BRUNTON'S

U.S. Taxletter

FOR CANADIANS

Covering U.S. Aspects of U.S. Citizens or U.S. Residents with Canadian Income or Assets, and Canadians with U.S. Income or Assets

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ADMINISTRATIVE/LEGISLATIVE/ JUDICIAL UPDATE

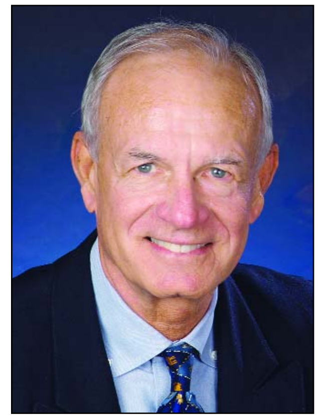
US Estate Tax

As of late July, 2010, literally no-one knows whether there will be any US federal estate tax applicable for all or any portion of 2010. However under present legislation the federal estate tax we will reappear on January 1, 2011. Legislation has been introduced to reinstitute the federal estate tax retroactive to January 1, 2010, however, there has been little action on the proposed legislation. The proposed legislation is somewhat similar to the legislation that was in affect up to December 31, 2009, although other different legislation may also be introduced.

Meanwhile tax practitioners and IRS tax compliance officers themselves are confused about how to proceed with respect to deaths occurring in 2010. For example, should the executor of a decedent passing away in 2010 proceed to file an estate tax return anyway, even though the law clearly does not require it (and the IRS would not be authorized to process it, or perhaps even accept it in any event) on the assumption any new law will have effect retroactively.

Similarly, what is the cost base for the sale by an estate or an heir of US real estate derived from an individual dying in 2010? Is it the fair market value at the date of death (the "old" rule and the rule for 2011), or is it a partial carryover basis from the decedent? The existing rules (for 2010) completely conflict with rules that could be implemented retroactively to January 1, 2010.

Further, what is the tax liability of executors, and "US statutory executors" who have control over funds on a real estate sale by the Estate or heir of a nonresident alien who dies in 2010. As we go to press the IRS has indicated they have no authority to issue "Transfer Certificates" (releases of estate tax lien) on such property because "there is no estate tax". The most conservative course of action may be for all sales proceeds to be held in escrow until the estate tax law is clarified.



RICHARD BRUNTON HOLDS A MASTERS DEGREE IN TAXATION/ACCOUNTING, IN WHICH HIS PRIMARY INTEREST HAS BEEN INTERNATIONAL TAXATION. HE HAS BEEN A RESIDENT OF FLORIDA FOR THE PAST 39 YEARS.

More Bad New for US Owners of Certain Canadian Mutual Funds

Readers are aware many (perhaps most) Canadian mutual funds are "passive foreign investment companies" (PFICS) for US income tax purposes, and therefore potentially subject to very unfavorable tax treatment for US citizens and residents on the sale of the mutual funds or on the receipt of dividends exceeding a certain amount. Such a sale or receipt of such dividends requires the filing of IRS form 8621.

As a result of new legislation enacted and effective March 18, 2010, US persons who are shareholders of PFICs foreign must file an annual report containing information required by the IRS for each PFIC which they own, regardless of whether there is a sale of the investment, or the receipt of a dividend exceeding a certain amount. (New IRC §1298(f)).

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To the extent US owners of Canadian mutual funds that were organized as trusts had previously avoided filing an IRS Form 3520 annually for each mutual fund on the basis that such mutual funds were treated as corporations for US purposes, they may now be required to file Form 8621 annually (or a new Form to be provided by the IRS) for each mutual fund based on new code section 1298(f)).

Owners of such investments should also be aware that if they give such investments to another person the PFIC rules may apply, - i.e a triggered "deemed disposition", and potential adverse US tax consequences. Similarly, if the investment is used as security for a loan, (for example in a brokerage firm) the investor may be treated as having disposed of the investment for purposes of the PFIC rules. (IRC §1298(b)(6)).

And that is not all. Proposed regulations provide that if you are a resident alien and become a nonresident alien while owning a PFIC you are treated as disposing of the PFIC at fair market value at the time you become a nonresident and all the bad PFIC tax rules potentially apply. This would occur even if you are not subject to the US expatriation rules described in the Fall, 2009, Taxletter. (Proposed Reg. §1.1291-3(b)(2)). In other words if (for example) you become a US resident for only 2 or 3 years and then become a nonresident, the above PFIC deemed disposition rules may apply. But remember you are entitled to a step-up (bump up) in the cost base of mutual funds you owned at the time you became a US resident to the fair market value at that date. (IRC §1296(l)).

More on "Nexus"

We previously mentioned that individual States often have different definitions of "nexus" depending upon whether they are applying their sales tax law, income tax law, or "Business Activity Tax" ("BAT") sometimes referred to as "Franchise tax" ("FT") or a "Business and Occupation ("B&O") Tax. To a great extent the BAT, FT, and B&O Tax are the States' way of collecting some tax from out-of-State businesses in cases where they are prevented from collecting State income tax because of the US Constitution.

Washington State has implemented new law defining "nexus", that may be imitated by other States the way the previously mentioned "Amazon Law" has been copied from State to State.

Under Washington State's new law, out-of-State recipients receiving royalty income, franchise fees, and other income from Washington can be subject to Washington's B&O tax. Effective June 1, 2010, franchise orders will be deemed to have "nexus" in Washington State in a tax year if the out-of-State seller has at least one of the following in Washington State:

1) Sales exceeding $250,000, or

2) At least 25% of its worldwide property, payroll, or sales, or

3) Property (presumably including inventory) with an average value exceeding $50,000, or

4) Payroll exceeding $50,000 (including certain third-party costs), or

5) A commercial domicile.

Once "nexus" has been established it will continue for one year after the year in which the taxpayer no longer meets one of the thresholds.

Penalty Potentially Increased For US Persons Failing To Report Foreign Trusts

Readers are aware that US individuals or entities that make transfers to a foreign trust, or are considered owners of a foreign trust, or receive distributions from a foreign trust, may be required to file IRS Form 3520 by the due date of their US income tax return.

Previously the penalty for noncompliance was 35% of the amount transferred to the trust and 35% of the amount received from the trust. Effective for returns required to be filed after December 31, 2009, the penalty has been changed to "*the greater of $10,000 or 35% of the amount of the transfer or the distribution received. (IRC §6677(a)).* (See Exhibit 4 on page 14).

The penalty for failure to report ownership of a foreign trust remains at 5% annually of the individual's portion of the trust. (IRC §6677(b)).

Good or Bad Tax News for Some Same-Sex couples

The IRS has ruled that certain same-sex couples resident in California must combine their income and each report half of it on their separate income tax returns. The ruling may only affect payers that were "wed" during the brief window when same-sex marriage was legal in California, commencing with a California law change in 2007 that treats the earned income of registered domestic partners as community property for State income tax purposes. (PLR 201021048).

