

Non-Resident Executors**Non-resident executors and legal reps in estate law**By **Margaret O'Sullivan**

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(May 16, 2019, 9:34 AM EDT) -- There are a number of tax and non-tax-related considerations that may arise when an estate has foreign executors or other legal representatives.

Tax reporting and disclosure obligations

It is important to consider tax reporting duties and disclosure requirements of executors and trustees. Generally, executors and trustees are responsible for the payment of taxes from the estate and related compliance, and for the deceased's income taxes, including relating to prior years insofar as such obligations are proper (enforceable) debts of the estate.

Reporting duties and disclosure requirements to the taxing authorities of a foreign jurisdiction typically arise pursuant to an enforceable obligation on the executors and/or trustees in the home jurisdiction to pay tax to the relevant foreign jurisdiction. In common law jurisdictions, there has historically been the "revenue rule" under which the courts have refused to enforce revenue judgments arising pursuant to the law of other sovereign states, either directly or indirectly, subject to exceptions under applicable tax treaties.

Many jurisdictions have increasingly entered into bilateral tax information exchange agreements. Canada and the U.S. have an Intergovernmental Agreement (IGA) to implement the U.S. *Foreign Account Tax Compliance Act*. Under the IGA, information on financial accounts held by U.S. residents and citizens is reported to CRA. CRA exchanges this information with the IRS. As well, under the *Canada - United States Tax Convention*, Canada and the U.S. assist one another in the collection of taxes. The *OECD Convention on Mutual Administrative Assistance in Tax Matters* creates enforceable disclosure obligations.

The Common Reporting Standard (CRS) was developed by the OECD as the new global standard for exchange of information to better fight tax evasion and improve tax compliance. Under CRS, foreign tax authorities will provide information to domestic tax authorities relating to financial accounts in their jurisdictions held by domestic residents and domestic tax authorities will reciprocally provide the same to foreign tax authorities on domestic accounts held by non-residents in their jurisdictions.

Multiple wills are often used where there are foreign assets which may appoint foreign executors to administer the assets located in the foreign jurisdiction. It is important to ensure that there is effective communication and co-operation among domestic executors and any foreign executors with regard to tax compliance matters.

Tax residence of estate

Each jurisdiction's laws will govern the determination of the tax residence of an estate. While the *Income Tax Act* (ITA) does not supply any rules for determining the residence of an estate or a trust, the Canadian Department of Finance has adopted the position that the residence of a trust is a question of fact depending on the circumstances of each particular case. Consideration should be given to the possible residence of the estate so that tax and estate administration matters may be properly addressed.

An estate is considered a trust under the ITA. The Supreme Court of Canada held in *Fundy Settlement v. Canada* 2012 SCC 14 that the residence of a trust for Canadian income tax purposes is where the central management and control of the trust actually takes place. The trustee's place of residence will also be the residence of the trust where the trustee carries out such central management and control of the trust and does this where he or she is resident.

According to CRA, where two or more trustees of a trust are active in exercising their powers and fulfilling their responsibilities, the residency of the trust will usually be the place where the trustees, or the majority of the trustees who are exercising the majority of such powers reside, or if one trustee exercises a more substantial portion of the trust's management and control than the others, generally where that trustee resides.

Generally, a Canadian tax resident, including a trust, is liable for Canadian income tax on worldwide income from all sources. A non-resident of Canada is liable for Canadian income tax on Canadian source income and on the disposition of certain property situated in Canada, including Canadian real estate. When a Canadian resident transfers funds or property to a non-resident, withholding and reporting obligations can arise.

Section 94 of the ITA prevents the avoidance of Canadian taxes by certain non-resident trusts with Canadian connections by deeming such trusts to be Canadian resident for certain purposes if the trusts have a Canadian resident contributor or a Canadian resident beneficiary. Generally, a resident contributor is a Canadian tax resident who has made a transfer of property to the trust, and a resident beneficiary is a Canadian tax resident who is a beneficiary of a trust to which a Canadian tax resident has contributed.

The consequences of having a resident beneficiary or resident contributor include that the trust is generally liable for income tax calculated on the basis that it is Canadian resident and certain filing obligations respecting foreign property. However, for other purposes, the trust is treated as non-resident: for example, in respect of withholding and reporting obligations when a transfer is made to the trust.

If an estate is considered Canadian resident, it is liable for Canadian income tax on its worldwide income from all sources, including tax on capital gains of estate assets since the date of the deceased's death, and for withholding amounts on certain transfers to non-resident beneficiaries. If the estate is considered a non-resident of Canada based on the central management and control test, it is likely that it will be deemed to be Canadian resident by s. 94 of the ITA for many purposes of the ITA, if the deceased was a Canadian resident and the deceased's property was transferred to the estate on the deceased's death. It would calculate taxes generally as though it were Canadian tax resident, although in limited respects it would be treated as non-resident.

The effect of the rules applicable to non-resident trusts on an estate, if applicable, should be limited if the estate is to be distributed outright rather than held in an ongoing testamentary trust.

This is part three of a four-part series. Read part one here, part two here.

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