TAX FOR THE Owner-Manager

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Personal-Use Property Held by a Corporation

A shareholder may cause the corporation to acquire property that will be subject to significant personal use. The courts have often been asked to quantify the subsection 15(1) benefit in such circumstances; the leading case is *Youngman* (FCA 1990).

In *Youngman*, the shareholders occupied a home custom-built and owned by the corporation. The shareholders made an interest-free loan to the corporation to assist it in financing the construction. They paid the corporation a fair market rent. They were unable to convince the court that their occupation of the home served any corporate business purpose. The court held that the corporation's equity in the house multiplied by a proper rate of return, rather than the fair market rent, was the appropriate starting point in computing the benefit. The benefit was reduced, however, by notional interest on the interest-free loan.

The court asked what the shareholders would have had to pay in similar circumstances to get the same benefit from a company of which they were not shareholders. It concluded that the benefit conferred on the shareholders was not merely the right to occupy the house but the right to occupy a house that the corporation had built to the shareholders' specifications. There was an inference that the fair market rent would have been sufficient had the house not been custom-built and had its cost not exceeded its value.

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Dobbin (TCC 2003) also sanctioned the equity rate of return as the proper method of computing the subsection 15(1) benefit. In an interesting twist, however, where the fair market rent paid in a particular year exceeded the benefit computed under that method, the excess was credited to the shareholder's loan account.

Paragraph 11 of *Interpretation Bulletin* IT-432R2 outlines the CRA's administrative position and is essentially in line with *Youngman*, except that it says that the corporation's equity is to be based on the higher of the property's cost and fair market value, a concept not ratified by the courts.

In *Houle* (FCTD 1983), a pre-*Youngman* case, a corporation acquired a yacht primarily for business purposes. The court held that the proper way to compute the benefit was to apportion the operating costs between business and personal use, and it did not assess a benefit based on the corporation's equity in the yacht.

In *Giffin* (TCC 1991), the court held that where a corporation had acquired a home in Florida for both business and personal use, the benefit to the taxpayer was an appropriate rental rate computed only with respect to those periods during the year when the property was actually used, for personal purposes, by the shareholder. *Houle* was cited as support. Of the four years in question, the longest period of personal use in any year was 34 days, which indicated that the primary use of the property was business.

By way of contrast, in *Soper* (TCC 1987), where a corporation acquired homes in Canada for the personal use of the shareholder and not for any business purpose of the corporation, the benefit was computed with respect to the entire year even though the personal use was minimal, on the basis that the homes were available for the personal use of the taxpayer throughout the year.

In summary, if a corporation acquires property primarily for the personal use of a shareholder, the taxable benefit will be based on the corporation's equity in the property (possibly computed with reference to the higher of its cost and fair market value), even if a fair market rent is higher. Furthermore, the benefit will be assessed for the entire year. If the use is primarily business, the benefit is based on a fair market rent; if the proportion of personal use can be established, the benefit will relate only to the periods of actual personal use. Otherwise—although this is not entirely clear—the benefit may be assessed for the periods of availability. The decision in *Fingold* (TCC 1996) to this effect was overturned by the FCA in 1997, but not on this point.

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Single-Purpose Corporations: Change in Administrative Policy

A single-purpose corporation is a device used to separate the legal ownership of an asset from the person who has the beneficial interest in it. Typically, it is a corporation formed to hold real estate or personal property (aircraft and yachts being common examples) in lieu of direct ownership by the individual shareholder(s) of the corporation. A fairly common structure is the formation of a Canadian Holdco to hold US real estate on behalf of a Canadian resident in order to simplify the interaction of the Canadian and US tax rules on the death of the resident.

As noted in "Personal-Use Property Held by a Corporation," above, subsection 15(1) is of concern whenever a corporate asset is made available to a shareholder. Until recently, the CRA had agreed that the subsection would not be applied if the corporation was formed to hold US real estate and a number of conditions were met. (In this regard, see generally the response to question 20 at the Revenue Canada Round Table of the 1980 Canadian Tax Foundation's annual conference.) The rationale for the policy was that until the amendment to the Canada-US income tax convention in 1995 that integrated Canadian taxes on death with US estate taxes, a Canadian-resident owner of US personal-use real estate could suffer a substantial tax penalty on death.