Strangely, although the result is that relevant couples must combine their income, and each report half of the income on each tax return, they are not allowed (because of the Federal Defense of Marriage Act - "DMO") to file a joint federal income tax return. The result may assist relevant couples where the amount of their income is hugely disproportionate, thus allowing them to average out the tax rate. The law may also affect certain residents of Nevada and Washington States. The ruling also determined that such income is not a gift for federal income tax purposes. A separate IRS Ruling provides that health insurance premiums (and certain other benefits) paid by an employer for a same-sex "spouse" of an employee are to be considered as wages paid to the employee even though the health insurance premiums paid to the employee are not considered wages. (CCA 20945047).

Subsequently, on July 8th, a federal district court in Massachusetts ruled that the section of the DMO preventing the federal Government from recognizing same sex-marriages is unconstitutional. The ruling only applies in Massachusetts and no doubt will be challenged.

CANADIAN BUSINESS WITH SOFTWARE RUNNING ON US SERVERS

In the Winter/Spring, 2009, issue of the Taxletter, we summarized some of the E-Commerce issues and the determination of whether a Canadian business would be deemed to have a "permanent establishment" ("PE") in the United States solely because it processes transactions using software running on a server located in the United States.

Readers are aware Article V(5) of the treaty states "***a person*** *(emphasis supplied) acting in a contracting State on behalf of a resident of the other contracting State - other than an agent of an independent status to whom paragraph 7 applies -- shall be deemed to be a permanent establishment in the first mention state if such person has, and habitually exercises in that state, an authority to conclude contracts in the name of the resident*". (In the US a "person" includes an individual, corporation, partnership, trust, and estate).

How would this rule apply in the case of "automated transaction processing" through a US server?

If the Canadian business establishes a data center in the US and owns or leases the equipment, the equipment could constitute a PE in the US as long as it is a "fixed" place of business. However the international Organization for Economic Cooperation and Development (OECD) model tax treaty suggests if the business activities conducted through the computer equipment consist of preparatory or auxiliary services, perhaps no PE would exist. For example, the following might be preparatory or auxiliary services:

1) Supplying information about your product or service,

2) Advertising your goods or service, or

3) Gathering US market data for your business.

In any event, it may be wise for a Canadian business to ensure that it has an outsourcing contract with a third-party hosting service with respect to the use of any US server. Although a PE may avoided if the fees paid to the third-party are based on the amount of disk space, it may be wise to ensure the contract does not result in the server and its location being "at the disposal" of the Canadian business.

However could a PE exist because of the transaction processing on the US server, under the "dependent agent rules"?. Of course in this context a PE cannot exist unless the "agent" has authority to conclude contracts. Does the server conclude contracts?

E-commerce issues and especially the "permanent establishment issue" are under constant study by the OECD and other tax commentators. One theory at the moment is that the server can not be deemed to conclude contracts because Article V(5) (quoted above) requires that a "person" conclude contracts, and the Canada/US treaty Article III(1)(e) specifically defines "person' as including an individual, estate, trust, or company, and any other body of persons. (Emphasis supplied). So, for the moment, it appears unlikely a computer is a "person".

But remember the "Amazon" law we described in previous Taxletters.

CANADIANS INVOLVED "INDIRECTLY" WITH UNITED STATES LLCs

A resident of Canada that is a nonresident alien of the United States may be involved directly or indirectly with United States Limited Liability Companies (LLCs) in many different ways. Two examples are set out in Exhibits 1 and 2.

Exhibit 1

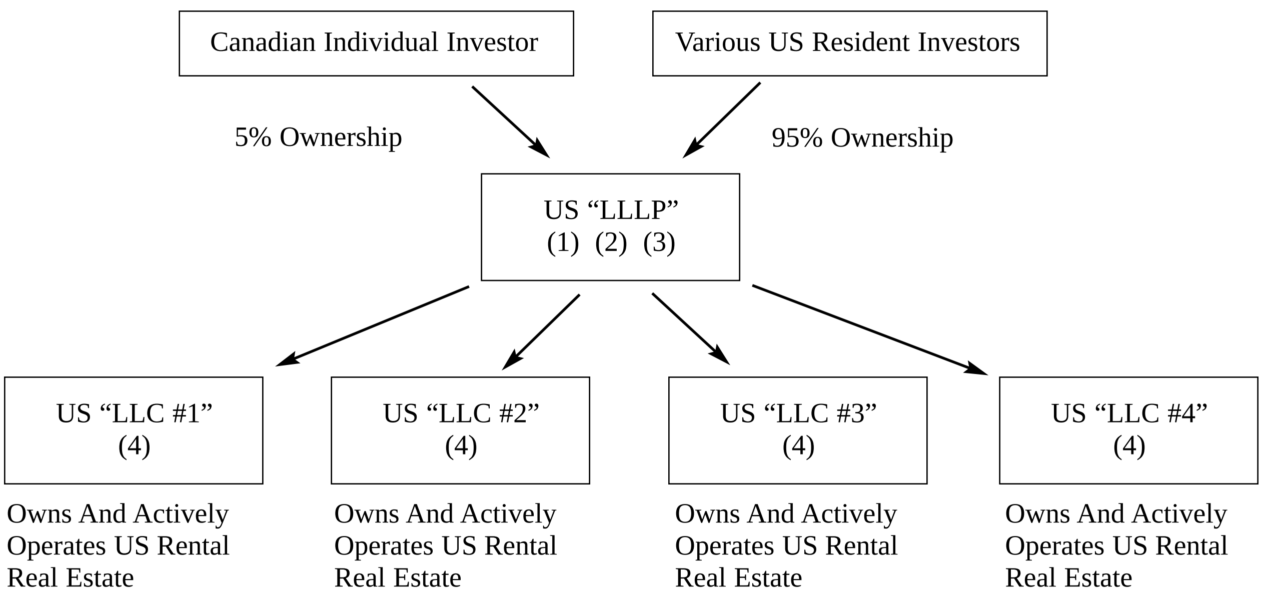
Exhibit 1 sets out an example where a Canadian individual taxpayer owns a small minority interest in a United States Limited Liability Partnership (LLLP) which in turn owns a number of LLCs.

In this example the LLLP has no assets or liabilities other than its ownership of the LLCs and the LLLP itself has no income or expenses. Each LLC owns one US real estate rental property which it actively manages. (The purpose of having each rental property owned by a separate LLC is, of course, to avoid creditors from one property having recourse to one of the other properties). Each LLC is a "single-member LLC" (i.e. solely owned by the LLLP) and has not elected to be taxed as a corporation in the US.

