

Foreign Beneficiaries

Foreign Beneficiaries: From multiple taxation to transfer of interests

By **Margaret O'Sullivan**



Margaret O'Sullivan

(May 8, 2019, 9:50 AM EDT) -- With increased mobility of people and their assets, more and more estates have a multijurisdictional dimension. A multitude of special considerations come into play which must be identified and dealt with if an estate has foreign beneficiaries which increase the complexity of the estate administration. This series of articles highlights a number of them and is written from the perspective of Canadian and Ontario law.

As stated in the previous article, various tax and non-tax related issues arise during the administration of an estate which has foreign beneficiaries, including:

Multiple taxation on death

Generally, tax on assets which pass on death under the tax legislation of various jurisdictions may be levied on the estate (or the deceased) or, less commonly, on the beneficiary, on various bases relating to personal characteristics of the deceased or beneficiary such as: citizenship; domicile and residency; and including where a person has recently ceased physical residency in a jurisdiction but maintains tax residency. Furthermore, tax may be levied on the basis of the location of the inherited assets.

Most jurisdictions impose some type of death, succession, or estate tax. In a small number of jurisdictions including Canada, but as well Australia, New Zealand, and Denmark, capital gains tax applies to the gain in the value of the deceased's property arising on death instead of an estate or inheritance tax.

The possibility for double or even triple taxation on death arises in various situations, involving taxation not only in Canada, but as well by multiple jurisdictions, and/or in the hands of different taxpayers. Few double taxation treaties provide for relief against double taxation with respect to gift or inheritance taxes, although unilateral measures may take such double taxation into consideration.

Canada has only two tax treaties which deal with taxation on death and provide certain relief for double taxation. There is the tax treaty between Canada and the United States: *Convention between Canada and the United States of America with respect to Taxes on Income and on Capital*, and the treaty between Canada and France: *Convention Between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*.

It will be of increasing importance to understand the impact foreign taxes can have on the administration of an estate, even one which is a domestic Canadian one but may have foreign beneficiaries. In this regard, certain countries impose inheritance taxes whereby the heirs or beneficiaries pay tax based on the value of their inheritance, including the following: Croatia, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Luxembourg, the Netherlands, Norway, Poland, Serbia, Spain, Switzerland (most cantons) and Venezuela.

Most wills have a debts and death taxes clause which provides that all taxes arising as a result of death are paid by the estate so that all beneficiaries are treated equally, notwithstanding local taxation. In certain jurisdictions, inheritance tax rates are high and may produce an unintended result. It will be increasingly important, in particular where a beneficiary resides in a jurisdiction which has a significant inheritance tax, as part of the will planning process, to seek the client's instructions with regard to whether the estate or the beneficiary should bear the burden of the inheritance tax. Failure to do so can result in future disputes on this issue.

Foreign currency issues

It is important to consider foreign currency and exchange issues in making distributions to non-resident beneficiaries.

Consider seeking instruction from beneficiaries regarding denomination of currency, wiring of funds (and the expense of this), in which jurisdiction the best foreign exchange may be obtained, any problems in negotiating cheques including delays, etc. prior to effecting distributions.

Interest in a domestic corporation

Problematic issues may arise where a foreign beneficiary holds an interest in a federal or provincial private corporation, in particular under the beneficiary's domestic tax laws. For example, a U.S. resident may be exposed to double taxation on earnings of the corporation due to a mismatch of foreign tax credits and be subject to certain filing requirements. Additionally, the U.S. resident may be subject to the U.S. controlled foreign corporation and passive foreign investment company rules, which can be punitive.

One must also consider whether the private corporation is subject to favourable tax treatment, which it could lose if it loses its status because of a change of tax residence of the estate that controls the corporation. For example, in Canada, a Canadian-controlled private corporation has various favourable tax advantages and treatment.

Payment to a foreign executor or legal representative

Where an estate beneficiary is deceased and his or her executors or other legal representatives are non-resident, one must consider what authority the non-resident legal representatives have to receive estate distributions on behalf of the deceased beneficiary. It is prudent to request a copy of the deceased's death certificate, and a copy of the document under which the foreign legal representatives claim to have authority to receive assets on behalf of the deceased beneficiary, either by way of statute, court order or other document. If there is any question as to the non-residents' authority, one should consider obtaining either a legal opinion and/or a court order or payment of the funds into court.

This is part two of a four-part series. Read part one here. The next article will discuss the tax and non-tax-related considerations that may arise when an estate has foreign executors or other legal representatives.

Margaret O'Sullivan is the managing partner at O'Sullivan Estate Lawyers.

Photo credit / Wara1982 ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437- 828-6772.