Tax Residency: CRS and FATCA World

“Multiple Tax Residency, Tax Treaties and Tax Treaty Tiebreakers”

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John Richardson – LL.B., J.D.

Toronto, Canada

http://www.CitizenshipSolutions.ca

john@citizenshipsolutions.ca

When the circumstances of your birth determine the outcome of your life

Prologue – Two ways of making money

There are

1. People making money
2. Money making money

Tax administration is the 21st century is about the hunt for "Money making money"

The “escape” of capital to offshore jurisdictions (erosion of the tax base)

1. The Paradise Papers
2. The Panama Papers

Discoveries have revealed that here is an “appetite” for “offshore bank and brokerage accounts”

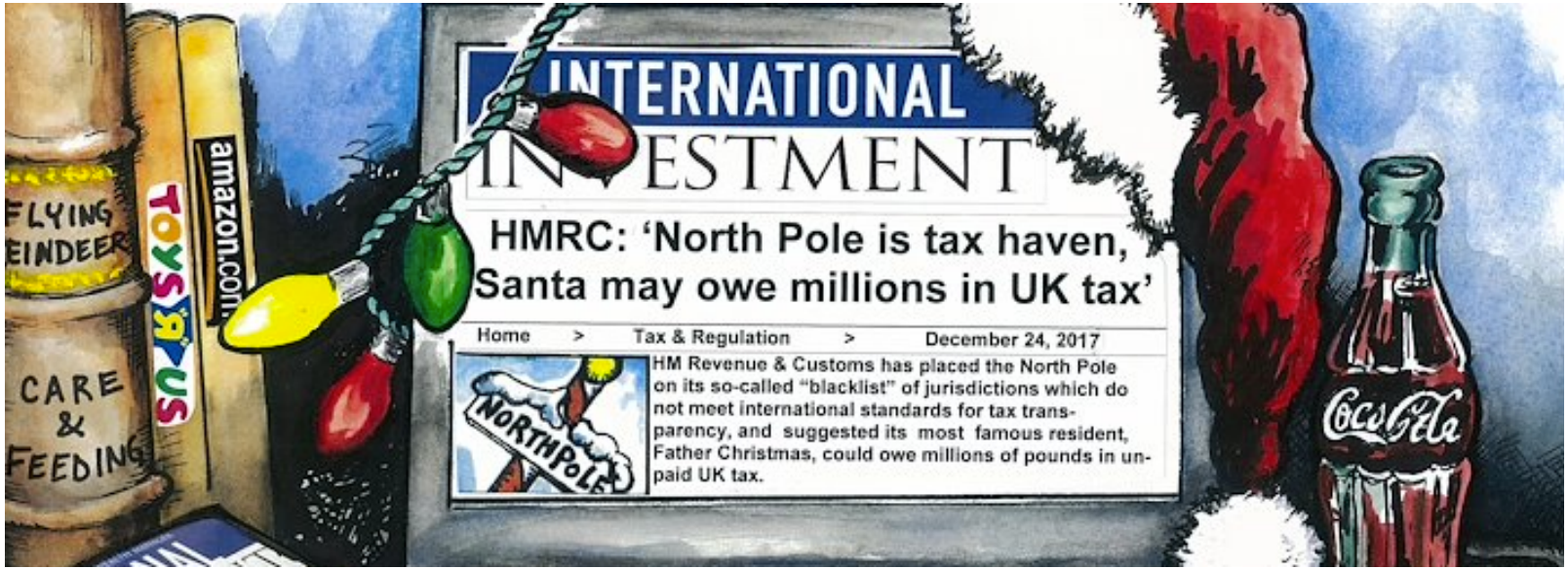
Think of the volume of data …

Encouraging return of “offshore capital” owned by “tax residents”

Amnesty Programs – Encouraging the return of the capital:

- **USA** – OVDP (brutal regime) – ending September 2018
- **Russia** – just bring the capital back
- **Pakistan** – just bring the capital back
- **India** – just bring the capital back
- Many more …

