

Recent CRA Commentary on LLCs and Services PEs

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Canadian Treatment of LLCs

- § Former CRA administrative position: LLCs are not “Residents” for purposes of the Canada US Treaty
 - § Therefore not entitled to treaty benefits
- § Fifth Protocol of Treaty (effective 2010)
 - § New Article IV(6)
- § TD Securities (USA) LLC v The Queen (April 8, 2010)
 - § Court held that pre-Protocol LLCs are “Residents” for treaty purposes

LLCs Under Article IV(6)

§ New Article IV(6) is intended to allow FTEs (particularly LLCs) to access Treaty benefits

§ Example:

§ USCO owns US LLC, which in turn owns Canco

§ Dividend paid to LLC by Canco entitled to treaty relief – 5% withholding tax

§ Anomalies remain

§ Distributions from ULCS

Distributions from ULCs

- § Dividends paid by a Canadian ULC to a US shareholder are denied treaty benefits under new Article IV(7) “anti-hybrid rule”
- § Solution: Two Step Distribution
 - § ULC declares a stated capital increase
 - § Deemed dividend for Canadian purposes
 - § ULC then reduces its PUC
 - § Non-taxable for Canadian purposes
- § Per CRA, this works for US-C corps, US-S corps, and partnerships with US partners

Two Step Distribution to LLCs

- § However, CRA position is that two-step distribution does not work for LLCs
- § Compare with CRA position on US-S corps and foreign partnerships
- § CRA position is that new Article IV(6) overrides TD Securities

Services PEs

- § Unique feature of Fifth Protocol –
 - § New services PE rule in Article V(9) whereby mere provision of services, without fixed base, can create a PE
 - § Rolling 183 day criteria
- § Number of interpretive issues remain unresolved
 - § In all scenarios, assume 183 day test is met

PE Scenario

- § Scenario 1: Services provided by unrelated non-resident
 - § Unrelated US resident service provider is hired by US parent corp to provide services to Canadian subsidiary
 - § Canadian PE for both US entities
- § Scenario 2: Services provided by related non-resident
 - § Related US resident service provider is hired by US parent corp to provide services to Canadian subsidiary
 - § Canadian PE for both US entities, since both are “providing” services to Can Sub
 - § “providing”//“performing”

PE Scenarios

- § Scenario 3: Services provided by arm's length resident of Canada
 - § US corp engaged to provide services to Canco
 - § US corp subcontracts the work to unrelated Canco2
 - § No Canadian PE, provided arm's length fee charged by Canco2
 - § Same analysis if Canco2 related to US corp
 - § Unclear why fee is relevant

PE Scenarios

- § Scenario 4: Services provided by partnership in Canada
 - § US partnership to sell services to Canco
 - § US partnership subcontracts services to Can partnership
 - § US partnership and Can partnership are members of global network
 - § US partnership does not exercise supervision and control over Can partnership
 - § No Canadian PE, so long as Can partnership is receiving an arm's length fee

PE Scenarios

§ Scenario 5: Secondment

§ US parent corp second employee to Canadian subsidiary

§ Employee remains on US payroll, but US parent is reimbursed by Canadian sub

§ No PE, since US parent not considered to be providing services in Canada

§ Scenario 6: Secondment for profit

§ Same facts as scenario 2 (secondment to Canadian sub), but US parent charges fee to Canadian sub

§ Canadian PE for US parent