Thus, for US income tax purposes, each LLC is a "disregarded entity" and the income

EXHIBIT 1

Canadian Resident Individuals Investing In A US Partnership Owning US LLCs (5)



(1) US LLLP = US "Limited Liability Limited Partnership".
(2) The LLLP Has No Liabilities And Its Only Assets Are Its Ownership Of The US LLCs.
(3) The LLLP Has No Income Of Its Own - However, The Income (Or Loss) In Each LLC Is "Deemed" To Be The Income (Or Loss) Of The LLLP For US Tax Purposes.
(4) US LLC = "US Limited Liability Company" - Each One Is Solely Owned By The LLLP And The US "Check-The-Box" Election Has Not Been Made.
(5) a) In This Scenario The Income (Or Loss) Of Each LLC Is Deemed To Be Earned By The LLLP And Then, In Turn Deemed To Be Earned Proportionately By Each Owner Of The LLLP, Including Each Canadian Owner. Each Owner, Including Each Canadian Owner, Must File A US Income Tax Return Reporting Their Proportionate Share Of The Earnings, Or Losses.
b) If There Are *No* Distributions From The LLCs To The LLLP There Is Generally No Income To Report In Canada. (The LLC Is Treated As A Corporation For Canadian Purposes).
c) If Distributions *Are* Made By The LLCs They Are Treated US Corporate Dividends For Canadian Purposes And Taxable In Canada. But Although They Will Be Taxed At Full Income Tax Rates In Canada, Canada May Only Allow A Maximum 15% Foreign Tax Credit For Any Taxable Income Attributed To This US "Dividend."
(ITA 20(12) May Provide Some Relief).

and expense of each LLC is considered for US income tax purposes to be the income and expense of the LLLP. Accordingly at the end of each tax year the LLLP issues a tax reporting statement (IRS form K-1) to each partner in the LLLP advising each partner what to report on his/her US income tax return with regard to the year's operations of the entire structure (i.e. including all rental properties of all the LLCs).

US Income Tax Filing Requirements

For US resident partners this can be an ideal structure. There is substantial liability protection for each partner in the LLLP and there is US income tax payable on only one level - i.e. only the partners are subject to income tax on the income of the entire structure. US residents file their US income tax returns (IRS Form 1040) and report the income and other information on the K-1 they receive from the LLLP.

Similarly, Canadian individuals or entities that are partners in the LLLP also file a US income tax return and report the income and other information included on the IRS Form K-1 they receive form the LLLP.

In the case of both US residents, and Canadians that are nonresidents aliens of the US, individual State income tax returns may also be required if the LLCs operate in different States.

Canadian Income Tax Filing Issues

However, it appears that each Canadian resident cannot automatically simply translate the information on the K-1 received from the LLLP into Canadian dollars and place it directly on his/her Canadian income tax return. The Canadian taxpayer may be required to "look through" the LLLP to determine the amount and nature of the income in the LLLP itself. Further, at the moment, it appears that Canada treats the single member LLC as a United States corporation and not as a "disregarded entity" as it is treated for US income tax purposes.

Hence there are several potential results for Canadian income tax reporting that may vary from the results for US income tax reporting!

1) If the aggregate operating results of the LLCs result in a net taxable income, (as reported on the K-1 from the LLLP) but the amount is not distributed from the LLCs to the LLLP or the Canadian partner, it appears there may be no income to report on the Canadian partner's income tax return for that year with respect to the structure, even though the income must be reported on the Canadian partner's US income tax return and even though US tax may be payable.

2) Later when the profits accumulated in the LLCs are distributed to the LLLP and out to the partners, it appears the Canadian partners may be required to report on the Canadian tax return a dividend received from a US Corporation. If the time period has expired for carrying forward foreign tax credits has expired in Canada, there may be double tax.

3) If the US interest in the LLLP is owned by a Canadian corporation and the US "branch tax" applies on the Canadian corporation's US corporate tax return, the aggregate US tax may far exceed any tax credit available in Canada.

4) If the aggregate operating results of the LLCs result in a loss (as reported on the K-1 from the LLLP) there may be no loss to report on the Canadian income tax return even though a loss will be reported on the United States income tax return. The loss on the US tax return can generally be carried forward for US tax purposes to offset future income for US tax purposes.

Exhibit 2

Exhibit 2 sets out in an entirely different scenario. In this example a Canadian resident is a prime motivator of the investment, owns 95% of a US LLLP, and has US partners that own 5% of the US LLLP. The LLLP has no assets, abilities, income, or expenses other than wholly owning a United States LLC that has not elected to be taxed as a corporation. The LLC owns one commercial real estate rental property which was rented out on a triple net lease and is managed by an independent property manager. Neither the LLC nor the LLLP are involved at all in the operations of the rental property.

As in Exhibit 1, this may be an ideal arrangement for the US resident 5% partners. Also, as in Exhibit 1, all partners file a US income tax return on the basis of the K-1 tax information reporting statement provided by the LLLP.

However, in Canada, the result might be different than Exhibit 1. Canadian tax practitioners are aware that Income Tax Act Subsection 91(1) requires Canadian residents to report on their Canadian income tax return their share of "foreign accrual property income" earned by a "controlled foreign affiliate".

Thus, if any US LLC is deemed by the Canada Revenue Agency (CRA) to be a "controlled foreign affiliate" and the income of the LLC considered by CRA to be "foreign accrual property income" ("FAPI"), then the Canadian resident may be required to report on the Canadian income tax return income earned in the LLC even if it is not distributed from the LLC to the Canadian partner. Please consult your Canadian tax advisor for more information about "FAPI".

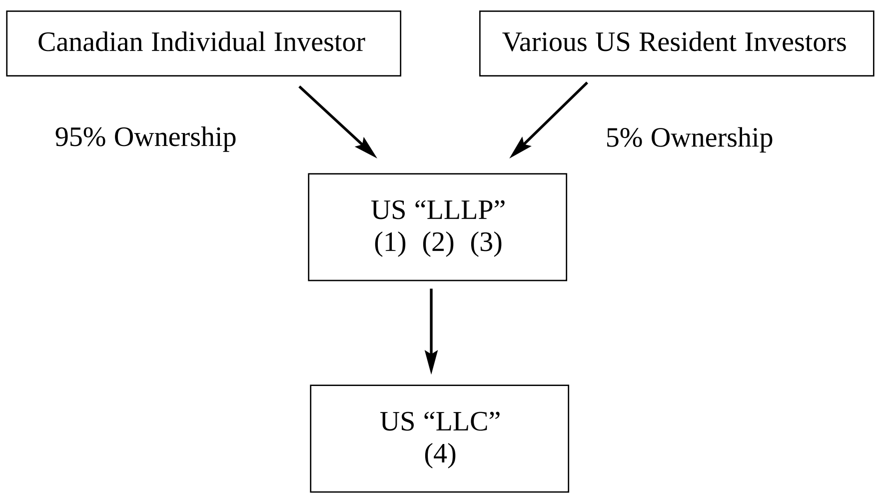
In years when any "foreign accrual property income" equals the amount reported on the LLLP's K-1 there may be no mismatching of income and foreign tax credits, Of course there may be years where different tax accounting rules in each country result in a different reported amount of income in each country.

Also, the definition of "foreign accrual property income" (FAPI) cannot result in a negative amount for Canadian income tax purposes, but it is quite possible there would be losses reported on the K-1 for US income tax purposes.

