Tax Law

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Border crossings trip up travellers with latent tax liabilities

EILEEN MARTIN

&

ELIZABETH BUSCAGLIA

U.S.-bound travellers be advised: those with U.S. citizenship and another citizenship who try to enter the U.S. on a foreign passport could not only be denied admission, but may also discover latent tax liabilities.

When a U.S. citizen applies for admission to the U.S. at a port of entry, she is examined by a U.S. Customs and Border Protection (CBP) Officer. Once the officer concludes she is a U.S. citizen, the examination is over, and she is admitted to the U.S. If the same person applies for admission to the U.S. on a passport from another country, she will be inspected as an alien as thoroughly as the CBP officer feels is necessary.

The main problem arises when a U.S. citizen who was born in the U.S. tries to gain admission to the U.S. on a passport from another country. The basis for this legal problem is 8 U.S. Code §1185(b), which states, "Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the U.S. to depart from or enter, or attempt to depart from or enter, the U.S. unless he bears a valid U.S. passport."

This statutory requirement is not new. What is new is the passport (or passport equivalent) requirement for all travellers to the U.S. Effective June 1, 2009, the Western Hemisphere Travel Initiative (WHTI) requires U.S. and Canadian travellers to present a passport or passport equivalent that denotes identity and citizenship when entering the U.S. The initiative is a result of the *Intelligence Reform and Terrorism Prevention Act* of 2004 (IRTPA). Travellers who may have been entering the U.S. with evidence of Canadian citizenship must now present a passport (or equivalent). If the passport reflects a U.S. place of birth, CBP officers will presume that the traveller is a U.S. citizen and should be applying for admission on a U.S. passport.

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U.S. citizens travelling without a U.S. passport may have tax troubles.

Some U.S.-born travellers have renounced their U.S. citizenship and are correctly travelling on a foreign passport. Because CBP officers do not have a database of U.S. citizens—or former U.S. citizens—they will not presume renunciation has occurred; they will require the traveller to provide evidence of renunciation. The way in which a former U.S. citizen evidences his renunciation is by presentation of a Certificate of Loss of Nationality (CLN). Currently, CBP officers are requiring U.S.-born travellers without U.S. passports to present CLNs.

At first blush, this appears to be bureaucratic posturing: rigid imposition of a statute for the sake of harassing travellers. However, we have concluded that the reason for this increasingly strict application of law has to do with revenue. The connection between money and passports may seem tenuous, but we believe the U.S. government is using this requirement to find those who are subject to its tax regime, which requires all U.S. citizens to file U.S. federal income tax returns annually reporting their worldwide income. Prior to the WHTI, these people may have easily escaped detection.

> **"We believe the U.S. government is using this requirement to find those who are subject to its tax regime..."**

This situation often arises when a child is born in the U.S. to foreign national parents in the U.S. on a temporary work assignment. When the family returns home, they are often unaware of the child's U.S. tax filing requirements. When the child then tries to travel to the U.S. for pleasure, to attend school, or to visit relatives, she will be advised that she needs to enter on a U.S. passport or provide documentation that she is no longer a U.S. citizen. If she completes and files a U.S. passport application, she can expect that the Internal Revenue Service will be advised to add another taxpayer to the rolls. If she renounces U.S. citizenship, she may be subject to a complex expatriation exit tax regime and may be rendered inadmissible to the U.S. If the U.S. Reed Amendment is ever enforced, she risks the possibility of losing the legal ability to re-enter the U.S. if the government determines her reason for renunciation is tax avoidance.

What begins as an innocent-sounding requirement—to travel on a U.S. passport or obtain a CLN—can have serious tax consequences and preclude a former citizen's ability to enter the U.S. for the rest of her life.

Attorneys and accountants can attempt to resolve this problem for their clients in advance by obtaining an opinion on the U.S. citizenship status of the client and the on-going cost of U.S. tax liabilities. If the U.S.-born client has a clear non-tax reason for renouncing U.S. citizenship, she can consider renunciation, but the tax consequences may be harsh.

The WHTI may be the cause for many new U.S. citizens to begin filing U.S. tax returns. ■

Eileen Martin and Elizabeth Buscaglia are attorneys in Hodgson Russ LLP's Immigration Practice Group. Hodgson Russ advises Canadian clients on U.S. legal issues affecting their cross-border operations in the U.S. and has a full-time office in Toronto devoted exclusively to practising U.S. law.