certain purposes. Tax residency will determine what property and income are subject to Canadian tax, as well as any related reporting and withholding obligations.

With increasing globalization comes added complexity and the need to successfully navigate these challenges, including obtaining appropriate professional advice in all relevant jurisdictions.

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