Focus CROSS-BORDER LAW

Tax implications of retiring with a green card

Veronika Chang

Canadian citizens who are resident in the United States and return to Canada should always seek legal counsel regarding both their immigration and tax status. Failure to do so can result in unpleasant surprises. Let's consider two Canadians who hold green cards and come back to this country after they retire.

They both lived in the U.S. for 10 years, but Jack moved back to Canada eight years ago and Jill returned three years ago. They are now retired, have minimal income and own investments. Like many people in this boat, neither of them has filed a U.S. tax return since they've been back and neither has surrendered his or her green card. This is not unusual.

On the surface it appears that the "greater offender" is Jack because he has been delinquent with the U.S. tax for a longer period. But in the eyes of the IRS it's Jill, and here is why.

Both are Canadian citizens who were considered lawful permanent residents (LPR) during the years they lived and worked in the United States. They eventually came back home, but did not get a re-entry permit and did not properly surrender their green card which requires signing form I-407 — Abandonment of Lawful Permanent Resident Status — when they left the U.S.

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There is no penalty for failing to properly surrender your green card, but if you are considered a long-term resident who has ended U.S. residency, you may face the exit tax. A long-term resident is defined as a lawful permanent resident of the U.S. in at least eight of the past 15 years, ending with the last year of your status as a long-term resident. But you are not treated as an LPR for any particular year if you are considered a resident of another country under a tax treaty and have not waived the benefit of that treaty.

American customs and border protection officers may determine that abandonment took place at the port of entry. The officers could ask the LPRs to surrender their green card by signing form I-407. Many people comply without realizing that they do not have to sign this form at all. During recent travel to the U.S., perhaps on holiday, an officer at the port of entry says Jack and Jill have abandoned their LPR status and must sign form I-407, so both comply, but with very different consequences.

Jill is definitely considered a long-term resident. She was an LPR in at least 10 of the past 15 years, but Jack's status as a long-term resident is murky. He can claim that he should be treated as a resident of Canada (under the treaty) for the past eight years and not treated as an LPR for those years.

Generally, to claim the treaty benefit you must file form 8833 — treaty-based return position disclosure under section 6114 or 7701(b), along with form 1040NR, which is the U.S. non-resident alien income tax return. This means you are treated as a resident of Canada under the treaty. However, there does not appear to be any rule denying treaty benefits for failing to file form 8833. This is in contrast to form 8840 which must be filed timely for you to be considered a non-U.S. tax resident. Such filing means you have established a closer connection to another country, but late filing of this form renders you ineligible for the closer-connection exception.

Thus, Jack can arguably file form 8833 to be treated as a resident of Canada for the past eight years. He would face a penalty of US$1,000 for each year he has failed to file this form, and in his case that is US$8,000, which could be significantly lower than the exit tax if he were considered a U.S. resident. But the penalty may be waived if he shows there was reasonable cause for not filing this form and he had acted in good faith.

Jack may have another option, too. He may be able to use the IRS's Streamlined Foreign Offshore Procedure which offers no penalty for those who comply with its terms. By making himself a resident of Canada for at least one year, Jack would not be considered an LPR who is subject to U.S. exit tax, and unlike Jill, he will not be treated as having sold all his property the day before he signed form I-407.

The problem for Jill? For immigration purposes, she has been non-compliant with her LPR status for three years, as opposed to Jack being non-compliant for eight years. Neither of them has lived in the U.S. during that time. For tax purposes, Jill has also been non-compliant for three years compared to Jack's eight, so she looks to be the "lesser offender" on both the immigration and tax fronts. However, Jill is subject to the U.S. exit tax while Jack is not.

To avoid winding up like being Jill, anyone planning to abandon their U.S. permanent residence should seek the advice of an advance planning legal counsel to co-ordinate their immigration and tax planning. This is important when a person with LPR status is required to file forms so they will be considered a non-U.S. resident.

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Visas: When structuring a company, pay attention to immigration issues

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tions on each side of the border, will establish the firm foundation upon which your company can conduct its cross-border operations

Know your goods and people

Concerns about the post 9/11 border and various labour mobility/immigration issues generally arise from a lack of awareness as to the opportunities that the modern border presents for cross-border traders. Commercial border wait times have improved significantly as more technology and advanced information have been deployed at the ports of entry. The "fearful" issues such as tariff classification may also demonstrate that the goods will receive tariff-free treatment pursuant to NAFTA. By putting the front-end time into knowing the origin and content of all goods, border "fears" may be addressed and actually enhance the competitiveness of a company's operations. Moreover, the respective countries' "single window" initiatives will create greater efficiencies as the multiple government agencies that require information at the border will be allowing the filing of such information via one portal.

Unfortunately, the NAFTA trading regime has not evolved to fully address an economy structured on the large scale movement of business travellers across the Canada-U.S. border. The present system requires immigration solutions — such as setting up corporate entities on each side of the border with identical corporate ownership structures — that often compete with tax-favourable solutions. Consequently, it is imperative that cross-border companies consider immigration issues at the time of corporate structuring. Further, every Canada-U.S. company must be aware of any potential criminal history of its employees before sending them to the border. For example, the U.S. recently implemented a policy of denying and revoking work visas for those individuals that have committed driving under the influence offences while in the U.S. (Canada has employed a similar policy for a number of years.) Additionally, given the enhanced exchange of information between the two countries, companies must be mindful to always provide cross-border customers and employees with documentation such as letters of invitation to present at the ports of entry when travelling as business visitors and routinely evaluate whether an employee's business travel requires a work visa. Notwithstanding these challenges, companies that deploy an integrated human resources, accounting and legal strategy can actually utilize the NAFTA immigration system to achieve a positive and consistent result at the border by obtaining relevant work permits and visas. Notably, the U.S. has recognized the importance of this issue by recently launching the Known Employer Pilot Program which includes mechanisms for companies to agree to certain pre-approved filings and procedures regarding corporate structure and job descriptions in order to streamline and strengthen immigration reviews.

The best way to eliminate the fear factor? Focus on knowledge, not assumptions.

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