In general, Income Tax Act Subsection 95(1) defines a "controlled foreign affiliate" to include a foreign corporation in which the taxpayer has an ownership interest of at least 10% and the foreign corporation is

EXHIBIT 2

Canadian Resident Individual "*Controlling*" A US Partnership Owning A US LLC (6)



Owns One US Rental Property
Not Actively Managed By The Canadian Owner (5)

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(2) The LLLP Has No Liabilities And Its Only Assets Are Its Ownership Of The US LLCs.
(3) The LLLP Has No Income Of Its Own - However, The Income (Or Loss) In The LLC Is "Deemed" To Be The Income (Or Loss) Of The LLLP For US Tax Purposes.
(4) US LLC = "US Limited Liability Company" - It Is Solely Owned By The LLLP And The US "Check-The-Box" Election Has Not Been Made.
(5) The US Rental Property Is A Small Property Subject To A Triple Net Lease. The Owners Take No Part In The Management Of The Property. A Management Company Has Been Engaged To Manage The Property - Locate Tenants, Negotiate Leases, And Arrange And Pay For Expenses Not Required To Be Paid By The Tenant.
(6) a) In This Scenario, For US Income Tax Purposes, The Income (Or Loss) Of The LLC Is Deemed To Be Earned By The LLLP And Then, In Turn Deemed To Be Earned Proportionately By Each Owner Of The LLLP, Including The Canadian Owner. Each Owner, Including The Canadian Owner, Must File A US Income Tax Return Reporting His/Her Proportionate Share Of The Earnings, Or Losses.
b) If There Is *No* Distributions From The LLC To The LLLP The Canadian Resident May *Still* Be Taxed In Canada On The Earnings Of The LLC Under The Canadian Rules For "Foreign Accrual Property Income." Please Consult Your Canadian Tax Advisor For Rules On "Foreign Accrual Property Income."

controlled by the Canadian taxpayer and not more than four other residents in Canada, or by non-arm's length persons.

In general, Income Tax Act Subsection 95(1) defines "foreign accrual property income" to include "certain" rents.

Question - under the structure and circumstances of Exhibit 2, would the income from the triple net lease in the US LLC be considered "foreign accrual property income" for purposes of Canadian income taxes for the Canadian partner in the LLLP? Please consult your Canadian tax advisor for further information.

CANADIANS USING A TRUST TO OWN THEIR US RESIDENCE

In the Winter/Spring, 2010, Taxletter article ***"A Tsunami Of Trusts Washes Ashore Into The US"*** we reviewed some of the issues with respect to the use of a Canadian trust by a Canadian nonresident alien of the United States to potentially avoid US estate tax by purchasing a US residence through a Canadian irrevocable trust.

On March 18, 2010, the U.S. Congress implemented new legislation, effective immediately, that may affect such trusts when someone occupying the residence is a US citizen, green card holder, or other US resident (including a "snowbird" who meets the substantial presence test but fails to file a US "Closer Connection Statement" - IRS Form 8840). (IRC §643(i)(1)).

Except as provided in Regulations, under the new rule, the fair market value of the use of the residence owned by a foreign trust might be treated for US income tax purposes, as a distribution to the grantor or beneficiary of the trust if the residence is used by any "US person" who is a grantor or beneficiary of the trust, or if the residence is used by any US person related to either the grantor of the trust, or a beneficiary of the trust.

Example 1: Irving (a nonresident alien of the United States) forms (is the grantor) of a Canadian irrevocable trust that purchases a US residence. Irving's wife Sarah is a US citizen or green card holder, a beneficiary of the trust, and the two of them occupy the US residence from time to time. Sarah may be deemed for US income tax purposes to have received a distribution from the trust because of Sarah's use of the residence.

Example 2. The facts are the same as Example 1, except Sarah is not a US citizen or green card holder. However both Irving and Sarah continuously spend 4 1/2 months in the US annually but do not file a "Closer Connection Statement". Hence they are both US residents (US persons) for US income tax purposes. Thus Irving and Sarah might be deemed for US income tax purposes to have received a distribution from the trust.

The taxable amount of a distribution from a trust is generally limited to the amount of the trusts "distributable net income". Therefore, assuming the trust had no other activity or income it is possible the IRS may interpret this new rule as not creating a "taxable" distribution, unless, for example, the IRS conceives that some form of deemed rental income was received by the trust due to expenses of the property having been paid by the individuals who used the property. We must await IRS regulations or other IRS guidance to learn how this new rule will be interpreted.

MORE ON "FBAR"

In the Winter/Spring, 2010, issue of the Taxletter we summarized the latest information with respect to the requirement for US persons and others to file IRS Form TD F 90-22.1 (Report on Foreign Financial Accounts - "FBAR"). The penalties for late filing are set out in Exhibit 3 on page 8. In the "normal" case where there has been no fraud, and all the income has been reported on tax returns, but there has been a "Pattern of Negligent Activity" the penalty could be a maximum of $50,000 per account. But as a practical matter the IRS may reduce or even forgive this in many cases.

Recently, on a separate parallel course, the US Treasury Department "Financial Crimes Enforcement Network - "FINCEN" - has issued *proposed* regulations under the Bank Secrecy Act.

Among other matters, the proposed regulations will include US Liability Companies (LLCs) as US persons, and thus require them to comply with the FBAR requirement file, even if they are owned by nonresident aliens or foreign corporations.

The proposed regulations also make it clear that the term "financial account" i.e. the accounts required to be reported on Form TD F 90-22.1 includes certain life insurance and annuity accounts, and mutual funds and similar pooled funds of the type offered to the public and identifiable by the ability of account holders to regain their shares.

Readers are aware that US individuals having "signature or other authority" over an account are also required to comply (but see the Winter/Spring, 2010, issue of the Taxletter for a temporary deferral). The proposed regulations define "signature or other authority" to mean authority of an individual (whether alone or in conjunction with another) to control the disposition of money, funds, or other assets held in a financial account by delivery instructions (whether communicated in writing or otherwise)

EXHIBIT 3

Late Filing Of US Treasury Form TD F 90-22.1
(Report On Foreign Accounts - "FBAR")

The Rules For Penalties For Not Filing The FBAR Are Quite Complex. The Penalty Depends Upon Various Factors Including (Among Others) Whether The Noncompliance Was Willful Or Non-Willful And Whether There Was A Pattern Of Noncompliance. The Rules For FBAR Are Not Contained In The Internal Revenue Code (Title 26 Of The "United States Code"). Instead They Are Found In Title 31 ("Money And Finance") Of The United States Code. The Schedule Below Sets Out The Range Of Penalties Provided Under Title 31 For The FBAR.

For Most Individuals Who Have Not Committed Fraudulent Acts But Who Have A "Pattern Of Negligent Activity" The Potential Penalty Is $50,000 For Each Account. However, As A Practical Matter, If No Income Has Been Omitted From A Tax Return The Taxpayer May Be Able To Claim A Reduction Or Waiver Of The Penalty Depending On Various Factors.

