

CRA Responses to CPA's New Questions arising from Supplemental Guidance Published

The following are our responses to the questions posed by the Chartered Professional Accountants of Canada on April 8, 2021.

Questions

- 1) *We understand the relief provided by CRA will not apply to residents of non-treaty countries. Can these individuals reach out to CRA on a case-by-case basis to discuss their situation?*

CRA comments: Yes. If your members have questions about how this guidance will apply, or if they have a situation that is not addressed in the guidance, they may send them to the CRA's temporary electronic COVID mailbox at PERESCOVIDG@cra-arc.gc.ca.

Meaning of "Travel Restriction" and Date extensions

- 2) *With respect to section VII.A, CRA has advised that "This supplemental guidance extends the period to which this specific relief applies until the earlier of the date of the lifting of the travel restrictions and December 31, 2021."*
 - a) *What is CRA's guidance as to how an individual should determine the "date of the lifting of the travel restrictions"?*
 - b) *Specifically, in the context a Canadian who returned to Canada at the government's recommendation – where an individual returned to Canada during 2020 due to COVID and remained in Canada for the duration of the year, would CRA consider all days during this period to be as a result of a travel restriction, despite the fact that travel between Canada and the US remained possible for most of 2020?*

CRA Comments: In response to this question:

- The date of the lifting of the travel restrictions will be a question of fact. The CRA does not expect issues to arise from this approach, provided that any individual relying on the relief acts in good faith. If there is a specific concern it should be sent to the COVID mailbox at PERESCOVIDG@cra-arc.gc.ca.
 - Yes, in the example provided in paragraph b) of your question, we would consider all of the days in 2020 that the individual was present in Canada to be as the result of the travel restrictions, provided that the crisis and government travel recommendation was the sole reason for returning to Canada.
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Overall applicability of Relief provided for Cross-border employment income for Canadian resident employees - VII.C(ii)

3) *[Question withdrawn.]*

CRA Comments: *[This question was withdrawn.]*

4) *In Section VII.C(ii), the CRA has indicated that where an individual's employer continued to withhold taxes as if the income was earned in the United States, the CRA will "consider the employment income from the United States employer to be sourced from the United States for 2020. This means they can file their tax returns like they did in prior years and claim a foreign tax credit for amounts paid in the United States".*

In this regard, is the CRA expecting an individual to file their US tax return on the basis that such employment income is taxable in the US, despite the fact that the services were performed in Canada? The IRS has not issued any guidance advising that they would tax any such income in this fashion. Alternatively, is the individual able to source the income as US-sourced solely on the basis that such income continued to be subject to US withholdings? If the latter is correct, the relief provide by CRA is unclear, as the IRS will simply refund the excess withholdings when the individual files their US tax returns, reporting the correct amount of US-sourced income.

CRA Comments:

For individuals who chose to take advantage of the administrative concession described in this question, the CRA will presume the income to be sourced from the United States, and therefore taxable in the United States. Should the United States later decide not to tax the income (i.e. the individual obtains a refund of excess withholdings), the individual must change their tax return in Canada in order to adjust the amount of foreign tax credit claimed in Canada.

5) *Section VII.C(ii) addresses Canadian resident employees, but only with respect to individuals may have been forced to perform their employment duties from their home in Canada instead of at the office of their United States employer. Is the extended relief provided in this section applicable to 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? It is noted that in the initial guidance, Section III.C pertained all Canadian resident employees, and not solely those working for a US employer.*

CRA Comments: The supplemental relief specifically addressed the situation of Canadian residents working for US employers because that was the largest group of individuals in this situation. The Agency will consider relief for those whose employers are in a country other than the US on a case-by-case basis.

183-day test

- 6) *Section VII.C(i) states that, “The administrative relief in the initial relief period in respect of the 183-day test in the employment article of the Canada-United States income tax treaty is being extended to December 31, 2020. An individual in this situation who has remained in Canada after December 31, 2020, must include each subsequent day present in Canada in calculating whether the 183-day test has been met.” It is our understanding that for purposes of determining whether the 183-day test was met for 2020, an individual would exclude any 2020 days in Canada resulting from a travel restriction and would only consider those days in 2021. Does this guidance apply also for purposes of determining whether the 183-day test was met in 2021 – i.e., can 2020 days be excluded?*

CRA comments: Yes. If the individual is eligible for the relief, no days in 2020 will be counted towards the 183-day test in respect of their 2020 or 2021 tax year.

