

July 2011

## **NEW CANADIAN TREATY-BASED WITHHOLDING RATE AND BENEFIT FORMS**

In April 2011, the Canada Revenue Agency (CRA) released the final versions of declaration forms that should be used by non-residents of Canada to provide the CRA and Canadian resident payers with information regarding their residency status and eligibility for treaty benefits. Previously, the CRA's policy was to allow the Canadian payer to rely on the payee's address for evidence of residency and treaty benefits unless there was a reasonable cause to suspect otherwise, but this is no longer sufficient.

The initial release of the draft forms closely followed the introduction of the 2007 Fifth Protocol to the Canada-U.S. Tax Treaty. The forms are similar to the U.S. Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholdings*. The new CRA declaration forms are:

[NR301](#) - Declaration of Eligibility for Benefits under a Tax Treaty for a **Non-Resident Taxpayer (i.e., Individual, Corporation or Trust)**

[NR302](#) - Declaration of Eligibility for Benefits under a Tax Treaty for a **Partnership with Non-Resident Partners**

[NR303](#) - Declaration of Eligibility for Benefits under a Tax Treaty for a **Hybrid Entity<sup>1</sup>**

<sup>1</sup> A hybrid entity is an entity that is considered "fiscally transparent" under the tax laws of a country that Canada has a tax treaty with and not "fiscally transparent" for Canadian tax purposes. For example, a U.S. limited liability company is generally treated as a partnership for U.S. tax purposes, but is treated by the CRA as a corporation for Canadian tax purposes.

The CRA has provided a transitional period until December 31, 2011 to allow for this policy change to become effective. As draft versions of these forms have been posted on the CRA's website for some time, a payer can continue to rely on the draft forms, if they have already been completed.

---

### **USE OF THE FORMS**

These forms should be used by non-residents of Canada in the following situations. Depending on the nature of the treaty claim, the forms should be submitted to the Canadian payer or to the CRA as outlined below.

#### **Part XIII Withholding Tax Reduced Under a Treaty**

The forms should be used if a non-resident of Canada receives interest, dividends, pension, annuities, rents, royalties, management fees and estate or trust income, which is subject to Part XIII non-resident withholding tax, and the withholding tax rate is reduced by a treaty. The form should be submitted to the Canadian resident payer, or if income is derived through a partnership or hybrid entity and that

partnership or hybrid entity has requested a completed form NR301, this form should be submitted to the partnership or hybrid entity.

### **Requesting a Refund of Part XIII Withholding Tax**

The forms should be used when a non-resident of Canada is submitting Form NR7-R, *Application for Refund of Part XIII Tax Withheld*, to obtain a refund of Part XIII withholding tax, if the non-resident of Canada is entitled to a lower withholding tax rate under a treaty or a treaty exemption. The form and Worksheet A of the form, should be submitted to the CRA with Form NR7-R.

### **Waiver of Regulation 105 Withholding Tax**

The forms should be used when a non-resident of Canada is submitting Form R105, *Regulation 105 Waiver Application*, to request a reduced amount of Regulation 105 15% withholding tax related to services provided by a non-resident in Canada. The form and Worksheet B of the form, should be submitted to the CRA with the Form R105.

### **Requesting a Certificate of Compliance**

The forms should be used when a non-resident of Canada has disposed of, or will be disposing of, taxable Canadian property or treaty protected property and is completing either of the following forms to request a certificate of compliance:

- T2062, *Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property*
- T2062A, *Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Canadian Resource or Timber Resource Property, Canadian Real Property (Other than Capital Property), or Depreciable Taxable Canadian Property.*

The form and Worksheet B of the form, should be submitted to the CRA with the T2062 or T2062A request.

### **Filing a Tax Return (Hybrid Entity)**

The forms should be used if a hybrid entity is filing a Canadian income tax return and is claiming a deduction or certain exemptions related to treaty benefits. The form and Worksheet B of the form, should be submitted to the CRA with the tax return.

