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2014 CANADIAN TAX FOUNDATION ANNUAL CONFERENCE

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The 66th Annual Tax Conference was held in Vancouver, British Columbia from November 30–December 2, 2014. The final plenary session included updates from the Tax Court of Canada ("TCC"), the Department of Finance, and the Canada Revenue Agency ("CRA"), and ended with the CRA Roundtable. The summary below is based on notes taken by attendees during the session and materials provided by the CRA.

Tax Court of Canada Update

Chief Justice Rip advised that there is likely to be at least four new judges sitting in the TCC by summer 2015. Approximately 3500 appeals are heard every year by the TCC and roughly 50% are settled before hearing. According to Rip CJ, the average time that it takes for a case to wind its way through the TCC is roughly one and two-thirds of a year from the time a notice of appeal is filed to the actual hearing of the tax appeal. Rip CJ acknowledged the TCC's poor information technology ("IT") system and indicated that improvements to the TCC's IT system are unlikely to take place in the near future. Rip CJ also commented on the limited jurisdiction of the TCC to hear various matters. He indicated that judicial review applications, applications regarding the investigatory powers of the CRA, and applications relating to the de-registration of pension plans or charities are examples of matters that should be heard by the TCC. He also mentioned that Employment Insurance and Canada Pension Plan cases will continue to be heard by the TCC for the foreseeable future. Rip CJ emphasized the importance of adhering to timetables in the TCC. He indicated that timetable changes are a constant source of conflict between the TCC and lawyers, and that approximately 100 applications a month are received by the TCC to amend timetables. It is important for parties in a TCC proceeding to stay within the agreed upon timetable to ensure that matters are addressed in a timely fashion.

Department of Finance Update

Brian Ernewein, General Director, Tax Policy Branch, Department of Finance, updated the audience on various proposed amendments in Bill C-43 (note: Bill C-43 received Royal Assent on December 17, 2014 — see the article further in this newsletter). Many of the items in this bill relate to the remaining proposed measures that were introduced in the 2014 federal Budget. Certain measures that were included in previous bills are also

contained in Bill C-43, such as the Canadian film or video production tax credit. Mr. Ernewein acknowledged that some of the proposed measures in Bill C-43, such as the proposed changes to spousal and similar trusts on the death of a beneficiary, caused concern within the tax community. Finance has recognized that this is an issue but is not prepared to make any changes to Bill C-43 at this time. Mr. Ernewein remarked that Finance hopes to continue with the introduction of technical bills, but it is unclear if a technical bill will be released in spring 2015 or if Finance will introduce two separate Budget bills next year (in light of the fact that a federal election may occur in 2015).

Mr. Ernewein summarized the draft legislation released before April 2013 that has been withdrawn. These now officially withdrawn proposals include the proposed limitation on interest deductibility rules in "old" sections 20.1 and 20.2, as well as the reasonable expectation of profit measures released on October 31, 2003 (proposed section 3.1 and subsection 9(3)).

Mr. Ernewein ended his remarks by encouraging the audience to review the base erosion profit shifting ("BEPS") reports from the OECD working groups and to provide feedback to Finance on these reports. Mr. Ernewein also participated in a BEPS panel at the Annual Conference with Rob Heferen, Executive Director, Revenue Group, Treasury Department, Australia; Robert Stack, US Department of the Treasury; and Mike Williams, Director, Business International Tax, HM Treasury, UK. The panel was chaired by Brian Arnold. The BEPS panel discussed the OECD's ambitious BEPS Action Plan and the practicalities of implementing the BEPS recommendations. Interestingly, during this panel, Mr. Ernewein commented that despite the OECD's timetable and expectation to deliver various reports by the end of 2015, it is likely that there will be more considerations on the BEPS Action Plan after 2015. He also stated that the progress and timing of the BEPS Action Plan should not be viewed as resulting in a moratorium on domestic changes, as these are likely to continue.

CRA Update

Andrew Treusch, Commissioner of Revenue of the CRA, provided an update on developments at the CRA, particularly the many electronic services now offered by the CRA. Mr. Treusch advised that approximately 83% of businesses filed electronically for 2013-2014 and that taxpayers can now ask tax-related questions online. The CRA's mobile app introduced this year also appears to have been very well received. The CRA is also focusing its efforts on voluntary compliance, aggressive tax avoidance, and receiving recommendations from the Underground Economy Committee, which is a new committee announced by Minister Findlay. The CRA also appears to be focusing its resources on international non-compliance and has formed offshore compliance divisions in British Columbia, Ontario, and Quebec. The CRA has seen an upward trend in the voluntary disclosures program, which has increased threefold since 2008.

