UHY VICTOR

# CANADA/US

## SURVIVAL GUIDE

2022

As we continue to move forward in the midst of the COVID-19 pandemic, 2021 was another tough year for all of us. UHY Victor wishes all our clients and contacts well, especially those who have faced challenging experiences during this difficult year.

UHY Victor praises our front-line workers for your commitment to global health and well-being.

UHY Victor monitors tax changes and tax interpretations that continue to be introduced in both the US and Canada. We are proactive in reviewing our clients' tax situations and are proactive in seeking out and implementing tax-effective solutions for our clients.

The UHY Victor Canada US Tax Team (CUTT) is pleased to present this guide, which covers the latest developments affecting companies, individuals and estates in both the US and Canada. The information contained in this guide is applicable until January 1, 2022.

The UHY Victor CUTT consists of a group of 13 experienced tax and accounting professionals, who assist clients in identifying and implementing practical solutions to their cross-border tax and corporate issues. We thank the members of CUTT for their contributions and support in the preparation of this guide.

Do not hesitate to contact us if we can help you with cross-border issues between the US and Canada.

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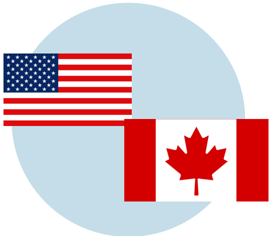

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# RECENT CHANGES


## Some recent key changes are as follows:

### PERSONAL

- The exemption for US estate taxes increased to $12,060,000
- The US Personal Income tax rate ranges between 10% to 37%
- The standard deduction increased to $12,950 for single filers and to $25,900 for married couples filing jointly.
- The alternative minimum tax exemptions have increased.

### CORPORATE

- The corporate tax rate remains at 21%.
- The corporate alternative minimum tax has been eliminated.

### INTERNATIONAL

- The recent introduction of a territorial tax system allows for US Corporations to receive dividends tax-free from controlled foreign corporations.
- GILTI and BEAT taxes continue to restrict off-shore tax-reduction plans.

# RECENT CHANGES
## (CONTINUED)

### GILTI

The US GILTI (global intangible low-tax income) tax applies to the foreign earnings of controlled foreign corporations (CFCs), including Canadian corporations owned by American tax persons. Do not be misled by the term "Intangible" - this tax applies to almost all active income that is not otherwise taxed under Subpart F.

Conceptually, GILTI can significantly reduce the Canadian tax deferral benefits of retaining undistributed profits in a Canadian company.

GILTI requires a US shareholder of a CFC to personally include its pro-rata share of the GILTI income generated by a CFC. Note that this inclusion is independent of any amounts distributed to the US shareholder during the year.

The inclusion of "Net-Stated Income" by GILTI consists of the aggregate of the shareholder's pro-rata share of the CFC's gross income minus certain adjustments, such as income taken into account in determining subpart F income (the US equivalent of the Canadian FAPI).

As a result, the net tested income generally includes the net active income of the CFC after foreign taxes.

## RECENT CHANGES
## (CONTINUED)

### GILTI

In 2020 the US Treasury Department introduced a tax exemption for GILTI. Income qualifying under the high tax exception is not included in the net tested income of the CFC.

To benefit from the high tax exception, the CFC's income must have been subject to an effective tax rate imposed by a foreign country that exceeds 90% of the US corporate tax rate of 21%, which is 18.9%.

The 2020 Final Regulations are effective for tax years of foreign companies beginning on or after July 23, 2020. US taxpayers are permitted to apply the 2020 Final Regulations for tax years beginning after December 31, 2017, and before July 23, 2020, as long as certain consistency requirements are satisfied.
Note that the US shareholder must claim the high-tax exemption for both GILTI and sub-part “F” income for the CFC.

Another option for GILTI planning is to elect a sec 962 election, but again, this may not eliminate GILTI if Canadian taxes are low.

The inclusion of GILTI could also be an additional tax for Canadian shareholders. Consider, for example, a corporate structure in which a Canadian parent company has a controlled foreign subsidiary in the US ("US Sub") that wholly owns a CFC ("Foreign Sub.").

The Foreign Sub generates active income that should translate to tested income for GILTI purposes. As a result, US Sub should have a GILTI inclusion in its taxable income for foreign Sub for US tax purposes. From a Canadian tax perspective, active income should be excluded from the FAPI and included in the exempt surplus of Foreign Sub.

## RECENT CHANGES (CONTINUED)

### BEPS

The CUTT closely monitors developments pertaining to the Base Erosion and Profit-Sharing ("BEPS") initiative. BEPS is an Organization for Economic Cooperation and Development (OECD) project aimed at setting new international standards for many issues, including:

- Realigning tax laws to avoid international income shifting, double taxation, and tax evasion
- International corporate taxation
- Transfer pricing
- Bilateral tax treaties and policy shopping
- Preferential regimes and transparency

The BEPS sets minimum standards to be adopted internationally, including updates to international tax rules and recommendations for tax treaties and policies, so that they are implemented uniformly.

Canada ratified legislation to implement in 2019, and the MLI entered force on December 1, 2019. The MLI applies only to tax treaties between two countries if the MLI has been ratified and is in force in both tax jurisdictions.

# RECENT CHANGES
## (CONTINUED)

### A COUNTRY-BY-COUNTRY REPORTING

Companies with annual revenues in excess of USD $850 million are required to report on country-by-country basis information on their profit, loss, and accumulated income.

### OECD COMMON REPORTING STANDARD & FINANCIAL INFORMATION EXCHANGE

The automatic exchange of information is a new international standard of tax cooperation as set out in the OECD/G20 Common Reporting Standard ("CRS"). 131 jurisdictions, including Canada, are committed to implementing the CRS.

Under the CRS, financial institutions must take steps to identify certain accounts held by, or for the benefit of, non-residents or dual residents and to report such accounts to the Canada Revenue Agency (CRA). The information would then be available for sharing with the jurisdiction in which the account holder resides for tax purposes under the provisions and safeguards of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters or the relevant bilateral tax treaty.

