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REFDATE 121017
SUBJECT Carrying on Business in Canada
SECTION ITA 115; 248; 253; Canada-US Tax Convention, Articles V, VII

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: (1) Whether a U.S. corporation is carrying on business in Canada pursuant to section 253 of the ITA. (2) Given the circumstances, is the U.S. corporation carrying on a business through a permanent establishment in Canada. (3) The U.S. corporation's Canadian filing requirements.

POSITION: Insufficient facts and information are provided for a definitive response to the questions. General comments are provided.

REASONS: Whether a non-resident corporation is carrying on business in Canada is a question of fact. If the U.S. corporation is carrying on business in Canada and meets the conditions of Article V(6) of the treaty, the U.S. corporation will not be carrying on business through a permanent establishment in Canada and will not be liable for Part I tax under the Act.

XXXXXXXXXX

2012-043869
K. Podor

October 17, 2012

Dear XXXXXXXXXX:

Re: Carrying on Business in Canada

This is in response to your email dated February 24, 2012, wherein you requested our opinion regarding whether a United States (U.S.) corporation is carrying on business in Canada. In addition, you have requested clarification of your filing requirements for the purposes of the Income Tax Act (the "Act").

You have indicated that a U.S. corporation ships inventory to a customer's warehouse located in XXXXXXXXXX. At the time the customer uses the inventory, title to the product transfers from the U.S. corporation to the customer. Title remains with the U.S. corporation while the product is stored in the warehouse in Canada.

Our Comments

Carrying on Business

We do not have sufficient details to provide a definitive answer to your questions. As a result, we offer general comments concerning the Canadian tax implications for this situation.

Whether an enterprise is "carrying on a business" in Canada is a question of fact to be determined following a thorough review of all the relevant information. Subsection 248(1) of the Act defines the term "business" and section 253 of the Act extends the meaning of "carrying on business" in Canada to include, inter alia, non-residents that solicit orders or offer anything for sale in Canada through an agent or servant, whether the contract or transaction is to be completed inside or outside Canada or partly in and partly outside Canada.

The following are some general factors that may be used in determining whether a person is carrying on a business in a particular place for the purposes of the Act:

- * The place where a contract which is the basis of the transaction is made;
- * The place where goods are delivered or payments made;
- * The location where decisions to purchase and sell are made;
- * The location of the business assets;
- * The place where the goods are produced or the services performed;
- * Whether an agent or independent contractor is utilized;
- * The location of the profit making operations (as opposed to where the profits are realized);
- * The nature of the activities/transactions;
- * The establishment of a bank account, listed telephone number or address;
- * Whether the taxpayer intended to do business in the jurisdiction;
- * The degree of supervisory or other activity in the jurisdiction;
- * The substance or object of the transaction;
- * The presence of a representative or resident expert;
- * Whether activities in the jurisdiction are merely ancillary to the main business (e.g., the business of buying, storing, selling or manufacturing the product);
- * Whether individuals in the jurisdiction assist (or are available to assist) the taxpayer in his/her endeavor;
- * The reason for the taxpayer's existence; and
- * The place where a reasonable person would consider the business to be carried on.

The Canada Revenue Agency (CRA) provides guidance in Income Tax Interpretation Bulletin (IT)-270R3, "Foreign Tax Credit", paragraph 23, regarding factors to consider when determining the location of the source of business income. This publication and other Canada Revenue Agency (CRA) publications are available on our website www.cra-arc.gc.ca under "Forms and Publications".

In our view, if a non-resident is engaged in the mere storage of inventory in an unaffiliated company's warehouse, this factor alone would not result in a conclusion that the non-resident is carrying on business in Canada.

However, where a non-resident is in fact carrying on business in Canada, Canada has the right to tax the business income subject to a tax treaty. In accordance with Canada's income tax treaties, the business income of a non-resident is generally taxable only in the country of residence, unless the business of the non-resident is carried on through a permanent establishment in Canada and then, only to the extent the income is attributable to the permanent establishment.

Paragraph 1 of Article VII of the Canada-United States Tax Convention (the "treaty") stipulates that business profits may be taxed in Canada if the non-resident carries on business in Canada through a permanent establishment. Article V of the treaty provides the conditions to consider in determining whether a place of business in Canada constitutes a permanent establishment.

Permanent Establishment

Paragraph 6 of Article V provides a list of specific business activities which are treated as exceptions to the general definition of a "permanent establishment" found in paragraph 1 and to the more specific conditions provided in paragraphs 2, 5 and 9. Paragraph 6 provides that the term "permanent establishment" shall be deemed not to include a fixed place of business engaged solely in the specific activities listed in paragraphs (a) through (e). These specific activities are generally preparatory or auxiliary in nature.

Based on the facts provided in your request, one of paragraphs 6(a) through 6(c) may apply in your situation:

* Paragraph 6(a) applies to situations where an enterprise of the U.S. acquires the use of facilities in Canada solely for the storage, display or delivery of its own goods or merchandise. Under these circumstances, the storage facility is deemed not to be a permanent establishment in Canada.

* Paragraph 6(b) provides that the maintenance of a stock of goods or merchandise in Canada, belonging to an enterprise of the U.S., for the purpose of storage, display or delivery shall be deemed not to be a permanent establishment in Canada.

* Paragraph 6(c) applies to situations where the maintenance of a stock of goods or merchandise in Canada, belonging to an enterprise of the U.S., for the purpose of processing by another person, shall be deemed not to be a permanent establishment in Canada.

The exceptions noted above apply for as long as the use of the facility is acquired solely for the purposes of storage, display or delivery of its goods or merchandise; the stock of goods or merchandise is maintained in Canada solely for the purpose of storage, display or delivery; or, the stock of goods or merchandise is maintained in Canada for the purpose of processing by another person. Should the business activities conducted at the facility by the enterprise expand to include business activities other than those described in paragraph 6, the exception provided would no longer be applicable and the enterprise will be deemed to have a permanent establishment in Canada.

Canadian Filing Requirements

If a non-resident corporation is not carrying on business in Canada pursuant to paragraph 2(3)(b) of the Act, the corporation will not be liable to tax in Canada. In addition, the non-resident corporation will not be required to file a return.

Where a U.S. corporation is found to be carrying on business in Canada but under the treaty paragraph 6 of Article V applies, the U.S. corporation is deemed not to have a permanent establishment in Canada (this assumes that the corporation does not also provide services in Canada which may result in a deemed permanent establishment under paragraph 9 of Article V). In this case, the U.S. corporation is not liable to Part I tax under the Act; however, the corporation must file a T2 corporation tax return ("T2 return") to claim a treaty exemption. Pursuant to clause 150(1)(a)(i)(B) of the Act, a non-resident corporation that is carrying on business in Canada is required to file a T2 return, including Schedules 91 and 97.

We trust these comments are helpful.

Lita Krantz, CA
Assistant Director
International Division/ Division des opérations internationales
International Section III
Income Tax Rulings Directorate
Legislative Policy and Regulatory Affairs Branch