

IT

INCOME TAX ACT

Residence of a Trust or Estate

IT-447

May 30, 1980

Subsection 2(1) (also subsections 75(2), 94(1), 104(1) and (2))

1. The residence of a trust or estate (hereinafter referred to as a trust) in Canada, or in a particular province or territory within Canada, is a question of fact to be determined according to the circumstances in each case. However, a trust is generally considered to reside where the trustee, executor, administrator, heir or other legal representative (hereinafter referred to as the trustee) who manages the trust or controls the trust assets resides.

2. The trustee who has management and control of the trust, while he may not have physical possession of the trust assets, will be the person who has most or all of the following powers or responsibilities:

- (a) control over changes in the trust's investment portfolio,
- (b) responsibility for the management of any business or property owned by the trust,
- (c) responsibility for any banking, and financing, arrangements for the trust,
- (d) control over any other trust assets,
- (e) ultimate responsibility for preparation of the trust accounts and reporting to the beneficiaries of the trust, and
- (f) power to contract with and deal with trust advisors, e.g. auditors and lawyers.

3. In certain cases, more than one trustee may be involved in exercising the management and control over the trust. In one such trustee clearly exercises a more substantial portion of the management and control than the others, the trust will reside in the jurisdiction in which that trustee resides. Where two or more trustees exercise relatively equal portions of the management and control of the trust, and trustees exercising more than 50% of such management and control reside in one jurisdiction, the trust will reside in that jurisdiction.

4. In some cases it may not be clear who has management and control of the trust and in these situations the Department will examine other factors relating to the trust to determine residence. The most important of these factors are:

- (a) the location where the legal rights with respect to the trust assets are enforceable, and
- (b) the location of the trust assets.

The residence of the beneficiaries of a trust and domicile of the settlor are not considered to be relevant except in situations as described in 5 below.

5. Normally residence of a trust is dependent upon residence of the trustee or trustees who can exercise management and control of the trust. In some situations the facts may indicate that a substantial portion of the management and control rests with some other person such as the settlor or the beneficiaries. In these situations the residence of this other person may be considered to be the determining factor for the trust regardless of any contrary provisions in the trust agreement.

6. Where an individual exercises the management and control of a trust, the residence of that individual is determined based on the normal factual tests for determining the residence of an individual.

7. Where a corporation exercises the management and control of a trust, the residence of that corporation is determined based on the normal factual tests for determining residence of a corporation. An exception to the general rule may be encountered where the management and control of a trust is exercised by a branch office, for example, a branch of a trust company. In these circumstances, the trust may be determined resident in the jurisdiction where the branch office is located even though the corporation itself is resident outside that jurisdiction.

8. In some situations, after examination of all factors, it may be determined that a trust is resident in Canada notwithstanding that another country may consider the trust to be resident in that country.

9. Pursuant to paragraph 94(1)(c) a trust not otherwise resident in Canada may be deemed to be a resident in Canada for the purposes of Part I of the Act if the trust is such that the amount of the income or capital of the trust to be distributed at any time to any beneficiary of the trust depends upon the exercise by any person of, or the failure by any person to exercise, any discretionary power.

10. Subsection 75(2) provides that, where property is transferred by a person to a trust created after 1934 on condition that the property, or property substituted for it, may revert to that person or pass to persons designated by him or that during his lifetime the property may be disposed of only with his concurrence, any income or loss or taxable capital gain or allowable capital loss from the property, or property substituted for it, is attributable to that person during his lifetime while he is resident in Canada. In such situations attribution applies whether or not the trust is resident in Canada.

11. The foregoing are the considerations viewed as relevant in determining the residence of a trust or estate in ordinary situations. Regard may be had to other factors where the purported residence of a trust or estate appears to have been motivated by reasons of tax avoidance.