Canada and the US signed an intergovernmental information exchange agreement in relation to FATCA in 2014, and financial information has been regularly exchanged between the two countries since 2016.

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# TRANSFER PRICING

**In 2019, the Canada Revenue Agency (CRA) cancelled Information Circular 87-2R (IC), a primary policy document that guides how the CRA applied transfer pricing laws.**

The CRA announced the IC was inconsistent with its administrative policies and did not reflect updates to the Organisation for Economic Co-operation and Development ("OECD") Guidelines. Due to the OECD Base Erosion and Profit Shifting (BEPS) project, many sections of the guidelines have been and are being amended.

In line with new developments in BEPS and the OECD in terms of transfer pricing, both the IRS and the CRA are increasing their scrutiny of cross-border transactions between related parties.

As a result, small and medium-sized businesses are experiencing an increase in transfer pricing audits.

Our methodology is to group pricing transactions into the following general areas:

- Intangible payments (such as royalty, licensing, or franchising fees).
- Management and administration fees.
- Intercompany loans.
- Sale of products.

Our experience is that the IRS and CRA focus primarily on the first three areas when conducting transfer pricing audits.

# TRANSFER PRICING

## (CONTINUED)

The CRA applies the OECD guidelines and requires companies to establish transfer pricing agreements that are consistent with the OECD transfer pricing guidelines. These agreements must provide economic support for the terms of arm's length and provide complete and accurate descriptions of the transactions. However, the CRA has not adjusted its requirements to include OECD transfer pricing guidelines to include the treatment of cash boxes affecting outbound financing of foreign subsidiaries of Canadian multinationals, and BEPS's proposed simplified approach to low-cost services.

OECD Action 13 has been implemented and requires companies with annual consolidated revenues exceeding €750 million to maintain:

- **Country by Country Reporting**
  Key information on all group members of the multinational
- **Master File**
  Key information about the Multinationals Group's Global Operations
- **Local File**
  Information and support on the local countries inter-company transactions

## FOREIGN ASSET REPORTING


### REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (FBAR)

US persons meeting the criteria listed below must file an FBAR annually with the US Department of Treasury using FinCen Report 114. The FBAR has the same filing deadline as individual income tax returns (although they are not filed together). Accordingly, the FBAR filing deadline for an individual's 2021 taxation year is April 15, 2022, with an automatic six-month extension to October 15, 2022.

US persons are required to file an FBAR if:

- The US person had either a financial interest in or signature authority over at least one financial account located outside the US.
- The aggregated value of all foreign financial accounts exceeded $10,000 USD at any time during the calendar year to be reported.

The following are considered US persons:

- US citizens
- US residents
- Green cardholders
- Individuals electing non-resident status under a tax treaty
- Entities, which include: Corporations, Partnerships, Limited Liability Corporations, Trusts, or Estates formed under the laws of the US

The FBAR must be filed electronically. Failure to properly file the form may be subject to significant penalties.

# FOREIGN ASSET REPORTING
## (CONTINUED)

### FATCA INTERGOVERN-MENTAL AGREEMENT (IGA)

In 2015, Canada and the US began to exchange financial and tax information. The agreement requires Canadian institutions to report financial information on accounts held by US residents and US citizens (including US citizens who are residents or Canadian citizens) to the CRA, which then transfers that information to the IRS.

In addition, the IRS provides the CRA with increased information on certain accounts of Canadian residents held at US financial institutions. Several exemptions are listed in the agreement.

For example, the following are exempt from FATCA and are not reportable:

- Registered Retirement Savings Plans (RRSP)
- Registered Retirement Income Funds (RRIF)
- Registered Disability Savings Plans (RDSP)
- Registered Education Savings Plans (RESP)
- Tax-Free Savings Accounts (TFSA)

Smaller deposit-taking institutions, such as credit unions with assets of less than $175 million, are exempt from this obligation.

Americans who are Canadian residents and do not comply with their US tax requirements should be aware that Canadian financial institutions report information about their investments to the IRS. The same applies to Canadians with US tax filing requirements.

It was reported that the CRA sent over 900,000 records from banks and financial institutions to the IRS in 2019. The CRA has refused to inform Canadians when their financial accounts have been shared.

## FOREIGN ASSET REPORTING

### (CONTINUED)

**FORM 8938**

In addition to filing the FBAR to the Department of Treasury, Form 8938 must also be included in the US personal tax return submitted to the IRS if financial account thresholds, higher than the FBAR, are met.

An individual who holds any interest in a specified foreign financial asset (SFFA) during the taxable year is required to file Form 8938. A specified foreign financial asset includes:

- A financial account maintained by a foreign financial institution
- Any stock or security issued by a foreign person
- A financial instrument or contract that has a foreign issuer or counterpart
- An interest in any foreign entity where such instrument is held for investment

Gold held in a safe deposit box, artwork, interests in a social security account, social insurance or other similar programs, and personally owned real estate do not constitute specified foreign financial assets.

However, gold held by a custodian, interests in foreign trusts, foreign estates, foreign pension plans, and foreign deferred compensation plans do constitute a specified foreign financial asset.

Real estate held in a trust or other entity is not reportable by the individual. However, an interest in a foreign trust or foreign entity is reportable on separate tax returns, which are then identified as filed on the FATCA form. Additional stock issued by a foreign corporation is a specified foreign financial asset.

