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PRACTITIONERS' CORNER

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In this article, the authors discuss Canada's 2015 federal budget amendments to allow qualifying nonresident employers to apply for an exemption on withholding obligations for remuneration paid to all qualifying nonresident employees.

Canada's 2015 federal budget introduced legislative amendments to alleviate the administrative burden imposed on foreign employers by section 102 of the regulations (regulation 102) to the Income Tax Act. In short, qualifying nonresident employers can now apply for an exemption on the withholding obligations in regulation 102 regarding salary, wages, and other forms of remuneration paid to all qualifying nonresident employees.

Regulation 102 and the Existing Regime

ITA subsection 153(1) requires every employer to withhold and remit amounts from salaries, wages, and other forms of remuneration paid to its employees for services rendered in Canada. Those obligations apply to both resident and nonresident employers. Failure to withhold and remit the amounts can result in the employer being liable to pay the amount that should have otherwise been withheld, along with any applicable interest and penalties.

Those withholding obligations apply regardless of whether the nonresident employee is exempt from tax under the ITA by virtue of a treaty exemption. When

source deductions have been withheld, the employee must file a Canadian income tax return and claim the exemption to receive a refund of amounts withheld.

However, nonresident employees can apply to the Canada Revenue Agency for a waiver to be relieved from the withholding obligations imposed by the ITA and regulation 102. To obtain that 102 waiver, nonresident employees must demonstrate that they would otherwise be exempt from Canadian tax obligations as a result of the application of one of Canada's tax treaties. A copy of the employee's employment contract must also be included with the 102 waiver application.

The nonresident employee must apply for the 102 waiver 30 days before either the employment services begin in Canada or when initial payment is made for that employment. That requirement is somewhat impractical for situations when the employee does not know ahead of time if or when he would be traveling to Canada. Further, given that a 102 waiver is granted on a per-employee basis, the regime becomes increasingly burdensome for nonresident employers with a significant number of nonresident employees working in Canada.

The New Regime

Under the 2015 budget amendments, qualifying nonresident employers can apply for a blanket exemption on the withholding requirement for all salaries, wages, and remuneration paid to qualifying nonresident employees.

Qualifying Nonresident Employers

To qualify as a qualifying nonresident employer, an employer must demonstrate that it is resident in a country with which Canada has entered into a tax

treaty¹ and has been certified by the Minister of National Revenue.

Certification from the Minister of National Revenue is obtained by completing Form 473E, "Application for Non-Resident Employer Certification." Similar to the current 102 waiver regime, qualifying nonresident employers should apply for certification at least 30 days before the qualifying nonresident employee begins providing services in Canada. Once certification is granted, it may remain valid for up to two calendar years. Until certification is granted, the employer must continue to withhold and remit tax on payments made to its employees.

The CRA provided for a transitional measure, whereby all applications for nonresident employer certification received by the Minister before March 1, 2016, were to be made effective as of January 1.

Qualifying Nonresident Employees

To qualify as a qualifying nonresident employee, the employee must demonstrate that:

- she is a resident in a country with which Canada has entered into a tax treaty and is not liable for Canadian income tax under Part I of the ITA because of the application of a treaty exemption; and
- she either works in Canada for less than 45 days in the calendar year that includes the time of the payment, or is present in Canada for less than 90 days in any 12 months that include the time of payment.

Employees who do not meet any of the above criteria may still apply for a 102 waiver by completing Form R102-R, "Regulation 102 Waiver Application."

Continuing Obligations for the Employer

Once certification is obtained, the qualifying nonresident employer will not be obliged to withhold tax on remuneration paid to its qualifying nonresident employees for the duration of the certification period.² However, the legislative amendments subject foreign employers to several continuing obligations, including:

- obtaining a business number;
- determining whether an employee is resident in a country with which Canada has a tax treaty;
- tracking and recording the number of days present or working in Canada for each of its qualifying nonresident employees;
- evaluating and documenting whether the qualifying nonresident employee is exempt from Canadian income tax under a tax treaty between Canada and the employee's country of residence;
- completing and filing a T4 Summary and Information Return for employees not excluded by proposed subsection 200(1.1) of the regulations³; and
- filing all applicable Canadian income tax returns for the periods under certification.

Revoking Certification

The CRA reserves the right to cancel an employer's certification if any of the above requirements are not met, or if the facts presented at the time of the request for certification are found to be incorrect. Further, if an employee ceases to be qualified for purposes of the exemption, the employer is required to immediately disclose that in writing to the CRA. However, failure to be compliant in prior years will not preclude future eligibility.

Conclusion

Although the new regime offers significant improvements over its predecessor, there is room for more. For instance, the requirement that the employee be present in Canada for less than 90 days or working in Canada for less than 45 days is perceived as too onerous. That is especially true in light of the fact that most of Canada's tax treaties exempt nonresident employees from Canadian tax if they are not present in Canada for a period not exceeding 183 days in any 12 months.⁴ The result is that many treaty-exempt employees will have to apply for a 102 waiver or be subject to withholding tax and therefore be required to file Canadian income tax returns.

Also, the employer's tracking and recording requirements for each of its nonresident employees could translate into significant compliance costs. Employers will have to remain cognizant of any employees encroaching on the threshold amounts to avoid liability for unremitted amounts.

Despite those drawbacks, the new regime benefits employers that periodically send employees to Canada on a short-term basis, especially in light of the compliance burdens involved in obtaining a 102 waiver. ♦

¹For nonresident partnerships, at least 90 percent of the partnership's income or loss for the fiscal period at the time of payment is allocated to partners resident in a country that has a tax treaty with Canada. If the partnership has no income or loss for the period in question, a deemed income amount of \$1 million is used to calculate the allocation of income for purposes of the 90 percent rule.

²A qualifying nonresident employer may still be required to withhold and remit amounts on account of employment insurance and Canadian pension plan contributions. Pension plan contributions are not required if the employer does not have an establishment in Canada or if the employee has a certificate of coverage under a Social Security agreement between Canada and the employer's country of residence. Employment insurance premiums are not required if the employee is covered under a similar program in his country while working in Canada.

³A T4 Summary is not required for qualifying nonresident employees who earn less than \$10,000 in the relevant year.

⁴See, e.g., Article XV(2)(b) of the Convention Between Canada and the United States.