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## Canada Introduces New Forms to Be Used to Obtain Treaty Benefits, Including by Partnerships and Hybrid Entities

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The Canada Revenue Agency (CRA) recently introduced new forms NR301, NR302, and NR303 (collectively the “NRs”), which can be completed by a nonresident person, or by a partnership or hybrid entity with nonresident owners, seeking to obtain the benefits of reduced withholding rates on passive income under an income tax treaty. The new forms are part of a change in the CRA’s policy for administering Canada’s nonresident withholding tax regime following the Fifth Protocol to the Canada-U.S. Income Tax Treaty. The new NRs are similar in form to the W-8s in the United States. However, unlike the W-8s, which are part of a regulatory framework for the withholding of taxes in the United States, the NRs were not created by statute or regulation and were not accompanied by any changes to the withholding tax obligations under the *Income Tax Act* (Canada) (the “Act”)<sup>1</sup> or regulations. Thus, the purpose of the forms is unclear. They do not appear to have any legal effect other than as a convenient method for setting out and providing the information required to obtain reduced treaty rates un-

der Canada’s withholding tax regime. Whether they evolve into something more may only become apparent with time.

### CANADA’S NONRESIDENT WITHHOLDING TAX REGIME

In general, Canada taxes certain passive income paid or credited to a nonresident by a resident of Canada under Part XIII of the Act.<sup>2</sup> The tax is 25% of the amount of the payment unless reduced by an applicable tax treaty.<sup>3</sup> Canada’s tax treaties generally reduce the rate of tax on such payments. The Canada-U.S. tax treaty, for instance, reduces the tax on dividends to 5% or 15%, depending on the level of ownership, and provides a complete exemption from Canadian tax on most interest payments. The tax is not paid directly by the nonresident but is withheld from the payment and remitted to the government by the Canadian payer.<sup>4</sup> Where the appropriate amount is not withheld as required, the Canadian payer may be

<sup>2</sup> §§212 to 218. The withholding obligations also apply to payers who are deemed to be residents of Canada for withholding tax purposes. Under Regulation 805, the 25% tax under Part XIII generally does not apply where such income is attributable to a business carried on in Canada by the nonresident from a permanent establishment. Such income is generally subject to Canadian tax on a net basis under Part I of the Act in the same manner as if earned by a resident of Canada. All section (§) references are to the Act unless otherwise indicated.

<sup>3</sup> §10(6) of the *Income Tax Application Rules*.

<sup>4</sup> §§215(1), 227(8.3), and 227(9). The withholding tax also applies to income that is attributable to business carried on in Canada by the nonresident from a permanent establishment unless an exemption certificate is obtained under Regulation 805.1. In the absence of an exemption certificate, the amount withheld can be credited against the nonresident’s Canadian branch’s tax liability when the branch files its Canadian tax return.

<sup>1</sup> R.S.C. 1985, c.1 (5th Supplement), as amended.

personally liable for any shortfall, together with interest and penalties.<sup>5</sup> The penalties may be 10% or 20% of the amount that should have been withheld. A payer may recover any shortfall from a subsequent payment, if any, due to the nonresident. The CRA also has the discretion to waive any interest and penalties.<sup>6</sup> Where the person failing to withhold is a corporation, the directors of the corporation may be jointly and severally liable with the corporation for such amounts.<sup>7</sup> The liability of the Canadian payer for uncollected tax, interest, and penalties is joint and several with the nonresident recipient. Where the nonresident claims entitlement to a reduced rate of withholding under an applicable treaty, the Canadian payer may withhold the lesser amount provided under the treaty but remains jointly and severally liable under the Act for any underwithholding. Where an excess amount is withheld, a nonresident can claim a refund by filing a Canadian tax return.<sup>8</sup>

Special rules apply where the payment is made to a partnership that includes nonresident partners (a non-“Canadian partnership”).<sup>9</sup> Where a payment is made to such a partnership, the partnership is deemed, in respect of the payment, to be a nonresident person and the gross amount of the payment is subject to tax under the same general rules discussed above.<sup>10</sup> This applies even to the share of the payment that can be said to be allocable to any Canadian resident partners of the partnership. The payment may also benefit from reduced tax rates under any applicable tax treaties. While a partnership is generally not considered by Canada to be a resident for purposes of such tax treaties, the CRA’s current administrative position is generally to permit a payment to a partnership to benefit from a reduced rate of withholding to the extent that the nonresident partners of the partnership would have been entitled to such a reduction under a tax treaty if such partners’ shares of the payment were made directly to such partners. This position has been under review by CRA since 2004 but appears to remain unchanged.<sup>11</sup> Similar relief is generally not provided for the share of the payment to the partnership allocable to any Canadian resident partners. In those circumstances, the amount withheld can be credited against the Canadian partner’s tax liability under the Act only when a return is filed for the taxation year and any excess can be claimed as a refund at that time.

## OBTAINING TREATY REDUCED RATES PRIOR TO THE NRs

There are few (if any) statutory provisions setting out the requirements for obtaining a reduced treaty tax

<sup>5</sup> §§215(6) and 227(8.1).

<sup>6</sup> §220(3.1).

<sup>7</sup> §227.1.

<sup>8</sup> §227(6).

<sup>9</sup> “Canadian partnership” is defined in §102(1).

<sup>10</sup> §212(13.1). No withholding tax applies to payments made to a “Canadian partnership,” because all of its partners are residents of Canada.

<sup>11</sup> Document 2004-0072381C6.

rate. The CRA’s administrative guidelines are set out in Information Circular IC-76-12R6, dated November 2, 2007 (the “IC”), which is now being revised to take account of the NRs.<sup>12</sup> The current version of the IC reminded payers that it was their responsibility to withhold and remit at the appropriate rate. In determining the appropriate amount to withhold, however, payers could generally rely on the name and address of the payee as the beneficial owner unless there was reasonable cause to suspect otherwise. The IC provided a non-exclusive list of criteria that would be regarded as reasonable cause to question whether the payee was the beneficial owner (and entitled to treaty benefits), including that the payee was known to act as an agent or nominee, the payee was reported as “in care of,” or “in trust,” and the mailing address was different from the registered address of the “owner.” In any doubtful case, a certificate was required to be completed and forwarded by the payee to the payer in order to obtain the reduced treaty rate. Otherwise, the 25% tax would apply.

The certificate to which the IC referred was not a pre-printed form but was instead a document that had to be prepared by either the payer or the payee, and completed and signed by the payee. The certification applied to individuals, corporations, and trusts. It required the payee to provide the person’s name, a description of the property, and a statement certifying that the person was a resident of and taxable in the treaty country and was the beneficial owner of the income from the described property.

A similar certificate could also be provided to a payer to obtain a reduced treaty rate where payments were made to a financial intermediary acting as nominee or agent. In such case, the financial intermediary would certify that the income was held solely for the beneficial ownership of a person that was a resident of a treaty jurisdiction that was entitled to a reduced tax rate.

Neither the IC nor the certifications dealt with payments made to flow-through entities such as partnerships. While the CRA permits payments made to partnerships with nonresident partners to benefit from reduced treaty rates, it did not, prior to the release of the NRs, provide any published guidance on what would be required to obtain the reduced rate, other than cautioning that in circumstances where the payer was not in a position to determine whether, or what portion of, the amount paid to a partnership was beneficially owned by a resident of a particular treaty country, the full 25% tax should be withheld and the relevant partners would be required to apply for a refund of any amount withheld in excess.<sup>13</sup> As the payer remained jointly and severally liable for any failure to withhold the required amount, the general practice would be to

<sup>12</sup> “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” is available at <http://www.cra-arc.gc.ca/formspubs/>.

<sup>13</sup> Document 2004-0074241E5.

withhold, particularly in the case of more complex structures involving tiered partnerships or separate classes of partnership interests with different income entitlements.

Even in the circumstances dealt with in the IC, compliance with its requirements did not affect a payer's obligations under the Act. Neither reasonable reliance on the name and address of the payee nor the receipt of a completed certification provided any relief from the legal requirement of a payer to withhold and remit the required amount of tax or, more importantly, the joint and several liability for such tax together with interest and penalties where the required amount was not withheld or remitted. The Act does not expressly provide an exclusion from such liability where the payer acted reasonably or where the certification was provided — nor does the Act provide a due diligence defense, except perhaps for penalties, on which compliance with the IC can be based.<sup>14</sup> The IC itself was silent on the issue. The payer remains jointly and severally liable for any underwithholding of tax. Whether the payer is assessed interest and penalties in those circumstances is left with the CRA. In cases where the payer is assessed, however, the CRA does have the discretion to waive interest and penalties.<sup>15</sup>

## OBTAINING TREATY REDUCED RATES UNDER THE NRs

The NRs were introduced as part of a change to CRA's administrative policy for obtaining treaty benefits. The IC is being revised to take account of the new forms and procedures. No changes are being made to the statutory withholding tax regime. The new IC will eliminate the CRA's longstanding position that a payer can generally accept the use of the payee's name and address to determine entitlement to treaty benefits. Except in certain limited circumstances involving individuals, which will be discussed below, the payer will now be required to obtain "recent and sufficient" information to determine the beneficial owner of the payment and whether it is a resident of the treaty country and entitled to the benefits thereunder. This requirement for more diligence was precipitated by the Fifth Protocol to the Canada-U.S. treaty but also reflects the increasing complexity in Canada and other jurisdictions in determining entitlement to treaty benefits under domestic law, treaties, and international norms, including the introduction of limitation on benefits provisions in the treaty with the United States.

<sup>14</sup> Though unclear, there is case law that suggests that there is a due diligence defense with respect to the *penalties* under §227(9) for the failure to withhold or remit the appropriate amount. This should be distinguished from the general discretion provided to the CRA to waive penalties that are otherwise applicable under §220(3.1). For a recent discussion, see comments of the court in *Cophorne Holdings Ltd. v. R*, 2007 D.T.C. 1230 (Tax Court of Canada [General Procedure]).

<sup>15</sup> §220(3.1).

The NRs can be used to provide the required information. In the CRA's view, the forms provide guidance to payers because the information required to complete the NRs is "important for determining whether a tax treaty can be relied on." There is, however, no legal obligation on either the payer or the payee to accept or provide the new forms. As well, the IC does not specifically require the use of the NRs. "Equivalent information can be accepted" in other formats, according to the IC. Thus, while there is a change in the information to be provided to obtain treaty benefits, the actual receipt of an NR does not appear to be one of them. The payer is under an obligation to obtain sufficient information to determine entitlement to treaty reduced rates. It need not be in the form of an NR. Where an NR is used, it expires on the earlier of three years after the calendar year in which they were signed and dated; or when there is any change in entitlement to treaty reduced rates. A person, including a partnership or hybrid entity, providing an NR is required to undertake to notify the recipient of the form of any change in the information provided. Unlike with W-8s, it does not appear that any statutory penalties can arise from any errors in the information provided, whether in the forms or otherwise.<sup>16</sup>

There are three new NR forms. The NR301 is the equivalent of the old certification and can be completed by individuals, corporations, and trusts. It is similar in form to the U.S. W-8BEN.<sup>17</sup> The NR302 and NR303 have no current equivalent and can be completed to obtain treaty benefits for payments made to flow-through entities, such as partnerships, that have nonresident partners (NR302), and certain hybrid entities that have nonresident owners (NR303), entitled to treaty benefits under a tax treaty entered into by Canada. The only Canadian tax treaty that currently provides benefits to owners who derive income through a hybrid is the treaty with the United States.<sup>18</sup> The NR302 and NR303 are similar in form to the U.S. W-8IMY.<sup>19</sup> The drafts of the three forms were released in 2009 for public comment and were finalized in April 2011.<sup>20</sup> There is a transition period until the end of 2011 to permit payers to collect the required information from payees.

<sup>16</sup> At the very least, W-8s are signed statements made under penalty of perjury. The CRA could argue that the penalty in provisions such as §163, 163.2 or 239 of the Act apply, but none of those provisions appear designed for circumstances such as the NRs.

<sup>17</sup> The W-8 forms (including the W-8BEN and W-8IMY) serve various functions under the U.S. withholding tax regime, including but not limited to claims for treaty reduced withholding rates.

<sup>18</sup> Specifically, the NR303 applies to persons to whom Article IV(6) of the Canada-U.S. Income Tax Treaty applies and Article IV(7) does not apply.

<sup>19</sup> Where the W-8IMY is used to claim treaty reduced rates, a withholding certificate similar to the worksheets to the NR302 (and NR303) is attached.

<sup>20</sup> The NRs are available at <http://www.cra-arc.gc.ca/E/pbg/tf/nr301/README.html>; <http://www.cra-arc.gc.ca/E/pbg/tf/nr302/README.html>; and <http://www.cra-arc.gc.ca/E/pbg/tf/nr303/>

*NR301.* The NR301 can be provided by an individual, corporation, or trust to a payer to support a claim for treaty benefits. The information required by the form is generally the same as the certification (i.e., name and mailing address of the individual, corporation, or trust) but asks for greater detail (i.e., type of income rather than description of property; foreign and Canadian tax identification numbers if the payee has them). Like the certification, the NR301 requires the nonresident to certify residence for treaty purposes and beneficial ownership of the income. The NR301, however, adds the requirement that the nonresident certify, to the best of the nonresident's knowledge, that the nonresident is entitled to benefits under the applicable treaty. Unlike the certification that was required only where the payer had reason to suspect the name and address provided by the payee, the NR301 (or equivalent information) is required from all corporations and trusts and, except in certain circumstances, individuals.

*NR302.* The NR302 can be provided by a partnership to a payer to support a claim for treaty benefits. The NR302 (and NR303) do not have equivalents under the old regime and perhaps represent the most significant procedural change. In terms of more substantive policy, the forms also appear to (re-)confirm CRA's administrative position that a partnership should be treated by Canada as a look-through for determining eligibility for treaty benefits. The NR302 requires the legal name and mailing address of the partnership and its foreign tax identification numbers and Canadian business number if the partnership has them. Where the payment to the partnership is subject to Canadian withholding tax, the form requires the partnership to determine the blended rate of withholding tax on each particular type of income, based on the rate of tax on the portion of the payment allocable to treaty and non-treaty resident partners under the partnership agreement. Where the payment is eligible for an exemption from Canadian tax under a treaty, the form requires the partnership to state the portion of the payment benefiting from such exemption, based on the portions allocable to treaty resident partners. Technical issues may arise in determining the allocation among partners where there is more than one class of partnership interest. Unlike the prior regime, the form also contemplates relief from withholding tax on the portion of the payment allocable to Canadian resident partners, which portion is considered zero rated or fully exempt for purposes of calculating the blended rate or the portion of the payment benefiting from exemption. Of course, a Canadian partner will be required to include the allocation of the payment on a Canadian tax return and pay tax on such income in the ordinary course.<sup>21</sup>

The support for the calculations of the blended rate or exempt portion of a payment is provided in work-

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README.html.

<sup>21</sup> Depending on the circumstances, there may be time-value-of-money benefits to a Canadian partner in avoiding withholding taxes on the partner's share of the payment and deferring such tax until the filing of the Canadian tax return.

sheets that are attached to the form. One worksheet, Worksheet A, is provided to determine the blended rate for a payment subject to withholding tax (i.e., interest and dividends) and another, Worksheet B, to determine the portion of a payment that is treaty exempt (business profits and capital gains). With respect to each partner, the worksheets require the name of the partner; the partner's Canadian tax identification number; the partner's treaty country of residence; the percentage of the payment allocable to the partner; and (Worksheet A) the withholding tax rate applicable to the allocation and (Worksheet B) the portion of the allocation that is exempt.

The NR302 is completed by an authorized partner on behalf of the partnership. In order to determine the residency of each partner, the partnership is required to obtain an NR301, NR302, NR303 or a statement of Canadian residency, as the case may be, or equivalent information, from each partner whose entitlement to a reduced rate or exemption affected the determination of the blended withholding rate or the portion of the payment that is treaty exempt. In the case of multi-tiered partnerships, such as a fund on fund, the NRs or equivalent information are presumably required from each tier to support the blended rate (or the portion that is exempt) on the NR302 that is provided to the Canadian payer. The authorized partner must certify on the NR302 that the partnership has obtained such supporting documents (or equivalent information). The partnership, however, is not required to include the back-up NRs (or equivalent information) received from the partners with the NR302 of the partnership that is provided to the payer.<sup>22</sup> The partnership should retain such NRs (or equivalent information) in its files. Again, in the case of a multi-tier partnership, this would presumably apply at each tier such that NRs provided by partners of each partnership would not be passed down each tier to the Canadian payer (and all partnerships in between).

*NR303.* This form and the attached worksheets A and B are similar to the NR302 except that the information is provided by the nonresident owners of a hybrid entity that are entitled to treaty benefits for income derived through the hybrid under an applicable Canadian tax treaty. In addition, the form does not appear to contemplate any relief to Canadian owners of the hybrid. Only the Canada-U.S. tax treaty currently provides entitlement to treaty benefits for payments made to hybrids. The NR303 would be used to support a claim for treaty benefits for payments made to a U.S. limited liability company that is treated for U.S. tax purposes as a disregarded entity or a partnership and has members that are eligible for treaty benefits.

## OTHER CIRCUMSTANCES

An NR is not required in all circumstances in order to obtain a treaty reduced tax rate. The revised IC will

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<sup>22</sup> In fact, the instructions on the NR302 provide that such supporting NRs are not to be provided to the payer.

provide that a payer can choose to apply treaty reduced rates of tax without obtaining an NR (or equivalent information) if: (1) the payee is an individual, or is an estate or trust, with an address in the United States; (2) such payee has provided an address that is not a post office box or in-care-of address; (3) the payer has no contradictory information and no reason to suspect the information is inaccurate or misleading; and (4) there are procedures in place so that a change in address will result in a review of withholding tax.

The NRs are also generally not relevant where treaty reduced rates of tax are not at issue. Thus, NRs are not required where the exemption is provided under the Act or other Canadian domestic law. For instance, the forms are not required on payments of certain passive interest income made to nonresidents who deal at arm's length with the Canadian debtor.<sup>23</sup> In addition, the NRs cannot be used to obtain exemptions from Canadian tax by foreign governments under the doctrine of sovereign immunity (or under a treaty, where applicable) or by certain foreign pension plans or tax-exempt entities under a treaty. The forms also cannot be used to avoid Canadian withholding where the payments (i.e., non-arm's-length interest, rents, or royalties) relate to a business carried on in Canada through a permanent establishment that is otherwise subject to Canadian tax on a net basis.<sup>24</sup> In those circumstances, the nonresident will generally be subject to tax on the income from such payments under Part I of the Act in the same manner as a Canadian resident and to Canadian withholding tax under Part XIII.<sup>25</sup> The withholding tax can be credited against the nonresident's Part I tax when the income is reported on a Canadian tax return. In certain circumstances, the nonresident can avoid the pre-payment of tax under the withholding tax regime by obtaining a payee certificate from the CRA through an application.<sup>26</sup> There is no NR that is the Canadian equivalent of the U.S. W-8ECI, which can be prepared and provided by the payee to certify that the income is attributable to a permanent establishment.