The filing thresholds for Form 8938 in 2022 are:

| WHILE LIVING IN THE US: | VALUE OF FOREIGN ASSETS AT THE END OF THE YEAR | VALUE OF FOREIGN ASSETS AT ANY TIME IN THE YEAR |
|---|---|---|
| **Unmarried** | $ 50,000 | $ 75,000 |
| **Married and filing jointly** | $ 100,000 | $ 150,000 |
| **Married filing separately** | $ 50,000 | $ 75,000 |
| **WHILE LIVING ABOAD:** | | |
| **Unmarried** | $ 200,000 | $ 300,000 |
| **Married and filing jointly** | $ 400,000 | $ 600,000 |
| **Married filing separately** | $ 200,000 | $ 300,000 |

# FOREIGN ASSET REPORTING

## (CONTINUED)

**T1135**

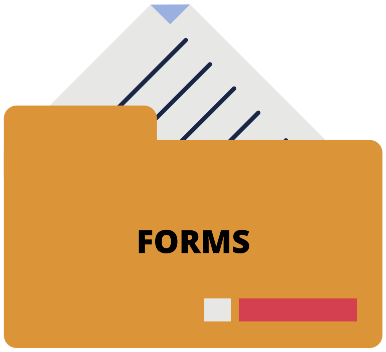
Taxpayers who own specified foreign property with a cost of more than CAD 100,000 at any point during the year must file form T1135.

The CRA has simplified procedures for taxpayers who hold specified foreign property with a total cost base of more than $100,000 and less than $250,000 at any time in the tax year.

Taxpayers who have more than $250,000 of specified foreign property must continue using the current detailed reporting method.

The foreign property specified includes funds (such as cash) held in a financial account outside Canada, shares of non-resident corporations (including those held in Canadian brokerage accounts), debts owed by non-residents (such as bonds issued by non-resident corporations and governments), interests in non-resident trusts, a real estate outside Canada and other property outside Canada.

Form T1135 is due by the deadline for filing the taxpayer's income tax return for the year. The basic penalty for missing or incomplete forms is $25 per day or $100, whichever is greater, up to a maximum of $2,500. There are harsher penalties for taxpayers who knowingly fail to file the T1135 or make false statements.



# IRS STREAMLINED FILING PROCEDURES

## PURPOSE

The IRS introduced the Streamlined Filing Compliance Procedures in 2012 to provide US taxpayers (individual taxpayers and estates of individual taxpayers) who had failed to report and pay taxes on foreign financial assets with:

- A streamlined procedure for filing amended or delinquent returns.
- Terms for resolving their tax and penalty obligations.

**The failure to report and pay taxes must not have resulted from willful conduct on their part.** Non-willful conduct is conduct that is due to negligence, inadvertence, mistake, or conduct that is the result of a good faith misunderstanding of the requirements of the law.

Returns submitted under these procedures may be selected for audit under existing audit selection processes applicable to any US tax return. They may also be subject to verification procedures. This means that the accuracy and completeness of submissions may be checked against information received from banks, financial advisors, and other sources.

If a taxpayer is concerned that their conduct was willful, they should consider participating in the Offshore Voluntary Disclosure Program.

After a taxpayer has completed the streamlined filing compliance procedures, they will be expected to comply with US law for all future years and file returns according to regular filing procedures.

## ELIGIBILTY

**In order to be eligible for the program:**

- The taxpayer must certify that previous compliance failures were due to non-willful conduct.
- If the IRS has initiated a civil examination of a taxpayer's return for any taxable year,  regardless of whether the examination relates to undisclosed foreign assets, the taxpayer will not be eligible to use the streamlined procedures.
- Taxpayers who want to participate in the program need to have a valid Taxpayer Identification Number (TIN) or Social Security Number.
- Taxpayers eligible to use streamlined procedures who have previously filed delinquent or amended returns must pay previous penalty assessments.

# IRS STREAMLINED FILING PROCEDURES

**STREAMLINED FOREIGN OFFSHORE PROCEDURES** (NOT RESIDING IN US)

In order to be eligible for Streamlined Foreign Offshore Procedures, US taxpayers (individuals or estates of individuals) must:

- Meet the Streamlined non-residency requirement.
- If joint filing, both spouses must meet the non-residency requirement.

The procedures for eligible US taxpayers are to:

- File amended tax returns and all required information returns for each of the last 3 years for which the due date of the US tax return has expired or the original 1040s.
- File any delinquent FBARs for each of the last 6 years for which the FBAR due dates have passed.
- File form 14653 with the reason for non-filling.

The full amount of the tax and interest due in connection with these filings must be remitted with the tax returns.

## IRS STREAMLINED FILING PROCEDURES

**STREAMLINED FOREIGN DOMESTIC OFFSHORE PROCEDURES** (RESIDING IN US)

The procedures for eligible US taxpayers who do not meet the non-residency criteria (individuals or estates) are to:

- File amended tax returns and all required information returns for each of the most recent 3 years for which the US tax return due date has passed.
- File any delinquent FBARs for each of the last 6 years for which the FBAR due dates have passed.
- Pay a "Title 26 Different Offshore penalty," which corresponds to 5% of the highest aggregate balance/value of the taxpayer's foreign financial assets, which are subject to the penalty in the years in the covered tax return period and the covered FBAR period.
- No penalties, limit look back period.

The full amount of the tax, interest and miscellaneous offshore penalty due in connection with these filings must be remitted with the amended tax returns.

In 2021 the IRS issued guidance for Streamlined filers with non-US corporations.

In general, a taxpayer who uses the Streamlined Filing Compliance Procedures to come into compliance remedies a specific number of tax years, generally the most recent 3 years for which the US tax return due date (or properly applied for extended due date) has passed.

Taxpayers that own SFCs [note this includes “CFC’s”] and have a section 965(a) inclusion using the Streamlined Filing Compliance Procedures must come into compliance for the section 965 transition tax in their submission and include the tax year in which the transition tax inclusion might occur (generally 2017 and/or 2018) even if that tax year would not be within the standard three-year lookback period.

In other words, the lookback period for any submission to the Streamlined Filing Compliance Procedures involving SFCs with a section 965(a) inclusion in 2017 must include the tax year 2017 and include all subsequent tax years.

# WITHHOLDING TAXES

## CANADIAN WITHHOLDINGS REGULATION 102

**Many US companies that provide services in Canada continue to struggle to comply with Regulations 102 and 105.**

When a US employee performs temporary employment duties in Canada, that employee must file a Canadian income tax return. If that employee earns less than $10,000 based on a proration of his annual salary over his stay in Canada, the Canada-US Tax Treaty may exempt the US employee from tax in Canada.

