

GROUP SEEKS RELIEF FOR U.S. CITIZENS WITH RESP AND TFSA ACCOUNTS

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In a letter dated March 4, 2016, the American Chamber of Commerce in Canada (“AmCham Canada”) requested that the United States Department of the Treasury (“Treasury”) provide various forms of tax relief to U.S. and Canadian citizens who have contributed to and maintain various cross-border deferred and tax-exempt savings accounts. If acted upon, this could be welcome relief to U.S. citizens living in Canada with RESP and TFSA accounts.

Both the U.S. and Canada maintain tax provisions allowing individuals to establish tax-deferred and/or tax-exempt savings accounts. Article XVIII of The United States-Canada Income Tax Convention and associated protocols (the “Treaty”) provides bilateral deferral of tax or inclusion in income for various qualified or registered pension or retirement plans. However, the Treaty does not provide any relief from double taxation or current inclusion in income for other plans and accounts such as:

- Education savings plans such as Registered Education Savings Plans (RESP) in Canada and Qualified Tuition Program (529) Plans in the United States.
- Disability savings plans such as Registered Disability Savings Plans (RDSP) in Canada and Qualified ABLE (Achieve a Better Life Experience) Plans in the United States.
- Generally tax-exempt savings accounts such as Tax Free Savings Accounts (TFSA) in Canada and Roth IRAs (individual retirement accounts) in the United States (under certain circumstances).

It is estimated that over one million Americans live in Canada and a similar number of Canadians live in the U.S. The lack of tax relief from double taxation or current inclusion in income provided under the Treaty for these plans and accounts has adverse tax consequences for:

- Americans living in Canada.
- Canadians living in the United States.
- Americans living in the United States who contributed to one of the Canadian plans while living in Canada.
- Canadians living in Canada who contributed to one of the United States plans while living in the United States.

In its proposal, AmCham Canada recommended that Treasury implement the following measures in order to reduce the tax and reporting burdens associated with various cross-border deferred and tax-exempt savings accounts:

1. Provide U.S. citizens and residents tax-deferred or tax-exempt treatment, comparable to that offered by Canada to its residents, for their contributions, income and withdrawals from properly established Canadian RESP, RDSP and TFSA.
2. Exempt properly established Canadian RESP, RDSP and TFSA from classification as grantor trusts. In addition, exempt U.S. citizens and residents from various onerous statutory filing requirements for foreign trusts and PFICs which can

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currently exist for these plans.

3. Work with their Canadian counterparts at Finance Canada to provide similar relief from taxation and burdensome reporting requirements for Canadian residents who hold and contribute to properly established 529 Plans, qualified ABLE accounts and Roth IRAs in the United States.

Under current law, if a U.S. person establishes an RESP for a child, the RESP is potentially considered a foreign grantor trust of the subscriber (not the child) for U.S. tax purposes, since the subscriber can reclaim his contribution to the plan, if the funds are not used for education purposes. As a result, the income earned by the RESP is subject to double taxation. The U.S. person who contributes to the account is taxed by the U.S. on the income as it is earned within the plan. Additionally, the Canadian beneficiary is taxed by Canada when the income is distributed by the plan to cover qualified educational expenses.

Furthermore, if an RESP is considered a foreign trust for U.S. tax reporting purposes, the U.S. subscriber must file Forms 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, and 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner*. In addition, a U.S. beneficiary must file Form 3520 upon receipt of distribution. The regulations relating to foreign trusts and their reporting requirements are complex and often unclear to unsophisticated taxpayers. Correctly preparing the forms usually requires the services of a professional tax return preparer. Inadvertent and unintentional failure to follow the regulations often results in the assessment of substantial penalties for failing to file these forms timely.

Specifically, AmCham Canada requests that Treasury implement the following measures with regard to RESPs:

1. Exempt RESPs from the grantor trust rules (making the beneficiary the person subject to tax on the income) and allow tax deferral of plan income until it is distributed to beneficiaries; this treatment is comparable to the Canadian tax provisions.
2. Tax the beneficiary (if a U.S. person) on the distribution when it is received
3. Exempt a U.S. subscriber or beneficiary of an RESP from the complex foreign trust information reporting rules if the RESP is considered a foreign trust for U.S. tax purposes. This relief might require modifying Article XVIII of the Treaty to specifically include RESP in the definition of pensions.

AmCham Canada also recommended that Treasury implement similar measures with respect to TFSAs.