



Estates with Foreign Ties



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Agenda

- Where is the trust/estate resident?
- Non-resident executors
- Citizenship and domicile of deceased
- Non-resident beneficiaries of Canadian estate
- Canadian estate with foreign assets
- Foreign estate with Canadian assets
- Foreign trust – trap and opportunity

Where is the trust/estate resident?

- **General Principles**
- Residency of a trust – where “central management and control” takes place
 - An estate is considered a trust for purposes of the ITA
- The residence of a trust is NOT necessarily determined by the residence of the trustee.
- Residence is a question of fact.
 - Must look at where the affairs of a trust are carried on and where the central management and control actually abides.
 - *Fundy Settlement v. Canada*, 2012 SCC 14

Where is the trust/estate resident?

- **Deemed Residency**
- Subsection 94(3) of the ITA deems a trust that is otherwise non-resident to be resident in Canada for certain purposes:
 - liability for Canadian taxation on worldwide income and
 - computing the trust's income for a particular taxation year.
- A trust will be deemed resident in Canada under subsection 94(3) of the ITA if at a specified time there is:
 - a "resident contributor" to the trust or
 - a "resident beneficiary" under the trust.

Where is the trust/estate resident?

- **Deemed Residency**

- **“resident contributor”**: Contributor currently a Canadian resident
- A “resident contributor” to a trust is defined in subsection 94(1) of the ITA as a person that is, at that time, resident in Canada and a contributor to the trust. A contributor is defined in subsection 94(1) of the ITA as a person that, at or before that time, has made a contribution to the trust – and the term “contribution” is broadly defined.

Where is the trust/estate resident?

- **Deemed Residency**

- **“resident beneficiary”**: contributions during “resident time” AND current Canadian beneficiary
- A “resident beneficiary” is defined in subsection 94(1) to mean a person that is, at that time, a beneficiary under the trust if, at that time, the person is: (a) resident in Canada, and (b) there is a connected contributor to the trust – a person who made a contribution to the trust either in Canada or at a “non-resident time” – i.e., within 60 months of moving to Canada or within 60 months of leaving Canada. In the case of an estate, the 60 month period is shortened to 18 months.

Where is the trust/estate resident?

- **Deemed Residency (other considerations)**
 - No 75(2) attribution (post-*Sommerer*)
 - Still have to file Form T1141/T1142 (still foreign trust)

Non-resident executors

- Is the estate non-resident?
- General Consequences:
 - Tax consequences?
 - Reporting requirements
 - Bonding requirement for probate?
 - Bond needs to be cancelled on wind-up of estate

Non-resident executors - Manitoba

- No requirement in Manitoba for executors to be residents of Manitoba, or even Canada, to be granted probate.
 - But it is advisable to appoint a resident
- An executor who is “not habitually resident within Canada,” may be required to post a security bond.
 - Section 7(2) of *The Court of Queen’s Bench Surrogate Practice Act*.
- *The Trustee Act* grants the Court of Queen’s Bench broad discretion to remove executors for reasons which could include if they “remain out of the province for more than 12 months.”

Non-resident executors - Ontario

- *Estates Act* provides for the posting of a bond by executors applying for a Certificate of Appointment where the executor is not resident in Ontario or elsewhere in the Commonwealth.
- Can request that the Court dispense with the requirement for a bond
 - *Re Henderson Estate* sets out information to be included in the affidavit to dispense with the administration bond.
- The *Estates Act* has procedures to cancel a bond
 - passing of accounts required and/or production of evidence that the “debts of the deceased have been paid and the residue of the estate duly distributed.”

Non-resident executors

- What if the non-resident executor is one of several executors?
 - Must consider the principles in *Fundy* – where is CMC exercised?
 - Does the non-resident executor come to Canada for meetings with the other executor/s?
 - Advisable if the estate is to maintain Canadian residency.
 - Even if CMC is outside of Canada, must still consider whether the estate is a deemed resident under s. 94.
 - If yes, tax filings in Canada may be required.
 - Consider tax issues re compensation

Citizenship of the deceased – US Estate Tax

- Canadian system generally levies tax on the basis of residency rather than citizenship.
- If deceased was a US citizen or green card holder, the estate will be subject to US estate tax - even if not resident in US
 - US "Estate Tax" is one of three types of "US transfer taxes" that may apply to Canadians
 - levied on an individual basis and is calculated based on a graduated tax rate system on the value of the taxable estate.
 - 2019 lifetime exemption of \$11.4M
 - Could give up US citizenship, but beware "exit taxes" that apply to high net-worth individuals

Citizenship of the deceased

- **Always ask:**
- When planning, consider the complexities that arise from dual or multi-citizenship
 - The larger the estate, the less likely the entire value will be shielded by an exemption
- When administering an estate:
 - Was the deceased considered “domiciled” in another jurisdiction even though resident in Canada at death?
 - What are the tax consequences?