However, notwithstanding the ultimate Canadian tax liability of the US employee, Regulation 102 requires US employers to register for Canadian payroll accounts, withhold, and remit Canadian income tax withholdings to the Canadian government.

# WITHHOLDING TAXES

## (CONTINUED)

**REGULATION 102**

**Canada provides two options to avoid the withholding and remittance of Canadian income taxes from US employees who render employment services in Canada:**

### Option 1: Non-Resident Employer Certification

- Must be resident in a country that maintains a tax treaty with Canada (such as the Canada-US Tax Treaty.
- Must have applied for and received certification from the Canada Revenue Agency under this program.
- Required to file a treaty-based tax return in Canada (no income tax obligation).

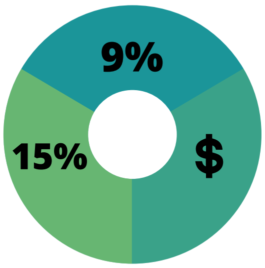
**Employee Obligations**

- Must be resident in a country that maintains a tax treaty with Canada (such as the Canada-US Tax Treaty).
- Must not be liable for income tax in Canada as a result of a tax treaty (i.e. they earn less than $10,000 of income attributable to Canada).
- They work less than 45 days in Canada within a calendar year or less than 90 days over the previous 12 months.
- Not required to file a Canadian tax return.

### Option 2: Regulation 102 Waiver

- Applicable when a US employee is exempt from Canadian income tax under the Canada-US Tax Treaty (i.e. less than $10,000 of income).
- Must apply for this waiver from the Canadian government (and Québec if applicable) at least 30 days prior to commencement of employment services.
- The employee is still required to file a Canadian tax return in order to apply for a treaty exemption from Canadian taxes.

## WITHHOLDING TAXES
### (CONTINUED)




### CANADIAN WITHHOLDINGS REGULATION 105

**Regulation 105 imposes a 15% withholding tax on fees, commissions or other amounts earned by US individuals and corporations from services provided in Canada. If these services are provided in the province of Québec, they will be subject to an additional Québec withholding tax of 9%.**

Often these withholding taxes can be recouped. The US entity must file a Canadian (and Québec) tax return at the end of the company's fiscal year and claim a refund to the extent that it is eligible for refunds under the Canada-US tax treaty.

To avoid the initial withholding and tax refund process, US service providers can request a reduction or waiver of their Canadian withholding requirement either 30 days before the start of services in Canada or 30 days before the first payment for these services is due.

This waiver is only available if there is no ultimate tax liability under the Canada-US Tax Treaty. A treaty-based Canadian tax return must still be filed to receive the exemption under the treaty.

# WITHHOLDING TAXES
## (CONTINUED)

## US WITHHOLDING REQUIREMENTS

### US WITHHOLDING AGENTS

US entities that make payments to non-residents must appoint a withholding agent. This withholding agent is required to withhold, remit and report these payments to the IRS.

In general, withholding taxes are reported on Forms 1042 and 1042-S and filed with the IRS on or before 15 March. The withholding agent is required to deposit the amounts withheld in a US bank.

### REDUCTIONS AND EXEMPTIONS

The Canada-US Tax Treaty reduces most withholding rates.

An application for reduction or exemption from US withholding under the tax treaty is generally made to the US withholding agent who fills out and processes Form 8233 with the IRS.

In addition, Form W-8BEN can be filed with the US financial institution or withholding agent to claim treaty exemption or reduced rate of withholding.

US taxable income from a partnership and LLCs with effectively connected income requires withholdings. Forms 8805 and 8813 are used to report the withholding tax.

Interest income may be exempt from withholding tax.

## AMERICANS WITH RENTAL PROPERTY IN CANADA

**Americans who own Canadian real estate must:**

- File annual Canadian income tax returns (and Québec, where applicable).
- Remit withholdings to the CRA on a monthly basis.
- Withhold at least 25% of the gross rental income. This can be reduced to 25% of the projected net income if an NR6 application is filed with the CRA in advance of the first rent payment of the year.

**Americans selling Canadian real estate must:**

- File annual Canadian income tax returns (and Québec, where applicable).
- Remit withholdings of 25% (plus 12% in Québec) on the gross sale proceeds within 10 days of the sale. These withholdings can be reduced if a clearance certificate is obtained in advance of the transaction closing.

## CANADIANS WITH RENTAL PROPERTY IN THE US


**Real estate holders should be aware of the tax implications of the following activities:**

- Disposition of US real property investment.
- US withholding on dispositions.
- Application of the Foreign Investment in Real Property Tax Act (“FIRPTA”).
- How to structure ownership of US vacation properties. Often the use of trusts and partnerships can achieve significant tax savings.
- Exposure to US Estate Tax.

### CANADIANS WITH RENTAL PROPERTY IN THE US

**Canadian real estate investors must:**

- File annual US tax returns. This applies to individuals, corporations, partnerships, LLCs, trusts, and estates.
- Apply a withholding tax on amounts realized on disposition or sale (FRIPTA):
- If the buyer acquires the US real property for use as a residence and the sale price does not exceed $300,000, there is an exemption from the withholding tax.
- If the amount realized exceeds $300,000 but is below $1,000,000 **and** the property will be used by the transferee as a residence, then the withholding rate is 10% on the full amount realized.
- If the amount realized exceeds $1,000,000, then the withholding rate is 15% on the entire amount, regardless of the use by the transferee.

The 15% withholding applies to the ownership of US real property held directly by individuals, indirectly through partnerships, and the ownership of stock in a US real property holding corporation.

# ESTATES AND TRUSTS


## US ESTATE, GIFT, AND GENERATION-SKIPPING TAXES

**A broad range of individuals must consider the impacts of the US Estate Tax. Subject to the various exemptions, this tax may apply to:**

- All US citizens (residing in the US or abroad).
- Canadians who reside in the US (either via a green card or with established permanent residence).
- Canadians who own US real estate or tangible personal property located in the US.
- Canadian shareholders of US companies (including stock investments).