The CRA has announced in *Income Tax Technical News* no. 31 (June 23, 2004) that its assessing policy with respect to such corporations is no longer applicable, citing the 1995 amendment to the Canada-US income tax convention. Limited grandfathering is proposed for arrangements currently in place until the earlier of the disposition of the US-based real estate by the corporation and the disposition of the shares in that corporation, other than a disposition to a spouse or common law partner as a result of the death of the shareholder.

This change in policy raises a number of questions. First and primarily, it is not clear that section 15 will always apply when personal-use real estate or other property is acquired by a single-purpose corporation. Under section 15, the question is whether a corporation has conferred a benefit on a taxpayer and, if so, how the benefit is to be quantified. If a corporation is formed and acquires a residence, say, with funds invested by the shareholder, and if the shareholder agrees to pay all of the expenses of the property in consideration for the right to occupy it rent-free, is section 15 applicable?

A good case can be made that there is no direct benefit to the shareholder in this example. If there is no benefit (and the CRA's willingness to say so in the context of US-based personal-use real estate under the former policy suggests that there is not), does the change in policy mean that the use of a single-purpose corporation in the example above will now be subject to a section 15 assessment? If so, how is the amount of the benefit to be calculated? The equity approach adopted in the *Youngman* case does not seem to be appropriate, because all the acquisition and maintenance costs are borne by the shareholder. Should the fact that title rests with the corporation be a taxable event? Normally one would not think so, since there is no obvious way to quantify the benefit.

A single-purpose corporation may be formed to hold title to a Canadian vacation property as part of an estate freeze for the benefit of the planner's children. If the property does not qualify for the principal-residence exemption (or if the exemption is not used in respect of the cottage), the imaginative use of share classes and provisions may provide a way to have the cottage held for the benefit of those children willing to contribute to its upkeep, while freezing its value in the planner's estate. Although the old assessing policy was expressed in terms of US-based real estate, many advisers believed that a similar approach was appropriate with respect to Canadian-based property.

It remains to be seen whether the CRA will be prepared to provide clarification of the new position on a case-by-case basis. Advisers considering the use of a single-purpose corporation for future planning strategies may want to apply for an advance ruling in any case that involves a property with substantial value.

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Trust Planning: Documentation Requirements

The *Cockeram* case (TCC 2004) concerns the deduction by a trust of some $49,200 in income. The case highlights the importance of carefully documenting transactions when tax minimization is an objective.

The Cockeram family trust was settled in 1994; Dr. and Mrs. Cockeram were the trustees and their two minor children were the beneficiaries. The deed of settlement permitted the trust to purchase real property as an investment. In 1995, Dr. and Mrs. Cockeram purchased a cottage in Maine. Although the trust had sufficient funds to pay for the cottage, the Cockerams instead used a mortgage loan and the proceeds from the sale of another property to finance the purchase. They took title personally as joint tenants. The Cockerams said that they intended that the Maine property be held by the trust; but the trust was not the registered owner of the property, and the costs of operation and maintenance of the property were paid for by the Cockerams, not by the trust.

On February 7, 1996, the trust issued a cheque for $49,200 payable to Mrs. Cockeram. This payment was purportedly made to reimburse her for part of the purchase price of the cottage, which the Cockerams considered to be owned by the trust. The payment was funded by a dividend that had been paid by the Dr. Alan Cockeram Professional Corporation on February 2, 1996. The trust deducted the $49,200 payment from its income on the basis that the money had been paid out of the trust for the benefit of the beneficiaries. The minister denied the deduction.

The Tax Court found that the trust had not acquired the Maine property. Dr. and Mrs. Cockeram's contention that the trust owned the property was supported only by their oral statements of intention; otherwise, all of the documentation and their entire course of conduct pointed to their personal ownership of the property. Campbell J said:

> Certainly evidence of intent may be considered to assist in determining the true nature of a transaction. However, evidence of intent alone will rarely be determinative. I have no reason not to believe Dr. Cockeram's evidence concerning his intention but mere statements of intent alone will not be sufficient to correct the entire array of documents which clearly point to the cottage ownership, both legal and beneficial, residing personally with the Cockerams. If a taxpayer wishes to arrange his personal affairs to obtain certain tax advantages, then the transactions must be documented.