CRA Audit Approach

The CRA was represented by Lisa Anawati, Director General, International and Large Business Directorate (the "Directorate"), and the discussion was chaired by Bill Maclagan. Ms. Anawati provided an update on the audit approach carried out by the Directorate. She focused on the transformation agenda for the Directorate and its efforts to continue refining the risk assessment tools used to increase efficiency inside the CRA and reduce the audit burden placed on taxpayers. The Directorate is focusing on the currency of the periods under audit, effectively selecting "workload", utilizing its human resources, and moving files between staff as appropriate based on needs. Ms. Anawati believes this risk-based approach is in line with the approaches of other countries and with the five pillars of co-operative compliance released by the OECD (commercial awareness, impartiality, proportionality, openness through disclosure, and transparency and responsiveness).

The risk-based approach was introduced four years ago and continues to be refined. Such refinements include a new automated tool linking information on CRA databases to assign risk scores to taxpayers that enables the CRA to rank businesses relative to one another and compare businesses by categories such as industry and region. The tool will be used to create a two-level risk profile: the first level is assigned by the tool, and the second level involves a human risk-profiling assessment by the CRA. This second-level review considers inherent risks as well as behavioural risks. Following this two-step process, businesses will be assigned a profile of either high risk, which will result in a full review; medium risk, which will result in a compliance review; and low risk, which may result in a cursory audit or no audit. Since 2011, the CRA has assigned approximately 35% of large businesses a high-risk profile.

The CRA also addressed what it perceived to be two of the primary complaints of taxpayers — timeliness and auditors' technical abilities. With respect to timeliness, the CRA said that its head office is investigating the files in its work-in-process inventory to determine why the files are there and how they should be handled. With respect to auditors' technical abilities, the CRA acknowledged that taxpayers feel as though auditors are not adequately trained and that inadequate supervision may be provided. In this regard, the CRA was excited to talk about the new "integrated large business audit teams" that will be rolled out in coming years. There will continue to be large file case managers, but their teams will be tailored to the risks on each file that need to be addressed. This will be combined with longer term work plans and linking with people at headquarters to ensure the correct talent is utilized on each file.

Finally, the CRA said that it will not move forward with a pre-filing review process for tax returns generally, citing capacity challenges at the agency. However, the CRA will continue to provide first-time claimant advisory service to first-time SR&ED claimants. It has found this expedites the review process post-claim. Importantly, the CRA mentioned that if a client declines to have a meeting, its claim will be held in abeyance pending review.

CRA Roundtable

The CRA Roundtable session was presented in a question and answer format. The CRA was represented by Randy Hewlett, Director, International Division, Income Tax Rulings Directorate. The Roundtable was chaired by Shawn Porter. All statutory references are references to the *Income Tax Act* (the "Act") unless otherwise indicated. The official responses were made available on December 9, 2014.

Question 1: Derivative Forward Agreement — Exchangeable Shares

In 2013, Finance introduced certain rules aimed at preventing transactions involving the sale of property that would give rise to ordinary income from becoming sales that would give rise to capital gains through the use of derivative contracts. In order for these rules to apply, there must be a "derivative forward agreement" ("DFA"), which is defined in subsection 248(1) of the Act. Randy Hewlett confirmed that, despite the ambiguous examples in the October 2013 Explanatory Notes to the definition of DFA and whether an exchangeable share could be a DFA, the CRA does not expect most exchangeable share transactions to be subject to the DFA rules, including instances where the exchange right is embedded within the share terms as the opportunity for profit and risk of loss will likely mirror the exchanged securities. The CRA also confirmed that this analysis applies equally to exchangeable partnership interests.

Question 2: Loss Consolidation — Update

Following extensive public consultations on whether rules for the taxation of corporate groups should be introduced, Finance announced in the 2013 Budget that a formal system of corporate group taxation would not be going forward. The CRA continues to receive ruling and technical interpretation requests on group loss consolidation transactions and Mr. Hewlett confirmed that the 2013 decision to not move forward with formal rules has not had an impact on the CRA's positions with respect to corporate group loss consolidation transactions.