**The following are the 2022 exemptions, which are subject to annual adjustment for inflation:**

| | |
|---|---|
| Federal Unified Estate & Gift Tax Life Time Exemption | $12,060,000 |
| Federal Generation Skipping Transfer Tax Exemption | $12,060,000 |
| Annual Gift Tax Exemption Per Donee | $16,000 |
| Annual Gift To Non-resident Alien Spouse | $164,000 |

# ESTATES AND TRUSTS
## (CONTINUED)


## US ESTATE, GIFT, AND GENERATION SKIPPING TAXES

**The Federal Estate and Gift Tax rate (not subject to inflation adjustment) is 40%.**

An individual can transfer up to $**12,060,000** during their life and at death. A married couple can transfer double that amount – up to $24,120,000. Transfers between spouses are generally exempt from taxation. A deceased spouse's unused exemption can be transferred to the surviving spouse and added to their exemption.

The tax cost basis of assets held by a decedent at death is generally adjusted to the values at the date of death.

It is very important to note that while exemptions exist from the US Estate and Gift Tax, similar exemptions do not apply to most states. Therefore, a person may not have a federal Estate Tax liability but may be subject to estate, inheritance, or gift taxes in the state of jurisdiction.

US residents who maintain trusts under Canadian jurisdiction, such as Canadian estates, may be required to file special information returns regarding the assets held in the trusts. These trusts may be subject to income taxation. Not filing required information returns can subject the trust to substantial penalties (See "Other US reporting issues").

## CANADIAN TRUST REGULATIONS

**Deemed Canadian Resident Trusts**

A trust created outside Canada may be deemed to be a Canadian resident trust where:

- A Canadian resident makes a contribution to a foreign trust; or
- A Canadian resident is a beneficiary of a foreign trust and a "connected contributor" contributes assets to that trust.

# E-COMMERCE

**E-Commerce transactions can raise many questions concerning sourcing the sale of goods and services, and the buyer's location. A further complication to consider is the possibility of unintentionally creating a Permanent Establishment (PE) in a foreign country by maintaining a computer server in that foreign jurisdiction. This may require the allocation of revenue to the PE based on the activities conducted by or for the PE.**

## E-COMMERCE

- Sales of inventory purchased are generally sourced where title transfers.
- Sales of intangibles are generally sourced to the seller's country or residence.

**However, the CRA will also consider the jurisdiction of primary use.**

- Income from the licensing of intangibles is ordinarily sourced based on use.
- Income from services is generally sourced where the services are performed, which generally means where personnel are employed and capital is expended.

## ONLINE SERVICES


**Sale Tax Changes Relating to the Digital Economy.**

**Effective July 1, 2021, the following sales tax changes were implemented.**

**This new rule will apply to the following three types of supplies:**

1. Sale of cross-border digital products and services
2. Sales of goods through fulfillment warehouses
3. Sale of short-term accommodation via digital platforms

- Non-resident vendors that have no physical presence in Canada and sell digital products or services to Canadian consumers will be required to register for GST/HST and collect and remit tax on taxable sales to Canadian consumers.
- CRA will have an online portal to register to simplify the registration process, filing, and remittance of tax.
- These rules apply to business-to-consumer transactions. This new obligation to charge GST/HST is limited to business-to-consumer supplies and does not extend to business-to-business supplies.

# E-COMMERCE (CONTINUED)


## ONLINE SERVICES

- A non-resident registered vendor will not be required to charge GST / HST if the business acquiring the supply provides its GST / HST number to the vendor.
- Under this new system, non-residents will not be eligible to claim input tax credits.
- Similar to all other businesses, the registration threshold will be $30,000.

For other provinces, including British Columbia, Saskatchewan, and Manitoba, an e-commerce business may be subject to Provincial Sales Tax. Non-resident vendors of products and services other than software and telecommunication services do not have to register for the PST. As of April 1, 2021, Canadian sellers of goods and Canadian and foreign sellers of software and telecommunications services will have to register to collect PST if this was established before B.C. revenues exceed $10,000.

**An e-commerce business that provides services or goods to Québec residents may be required to collect and remit Québec Sales Tax (QST).**

- Generally, advertising services are sourced where income-producing activities are performed.
- When income-producing activities take place partly within and outside the US, it requires an allocation of revenue. The allocation must be based on facts and circumstances.
- Internet Service Providers (ISP) involve the use of labour and equipment which requires an allocation based on the place of performance rule, i.e. location of a server, routers, or other equipment.
- When sourcing an Application Service Providers' (ASP) Software as a Service (SaaS), you determine where the activities giving rise to income occur based on the facts and circumstances.
- The sale of digital products such as software, e-books, music, and videos present different sourcing issues. The location of the purchaser may be unknown, in which case sourcing may necessitate the use of the buyer's domain.

## E-COMMERCE
### (CONTINUED)

### PERMANENT ESTABLISHMENT

**The tax treaty concept of Permanent Establishment (PE) requires a physical location. This is either where business operations are regularly conducted by employees or agents, or the location of a server.**

- ISPs will source revenue to a PE if there are equipment and personnel present.
- Allocation within and without is based on the locations where the income-producing activities occur.
- Income for automated web-based services, ASP, and SaaS is sourced based on the primary and secondary income-producing activities.
- The location of a fully automated server generally creates a PE. However, profits may be allocated based on where substantial activities for the maintenance and operation of the Website occurs.
- In 2018, the US Supreme Court rules in South Dakota vs Wayfair Inc. which indicated that US states may require e-commerce businesses transacting with their residents to collect and remit state sales taxes.

