



TaxNewsFlash

Canada

CRA Further Clarifies COVID-19 Travel Restriction Relief

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Individuals and employers affected by international travel restrictions should review the CRA's recent clarifications on extended cross-border relief measures. In the new guidance, the CRA clarifies the meaning of "travel restrictions" and the process for requesting interest and penalty relief for certain Canadian residents who ordinarily work in the U.S. and are awaiting refunds from the IRS to pay their 2020 Canadian tax obligations. The CRA also says that, generally, it will consider relief on a case-by-case basis for Canadian residents who ordinarily work in a country other than the United States, and for foreign non-U.S. resident employees who are working in Canada as a result of travel restrictions. The CRA also advises that it intends to provide additional guidance for affected individuals and employers for their 2021 tax years.

The CRA provided these clarifications to CPA Canada in response to questions on cross-border tax relief announced on April 1, 2021 for certain individuals and employers. The CRA also considers several taxpayer situations as part of its answers, and advises individuals and employers to get in contact about relief for other specific situations.

Background

As a result of COVID-19, countries around the world including Canada imposed restrictions on travel that have disrupted normal business operations. In response, the CRA released guidance in May 2020 to provide relief for employees and businesses affected by these restrictions. This guidance generally expired on September 30, 2020.

In the guidance, the CRA advised individuals who were visiting Canada at the time when travel restrictions were imposed—and who remained in Canada solely because of these

restrictions—that they would not be deemed to be resident in Canada for tax purposes solely for that reason.

The CRA also noted in its initial guidance that it would not consider certain non-resident entities that carry on a business in Canada and reside in a jurisdiction that Canada has a tax treaty with, to have a permanent establishment in Canada only because their employees performed their employment duties in Canada solely as a result of travel restrictions. The CRA also provided similar relief for non-resident entities that resided in treaty jurisdictions in respect of potential “agency permanent establishments” and “service permanent establishments” issues arising due to travel restrictions.

At that time, the CRA further stated that U.S. residents who were present in Canada for more than 183 days solely due to travel restrictions would not have those days counted towards the 183-day test in the Canada-U.S. income tax treaty to determine whether they are taxable in Canada on their employment income. The CRA also initially announced additional relief measures for non-resident persons who sought requests to waive certain withholding requirements under Regulation 102 and 105 of the *Income Tax Act*, and for non-resident vendors who disposed of certain taxable Canadian property but who were still awaiting a Section 116 certificate. The CRA also provided guidance on corporate residency, withholding obligations for non-resident entities, residency of foreign affiliates for surplus purposes and the status of “qualifying non-resident employees, which expired on September 30, 2020. For full details on the CRA’s guidance, see *TaxNewsFlash-Canada* 2020-50, “[COVID-19 — New CRA Relief Addresses Travel Restrictions](#)” and *TaxNewsFlash-Canada* 2020-70, “[CRA Further Extends Travel Restrictions Relief](#)”.

The CRA updated its guidance to clarify its interpretation of “travel restriction” and to provide certain withholding, remittance and reporting relief to certain non-resident employers, on October 15, 2020. This additional relief, which was not subject to the September 30, 2020 expiry date, could apply until December 31, 2020 at the latest. See *TaxNewsNow*, “[CRA offers additional relief for travel restrictions](#)”.

The CRA provided details for certain cross-border employees on how to properly file their 2020 Canadian income tax filings on April 1, 2021, including using either the “previous year approach” or the “treaty-based approach”, depending on their circumstances. In addition, the CRA also extended its previous administrative relief for U.S. resident employees working in Canada (to December 31, 2020 from September 30, 2020), and for individuals who may otherwise meet Canada’s individual residency test (to the earlier of the lifting of the travel restrictions and December 31, 2021, from September 30, 2020). For details, see *TaxNewsFlash-Canada* 2021-18, “[CRA Offers Additional COVID-19 Travel Restriction Relief](#)”.

Individual Canadian income tax residency

"Lifting" of travel restrictions

In its response to CPA Canada's questions, the CRA clarifies that the date that the travel restrictions are considered lifted is a question of fact, for purposes of determining eligibility for relief of an individual's Canadian tax residency. In its current guidance, the CRA advises that the supplemental guidance is effective to the earlier of the date of the lifting of the travel restrictions and December 31, 2021.

Meaning of "travel restriction"

The CRA clarifies that, where a Canadian followed the government's recommendation to return to Canada during 2020 due to COVID-19, and remained in Canada for the duration of the year, it would consider all of the days in 2020 that the individual was present in Canada to be "as the result" of the travel restrictions for purposes of determining eligibility for relief for purposes of determining the individual's Canadian tax residency. The CRA noted however that, in this case, the government's travel recommendation must be the sole reason for returning to Canada.