Violation	Civil Penalties	Criminal Penalties	Legislative Source
Negligent Violation	Up To $500	N/A	31 U.S.C. § 5321(a)(6)(A) 31 C.F.R. 103.57(h)
Non-Willful Violation	Up To $10,000 For Each Negligent Violation	N/A	31 U.S.C. § 5321(a)(5)(B)
Pattern Of Negligent Activity	In Addition To Penality Under § 5321(a)(6)(A) With Respect To Any Such Violation, Not More Than $50,000.	N/A	31 U.S.C. 5321(a)(6)(B)
Willful - Failure To File FBAR Or Retain Records Of Account	Up To The Greater Of $100,000, Or 50 Percent Of The Amount In The Account At The Time Of The Violation.	Up To $250,000 Or 5 Years Or Both.	31 U.S.C. § 5321(a)(5)(C) 31 U.S.C. § 5322(a) And 31 C.F.R. § 103.59(b) For Criminal. The Penalty Applies To All U.S. Persons.
Willful - Failure To File FBAR Or Retain Records Of Account While Violating Certain Other Laws	Up To The Greater Of $100,000, Or 50 Percent Of The Amount In The Account At The Time Of The Violation.	Up To $500,000 Or 10 Years Or Both.	31 U.S.C. § 5322(b) And 31 C.F.R. § 103.59(c) For Criminal. The Penalty Applies To All U.S. Persons.
Knowingly And Willfully Filing False FBAR	Up To The Greater Of $100,000, Or 50 Percent Of The Amount In The Account At The Time Of The Violation.	$10,000 Or 5 Years Or Both.	18 U.S.C. § 1001, 31 C.F.R. § 103.59(d) For Criminal. The Penality Applies To All U.S. Persons.
Civil And Criminal Penalties May Be Imposed Together. 31 U.S.C. § 5321(d).			

directly to the person with whom the financial account is maintained. Some clarity is provided for the complicated status of an officer or director of a company that has such an account, but who does not have direct signing authority.

Liberal rules are provided in connection with beneficiaries of certain retirement plans and trusts.

As if all this were insufficient, in 2010 the Congress has added another layer of reporting for financial accounts which will operate in addition to the FBAR rules. Please see the article "***AS IF FBAR ISN'T ENOUGH!***"

IRS HAS SUMMARIZED SOME ALTERNATIVE TAX PAYMENT OPTIONS

The IRS has provided the following tips on some alternate payment options for taxpayers who cannot immediately pay the full amount of tax due:

1) A brief additional amount of time to pay can be requested through the "Online Payment Agreement Application" at www.irs.gov. An extension of up to 120 days to pay can potentially be arranged and there could be reduced penalties and interest compared with other alternatives.

2) You can apply for an IRS installment agreement also using the "Online Payment Agreement Application" at www.irs.gov. If you owe $25,000 or less in combined tax penalties and interest you can receive immediate notification of approval. For balances over $25,000 you are required to complete a financial statement to determine the monthly payment amount.

3) You can charge your taxes on your American Express, MasterCard, Visa or Discovery credit cards. Also, you can pay by using a debit card. However the debit card must be a Visa Consumer Debit Card, or a NYCE, Pulse or Star Debit Card. To pay by credit card or debit card contact:

a) Official Payments Corporation - 888-872-9829 www.officialpayments.com/fed, or

b) Link2Gov Corporation - 888-729-1040 www.pay1040.com, or

c) RBS WorldPay Inc. - 888-972-9829 www.payUSAtax.com

Please see also the article "***THE GOOD, THE BAD, AND THE UGLY***" in the Winter/Spring, 2009, Taxletter.

FOREIGN TAX CREDITS & CAPITAL GAINS & LOSS ADJUSTMENTS

There are two particular adjustments a US citizen or US resident must make in computing foreign tax credits when there is a "non-US source" (foreign source) capital gain.

These two adjustments may be known as:

1) The US capital loss adjustment, and

2) The capital gain "rate differential" adjustment.

The US Capital Loss Adjustment

If you have a year in which you have a foreign source capital gain and a US source capital loss you might be required to reduce the foreign source capital gain by the amount of the US source capital loss before you apply the rules to compute a foreign tax credit. (IRC §904 (b)(2)(A) and §904(b)(3)(A)).

Example: Ben is a US citizen, resident in Canada. In 2009 he incurs a $100,000 long term capital gain from the sale of stocks and a $50,000 short term loss from the sale of US real estate. When determining his foreign source capital gain to compute his foreign tax credit on his US income tax return, Ben must deduct the $50,000 US loss from the 100,000 gain, resulting in the fact that he only has $50,000 of foreign source capital gain income for foreign tax credit purposes on his US income tax return.

The Capital Gain Rate Differential Adjustment

Although 100% of capital gains are generally taxable in the US (an exception may apply on gain from the sale of stock of certain qualified US small business corporations) the maximum tax rate on long-term capital gains (property held over 12 months) is usually less than the maximum tax rate on ordinary income. This is referred to as "the alternative tax rate".

For example, the maximum US federal individual tax rate on long-term real estate gains (excluding depreciation recapture) is approximately 15% compared with the maximum US federal "applicable' tax rate of 35% on ordinary income for individuals.

Because of this special US long term capital gains tax rate, when a US citizen or US resident has a net non-US source (foreign source) long term gain, the individual is not allowed to use the total foreign source gain in computing the US foreign tax credit. Instead, the foreign source gain must be reduced for purposes of the computation, to allow for the fact that the gain is being taxed at a special lower rate (15% compared with 35%). (IRC 904(b)(2)(B). The reduction amount is the same proportion of the gain as:

1) The excess of the highest "applicable" tax rate over the alternative tax rate, bears to

2) The highest applicable tax rate.

Thus, if the highest applicable tax rate is 35% and the alternative tax rate (maximum capital gains rate) is 15% the reduction proportion is: (35-15)/35 = .5714. Thus the portion of the gain that can be used in the computation of the foreign tax credit (FTC) on the US income tax return is the reciprocal of .5714. (i.e. .4286 = 1.0000-.5714).

Therefore if a US citizen or US resident has a Canadian source long term real estate capital gain, the maximum portion of the capital gain that can be used on the US income tax return to compute the US foreign tax credit is 0.4286 of the gain. (See IRC §905(c)).

Many more complexities apply, both in the case of the US capital loss adjustment and the capital gains rate differential adjustment. Please consult your tax advisor.

There are also two other particular adjustments a US citizen or US resident must make in computing foreign tax credits when there is an "overall foreign loss", or an "overall domestic loss". More next time.

US DEDUCTIONS FOR TRAVEL EXPENSES -CANADIAN EMPLOYEES TEMPORARILY IN THE US

Under U.S. rules, a "travel expense" is generally deductible by an employee if the employee is "***temporarily***" away from "***home***" in the pursuit of a trade or business. (Of course if you travel between job sites by car, air, etc., during the course of a work day you may be entitled to deduct "transportation costs" - a different concept than "travel expense").

The IRS has defined "temporary" to mean the assignment does not last more than one year. You can only be "away from home" if you are away overnight on a temporary, (as distinguished from an indefinite or permanent) work assignment.

Thus, generally, if you are a nonresident alien employee working in the U.S. your costs of food and lodging in the U.S. are deductible in computing your U.S. tax if you are "away from home", and the work assignment is intended to last one year or less. (If initially the intention is for a stay of one year or less, and the intent changes during the work assignment, the expenses up to the time of change of intent are deductible).