Taxpayers who seek tax advantages in the organization of a transaction must ensure that the legal form of the transaction matches their intentions. Dr. Cockeram stated that he had no legal expertise, had not sought legal advice, and did not understand the consequences of the various legal steps he took. Campbell J, though sympathetic, stated, "[T]axpayers bear the responsibility of ensuring that their actions comply with the very provisions of the Act they wish to invoke." Campbell J acknowledged Dr. Cockeram's sincerity; nevertheless, she found that he had not lived up to the responsibilities imposed by the Act and by his duties as trustee.

The court also discussed an incidental issue. In *Langer Family Trust* (TCC 1992), the Tax Court held that if an amount is not paid to a beneficiary but is used by a trust to make a payment *on behalf of* a beneficiary, the amount will not be deductible. The Crown in *Cockeram* sought to invoke *Langer* as another ground for denial of the deduction to the trust.

The uncertainty created by *Langer* has led to many complicated arrangements being undertaken by family trusts. In *Income Tax Technical News* no. 11 (September 30, 1997), the CRA said that if an indirect payment was made by a trust for the benefit of the beneficiary, the payment would be deductible. The CRA specifically addressed a payment by the trustee of a discretionary trust to a parent as a reimbursement for an expenditure; it set out a list of relatively elaborate steps that the trustee would have to take, not all of which were internally consistent. Although it is not clear from the judgment in *Cockeram*, it seems that the Cockerams were relying on this administrative position in support of the deduction claimed by the trust.

The minister's reliance on *Langer* raises two important points. The first is that while administrative pronouncements that ameliorate the law are helpful, it is always open to the minister to assess contrary to a relieving administrative position. In other words, the minister cannot be relied on in all circumstances to follow his own administrative positions. The second point is that if one is going to rely on a relieving administrative provision, one must scrupulously follow its requirements. It is not sufficient to act in a way that is consistent with the administrative policy; the policy must be followed rigidly to reduce the risk that the minister will say that it did not apply.

In *Cockeram*, Campbell J did not permit the minister to rely on *Langer*. She said that there was no evidence that the cottage had become the property of the trust, and that therefore the decision in *Langer* had no application. However, she also said:

> If I had concluded that the property was or had become an asset of the Trust, which I have not, I see no reason . . . why payments to third parties which benefit beneficiaries by preserving an asset of the Trust, may not be deducted pursuant to these provisions, where properly documented.

Although this statement is obiter dictum, it is nonetheless significant. Given that the controversial statements in *Langer* were also obiter dicta, it is to be hoped that

Campbell J's statements lay to rest the claim that amounts paid on behalf of a beneficiary for the benefit of a beneficiary are not deductible by a trust. *Cockeram* is under appeal to the Federal Court of Appeal.

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Trusts and the New Stop-Loss/Affiliation Rules

The superficial loss rules in the Income Tax Act generally operate to deny the recognition of loss on the transfer of property between affiliated persons. The theory behind these rules is that a person ought not to be able to recognize a loss for tax purposes if the person retains an interest in the loss property or if that interest is held or acquired by an affiliated person. For example, if an individual shareholder transfers property to a corporation that he or she controls, the loss will not be recognized, but the adjusted cost base of the taxpayer's shares in the corporation will be increased by the amount of the loss. (See the definition of "superficial loss" in section 54, subparagraph 40(2)(g)(i), and paragraph 53(1)(f).) If a corporation, trust, or partnership is the transferor of property with an accrued loss and the transferee is another corporation affiliated with the transferor, a parallel (but different) set of rules denies the recognition of the loss until the property is disposed of by the transferee to a non-affiliated person. (See subsections 40(3.3) and (3.4).)

Before the 2004 federal budget, there were no specific provisions in the Act extending the stop-loss rules to transactions between a trust and its beneficiaries. As a consequence, in some situations a loss could be realized on the transfer of a loss property to a trust in which the transferor had a beneficial interest. The changes proposed in the budget are intended to prevent this from happening in the future.

Before the budget, trusts were subject to the affiliation rules only in a general way. A reference to a trust generally was to be read as a reference to the trustee, executor, administrator, or other legal representatives having ownership or control over the trust property. Therefore, one generally looked only at the trustee when determining the application of the affiliation rules. If a taxpayer was the sole beneficiary of a trust but not the trustee, and if the taxpayer disposed of a loss property to the trust, the loss would not be denied or deferred.

