

Spring 2014

# Planning Matters

## Canadian Snowbirds Beware!

Virtually all Canadian snowbirds know they must keep track of how many days they are in the US and outside of Canada because “bad” tax and non-tax surprises await those who are in or out of either country too long. Given the importance of “day count,” why do so few travellers (relatively speaking) trigger an examination based on the amount of time they have spent in either country?

The answer may come as a shock to most (and I would guess nearly all) snowbirds: *prior to 2014 neither the US nor Canada knew how many days someone had been within its borders.* That will change in 2014 as new rules go into effect. All snowbirds need to know how this change will affect them.

### **The “Entry/Exit Initiative”: Changes in 2014 every Canadian snowbird needs to know**

***Beginning June 30, 2014, both Canada and the US will implement the final phase of the Entry/Exit Initiative of the Perimeter Security and Economic Competitiveness Action Plan in which both countries will share information on people entering and leaving the respective country.***

In other words both countries will, for the first time, be able to *independently* determine the number of days spent in each country. What this means for Canadian snowbirds is that they must be much more vigilant than they have in the past about counting and reporting their days in and out of each country. Starting next year, both Canada and the US will both know, in real time, which country snowbirds have been in and for how long.

The Entry/Exit Initiative and the Perimeter Security and Economic Competitiveness Action Plan is part of a larger cooperative effort between Canada and the US called *Beyond the Border: A shared Vision for Perimeter Security and Economic Competitiveness* announced on February 4, 2011. The stated purpose of the effort is to

promote security and economic competitiveness through various means.

### **The “good old days” of lax enforcement of “day count” will end in 2014**

Before the implementation of Phase IV of the *Entry/Exit Initiative*, each country counted individuals’ day presence *only* when they entered the country, and not when they left the country. Further, this information was rarely shared between the two countries. Consequently, typically neither country knew how long someone had been present within its borders.

In the good old days, if an individual wanted to obtain an accurate accounting of the days in (or out) of both countries, he would have to contact both the US Customs and Border Protection (“USCBP”) and the Canadian Border Services Agency (“CBSA”) and request border entry data. Only after receiving both reports and cross-referencing such data could an individual be sure of how many days they were present in Canada or the US.

Although there are a few months before the final phase of Entry/Exit Initiative goes into force, much of the data on border crossings is presently on the USCBP website (<https://i94.cbp.dhs.gov/I94/request.html>). I encourage you to check out the information for yourself. All you need is your personal information (including passport number) and acknowledge that you are not accessing the information for impermissible purposes, and you’ll be able to see your border crossing details.

Note, the data is a bit incomplete right now. However, that will surely improve as the final phase of the Initiative goes into effect in July.

## "Bad" tax and non-tax surprises that can result from being in or out of the country for too long

There are generally five bad surprises that can result from being in the US or out of Canada for too long.

All of the following "bad" tax and non-tax surprises hinge on whether an individual is "resident" or not. Those who expect consistency and logic in law (whether it be tax, immigration, or health services) will be disappointed, though probably not surprised, to learn the definition of "resident" is different in each of the following examples.

The following are the highlights (or "lowlights" as it were):

### **1. Banned from travel to US if unlawfully present.**

Perhaps the most draconian consequence to spending too much time in the US is to fall into the "unlawful presence" rules. Canadians who remain in the US for more than 180 days in a rolling twelve month period risk being deemed unlawfully present, the consequences of which are: a) a 3-year travel ban if unlawfully present for between 180 and 365 days; and b) a 10-year travel ban if unlawfully present for more than 365 days.

### **2. Liability for US income tax on worldwide income.**

The US taxes US citizens and "US residents" on their worldwide income. If the snowbird is present in the US for too many days he risks becoming deemed a US

resident and therefore subject to tax on his worldwide income.

**3. Liability for US estate tax on fair market value of worldwide assets.** The US also taxes US citizens and "US residents" on the fair market value of their worldwide assets at death. Unfortunately the definition of "US resident" for estate tax is fundamentally different than the definition for US income tax purposes. The result is that the heirs of the uninformed snowbird can find their inheritance subject to the US estate tax.

**4. Liability for Canadian departure tax.** Canada taxes its residents on their worldwide income. Once a Canadian resident is no longer resident he is deemed to have disposed all of his assets (subject to exceptions), recognize the gain on those assets, and pay tax on that gain. Whether an individual is no longer resident is a facts and circumstances test; however, a big factor in that analysis is day count. Therefore, the snowbird who spends too much time in the US risks a nasty Canadian tax surprise.

### **5. Loss of provincial health care.**

Canadian residents are entitled to participate in provincial health services. Once an individual is no longer resident of the particular province, he loses this entitlement. Of course, the rules for "residency" in the health care context are different than those discussed above.

## Conclusion

In light of the fact that neither the US nor Canada has historically known an individual's day count, it is not surprising that day count has not usually been a triggered IRS or CRA examination. We have all been required to self-report our days and residence status to the appropriate authorities. It is as though we have all been lulled into the quotidian task of grading our own homework and have been generously giving ourselves high marks, regardless of whether we deserve them or even completed the assignment at all. In 2014, the teacher will begin to grade our homework... and she knows the answers.

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