- 7) *In the initial guidance provided, section III.B addressed “Other resident employees” and indicated “The CRA will also take this approach in applying the days-of-presence test in Canada’s other tax treaties” (referring to the guidance provided in Section III.A for US resident employees). New section VII.C(i) extends the relief for US resident employees until December 31, 2020. Section VII.C makes no reference to employees who are resident of countries other than the United States or Canada. Does the initial guidance provided other resident employees continue to apply until September 30, 2020?*

CRA Comments: The CRA will consider providing relief to an individual in the situation you have described on a case-by-case basis, i.e. we will consider whether an extension of the relief period to December 31, 2020 is appropriate in their circumstances.

- 8) *Please provide guidance on what CRA would consider “usual resident of another country”. An example was provided in our previous submission - see issue 16 below.*

CRA Comments: As your issue 16 is a question in respect of a foreign tax credit, we have assumed that your reference is to your issue 17, which deals with residency. In our view, the meaning and intent of the use of the phrase “usually a resident of another country” is clear in the circumstances described in the guidance. Where a taxpayer’s circumstances are such that they do not fit into this meaning, they should contact the COVID mailbox for additional information.

Interest and Penalty Relief

- 9) *Section VII.C(ii) provides relief from penalties and interest where the individual is waiting for a US refund to pay the Canadian balance due.*
- a) *Is the individual required to pay the penalty and interest balance due prior to submitting a request for cancellation of penalties and interest?*

- b) *Where the individual is awaiting either (i) the US refund to pay the Canadian balance due and/or (ii) CRA to process the request to cancel penalties and interest, will CRA automatically put a hold on any collections notices to the individual? If not, will there be a streamlined process for the individual to request a hold on any such collections notices?*

CRA Comments: The supplemental guidance does not require a taxpayer to pay any assessed penalty or interest prior to submitting a request for relief. As the specific circumstances of individuals vary, there will be no automatic hold placed on collections notices. However, affected individuals who receive such a notice may contact the CRA's debt management call centre at 1-888-863-8657 to speak to an agent and inform them of their circumstances. Affected individuals should be prepared to provide any verification information requested.

- 10) *In Section VII.C(ii), the CRA has indicated that they “will cancel all or part of the interest or late-payment penalties that arise as a result until the time the individual receives their United States refund and pays it towards their amount owing within a reasonable time”. Is it reasonable to assume that the cancellation of payment and interest will apply only to the amount of the United States refund (and not the entire Canadian tax balance due)?*

CRA Comments: An affected individual may make a request for relief in excess of their US refund. However, whether relief is granted in respect of that portion of the interest and penalties would be determined on its own merits and separately from the US refund portion of the request.

Contributions to Federal Insurance Contributions Act (FICA)

- 11) *Section VII.C(ii) states:*

As in years for which the taxpayer was exercising their duties in the United States, if the individual has made valid contributions to the United States in 2020 under the United States Federal Insurance Contributions Act (FICA), the individual may claim a foreign tax credit in respect of those contributions. For the purpose of claiming the FICA contribution portion of the individual's foreign tax credit, administratively the entire amount of the individual's employment income on which the contributions were based may be included in the individual's 2020 foreign non-business income.

In the case of a Canadian resident individual who (i) works for a US employer; (ii) would ordinarily work in the US, and (iii) performed services in Canada for 2020 due to travel restrictions, the remuneration paid for the services performed in Canada may not be subject to FICA. In this case, what would CRA view as a “valid contribution” to FICA? Would this include where an individual obtains a Certificate of Coverage to continue to contribute to FICA?

CRA Comments: As a general statement, the intention is to allow an affected individual to claim a foreign tax credit in respect of amounts paid that are recognized as FICA contributions under that Act. Of particular concern would be an individual receiving a refund of their FICA contributions and attempting to claim a foreign tax credit in respect of those amounts. A Certificate of Coverage would generally be sufficient to show that an individual's contributions were validly made.