## EXPATRIATES

**Expatriates are US citizens who relinquish their US citizenship or long-term permanent residents who surrender their green cards. An increasing number of Americans have been expatriating despite the complicated renunciation process. In 2020, a record number of Americans formally renounced their US citizenship or residency.**

Taxpayers must file an Exit Return the year of their renunciation, which triggers a deemed sale of their assets the day before the expatriation date at fair market value. This sale has a capital gains tax with an annually adjusted inflation exclusion of $744,000 in 2021.

The tax attributable to the deemed sale of property may be extended until the due date of the return for the taxable year, in which such property is disposed of, provided that an election to defer the tax is made. An irrevocable election to defer the tax may be made. However, adequate security must be provided. Generally, a bond or letter of credit is considered acceptable security interest. Interest will be charged on any deferral of tax.

**Certain property deemed sold will not qualify for the election such as:**

- Any deferred compensation payments
- Any specified tax-deferred accounts
- Any interest in non-grantor trusts

Special rules apply to US withholding on deferred compensation payments.

# U.S. EXPATRIATION

## (CONTINUED)


### DATE OF EXPATRIATION

**Only covered expatriates are subject to these deemed sale rules.**
**A covered expatriate is a person whose:**

- Average annual net income for the 5 tax years ending prior to the date of loss of US citizenship exceeds $162,000 (2017) or
- Has a net worth of $2 million or more at the time of expatriation.

Such a person must certify under the penalty of perjury that he or she has met the requirements for the 5 preceding taxable years. The $172,000 (2022) annual income is indexed for inflation ($139,000 in base year 2008).

### COVERED EXPATRIATES

**A citizen shall be treated as relinquishing his or her US citizenship on the earliest date where:**

- Renunciation of US nationality occurs before a diplomatic or consular officer of the US pursuant to paragraph (5) of section 349(a) of the Immigration and Nationality Act.
- The US State Department furnishes a signed statement of voluntary relinquishment of US nationality.
- The US State Department issues a certificate of loss of nationality.
- A court of the US cancels a naturalized citizen's certificate of naturalization.

# U.S. EXPATRIATION

## (CONTINUED)

### EXCEPTIONS

**Two exceptions to the exit-tax regime are:**

- Individuals who were born with dual citizenship in Canada and the US, continue to be a citizen and tax resident of Canada as of the date of expatriation, and they have not been a US resident for more than 10 taxable years during the 15-year period ending with the taxable year of expatriation.

- US citizens who renounce their US citizenship before reaching the age of 18 1/2, provided that they were not a US resident for more than 10 taxable years before the renunciation.

**Individuals considering expatriation should be aware that Congress enacted immigration legislation (the Reed Amendment) in 1996.** This amended the grounds of visa ineligibility and of inadmissibility to the US. Under the Reed Amendment, any former US citizen who officially renounced their US citizenship and who is determined by the Attorney General to have renounced it for the purpose of avoiding taxation by the US will be inadmissible to the United States and ineligible for a visa.

**Long term residents of the US terminate their resident status by:**

- Filing Form I-407, Abandonment of Lawful Permanent Resident Status with the US Citizenship and Immigration Services (USCIS) or a consular officer or

- Beginning to be treated as a resident of a foreign country under the residence tie-breaker rules in a treaty with the US, does not waive the benefits of the treaty, and notifies the secretary of such treatment on Form 8833 and Form 8854.

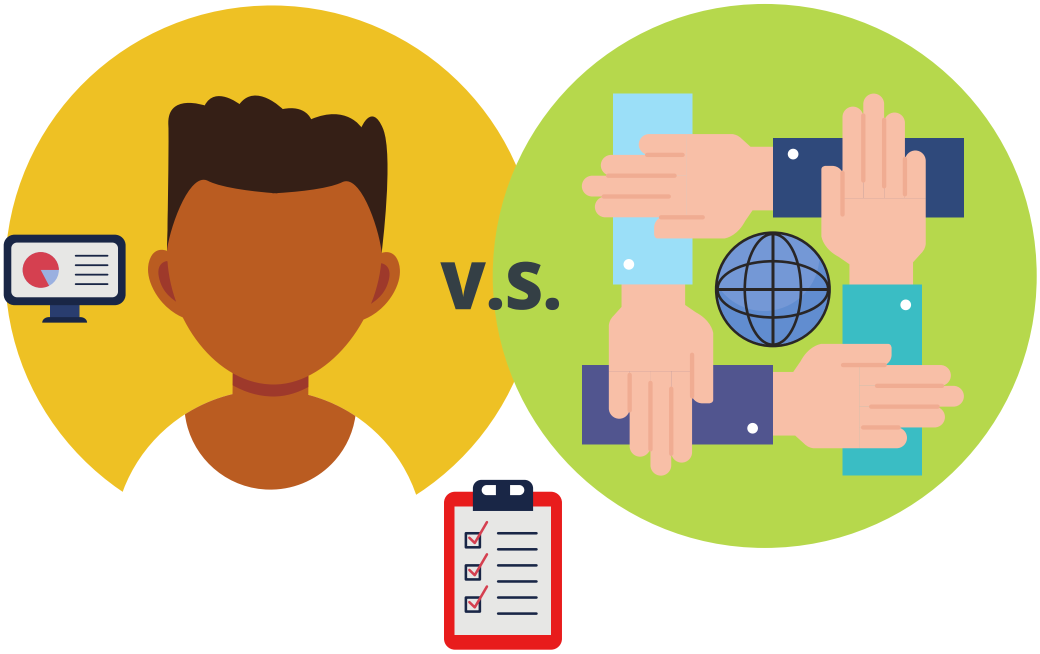
A long-term resident is defined as an individual who has held a green card for any portion of at least 8 of 15 years preceding expatriation. Even one day in a year is considered any portion of a year.

## PE FOR SERVICE PROVIDERS TO CANADA

Effective January 1, 2010, the fifth protocol to the US Canada Tax Treaty introduced a new definition of Permanent Establishment (Article V). Cross border contractors are now deemed to have a permanent establishment in the other country if they pass either:

**The Single Individual Test (for Individuals):**
Services are performed by an individual who is present in the other Contracting State for more than 183 days in a 12-month period and during this period more than 50% of the gross active revenues of the enterprise are generated from these services; or

**The Enterprise Test (for Corporations):**
Services are provided in the other Contracting State for more than 183 days in a 12-month period with respect to the same or connected project. These services are provided for customers who are either residents of or maintain a PE in the other State and the services are provided to the other PE.



