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**Canada – Certain
Nonresident Employers
May Apply for Payroll
Withholding Exception**

by KPMG LLP, Canada (a
KPMG International member
firm)

flash Alert

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The Canadian government introduced a new exception to the Regulation 102 withholding tax requirement in the 2015 federal budget. This exception was summarized in our GMS [Flash Alert 2015-059](#) (4 May 2015). Since then, draft legislation¹ has been introduced and forms clarifying the certification process have been released. While the exception has not been enacted into law, the Canada Revenue Agency (CRA) is operating on the basis that the exception will be enacted into law substantively unchanged and effective January 1, 2016.

Why This Matters

Regulation 102 requires nonresident employers to withhold Canadian income tax and Canada Pension Plan (CPP) and Employment Insurance (EI) on income earned in Canada by their nonresident employees, regardless of whether that income would ultimately be subject to Canadian tax. For employers with tax-exempt employees, the employer faced a choice of:

- remitting taxes on behalf of these employees and awaiting the filing of a tax return that claims the treaty exemption (resulting in a potential cash flow issue); or
- alternatively filing for a tax waiver for every individual tax-exempt employee using R102 J or R102 R.

As a result, Regulation 102 and the existing waiver process results in unnecessary administrative burden on employers. Under the new exception process, multinational employers sending assignees to work in Canada may see their withholding obligations eased for employees that meet the conditions for the exception.

Regulation 102 – Withholding Tax Updates

Nonresident employers that have nonresident employees working in Canada can now apply to be eligible for the new exception from the withholding tax requirements under Regulation 102 of the Income Tax Act. This exception takes effect January 1, 2016.

The CRA does not anticipate giving retroactive approvals, but as a transitional measure, all applications for employer eligibility received by February 1, 2016, will be considered for a retroactive effective date of January 1, 2016. As such, employers that want to apply the exception to their eligible employees from January 1, 2016, must **act quickly to meet the February 1 deadline** to submit their applications.

KPMG Note

Since the certification is not retroactive other than as a transitional measure, employers with employees working in Canada on January 1, 2016, may wish to consider applying

KPMG Note (cont'd)

for a Regulation 102 waiver using either Form R102-R or R102-J if the employer does not file for employer certification using the new Form RC 473 by February 1, 2016.

Qualifying for the Exception

The Regulation 102 rules require employers to withhold Canadian tax on income earned in Canada by their nonresident employees. The new exception to these rules will be available for qualifying employers and employees.

To qualify for the exception, an employee must meet the criteria under a tax treaty to be exempt from income tax in Canada. The employee must work in Canada for less than 45 days in the calendar year that includes the time of the payment, or must be present in Canada for less than 90 days in any 12-month period that includes the time of the payment. The original budget proposal did not include the 45-day rule.

A qualifying employer must be resident in a country with which Canada has a tax treaty and must be certified by the CRA at the time of the payment. The requirement that the employer not carry on a business in Canada through a permanent establishment which was present in the original budget proposal has been removed. These modifications have reduced some of the uncertainty in determining whether an employer will qualify.

KPMG Note

Because the exception does not provide withholding tax relief for all employees that are exempt from income tax in Canada under a tax treaty, the existing Regulation 102 tax waiver process remains available for these employees and is also available where the nonresident employer chooses not to file for employer certification under the exception.

Certification Process

The two-page application that employers will use to apply for certification, along with guidance on the certification process, was released on January 12, 2016. The Form RC 473, *Application for Non-Resident Employer Certification*, requests:

- Employer/employee identification;
- Declaration of employer residency;
- Employer certification that all obligations and requirements of a qualifying nonresident employer have been met;
- Details on the estimated number of employees to come to Canada during the certification period and broadly the type of services they will perform.

The CRA states that it should receive applications at least 30 days before a qualifying nonresident employee starts providing services in Canada. Applications need to be sent to the CRA Tax Services Office in Vancouver since they are overseeing employer certification.

KPMG Note

Employers are not required to submit supporting documents up-front. Rather, the CRA reserves the right to ask for further documentation at a later date.

Once the employer's application has been submitted and reviewed, a letter confirming approval will be issued. This approval will be granted for up to two calendar years.

If an employee ceases to be a qualified nonresident employee and thus is no longer eligible for the exception, the employer is required to immediately make a written disclosure to CRA.

Obligations of a Qualifying Employer

The CRA states that, among other things, a qualifying employer must:

- track and record the number of days each qualifying employee is either working in Canada or is present in Canada;
- determine whether the employee is resident in a country with which Canada has a tax treaty;
- complete and file a T4 Summary and Information Return for employees who have provided employment services in Canada, except for employees earning less than C\$10,000;
- obtain a Business Number and, if required to make remittances, a program account number for payroll purposes;
- file the applicable Canadian income tax returns for the calendar years in which they are certified as qualifying employers.

The CRA also details the situations in which qualifying employers do not have to withhold Canada Pension Plan (CPP) and Employment Insurance (EI) contributions from remuneration paid to qualifying employees.

Footnote:

1 Legislative Proposals Relating to the Income Tax Act And Regulations, Clauses 15 to 18 & Explanatory Notes on the Legislative Proposals Related to the Income Tax Act and Regulations, Clauses 15 to 18, 31 July 2015.

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See the following recently-published article in *The Expatriate Administrator*, the online “insight & analysis” journal from KPMG’s Global Mobility Services practice.

[“What’s Your Company’s Plan When It Comes to Globally Mobile Employees with Equity Awards?”](#)

by Ed Gibbons with KPMG LLP (U.S.) in New York City

This article discusses the burdens on stakeholders to comply with mobility-related tax demands, what the concerns are around withholding and reporting when employees with equity-based compensation cross borders, and how to effectively mitigate risk and foster compliance in multiple jurisdictions.

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