Now the proposed rules no longer look to the trustee. After March 22, 2004, a person will be affiliated with a trust if the person is a majority interest beneficiary of the trust or affiliated with a majority interest beneficiary. If the trustee has the power to allocate to any particular beneficiary, either alone or within a group of affiliated beneficiaries, more than 50 percent of the income or capital of the trust to the exclusion of other beneficiaries, that beneficiary is a majority interest beneficiary, whether or not the discretionary right is ever exercised in the particular beneficiary's favour.

As a result of the new rules, if a taxpayer is the sole beneficiary of the trust and he or she transfers a loss property to the trust, the loss will fall within the definition of a superficial loss and be denied. However, it is not clear from the budget proposals when (or how) this loss will be recognized. In theory, it may be that recognition by the transferor beneficiary will be deferred until the trust disposes of the property to a non-affiliated person. Alternatively, the trust may be permitted to increase the ACB of the property by the amount of the denied loss and to be the taxpayer that ultimately recognizes the loss when it disposes of the property. Which approach is adopted will depend on the actual wording of the implementing legislation.

Because the new rules no longer focus on the trustee, a trustee who is not affiliated with the trust should be able to dispose of a loss property to the trust and recognize the loss. This may provide scope for planning in appropriate cases. The proposed rules are complex, and this article does not purport to identify all of the opportunities and pitfalls that may be inherent in them. This much is clear, however: transactions after March 22, 2004 that involve a trust and its beneficiaries will have to be evaluated in the light of the possible application of the new rules. The assistance of a competent tax professional will be required to assess the tax consequences of transactions that were, before the proposed amendments, routine.

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Tax Planning: The Reasonableness of Management Fees

Aessie (TCC 2004) was recently decided under the Informal Procedure. While it does not have the authority of a General Procedure decision, it is of interest because of the type of tax planning involved and the court's positive reaction to it.

The appellant carried on a part-time accountancy practice out of a home office. Most, if not all, of the practice consisted of tax-return preparation for business and individual clients. The appellant's wife provided services to the practice through a management company of which she and her sister were the only shareholders. She was the only person who provided services to the practice. The gross revenues from the practice were $55,320 in 1999 and $57,825 in 2000. The appellant paid management fees to the company of $34,500 in 1999 and $38,000 in 2000. The CRA assessed on the basis that no more than $8,850 a year in management fees was reasonable in the circumstances. Beaubier J allowed the appeal in full on this point.

The management services involved were of a general administrative nature: answering the telephone, greeting clients, assembling and mailing documents, making bank deposits, and purchasing supplies. These services were provided on an as-needed basis, reflecting the part-time nature of the accountancy practice.

The evidence was not clear on how the management fees were calculated. The minister assumed that they were based on "available cash flow and tax planning of the Appellant." The appellant, who was the only witness called, testified that "part of the management and administration was based on tax planning." Apart from this, it does not appear that any attempt was made to value the services by reference to salaries paid in comparable arm's-length circumstances.

The judge noted that the fees paid amounted to about $3,000 per month and that the appellant was relieved of the obligation to make deductions for Canada Pension Plan, employment insurance, and worker's compensation payments. Nor did he have to pay for statutory sick leave or holidays. The judge said that "[a]ll of these are substantial financial burdens to a businessman and the Appellant has economized on them by his contract with [the management company]."

Notwithstanding that no direct evidence was called by the appellant with respect to the reasonableness of the fees charged (or, it appears, by the minister in support of the reduced amounts allowed on assessment), the court allowed the appeal. Beaubier J observed that "[t]he deal with [the management company] is a common and reasonable business deal that is not unusual or untoward in the business world. It is not appropriate for the Court to interfere in such a transaction."

The appellant's reported net income from the practice after payment of all expenses was a negative amount ($1,522) in 1999 and $677 in 2000; the management fees, expressed as a percentage of gross revenue from the practice, were about 62 percent and 67 percent, respectively. The judge was aware of this, but commented that "many professionals and businessmen make less money from their businesses than their secretaries do."

It seems clear from the evidence that real services were provided to the practice through the management company; the issue was the reasonableness of the amounts charged. The court was satisfied that the arrangements represented a "common and reasonable business deal" and that it should therefore accept them at face value. Also of interest is the minister's decision to assess on the basis that a management fee of $8,850 per year would have been reasonable. Why this amount rather than some higher (or lower) amount? The judgment is silent on this, and it is a fair inference that no evidence was led in support of this aspect of the assessments.

