# Attention Snowbirds: Start Counting

**Authors: Melissa Malden**

*published 11/26/2014*

On June 30, 2014, Canada and the U.S. implemented Phase IV of the Entry/Exit Initiative of the Perimeter Security and Economic Competitiveness Action Plan. Pursuant to this initiative, the U.S. and Canada will begin sharing information on individuals entering and leaving the respective countries. It may come as a surprise to most, but before the implementation of this initiative, each country only kept track of when an individual *entered* its respective country, and not when an individual left the country.  Further, the two countries rarely shared their records with one another.  As a result, neither country maintained an accurate record of the length of time an individual was present within its borders and instead, merely relied on the declaration provided by the individual traveler.  Now, each country will exchange information, allowing each to precisely track an individual's stay within its borders, including: the date of entry, time of entry and the port through which the individual entered.

The result of this initiative is that frequent Canadian travelers, in particular, snowbirds, will have to keep thorough records of the number of days they spend in the U.S. and comply with the residency rules of each country regarding taxation. The number of days a Canadian is present within the U.S. will determine the requirements imposed on the individual taxpayer, if any.

## COUNTING THE DAYS & FILING TAXES:

The U.S. taxes three classes of individuals on their worldwide income: U.S. citizens, U.S. green card holders, and "U.S. Residents". You, as a Canadian individual, may be or become a "U.S. Resident" in the eyes of the Internal Revenue Service ("IRS") if you spend too many days in the U.S. in a given year.  If you are considered a U.S. Resident, you are subject to certain filing requirements. While the requirements have not changed, the obligation to ensure that you have properly counted your days in the U.S. is imperative. The filing requirements are based upon the results of the following tests:

**1. 183 Day Rule:**

The first test is the easiest to understand and administer: if you, as a Canadian resident, are physically present in the U.S. for more than 182 days in a calendar year, you will be considered a “U.S. Resident” under U.S. tax law and be subject to U.S. income tax and foreign reporting obligations on worldwide income. If you fall into this category, you are obligated to file a U.S. tax return. In doing so, you may be able to find some relief under the Treaty if you can show a closer connection to Canada. Provided that these filings are satisfactory, the IRS will only tax you on certain U.S. income; any income earned outside the U.S. would be exempt from U.S. tax. Notwithstanding the foregoing, it is imperative to make yourself aware of the filing deadlines (generally June 15, provided you are not receiving a wage or compensation in the U.S.), as this relief does not relive you from the obligation to file or to pay potentially devastating penalties for the failure to file these forms on time. Also, remember that this has no bearing on your obligations as a Canadian resident; your obligations to file Canadian tax returns and report on worldwide income remain unchanged.

**2. Substantial Presence Test:**

Unfortunately, spending less than 182 days in the U.S. in any given year does not automatically alleviate the requirement to file a U.S. tax return with the IRS. You may still be considered a U.S. resident in the eyes of the IRS if you satisfy their other method of calculating residency; the Substantial Presence Test (“SPT”). The SPT will be applied if you are present in the U.S. for more than a mere 30 days in the U.S. in the current calendar year. If, in applying the test, the result is more than 182 days, you are considered a U.S. resident.

To calculate the days under the SPT, the following formula is applied:

- Add all the days (100%) you were present in the current year (provided this number is more than 30 days); plus
- 1/3 of the number of days you were present in the US in the previous year; plus
- 1/6 of the number of days you were present in the US in the second preceding year.

(for the purposes of calculating these days, one day is any part of a 24-hour period)

If, in applying the foregoing calculation, the result is 183 days or more during the three-year period (including the two preceding years), the IRS will consider you to be a U.S. resident and you may be taxed as a U.S. resident, on your worldwide income. If the sum is 182 or less, then you are not resident for U.S. income tax purposes and no filings are required, pursuant to this test.

**Example:**

You were physically present in the U.S. for 120 days in each of the years 2012, 2013, and 2014. To determine if you meet the substantial presence test for 2014, count the full 120 days present in 2014, 40 days in 2013 (1/3 of 120), and 20 days in 2012 (1/6 of 120). Since the total for the 3-year period is 180 days, you are not considered a resident under the substantial presence test for 2014.

However, if you stay in the U.S. for just 4 extra days this year, then the total day count after applying the SPT would equal 184 days (124 + 40 + 20). Those 4 extra days would result in your being deemed a U.S. resident for the purposes of filing U.S. taxes.   However, if you can clearly show that you have a closer connection to Canada than the U.S., you may be able to claim an exemption.

To do so, you must file Form 8840 “Closer Connection Exception Statement for Aliens” with the IRS.  This form is required to satisfy the IRS that you have a closer connection to a foreign country during the year, that you maintain a “tax home” in a foreign country (Canada) and are therefore a non-resident of the U.S. for tax purposes. In most cases, that should prove Canadian residence, with no further issues, overriding any possible ‘resident’ status and relieving you from further filing obligation in the U.S. and any U.S. taxes payable on worldwide income.

## PARTICULAR ‘TRICKS’ OF THE DAY COUNT:

Here are a few things you need to know when keeping track of the number of days that you are in the U.S.:

- “A day” in the U.S. includes any part of a 24-hour period that you are physically present on U.S. soil.  This means that, even if you leave the U.S. in the early morning or arrive at 11:30 p.m., that day will count as one full day for the purposes of the day count.
- Notwithstanding the foregoing, any days you are present in the United States for less than 24 hours, for the sole purpose of transit between two places outside the United States (i.e. a lay over on your flight from Winnipeg to a country other than the U.S.) do not count as a day spent in the U.S.
- There are additional specific exceptions that may apply to you and we recommend that each instance be considered.

Don’t forget that showing you are a non-resident in the U.S. only alleviates you from filing U.S. taxes, the Canadian governments will continue to tax your income as if you never left Canada.

## OTHER UNWANTED SURPRISES

While beyond the scope of this article, you should be aware that there are a few other

 | 

unwanted surprises that can result from being in the U.S. or out of Canada for too long, all of which depend on whether you are considered a “resident” or not:

**1. Immigration Status:** Canadians who spend more than 180 days in the U.S. in a rolling twelve-month period (not necessarily a calendar year) without a proper visa may be considered “unlawfully present” in the U.S. and be banned from future travel to the U.S. It is now increasingly important to keep track of these days as the consequences of being unlawfully present can result in a travel ban to the U.S. (from three to ten years); while you may be on-side for tax purposes, that may not be the case for immigration purposes.

**2. Estate Tax Exposure:** The U.S. also imposes estate taxes on the fair market value of an individual’s worldwide assets if that individual is considered a “U.S. resident” at death. Unfortunately, the test to determine residency for U.S. income tax purposes (discussed above) is not the same for estate tax purposes.

**3. Liability for Canadian departure tax.** If you spend too much time in the U.S., you may be at risk of losing your residency status in Canada. Once a Canadian resident becomes a non-resident of Canada he is deemed to have disposed all of his assets (subject to exceptions), recognize the gain on those assets, and pay tax on that gain.

**4. Loss of Medical Insurance.** A loss of residency status in your particular Canadian province of residence will result in a loss of Canadian health care. Not surprising, the definition for “residency” in the context of health care is different than that for income tax.

## CONCLUSION

In light of the fact that neither the U.S. nor Canada has historically kept track of anyone’s actual days spent in either country, it has been easy for travelers to estimate the days spent and arguably having control over days reported and effectively, residency status. That reality has now changed. Estimations don’t work and, as shown above, just a few days can make all the difference. The key is to pre-plan as much as possible, and stop estimating… start counting!

*Updated September 8, 2015*

 

**DISCLAIMER:** *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

*While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.*