PRIVATE EQUITY AND INTERNATIONAL WEALTH MANAGEMENT

Recent Changes to Canada's Immigration Policy and Related Tax Rules

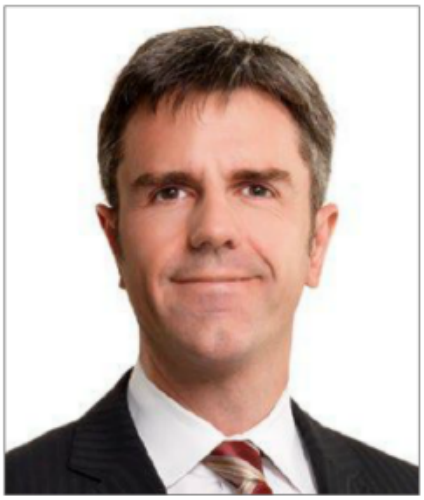
By Robert Worthington and Prof Robert Anthony

Canada is a capital-importing nation and is generally open to immigration. However, high net-worth individuals moving to Canada should be advised of changes made by the Canadian government to its immigration incentive programs. Recent changes include the repeal of both the tax holiday for immigration trusts and the investor class immigrant program, but new opportunities as well.

...next page

The Canadian Income Tax Act has non-resident trust rules (often referred to as the "NRT rules") that may deem a trust to be resident in Canada where it would be factually resident elsewhere. Under the NRT rules, a deemed-resident trust is subject to Canadian tax on the trust's worldwide income. The "immigration trust" was one of the exceptions to the NRT rules. The NRT rules apply where there is a Canadian "resident beneficiary" of the trust, or alternatively a "resident contributor" to the trust. The legislative concept of "contribution" to a trust is quite broad, and captures most transfers of property and loans to a trust, other than certain arm's length transfers. Since a trust may be deemed resident in Canada but factually resident in another country, a dual residency issue may arise.

If a trust is resident in one country under a tax treaty between that country and Canada, can the NRT rules validly deem the trust to be resident in Canada notwithstanding the treaty? Domestic Canadian legislation states that NRT rules can override treaties. This domestic override is inconsistent with Canada's approach to treaty negotiation in other contexts. For example, the anti-deferral regime in the controlled foreign corporation rules is explicitly carved out of Canada's treaties. However, the interesting legal issues as to the effect or validity of the unilateral treaty override with respect to the NRT rules have not yet been considered by the courts.



Robert Worthington

Prof. Robert Anthony

If the NRT rules deem a trust to be resident in Canada, the trust will be subject to tax at a current federal rate of 42.92%, assuming the trust has no income earned in a province, and may in some cases be subject to provincial tax. Generally, distributions by a trust to beneficiaries are deductible to a trust and taxable in the hands of a beneficiary, but there are restrictions to such deductions in the case of a deemed resident trust. The calculation of the available deduction depends on various factors including whether the beneficiary is resident in a country with which Canada has a tax treaty. Distributions made by the trust to a non-resident beneficiary may be subject to withholding tax at a rate of up to 25%.

As mentioned, one important exception to the NRT rules that was available until recently was the "immigration trust". Where the person who created a trust had not been a Canadian resident for 60 months, the trust would not be deemed resident in Canada until after the 60-month period expired. In short, the trust enjoyed a 5 year tax holiday from the time of the immigrant's arrival in Canada. Unfortunately, the immigration trust exception was repealed in the 2014 budget, and so this structure is no longer available. Despite the tax community's efforts to persuade the Canadian government to grandfather existing immigration trusts, no such relief was provided. Apparently the government believed this tax holiday was no longer useful.

In the same budget that the immigration trust exception was repealed, Canada cancelled its investor immigrant program. Under that program, an investor class immigrant could obtain favoured application conditions by providing an $800,000 interest-free loan to the government (most of which could be financed by a Canadian bank). The relatively low cash requirement made this program very attractive compared to similar programs in other countries. The cancellation of the program was controversial. A large number of Chinese applicants filed a class action lawsuit against the government in response to their pending immigration applications being cancelled.

Although the Canadian government has cancelled the investor class immigration program, new opportunities are available under programs for high net worth individuals and entrepreneurs. The "Start-up Visa Program" requires an investment commitment from an angel investor group or venture capital fund of at least CAD $75,000 or CAD $200,000, respectively. Another program, not yet in effect, is the Immigrant Investor Venture Capital Program, which requires a personal net worth of CAD $10,000,000 or more and a CAD $2,000,000 investment.

Similarly, the repeal of the immigration trust rule does not eliminate all tax planning opportunities for immigrants using trusts. For example, it may be possible for a non-resident contributor to establish a so-called "granny trust" so long as all contributions are made at a non-resident time. Additionally, other civil law entities such as private foundations may fall outside the scope of the NRT rules and create tax deferrals. It goes without saying that it is always worthwhile to seek tax advice for pre-immigration planning.

GGI member firm
Shea Nerland Calnan LLP
Tax, Law Firm
Calgary, Canada
Robert Worthington
E: rworthington@snclaw.com
W: www.snclaw.com

GGI member firm
Anthony & Cie
Auditing & Accounting, Tax, Advisory, Corporate Finance, Fiduciary & Estate Planning
Valbonne, Sophia Antipolis, France
Prof. Robert Anthony
E: robert@antco.com
W: www.antco.com