

New Protocol to the Canada-US Tax Treaty: Taxpayer Emigration

One of the notable features of the Fifth Protocol (the “**Protocol**”) to the *Canada-US Income Tax Convention* (the “**Treaty**”) are the new provisions that are designed to prevent the double taxation of pre-emigration gains on property held by an emigrant.

Under current rules, the Treaty allows both Canada and the US to tax their residents in respect of all of their capital gains. However, in Canada, when an individual emigrates, he or she is generally deemed to dispose of his or her capital property for fair market value proceeds at the time of emigration with the result that he or she must recognize (and be taxed on) accrued gains upon departing from Canada (this tax is commonly referred to as the “departure tax”). The problem is that the Treaty does not currently contain any provisions that would relieve a Canadian taxpayer from US taxation in respect of the same gain in the event that the taxpayer becomes a resident of the US and disposes of the property at a later date.

The new rule contained in the Protocol allows individuals who are subject to the “departure tax” in respect of the deemed disposition of certain assets to opt to be treated in their new country of residence as having disposed of and reacquired the property for fair market value proceeds at the time of changing residence. As a result, gains that have been recognized and subjected to tax in a taxpayer’s original jurisdiction of residence will not be subject to double taxation. Any post-emigration gains on the property would be taxable in the new country of residence.

Upon ratification of the Protocol, this rule will apply to emigrations that took place after September 17, 2000 (the date on which the US Treasury and the Canadian Department of Finance announced their agreement on this issue).

A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

ABOUT McMILLAN LLP'S TAX LAW GROUP

Our Tax Law Group ranks among the best in Canada and includes individuals who have been recognized internationally as leading advisers in The Martindale-Hubbell Legal Directory and The Canadian Legal LEXPERT Directory. Always sensitive to our clients' business objectives, we provide comprehensive and pragmatic Canadian tax advice on a wide variety of matters, including corporate reorganizations, mergers and acquisitions, securities, structured financing and derivative products, leasing, and cross-border transactions. Routinely advising clients on compliance matters, we are experienced in negotiating disputes with revenue authorities and litigating tax issues.

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