

## Blakes

### CRA Provides Updated Guidance for COVID-19 Cross-Border Tax Concerns

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April 14, 2021

On April 1, 2021, the Canada Revenue Agency (CRA) released [supplemental guidance on international income tax issues](#) raised by the COVID-19 crisis. This Supplemental Guidance extends certain administrative relief that was originally released on May 20, 2020 (the Initial Guidance). The Initial Guidance provided, among other things, that an individual's physical presence in Canada as a result of COVID-19-related travel restrictions would not, on its own, cause such individual or a corporation to become resident in Canada or cause a corporation to have a permanent establishment in Canada. Please see our bulletin on the Initial Guidance [here](#). The Initial Guidance was mostly effective from March 16, 2020 to September 30, 2020. At the time of expiry, the CRA declined to extend the guidance.

Although the Supplemental Guidance does not address all cross-border taxation issues raised by COVID-19-related travel restrictions, it is helpful in a number of circumstances, particularly for individuals whose employment duties were affected by COVID-19 travel restrictions and who are now in the process of filing their 2020 tax returns. For situations not addressed in the Supplemental Guidance, the CRA suggests contacting the agency directly at [PERESCOVIDG@cra-arc.gc.ca](mailto:PERESCOVIDG@cra-arc.gc.ca).

#### RESIDENCE ISSUES

Residence for individuals is generally a common law determination. A special rule in the [Income Tax Act](#) (Canada) (ITA) also deems an individual who is physically present in Canada for 183 or more days in a tax year to be considered resident in Canada for the year.

The Initial Guidance provided that the CRA would not consider an individual to be resident in Canada under the common law where they have remained in Canada solely because of travel restrictions. Also, the CRA would not consider days during which an individual is present in Canada and unable to return to their country of residence solely because of travel restrictions to count towards the 183-day deemed residency test.

The Supplemental Guidance extends the above relief until the earlier of the following dates: that upon which the travel restrictions are lifted and December 31, 2021. The extension of administrative relief applies only in respect of individuals and does not extend to the determination of corporate residency.

#### PERMANENT ESTABLISHMENT ISSUES

Most tax treaties entered into by Canada provide that a resident of the other relevant jurisdiction will be exempt from Canadian income tax on income from carrying on business in Canada as long as the non-resident entity does not have a permanent establishment (PE) in Canada. Definitions of PE in Canada's treaties generally include: (1) a fixed place of business, and (2) a person acting in Canada on behalf of the non-resident (Agency PE). The Canada-U.S. Tax Treaty also includes a services-based PE, which may depend on, among other things, whether an individual performed services for Canadian customers on behalf of the non-resident in Canada for 183 days or more in any 12-month period.

The Initial Guidance provided the following relief:

1. Fixed place of business PE: the CRA will not consider a non-resident entity to have a PE in Canada solely because its employees perform their employment duties in Canada as a result of the travel restrictions;
2. Agency PE: the CRA will not consider a non-resident entity to have a PE in Canada solely due to a dependent agent, provided that such activities are limited to the period during which travel restrictions are in place and those activities would not have been performed in Canada but for the travel restrictions; and
3. Services-based PE: the CRA will not include any days that an individual was present in Canada because of the travel restrictions in determining whether an individual meets the 183-day presence test.

The Supplemental Guidance does not extend the administrative relief provided in the Initial Guidance which expired on September 30, 2020. However, the CRA states its expectation that the application of the relevant treaty provisions should generally not result in an individual's temporary presence in Canada because of COVID-19 travel restrictions being considered to create a Canadian permanent establishment. The position taken by the CRA is generally consistent with the assessment by the OECD of the potential impact of COVID-19 travel restrictions on the application of international tax treaties. (See ["OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis"](#) released April 3, 2020.) In particular, the Supplemental Guidance provides the following clarification on the tests for PEs:

1. Fixed place of business PE: the CRA notes that an individual working remotely from their home or short-term residence in Canada while the travel restrictions remain in place will generally not meet the requirement for a fixed place of business PE;
2. Agency PE: the CRA notes that the requirement that the agent habitually exercise the right to conclude contracts will generally not be met where an individual who has the right to conclude contracts on behalf of their employer is doing so from Canada solely because of the travel restrictions; and
3. Services-based PE: the CRA notes only that this test will not be met provided that the individual in Canada is not working on projects for Canadian customers.

## **CROSS-BORDER EMPLOYEES**

### **U.S. Resident Employees**

The Canada-U.S. Tax Treaty allows Canada to tax the remuneration of employees who perform their duties in Canada provided that, among other things, the employee is present in Canada for more than 183 days in a 12-month period. The Initial Guidance provided that employees who are exercising their duties in Canada solely as a result of the travel restrictions would not have such days counted toward the 183-day test.

The Supplemental Guidance extends this administrative relief to December 31, 2020. Unfortunately, no relief is provided for subsequent days after December 31, 2020, and each subsequent day in Canada after that time must be included in determining whether the 183-day threshold has been exceeded. The Supplemental Guidance also provides that a non-resident employer will not be required to submit a T4 slip for the 2020 taxation year in respect of employees covered by the guidance. However, the CRA expects the employer to track the number of days during which the employee is working.

Unlike the Initial Guidance, the Supplemental Guidance is silent on non-residents other than U.S. residents.

### **Canadian Residents**

Non-resident employers of Canadian residents are required to withhold at source from remuneration they pay, even if the employment duties are performed outside of Canada. In some circumstances, the CRA will issue a “letter of authority” to such an employee to allow the non-resident employer to reduce Canadian withholdings to reflect the foreign tax credit available to the Canadian employee in respect of taxes payable to the foreign country. The Initial Guidance provided that such a letter of authority would continue to apply to a Canadian resident forced to perform their duties in Canada as a result of the travel restrictions.

The Supplemental Guidance recognizes that, notwithstanding the relief provided with respect to employer withholding requirements in the Initial Guidance, some employees may still be subject to more Canadian income tax on their employment earnings (and less U.S. tax) because of having performed more of their duties in Canada. For individuals in this situation, the CRA will provide an administrative concession to consider the employment income to be sourced from the United States for 2020, so that employees can file their tax returns like they did in prior years and claim a foreign tax credit for amounts paid in the United States. This relief applies only to individuals who, because of the travel restrictions, have been forced to perform their employment duties in Canada instead of at the offices of their United States employer. Alternatively, individuals may choose to report their employment income in accordance with the Canada-U.S. Tax Treaty, i.e., as sourced from Canada during the time when they were performing such duties in Canada. The CRA will provide additional guidance at a later date to address the impact to individuals in 2021.

Please visit our [COVID-19 Resource Centre](#) to learn more about how COVID-19 may impact your business.

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