

50 Ways to Leave – Tax Considerations for Departing Canadian Individuals

Elan Harper MBA
February 28, 2019

Those of you of a certain age may remember the old Paul Simon standby “[50 Ways to Leave Your Lover](#)”. Sadly, in Canada, the current rendition of this classic seems to be “50 Ways to Leave Your Country”. Lately, it seems like almost as soon as we meet new people and get introduced with the words “international tax advisor” or “US tax lawyer,” the questions about tax and business motivated emigration start – whether at the coffee shop down the street, at the gym, or lunch with a friend. The combination of high Canadian taxes and falling competitiveness, contrasted against the recent tax rate cuts in the US, are driving one recurring question. How do I get out? Can I leave my family here in Canada, come home on the weekends, and still be outside the Canadian tax web? If I plan to go to the US, do I need to have a Green Card in the US to not pay tax in Canada anymore?

Let’s be clear. Most of these people are hard-working Canadians who own their own business, or in many cases, multiple businesses. They, and their businesses, have paid Canadian taxes all their lives, and they love this country, but enough is enough. And now, they are considering their options. So as the song goes, if you would like to make a new plan, just listen to me.

Just get yourself free

Residency is central to the taxation of Canadians. Regardless of whether you are a Canadian citizen or not, the Canadian Income Tax Act (the “Act”) limits Canada’s taxation of non-residents to income earned from employment in Canada, income from carrying on business in Canada, and income from the disposition of Canadian taxable property.^[1] So if you cease to be resident in Canada, in most cases, this will mean that you will no longer have to pay Canadian taxes or file a Canadian tax return. In contrast, as long as you are a Canadian resident, Canada will tax you on your worldwide income, and you will be subject to various filing and reporting requirements.

Importantly, while there may be planning which can be done in advance of your departure to minimize the financial impact, leaving Canada is rarely without cost. Under the Act, your departure from Canada will trigger a taxable deemed disposition of most of what you own, at its fair market value. A significant exception to the application of this rule is Canadian real estate that is held directly by the departing individual. Canadian real estate doesn’t get taxed on departure because an actual disposition of Canadian real estate will still be taxable in Canada even if you are non-resident at the time. In some cases, you may be able to give the Canada Revenue Agency (“CRA”) security against the taxes created on your departure, rather than an outright payment of the tax. Providing the CRA with security against taxes owing as a result of the deemed disposition which occurs on departure can be particularly attractive if there is a possibility that you may return to Canada.

The US, in contrast, taxes based on citizenship as well as on residency. If you are a US citizen, legal permanent resident (a “green card holder”) or a resident alien, the US will tax you on the totality of your worldwide income and assets regardless of whether you live in the US or abroad. If you are neither of the above categories, you are considered a “non-resident alien” and thus only subject to tax by the US

on specific types of US-source income, gains or activities and not subject to worldwide tax by the US unless you meet one of two criteria making you a resident alien. You are a “resident alien” of the US for tax purposes if you either hold a green card or if you pass the substantial presence test for the calendar year. At a high level, you will meet the substantial presence test if you are present in the US for at least 31 days in the current calendar year, and an aggregate of 183 days during the current and two preceding years, counting all the days of physical presence in the current year, one-third of the days in the first preceding year, and one-sixth of the days in the second preceding year.

So why does it matter so much if you are subject to worldwide tax as a resident alien of the US? The Canadian Income Tax Act has some high-level rules which speak to residency but is subordinate to all of the bilateral income tax treaties to which Canada is a party. If you ordinarily live in Canada than you are likely Canadian resident for tax purposes under the Act. If you spend 183 days or more a year here, than you may be deemed to be resident in Canada throughout a taxation year under the Act, but the fact that you did not spend 183 days or more in Canada doesn't make you non-resident. Importantly, if you are a non-resident of Canada, and a resident of another country for the relevant tax treaty (more about this later), you will be a non-resident of Canada for the Act – regardless of the Canadian 183 day deemed residency rule. Income tax treaties generally include tiebreaker rules which set out more specific rules for the determination of which country you will be considered a resident of for tax purposes. But these rules will only apply if you are covered by the Treaty, and for the Treaty to apply – you would need to be subject to comprehensive worldwide taxation in the other country.

Treaty Residency Tests

The first requirement is that the Treaty must apply – in other words, you must be a resident in two countries, and subject to worldwide tax in the US under one of the enumerated reasons. For an individual, the enumerated reasons include being liable to worldwide tax in a foreign country because of your domicile, residence, or citizenship. As discussed above, provided you are a resident alien in the US by either holding a green card or under the substantial presence test, then this requirement should be satisfied.

Assuming that you have spent enough time in the US to be a resident alien, then the Canada – US Treaty (the “Treaty”) should apply. The Treaty has a series of tests which are used sequentially to determine residency. If you tie break to one country or the other under the first test, then you wouldn't go on to the second test, etc. Realistically, however, we would generally seek to ensure that under all of the tests in the Treaty you should be found to reside in the country in which you want to be resident.

