Special points of interest:

July - August 2001

- Canadians Commuting to the U.S. for Work or Self-Employment
- Visas for the Investor

Cross-Border Tax Insight
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NORTH AMERICAN TAX SERVICES

Cross-Border Tax Insight

Cross-Border Tax Newsletter

Dear Fellow Professionals:

The last issue of this newsletter was entitled the May-June 2001 edition. If you did not receive this it or past issues of the newsletter – please send me an email and I will send it (them) to you. As usual, your questions, comments and suggestions are always welcome.

Again, if you feel someone in your office, or a colleague, could benefit from *Cross-Border Tax Insight* - please have them forward an e-mail to me with the words "subscribe to newsletter" in the e-mail subject line.

Please note our regular column on U.S. Multistate Corporate Taxation will be continued in the September edition of this newsletter.

Regards,

Joseph Soussan

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This newsletter is generally published on a monthly to bi-monthly basis.

To Commute or Not to Commute – Canadians Commuting to the U.S. for Work or Self-Employment

As mentioned in our last newsletter, individuals who sojourn in the U.S. for relatively lengthy periods may be considered U.S. residents for tax purposes. A significant tax consequence of such a classification is that such individuals would be required, by U.S. tax authorities, to report their worldwide income, by filing Form 1040 with the IRS.

Also discussed were criteria used by the IRS, in classifying individuals as U.S. residents for tax purposes (a.k.a. *resident aliens*). Specifically, U.S. tax residency is deemed applicable if either *a green card* or *substantial presence* test is met.

The *Green Card* test requires that lawful U.S. permanent residents (including green card-holders) and immigrants file a resident tax return (Form 1040). The *Substantial Presence* test requires that an individual who meets certain physical presence requirements also be treated as a U.S. resident. To meet this latter test, a person must be physically present in the U.S. for at least 31 days in the current year (assume the current year is 2000), and at least 183 days during the period 2000, 1999 and 1998, counting all the days of physical presence in 2000, but only 1/3 the number of days of presence in 1999, and only 1/6 the number of days of presence in 1998.

The Internal Revenue Code provides, however, for an exception to the concept of physical presence as applicable to the substantial presence rules, with regard to commuters from Canada (and Mexico).

Under a general rule in the Code, for the purpose of applying the substantial presence rules, an individual shall be treated as present in the U.S. on any specific day if such individual is physically present in the U.S. at any time during such day.

If, however, an individual *regularly commutes* to the U.S. from Canada (or Mexico) for employment or self-employment purposes, the individual will not be treated as present in the U.S. on any day during which he so commutes. **Thus, the bottom line is that Canadian (or Mexican) commuters may not be required to report their worldwide income to the IRS in certain instances.** Thus, instead of filing Form 1040, applicable U.S. source income may simply be reported on Form 1040NR. Form 1040NR is commonly used by non-residents of the U.S, who have specific U.S. sources of income.

So what does *regularly commute* mean? Further guidance is provided in the Regulations.

An alien individual will be considered to *regularly commute* if the individual commutes to the individual's location of employment or self- employment in the United States from his or her residence in Mexico or Canada, on more than 75% of *workdays* during the *working period.*

Additional definitions provided in the Regulations will clarify the above. *Workdays* refers to days on which the individual works in the U.S., Canada and Mexico.

The term *commutes* means to travel to employment or self-employment, and to return to one's residence within a 24-hour period.

The term *working period* means the period beginning with the first day in the current year on which the individual is physically present in the United States for purposes of engaging in employment or self-employment, and ending on the last day in the current year on which the individual is physically present in the United States for purposes of engaging in that employment or self-employment.

If the nature of the employment or self-employment is such that it requires the individual to be present in the United States only on a **seasonal or cyclical basis**, the working period will begin with the first day of the season or cycle on which the individual is present in the United States for purposes of engaging in employment or self-employment, and end on the last day of the season or cycle on which the individual is present in the United States for the purpose of engaging in that employment or se1f- employment. Thus, there may be more than one working period in a calendar year and a working period may begin in one calendar year and end in the following calendar year.

