



TAX MATTERS

Count your days in the U.S. to avoid tax filings south of the border



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Here in Canada, you'll hear tax specialists speak about the "Income Tax Act" – or the "tax law." South of the border, our U.S. cousins refer to their tax legislation as the "tax code." The name is appropriate because the typical tax form in the United States looks like Greek to a person who can't read Greek. It's a code alright – and one that the average person can't crack.

My suggestion? Avoid tax filings in the United States if you can. Now, if you're a U.S. citizen, reside there or hold an Alien Registration Card (a "green card"), then you'll have to file a U.S. tax return. You may also have to file if you make certain investments in that country (most notably if you own a U.S. rental property or make an investment in a U.S. partnership or private corporation).

But what if you're the average Canadian who simply spends time in the United States each year? Surely, you'll escape tax filings south of the border. Not so fast. You may have tax filing obligations if you meet the "Substantial Presence Test" (SPT), which is based on physical time spent there. Since we're not yet at Dec. 31, you may still have time to control your days in the United States for 2018 and avoid tax filings down south.

The test

Under the SPT, you'll be considered a resident of the United States if you're physically present there for 183 days or more in any particular year. But you'll also meet the test if, during the three-year period that includes the current year, you're there for a total of 183 days or more based on the following formula: Add the number of days present in the current year (2018), plus one-third of your days present in the U.S. last year (2017), plus one-sixth of the days in the United States the year before that (2016). Does the total come to 183 or more? If so, you're caught under the SPT.

To be clear, if you meet the SPT, you'll be considered a "resident alien" (that is, a non-citizen who is resident in the United States – just as though you were living there), and this comes with an obligation to file Form 1040 (U.S. Individual Income Tax Return). Since you'll very likely be considered resident in Canada for tax purposes at the same

time, you'll have to file tax returns in both countries, and this will make your tax filings slightly more complicated than reading the owner's manual of a NASA spacecraft.

The remedies

Your first line of defence is to avoid meeting the SPT. If you're stateside for 120 days each year for three years in a row, the SPT formula will amount to 180 and you'll escape residency under the SPT. Any more days than this, and you may be caught – but do the math; don't rely on rules of thumb.

As an aside, your days spent in the United States have been tracked more accurately through an automatic system at border crossings since June 30, 2014. You can access your number-of-days data on [the U.S. government website \(cbp.gov/I94\)](http://cbp.gov/I94). I should mention that some days there can be excluded from your calculation (days on which you were a foreign government-related individual, a teacher or trainee, a student, a professional athlete competing in a charitable sports event or if you were prevented from leaving the United States owing to a medical condition).

What if you meet the SPT? Can you still avoid filing a U.S. tax return? Maybe. If you have a closer connection to Canada, you can file U.S. Form 8840 (Closer Connection Exception Statement for Aliens). This form confirms with the Internal Revenue Service (IRS) that you have closer personal, social and economic ties to Canada than the United States, and this will generally get you out of the requirement to file a full U.S. tax return. File Form 8840 by April 15 each year (June 15 in some cases). If you were present in the United States for 183 days or more in the current year, you won't be able to file Form 8840.

If you can't file Form 8840, you may still be able to rely on the Canada-U.S. tax treaty "tiebreaker rules" to avoid being considered a U.S. resident. To do this, you'll have to file U.S. Form 8833 (Treaty-Based Return Disclosure Under Section 6114 or 7701(b)), along with a completed Form 1040NR (U.S. Non-Resident Alien Income Tax Return). These are due on April 15 (June 15 in some cases). This is still easier than filing a full-blown Form 1040 tax return and it may not require sending a cheque to the IRS. Filing Form 8840 is still the easiest option because there is just one form to file.

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