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Count your US days: The snowbirds sing... and the IRS listens (2018 update)

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In brief

For many Canadians, the opportunity to avoid a harsh winter by fleeing to the southern United States is irresistible. However, Canadians must consider the US income tax and immigration implications of an extended stay in the United States.

This *Tax Insights* outlines relevant US income tax and immigration rules. These rules apply to all Canadians.

In detail

Snowbirds

Snowbirds—Canadians who spend a significant amount of time in the United States during the winter—may not realize that simply by being present in the United States, they may have exposed themselves to the Internal Revenue Service (IRS), hungry for US income and estate tax.

The IRS considers foreigners who meet the US "substantial presence test," along with US citizens and greencard holders, to be residents and therefore potentially liable for US income tax.

A Canadian meets the substantial presence test if he or she spends:

- at least 31 days in the United States during the year, and
- 183 days or more in the United States under the following formula:

  Total days present in the United States in the current year

  \+ 1/3 of the days present in the United States in the year before

  \+ 1/6 of the days present in the United States in the year before that

It doesn't matter whether the purpose is business or otherwise. A day generally includes any part of a day spent in the United States unless the

Sample calculation		Number of days in the United States each year		
		Same (122)	Decreasing (170 to 109)	Increasing (92 to 131)
Total days present in the United States in:	Current year (e.g. 2018)	**122** x 1 = 122	**109** x 1 = 109	**131** x 1 = 131
	Previous year (e.g. 2017)	**122** x 1/3 = 40 2/3	**137** x 1/3 = 45 2/3	**110** x 1/3 = 36 2/3
	Year before that (e.g. 2016)	**122** x 1/6 = 20 1/3	**170** x 1/6 = 28 1/3	**92** x 1/6 = 15 1/3
Formula total		**183**	**183**	**183**

Sample calculations are shown above for three possible combinations of days present in the United States in the last three years. Notably, 122 days' presence (about four months) in each year produces a total of 183 days, constituting a substantial presence in the United States. In each example, one less day in any year would save the individual from meeting the US substantial presence test.

individual is in transit through the United States.

Two exceptions

Two important exceptions can save Canadians from being considered US residents and having to pay US tax.

The closer connection exception

A Canadian who meets the substantial presence test in a year may still be able to avoid being considered a US resident by successfully demonstrating:

- a "closer connection" to Canada, and
- that he or she was in the United States less than 183 days in the year

A closer connection generally exists if the Canadian is still considered a tax resident of Canada and his or her social and economic ties remain closer to Canada. The IRS looks at such things as:

- the location of a permanent home or homes, family connections, business and banking ties, and
- access to healthcare coverage, etc.

To claim the closer connection, the individual must file a US form (Form 8840) for each year for which the substantial presence test is met and the closer connection exception is claimed. This form is due on June 15.

The treaty exception

Canadians who spend 183 days or more in the United States during the year can still avoid being considered US residents if the "tie-breaker" rules in the Canada-US Income Tax Treaty work in their favour. This is far more detailed and requires much more disclosure than the closer connection exception.

To claim the treaty exception, a US non-resident income tax return (Form 1040NR) must be filed, including a disclosure (Form 8833) explaining why the person should be considered a resident of Canada. Both are due on June 15 each year.

Even if the treaty exception results in Canadian residency for tax purposes, the individual may still have other IRS disclosure requirements, including those that apply to Canadian bank accounts, interests in Canadian corporations and Canadian trusts of which the individual is a beneficiary or trustee. Severe penalties can be imposed for non-compliance. For these reasons, in spite of the treaty, Canadians generally should limit their presence in the United States to 182 days in any calendar year.

Owning the vacation property

Canadians who personally own their US vacation properties face additional tax considerations. If they rent out their properties for any part of the year, federal and potentially state income tax returns must be filed each year to preserve deductions that can be claimed on the eventual sale of the home. Net rental income or loss must be reported on US Form 1040NR, which is due on June 15.

The actual sale of the vacation home must be reported on the US federal return, Form 1040NR. A state income tax return also may be required, depending on the location—but no return is required in Florida. US withholding tax may also apply at the time of the sale, but it can be claimed as a payment against the final US tax liability.

While the Canadian will be required to report the sale on a Canadian tax return, the final Canadian tax will be reduced by the amount of any US tax paid on the sale, preventing double taxation.

US estate tax

In addition to income tax, the ownership of US real estate can expose Canadians to US estate tax, regardless of the amount of time spent in the United States. The US estate tax applies to a Canadian holding US-situs assets at the time of his or her death. US-situs assets include such items as stocks of US companies, and of course US real estate.

Estate tax is calculated at graduated rates based on the fair market value of the person's assets net of liabilities at the time of death. Current rates range from 18% to 40%, depending on the size of a person's estate.

Be aware that on December 22, 2017, President Donald Trump signed into law the *Tax Cuts and Jobs Act* (TCJA). The changes implemented by the TCJA include doubling the federal estate and gift tax exemption amounts from US$5.6 million to US$11.2 million for 2018 (to be indexed annually). For more information, see our *Tax Insights* "Estate tax update: US estate tax exposure for Canadians (2018 edition)" at www.pwc.com/ca/taxinsights.

US immigration

Canadian nationals regularly travel to the United States without regard to the complex immigration rules that are at play in the background. While Canadians generally enjoy seamless, frequent travel between the United States and Canada due to the shared border, there are important considerations that Canadian snowbirds must consider if they wish to spend a significant amount of time in the United States.

I-94 record

Whenever a foreign national enters the United States, they are given an I-94 record as evidence of their legal admission. This document contains an expiry date that mandates when the individual must depart the United States.

The permitted admission period noted on the I-94 record is determined at the discretion of the Department of Homeland Security and US Customs and Border Protection (CBP) officials at the port-of-entry. While six months is the common admission period for Canadian snowbirds, the CBP official has the authority to limit the duration or even deny entry. Thus, it is important that snowbirds recognize that admission into the United States for six months is always discretionary and never guaranteed.

In addition, the six month admission period may be limited to reflect days spent in the United States within the previous 12 months. While an individual may receive a fresh 180 day period upon a subsequent reentry, this is not guaranteed.

Canadian nationals may not realize that they have an I-94 record, but it should be reviewed to take note of the granted admission period. Remaining in the United States beyond the expiry date can have serious repercussions. The record is available online at **i94.cbp.dhs.gov**.

Evidence of temporary intent

Canadian snowbirds enter the United States as visitors, formally known as B-2 status. This status requires that the individual be able to provide evidence of their intent to remain in the United States temporarily. It is advisable that Canadian snowbirds carry evidence when travelling to the United States of their ties to Canada and their intent to return, such as return travel bookings, ownership of Canadian property, Canadian bank accounts, etc.

Visitors in the United States on B-2 status cannot engage in any form of work in the United States.

Inadmissibility

Canadian nationals are fortunate that they are considered visa exempt, which means that a visa is generally not required to enter the United States. Nonetheless, Canadian nationals should be mindful that any prior criminal charges could potentially render them inadmissible to the United States. Individuals with criminal charges should consult with an immigration attorney prior to their planned travel to the United States to discuss any potential barriers to admission.

Let's talk

For more help understanding how US income tax, estate tax, and US immigration rules could apply to you, please contact any of the following:

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