The CRA will continue to consider ruling requests where the corporations are related and affiliated, as well as circumstances where the corporations are related. However, where the corporations are not related, the CRA will only consider a loss consolidation arrangement ruling if the corporations are affiliated by reason of *de jure* control.

Question 3: Restrictive Covenants

The highlight of this year's Roundtable is that the CRA has reversed its position set out in CRA Document No. 2014-0522961C6, "STEP CRA Roundtable — June 2014". The effect of this is that the allocation of $1 of consideration to a restrictive covenant in order to give effect to the legally binding nature of the covenant will not constitute proceeds for the purposes of paragraphs 56.4(6)(*e*) and (7)(*d*) of the Act. For tax practitioners who are called upon to advise on purchase and sale transactions involving restrictive covenants, this administrative concession is welcome, as each of subsections 56.4(6) and (7) sets out many conditions which must be satisfied in order to avoid the application of section 68.

Question 4: Section 212.1 and the General Anti-Avoidance Rule

This question follows the comments made by the CRA at the International Fiscal Association Conference in May 2013 that the general anti-avoidance rule ("GAAR") may apply to cross-border paid-up capital planning. At that time, the CRA stated that GAAR would apply to post-acquisition and non-acquisition planning. A fact scenario was provided where a non-resident corporation finances a Canadian acquisition company by way of capital contribution to purchase a non-resident target that has a Canadian subsidiary. Following the acquisition, the foreign target sells the shares of the Canadian subsidiary to the Canadian acquisition company in exchange for a note receivable equal to the fair market value of the shares. The capital gain would not be taxable since the foreign target is not taxable in Canada and the shares of the Canadian subsidiary are not taxable Canadian property. Section 212.1 does not apply because of the exception in subsection 212.1(4). The Canadian acquisition company then distributes the non-resident target to its non-resident parent as a reduction of capital and the Canadian subsidiary distributes a dividend to the Canadian acquisition company, who in turn repays the note.

The CRA stated that, in its opinion, GAAR would apply, since the planning allows the Canadian subsidiary's surplus to eventually be distributed outside of Canada without Part XIII tax applying. Accordingly, in the CRA's opinion, subsection 212.1(4) has been used to defeat the objective of section 212.1.

Question 5: Streaming Partnership Income

The CRA was asked whether certain types of income could be streamed to particular partners where the partnership agreement provides for such allocation. An example of this is to distribute dividends to taxable corporations who could deduct them from their income pursuant to subsection 112(1), and allocate interest to non-taxable partners or partners with losses that can shelter income from taxation. In response, the CRA provided that it does not accept the streaming of income to particular partners and it is the CRA's view that such an arrangement is not acceptable by virtue of subsection 103(1).

Question 6: Subsection 97(2) and the "Canadian Partnership" Requirement

Mr. Hewlett provided that the CRA's GAAR committee recently considered a scenario in an advanced income tax ruling request involving a situation where only Canadian partners were admitted to a partnership in order to use the rollover provision contained in subsection 97(2) and on the next day the partnership admitted non-resident partners. The transactions were carried out in a manner such that subsections 100(1.4) and (1.5) did not apply. The CRA provided that it would apply the GAAR to this arrangement since, in the CRA's opinion, it would be a misuse or abuse of the Act having regard to the 2012 amendments to subsection 100(1) and the addition of the anti-avoidance dilution provisions contained in subsections 100(1.4) and (1.5).

Question 7: Article XXIX-A(3) of the Canada–US Tax Convention

Mr. Hewlett was asked to clarify the meaning of "substantial" for the purposes of the "active trade or business" test in Article XXIX-A(3) of the Canada–US Tax Convention (the "Treaty"). In general, a resident that is not a "qualifying person" may obtain Treaty benefits with respect to income earned in a country that is not its resident country if this test is met. One of the requirements of the test is that the "active trade or business" carried on in the resident country is "substantial" as compared to the activities in the other country.

Mr. Hewlett noted that several favourable rulings have been granted on the "active trade or business" test (see CRA Document Nos. 2009-0349141R3, 2011-0424211R3, 2012-0458361R3, and 2013-0507961C6). However, the numbers and percentages in these rulings are often redacted, making it difficult for taxpayers to quantify the meaning of "substantial". Mr. Hewlett noted that as long as there is "more than a lemonade stand", the "substantial" requirement is satisfied. Sample numbers are included in the CRA's written responses.

Question 8: FAPI and Subparagraph 95(2)(*b*)(ii)

In CRA Document No. 2013-0474431E5, the CRA takes the position that foreign accrual property income ("FAPI") will result under subparagraph 95(2)(*b*)(ii) if a Canadian parent company ("Canco") seconds its employees to a foreign

affiliate and the foreign affiliate reimburses Canco for the salaries of the employees plus an additional percentage markup.

Due to time constraints, this question was not discussed at the Roundtable. The CRA's written responses note that the main issue is whether the markup includes a "profit element". If it is determined that Canco earns a profit via the markup, then the CRA will consider Canco to be providing services of its seconded employees in the course of carrying out its own business; accordingly, FAPI applies. The written answers went on to note that whether the fee charged to the controlled foreign affiliate can be deducted in computing FAPI will depend on the circumstances and transfer pricing principles.

Question 9: *Lehigh Cement Limited v. The Queen*

Mr. Hewlett was asked to comment on the recent Federal Court of Appeal decision in *Lehigh Cement Limited v. The Queen* (2014 DTC 5058 (FCA)). This case confirmed that the anti-avoidance provision in paragraph 95(6)(*b*) regarding the manipulation of share ownership was not intended to apply as a broad general anti-avoidance rule but instead to address a specific abuse.

Mr. Hewlett confirmed that the CRA accepts the *Lehigh* decision. However, he went on to note that this decision does not entirely foreclose the application of paragraph 95(6)(*b*) to other manipulations of share ownership. The CRA intends to review the decision and may update its discussion of the provision in *Income Tax Technical News* No. 36. Although the foreign affiliate dumping rule in section 212.3 has since been enacted to counter this type of tax planning, Mr. Hewlett noted that, for cases with taxation years prior to the application of section 212.3, the CRA may consider applying the GAAR.

Questions 10 and 11: Folios and Pre-Ruling Consultations

The CRA is replacing Interpretation Bulletins with Folios. Mr. Hewlett briefly noted the Folios were progressing well. No statistics were provided regarding the number of Folios currently outstanding.

Mr. Hewlett confirmed that the pre-ruling consultations pilot project, announced at last year's annual tax conference, will continue. This service allows taxpayers to approach the Income Tax Rulings Directorate ("ITRD") on a formal written basis to obtain a preliminary pre-ruling and ensure that a full ruling can be issued on the same subject to prevent taxpayers from incurring significant costs to prepare a request for a ruling that the ITRD is unable to provide. To date, 21 requests have been received.

The CRA is expected to issue a revised circular on the process to clarify that pre-rulings are subject to the same conditions as rulings. For example, a pre-ruling will not be provided on an issue currently under audit. Further, a pre-ruling will not provide a full GAAR analysis. Mr. Hewlett also noted that if information requested under the pre-rulings request is not provided within 30 days, the CRA will close the file.

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INCOME TAX FOLIOS

Effective December 9, 2014, the Canada Revenue Agency ("CRA") released new Income Tax Folio S3-F9-C1, Lottery Winnings, Miscellaneous Receipts and Income (and Losses) from Crime. Some of the updated and new information contained in the Folio includes:

- examples of taxable voluntary payments (¶1.5);
- income tax implications of lottery prize commissions (¶1.16) and fraudulent investment schemes (¶1.41–1.45); and
- updates to the definitions of "syndicate" (¶1.23), "disposition" (¶1.8), and "proceeds of disposition" (¶1.41).

The Folio replaces and cancels the following Interpretation Bulletins:

- IT-185R (Consolidated), Losses from Theft, Defalcation, or Embezzlement;
- IT-213R, Prizes from Lottery Schemes, Pool System Betting, and Giveaway Contests;
- IT-256R, Gains from Theft, Defalcation, or Embezzlement; and
- IT-334R2, Miscellaneous Receipts.

There is a three-month comment period, ending March 9, 2015, during which suggestions about content and structure may be sent to the CRA at folios@cra-arc.gc.ca.

Effective December 5, 2014, the CRA revised Income Tax Folio S1-F3-C1, Child Care Expense Deduction, at ¶1.16 to refer to the publication of Income Tax Folio S1-F5-C1, Related Persons and Dealing at Arm's Length.