# MISCELLANEOUS

## (CONTINUED)

## US PASSIVE FOREIGN INVESTMENT CORPORATION ("PFIC") RULES

**Increased PFIC information has to be reported by US shareholders annually on Form 8621.**

A new de-minimis threshold amount was established relating to PFIC reporting. PFIC reporting is required if on the last day of the tax year either:

- The value of all PFIC stock owned directly or indirectly by the shareholder exceeds $25,000, or
- The shareholder only holds the PFIC stock indirectly and the value of the indirectly owned stock exceeds $5,000.

The IRS has provided regulations on determining indirect ownership and reporting requirements of PFICs. There are new anti-duplication rules so that stock is not counted twice when determining whether a person with an interest in a domestic corporation is an indirect owner of a PFIC that is held by that same domestic corporation.

There is also additional guidance on how PFIC shareholders should complete IRS Form 8621 and IRS Form 5471.


## SECTION 383 US INTERCOMPANY DEBT-EQUITY RULES

I**n 2018, the IRS has issued final regulations on the recharacterization of certain intercompany debt instruments as equity for tax purposes in the US.** These rules do not apply to the first $50 million of debt issued by a corporation (as short-term debt or funding new investments of a controlled subsidiary.)

Under Section 385, debt issued by a corporation to an affiliate is recharacterized as equity if it is issued:

- In connection with a distribution to shareholders, or
- An exchange for stock of an affiliate, or
- Certain exchanges for property in an asset reorganization.


### SALES TAX IN CANADA

**US entities are required to register for and charge Canadian sales taxes if they meet the definition of "carrying on business" in Canada.**

| 2022 SALES TAX RATES | GST | PST | HST | TOTAL |
|---|---|---|---|---|
| Alberta | 5% | - | - | 5% |
| British Columbia | 5% | 7% | - | 12% |
| Manitoba | 5% | 7% | - | 12% |
| New Brunswick | - | - | 15% | 15% |
| Newfoundlad & Labrador | - | - | 15% | 15% |
| Northwest Territories | 5% | - | - | 5% |
| Nova Scotia | - | - | 15% | 15% |
| Nunavut | 5% | - | - | 5% |
| Ontario | - | - | 13% | 13% |
| Prince Edward Island | - | - | 15% | 15% |
| Québec | 5% | 9.975% | - | 14.975% |
| Saskatchewan | 5% | 6% | - | 11% |
| Yukon | 5% | - | - | 5% |

## MISCELLANEOUS

## (CONTINUED)

### ANTI-INVERSION GUIDANCE

**In 2016, the IRS issued regulations affecting inversion transactions.** The tax consequences of transferring a domestic entity to a foreign entity in an inversion transaction are based on the percentage of ownership of the foreign corporation by the owners of the domestic entity before the transaction.

If the percentage is at least 60% but less than 80%, special taxes are applied to the inverted entity. If the percentage of ownership is at least 80%, the foreign corporation is treated as a domestic corporation for tax purposes.

### LEVERAGED PARTNERSHIPS

**The IRS has issued new regulations to limit the use of leveraged partnerships as a structure to take cash out of a business tax-free.**
Prior to these new regulations, partners could distribute cash tax-free if it was funded with partnership debt. Under these new regulations, the partnership's liabilities will be treated as nonrecourse liabilities in certain situations.

### OTHER US REPORTING ISSUES

**FORM 5471 – Information Return of US Person with respect to certain foreign Corporations.** Failure to file a complete and accurate Form is subject to a $10,000 civil penalty per filing**.**

**FORM 5472 – Information of a 25% foreign-owned US Corporation or Foreign Corporation engaged in a US trade or business (such as US LLCs).** Failure to file a complete and accurate Form is subject to a $25,000 civil penalty per filing.

**FBAR–** FinCen Report 114 (formerly TD F 90-22.1) – Information detailing foreign bank accounts and other foreign investments if the aggregate value of such accounts at any point in a calendar year exceeds $10,000. Failure to properly file the form may be subject to penalties, including a civil penalty of $10,000. Reasonable cause for failure to file may eliminate the penalty**. Willful failure to file may be subject to a civil monetary penalty equal to the greater of either $100,000 or 50% of the balance in the account.**

### OTHER US REPORTING ISSUES (CONTINUED)

**WITHHOLDING 1042, 1042-S –** Failure to not file the form when due is 5% of the unpaid tax for each month or part of a month the return is late, up to a maximum of 25% of the unpaid tax.

**FORM 1120F – US Income Tax Return of a Foreign Corporation.** Required of a foreign corporation that conducts business in the US, whether or not it is through a US office. Failure to file Form 1120F may result in the income of the foreign corporation to be taxed on a gross basis.

### OTHER CANADIAN REPORTING ISSUES

**T1135 – Foreign Property Reporting:** Canadian resident taxpayers who own foreign property at a total cost of more than $100,000 at any time in a year are required to file a T1135 information return with the CRA to report certain information on foreign property and income derived from it. This form should be submitted by the deadline for the taxpayer's annual income tax return. The maximum penalty for missing or incomplete forms is $25 per day or $100, whichever is greater, up to a maximum of $2,500. There are harsher penalties if the taxpayer knowingly fails to file the T1135 or falsely declares.

**T1134 – Foreign Affiliate Reporting:** Taxpayers are required to file an annual T1134 information return to report information regarding their foreign affiliates and controlled foreign affiliates. In very general terms, a foreign affiliate is a non-resident corporation in which the taxpayer and persons related to the taxpayer own at least 10% of ownership, with the taxpayer alone owning at least 1% of the non-resident corporation (ownership may be direct or indirect). These returns should be filed no later than 15 months after the taxpayer's tax year-end (due date to be reduced to 12 months in 2021 and 10 months after 2021). Assuming that the taxpayer is not required to file more than 50 T1134 returns, the maximum late-filing penalty with respect to T1134 returns is $2,500 per missing form.