Cross-border employment income

Canadian resident employees

The CRA also provides guidance in situations where a Canadian resident individual receives employment income from a U.S. employer that the CRA considers to be sourced from the United States for 2020 (under the "previous-year approach" described in the April 1, 2021 supplemental COVID relief guidance). Where the IRS later refunds excess withholding tax, the CRA advises that individual must adjust the amount of foreign tax credit they claim in Canada on their Canadian tax return. The CRA acknowledges that this situation may occur where an individual's employer continued to withhold taxes as if the income was earned in the United States and the IRS refunds the excess withholding after a U.S. tax return is filed, based on actual U.S. source income.

The CRA notes that, where individuals use the treaty-based approach to report employment income (instead of the "previous-year approach") and are unable to pay the full Canadian tax amount owing until after they receive a refund of U.S. withholdings, they may request relief for their entire Canadian tax balance and not solely the amount attributable to the U.S. refund. However, the CRA indicates it will grant relief on late payment interest and penalties on that excess amount based on its own merits and separately from the U.S. refund portion of the request.

The CRA also advises that an individual who is waiting for a U.S. refund to pay their Canadian balance due is not required to pay any assessed penalty or interest prior to submitting a request for relief. Although there will be no automatic hold placed on

collections notices, the CRA encourages affected individuals to contact the CRA's debt management call centre.

The CRA states that, to show the validity of an individual's contributions in 2020 to the United States under the Federal Insurance Contributions Act (FICA), a Certificate of Coverage would generally be sufficient. Where these contributions are valid under the FICA, an individual may claim a foreign tax credit in Canada for the FICA contributions made (that weren't subsequently refunded).

KPMG observations

Note that individuals who are cross-border commuters would typically not have applied for a Certificate of Coverage. An individual in this circumstance could likely prove FICA contributions using their:

- U.S. W2 Wage Statement
- U.S. pay statements and
- U.S. tax return.

The CRA further notes that its guidance released on April 1, 2021 generally applies to Canadian residents who ordinarily perform their employment duties in the U.S. However, the CRA says it may provide relief on a case-by-case basis for Canadian resident employees who were forced to perform their employment duties from their home in Canada instead of at the office of a location other than the United States.

The CRA indicates that it will consider the following relief for Canadian residents employed in a foreign country other than the U.S., on a case-by-case basis:

- The sourcing of compensation related to days worked from a Canadian home because of travel restrictions
- Penalty and interest relief on Canadian tax paid until a refund is received from the foreign (non-U.S.) employer
- Foreign tax credit relief for mandatory social security paid
- Relief for contributions to certain foreign retirement plans
- Foreign tax credit relief for other countries that will refuse to give up the right to tax.

U.S. resident employees working in Canada

The CRA clarifies that, in calculating whether the 183-day test for employment income in the Canada-U.S. income tax treaty has been met, no days in Canada in 2020 as a result of a travel restriction will be counted towards the 183-day test in respect of the individual's

2020 or 2021 tax year (for purposes of counting the days in any 12-month period under the test). An individual who remained in Canada beyond December 31, 2020 must count each subsequent day in Canada for purposes of the 183-day test.

Other resident employees working in Canada

The CRA also confirms that it will provide extended relief on a case-by-case basis to determine whether individuals meet the days-of-presence test for taxing employment income for duties performed in Canada as set out in Canada's other tax treaties. Specifically, the CRA states that it will consider whether an extension of the relief period to December 31, 2020 (from September 30, 2020) that would not count days in Canada solely as a result of travel restrictions for purposes of the test, is appropriate in each circumstance.

International waivers and certificates of compliance

The CRA states that, when applying for international waivers (regulations 102 and 105, and Form RC473, "Non-Resident Employer Certification"), days spent in Canada's mandatory 14-day quarantine period should not be counted as part of the days in Canada or the service period. Specifically, the CRA clarifies that this relief applies only to the time that an individual is in Canada but cannot work, and would not apply for a person working during this period.

Non-resident employer certification

The CRA says that, for purposes of the 45 days worked or the 90 days present tests for the definition of a qualifying non-resident employee, it will not count the days that a non-resident individual is working or present in Canada and cannot return to their country of residence due to the travel restrictions, as long as the employee returns to their country of residence as soon as they can. In this case, the CRA states that the threshold for returning "as soon as they can" is generally the same as the requirement to return to the country of residence for eligibility for income tax residency relief.

Other issues

The CRA indicates that it is prepared to consider relief on a case-by-case basis for other issues including:

- Whether an individual's personal choice to avoid non-essential travel during the pandemic, or their employer instruction to avoid non-essential travel, is considered a "travel restriction"
- The treatment of individuals who intended to establish U.S. residency but did not because of travel restrictions and are therefore not considered a resident of any jurisdiction

- The treatment of Canadian days for purposes of the 60-month rule for departure tax.

We can help

Your KPMG adviser can help you assess the effect of the CRA's guidance on cross-border tax issues caused by travel restrictions put in place because of COVID-19, and provide guidance on how your business might be affected in the future. We can also keep you abreast of any tax-related changes related to COVID-19 that you'll need to consider in the days and weeks ahead. For more details, contact your KPMG adviser.

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