Effective November 28, 2014, the CRA released Income Tax Folio S4-F7-C1, Amalgamations of Canadian Corporations. The Folio — which replaces and cancels IT-474R2, Amalgamations of Canadian Corporations — primarily references section 87 of the *Income Tax Act*. Changes to the Folio from the former Interpretation Bulletin are detailed in the Folio's Chapter History page; some of these include changes to:

- reflect significant court decisions including *Envision Credit Union v. The Queen*, 2013 DTC 5144 (SCC) (¶1.4); *CGU Holdings Canada Ltd. v. The Queen*, 2009 DTC 5044 (FCA) (¶1.13); *The Queen v. Dow Chemical Canada Inc.*, 2008 DTC 6544 (FCA) (¶1.57 and ¶1.58); and *Copthorne Holdings Ltd. v. The Queen*, 2012 DTC 5007 (SCC) (¶1.87);
- summarize CRA positions regarding exercise of statutory rights of dissent on an amalgamation (¶1.5), the timing of an amalgamation (¶1.16), deemed year end(s) upon amalgamation (¶1.19 and ¶1.20), non-qualifying amalgamations (¶1.24), and undepreciated capital cost and accelerated capital cost allowance (¶1.29, ¶1.30, and ¶1.33); and
- provide additional comment and more detailed discussion as to cost of inventory (¶1.26), exercise of options issued by a predecessor corporation (¶1.45 and ¶1.46), net capital loss and non-capital loss streaming rules (¶1.48), and resource expense pools (¶1.55 and ¶1.56).

Suggestions about this Folio's structure and content may be submitted to the CRA at folios@cra-arc.gc.ca. The period for comment regarding the Folio's introduction will end on February 28, 2015.

BILL C-43 RECEIVES ROYAL ASSENT

Bill C-43, *Economic Action Plan 2014 Act, No. 2*, received Royal Assent on December 17, 2014, becoming S.C. 2014, c. 39. The amendments from former Bill C-43, which implements certain provisions of the 2014 federal Budget and other previously announced measures, will be added to Wolters Kluwer's *Income Tax Act* online and on DVD as soon as possible and will be included in the 100th edition of Wolters Kluwer's *Canadian Income Tax Act with Regulations, Annotated*, which will be published this summer.

PRESCRIBED INTEREST RATES — FIRST QUARTER OF 2015

The prescribed interest rates for the first quarter of 2015 were released by the Canada Revenue Agency on December 15, 2014. Except for corporate taxpayers' rates for interest on pertinent loans and indebtedness (which will be 4.89%), the rates have not changed from the fourth quarter of 2014 and are noted below.

- 1% to calculate a deemed interest taxable benefit on subsidized employee and shareholder loans;
- 1% on refunds of income tax overpayments paid to corporate taxpayers;
- 3% on refunds of income tax overpayments paid to non-corporate taxpayers; and
- 5% on payments of overdue income taxes, insufficient income tax instalments, unremitted employee source deductions, CPP contributions or EI premiums, and unpaid penalties.

These rates will be in effect from January 1, 2015 to March 31, 2015.

MEANING OF "GROSS REVENUE" FOLLOW-UP

The Canada Revenue Agency ("CRA") was asked if amounts received as volume discounts should be included in a corporation's gross revenue for purposes of subsection 402(3) of the *Income Tax Regulations* (the "Regulations"). "Gross revenue" is defined in subsection 248(1) of the *Income Tax Act* (the "Act") and, under paragraph (*a*) of that definition, includes "all amounts received in the year or receivable in the year . . . otherwise than as or on account of capital". Paragraph (*b*) of the definition also includes certain accrued amounts other than amounts already included in paragraph (*a*). Under Regulation 402(3), a corporation's gross revenue is used in the formula to allocate taxable income in a taxation year where a corporation has a permanent establishment in a province and a permanent establishment outside that province. In Document No. 2010-0382161I7, "Discounts and Rebates — Application of IAS 2 and EIC-144" (October 27, 2011), the CRA indicated that discounts and rebates received by a taxpayer after a purchase are included in the taxpayer's gross revenue.