In this context what is meant by "home"? Your "home", for this purpose, is considered to be located at your regular or principal place of business, or (if no regular place of business exists) your home is your "regular place of abode". If you have neither, you are an "itinerant" and your home is wherever you are working. Thus, if you are a nonresident alien working in the U.S. you can generally deduct "travel expense" if your regular or principal place of business is in Canada, you remain in the US overnight, and the project is intended to last for one year or less.

If the nature of your work is such that you have ***no*** regular or principal place of business, you will not be precluded from having a "home" for purposes of the travel expense deduction. Instead, the inquiry shifts to whether you have a "home" in the form of a "regular place of abode".

If you are claiming that your "regular place of abode" is in Canada, three factors will be taken into consideration to evaluate your claim of travel expense on your US tax return:

1) Whether you perform a portion of your work in the vicinity of your abode while you are using your abode for lodging,

2) Whether your living expenses at your abode are duplicated because your business interests require you to be away from the area, and

3) Whether you:

a) Have not abandoned the area in which your historical place of lodging and claimed abode are located,

b) Have a member of your family currently reside at the claimed abode, and

c) Use the claimed abode frequently for purposes of lodging.

If you satisfy all three criteria your claimed abode will be treated as your tax home. If you satisfy only one, you will be classified as an itinerant. If you satisfy two, your abode will be determined from a consideration of all the facts and circumstances.

Of course, if you travel on business *within the U.S.*, away from your U.S. home, those travel expenses may be deductible even though the expenses at your U.S. home are not deductible.

How much can you deduct? If you are a nonresident alien employee working in the US and entitled to deduct travel expenses, and you are not reimbursed by your employer you list your valid travel expenses on IRS Form 2106 on your US income tax return. You must be able to substantiate your expenses with actual documentation, and the aggregate deduction is limited to expenses in excess of 2% of your "adjusted gross income".

On the other hand, if you are reimbursed for "travel expenses" by your employer different rules may apply. Please see the article "***CANADIANS & THE PER DIEM TRAVEL DEDUCTION***"

Caveat for Canadian Employers Sending Employees to Work Temporarily in the US

Please see the article "***NEW CAVEAT FOR CANADIAN BUSINESSES SENDING EMPLOYEES TO WORK IN THE US***."

CANADIANS & THE PER DIEM TRAVEL DEDUCTION

If an employee is reimbursed for travel expenses by the employer, the employee's deduction for travel expenses depends mainly on the arrangement between the employer and the employee for advances, allowances, and reimbursement of the business expenses. There are two basic types of reimbursement arrangements:

1) Accountable plans and
2) Non-accountable plans.
(IRC §62).

Accountable Plans

If the plan is a "accountable plan" the tax code states the reimbursement must first be included in wage income and then immediately deducted. However, since this is a "wash" the regulations provide that such reimbursements, to the extent paid under an "accountable plan" (for which there is full compliance) are not to be treated as wages and are not deducted - i.e they are simply ignored on the employee's tax return - they are not reported as income by the employee and they are not deducted by the employee.

An "accountable plan" refers to an arrangement between the employer and employee that satisfies three basic requirements:

1) Substantiation,
2) Return of excess amounts, and
3) Business connection.

An "accountable plan" requires the employee to furnish adequate substantiation of reimbursed expenses to the employer. If a deduction for the expense is expressly conditioned on compliance with particular substantiation requirements imposed elsewhere in the tax code, those substantiation requirements also apply for purposes of the "accountable plan".

To qualify as an "accountable plan" an arrangement must require an employee to return to the employer any amount that exceeds the employees properly substantiated expenses. If an employer fails to return amounts received in excess of substantiated expenses the amounts paid in excess are treated as paid form a "non-accountable plan".

To simplify the paperwork for an "accountable plan", the IRS has issued special "per diem" allowance rules under which certain travel and incidental expenses are deemed substantiated and the taxpayer is not obligated to substantiate the actual amount. The employee must still substantiate to the employer the other elements of the expense such as time, place, and business purpose, but not the expenses themselves.

A per diem allowance is a payment under an "accountable plan" that 1) is paid with respect to the employee's lodging, meal and incidental expenses (or for meal and incidental expenses, but not for lodging expenses alone) for business travel away from home; 2) is reasonably calculated not to exceed the amount of expenses or anticipated expenses and 3) is paid at or below the applicable federal per diem rate, a flat rate or stated schedule or in accordance with any other IRS-specified rate or schedule.

The regular federal per diem rate is the highest amount the federal government will pay to its employees while away from home on travel. The federal per diem rate has two components and is defined as the sum of federal lodging expense rate and the federal meal and incidental expanse (M&IE) rate, for the date and locality of travel.

Each of these rates is published for a date and particular locality in the US or outside the United States. If the employer pays an advance per diem allowance for meals and incidental expenses that exceed the federal M&IE rate for that locality, the excess is treated as paid under a "non accountable plan".

The IRS issues per diem rates from time to time - see Publication 1542 for rates inside the US or you can go to www.gsa.gov and click on "per diem rates" on the left hand side. On the page for "*Domestic Per Diem Rates*" you can click on the box for "Foreign Per Diem Rates (just opposite the map of the US) to obtain the foreign rates. (Reference Reg, §1.62-2(c)(4)).

Non-accountable Plans

If the plan is a "non-accountable plan the reimbursement for travel expenses is reported as wages. The payments are subject to income tax withholding, (and US social security tax except where overridden by the Totalization Agreement). The employee can then list expenses on IRS Form 2106 (as previously mentioned) to the extent they can be substantiated and are otherwise deductible as travel expenses. The "per diem" deduction system described above cannot be used with non-accountable plans. (Reference Reg. 1.62-2(c)(5)).

Canadian Employers Sending Employee to Work Temporarily in the US

In view of the potentially advantageous "Per Diem" rules described above, it appears it may be beneficial for Canadian employers sending employees to work temporarily in the US to consider instituting a travel reimbursement plan that complies with US rules for an "Accountable Plan". If this is done, and all the other rules are complied with in connection with "travel expense" (see the article ***US DEDUCTIONS FOR TRAVEL EXPENSES - CANADIANS TEMPORARILY IN THE US***, it appears the reimbursement and expenses can be disregarded on the Canadian employee's US income tax return.

Caveat for Canadian Employers Sending Employee to Work Temporarily in the US

Please see the article "***NEW CAVEAT FOR CANADIAN BUSINESSES SENDING EMPLOYEES TO WORK IN THE US***".

AS IF "FBAR" ISN'T ENOUGH!

In 2010 the U.S. Congress enacted legislation effective for tax year 2011 that requires reporting on foreign assets held by US persons in addition to the FBAR requirements -i.e in addition to Form TD F 90-22.1. (IRC §6038D). Please see the article "***MORE ON FBAR***".

The new provision requires **any** individual who holds an interest in a "specified foreign financial asset" to attach to their US income tax return, information on each such asset if the aggregate value of such assets exceeded $50,000 during the year. (Recall, that Form TD F 90-22. is not attached to the tax return - it is sent separately to the Department of the Treasury, (The legislation provides authority to Internal Revenue Service to provide **special rules for nonresident aliens**!).