Non-resident beneficiary of Canadian estate

- Not uncommon to have one or more beneficiaries of a Canadian-resident estate living outside Canada.
 - Implications for the distribution of income
 - Withholding tax obligations
 - Limited ability to “roll out” assets on a tax-deferred basis to non-residents
 - S. 116 certificate required for certain distributions

Non-resident beneficiary of Canadian estate/trust

- **Distribution of income**

- Withholding tax
 - 25% unless reduced by a treaty
 - Executor/trustee is responsible to remit the withholding tax
 - Executor will need to obtain confirmation of the beneficiary's tax residency
- Capital dividends
 - received tax-free by resident Canadian beneficiaries
 - but subject to withholding tax for non-residents (and potentially additional tax in the country of residence of the beneficiary)

Non-resident beneficiary of Canadian estate/trust

- **Distribution of capital**

- Generally, cannot roll assets out of the estate/trust to non-resident beneficiary
- Unless the asset being transferred is real property
 - can be rolled out to the non-resident beneficiary because the beneficiary will be taxed in Canada on a subsequent sale or transfer
- If the distribution is of cash, and tax has been paid by the estate on the liquidation of the assets, there should be no further Canadian tax

Non-resident beneficiary of Canadian estate/trust

- **Is a s. 116 Certificate required?**
 - s. 116 Certificate is required for transfer of taxable Canadian property (TCP) to a non-resident
- Since 2010, an interest in a trust is not considered TCP, unless the trust held an interest in real property in Canada that constituted more than 50% of the FMV of the trust at the time of the transfer or in the prior 60 month period (18 months for an estate)

Equalizing between resident and non-resident beneficiaries?

- Distributions of income to resident beneficiaries retain their character for tax purposes, while distribution to a non-resident is subject to withholding tax.
 - Non-resident should be able to access foreign tax credits

Equalizing between resident and non-resident beneficiaries?

- Distributions of capital where there is an accrued gain that is taxable to the estate
 - What does Will provide?
 - Should the tax be paid from the assets going to the non-resident only?
 - Can different assets be distributed to the resident v. non-resident beneficiaries?
- Is the foreign beneficiary taxable on the receipt of capital distribution?

Canadian estate with foreign assets

- **Tax issues**

- Potential for double taxation

- Canadian capital gains tax and inheritance tax on the same asset (different taxpayers – deceased in Canada, estate in, e.g., UK)
 - Canada-US Treaty - relief
 - Is there a structure in place to avoid US estate tax?
 - limited partnership holding US real estate – “Check-the-Box” election (to deem the partnership to be a corporation in the US) must be undertaken shortly after death
 - Canadian capital gains tax on death and tax on subsequent sale by beneficiaries (e.g., India, Israel)

Canadian estate with foreign assets

- **Estate administration:**

- May be necessary to obtain an ancillary grant of probate in the foreign jurisdiction for the executor to be able to deal with the assets.
- US financial institutions will often accept a Canadian grant
 - US financial institutions may rely on grant from a Canadian province for transfer of accounts
 - in order to deal with real estate, an ancillary grant is required
- Preparing a Will that deals only with the foreign assets may help to speed up the probate process.

Foreign estate with Canadian assets

- **Getting Access to the Assets**
- Canadian banks holding assets for non-Canadian estates will usually insist on ancillary grant or re-sealing of the probate.
- Ancillary grant likely required in order to deal with real estate.
 - entails obtaining an administration bond; or
 - court-order waiving the necessity of the bond.

Foreign estate with Canadian assets

- **Tax issues**
- Consider whether there is tax on the capital gain (TCP v. non-TCP)
- Beware of US revocable trusts holding Canadian property that is transferred to surviving spouse

Foreign trust with Canadian beneficiary

- **Beware trap:**
- Income or capital gains earned by foreign trust loses its character
 - Taxable in Canada as foreign investment income – graduated rates
- No foreign tax credits (FTC) for foreign tax paid by trust

Foreign trust with Canadian beneficiary

- **Opportunity:**
- Could be structured so that distributions to Canadian beneficiaries are tax free (“granny trust”)
- Need mind and management outside Canada (so not factually resident)
- Need foreign contributor (so not deemed resident)
- Need income or gains only paid or payable AFTER year end of trust
 - Converted to “capital”
 - Reportable on Form T1142

Conclusion

- Multi-jurisdictional estate planning must consider:
 - Residency
 - Estate
 - Deceased
 - Executor/s
 - Beneficiaries
 - Citizenship
 - Situs, value, and nature of assets
 - Timing and method of distribution
- Foreign ties create challenges and opportunities for tax-efficient estate administration

Presented by:

