Tax Notes

August 2022
Number 715

COLLINS FAMILY TRUST

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Background

Many years ago, there were two types of courts — courts of law and courts of equity — in England. Courts of equity developed to provide remedies, which lawyers call "equitable remedies", where the decisions of courts of law would produce results that were unconscionable or otherwise unfair. Later, law and equity were fused into one system which was administered by one set of courts. The common law provinces of Canada adopted this system. Equitable remedies were available in the common law provinces long before there was an *Income Tax Act*. Equitable remedies have been and still are used to resolve disputes between two or more persons who deal at arm's length with each other where taxes are not the primary concern, or perhaps are not a concern at all.

Taxpayers have used two equitable remedies, rectification and rescission, to obtain tax relief. Each of these equitable remedies has a number of technical requirements; each of these equitable remedies is discretionary. Rectification applies when the written documents in respect of an agreement do not correspond to the actual agreement made by the parties. It corrects the written documents so that they do correspond with the actual agreement. Rescission applies in certain situations where mistakes have been made. It cancels a transaction and restores parties to the position they were in before the transaction.

The CRA has been concerned that taxpayers have been using equitable remedies to conduct retroactive tax planning and has challenged the use of them in a number of court cases. This culminated in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 DTC 5135 (SCC), with respect to rectification.[1] In *Fairmont*, the Supreme Court of Canada restricted the availability of rectification so that it could not be used for retroactive tax planning but left it available to correct written documents where they did not reflect the actual agreement of the parties. I have had a number of successful rectifications after *Fairmont*.

The Facts

In *Canada (Attorney General) v. Collins Family Trust*, 2022 DTC 5069 (SCC), the taxpayer sought to use rescission to deal with their tax problem. The CRA considered this to be retroactive tax planning. The majority of the Supreme Court of Canada (the "Majority") described the facts as follows in paragraphs 2 to 4 of the decision.

[1] *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 DTC 5134 (SCC), is a companion case which was decided under Québec civil law.

> [2] In 2008, Todd Collins, principal of Rite-Way Metals Ltd., and Floyd Cochran, principal of Harvard Industries Ltd., each retained the same tax advisor to propose a plan to protect corporate assets from creditors without incurring income tax liability. The resulting plans took advantage of the attribution rules in s. 75(2) and the inter-corporate dividend deduction in s. 112(1) of the Act. In each case, a holding company was incorporated to purchase shares in an operating company, a family trust was created with the holding company as a beneficiary, and funds were loaned to the trust to purchase shares in the operating company. The operating companies paid dividends to the trusts, which were attributed to the holding companies under s. 75(2). They, in turn, claimed a deduction in respect of those dividends under s. 112(1). The effect was to move $510,000 from Rite-Way to the Collins family trust, and $2,085,000 from Harvard to the Cochran family trust, without income tax being paid.
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> [3] The proposals were based in part on the interpretation of the provisions published by the Canada Revenue Agency ("CRA") at the time.
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> [4] In 2011, however, in *Sommerer v. The Queen*, 2011 TCC 212, 2011 D.T.C. 1162, aff'd 2012 FCA 207, [2014] 1 F.C.R. 379, the Tax Court of Canada held that the attribution rules in s. 75(2) are inapplicable where the property in question was sold to a trust, as opposed to gifted or settled. Subsequently, the CRA reassessed the respondents' returns, leading in turn to the issuance of notices of reassessment imposing tax liability upon the respondents in respect of the dividends. The respondents objected, were unsuccessful, then sued for rescission of the transactions leading to and including the payment of dividends.

The Decision

The Majority ruled against the taxpayer. In paragraph 1 of the decision, the Majority summarized their conclusion as follows:

> [1] This Court has barred access to rectification where sought to achieve **retroactive tax planning** *(Canada (Attorney General) v. Fairmont Hotels Inc.*, [2016] 2 S.C.R. 720, at para 3). Taxpayers should be taxed based on what they actually **agreed to do and did**, and not on what they could have done or later wished they had done (*Fairmont Hotels*, at paras 23–24, citing *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at para. 45). At issue in this appeal is whether taxpayers are also barred from obtaining other equitable relief — here, rescission of a series of transactions — sought to avoid unanticipated adverse tax consequences arising from the ordinary operation thereon of the *Income Tax Act*, R.S.C.1985, c. 1 (5th Supp.). As I explain below, they are. [Emphasis added]

The Majority stated that equitable remedies cannot be used to carry out retroactive tax planning when the parties have actually done what they have agreed to do. As a result, the *Fairmont* test continues to apply to rectification. Tax-motivated rescissions where the CRA and the taxpayer are the only parties will likely be regarded as retroactive tax planning and will not be available.

The Majority explained the basis for its reasoning as follows in paragraph 11 of the decision:

> [11] . . . Generally speaking, a court of equity may grant relief where it would be **unconscionable or unfair** to allow the common law to operate in favour of the party seeking enforcement of the transaction. But there is nothing **unconscionable or unfair** in the ordinary operation of tax statutes to transactions freely agreed upon . . . [Emphasis added]

The Future

Where does the Majority's decision leave the equitable remedy of rescission? Are there circumstances where it is still available? Are there circumstances where it can still be used to remedy a problem which arises in a tax or estate planning situation?

In order to assess the consequences of *Collins Family Trust*, it is helpful to recall that the case involved a situation where all of the following aspects were present:

(1) The parties (the "Participants") did not deal at arm's length with each other.

(2) There was no actual non-tax dispute between the Participants.

(3) The CRA was the only entity that would receive a "windfall" if the transactions were not rescinded.

(4) There was no indication that the tax consequences would be catastrophic to a Participant if rescission were not granted.

There will undoubtably be situations where one or more of these aspects will not be present. How will the courts react?

It is also helpful to consider what the technical requirements of rescission were before *Collins Family Trust*. In paragraph 89 of *Canada Life Insurance Company of Canada v. Canada (Attorney General)* 2018 ONCA 562, the Ontario Court of Appeal described the technical requirements for rescission as follows:[2]

> [89] The relief that CLICC seeks is more accurately described as rescission of a contract entered into by mistake. Accordingly, this court's decision in *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422, 313 O.A.C. 137 (Ont. C.A.), governs. It requires the party seeking equitable rescission of a contract to establish that (a) the parties were under a common misapprehension as to the facts or their respective rights; (b) the misapprehension was fundamental; (c) the party seeking to set the contract aside was not itself at fault; and (d) one party will be unjustly enriched at the expense of the other if equitable relief is not granted (at paras. 23, 24, 26 and 31). None of these requirements apply in the present case, nor does CLICC attempt to bring itself within the requirements for equitable rescission of a contract.

The Ontario Court of Appeal found against the taxpayer in *Canada Life*. Apparently, the Court of Appeal may have felt that it was necessary for an entity other than the CRA to be unjustly enriched at the expense of another.

The following examples illustrate one situation where rescission will likely continue to be available and two situations where it is unclear whether rescission will be available.

Example 1

Assume that two parties deal at arm's length, have an actual business dispute, and one party will be unjustly enriched at the expense of the other. Assume tax considerations are relatively minor. When all of the technical provisions of rescission are met, it is to be hoped that rescission will be available after *Collins Family Trust*. In fact, it is questionable whether the CRA will even become aware of these disputes.

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[2] There are two lines of cases which have considered rescissions. One line considers the rescission of voluntary dispositions dividends. *Collins Family Trust* falls within this line of cases. A second line considers the rescission of transactions and contracts. *Canada Life* falls within this line of cases. The Supreme Court of Canada did not distinguish between the two lines of cases in *Collins Family Trust*.

Example 2

Assume the same facts as in Example 1, except that the tax consequences of rescinding the transaction are significant. Would the CRA become aware of the litigation while it is ongoing? If so, what steps would the CRA take? What steps could the CRA take if it becomes aware of the matter only after the court has granted a rescission order? The requirements for rescission include that one party be unjustly enriched at the expense of another if equitable relief is not granted. Is the amount of the unjust enrichment in relation to the tax consequences relevant?

Example 3

Assume the following:

(1) There has been a tax-planned reorganization which involved a closely-held group of corporations and a family trust. The parties do not deal at arm's length.

(2) Two errors have been identified.

(3) One is a tax error which will result in additional tax of $X to one of the corporations.

(4) One is a valuation error which will cost the family trust $Y.

(5) If it is available, rescission will eliminate the tax cost of $X and will restore $Y to the family trust

(6) The trustees of the family trust have approved the reorganization. They are concerned that the beneficiaries will sue them for breach of trust if they do not find a way to restore the $Y to the family trust.

Will rescission be available in this situation? Is the size of $X in relation to $Y relevant? Is it relevant that the trustees do not have assets worth $Y and that an award for breach of trust would bankrupt them? Do the consequences of the loss of $Y to the family trust and the beneficiaries matter?

CURRENT ITEMS OF INTEREST

Government Clarifies Luxury Tax Implementation Dates

On July 14 the Government of Canada announced some clarifications regarding the implementation of the Luxury Tax, which was enacted by Bill C-19. First, an amendment made to Bill C-19 during the legislative process authorizes the Governor in Council to set the coming into force date of the Luxury Tax as it applies to aircraft. The Deputy Prime Minister and Minister of Finance have accordingly recommended to the Governor in Council a coming into force date of September 1, 2022, for all subject items, including aircraft.

The government also intends to release draft regulations in the near term that would clarify that the existing transitional provisions in Bill C-19 for the Luxury Tax will continue to apply to all subject items, including aircraft. These regulations would provide that the Luxury Tax is relieved from a subject item if a written sales agreement in respect of the subject item was entered into before January 1, 2022.

Second, the government intends to release draft regulations in the near term that, effective September 1, 2022, would relieve the Luxury Tax on sales of certain aircraft for export at the time the sale is completed by a registered vendor, even if the exportation occurs at a later time. This refinement would mitigate certain cash flow issues raised by Canadian manufacturers and exporters of aircraft. Following feedback from stakeholders at the conclusion of the public consultation, this refinement provides an administratively similar approach to achieving the overarching objective of the legislation and is consistent with the government's longstanding commitment to exempt export sales.

Third, the government intends to release draft regulations in the near term that would simplify and reduce the reporting requirements, effective September 1, 2022, for automotive vendors that are registered with the CRA. These regulations would eliminate the requirement for these vendors to complete certain information returns.

Government Clarifies C-19 Amendment Affecting Cider and Mead

The Government of Canada announced clarifications on July 14 related to an amendment adopted in the House of Commons to Bill C-19. This amendment maintains the excise duty exemption for wine produced in Canada from apples or honey (i.e., cider and mead) and composed wholly of Canadian agricultural or plant product.

However, as this amendment was adopted without consequential amendments to other portions of Bill C-19, it would result in two unintended inconsistencies if left unaddressed:

- It would make it illegal for any person to possess exempt cider and mead; and
- It would remove the labelling requirements for exempt cider and mead, which may result in downstream administration and enforcement issues.

To correct these inconsistencies, the government intends to eventually introduce legislative proposals to clarify that restrictions on possession would not apply to exempt cider and mead and that certain regulatory labeling requirements for alcoholic beverages in respect of exempt cider and mead would be preserved. It is the government's intention that these measures be effective retroactively to June 30, 2022.

Notice of Policy Update: Publication of the Revised TPM-03R

The Canada Revenue Agency ("CRA") regularly reviews and updates its forms and publications to reflect legislative and policy changes, to clarify ambiguities identified, and to enhance compliance through effective sharing of information. TPM-03R, entitled "Downward Transfer Pricing Adjustments", has been updated to provide greater detail regarding how downward transfer pricing adjustments are directed and managed within the CRA, and the circumstances where, in accordance with the legislative requirement, a downward transfer pricing adjustment would not be appropriate.