Normally, one might have expected the court to require more direct evidence in support of the reasonableness of the fees charged. The fact that it did not do so here, and that it positively endorsed the arrangements notwithstanding the admitted tax-planning motive, may be a useful precedent in other cases of a similar nature. While the decision is not binding, it is a clear example of a court agreeing that, within bounds, it will not second-guess the reasonableness of fees paid for services provided by a related person. In this regard, and as noted above, it is essential that real services be provided if the fees charged are to fall within the reasonableness ballpark.

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Draft Legislation for Collection of Federal Tax Debts

In *Markevich* (SCC 2003), the Supreme Court of Canada held that the six-year limitation period in the Crown Liability and Proceedings Act (Canada) applied to tax debts owing under the Income Tax Act (ITA). As a result of *Markevich*, certain tax debts owing by taxpayers became uncollectible. Further, taxpayers may have paid to the Crown amounts that they were not obligated to pay because of the expiry of the applicable limitation period.

On March 29, 2004, the minister of finance tabled a notice of ways and means motion that proposes to amend the ITA, part IX of the Excise Tax Act ("the GST legislation"), and certain other statutes to extend the limitation period for the collection of federal tax debts. The new legislation will apply to any amount payable by a taxpayer under the ITA or payable or remittable by a taxpayer under the GST legislation and will override and limit the effect of the decision in *Markevich*.

Generally, the CRA will not be able to collect a tax debt owing by a taxpayer after the expiry of the 10-year limitation period. For tax debts owing under the ITA, the limitation period generally begins 90 days after the day of mailing or serving of the last notice of assessment in respect of the tax debt that was mailed or served after March 3, 2004. For tax debts owing under the GST legislation, the limitation period generally begins on the day of mailing or serving of the last notice of assessment in respect of the tax debt that was mailed or served after March 3, 2004 or, if no such notice was mailed or served in respect of the tax debt, and if the earliest day on which the CRA can commence an action to collect the tax debt is after March 3, 2004, then on that earliest day. However, the limitation period commences on March 4, 2004 for tax debts that are payable on that date or that would be payable on that date if not for the expiry of the limitation period.

The limitation period restarts for a new 10-year period on any day on which certain events occur. These events include, but are not limited to, the following: (1) The taxpayer acknowledges the tax debt. (2) An action is commenced by the CRA to collect the tax debt. (3) An assessment is made under the ITA or the GST legislation, as applicable, of another person in respect of the tax debt pursuant to certain provisions of the particular statute (for example, under subsection 160(2) or 227(10) of the ITA).

A taxpayer is considered to acknowledge a tax debt if the taxpayer or his agent or legal representative takes any of the following steps: (1) The taxpayer promises in writing to pay the tax debt. (2) The taxpayer makes a written acknowledgment of the tax debt, regardless of whether or not a promise to pay can be inferred from the acknowledgment and whether or not it contains a refusal to pay. (3) The taxpayer makes a payment on account of the tax debt. ("Payment" includes a purported payment by way of a negotiable instrument that is dishonoured.)

The limitation period in respect of a tax debt is extended by the number of days on which one or more of the following is the case: (1) Security has been accepted by the CRA and held in lieu of payment of the tax debt. (2) A taxpayer who was resident on the day the limitation period began because of the sending of a notice is non-resident. (3) The power of the CRA to commence an action with respect to the tax debt is restricted or not permitted by any provision of the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, or the Farm Debt Mediation Act. (4) The CRA is prohibited from taking measures to collect a tax debt under the ITA. (5) The CRA has postponed collection action in respect of the tax debt under subsection 315(3) of the GST legislation.

Regrettably, the draft legislation also contains two provisions with retroactive effect. First, all federal tax debts outstanding on March 4, 2004 that were uncollectible because of *Markevich* are subject to a new 10-year limitation period commencing on March 4, 2004. This will be the case notwithstanding any court order or judgment made after March 3, 2004 that declares the debt not to be payable (or remittable, in the case of the GST legislation) or orders the CRA to reimburse the taxpayer for a tax debt that was paid but is uncollectible because of the expiry of the former limitation period. Second, taxpayers are precluded from making a claim against the federal government for federal or provincial tax debts collected before March 4, 2004 and after the expiry of the relevant limitation period.

With respect to tax debts owing under the provincial legislation, taxpayers should refer to the applicable provincial law to determine whether the debt is uncollectible or whether they may seek reimbursement from the relevant provincial government for amounts paid in respect of statute-barred debt.