In addition on this issue, the CRA is aware of a number of factsheets provided to affected individuals by their employers. These fact-sheets indicate that they were prepared by the US chapter of one of your member firms (presumably with input from the Canadian chapter). There seems to be some differing interpretive views as to whether FICA contributions are still able to be made by affected individuals under US legislation and *Treaty E102189 - The Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security*, and the effect of the Canada-United States income tax treaty on the Canadian income tax treatment of such amounts. If your association is amenable to it, we would like to take advantage of your offer to assist us with the issues covered by the guidance and ask for your technical views on these issues concerning FICA contributions.

Quarantine Days

12) *The supplemental guidance specifies in the paragraph "Persons entering Canada during the Covid-19 pandemic" that when applying for a tax withholding waiver quarantine days spent in Canada do not count as part of the days in Canada or the service period. Are quarantine days counted as workdays (if the individual worked during those days) in Canada as a non-resident for tax purposes and were residents of a non-treaty country? Or could those days be exempt from taxation?*

How does this relief apply in calculating Canadian source income in relation to services performed in Canada by non-resident individuals?

CRA Comments: The relief in the guidance you have referenced is applicable only to the time in the quarantine period that an individual is in Canada but cannot work. It would not apply in respect of a person working during this period.

Relief for "other" non-Canadian employees

13) *The supplemental guidance under VII.C. is specific to US employees. Will it apply to other non-Canadian employees?*

- a) *If a 2020 Tax Deduction Waiver was approved and foreign payroll taxes continued to be withheld, can the compensation related to Canadian work from home workdays be sourced to the foreign employment / resident location other than the US?*
- b) *If a 2020 Tax Deduction Waiver was not approved, will there be penalty and interest relief on Canadian tax paid when the foreign refund is received other than from the US?*
- c) *Relief for FICA: Claiming foreign tax credit even on income related to Canadian workdays. What about relief for other country's mandatory social security?*

- d) *Relief for contributions to foreign retirement plans: Can contributions to other plans eligible for deduction on form RC269 also benefit from deduction as if employment duties were exercised in the other country?*
- e) *Relief for US state tax for states that refuse to give up their right to tax: What about foreign tax credit relief for other countries that will refuse to give up the right to tax (whether a treaty country or a non-treaty country)? e.g. Mongolia (has treaty with Canada)*

CRA Comments: The answers to these questions would be dependent on their specific facts and governing laws. If your members have questions about how this guidance will apply, or if they have a situation that is not addressed in the guidance, they may send them to the CRA's temporary electronic COVID mailbox at PERESCOVIDG@cra-arc.gc.ca.

Guidance for 2021 tax year

- 14) *The end of Section VII indicates that “the CRA will provide additional guidance at a later date for impacts on affected individual’s 2021 tax years.” Given this statement is specific to ‘individuals’, should taxpayers assume that, at this time, no employer relief is being contemplated for 2021?*

CRA Comments: The statement you reference encompasses both the individual's Canadian income tax obligations and their employer's obligations that result from that employment. The CRA is constantly monitoring these issues and will publish additional guidance when appropriate to do so.

Meaning of “Travel Restrictions”

- 15) *For non-Canadians who chose to come to Canada during the pandemic period, and subsequently worked in Canada (e.g. from a vacation property or while staying with family), would the individual’s personal choice to avoid non-essential travel during the pandemic or an employer instruction to avoid non-essential travel, be considered to qualify as a “travel restriction” for purposes of the relief granted by CRA for the period March 16 to September 30, 2020? I don’t believe this has been clarified, whether this situation would be considered a “travel restriction”*

CRA Comments: Relief for such situations is on a case-by-case basis, we would consider relief in such a situation but we would need to know the specifics.