“tax haven” = any another country with lower tax rates and no info exchange



Locating the capital: AEOI – Automatic Exchange of Information – a treaty

International Automatic Information Exchange Agreements

FATCA: U.S. "Foreign Account Tax Compliance Act"

(The world provides information, pursuant to IGAs, about U.S. "tax residents" under threat of U.S. sanctions – information flows to U.S. with no reciprocity)

CRS: OECD Common Reporting Standard

(Internationally agreed information exchange among non-U.S. countries)

FATCA = U.S. Demand for information about “U.S. Persons”

Those who the U.S. defines (under U.S. law) as:

- U.S. citizens (a status with shifting definitions over the years)
- U.S. “permanent residents” AKA “Green Card Holders”

Many people are learning they are U.S. tax residents through FATCA!

FATCA – The hunt for U.S. tax residents

CRS = information exchange about “tax residents”

- The new global standard on **Automatic Exchange of Information** (AEOI) reduces the possibility for tax evasion. It provides for the **exchange** of non-resident financial account **information** with the tax authorities in the account holders' country of residence.

- **Automatic Exchange of Information - OECD.org**

- *www.oecd.org/tax/transparency/automaticexchangeofinformation.htm*

The microscopic effect of the CRS

How exactly does the automatic exchange of information work?

https://www.youtube.com/watch?v=2r0igKB6KkE

FATCA and CRS have led to people receiving written inquiries asking:

- **List all the countries that you are a "tax resident" of**

(A general question that is an information probe)

- **Are you or have you ever been a U.S. citizen or Green Card Holder?**

(More of an accusation – this spells trouble)

People are TERRIFIED by these question, because …

People don’t understand what is meant by “tax residency”

Each country has its own definition of:

- Who is a “tax resident”
- What it takes to sever “tax residency”

There may be different definitions of “tax residency” for different kinds of taxes **(Example: USA uses “deemed residency” for income tax and “domicile” for Estate and Gift Tax)**

Global Mobility – The 5 questions:

I. What rules does a country use to define “tax residency”?

II. What about “multiple tax residency”?

III. How does one sever tax residency?

IV. How can tax treaties be used to sever tax residency?

V. Are there Exit/Departure taxes imposed on severing tax residency?

http://www.citizenshipsolutions.ca/2016/12/15/the-difference-between-residency-for-tax-purposes-and-residency-for-immigration-purposes/

I. “Tax residency” may be based on …

Factors that jurisdictions use to determine that there is a sufficient connection to claim a person as a “tax resident” include:

- **Ordinarily resident** (requires some physical connection)
- **Deemed resident** (based on a minimum number of days – often 183)
- **Domicile** (intent to make a place a permanent home – permanent connection)
- **Citizenship** (USA only: no connection or no intended physical presence)

I. Okay, I'm a "tax resident". What does this mean?

A "tax resident" is subject to whatever "tax system" a country chooses to impose.

For all practical purposes, this is likely to be "worldwide taxation".

There are a few countries (Hong Kong and Singapore) that employ a system of "territorial taxation" (taxing only income earned in the country).

I. CRS: OECD chart defining “tax residence”

- “Tax Residency” is defined by each country
- An individual **can be a tax resident of more than one country**

Definitions of “tax residency” for 102 countries that have signed the CRS (as of May 23, 2018) – The U.S. has not signed the CRS.

http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/

I. FATCA: U.S. Tax Residency

- Income Tax Residency – Deemed Tax Residency – Based on:
- Citizenship
- Permanent resident status (EB-5 applicants should know this!)
- Substantial presence test*

***Can sever U.S. tax residency without being subject to Exit Taxes!**

II. Multiple Tax Residences

II. Multiple Tax Residences

Example of USA, Canada and Portugal – U.S. citizen, CDN tax resident decides to relocate to Portugal:

Meets definition of "tax residency" in USA Canada and Portugal:

USA – He was born there and is therefore a U.S. citizen

Canada – can be "ordinarily resident: living there < 183 days

Portugal – deemed resident if lives there > 183 days

Subject to full taxation in all three countries!

