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How snowbirds can avoid the IRS net

TAXtalk

Canadians who do not otherwise have ties to the United States from an immigration or tax perspective but who live there for months at a time may end up being taxed as U.S. residents, unless they take precautionary measures.

If you regularly spend in excess of 120 days but less than 183 days *cumulative* in the U.S. each calendar year, you may be deemed to have a substantial presence, and are therefore a U.S. resident for immigration and tax purposes. This could, for example, include snowbirds who spend the months of January to April and other vacation days throughout each year in warmer parts of the U.S. such as Arizona, California or Florida.

If snowbirds exceed the Substantial Presence Test (see below) and are deemed to have a “substantial presence” in the U.S., it is prudent for them to demonstrate and establish closer connections with Canada for tax purposes, to preclude U.S. resident status.

Required tax and information returns

Form 8840 – Closer Connection Exception Statement for Aliens at <http://www.irs.gov/pub/irs-pdf/f8840.pdf>. Please be sure to read the General Instructions provided by the Internal Revenue Service that accompany the above link.

Who must file

We highly recommend that any snowbirds who are close to or exceed the Substantial Presence Test and Calculation outlined below file Form 8840 with the IRS. This will help establish that they have met the Closer Connection Exception and are not U.S. resident taxpayers by reason of that exception. Filing Form 8840 is a proactive measure that demonstrates stronger or closer family, economic and tax ties to another tax jurisdiction, i.e. Canada.

Substantial Presence Test (for 2012)

An individual is considered a U.S. resident taxpayer if physically present in the U.S. for at least:

- 31 days during 2012; and
- 183 *weighted* days during the period of 2012, 2011 and 2010 – counting 100% of the 2012 days, plus one-third of the 2011 days, plus one-sixth of the 2010 days.

For example:

Mr. and Mrs. Snowbird reside in Victoria, B.C., but spent the following time in Arizona – 125 days in 2012, 100 days in 2011 and 90 days in 2010.

Mr. and Mrs. Snowbird were in the U.S. for more than 31 days in 2012; however, the subsequent calculation determines that they were in the U.S. for only 173 weighted days:

$$125 \text{ days} + 33.3 \text{ days } (100/3) + 15 \text{ days } (90/6) = 173 \text{ days}$$

Thus, they did not have a substantial presence in the U.S. for 2012. However, if Mr. and Mrs. Snowbird spend 126 days in Arizona in 2013, they will be deemed to have a substantial presence in the U.S. for 2013:

$$126 \text{ days} + 42 \text{ days } (125/3) + 17 \text{ days } (100/6) = 185 \text{ days (and they were in the U.S. for more than 31 days in 2013).}$$

For 2013, both Mr. and Mrs. Snowbird should file Form 8840 with the IRS for the 2013 tax year to establish and affirm Canada as their tax jurisdiction. In fact, it would be prudent and proactive for them to file Form 8840 for 2012 given they have spent a significant amount of time in the U.S. in recent years.

By not filing Form 8840 and as the Snowbirds had substantial presence in the U.S. in 2013, they will be deemed to be U.S. resident taxpayers and subject to the same reporting obligations as a U.S. citizen, subject to the Canada-U.S. Tax Treaty “Tiebreaker Rules” (which are beyond the scope of this article). Please speak to a cross-border tax expert to discuss these rules further.

Investment and Wealth Planning Considerations:

There are no additional investment and wealth planning considerations as long as Form 8840 is filed when substantial presence tests/calculation are exceeded.

The above information is intended to provide general guidance only and should not be construed as legal or financial advice. It is highly recommended that where it has been determined that you have, or may have, U.S. tax ties, you should speak with competent cross-border tax, will and estate planning experts who regularly engage in cross-border planning. This article first published in November 2012.

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