Foreign Tax Credit Issues

- 16) *Creditable tax on T1 for foreign tax credit claim/US Economic Impact Payment (EIP): This will not be subject to US tax. The CRA has provided guidance that it will not be subject to Canadian tax if received by a non-resident. Where a US taxpayer was eligible and did not receive the EIP, they can claim a credit on their US federal tax return. We think US tax before the EIP credit is the amount of creditable tax for an FTC on the T1. If*

this is not the case, those US taxpayers who received the EIP payment and did not claim an EIP credit on their 2020 Form 1040 would be at an advantage. Please confirm CRA's position with regards to the amount of US tax creditable on the T1 for FTC purposes: US tax liability gross or net of the EIP credit

CRA Comments: As this appears to be an interpretive question and not one related to the Guidance, we suggest that you consider requesting an external interpretation from the Income Tax Rulings Directorate (for instructions on how to obtain an interpretation, see [IC70-6R10](#)). However, our understanding of the EIP is that it is a refundable tax credit (see Rulings Internal Interpretation 2020-085181117). As such, it is not clear to us on what basis a refundable tax credit received at any time by an individual in respect of a taxation year would not reduce the amount of foreign income taxes paid for that year for purposes of claiming a foreign tax credit.

Issues Around Residency

17) *Please consider the following scenario as it relates to the current guidance and the CRA's position for "U.S. Resident Employees" and/or "Non-resident Employee in Canada", for individuals who intended to establish U.S. residency but did not because of travel restrictions and essentially are not considered a resident of either jurisdiction:*

- *Canadian citizen departs Canada with family and moves to the U.S. for work under an L1A visa on November 1, 2019 (ceasing Canadian residency);*
- *Due to COVID-19, taxpayer and family moved back to Canada on April 1, 2020 and stay with relatives before moving back to the U.S. on February 20, 2021*
- *Remained on U.S. payroll and only worked for the benefit of the U.S. company*
- *Filing position for U.S. purposes for 2020 would be as a non-resident because the individual did not establish residency there.*

Question: *Given the taxpayer had not established U.S. residency (but otherwise would have established US residency had COVID travel restrictions not occurred), what would be the filing position in Canada for 2020 (i.e. part-year resident or non-resident or treaty based non-resident under Article XV(2) of the Canada-U.S. treaty)*

[Note from submitting firm: we realize this question could be considered too "case specific" for the CRA to answer, however want to highlight the issue of someone possibly not being a resident in either jurisdiction].

CRA comments: Thank you for bringing this example to our attention. The submitting firm may contact the COVID mailbox with any further inquiry on this topic.

Departure Tax Issues

18) *There is a concern relating to the exemption for short-term residents. Where an individual was unable to leave Canada due to COVID, and exceeded 60 out of the prior 120 months in Canada, will the CRA provide an extension to the time limit within subparagraph 128.1(4)(b)(iv) under assets held when the taxpayer last became resident in Canada (or acquired by inheritance after becoming resident) would be exempt from*

the deemed disposition only if the taxpayer was not resident in Canada for > 60 months in a 120-month period that ends at that time. For example, if an individual remained in Canada beyond 60 months only due to the travel restrictions, would the months that relate to periods with travel restrictions not count?

CRA Comments: The Agency is aware of this issue and is working with the firm that we believe has this issue. The Agency is approaching this issue on a case-by-case basis, on the assumption that there will not be a large number of individuals in this situation. If this is incorrect, please let us know.

19) Although the CRA provided guidance with respect to the impact of days spent in Canada due to COVID on permanent establishment, residency, and cross-border employment income, could similar guidance be provided with respect to treatment of such Canadian days for purpose of departure tax (namely, the 60-month rule) and RCA / SDA exemptions?

CRA Comments: The CRA would consider providing relief in respect of these issues on a case-by-case basis.

Regulation 102 Relief

20) With respect to the CRA's previous guidance on Employer Certification, can the CRA provide additional clarity with respect to the requirement that "the employee returns to their country of residence as soon as they can". As it applies to Canadian citizens who returned to Canada due to COVID, how is "as soon as they can" defined? Would this be the date that the country of residence would permit incoming travelers?

CRA Comments: The threshold for returning "as soon as they can" would generally be the same as the threshold for the requirement to return to the country of residence for eligibility for residency relief under I.A. of the guidance.