The CRA commented that some may consider that the definition of gross revenue in subsection 248(1) is the same as a corporation's revenue as determined for financial statement purposes. However, the CRA cited instances where they can differ, and concluded that while they may be similar, there could be significant differences depending on the method of accounting used by the taxpayer. The CRA concluded that gross revenue for purposes of Part IV of the Regulations (including Regulation 402(3)) includes "all amounts received or receivable by a taxpayer other than on account of capital but does not include amounts received in respect of expenditures of the taxpayer". As well, the CRA noted that amounts such as unearned income or amounts receivable from property sold or services rendered are included in income under paragraph 12(1)(*a*) or (*b*) of the Act, and are also part of gross revenue for Part IV of the Regulations. The CRA gave the following examples of what would not be included in gross revenue:

- amounts such as volume rebates that are received or receivable on account of the taxpayer's expenditures;
- government assistance received in respect of expenditures incurred or to be incurred by the taxpayer;
- amounts included in income from the disposition of capital property such as under section 13, 14, or 38; and
- amounts that were included in gross revenue in a previous taxation year.

The CRA confirmed that this position on the definition of gross revenue for purposes of the provincial allocation differs from that described in Document No. 2010-0382161I7.

— *Internal Technical Interpretation, International Division, March 31, 2014, Document No. 2013-0514921I7*

RECENT CASES

Corporate taxpayers operated personal services businesses, not entitled to small business deduction

EBI was a corporation which held garbage collection contracts with certain municipalities in Quebec. To enable it to carry out its obligations, it engaged several individual corporations (including the corporate taxpayers) to perform various garbage collection tasks, allegedly, as independent contractors. These corporations used their own trucks and

drivers, who worked alone and were paid by the hour. These drivers had formerly been employees of EBI. In reassessing the taxpayers for 2004 to 2008, the Minister denied them the small business deduction ("SBD") and imposed penalties for gross negligence. The taxpayers appealed to the Tax Court of Canada.

The taxpayers' appeals for 2007 and 2008 were allowed in part, and their appeals for 2004 to 2006 were dismissed. EBI had sufficient control over the taxpayers to bring about a hierarchical relationship over them in accordance with Quebec law. Accordingly, it was reasonable to conclude that, were it not for the separate corporate existence of the taxpayers, their truck-driver shareholders would have been EBI's employees. As a result, the taxpayers were operating personal services businesses and, hence, were not entitled to the SBD they had claimed. The penalties for gross negligence, however, were not exigible for 2007 and 2008 in the absence of evidence of gross negligence on the taxpayers' part for those years.

9016-9202 Québec Inc., 2014 DTC 1201

No breach of procedural fairness in refusal to disclose corporate tax information

The applicant was seeking judicial review under the *Access to Information Act* (the "Act"). She was seeking disclosure of all Canada Revenue Agency ("CRA") audit documentation that had supported its decision to disallow business losses she had claimed, as well as documents relating to the garnishing of her wages. The applicant was reassessed in 2008 due to her involvement in a tax avoidance scheme whereby she claimed substantial business losses. The disallowance of the losses led to the taxpayer owing significant taxes and the CRA taking garnishment proceedings. The taxpayer on three occasions submitted access to information requests to the CRA that were only partially answered. She was told documents were missing and there were delays in providing information. She also complained to the Office of the Information Commissioner ("OIC"), after which time further documents were produced. After the application for judicial review was submitted, the CRA produced more documents, having discovered that documents initially thought to have been destroyed were in fact available. The CRA produced all the documentation pertaining to an audit conducted on the applicant but would not release information relating to the corporate parties in the tax avoidance scheme, arguing confidentiality. The applicant claimed the corporate parties were her agents and, as such, she was entitled to their information.

The application for judicial review was dismissed with costs awarded on a party-and-party scale. Taxpayer information can only be supplied without the consent of the parties if it would be reasonably necessary for the administration and enforcement of the Act. The taxpayer's argument that the corporate parties were her agents, and as such she was entitled to their tax information, is unsupported in law. The applicant failed to show that the information requested regarding the corporate parties was needed to defend or appeal her tax assessment. The personal audit information provided clear explanation for the denial of the business losses. Although there were delays in providing the information, once the application for judicial review was brought, all the information that could be disclosed was provided to the applicant. The OIC and the supervisory jurisdiction of the Federal Court ensured that all the documentation that could legally be produced was in fact produced. There was no breach of procedural fairness. There was no evidence of malice that would support costs on a solicitor-client basis, but costs were appropriate given that the full documentation was only produced after the application for judicial review was brought.

