The Joint Committee on Taxation of
The Canadian Bar Association

and

Chartered Professional Accountants of Canada
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June 11, 2020

Ms. Alexandra MacLean
Director General
International and Large Business Directorate
Canada Revenue Agency
344 Slater Street
Ottawa, Ontario K1A 0L5

Dear Ms. MacLean:

Subject: Guidance on international income tax issues raised by the COVID-19 crisis

This submission sets out comments of the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada ("Joint Committee") with respect to the Guidance on International Income Tax Issues raised by the COVID-19 crisis (the "Guidance").

Although the guidance has been published and a request for general feedback was not specifically made, we trust that the Canada Revenue Agency (the "Agency") is open to additional feedback and suggestions, which are included in the accompanying summary. We note that most of our observations deal with situations that were not specifically addressed, and that feedback on such situations was encouraged.

Members of the Joint Committee and others in the tax community participated in the discussion concerning this submission and contributed to its preparation, including:

- Rosemary Anderson – Thorsteinssons LLP
- Bruce Ball – CPA Canada
- Fabio Bonanno – CPA Canada
- Catherine Brayley – Miller Thomson LLP
- David Bunn – Deloitte LLP
- Ian Crosbie – Davies Ward Phillips & Vineberg LLP
- Ken Griffin – PwC LLP
- Amanda Heale – Blake, Cassels & Graydon LLP
- Vivian Leung – CPA Canada
- Hugh Neilson – Kingston Ross Pasnak LLP
- Anu Nijhawan – Bennett Jones LLP
- Angelo Nikolakakis – EY Law LLP
- Carmela Pallotto – KPMG Canada
- Carrie Smit – Goodmans LLP
- Jeffrey Trossman – Blake, Cassels & Graydon LLP
- Anthony Strawson – Felesky Flynn LLP
- Christina Zurowski – Grant Thornton LLP

If it would be helpful, members of the Committee would be pleased to discuss the issues in more detail.

Yours very truly,

David Bunn
Chair, Taxation Committee
Chartered Professional Accountants of Canada

Angelo Nikolakakis
Chair, Taxation Section
Canadian Bar Association

Cc:

- Ted Gallivan, Assistant Commissioner, Compliance Programs Branch, Canada Revenue Agency

Comments of the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada ("Joint Committee") with respect to the Canada Revenue Agency Guidance on International Income Tax Issues raised by the COVID-19 crisis (the "Guidance")

Corporate Residency for Purposes of Exempt Surplus Regime

One of the key concerns that emerged due to the pandemic is the impact of Travel Restrictions (as defined in the Guidance) on the residency of corporations. As the Guidance points out, corporations that have been formed under foreign law will nevertheless be considered resident in Canada if their "central management and control" is located in Canada. Specifically, one of the key factors typically considered in applying this common-law concept is the jurisdiction in which the meetings of the board of directors take place.

In the discussion of income tax residency for corporations, the Guidance sets out two main conclusions. First, for corporations in jurisdictions covered by income tax treaties, in light of the extraordinary circumstances resulting from the Travel Restrictions, where a director of a corporation must participate in a board meeting from Canada due to Travel Restrictions, the Agency will not consider the corporation to become resident in Canada solely for that reason. Second, for corporations in non-treaty countries, determinations of residency will be made on a case-by-case basis. Although we would have preferred that more certainty could be provided where non-treaty counties are involved, the Guidance more generally is helpful.

The focus of the Guidance, however, is on the effect of the Travel Restrictions on whether a foreign corporation will be considered to be resident in Canada. We would recommend that the same approach be taken whenever the common law corporate residency concept is relevant for Canadian income tax purposes. This would include the determination of whether a foreign affiliate (a FA) is resident in a "designated treaty country" ("DTC") as defined in subsection 5907(11) of the Regulations to the *Income Tax Act* which concept is relevant for determining a foreign affiliate's surplus pools. A FA's net earnings from an active business are added to exempt surplus only if, among other things, the FA is resident in a designated treaty country (a tax treaty country or a jurisdiction with which Canada has entered into a tax information exchange agreement (TIEA)). For this purpose, residency may be determined party or entirely under common-law principles. A treaty tie-breaker rule can have the effect of ensuring a FA is not resident in Canada (in conjunction with subsection 250(5)) but cannot locate the common law residence of the FA in any particular jurisdiction, and there are no tie-breaker rules under a TIEA. It appears to follow from the CRA guidance that this would be considered on a case-by-case basis.

Canadian multinationals would benefit from further guidance on this issue. For example, where one or more directors cannot attend a board meeting in person solely because of Travel Restrictions, it would be helpful for the Agency to confirm that this will not, in and of itself, negatively impact the treatment of active income earned in foreign jurisdictions as exempt surplus.

