

CRA'S NEW AUDIT INITIATIVE DEMYSTIFIED:

**Compliance strategies for
Cross-Border Motor Carriers**

Louis Amato-Gauci | Marie-Hélène Tremblay

June 6, 2024



CRA's Audit Initiative

- CRA has a new audit initiative targeting cross-border motor carriers who engage non-Canadian drivers and owner-operators (O-Os)
- Focus is on the withholding tax obligations arising under Paragraph 153(1)(g) of the Canadian *Income Tax Act*, and:
 - Regulation 102 – in respect of non-Canadian employee drivers
 - Regulation 105 – in respect of non-Canadian O-Os

Regulations

102 (1) Except as otherwise provided in this Part, the amount to be deducted or withheld by an employer

(a) from any payment of remuneration (in this subsection referred to as the **payment**) made to an employee in his taxation year where he reports for work at an establishment of the employer in a province, in Canada beyond the limits of any province or outside Canada [...]

* * *

105 (1) Every person paying to a non-resident person a fee, commission or other amount in respect of services rendered in Canada, of any nature whatever, shall deduct or withhold 15 per cent of such payment.

Regulations 102 and 105 applied to cross-border motor carriers

- Are services rendered in Canada by U.S. truck drivers (employee drivers or independent contractor drivers (“O-Os”)) taxable in Canada?
 - **Generally not**
 - See: Canada—United States Tax Treaty, Art. XV, Section 3.
- Do Regulations 102 and 105 apply even if no tax is payable in Canada?
 - **Yes!**
 - CRA claims to be entitled to withholding taxes on remuneration paid to a driver for any portion of a cross-border movement on Canadian soil.

Consequences of failure to withhold

Cross-border motor carriers who fail to withhold are liable for:

- ▶ Withholdings that should have been remitted to the tax authorities
 - How to seek a subsequent reimbursement if no tax payable?
- ▶ Interest
- ▶ Penalties
 - 10 percent of the assessed amount for failure to deduct at source, but this can be doubled in the event of gross negligence
 - up to 20 percent for failure to remit; and
 - up to a further \$7,500 for late filing

Option #1 to avoid withholding obligation R102 Waiver for Employee Drivers

- U.S. motor carriers could require each non-Canadian employee driver who will perform cross-border services to:
 - ▶ register with CRA;
 - ▶ obtain an Individual Tax Number; and
 - ▶ file a Form R102 Waiver Application.
- Driver cannot earn >\$10K in one calendar year
- Driver's time in Canada cannot exceed 183 days
- Only valid for one year

Option #1 to avoid withholding obligation

R105 Waiver for O-Os

- Reg. 105 waivers are generally available to owner-operators if:
 - ▶ The O-O does not have a fixed base or permanent establishment in Canada;
 - ▶ They can confirm residency in the U.S. (or another treaty country); and
 - ▶ They can confirm that they are entitled to treaty benefits.
- O-Os must submit Reg. 105 waiver application at least 30 days prior to commencement of services, or the initial payment for services
- CRA may require security in an amount equal to the potential Canadian tax liability

Option #2 to avoid withholding obligation Carrier as a Qualified Non-Res. Employer

- Cross-border motor carrier can file CRA Form RC473, seeking to be designated a **Qualified Non-Resident (QNR) employer**
- If the designation is allowed, the carrier will be exempt from withholding federal Canadian withholding taxes on the amounts paid to its employee drivers
- But note that QNR status does not address:
 - ▶ the withholding issue with regard to O-Os
 - ▶ other withholding obligations (e.g.: Canada Pension Plan; Employment Insurance)
- The designation is valid for two years

Option #2 to avoid withholding obligation Carrier as a Qualified Non-Res. Employer

Following certification as a QNR employer, the carrier must:

- ❑ track and record the number of days each non-resident employee driver is either working in Canada, or present in Canada, and the income attributable to these days, proactively;
- ❑ ensure that each employee driver is resident in a country with which Canada has a tax treaty, and evaluate and document if the remuneration paid is expected to be exempt from tax in Canada under an applicable tax treaty;
- ❑ confirm that each employee driver either works in Canada for less than 45 days in the calendar year that includes the time of the payment, or is present in Canada for less than 90 days in any 12-month period that includes the time of payment;
- ❑ issue and file T4 tax slips and summaries for non-resident employee drivers;
- ❑ file Canadian income tax returns as required by the *Income Tax Act* for the calendar years covered by the certification period; and
- ❑ upon request, make books and records available in Canada for inspection by the CRA for the purpose of administering the employer certification agreement and withholding requirements.

Option #2 to avoid withholding obligation Carrier as a Qualified Non-Res. Employer

Your employment agreements must require U.S. drivers to disclose:

- ❑ Every day / part day that the driver is working in Canada
- ❑ Every day / part day that the driver is present in Canada for reasons unrelated to work
- ❑ The driver's country of residence for tax purposes

The agreements should also require drivers to acknowledge that they may be subject to Canadian withholding tax if:

- ❑ Their country of residence changes at any time
- ❑ Their work in Canada hits or exceeds 45 full or partial days in any calendar year
- ❑ Their total time in Canada for any reason hits 90 days or more in any 12-month period

Option #3: Withhold!

- Final option would be for the carrier to withhold taxes from all amounts paid to non-Canadian employee drivers and O-Os, for that portion of their remuneration reasonably allocable to operations within Canada
- Drivers will have two years in which to request a refund from the CRA
- Burden for the drivers to file returns with the CRA and claim refunds



Currently non-compliant?
Received a CRA Audit Letter?

Contact a member of Miller Thomson's
Tax Disputes Resolution Group, or the
Transportation and Logistics Team



LOUIS AMATO-GAUCI

**PARTNER, CO-LEADER
TRANSPORTATION & LOGISTICS**

416 595 8551

lamatogauci@millerthomson.com



MARIE-HÉLÈNE TREMBLAY

**PARTNER, NATIONAL LEAD
TAX DISPUTES RESOLUTION**

514 879 2121

mhtremblay@millerthomson.com



MILLERTHOMSON.COM



© 2024 Miller Thomson LLP. All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the presenter(s).

This presentation is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and viewers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.