

THE NAVIGATOR



NON-RESIDENT EXECUTORS (LIQUIDATORS IN QUEBEC)

Did you know that where your executor/liquidator lives may affect the administration of your estate?

By appointing a non-resident of Canada as the sole executor/liquidator of your estate, the Canada Revenue Agency (CRA) may consider your estate to be a non-resident of Canada. This could potentially trigger some negative tax consequences, regardless of how capable and willing the proposed executor/liquidator may be. This article will discuss some of those negative tax consequences as well as some other challenges a non-resident executor/liquidator may face.

This article outlines several strategies, not all of which will apply to your particular circumstances. The information is not intended to provide legal or tax advice. To ensure that your own circumstances have been properly considered and that action is taken based on the latest information available, you should obtain professional advice from a qualified tax and/or legal advisor before acting on any of the information in this article.

RESIDENCY STATUS OF THE ESTATE – TAX CONCERNS

In Canada, the federal Income Tax Act (Act) provides that an estate is also a trust for tax purposes. A trust is considered to be resident where the central management and control of the trust takes place. From a tax perspective, this means that if your executor/liquidator is a non-resident, the estate could be considered to be a non-resident too.

To further complicate matters, there are rules in the Act that may deem a trust to be a Canadian resident trust even though the central management and control takes places in another

country. Therefore, it is very important to seek the assistance of a qualified tax advisor to determine the residency of the estate.

POTENTIAL TAX IMPLICATIONS OF NON-CANADIAN RESIDENCY

- The non-resident estate could lose the preferred tax treatment for capital gains and Canadian source dividends that flow through to Canadian resident beneficiaries.
- A non-resident estate may not have the option, which is otherwise available to a Canadian estate, of splitting the tax burden between the estate and its Canadian resident beneficiaries.

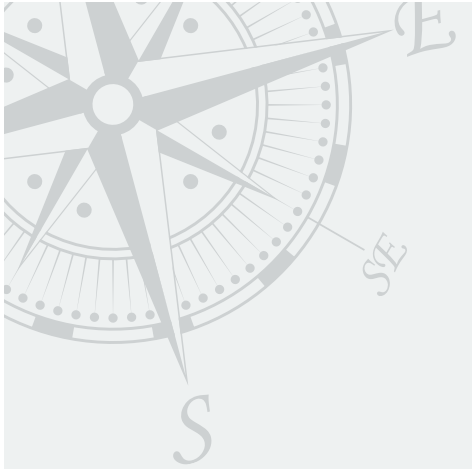
- If the estate becomes a non-resident estate at any point during its administration, the estate will be deemed to have disposed of its assets at fair market value, potentially exposing the estate to a capital gains tax liability.

POTENTIAL SOLUTIONS

- When appointing a sole executor/liquidator, choose one who is likely to remain resident in Canada. This may be achieved by choosing a professional trust and estate services provider such as a Canadian corporate trustee.
- When appointing co-executors/liquidators, keep in mind that the



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An out-of-country executor/liquidator may be required to provide a surety bond before they are given the authority to administer the estate.

residency of the individual who clearly exercises a substantial portion of the management and control of the estate will generally determine the residency of the estate. If there is equal management and control, the residency of the majority of the executors/liquidators will be the deciding factor. If this factor cannot determine the residence of the trust, the CRA will consider other factors, such as the location of the estate assets and where the legal rights with respect to the estate assets are enforceable. Speak to your qualified tax advisor if you believe the residency of the estate will be unclear.

- Appointing more than one executor/liquidator can help avoid the risk that the estate may become a non-resident estate should one of the executors/liquidators move from Canada. If an executor/liquidator is to become a non-resident of Canada, they could renounce their appointment prior to departure from Canada to avoid negative tax consequences for the estate.

FOREIGN RESIDENCY

Depending on the tax rules of the country where the executor/liquidator resides, the estate could be considered a resident and taxable in that country. This could apply regardless of whether the estate is considered to be a Canadian resident or not. In some cases, the estate could be taxable in more than one jurisdiction. Therefore, it is important to understand the tax rules in the executor's/liquidator's country of residence in addition to the tax rules in Canada.

REQUIREMENTS TO 'POST A BOND'

In some jurisdictions, an out-of-country executor/liquidator may be required to obtain and provide a

surety bond to the court before they are given the authority to administer the estate. This is often referred to as the requirement to "post a bond". A bond protects the estate's creditors and beneficiaries in the event that the assets of the estate are administered improperly.

Obtaining a bond is time consuming and an added expense. The estate usually bears this cost. You should consider this potential cost if you choose an out-of-country executor/liquidator. This may also be an issue if you choose one executor/liquidator to administer your estate that has assets located in multiple jurisdictions.

PRACTICAL CHALLENGES FOR FOREIGN EXECUTORS/LIQUIDATORS

Executors/Liquidators may face challenges in carrying out their duties if they do not live in the country in which the estate assets are located. For example, they may not be familiar with the local legislation. This may result in a more lengthy and complex estate administration. Out-of-country executors/liquidators may also face regulatory issues with regard to their ability to give investment instructions to the deceased person's professional advisors in another jurisdiction.

It is challenging to act as executor/liquidator from a distance. There may be occasions throughout the estate settlement process where the executor's/liquidator's physical presence is required to complete certain tasks, such as valuing estate assets or making distributions to beneficiaries. This may result in an additional cost to the estate, as the executor/liquidator may be required to travel back and forth from their place of residence and the jurisdiction where the estate assets are located.

A Canadian corporate trustee may simplify the estate administration for an executor/liquidator who is unfamiliar with local laws.

**APPOINTING A CORPORATE TRUSTEE
AS SOLE EXECUTOR/LIQUIDATOR
OR AS AGENT FOR THE EXECUTOR/
LIQUIDATOR**

Being an executor/liquidator can be an onerous task, especially for a non-resident executor/liquidator due to the additional challenges they may face. A Canadian corporate trustee

may be able to assist by taking on the role of executor/liquidator, or agent for the named executor/liquidator in administering the estate assets. This may be a welcome option, and potentially a cost-effective one, to simplify and expedite the estate administration for an executor/liquidator who is unfamiliar with local laws.

Please contact us for more information about the topics discussed in this article.

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