Assuming the Treaty applies, then we would next consider the tiebreaker rules in the Treaty. Paraphrasing liberally, the rules are as follow:

1. You will reside where you have a permanent home available to you. So if you want to be a resident in the US and not in Canada, then ensure you have a long term lease or have purchased a home of some description in the US that is continuously available for your use. Further, ensure that you have either sold or rented out your home in Canada under a long term agreement.
2. If you have a permanent home available in both countries or neither country, you will be a resident of the country where you have the closest personal and economic relations. These relations would include family and social, occupation, political, cultural or other activities, your place of business, etc. Note: it is not necessarily the number of ties that you have with one country or another, but also the depth of the ties. For example, if you have a spouse and or dependent children in one country, often that is where you would be found to reside.

3. If the country of your centre of vital interests cannot be determined, you will be a resident of the state in which you have a habitual abode. The concept of “habitual abode” includes frequency, duration and regularity of stays of a quality which are more than just transient. It is where you usually live.
4. If you have a habitual abode in both countries, or neither, then you will reside in the Country you are a citizen of; and
5. (e) if you are a citizen of both countries or neither of them, the competent authorities of the countries shall settle the question by mutual agreement.

As an aside, generally, you do not want to end up in competent authority as this process can be long, difficult to navigate and expensive.

Frequently Asked Questions

Questions that we often hear include:

1. **Do I need to have a Green Card to be found a resident of the US rather than Canada for tax purposes?**

This misconception is widely held. Immigration and tax are only fleetingly related, and your immigration status in the US will have little to do with your tax status, provided your status allows you to legally make a home in that country long enough to pass the substantial presence test discussed above.

2. **Can I be a resident for tax purposes in more than one country at a time?**

Yes. Because the domestic rules for each country don't necessarily line up, you may find that you are considered resident in two countries at the same time. Provided there is an income tax treaty between the countries which applies to you, then the tiebreaker rules in the treaty will generally break you back to one country or another. In cases where this does not happen, then you would end up relying on the use of foreign tax credits to reduce the potential incidence of double taxation. The moral of the story – know where you want to be resident and seek advice to ensure that you accomplish this.

3. **Can I choose to reside nowhere for tax purposes?**

As a practical matter, this is likely impossible. If you are a citizen of a country, like Canada (that taxes based on residence rather than citizenship), while it sounds like this theoretically should be possible, Canada is going to struggle to consider you a non-resident of Canada to the extent you are not resident somewhere else, and will likely argue that you are still Canadian resident. If you don't have a center of vital interest somewhere else than the CRA would find that your center of vital interest is likely still in Canada.

4. **My kids are in school here in Canada, and I don't want to move them. I want to live in the US Monday through Friday and then come home to my family on weekends. Isn't that sufficient to make me non-resident of Canada?**

Generally, no. While there are some circumstances where you could leave your family behind and still be found to have departed Canada, this rarely happens. The most likely scenario where this might apply would be within the case of an ongoing divorce or legal separation. So while the

song may say that “*you don’t need to discuss much*,” if you are planning a change of residency, likely you and your family have some talking to do to get them on board with a move.

5. If I move, will my business also have to move? And won’t this will be prohibitively expensive?

It is true that businesses can also change their residence, and this can be very expensive from a tax perspective, but most frequently we would advise that your Canadian business would carry on mostly without you, and you would move and incorporate a new business that functions mostly independently of your Canadian business. There are lots of tricks and traps which may apply in situations like this, so definitely a time to seek advice.

6. The CRA has a form online – Form NR73 Determination of Residence Status – if I fill this out won’t they tell me if I have become a non-resident of Canada?

Yes, the CRA will give you an answer, but this tool is a blunt instrument and can result in the wrong results, so we certainly wouldn’t recommend voluntarily filling this out, and especially wouldn’t recommend filling it out without professional advice.

Like the song says – *the answer is easy if you take it logically...*

So there you have it: a very high-level description of residency for tax purposes, but the actual determination of residence is involved, as is the determination as to how a change in residence will affect your tax picture. And for that, you need more advice than I can give you during a short meeting at the coffee shop down the street, between sets at the gym, or lunch. It’s complicated with trade-offs, but with proper advice, the benefits may be worth it. Like “50 Ways to Leave Your Lover” also states:

*You just slip out the back, Jack
Make a new plan, Stan
You don’t need to be coy, Roy
Just get yourself free
Hop on the bus, Gus
You don’t need to discuss much
Just drop off the key, Lee
And get yourself free*

So if you want to “slip out the back” from Canada’s tax net “and get yourself free,” make sure you take it logically.

^[1] Taxable Canadian property includes real estate in Canada, as well as Canadian resource and timber property held directly or indirectly.