III. Severing “tax residency” – without a tax treaty tie breaker

(i) Severing “tax residency” without a “tax treaty” – must cease to meet the definition of “tax resident”

- Very difficult in a country like Canada that uses a test of “ordinarily resident” (requires almost complete eradication of your presence)

- Impossible for U.S. citizens unless they relinquish/renounce U.S. citizenship

Severing tax residency will trigger exit/departure taxes in Canada and USA!

IV. Severing “tax residency” – WITH a tax treaty tie breaker - 1

The curious case of the U.S. citizen

U.S. citizens can NEVER sever “tax residency” from the USA by using a “tax treaty tie breaker”

U.S. citizens can sever “tax residency” from another country by using a “tax treaty tie breaker”

This is because of the “savings clause” in U.S. tax treaties.

http://www.citizenshipsolutions.ca/2016/05/26/savings-clause-in-us-tax-treaties-guarantees-us-right-of-taxation-on-residents-and-citizens-of-other-nations/

IV. Severing “tax residency” – WITH a tax treaty tie breaker - 2

The interesting case of the U.S. “permanent resident” AKA Green Card Holder

A U.S. “permanent resident” CAN sever “tax residency” from the USA by using a “tax treaty tie breaker”. But due regard must be had to:

- How will this affect the validity of the “permanent resident” visa for immigration purposes; and

- Will this trigger the application of the S. 877A U.S. Exit Taxes?

http://www.citizenshipsolutions.ca/?s=tax+treaty+tie+breaker

IV. Severing “tax residency” – WITH a tax treaty tie breaker - 3

The usual case for those who are NOT “U.S. persons”

You can sever “tax residency” through “tax treaty tie breaker” provisions provided that:

1. You are a tax resident of both countries; and
2. The two countries have a tax treaty that contains a “tax treaty tie breaker”

Topsnik - A mystery story about: residence, tax, and “tax residency”

Meet Mr. Gerd Topsnik, a “permanent resident” of the United States:

A. If at first you don’t succeed!

http://www.citizenshipsolutions.ca/2017/05/21/topsnik-1-2014-what-it-means-for-the-greencard-taxresidency-and-tax-treaty-tiebreakers/

B. Then, please try again (even if it means paying the Exit Tax)!

http://www.citizenshipsolutions.ca/2017/05/22/the-teaching-of-topsnik-2-2016-greencard-expatriation-and-the-s-877a-exit-tax/

IV.“Tax treaty tie breaker” – Severing “tax residency” with Canada – Article 4 (2)

“2. Where by reason of the provisions of paragraph 1 an individual is a **resident of both Contracting States**, then the individual's status shall be determined as follows:

- (a) **the individual shall be deemed to be a resident only of the State in which the individual has a permanent home available**; if the individual has a permanent home available in both States, the individual shall be deemed to be a resident only of the State with which the individual's personal and economic relations are closer (centre of vital interests);”

In order to sever “tax residency” with the United States, the person would

Relinquish U.S. citizenship!

Note that “renouncing” is one way of “relinquishing U.S. citizenship”.

See Section 349(a) of the U.S. Immigration and Nationality Act!

http://www.citizenshipsolutions.ca/2015/03/03/renunciation-is-one-form-of-relinquishment-its-not-the-form-of-relinquishment-but-the-time-of-relinquishment/

But beware of the IRC Sec. 877A Expatriation Tax!

V. Exit and Departure Taxes imposed upon severing tax residency - 1

Canada has "departure taxes" that are triggered by severing "tax residency" from Canada

- Imposed on assets that escape Canada's jurisdiction

http://www.citizenshipsolutions.ca/2015/04/08/part-8-the-u-s-exit-tax-vs-canadas-departure-tax-citizenship-taxation-vs-residence-taxation/

V. Exit and Departure Taxes imposed upon severing tax residency - 2

The United States imposes it's S. 877A Exit Tax rules on U.S. citizens and "long term permanent residents" who are "covered expatriates".