The definition of "specified foreign financial asset" includes, in addition to the normal foreign bank and brokerage accounts:

1) The ownership of any stock or security issued by a non-US person,

2) Any financial instrument or contract held for an investment that has an issuer which is non-US person, and

3) Any interest in a "foreign entity" as defined in new code section 1473.

The information required to be reported is:

1) The maximum value of the assets during the year,

2) In the case of any account, the name and address of the financial institution and the number of the account,

3) In the case of any stock or security, the name and address of the issuer and such information as is necessary to identify the class of such stock, and

4) In the case of any other contract or interest, such information as is necessary to identify the interest or contract and the names and addresses of all issuers and counterparties with respect to the interest or contract.

Penalties

The penalty for failure to attach the information to a timely filed US income tax return is $10,000. The statute of limitations will also be extended to six years in the case of individuals for failure to comply with this requirement. (IRC §6501). In addition, the "accuracy related penalty" may be levied if there has been failure to comply. (IRC §6662(b)(7)).

Presumption of Filing Requirement

If the IRS determines that an individual has an interest in one or more "specified foreign financial assets" and the individual does not provide sufficient information to demonstrate the aggregate value of such assets, then the aggregate value of such assets shall be treated by the IRS is being in excess of 50,000 for purposes of assessing penalties. (IRC §6038D(e)).

Effective Date - Tax year 2011.

NEW CAVEAT FOR CANADIAN BUSINESSES SENDING EMPLOYEES TO WORK IN THE US

Until tax years beginning in 2010 many Canadian businesses sending employees to the US for extended periods of time (without any other US connection) often had good reason to be confident they did not have a "permanent establishment" (PE) in the US and therefore were not subject to US federal income tax. However readers are aware this rule changed drastically for many Canadian businesses for 2010 and thereafter because if the addition of Article V(9) to the tax treaty as a result of the 5th Protocol to the treaty.

Article V(9) states that where an enterprise of one State provides services in the other State a PE will exist in "the other State" if:

a) Those services are performed in that other State by an individual (*emphasis supplied*) who is present in that other State for a period or periods aggregating 183 days or more in any 12-month period, and, during that period or periods, more than 50% of the gross active business revenues of the enterprise consists of income derived from the services performed in that other State by that individual; (*emphasis supplied*), ***or***

b) The services are provided in that other state for an aggregate of 183 days or more in any 12-month period with respect to the same or connected project for customers (*emphasis supplied*) who are either residents of that other state or who maintain a permanent establishment in that other state and the services are provided in respect of that permanent establishment.

Thus, among other circumstances, as a general rule of thumb, no PE will exist in the US under article V(9) if:

1) 50% or less of the Canadian enterprise's gross active business revenues in any 12 month period are derived from services in the United States by the individual described in a) above, and

2) The services are provided in the US for an aggregate of less than 183 days in any 12 month period with the respect to the same or connected project.

This new rule is also overridden by the prior and continuing rule in Article V(3) that exempts certain building sites or construction or installation projects that last 12 months or less. In other words if the "services" are provided in conjunction with an activity that is exempt PE status under Article V(3) then no PE will exist despite Article V(9).

Thus, Canadian businesses that send employees to work in the US must be very cognizant of the fact of whether or not they have inadvertently created a PE in the US and are therefore subject to US federal income tax as a result of sending employees to work in the US.

As an example, a Canadian self-employed IT consultant may undertake a consulting job in the US for 7 or 8 months. Alternatively a Canadian recruiting business may send Canadian individuals to temporarily work in the US for the same US customer for a period lasting more six months even though employees are rotated and none is present in the US more than 182 days. In either case a US PE may exist.

CORPORATE TAX RETURN (AND OTHER) "LATE FILING" PENALTIES

The US Congress and the IRS are continually adding, updating, (and increasing) penalties for late filing of various documents. On page 14 Exhibit 4 sets out:

1) US federal penalties for late filing of domestic and foreign corporations' US income tax returns, and

2) Some (<u>but not all</u>) the penalties that may apply in other cross-border circumstances.

Although the penalties apply to the taxpayer, in reality the increased focus on penalties <u>results in increased pressure on tax preparers or other tax compliance persons</u> because of the potential for litigation by the taxpayer against the compliance person when penalties are levied, <u>especially because the penalties have become so large</u>.

Apart from the example of penalties listed in Exhibit 4 (which obviously does not include all the potential penalties) recent legislation

EXHIBIT 4

US Federal Penalties And Interest For Late Filing Of Corporate Income Tax Returns And Late Payment Of Tax

(IRC 6651, 6655, 6601, 6621 and 6622)

(For US Federal Filing Due Dates For Corporate Income Tax Returns See The Winter/Spring, 2010, Taxletter.)

Infraction	*Penalty*
Late Filing Of Income Tax Return.	5% Per Month - Maximum 25% This Penalty Also Applies To Any Tax Determined To Be Due As A Result Of An Audit Of The Tax Return (IRC 6651a(3)). If The Return Is Not Filed Within 60 Days Of The Due Date The Minimum Penalty Is The Lesser Of $135 Or The Tax Due.
Late Paying Of Tax Due With The Tax Return.	0.5% Per Month - Maximum 25%
Interest On Late Payment.	Under IRC 6601, Interest, *<u>Compounded Daily</u>* Under IRC 6622, Is Computed Under The Rules Of IRC 6621. This Section Generally Provides That The Interest Rate Is 3% Percentage Points *<u>Higher</u>* Than "The Federal Short Term Rate," Which Is A Rate Determined Monthly By The IRS.
Late Payment Of Installment (Estimated) Tax-- To Be Described In The Fall, 2010 Taxletter.	

<u>Code Section Summary</u>

Installment Payments	6655	Late Filing	6651
Due Dates	6072	Late Paying	6651
Extensions	6081	Interest	6601 / 6621 / 6622

<u>Sampling Of Some Other Penalties</u>

Late Filing Of IRS Form 5471 - Relating To US Persons & Certain Non-US Corporations	$10,000	(IRC 6038)
Late Filing Of Form 926 - Relating To US Persons & Certain Non-US Corporation	10% Of Property Transferred	(IRC 6038B)
Late Filing Of IRS Form 5472 - Relating To Non-US Owned Corporations	$10,000	(IRC 6038A)
Late Filing Of IRS Form 8865 - Relating To US Persons & Certain Non-US Partnerships	$10,000	(IRC 6679)
Late Filing Of IRS Form 8858 - Relating To Foreign Disregarded Entities	$10,000 If Applicable	(IRC 6038)
Late Filing Of Form 3520 / 3520A		
i) Transfers To A Foreign Trust	The Greater Of $10,000 Or 35% Of The Amount Transferred	(IRC 6677)
ii) Distributions From A Foreign Trust	The Greater Of $10,000 Or 35% Of The Amount Of The Distribution	(IRC 6677)
iii) Ownership Interest In A Foreign Trust	5% Of The Value Of The Interest	(IRC 6677)
iv) Gifts Or Bequests From Non-US Person	5% Per Month Of The Gift - Maximum 25%	(IRC 6039F)
Late Filing Of FBAR (Form TD F 90-22.1 - Reporting Of "Foreign Accounts" By US Person	See Exhibit 3	Not IRC
Failure To File IRS Form 8833 (Treaty Based Position)	$1,000 / $10,000	(IRC 6712)
Failure To File Form 8854 (Expatriation)	$10,000	(IRC 6039G)
Late Filing Of Dept. Of Commerce Form BE-605 (Acquisition Of US Investment)	$2,500	Not IRC
Accuracy Related Penalty	25%-50% Of Underpaid Tax	(IRC 6662 6662A)

has already imposed new penalties that come into effect in years 2011 and thereafter. Of course we will keep readers updated on penalties specifically related to cross-border transactions.