Key changes include:

- Updates to the instructions on where to send a request for a downward transfer pricing adjustment;
- Updates to the explanation of circumstances in which the Audit Division will consider a downward transfer pricing adjustment;
- Increases to the threshold for referrals to the Director of the International Tax Division;
- More information regarding repatriation of funds to Canada following downward transfer pricing adjustments; and
- Updated examples of downward transfer pricing adjustments for clarity purposes.

CRA Publishes Report on Tax Gap

The Minister of National Revenue, Diane Lebouthillier, published Canada's first report on the tax gap on June 28. The tax gap is the difference between taxes paid if all obligations were fully satisfied and the tax actually collected. From 2014 to 2018, the annual tax gap was approximately 9% of federal tax revenues. The report also shows that for tax year 2018, the total gross tax gap was estimated to be between $35.1 billion and $40.4 billion. However, the CRA's recent compliance enforcement activities are said to be reducing this gap to between $18.1 billion and $23.4 billion. For further details on the contents of the tax gap report, see: www.canada.ca/en/revenue-agency/news/2022/06/minister-of-national-revenue-publishes-canadas-first-overall-tax-gap-report.html.

COVID-19 UPDATE

Given the rapidly changing information related to COVID-19 we are providing continuously updated information at blog.intelliconnect.ca/.

Federal

Canada Arts and Culture Recovery Program

On June 27, 2022, the government announced details of the Canada Arts and Culture Recovery Program ("CACRP"), which will provide targeted support for cultural organizations that still face significant financial challenges in the third year of the pandemic. As announced in Budget 2022, the Government of Canada is investing $50 million to support Canadian arts, culture, and heritage organizations that have experienced revenue losses due to public health restrictions and capacity limits and the ongoing hesitancy of audiences to return. This funding will reinforce the two-year, $300 million Recovery Fund for the Arts, Culture, Heritage and Sport Sectors and the $200 million Reopening Fund from Budget 2021.

This recovery fund will help organizations ease the financial risks of organizing activities in an unpredictable operating environment. CACRP will help offset declines in a broad range of self-generated income. This funding will be delivered over the coming weeks and months through the following Canadian Heritage existing programs and portfolio Crown corporations:

- Canada Arts Presentation Fund;
- Museums Assistance Program;
- Canada Music Fund;
- Canada Council for the Arts; and
- Telefilm Canada.

For additional information, see www.canada.ca/en/canadian-heritage/news/2022/06/backgrounder-targeted-recovery-support-for-canadian-arts-culture-and-heritage-organizations-as-they-welcome-back-audiences-and-rebuild-revenues.html.

Provincial

Alberta

Workforce Strategies Grants

As part of Alberta at Work, organizations could receive up to $1.5 million through Workforce Strategies Grants for projects that help Alberta workers develop the necessary skills to meet workforce needs and that build the capacity of industry, employers, and regions to attract, develop, and retain workers. To support Alberta's continued economic recovery and diversification, funding will prioritize projects that target emerging sectors, such as technology and fintech, agriculture and agri-tech, forestry, tourism, energy, logistics, and culture. Projects that aim to employ under-represented groups, such as people with a disability, youth, and racialized individuals, will also be prioritized for funding to help everyone participate in Alberta's recovery.

Organizations had until July 22 to submit an expression of interest for their project. Successful applicants will be contacted to submit a full project proposal. A total of $8 million in funding is available through the Workforce Strategies grants. Successful projects can be up to 36 months long and funding will range from $50,000 to $1.5 million. To be eligible for a Workforce Strategies grant, organizations must have a minimum of two years' experience related to one of the following streams they apply under:

- **Skills Development Stream:** Supports the re-skilling of unemployed Albertans by providing training and/or services resulting in new skills development and employment;
- **Regional and Employer-focused Stream:** Supports regional and employer-led projects that address regional workforce challenges; and
- **Industry-focused Stream:** Supports industry-led projects that address provincial workforce needs.

For additional information, see www.alberta.ca/workforce-strategies-grants.aspx.

Alberta Jobs Now

The Alberta Jobs Now program opened its third and final application intake on June 3, 2022. Employers had until 4:15 p.m. MDT on June 30 to apply to the program at alberta.ca/jobsnow during the third and final intake period.