They are draconian and operate primarily to attack assets located outside the United States (including non-U.S. pension plans).

http://www.citizenshipsolutions.ca/2015/04/01/renouncing-us-citizenship-how-the-s-877a-exit-tax-may-apply-to-your-canadian-assets-5-parts/

V. Exit and Departure Taxes imposed upon severing tax residency - 3

Oh my God! This U.S. citizen who is a tax resident of Canada appears to be subject to Exit Taxes in BOTH the U.S. and Canada, if he severs tax residency with each country!

Q. Can the U.S. Canada Tax Treaty be used to prevent double taxation?

A. I don’t know. But, let’s try!

V. Exit and Departure Taxes imposed upon severing tax residency - 4

Paragraph 7 of Article XIII of the Canada U.S. Tax Treaty:

7. Where at any time an individual is treated for the purposes of taxation by a Contracting State as having alienated a property and is taxed in that State by reason thereof, the individual may elect to be treated for the purposes of taxation in the other Contracting State, in the year that includes that time and all subsequent years, as if the individual had, immediately before that time, sold and repurchased the property for an amount equal to its fair market value at that time.

https://www.fin.gc.ca/treaties-conventions/unitedstates-etatunis-eng.asp

V. Exit and Departure Taxes imposed upon severing tax residency - 5

Question: Should he renounce U.S. citizenship before or after severing "tax residency" with Canada?

Answer: He should renounce U.S. citizenship first. This way he will get the "bump up" in basis for the purposes of Canada's Departure Tax.

(Notice that the answer depends on the Canada U.S. tax treaty!)

V. Exit and Departure Taxes imposed upon severing tax residency - 6

Global Mobility, Exit Taxes and the role of tax treaties:

Spain, Austria, Japan and more are examples of the tension between increased mobility and the desperation of governments to impose tax on capital movements when individuals change their “tax residency”.

The more mobility is possible, the more governments will try to prevent it it involves a change in “tax residency”.

https://www.lexology.com/library/detail.aspx?g=b01cd64e-3966-481e-8fa8-b5761c108363

V. Exit and Departure Taxes imposed upon severing tax residency - 7

Exit Taxes, Mobility and Treaties Within The EU:

The European Commission has held that “Exit Taxes” with the EU violate the “Freedom Of Establishment” clause found in Article 49 of the “TFEU” (Treaty On The Functioning Of The European Union).

https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/2012_exit_taxes_deloitte_ireland.pdf

Tax Treaty Tie Breakers and severing “domicile” for Estate and Gift Tax

There are “tax treaty tie breaker” provisions in Estate and Gift tax treaties. See for example the U.S./U.K. treaty (citizenship matters):

http://uniset.ca/misc/us-uk1980.html

http://www.citizenshipsolutions.ca/2018/05/27/tax-residence-for-us-estate-and-gift-and-tax-treaty-tiebreakers-with-overlapping-domicile/

Additional thoughts about treaties and other international agreements

Additional thoughts about treaties and other international agreements - 1

Automatic information exchange:

FATCA and CRS are AUTOMATIC information “exchange” agreements.

Mutual Assistance with respect to “information” requests:

Be aware of general information exchange agreements between your country of emigration and your country of immigration.

Additional thoughts about treaties and other international agreements - 2

The demise of the "revenue rule" – Be aware of treaties that allow for (1) information disclosure and/or (2) assistance with tax collection

"The traditional rule that a country will not enforce the revenue laws of another country and that no country is under an obligation to disclose financial information to foreign governments is very much on its way to extinction."

http://citizenshiptaxation.ca/wp-content/uploads/2017/12/vkrishna_October-29-2004-Demise-of-the-revenue-rule-in-tax-law.pdf

Additional thoughts about treaties and other international agreements - 3

When citizenship can be a defense to "tax debt enforcement"

Citizens of the following countries may have enhanced protections:

United States, France, Canada, Sweden, Netherlands, Denmark and soon Japan

https://isaacbrocksociety.ca/2016/11/01/dual-citizens-of-sweden-france-netherlands-denmark-canada-take-note-your-country-will-not-collect-for-the-u-s/

For example: Paragraph 8 of Article XXVIA of the Canada U.S. Tax Treaty

8. No assistance shall be provided under this Article for a revenue claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that

- (a) where the taxpayer is an individual, the revenue claim relates either to a taxable period in which the taxpayer was a citizen of the requested State or, if the taxpayer became a citizen of the requested State at any time before November 9, 1995 and is such a citizen at the time the applicant State applies for collection of the claim, to a taxable period that ended before November 9, 1995;

https://www.fin.gc.ca/treaties-conventions/unitedstates-etatunis-eng.asp

Additional thoughts about treaties and other international agreements - 4

Treaties of Commerce and Navigation with the United States – Citizenship matters!

Those who are **nationals** of a country that has a treaty of commerce and navigation with the United States are eligible for a EB-1 and/or EB-2 visa for business in the United States. This means that the person would NOT be subject to the burdens of the "Green Card".

http://www.citizenshipsolutions.ca/2018/05/20/considering-the-eb-5-visa-the-u-s-s-877a-expatriation-tax-demonstrates-that-not-all-taxresidency-is-the-same/

Additional thoughts about treaties and other international agreements - 5

Quality of the passport for mobility purposes:

https://www.passportindex.org/

https://www.henleypassportindex.com/assets/PI_2018_INFOGRAPHS_GLOBAL_180215.pdf

Global Entry type arrangements:

http://www.citizenshipsolutions.ca/2018/02/18/global-entry-nexus-and-the-effect-of-renouncing-us-citizenship/

Additional thoughts about treaties and other international agreements - 6

CFC Rules and the possible effect of tax treaties on those rules:

http://www.citizenshipsolutions.ca/2018/05/30/the-interaction-between-tax-treaties-and-the-cfc-rules/

Does a “savings clause” preserve the enforceability of domestic CFC rules?

Additional thoughts about treaties and other international agreements - 7

Question: Do the recent OECD concerns about CBI and RBI programs undermining the "Common Reporting Standard" have any validity?

Answer: No absolutely not. Neither citizenship nor the right to live in a country are determinative of "tax residency".

https://investmentmigration.org/articles/lack-connection-tax-residency-rbi-cbi-programs/

Additional thoughts about treaties and other international agreements - 8

Question: Does “citizenship” make a difference in the application of tax treaties?

Answer: Yes

Perhaps this should be a consideration in the consideration of “Citizenship By Investment” programs.

Additional thoughts about treaties and other international agreements - 9

In a "Global World" you must keep track of:

- Your "citizenship" portfolio
- Your "residence" portfolio
- Your "tax residency" portfolio
- How citizenship, residency and treaties impact your "tax residency!"

Speaking of “tax residency” …

Thanks to Helen Burggraf …

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Her work as a writer for “International Investment” is featured here:

http://www.internationalinvestment.net/author/helen-burggrafodmpublishing-com/

Further education: A tribute to Andrew Grossman's FATCA Bibliography …

"Andrew Grossman is a retired U.S. Foreign Service Officer who served in Seoul, Abidjan, London, Tehran, Algiers and Geneva. He holds the degrees of B.A. in Economics (Clark), LL.B. (Columbia), M.A. in L.I.S. (University College London) and of Licencié en droit européen et international, Maître & Docteur en droit (Louvain-la-Neuve) and is a member of the New York Bar. He now lives in Switzerland, where he writes on private international law issues, especially in the fields of nationality and tax."

http://www.nyulawglobal.org/globalex/Fatca_Citizenship_Based_Taxation.html#_4.2._Extraterritorial_Reach

In the 21st century …

In the 21st century, the most interesting thing about a person is "tax residency".

John Richardson, LL.B., J.D.

http://www.citizenshipsolutions.ca

http://www.twitter.com/expatriationlaw

john@citizenshipsolutions.ca