THE NEVER ENDING OBLIGATIONS OF US RESIDENTS

Incredibly, a US resident who makes premium payments on a Canadian policy of:

1) "Insurance" or

2) An Annuity contract.

generally must pay a US excise tax to the IRS. (IRC §4371).

"Insurance" includes Life Insurance, Casualty Insurance (home owners insurance and auto insurance), and Sickness (health) and Accident Insurance.

The excise tax rate is 1% annually on payment of non-US life insurance, sickness, and accident premiums and 4% annually on payments on non-US casualty insurance premiums.

Some exemptions apply - see IRC §4373.

The liability is imposed on the person who pays the premium. Otherwise anyone who sold the policy or is insured under the policy must pay. IRS Form 720 must be filed quarterly to report the payment and pay the tax. Penalties and interest apply for late filing Form 720 and late payment of the tax due.

THE IRS AND THE "NUMBERS GAME" FOR NONRESIDENT ALIENS

Readers are aware some situations require a nonresident alien to obtain a "US Taxpayer Identification Number" (ITIN). An ITIN is applied for on IRS Form W-7.

(US citizens, green card holders and individuals with certain visas - such as TN, E-1,

E-2, or L-1 are required to obtain a US social security number instead of an ITIN).

Interestingly the IRS demands that you have an ITIN in many situations but often makes it difficult to obtain the ITIN. Essentially you cannot obtain an ITIN simply because you would like to have one.

Typical, but not all, circumstances in which an ITIN can be obtained are:

1) You are filing a US income tax return,

2) You wish to claim an exemption on a US income tax return for a spouse or dependent that does not qualify for a US social security number, and

3) You are claiming a treaty benefit.

However many other circumstance also enable/require you to obtain an ITIN.

Selling Real Estate

1) If you are selling real estate and the "FIRPTA" 10% withholding tax is being remitted to the IRS it is "advisable" to have, or apply for a number at that time. Otherwise the IRS will not issue a receipt to you for the tax that was withheld and the IRS may have difficulty matching the "FIRPTA" tax withheld with the US tax return for the transaction that you file after the end of the tax year.

2) If you are applying to the IRS for a "Withholding Certificate" - i.e,. a reduction in the "FIRPTA" tax to be withheld you must have, or apply for, a number for both you and the buyer of the property.

It is not necessary for you to have a number to purchase US real estate, but if the seller is applying for a "Withholding Certificate he/she may ask you to apply for one.

Some Other (Problem) Cases

You are a Partner in a Canadian or US Partnership. Partners in a partnership that are engaged in US business, including rental property, receive an information reporting slip (IRS Form K-1) after the tax year-end which must include their US taxpayer number. Further, if there is effectively connected taxable income during the tax year allocable to a foreign partner, tax must be remitted to the IRS quarterly with respect to that partner. Of course the partner (who must file a US income tax return) wants to ensure the tax remitted is property recorded against his "account" with the IRS.

The IRS W-7 instructions provide a procedure to obtain a number in advance for the partner if it is a foreign partnership or a US partnership with 10 or more partners. In this case a copy of the partnership agreement or LLC agreement can be provided to the IRS with the ITIN application. The W-7 instructions are silent on the procedure for a US partnership with less than 10 partners.

Canadian Business Selling Products in the US. If a Canadian business is simply selling products in the US that are approved and shipped from Canada and there is absolutely never any presence in the US at any time in any way - e.g. orders are received online in Canada and shipped to the US by common carrier and there are never any employees or representatives in the US (and no permanent establishment otherwise) then a US tax ID number is not required.

However a US customer will often get "nervous" about making a payment to a non-US recipient without withholding 30% US tax, and may threaten to do so. The correct response in the scenario is for the Canadian business to file IRS Form W-8BEN with the customer - ignoring Parts II and II of the Form and signing the Form in Part IV on the basis of line 3 - "*that the income is not effectively connected with a trade or business in the United States*" (emphasis supplied).

Nonetheless US suppliers are often inexperienced and sufficiently uneasy about their authority to rely of Form W-8BEN that they might insist on other actions. For example they might request that you file IRS Form W-8ECI with them, indicating that you intend to file a US income tax return. However Form W-8-ECI requires the business to have a US number! If the Canadian business is a corporation obtaining the appropriate number (an Employer Identification Number - EIN) is simple. However if the business is a sole proprietorship, the ITIN will be applied for on the basis that you are claiming a treaty benefit. The particular claim is that you do not have a "permanent establishment' (PE) in the US. In this case you should attach a letter from your customer stating that the customer will withhold tax unless Form ECI with a number is received.

Canadian Business Sending Employees to Work in the US. If a Canadian business sends employees to work in the US the employer may be required to withhold US income tax on each employee and remit it to the IRS weekly or monthly. IRS Form 941 must be submitted quarterly to the IRS setting out the tax remitted and indicating the employees to which the tax is to be credited. Of course unless the employee has a US number the tax will not be correctly recorded against the appropriate employee's account. The W-7 instructions are silent on how to obtain an ITIN for each employee in this scenario. Beginning in 2011 tax deposits by employers must be made electronically (not by tax coupon) if quarterly tax liabilities exceed $2,500.

Possible Alternatives

There are some ways to obtain an ITIN even if you do not require it.

Bank Accounts. Many snowbirds and other US visitors are aware it is possible to open a US personal bank account without an ITIN simply by providing IRS Form W-8BEN to the bank. However the IRS provides a way to obtain an ITIN by opening an interest bearing deposit account that generates income effectively connected with a US trade or business. To do so you attach to Form W-7 a letter from the bank stating that you have opened a business account that is subject to IRS information reporting and/or federal tax withholding.

Brokerage Accounts. If you have a US brokerage account with US stocks you are normally subject to US withholding on the dividends. Therefore you can attach to your W-7 a letter from the Brokerage Firm evidencing that an ITIN is required to make distributions to you that are subject to US information reporting and tax withholding.

Individuals Receiving US Pensions or Annuities. Because these payment (excluding Social Security payments) are subject to withholding and reporting you can attach to the W-7 a letter from the withholding agent, similar to the case of a bank account or brokerage account.

You Have a US Mortgage on Your Property. Because mortgage interest payments to lending institutions are subject to US reporting by the institution to the IRS you can attach to your W-7 documentation showing evidence of a home mortgage loan including a copy of the purchase contract or closing document.

For more information on obtaining an ITIN please refer to the instructions to IRS Form W-7 especially the "Exception Tables" on pages 6-8 and also IRS Publication 1915.

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