CRA and Non-Resident dispositions of Real Property

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Introduction:

- Why do we care about non-residents selling real property
  - Gains and accrued value on sale of real property
  - "Who gets the tax on the gains?" – subject to taxation regardless of residency
  - A country's wealth– ability to extract revenue from its resources – ***TAXES***
  - Single most important resource – ***REAL PROPERTY***
  - No country wants to give up their ability to tax most important resource – ***SACRED***
  - A country's wealth is its resources (i.e. real property)
    - This land is your land, this land is my land – Woody Guthrie.
    - Founding principal of a country's wealth (i.e. Monopoly)

Canada prevents loss of wealth

- ***Income Tax Act & Tax treaties*** – Canadian real property taxable in Canada (keep land sacred)
- ***Compliance*** – create mechanism for compliance
  - Section 116 compliance certificate
- ***Tax collection*** – collect money in advance
  - Imposed withholding taxes of 25%
- ***Liability*** –***enforceable*** liability to produce obedience
  - Legal liability imposed on Canadian residents (purchasers)
- ***Tax filing***– Canada Revenue Agency already knows
  - Actual liability vs. withholdings

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Income Tax Act & Tax treaty

- Income Tax Act – subsection 2(3)
  - Tax payable by a non-resident on disposition of "Taxable Canadian Property" (i.e. real property)
- Tax treaties - OECD Model Convention (Organization for Economic Co-operation and Development)
  - Chapter IV: Taxation of Capital
    - Article 22 – Capital
      - Chapter 1 – immovable property taxable in country where property exists.
- This keeps Canada's tax base sacred

Compliance

- Section 116 certificate of compliance
  - Approval by CRA that you have complied with tax legislation (*see liability section for why we care to comply*)
  - Pending disposition – apply in advance
  - Actual disposition – apply within 10 days after closing
  - Form – T2062
  - Information required:
    - Name, address of person selling property,
    - Name, address of person purchasing property,
    - Description of property being sold,
    - Estimated or actual proceeds, and
    - Adjusted cost base

Tax collection

- Before certificate of compliance issued:
  - 25% of the gross capital gain paid to Canada Revenue Agency, or
  - Acceptable security provided to the Minister
- ***Forthwith*** issuance of certificate of compliance
- This is not "TAX PAID"
- This is "TAX WITHHELD"
- Ultimate liability is yet to be assessed

Liability

- Subsection 116(5) – Liability of purchaser
  - If vendor does not comply, purchaser liable to remit 25% of the purchase price to Canada Revenue Agency within 30 days after the end of the month of acquisition.
  - Exceptions:
    - If after reasonable inquiry – no reason to believe person was a non-resident:
      - Vendor warrant or statutory declaration "not a non-resident"
      - Suspicious facts or situations must be considered
    - Certificate of compliance was issued by the Minister on the actual sale (not a proposed sale)

Liability

- Interest imposed on the liability of the purchaser
- You are representing your client and your client is liable for 25% of the proceeds of which you have already released to their lawyer.
- If the real property is considered inventory (i.e. not capital property) the liability is 50% of proceeds.
- LAWSUIT and INSURANCE ADJUSTOR
- Penalties imposed on purchaser if money withheld and not remitted- max 10% (20% repeat offense)

Tax Filing

- Section 116 is to comply with withholding of appropriate tax or security.
- Capital gain must still be reported under Part I of the Income Tax Act.
- Tax return must be filed to report transaction. Due date April 30th of following year.
- Graduated tax brackets, same as Canadian residents
- Generally no non-refundable tax credits available
- Outlays and other expenses reduce capital gain (does not reduce withholdings)

Other situations

- Principal residence exemption – form T-2091 reduces withholding tax and ultimate capital gain
- Form T-1261 – request for individual tax number
- Penalty under 162(7) - $25/day (max $2,500) failure to file
- Section 116 does not apply to a deemed disposition on death
- Inter-vivos gift (i.e. no proceeds) must comply with 116 based on FMV

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