

FATCA – A Canadian perspective / commentary

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As many of you know, our firm has been very active in the “[FATCA](#)” space. A quick review of our last 10 blogs or so (which you may read by clicking [here](#)) should be obvious of that. Much of our activity has been ensuring that our clients and friends are ready when the July 1, 2014 implementation date arrives. In addition, we have been very active in responding and providing commentary to Canada’s draft legislation, which is necessary to give effect to the [inter-governmental agreement](#) (“IGA”) between Canada and the US that was signed by both countries in early February 2014.

However, the purpose of this short blog is not to further analyze the horrendously complex underpinnings of [FATCA](#) (which is US law), the IGA, the [draft Canadian implementing legislation](#) and the soon-to-be released Canadian guidance notes, but instead comment on some of the criticism that has flooded the “interwebs” regarding FATCA, the various Intergovernmental Agreements (“IGAs”) and specifically, Canada’s legislation.

Ceding sovereignty, constitutional issues, privacy, etc.

In today’s day and age, anyone with a microphone and access to the Internet can provide their opinion, and while free and open democracies need freedom of speech in order to function, sometimes the loudest opinions are inaccurate, incomplete and, in the FATCA world, inflammatory. And this is not surprising, because FATCA and the IGAs are frightfully complex and strongly emotive. Many FATCA commentators often state that Canada is giving up its sovereignty by cooperating with the US and signing the IGA. Others state that Canada should “stand up to FATCA” and refuse to cooperate with the US. Some go further and trumpet that Canada cannot cooperate with the US, since doing so would breach Canadian privacy laws. Additionally, some state that providing such information to the US would constitute a breach of Canadians’ Charter rights. All of these points of view are certainly worthy of debate. Frankly, I am not an academic or privacy or constitutional legal expert and will leave the debate to those who are. I am simply a tax practitioner, and in my world, I deal with positive tax issues, which is to say analysis of existing tax law, its application, and intended and unintended consequences. As a practitioner and not an academic, I do not frequently delve into normative tax issues, which is to say analysis of what tax law should be. As a practitioner, I live in the “real” world.

It is unfortunately a rare day when FATCA commentary is measured and balanced, but the late Canadian Finance Minister James Flaherty did that by penning an [op-ed piece](#) to a number of US newspapers. Fortunately, the IGA mitigates much of the direct negative effect of FATCA that would otherwise apply as Mr. Flaherty wrote about.

While I appreciate my next comment is more complex than spilled ink can provide for, the simple fact is that FATCA is a data information exchange medium designed to ferret out non-compliant US citizen taxpayers. The Canada/US tax treaty, in Article XXVII, has long contained broad information exchange provisions. FATCA and the IGA do not cause data exchange to be a new matter. The implementation of the IGA simply relies on existing treaty provisions to carry out the data exchange, which, as mentioned,

is designed to ferret out non-tax compliant US citizens. As such, if you are a US citizen who is already compliant with your US tax affairs, you have nothing to worry about.

Citizenship vs. residency taxation

While unique of developed countries, the US taxes the worldwide income of its citizens and has done so since the adoption of the 16th Amendment to the US Constitution in 1913. That is not new... what is relatively new is the US attempt to ensure that US citizens who are living abroad, or have foreign assets, are compliant with their tax matters. In my opinion, citizenship-based taxation is an archaic remnant of the early 20th Century, however, it is US law and there is nothing wrong with these efforts to enforce its laws (even if ill-suited to the 21st Century). US citizens who desire to keep their citizenship should not feel threatened by their government's attempt to "find them."

One group who may feel blindsided by citizenship taxation laws are "accidental Americans" (generally, a group of Canadians who have only recently come to realize that they are US citizens and thus have very complex tax filing obligations). I can certainly appreciate the fact that Canadians who are "accidental Americans" feel that their government – the Canadian government, given the fact that this group of people often do not identify themselves as Americans – may "cooperate" with the US government by exchanging data with the US that will identify them as US citizens. But, there is a solution to their plight: renounce their US citizenship. Admittedly, this is easier said than done, but renunciation with professional help is likely the solution if they are concerned about being disclosed. Yes, I am sympathetic to "accidental Americans" but the simple fact is: "it is what it is."

Thus, US citizens who live abroad or have foreign assets must comply with their tax obligations, like they always have. FATCA does not impose citizenship taxation... it already exists for US citizens. FATCA simply highlights how broad the reach of tax legislators and administrators can be in this increasingly transparent and mobile world. Accordingly, US citizens living abroad who are not compliant with their tax affairs need to get compliant soon!

Yes, FATCA is frightfully complex

FATCA is US law and not Canadian law. That fact alone might be tempting for me to ignore FATCA given the fact that I'm a Canadian tax practitioner and not a US trained practitioner. However, my attitude has been, and always will be, that a tax professional needs to fully invest themselves in the new trends, issues, legislation, etc. that will impact their clients. FATCA is one of those issues. I certainly find FATCA breathtakingly broad and horrifically complex. In a perfect world, everybody would voluntarily pay their taxes, there would be no tax evasion, and I would be 6'4" and play in the NHL (those who know me well can stop chuckling at this comment now). However, that does not stop me from trying to understand the breadth of its application and determine the impact that it will have on our clients.

It is my experience, however, that many Canadian tax professionals are simply unwilling to invest the time to understand the complexities and impact that FATCA will have on their clients. In my view, the Canadian tax community needs to invest in more fully understanding the future impacts that FATCA will have on their Canadian clients – there will be many.

FATCA is only the beginning

FATCA is very clever in its implementation and application. FATCA relies on the markets for its enforcement. It is much like a sales tax in that it is the payor of amounts that ultimately controls whether or not there is a withholding obligation. Other countries have taken note on how clever FATCA is and

have followed suit. For example, the UK has implemented domestic [FATCA-like legislation](#) (often referred to as the “son of FATCA”) wherein it will be collecting information with respect to its crown dependencies. In addition, the OECD has introduced a [common reporting standard](#), which it is suggesting that its member countries should follow with respect to data exchange. Surprise, surprise... the new OECD common reporting standard looks an awful lot like FATCA.

All this to say that FATCA is not going away and, instead, it appears as if the wildfire is spreading fast. Accordingly, and as earlier stated, I believe that Canadian tax professionals need to quickly ramp up their knowledge on FATCA and its many new sprouts that are appearing throughout the world.

I'm sure that this short piece will not influence the position of people who are railing against FATCA, but hopefully, over time, cooler heads will prevail and people will realize that FATCA is not going away any time soon. Instead of lashing out at the world or burying your head in the sand, I respectfully submit that people should try to understand the purpose of FATCA and the intended and unintended impact that it will have. Only by taking the time to understand FATCA, the IGAs and the global trend of information reporting, will we as practitioners be able to affect the evolution of the law and thereby direct it to its intended result and mitigate its unintended consequences.