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Canadian tax alert

Employer certification – the much awaited relief for non-resident employers is here

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Overview

The Department of Finance and the Canada Revenue Agency (CRA) have responded to feedback from the international business community with the release of Form RC473, *Non-Resident Employer Certification* and related guidance to accompany the proposed changes to the payroll withholding and reporting rules for non-resident employees who are exempt from Canadian tax by virtue of a tax treaty. Such changes were originally proposed as part of the 2015 federal budget and were subsequently amended on July 31, 2015. The new regime allows qualifying non-resident employers to apply for certification and, once approved, be relieved from Canadian tax withholding and, potentially, reporting requirements for payments to qualifying non-resident employees.

While the budget proposal which introduced these measures has not yet been enacted, the CRA has indicated that it will implement the certification process effective January 1, 2016.

Background

Historically, Canadian tax rules required all employers to withhold Canadian income tax from remuneration paid to non-resident employees providing services in Canada. Such obligation applied despite the fact that an employee might have been exempt from Canadian tax on such earnings as a result of a tax treaty that Canada had entered into with the employee's country of residence. Such withholding obligation is referred to as "Regulation 102 withholding". In an effort to mitigate the cash flow challenges imposed by Regulation 102 withholding, the CRA allowed employees to apply for a waiver of such obligation on a case by case basis. Such waiver process generally was found to be administratively burdensome and, in some cases, impractical, as a separate waiver was required to be sought for each individual employee and was also required to be received in advance of the services being provided. Employer certification is designed to mitigate or completely eliminate many of the administrative challenges inherent in this waiver application process. This process will remain available, however, for employers and employees that either do not qualify for the new certification program or are otherwise better serviced by the existing waiver program.

Employer certification

Any employer that is a resident of a country with which Canada has a tax treaty is eligible to apply for certification. In addition, partnerships where 90% or more of their annual income is allocated to partners resident in countries with which Canada has a tax treaty and US limited liability companies (LLCs) are also eligible to apply for certification.

Once an employer has become certified as discussed below, it will not be subject to Regulation 102 withholding on payments to a qualifying non-resident employee. The definition of a qualifying non-resident employee is one who:

- is resident in a country with which Canada has a tax treaty at the time of payment;
- is not liable to income tax on the payment because of the tax treaty; and
- has less than 45 work days in Canada in a calendar year or is present in Canada for any purpose for less than 90 days in any 12-month period

In addition, where the qualifying non-resident employee earns less than CAD \$10,000 of Canadian-source compensation during the year, the annual requirement to report such remuneration on Form T4 is waived. The waived T4 filing obligation is significant since it also removes the need for the employee to apply for and obtain a Canadian taxpayer identification number.

Form RC473, Non-Resident Employer Certification

Form RC473 must be completed and submitted to the Pacific International Waivers Centre of Expertise located at the Vancouver Tax Services Office. The CRA has designated this office to process all applications related to employer certification so that applications can be reviewed on a timely and consistent basis. The CRA recommends filing the application at least 30 days in advance of when the employer wishes the certification to be effective. The application requires the non-resident employer to have a CRA Business Number (BN) or, alternatively, the non-resident employer can apply for a BN along with the application. Other than a BN, the application does not require any additional supporting documentation to be included. The CRA has indicated that any further information necessary to process the application will be requested on a case by case basis.

Once the application is processed, the CRA will inform the employer in writing that it has been approved for employer certification and the effective date. Until such approval is received, the employer is required to withhold Canadian tax at source or ensure that an appropriate waiver has already been received by the employee. An approved certification application is valid for a period of up to 2 years.

The form has five sections and requires employer identification, representative and employer information, residency declaration and certification. The form also notes that the employer must inform the CRA immediately in writing of any changes to the information submitted or if the employer or employees no longer meet the conditions specified therein.

Employer obligations

The form lays out employer obligations resulting from certification.

These obligations include:

- Tracking and recording the number of days each qualifying non-resident employee works or is present in Canada and the income attributable to these days on a proactive basis;

- Determining whether the employee is a resident of a country with which Canada has a tax treaty;
- Evaluating and documenting whether the qualifying non-resident employee's remuneration is expected to be exempt from Canadian tax under the relevant tax treaty;
- Determining whether the qualifying non-resident employee either works in Canada for less than 45 days in the calendar year that includes the time of payment, or is present in Canada for less than 90 days in any 12 month period that includes the time of payment;
- Obtaining a BN, and, if required to make remittances, a program account for payroll purposes;
- Completing and filing a T4 Summary and Information Return for those employees earning in excess of CAD \$10,000 of Canadian source remuneration for the year;
- Filing any necessary Canadian corporate income tax returns for calendar years under certification; and
- Upon request, making books and records available in Canada for inspection by the CRA for purposes of administering the employer certification agreement and the Regulation 102 withholding requirements.

In addition, the CRA has clarified that even where a qualifying employer is exempt from income tax withholding, the employer may still be required to withhold Canada Pension Plan (CPP) contributions and/or Employment Insurance (EI) premiums, subject to exceptions given under these regimes.

Where an employer has received certification approval from the CRA, such status can be revoked should the CRA determine upon inspection of the books and records that the employer has not fulfilled the above obligations.

As a result of the CRA's ability to revoke an employer's certification status upon discovery of a violation of one of the above obligations, it is imperative that employers take the actions necessary to develop and implement processes and procedures that will allow for the tracking of employee presence in Canada both for work and non-work purposes over different time periods. In addition, adequate internal controls should be implemented to ensure the tracking data is reliable. Failure to implement such tracking system prior to applying for and receiving employer certification can lead to an increased risk that the CRA will revoke certification. Revocation of an employer's certification may lead to difficulties in receiving approval upon reapplication.

Transitional period

The CRA has offered a transitional window period for an employer to become certified and any application received during this period will allow for the certification period to be backdated to January 1, 2016. For any application filed after the window period, the employer must continue to withhold and remit tax on payments made to employees unless an employee-specific waiver has been obtained. The CRA has not yet indicated whether any additional transitional relief will be available in respect of the 2016 calendar year, given the timing of the application form's release.

Employers should be prepared

The Department of Finance and the CRA have taken welcome steps to reduce administrative burdens previously placed on non-resident employers providing services in Canada. The new employer certification program should allow for organizations to effectively and efficiently manage their obligations while at the same

time protecting the CRA's enforcement abilities to ensure that the proper amount of Canadian tax is assessed and collected.

The time for employers to take advantage of these much desired changes is now. This means that if they have not already done so, non-resident employers with non-resident employees performing services in Canada should take the necessary steps to develop the proper internal policies and procedures in order to allow them to meet their obligations under the certification process.

If you have any questions concerning the issues in this GES NewsFlash, please contact one of the GES professionals at our Deloitte offices.

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