**T106 – Reporting Non-Arm's Length Transactions with Non-Residents:** Taxpayers are required to report their transactions with non-arm's length non-residents for each taxation year by filing a T106 information return if the combined annual amount of these transactions exceeds $1,000,000. Common reportable transactions include sales, purchases, or the borrowing and repayments of loans and indebtedness. These forms should be filed by the filing deadline for the taxpayer's income tax return for the year. Assuming that the taxpayer is not required to file more than 50 T106 slips, the maximum late-filing penalty with respect to T106 forms is $2,500 per missing form.

### OTHER CANADIAN REPORTING ISSUES

**T4A-NR – Payments to Non-Residents for Services Performed in Canada:** Taxpayers that make payments during the calendar year to non-residents for services performed in Canada are required to file a T4A-NR information return with the CRA. A T4A-NR return reports both the gross payments made to non-residents and the withholding tax on these payments remitted to the CRA. The filing deadline for T4A-NR information returns is the last day of February of the following calendar year. The maximum penalty for late-filing a T4A-NR information return varies from $1,000 - $7,500, depending upon the number of T4A-NR slips required to be filed.

**NR4 – Other Payments to Non-Residents:** Canadian residents and non-residents that carry on business in Canada are required to file an annual NR4 information return to report payments made to non-residents during the year. Common payments which are required to be reported on an NR4 return include interest, dividends, rents, management fees, and royalty or licensing payments.
An NR4 return reports both the gross payments made to the non-resident and any withholding tax remitted to the CRA with respect to the payments. The filing deadline for NR4 returns is 90 days after the calendar year-end. The maximum penalty for late-filing an NR4 return varies between $1,000 and $7,500 depending upon the number of NR4 slips required to be filed.

**NR6 – Undertaking to Withhold on a Net Basis from Rental Income Paid to Non-Residents:** The default Canadian income tax treatment for rents earned in Canada by non-residents is a 25% withholding tax on gross rents. Non-residents may elect to pay Canadian income tax on rental income on a net basis by filing an annual Section 216 election return with the CRA. In order to withhold on a net basis, non-residents (together with their Canadian resident agents) must annually file Form NR6 with the CRA. Form NR6 should be filed before the first rental payment of the year, and must be approved by the CRA prior to withholding on a net basis.

**NR301 - Declaration for Benefits under a Tax Treaty for Individual, Corporation, or Trust:** Must be completed by entities benefiting from treaty reduced withholding rates on dividends, interest, management fees, rents, and royalties paid to or for the benefit of non-residents.

### OTHER CANADIAN REPORTING ISSUES

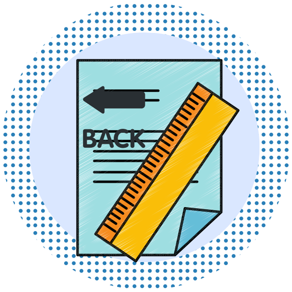
**NR302 - Declaration for Benefits under a Tax Treaty for a Partnership:** Must be completed by entities benefiting from treaty reduced withholding rates on dividends, interest, management fees, rents, and royalties paid to or for the benefit of non-residents.

**NR303 - Declaration for Benefits under a Tax Treaty for a Hybrid Entity:** Must be completed by entities benefiting from treaty reduced withholding rates on dividends, interest, management fees, rents, and royalties paid to or for the benefit of non-residents.

**T2 SCHEDULE 91 & 97 – Treaty-Exempt Income Tax Return for Non-Resident Corporations:** Non-resident corporations that carry on business in Canada but do not have a permanent establishment in Canada under the applicable bilateral income tax treaty are required to file an annual corporate income tax return (T2) to report their claim for a treaty-based exemption from Canadian income tax. The filing deadline for a corporate income tax return is six months after the corporation's fiscal year-end. The maximum penalty for late filing a corporate income tax return is $2,500.

**T5018 – Construction Industry Subcontractor Payment Reporting:** Taxpayers that carry on business in the construction industry are required to annually report to the CRA payments made to subcontractors during the year by filing a T5018 information return. Taxpayers can choose to use either the calendar year or their fiscal year to report these payments. The maximum penalty for late-filing a T5018 return varies from $1,000 - $2,500 depending upon the number of T5018 slips required.

## BACK-TO-BACK RULES




**Canada introduced regulations in 2014 to prevent the use of intermediaries to reduce withholding taxes on interest payments to non-residents or in the avoidance of thin capitalization rules.**

In addition, Canada expanded the back-to-back rules and prevented the use of intermediaries to reduce withholding taxes by:

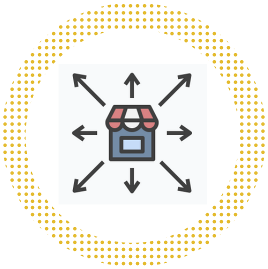
- Expanding the application to royalties, rents, and similar payments.
- Extending the application to structures with multiple intermediaries.
- Adding character substitution rules.

Canada has also extended the rules to outbound loans (in an attempt to avoid shareholder lending rules).

## MISCELLANEOUS

## (CONTINUED)

### EXPANSION OF SUBSECTION 55 (2) ANTI-AVOIDANCE RULE



**Dividends paid between Canadian corporations are generally paid tax-free.** However, there is an anti-avoidance rule in Subsection 55(2) of the Income Tax Act which prevents tax-free dividends from being paid when the purpose is the reduction or avoidance of capital gains on the sale of shares of the corporation that paid the dividends.

**Subsection 55(2)** now applies to tax-free intercorporate dividends when they were issued:

1. To reduce or avoid capital gains on the disposition of shares.
2. To reduce the fair market value of any share.
3. To increase the cost of property of the dividend recipient.

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