Carrying on Business in a Jurisdiction for Purposes of the Foreign Affiliate Regime

The Guidance addresses whether Travel Restrictions could result in a non-resident entity being considered to carry on business in Canada or have a Canadian permanent establishment. The Guidance does not, however, address these issues in the context of foreign affiliates and the determination of foreign accrual property income (FAPI).

Income earned by a foreign affiliate through a permanent establishment in a "non-qualifying country" that would otherwise be active business income is income from a "non-qualifying business" and included in FAPI. A "non-qualifying business" is defined in subsection 95(1) of the *Income Tax Act* as a business that is carried on through a permanent establishment in a "non-qualifying country" (a country that has neither a tax treaty nor a TIEA with Canada and with which Canada initiated TIEA discussions more than 60 months before that time).

Further, even with reference to surplus pools, the determination of whether income from an active business carried on by a foreign affiliate that is resident in a DTC is included in its exempt earnings or taxable earnings will often depend on whether the income is attributable to business activities carried on in a DTC. Thus, there can be an impact if employees are stranded in a non-DTC.

Similarly, income earned by a FA from an "investment business" is included in FAPI, subject to the deemed active business income rules. One of the exceptions from the "investment business" definition looks, amongst other things, to whether the activities of the FA are regulated under the laws of "each country in which the business is carried on through a permanent establishment in that country". Similar issues may arise under other provisions of the FAPI rules.

It would be helpful if the CRA could confirm that the administrative approach in the Guidelines would also be applied in the context of the foreign affiliate rules. This would include determining whether a FA is earning non-qualifying business income, whether a FA is carrying on business in a DTC, and whether a FA is carrying on an investment business.

Permanent Establishment in Canada – Building sites, Installation or Drilling Rigs etc.

The Guidance speaks to the impact of a non-resident entity having employees or dependent agents in Canada and how the 183-day test in the services permanent establishment provisions will be interpreted. In particular, the Agency discusses whether employees who regularly work outside of Canada but, due to Travel Restrictions, exercise their employment duties in Canada, will result in the non-resident entity carrying on business in Canada or create a permanent establishment in Canada for the non-resident entity. Generally speaking, the conclusion in the Guidance is that the Agency will not consider a non-resident entity to have a permanent establishment in Canada solely because its employees perform their employment duties in Canada solely as a result of Travel Restrictions, assuming the entity is resident in a treaty country. For entities resident in a non-treaty country, the determination of whether administrative relief is available is made on a case-by-case basis.

There are other provisions of certain tax treaties, such as the 12-month period referenced in the building site and installation or drilling rig provisions, that could result in similar permanent establishment issues, if the project is delayed due to the Travel Restrictions. As such, would the Agency be willing to provide similar administrative relief in these situations?

Cross-border Employment Income – "Qualifying Non-Resident Employee"

In the Guidance, the Agency addresses situations where U.S. residents regularly exercise their employment in Canada but are normally not taxable on employment income in Canada because the employees meet the conditions set out in the Canada-United States income tax treaty. Concerns have been raised for those employees who will not meet the 183-day test solely because of Travel Restrictions.

The Agency states that where such individuals are present in Canada, and are exercising their employment duties in Canada, solely as a result of the Travel Restrictions, those days will not be counted toward the 183-day test in the Canada-United States income tax treaty, and therefore, these individuals will continue to benefit from the treaty relief.

There are other situations where an individual's status may depend on the number of days an individual spends in Canada, such as the 45-day and 90-day periods applicable in determining whether an individual resident in a treaty country is a "qualifying non-resident employee" under subsection 153(6) of the *Income Tax Act*. Will the Agency similarly not count days spent in Canada due to the Travel Restrictions for the purposes of these rules?

Carrying on Business for GST/HST Purposes

Although we recognize that the Guidance was designed to deal with income tax issues, it would be useful if the CRA could comment on similar concerns for GST/HST issues. In particular, the determination as to whether a non-resident is required to register for GST/HST purposes is set out in the CRA's Policy P-051R, which looks at a number of factors, including the place where agents or employees of the non-resident are located and the place where the business contracts are made. In general, a non-resident person must have a significant presence in Canada to be considered to be carrying on business in Canada.

Accordingly, it would be helpful if the Agency could address whether the determination as to whether a non-resident person has a significant presence in Canada should be made without considering the activities that the non-resident is required to perform in Canada as a result of the Travel Restrictions.

Non-Resident GST Registration

As a result of the COVID-19 crisis, the processing of non-resident GST registrations was temporarily interrupted. In addition, many organizations may have had similar challenges in their own staffing making it difficult to make the registration request on a timely basis. For income tax issues, such as waiver requests and section 116 clearance certificate requests, the Guidance provides temporary measures and email addresses to allow for electronic submission of such requests. Could the CRA consider similar measures for non-resident GST registrations?