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Tax Evasion: It Never Pays

"Tax avoidance" is usually the product of astute tax planning, and it is perfectly acceptable under our voluntary compliance systems. "Tax evasion" is something that no taxpayer should have anything to do with. Tax evasion is the intentional non-compliance with tax payment or collection obligations, and it is generally punishable under numerous quasi-criminal provisions in the Income Tax Act, the Excise Tax Act, and provincial retail sales tax acts. Many jurisdictions are actively pursuing taxpayers and small businesses suspected of tax evasion. No jurisdiction has been more active, or more willing to publicize its activities, than Ontario's Ministry of Finance.

For some time, Ontario has been charging the principals of businesses suspected of tax evasion under the relevant taxing legislation and prosecuting them in the provincial courts under the Provincial Offences Act. Business owners in these circumstances are often treated as common criminals and subjected to court summonses, arraignment, and quasi-criminal trials.

Ontario has been quick to publicize its successes; for example, a conviction of the principals in Dollar Rent a Car was the subject of a May 27, 2004 news release entitled, "Car Rental Agency, Executives Facing Almost $500,000 in Penalties for Sales Tax Offences." The Toronto company and three of its executives were convicted of evading the payment of retail sales tax. The company collected but failed to completely remit both provincial sales tax and the tax aimed at encouraging fuel conservation (the "gas-guzzler" tax). The evidence was that between 1996 and 2000, almost $900,000 was collected and just over $550,000 was remitted. Charges were laid after the Ministry of Finance's Special Investigations Branch confirmed the shortfall.

Upon their conviction on two charges of tax evasion, each of two executives (the general manager and the business manager) was fined $110,000. The third person, a director of the company, was fined $41,000 for "authorizing the company's failure to remit its PST collections."

In total, including the mandatory 20 percent Victims' Justice Fund surcharge on all fines, the three men and the company paid court-imposed penalties of $499,200. (The surcharge amounted to some $83,200.)

It is worth noting that in addition to the fines and surcharge, the company and the directors are liable for the $309,308 tax owing, plus civil penalties and interest. (Note that the directors of the company are personally liable for these amounts under the directors' liability provisions of the relevant provincial statutes.) In practical terms, the total liability in cases such as this can amount to two or three times the tax evaded. A conviction often leads to the immediate bankruptcy of the individual business owners.

A business owner who is charged with tax evasion faces some very difficult decisions. Competent legal advice is essential, because an appropriate strategy must be developed to deal with the several authorities involved—for example, whether the charges should be contested or whether a settlement or plea bargain should be sought. As well, the implications of declaring personal bankruptcy should be considered.

Unfortunately, we see more and more attempts at tax evasion in the current economy. Individuals who have participated in tax evasion but have not yet been identified by the tax authorities should make a voluntary disclosure in order to mitigate the impact of the penalties and fines that become payable upon a conviction.

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Residence in Canada: Connecting Factors

In several recent cases, the decisions turned on whether the taxpayer had successfully given up residence in Canada. Cases of this type ultimately turn on questions of fact and are not, strictly speaking, of much precedential value in other cases. However, the three cases discussed here provide a useful checklist of the factors to be considered when an individual is considering giving up residence in Canada.

In *Revah* (TCC 2004), the taxpayer sold his residence near Montreal in September 1992 and moved to the United States with the intention of residing there permanently. In due course he purchased a home in Florida. Before leaving Canada, he sold his car and cancelled his Quebec driver's licence. He also cancelled his Quebec health insurance card, his Canadian credit cards, and his club affiliations. He maintained two bank accounts in Canada into which he received payments under the Canada and Quebec pension plans and from his RRSP. During the taxation years in dispute (1993 and 1994), his wife was the registered owner of a residence property in Quebec, which was occupied on a rent-free basis by their son. The taxpayer visited Canada infrequently ("maybe once a year") to see his family in Montreal. The case report does not indicate where he stayed during the visits.

The taxpayer obtained a green card permitting him to work in the United States. He owned 50 percent of the shares of a private US corporation and was employed as its chairman. He filed tax returns in the United States for 1993 and 1994 in which he reported the income earned in the United States, but not his worldwide income. He also filed Canadian returns for those years, claiming status as a non-resident. He did not report any income subject to Canadian tax in those returns. However, those returns showed a Quebec address for the taxpayer and indicated that Quebec was his province of residence on December 31 in both years.