The NRs, however, can be used to support a claim for treaty reduced rates where certain payments are made to agents or nominees, such as foreign financial institutions or other financial intermediaries. Payments made to such agents or nominees are subject to tax at the full 25% statutory rate unless the beneficial owner of the payment is entitled to a reduced rate under an applicable treaty. Similar to the approach under the old IC, where interest or dividends are paid to a nonresident agent or nominee that is in a country with which Canada has entered into a tax treaty and provides financial intermediary services as part of its business, a Canadian payer may apply reduced rates under an applicable treaty where the payer has re-

ceived documentation from the agent or nominee certifying beneficial ownership, country of residence, and eligibility for treaty benefits prior to the payment. The revised IC will set out criteria that should be followed for supplying the required documentary information. The beneficial owner should provide completed NR forms (or equivalent information) as applicable to the agent or nominee. Based on such forms or equivalent information, the agent or nominee can then provide a certificate to the Canadian payer, certifying that the payment (or a portion thereof) to the agent or nominee is for the benefit of beneficial owners entitled to treaty reduced rates. The IC will include the suggested wording for the certificate. It appears that this process of documenting support for obtaining treaty benefits should apply in tiered ownership structures, whether involving partnerships, hybrid entities, or other financial intermediaries, regardless of whether the nominee or agent is the direct or indirect payee, though some clarification of this would be helpful.<sup>27</sup>

Based on the instructions on the forms, the NRs are also apparently to be used in support of a waiver from the 15% withholding tax on payments for services rendered by nonresidents in Canada under Regulation 105 and in connection with an application to the CRA for a clearance certificate where a nonresident disposes of taxable Canadian property, such as Canadian real property, to avoid having tax withheld on the payment of the sales proceeds. The forms for the Regulation 105 waiver and the T2062 application for the clearance certificate do not appear as of yet to have been updated to account for this change.

## ISSUES, CONCERNS, AND COMMENTS

The NRs raise some practical issues that the forms and the IC do not clearly address. For instance, the NRs include instructions that indicating "residency" and entitlement to treaty benefits are technical issues based on the terms of the applicable treaty. The NRs and the IC, however, do not discuss the level of analysis required by the payee in completing the form. In some cases, the residency and entitlement issues may be relatively straightforward. In other cases, they will be less clear because of, for instance, CRA's administrative positions on residency and beneficial ownership. In the case of the Canada-U.S. treaty, there is also the added complexity of the Limitation on Benefits article. What level of diligence is required from

<sup>23</sup> See ¶212(1)(b)(i).

<sup>24</sup> This would include payments of rent where an election has been made under §216 of the Act.

<sup>25</sup> §§2(3) and 115(1) of the Act and Regulation 805.

<sup>26</sup> Regulation 805.1.

<sup>27</sup> For instance, the IC and the NRs do not clearly deal with the situation where dividends are paid to a partnership, the partners of which include financial intermediaries that would otherwise qualify to provide the certification to the payer directly under the IC. They also do not clearly deal with situations where the property is held through a chain of financial intermediaries. Presumably, the financial intermediary could provide the required certification to the partnership (or other financial intermediary) to allow the partnership (or financial intermediary) to prepare its own NR302 (or certificate), but the NR302 worksheets do not appear to contemplate a partner that acts as an agent or nominee.

the payee in these circumstances? The IC is silent on this point. The apparent lack of any statutory penalty for errors on the form, whether good faith or otherwise, may not encourage the required level of diligence. That being said, it is unclear to what extent Canada would generally be able to enforce penalties on a nonresident payee.