The following examples adopted from current U.S. Regulations will demonstrate the above concepts:

Example 1:

B lives in Canada and is employed by Corporation X in its office in Canada. B was temporarily assigned to X's office in the United States. B's employment in the United States office began on February 1, 1998, and continued through June 1, 1998. On June 2, B resumed his employment in Canada. On 59 days in the period beginning on February 1, 1998, and ending on June 1, 1998, B travelled each morning from his residence in Canada to X Corporation's United States office for the purpose of engaging in his employment with X Corporation. B returned to his residence in Canada on each of those evenings. On seven days in the period from February 1, 1998 through June 1, 1998, B worked in X's Canada office.

B is not considered to have been present in the United States on any of the days that he travelled to X's United States office for the purpose of engaging in employment with Corporation X, because he commuted to his place of employment within the United States on more than 75% of the workdays during the working period (59 workdays in the United States/66 workdays in the working period = 89.4%).

Example 2

C, who lives in Canada, contracted with a resort located in the United States to provide snow-skiing instruction for the resort's customers for two skiing seasons, the first beginning on November 15, 1997 and ending on March 15, 1998, and the second beginning on November 15, 1998 and ending on March 15, 1999. On 90 days in each of the two skiing seasons, C travelled in the morning from Canada to the resort to provide skiing instruction pursuant to the contract. C returned to Canada on each of those evenings. On 20 days during each of the two skiing seasons, C worked in Canada.

C is not considered to have been present in the United States on any of the days that she travelled to the United States to provide ski instruction in either the first working period beginning on November 15, 1997 and ending on March 15, 1998, or the second working period beginning on November 15, 1998 and ending on March 15, 1999, because she commuted to her employment within the United States on more than 75% of the workdays during each of the working periods (90 workdays in the United States/110 workdays in the working period = 81.8%).

In sum, the above should be kept in mind prior to determining one's U.S. filing status in a given year. Furthermore, in some specific situations the Canada-U.S. Tax Treaty may exempt a Canadian person from U.S. tax, thus it as well should be consulted, at such a time.

Obviously, a current or prospective client of your practice or firm needs to be informed of the need to maintain proper records regarding both the applicable dates and location with respect to North American workdays, in order to be in a position to make the above determination.

Visas for the Investor

Canadian business people who are involved in U.S. import and/or export trade can apply for E-1 status under NAFTA. The E-2 status is available to Canadians who represent major investments in the U.S.

In this issue, I will discuss **E-1** Status: **TREATY TRADER**

Briefly, the U.S. Immigration Naturalization Service will grant E-1 status to Canadians whose companies carry on substantial trade with the U.S. The particular individual seeking the visa must have an executive, supervisory or special-skills position with the Canadian company, and must also be a Canadian citizen.

Broadly, the following are the requirements for a successful application:

- The business must conduct *substantial* trade between Canada and the U.S.
- The applicant must qualify in an executive, supervisory, or special-skills category.
- Trading must be carried out *principally* between Canada and the U.S.
- The applicant must be a citizen of the same country in which the company is based.
- The E-1 visa-holder must leave the U.S. when the work is completed. However, renewals are not difficult to secure.

The most challenging issues are: what constitutes "trade" and how much is necessary to comply with the requirement that the trade be "substantial".

TRADE

As the use has expanded, so has the definition of trade. It now includes both the exchange of "goods" and "service activities" whereas, previously, the emphasis had been predominantly on dealing with "goods."

"Service activities" include, but are not limited to: banking; insurance; transportation; communications; data processing; advertising; accounting; design; engineering; management consulting; tourism and technology transfer. As is evident, the definition of "service" is very broad.

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ADVANTAGES

These applications can be processed rather quickly, as they may be filed with the U.S. Consulate in Toronto, thereby avoiding the extremely time-consuming process of filing with one of the very clogged U.S. Service Centers.

Although the initial application is valid for a five-year period in one-year increments, this visa is virtually unlimited.

E-1 allows employees in the approved categories to travel freely across the border, since there are no residency requirements.

SUMMARY

The E-1 Treaty Trade Temporary Visa is an appropriate response to the needs of international business. It is recognition of the way in which business is really transacted. For such applications, professional advice is essential.

Documentation is complex, financial projections must meet certain standards, and the applicant must prove his/her position with the company. As each application is evaluated on a case-by case basis, it is expedient to present a perfected application at the outset, so as not to delay the approval process.

In the next issue, I will discuss **E-2 Status: Treaty Investor**. This is a category with a much broader application to the individual entrepreneur.

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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.

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. If he can be of assistance to your firm, please do not hesitate to contact him (Tel: 416-567-1829).