The taxpayer successfully appealed assessments for Canadian income tax (and penalties) on his worldwide incomes for 1993 and 1994. The court noted the positive steps taken by the taxpayer to sever his connections with Canada; the negative factors were the residence in his wife's name and the statements of place of residence in the Canadian returns. The court accepted evidence that the wife held title to the property on behalf of her son, the beneficial owner, and that the residence address was included in error by the return preparer. The court was satisfied that the taxpayer had left Canada with a permanent intention to make his home in the United States.

Readers are invited to submit ideas or written material to *Tax for the Owner-Manager*. Please write to Thomas E. McDonnell in care of the Canadian Tax Foundation.

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In *Snow* (TCC 2004), the issue was whether the taxpayer continued to be resident in Canada in 1998 and 1999 during a period when she was employed as an education consultant in Belize. She took the foreign posting after retiring as a vice-principal in the Surrey school district in British Columbia. She testified that her move to Belize was prompted by her decision to do something different with her life. She said that when she left, she had decided in her own mind that she would not be returning to Canada.

She closed a small business she owned, surrendered her provincial health card, and resigned her memberships in professional associations and clubs. She owned a townhouse in Vancouver, but she was reluctant to sell it because the market was down at the time. She allowed her son and his family to use the property rent-free. She retained her BC driver's licence, her Canadian bank account, her Canadian credit cards, and her RRSP. Her pension payments were credited to her Canadian bank account. She continued to have her mail delivered to her Canadian address because of a lack of confidence in the Belize postal service. She made several visits to Canada during 1998 and 1999, staying in her townhouse on each occasion. Her term of employment in Belize was extended for a third year, after which she returned to Vancouver.

The court held that she remained a Canadian resident throughout the period under review. The determining factors were the ownership of the Vancouver residence and the continuing banking, financial, and postal arrangements. She never really severed her residential ties with Canada and was ordinarily resident in Canada under the *Thomson* test (SCC 1945).

Allchin (FCA 2004) was an appeal from a tax court decision (TCC 2003) denying the taxpayer the benefit of the tiebreaker rules in the Canada-US income tax convention. The taxpayer was a resident of Windsor, Ontario when she obtained a US green card and moved to Detroit. From 1992 to 1994 she worked in the United States, filed tax returns there, and paid tax on her worldwide income to the United States. Thereafter, she retired from work and returned to Windsor to live.

The Tax Court held that the taxpayer had never severed her residential ties with Canada. Accordingly, the court said, she never became a resident of the United States and was not entitled to the benefits of the treaty. The Federal Court of Appeal held that this was an incorrect application of the Canadian law and the treaty, and allowed the appeal.

The issue was whether the taxpayer had become a resident of the United States for the purposes of the treaty, not whether she had severed her ties with Canada so as to cease to be a resident here. Whether or not she was a resident of the United States was to be determined by the Canadian law of residence as modified by the treaty. The Tax Court had failed to consider whether the taxpayer had become liable for US tax as a resident there. Article IV of the treaty provides that a person is resident in a jurisdiction if she is liable to tax there by reason of residence "or any other criterion of a similar nature." As a green-card holder, the taxpayer was liable to tax in the United States regardless of her physical residence. "Green card status," the court said, "is a 'criterion of a nature' similar to United States residence so as to bring [her] within the definition of 'Resident of a Contracting State.' " Once it was decided that the taxpayer was a resident of both jurisdictions, it was appropriate to apply the tiebreaker rules in determining which jurisdiction had the authority to tax. On the facts, because the taxpayer had her permanent home in the United States, she was resident in the United States, not in Canada.

This decision illustrates that the obtaining of a US green card presents tax-planning opportunities. Green-card status gives the United States the right to tax the individual as a resident of the United States. For an individual who moves to the United States and wants to maintain some ties to Canada, this status will be enough to bring the treaty into play and allow the taxpayer to escape Canadian taxation by establishing a permanent home in the United States. (The other aspects of the tiebreaker rules would have to be observed if the taxpayer also maintained a home in Canada.) Conversely, depending on the circumstances, a taxpayer who obtains a green card may be deemed to have given up Canadian residence, with attendant departure tax considerations. (Consider in this regard the possible application of subsection 250(5).) As well, the green-card holder would have to plan for the possible imposition of US estate and gift taxes.

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