Summers, 2014 DTC 5112

Corporate taxpayer permitted to amend its notices of appeal

The taxpayer was a large corporation subject to the special requirements provisions of subsection 165(1.1) of the *Income Tax Act* (the "Act") respecting the content of notices of objection, as well as to the limited access appeal provisions of subsection 169(2.1). The Minister issued two assessments to the taxpayer for 2006 (the "First Assessment," dated July 14, 2011, and the "Second Assessment," issued on April 19, 2013). The First Assessment related to the eligibility of SR&ED expenses claimed. The Second Assessment, which was issued after appeal proceedings in the Tax Court of Canada had been commenced with respect to the First Assessment, related to foreign affiliated corporation losses. On July 18, 2013, the taxpayer filed a notice of objection to the Second Assessment and later appealed to the Tax Court with respect to it. The taxpayer was faced with a somewhat similar pair of assessments

relating to 2007. In the course of its appeals, the taxpayer applied for an order declaring that (a) the Second Assessment for 2006 was an "additional assessment" for the purposes of subsection 165(7) of the Act; and (b) the two similar assessments for 2007 were also "additional assessments".

The application was dismissed. The Second Assessment for 2006 increased the taxpayer's taxable income for 2006 and, hence, was not an "additional assessment" but a fresh reassessment. In the notice of objection filed against the Second Assessment, however, the taxpayer had specifically raised objections to the additions to its taxable income contained in the Second Assessment, and was therefore entitled to amend its notice of appeal to contest those additions because it had complied with the provisions of subsections 165(1.1) and 169(2.1). The same reasoning applied to the two similar assessments for 2007, neither of which was an "additional assessment". For similar reasons, the taxpayer was also permitted to amend its notice of appeal for 2007, but conditional, however, upon adding to that Notice certain particulars.

Rio Tinto Alcan Inc., 2014 DTC 1200

Taxpayer not entitled to interest amounts on remission of tax as it was not the same as refund of tax overpayment

There were two applications brought in respect of the Syncrude Remission Order, a tax relief measure put into place in 1976. At issue was whether the remission of tax was the same as a refund of a tax overpayment that would accrue interest payable to the recipient taxpayer.

The taxpayer's application was dismissed. A remission of tax is not the same as a refund of tax overpayment for purposes of the *Income Tax Act*, with the result that the Minister would owe interest on the outstanding amounts. Accordingly, the taxpayers were not entitled to approximately $5 million in interest on the remission amounts received. One of the applications was also statute-barred and not open to dispute before the Court.

Imperial Oil Resources Ltd., 2014 DTC 5113

Taxpayer not declared *de jure* or *de facto* director and therefore not liable for payroll deductions and GST remittances payable to the CRA

The appellant, Christopher MacDonald, was a shareholder of the Great Canadian Pub Inc. ("GCPI"), which operated a bar in Moncton, New Brunswick. The appellant had previously taken over the shares of a former shareholder and signed company-related documents as either Secretary-Treasurer, "Owner", or at times as director, but never intended to be involved in the business as director or officer of the company. It was later discovered that GCPI owed payroll deductions and GST remittances payable to the Canada Revenue Agency ("CRA") under subsection 227.1(1) of the *Income Tax Act* ("ITA") and subsection 228(2) of the *Excise Tax Act* ("ETA"), respectively. The CRA claimed the appellant was a director of CGPI and, therefore, personally liable for the taxes owed.

The appeal was allowed. The issue on appeal was whether the appellant was a *de jure* or *de facto* director of GCPI. A *de jure* director is an individual who has been appointed as such pursuant to the corporate law of the jurisdiction in which the body corporate was created. The Tax Court of Canada previously held that a person who was never made aware that they were a director, and did not consent to be a director, is not a *de jure* director. Furthermore, the Court indicated that a *de facto* director can exist in two forms: (i) one who is ostensibly duly elected but who may lack some qualification under the relevant corporate law; or (ii) one who simply assumes the role of director without any pretence of legal qualification. There are several factors that led to the Court's conclusion that the appellant was not a director and, therefore, not liable for the taxes payable under the aforementioned subsections: there was no director's meeting of any kind by which directors were appointed; there were no dossiers signed by the appellant consenting to do any business as a director and the appellant did not know he was a director even though he signed some documents to that effect; the appellant specifically acknowledged he was one of two persons with signing authority for cheques for GCPI but stated firmly and repeatedly that he did not consent to be a director; and he did not intend to be a director at any time for the corporation. The facts of this case establish that the appellant was a shareholder only. Having found the appellant was neither a *de jure* nor a *de facto* director, liability is not engaged and the Court did not

