

TAX

NEW RULES PROVIDE RELIEF FROM CANADIAN WITHHOLDING ON SALARY PAID TO CROSS-BORDER EMPLOYEES*by Ted N. Citrome*

Proposed amendments to the *Income Tax Act* (Canada) (ITA) will provide relief from Canadian payroll withholdings for many non-resident employers whose employees work in Canada on a temporary or short-term basis.

An employee who is a non-resident of Canada is generally subject to Canadian income tax on remuneration that he or she receives in respect of work performed while physically present in Canada. However, salary paid to an employee who is resident in the U.S. is generally exempt from Canadian tax under the *Canada-U.S. Tax Convention* (Treaty) if either: (a) the amount paid in respect of Canadian employment is less than C\$10,000 in the year; or (b) the employee was present in Canada for less than 183 days in any 12-month period that includes the year, and the amount was not paid or borne by a Canadian resident or a Canadian permanent establishment.

Currently, employers are required to withhold Canadian payroll tax from all remuneration paid to employees, including amounts that are ultimately exempt under a tax treaty, unless a waiver is obtained from the Canada Revenue Agency before the work commences. However, obtaining a waiver is often impractical due to processing times. Consequently, employees earning treaty-exempt income are forced to wait until the end of the year and file a Canadian income tax return to claim a refund. This system is particularly arduous for employees who are already subject to U.S. payroll deductions.

The new rules will streamline the procedure for relieving U.S.-resident employers from many Canadian payroll remittance obligations. By filing an application to be certified as a "qualifying non-resident employer", an employer that is resident in a country with which Canada has a tax treaty will be excluded from payroll withholding requirements from salary paid to an employee who:

- is resident in a country with which Canada has a tax treaty;
- is not liable for Canadian income tax because of the application of that treaty; and
- works in Canada for less than 45 days in the calendar year, or is present in Canada for less than 90 days in any 12-month period that includes the relevant time.

The new system allows eligible employers to obtain relief from Canadian payroll remittance obligations by filing one application form instead of having to apply for a separate waiver in respect of each cross-border engagement. A new certification is typically required after two years.

It is notable that a U.S. limited-liability corporation may not qualify for this relief under the CRA's long-standing administrative position that a LLC is not resident in the U.S. for purposes of the Treaty.

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