---

### **EXPIRY OF FORMS NR301, NR302, AND NR303:**

For Part XIII withholding tax purposes, the declaration expires on the earlier of:

- Date there is a change in the taxpayer's eligibility for the declared treaty benefits (e.g., change in country of residence), or
- Three years from the end of the calendar year in which the form was signed and dated.

For other purposes, the non-resident will presumably be required to submit a current form with their application, request or tax return.

---

## RECOMMENDATIONS

1. Although the use of the forms is not mandatory, it would be prudent for Canadian resident payers to obtain completed forms from non-residents of Canada when the non-residents are receiving income subject to Part XIII withholding tax because:
  - It is likely that in the case of a review or audit, the CRA will request this information and the CRA will not provide reduced withholding rates, treaty benefits or refunds if the information is not provided. If these specific forms are not used, equivalent information should be obtained by the Canadian resident payers.
  - If the payer does not request this information from the payee and insufficient tax is withheld, the payer, the payee, or both, will be liable for the insufficient tax, and interest and penalties.
  - The completion of these forms, however, will not automatically guarantee the Canadian resident payer an exemption from liability for the under-withheld tax and any associated penalties and interest. The CRA has indicated that it will consider a waiver of penalties and interest in certain circumstances where the Canadian payer has taken reasonable care to obtaining all the necessary information required in the forms.
  - The forms set out the analysis and extent of information required in determining the applicable Part XIII non-resident withholding tax rate.
2. The Canadian resident payer should review the information obtained from the payee in forms NR301, NR302 and NR303 to ensure there is sufficient information to support a lower withholding tax rate or a treaty exemption. The information obtained on the forms should be consistent with information known about the non-resident payee. The Canadian resident payer should not apply a reduced withholding tax rate if:
  - The non-resident payee has not provided the declaration,
  - The NR301, NR302 and/or NR303 form is not complete,
  - Information on the NR301, NR302 and/or NR303 form is incorrect or misleading, or
  - The non-resident payee resides in a country that does not have a tax treaty with Canada.
3. A Canadian resident payer of amounts subject to Part XIII withholding tax is not required to submit the forms to the CRA; however, a copy should be kept on file should the CRA request it.
4. The limitation on benefits rules in Article XXIX-A of the Canada-U.S. Tax Treaty is an “anti-treaty shopping” provision that is common in many U.S. tax treaties. The 2007 Fifth Protocol to the Canada-U.S. Tax Treaty extended the application of the provision to restrict a U.S. corporation’s ability to claim treaty benefits. The CRA recommends that the Canadian payer obtain Form NR301 or similar information before applying a reduced tax treaty rate.

The forms come with detailed instructions but additional information is also contained in the following CRA documents:

- Pending updates to IC76-12, *Applicable rate of Part XIII tax on amounts paid or credited to persons in countries with which Canada has a tax convention related to forms NR301, NR302, and NR303* (click [here](#)), and
- More information on forms NR301, NR302, and NR303 (click [here](#)).

If you have any questions or would like further information on the declaration forms, please call or email your Smythe Ratcliffe service contact or any member of our Tax Group. Click here for our [Contact Page](#).

**Smythe Ratcliffe** is a full-service accounting firm based in Vancouver, British Columbia, recognized for exceptional service in assurance, taxation and business advisory for private and public clients. The Firm delivers local knowledge through its British Columbia offices (Vancouver, North Vancouver, Victoria and Nanaimo) and global insight through its affiliation with PKF International an association of over 240 accounting firms in nearly 125 countries worldwide. The Firm's skilled audit and tax advisors are a diverse team of professionals – many of whom are experts in the not-for-profit & union benefit and pension plans, technology, resources, and real estate and construction industries. Employee diversity, exceptional retention rates and skilled specialists have consistently led Smythe Ratcliffe to rank among the top accounting firms in Canada. [www.smytheratcliffe.com](http://www.smytheratcliffe.com)

---

Smythe Ratcliffe LLP is a member firm of both the PKF International Limited network and PKF North America, which are, respectively, a network and an association of legally independent firms and does not accept any responsibility or liability for the actions or inactions on the part of any other individual member firm or firms.

The information contained in this newsletter is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.