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Cross-Border Tax Insight
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Cross-Border Tax Newsletter

NORTH AMERICAN TAX SERVICES

Cross-Border Tax Insight

U.S AMT & Canadians

For those of you with clients who are U.S. citizens living in Canada, with U.S. alternative minimum tax (AMT) amounts typically owing – an interesting case was recently heard in U.S. Tax Court. In essence, in Kappus vs. the Commissioner of the IRS[1], it was held that U.S. AMT[2] as provided in the Internal Revenue Code (IRC) could not simply be overridden or avoided by taking a position that the Canada-U.S. Tax Treaty, as amended by subsequent protocols, nullifies such tax.

Background

Certain U.S. citizens living in Canada, and earning primarily Canadian-source employment or business income, may be subject to U.S. AMT resulting in double taxation, given that such U.S. AMT may apply in addition to Canadian tax owed on such income. For such individuals, regular U.S. tax will not be owing, since such tax will normally be completely reduced as a result of claiming the U.S. Foreign Earned Income Exclusion and/or claiming a U.S. foreign tax credit (FTC) for tax paid in Canada.

From a mechanical perspective, U.S. AMT arises since only 90 per cent of U.S. alternative minimum taxable income may be offset by foreign tax credits. Consequently, AMT will apply at a rate of either 26 or 28 per cent to 10 per cent of an individual's alternative minimum taxable income in excess of such permitted foreign tax credits.

Since 1996 and subsequent years, many U.S. citizens living in Canada, and subject to U.S. AMT, were successful in taking a position on their U.S. tax returns

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Legal Reasoning

Specifically, the petitioner in the Kappus case attempted to argue that a conflict existed with respect to the assessment of U.S. AMT, under U.S. domestic law (i.e. the IRC) and the Canada-U.S. Tax Treaty. Furthermore, the petitioner argued (based on established case law[3]) that, since a conflict existed between these two bodies of legislation, the latter one enacted should prevail. The petitioner attempted to claim that a protocol to the Canada. U.S. Tax Treaty was enacted subsequent to the application of the U.S. AMT provision (See §59(a)(2) in the IRC), thereby supporting his position that U.S. AMT should not be applicable to a U.S. citizen living in Canada.

The judge's reasoning, striking down the petitioner's position, was based on the following:

a. Certain other legislation, known as TAMRA 1988[4], specifically demonstrated Congress's intent to override existing treaties in certain instances. Specifically, under §1012(aa) (2) of TAMRA, it was specified that to the extent such amendments under the IRC relate to the alternative minimum tax foreign tax credit as outlined under §59(a)(2) of the Code - such amendments shall apply notwithstanding any treaty obligation of the United States in effect on the date of the enactment of the Reform Act.

b. Secondly, since, neither subsequent domestic law nor subsequent treaty protocols specifically referred to the AMT FTC, no conflict between domestic law and the treaty was (or is) applicable. Given that there is no conflict between the two, both the Code and the treaty should be read together or at least on equal footing, to determine the application or non-application of either or both. The judge thus indicated and concluded that neither of the later protocols mentions the limitation of the alternative minimum tax foreign tax credit imposed by §59(a)(2) or §1012(aa)(2) of TAMRA. Furthermore, he pointed out that neither the Third or Fourth Protocol contains a clearly expressed intent to supersede §59(a)(2).

In sum, it was concluded that U.S. AMT is applicable to U.S. citizens living in Canada pursuant to IRC §59(a)(2) despite any applicable provision in the Canada U.S. Treaty.

Conclusion

In conclusion, given this recent case, it would not be prudent to take such a filing position on a U.S. tax return of a Canadian resident. Nonetheless, I am confident that this case is likely to be appealed. However, personally, I would not hold my breath in anticipation of a reversal.

Perhaps the cross-border tax practitioner may want to recommend alternative, more relevant, strategies to the client in dealing with this particular potential double-tax situation. Cheers! Joyous tax season to all.

