Vern Krishna: An easier way to police the senate residency requirement

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More from Vern Krishna

Adopting a deemed residency rule would make it easier for Canadian senators to comply with their constitutional requirements, Vern Krishna suggests

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An easier way to police Canada's senate residency requirement

The Canadian Constitution requires Senators be “resident” in the province from where they are appointed. The theory is that they should be connected to their place of appointment. Yet some members of the upper chamber complain that the concept of residence is too fuzzy and vague for them to comply. Of course, it is up to the prime minister to select senators who qualify before he appoints them and to pick only those who pass a test on the meaning of “resident in the province.”

Twenty million Canadians file their federal and provincial tax returns every year based on their residence. “Too fuzzy and vague” is not an acceptable reason for false filings. File accurately or pay the price for providing false information.

Canada uses “residence” and “ordinary residence” as its primary connecting factors to tax individuals on their worldwide income, and has done so for nearly a hundred years. Residence for tax purposes is not synonymous with physical presence in Canada, but refers to the legal and economic nexus that an individual has with the country. Although physical presence is an important criterion, it is not necessarily conclusive in establishing taxable nexus. Thus, a person who is absent from Canada for a considerable period may, nevertheless, be a Canadian resident for income tax purposes.

There are two basic ways to establish residence: a bright line test or a facts and circumstances approach. The Income Tax Act uses both methods. We deem individuals to be residents of Canada if they sojourn in Canada for 183 days or more in a year. This rule is easy to apply since a deeming provision is a conclusive presumption of law.

Sojourning implies a temporary stay in a place, as opposed to "ordinary residence". Mr. Justice Willard Estey addressed this in a key 1946 Supreme Court of Canada decision called *Thomson v. Minister of National Revenue*: "One sojourns at a place where he unusually, casually or intermittently visits or stays." For example, an individual may be a Canadian resident for tax purposes even though he only has "visitor status" under the immigration rules. One can even be an involuntary sojourner, as in the case of a person serving a prison term or ill in a hospital.

Most tax-filing Canadians are not sojourners but are residents under the facts and circumstances test. Where an individual's factual links with Canada are sufficiently strong, we consider the individual to have taxable nexus with the country and she is a resident for tax purposes. The sufficiency of connecting factors is a question of fact that depends upon several criteria, including ownership of property, a dwelling, presence of a spouse or common-law partner, or dependents. Thus, an individual who is out of Canada, even for an extended period, may, nevertheless, be "ordinarily resident in Canada" if she has sufficient ties with Canada.

Given the dual tests, an individual may end up as a resident of two countries. For example, an individual may be resident in Canada by virtue of the 183-day rule and a resident of the United Kingdom under the facts and circumstances test. In these circumstances, we turn to the relevant tax treaty (if any), which provide tiebreaker rules to settle dual residence claims.

The first tiebreaker is to determine where the individual has a permanent or primary home. A home is "permanent" if the dwelling is available to the individual at all times and not merely for short stays, For example, a rented home or apartment, or even a furnished room in a house can be "permanent" if it is available to the individual at all times. An individual can have more than one permanent home, in which case it is necessary to look at other connecting factors, such as, habitual abode and economic interests.

The facts and circumstances test is more complex than the deeming rule. Nevertheless, 20 million ordinary Canadians file their annual tax returns based on the test. The Canada Revenue Agency does not tolerate excuses — such as, vagueness, complexity or uncertainty of the law. Get it wrong and they assess you, impose penalties and interest, and, in extreme cases, charge you with criminal tax evasion.

Members of the chamber of sober second thought, who live off the taxes of ordinary Canadians, could benefit from a deeming provision. For example, they could be required to stay at least, say, 120 days in their province of appointment. Such a rule would be certain, easy to enforce, and would ensure that Senators stay in touch with their roots according to the spirit of the Constitution.