address the other issues raised in this appeal, specifically the reliance on the due diligence defence provided under subsection 227.1(3) and subsection 323(3) of the ITA and ETA, respectively, in addition to the applicable limitation periods under subsection 323(5) of the ETA.

MacDonald, 2014 DTC 1212

Minister not required to alter nil reassessments retroactively to reallocate certain ABILs

The Minister assessed the taxpayer once for 2001 on September 18, 2002. On March 8, 2012, the taxpayer requested that the Minister permit allowable business investment loss ("ABIL") deductions for 2001 and 2004. On May 30, 2012, the Minister refused the requested deduction for 2001 as being statute-barred under subsection 152(4.2) of the *Income Tax Act* (the "Act"), but did allow and apply an ABIL deduction for 2004, as well as for 2002, 2003, 2005, and 2007, with the result that tax for all of those years was reassessed at nil. In answer to notices of objection filed by the taxpayer on May 14, 2012, to reassessments for 2002, 2003, 2004, 2005, and 2007 made on April 19, 2012, the Minister determined, on July 2, 2013, that no tax was payable for any of those years. On July 24, 2013, the taxpayer applied to the Tax Court of Canada for an order (a) extending the time to request that the Minister retroactively reallocate an ABIL of $506,840 from 2001 to 2002; and (b) requiring the Minister to recalculate the previous allocation of the ABIL for 2004.

The taxpayer's application was dismissed. No appeal lies from a nil assessment (see *Okalta Oils Ltd. v. MNR*). Therefore, the taxpayer could not ask at this stage for reassessments of the nil reassessments already made by the Minister for 2002 and 2004 in order to reallocate the ABIL deduction originally claimed for 2001. This was the case even though the taxpayer had argued that the reallocation was justified in light of new evidence that he had allegedly obtained showing that the ABIL for 2001 should initially have been claimed for 2002 and not for 2001. That said, however, the taxpayer might be able to carry forward to 2010 and subsequent taxation years any unused portions of the ABILs in issue as net capital losses under paragraph 111(1)(*a*) of the Act.

Bérubé, 2014 DTC 1218

Income of status Indians was not connected to reserve and was taxable

The taxpayers, all status Indians, were appealing reassessments that stated their employment income was taxable. They argued that their employment income should be exempt from taxation as being personal property of an Indian situated on a reserve. The taxpayers were all employed by Native Leasing Services ("NLS"), which provided employment placement services to not-for-profit Aboriginal organizations. In return for a service fee of 5% to 6%, NLS provided payroll services, human resource support, bookkeeping, and staffing services. NLS had its office and bank account on a reserve, and the wages of the taxpayers were deposited in bank accounts that were on a reserve. The taxpayers worked for various social service agencies providing services to Aboriginals.

The appeals were dismissed. The taxpayers argued that the *situs* of the debt was the proper test and that their income was exempt from taxation because the residence of the person paying the wages (NLS) was on the reserve. However, the test to apply here is the "connecting factors" test to determine if the income earned is situated on the reserve. The purpose of the tax exemption is not to confer economic benefits on status Indians by allowing them to deal with their property on different terms than other citizens, but to preserve the entitlements of status Indians to their reserve lands and to ensure that the use of their property on the reserves is not eroded by the taxation regime. The location and nature of the work are the most important factors to consider, not where the employee and employer reside or where the employee is paid. There must be a strong connection between the income earned and the reserve. All the work performed by the taxpayers was done off-reserve, and there was no connection between the income earned and the reserve. Although some of the clients serviced lived on reserves, the services provided were focused mainly on clients who lived off reserves, and there was insufficient linkage between the employment income and the reserve. That the NLS office was located on the reserve was not relevant. No benefits flowed to the reserve from NLS, which was just trying to forge a connection between the wages paid and the reserve.

Baldwin, 2014 DTC 1211

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