Against that backdrop, the payer must in turn determine the extent to which it can rely on the information provided by the payee. The revised IC places the obligation on the payer to “. . . question the information given and look at other information received from the non-resident, or known about the non-resident, *if the payer knows or has reasonable cause to believe* that the information given on the form is not correct or misleading, contradicts information in the payer’s files or is given without knowledge of consideration of the facts of a situation.” (Emphasis added.) Does the lack of such reason to doubt the information provided in the NR mean that the obligations on the payer have been satisfied by receipt of the information on the completed form? Can a payer rely on a certification in an otherwise properly completed NR301 from a U.S. corporation without asking whether the requirements of the Limitation on Benefits article in the Canada-U.S. treaty are satisfied? Can a payer rely on the determination of the blended rate provided by a partnership in the NR302 where the attached worksheets indicate that some or all of the partners are in turn foreign partnerships without reviewing the bases of such foreign partnerships’ determinations of their blended rates?

The NRs and the revised IC would appear to suggest that, absent evidence to the contrary or reasonable cause to doubt the information provided, it is not necessary for the payer to go behind the NRs and review the underlying basis for each payee’s claim for treaty benefits. From a practical perspective, this is perhaps a necessary requirement for the withholding system to operate efficiently. Because there is no change in the withholding tax regime under the Act or regulations, however, the payer remains potentially liable for any shortfall in taxes and for interest and penalties. The receipt of NRs that on their face appear accurate does not absolve the payer from liability for underwithholding or provide any protection from interest and penalties.

Within that framework, it is not surprising that the biggest criticism of the NRs is not so much what the forms do, but what they do not do. Because the forms were not accompanied by any change to the statutory withholding tax regime, a payer will not be able to absolutely rely on the forms to apply a reduced withholding rate to a payment to a nonresident and will not be protected from liability for any shortfall in such withholding or interest and penalties by the receipt of such form. This contrasts with, for example, the W-8 regime in the United States where, absent evidence to the contrary, a payer can generally rely on receipt of the W-8 to apply a treaty reduced rate of withholding

tax without liability if there is a resulting shortfall.<sup>28</sup> While the Act is clear that no relief is available from joint and several liability for any shortfall in the amount of tax withheld, there are provisions that permit the CRA the discretion to waive any interest and penalties.<sup>29</sup> Practitioners have lobbied the CRA to confirm that it will generally exercise its discretion under §220(3.1) where the payer has received a properly completed form. The CRA has not been prepared to provide such comfort, even in circumstances outlined in the IC.<sup>30</sup> This was recently confirmed by the CRA at an International Fiscal Association (IFA) conference held in Toronto in May 2011.

To be fair, it does not appear that the NRs were ever intended to change the existing statutory withholding obligations under the Act, including the obligation on the payer to exercise reasonable due diligence or risk interest and penalties for any shortfalls. The NRs appear to serve as a guide from the CRA concerning the information it views as important in determining entitlement to treaty benefits and provide a convenient means by which nonresidents can provide such information to payers. They do not appear to have any other effect on the payer’s legal obligations to withhold or otherwise. This was the case even under the old IC. The payer is, from a liability perspective, arguably no better or worse off by the introduction of the NRs, other than having the added administrative burden of collecting more information. That, however, may provide little comfort to payers. For the same reason that the CRA is changing its position to deal with the increasing complexity of determining entitlement for treaty benefits, payers must manage the administrative burdens of determining entitlement to treaty reduced withholding rates and the risk of underwithholding. From a practical perspective, the ability of the payer to rely on a properly completed NR absent cause, without additional due diligence or threat of interest or penalties, would simplify the withholding tax process. However, a partial or complete move toward such a regime, where qualification for reduced withholding rates (and/or protection from liability for interest, penalties, or even shortfalls) is based on receipt of prescribed tax forms completed by the payee, may involve broader issues than the introduction of a form, including an assessment of the potential risk to the fisc. Even without legislative change, the NRs may yet evolve into that kind of system based on customary practice and CRA’s assessing policy. That will only become apparent with time.

<sup>28</sup> Regs. §1.1441-7(b).

<sup>29</sup> §220(3.1).

<sup>30</sup> See, e.g., Submission of the Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants to the Canada Revenue Agency — “Proposed Declaration Process for Applying Treaty Benefits to Income Paid to Non-Residents,” dated Sept. 20, 2009.