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[1]T.C. Memo. 2002-36, February 8, 2002
[2]See IRC Sec. 59(a)(2)
[3]See Whitney V. Robertson
[4]Technical and Miscellaneous Revenue Act 1988, Sec. 1012(aa)(c)

BUSINESS IMMIGRATION UPDATE! LETTING THE SPOUSE WORK

As competition for the best and brightest has expanded beyond national, or even continental borders, the U.S. has realized that its immigration policies must keep current in order to continue to attract the highly skilled labour force necessary to retain its status as global leader. In addition, investment capital and employment stimulation remain high priorities.

One of the tools used successfully by other countries, including Canada, is the granting of automatic work permits for spouses of holders of temporary employment authorizations, i.e. non-immigrants.

In earlier issues of this publication, we have discusses the E-visa - Investment, and the L-visa - intracorporate transfers. Entrants in each of these categories offer much to the U.S. economy and self-interest drive these changes. It is not unusual for the spouse of a business person or entrepreneur to have a career of his/her own. Therefore, a move to a country in which that person will be unable to continue working is unappealing and, naturally, resisted. Particularly since other countries have facilitated the process, the U.S. was losing ground.

Two bills have passed in the Senate and the House, awaiting only the signature of the President. It is expected that this will occur shortly. Once signed, these new laws will permit the spouses of certain non-citizens to work in the U.S. and avoid the usually tortuous process of obtaining a work permit. H.R. 2277 would grant a work permit for the spouse of a non-citizen on an E-visa. H.R.2278 would do the same for the spouse of a non-citizen on an L-visa.

In addition, H.R. 2278 would reduce the time the employee in question must be employed by the parent company before qualifying as an intracorporate transfer (L-visa). The benefits that flow from this are easily measured. Often a new executive is recruited for the express purpose of supervising, or even establishing, a U.S. branch office. Formerly, it was necessary that said executive be employed by the parent for one full year, and this was often impractical.

At first glance, although these may seem like small offerings, the ramifications are substantial. Suddenly, working in the U.S. is once again highly attractive. The bottom line is that it will be increasingly easier for corporations to transfer critical staff to the U.S. This can often affect the fine line between economic success or failure, allowing for serious long-term planning and growth.

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Ottawa Tax Seminar:
Personal U.S. Taxation and Canadians - REGISTER EARLY LIMITED SPACE

Date:	**Monday, June 10, 2002**
Speaker:	Joseph Soussan, CGA, CPA (De. Cert.) of North American Tax Services (Toronto)
Time:	8 to 8:45 a.m. –registration and hot breakfast
	8:45 to 12:30 p.m. - seminar
Location:	Embassy West Hotel Conference Centre
	1400 Carling Avenue, Ottawa
Cost:	$115, $100 (Students)
CPD:	5
Registration Contact:	Bernadette Murray, CGA
	Tel: 613-734-6891
	E-mail: Bernadette.murray@canadapost.ca

CGA Ontario Ottawa Chapter invites you to its next taxation seminar entitled "Personal U.S. Taxation and Canadians". The seminar is open to the general public. All are welcome.

Topics include:

- Canadians living and/or working in the U.S. (or those who have earned U.S. sources of income).
- U.S. non-resident alien tax issues, as well as the impact of the Canada-U.S. Tax Treaty on such filers.
- U.S. citizens living and/or working in Canada

(The primary focus will be on the first and second categories.)

Joseph Soussan founded ***North American Tax Services*** in 1998. Since 1997, he is a member of the Certified General Accountants' Association of Ontario. He completed the CICA In-Depth Tax Course in 2000, and obtained CPA certification in 1998 from the state of Delaware. His firm is dedicated to providing both U.S. (primarily) and Canadian tax expertise (as applicable to international tax situations), tax-related educational services, and technical writing assistance to Canadian accounting and law firms. Joseph speaks frequently to organizations and companies on cross-border tax matters.

He currently practices exclusively in the areas of both cross-border corporate and personal taxation. He has, to date, provided extensive consulting and compliance services to the following firms in Toronto and Montreal: Deloitte and Touche, Ernst and Young, I.T.S.G, Cross-Border Tax Services, Horwath Orenstein LLP, and other local CA firms.

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