FOCUS ON CURRENT CASES

Will return next month.

RECENT CASES

Tax Court Rejects Claim of Small Business Deduction

The Appellant provided engineering, consulting, and management services in relation to the oil and gas sector. It challenged reassessments for its 2012–2014 taxation years that denied it the small business deduction provided by paragraph 18(1)(*p*) of the *Income Tax Act* (the "ITA") because the CRA determined the Appellant conducted a personal services business, which is excluded from the deduction. The Appellant argued it was associated with the company for which it provided services and was therefore not a personal services business.

The Tax Court dismissed the appeal. Whether or not the Appellant was associated with its clients did not affect its (in)eligibility for the small business deduction; under subsection 125(2) of the ITA, the deduction is lost by the Appellant's association with two Canadian-controlled private corporations. In a teleconference, the Appellant's counsel stated that its objective was to qualify for the 13% general rate reduction provided in subsection 123.4(2). However, personal services corporations under subsection 123.4(1) are ineligible for the reduction. The Court then considered the argument that it was associated by virtue of one client's *de facto* control of the Appellant. It noted that *de facto* control relates to the controlling entity's control over the board of directors, not day-to-day operations. It found that the documents on which the Appellant relied — a consulting agreement and two unanimous shareholder agreements — had nothing to do with control over the directors. The circumstance the Appellant cited here, its financial dependence on the allegedly controlling entity, was a typical feature of corporate structures such as those at issue, and again had nothing to do with the directors. Applying the "but for" test of subsection 125(7), under which the incorporated employee would be an officer or employee of the person or partnership to whom the services are rendered but for the existence of the corporation, the Court found that the Appellant's principal would have been an employee. The Court concluded: "[T]he Appellant carried on a single business that was primarily the provision of engineering, consulting and management services. . . . All of the revenue the Appellant received . . . was received in respect of a personal services business." The appeal was dismissed with costs payable to the Respondent.

Astro Consulting Inc. v. The Queen

2022 DTC 1038

Tax Court Reaffirms Foreign Tax Credit Not Available for Mandatory Pension Deductions

The Appellant worked in the Spanish embassy for the Labour Minister of Spain. For the 2016, 2017, and 2018 taxation years he claimed foreign tax credits for mandatory pension contributions. On March 14, 2018, after he was reassessed, he wrote to the CRA's Processing Payment Centre providing documentation of his claims. This appeal followed.

The Tax Court dismissed the appeal. It found that the March 14 letter met three of the requirements for a Notice of Objection (being in writing, stating reasons, and stating relevant facts) but not the fourth: it was not "addressed to the Chief of Appeals in a District Office or a Taxation Centre of the Canada Revenue Agency and delivered or mailed to that Office or Centre." The Court accordingly quashed the appeal. Since the CRA nonetheless had discretion to accept the March 14 letter as a notice of objection, the Court went on to consider the merits. The issue was whether the Appellant's foreign pension payments are a "tax". Under the Supreme Court's *Lawson* decision, a tax must be enforceable by law, imposed under the authority of the legislature, imposed by a public body, and made for a public purpose. The Appellant satisfied the first three prongs of this test, but Tax Court jurisprudence consistently holds that foreign pension deductions are for the benefit of the taxpayer, not for a public purpose.

Vidal v. The Queen

2022 DTC 1041

Petition For Rescission Dismissed As Premature and Because a Court Order Is Not Necessary To Achieve a Just and Fair Result, According To Law

The petitioners, Kraft Heinz Canada ULC ("KH Canada") and H.J. Heinz Investments Coöperatief, U.A. ("Heinz Co-op"), had agreed on and effected a capital contribution agreement and then realized, four months later, that it would attract a withholding tax of either 5% or 15% under Canadian tax law. The petitioners took steps to reverse and nullify the transaction and they now seek a declaration that it was void *ab initio* in the British Columbia Supreme Court. The Attorney General had submitted that the application was premature because the CRA had not assessed any tax payable in consequence of the capital contribution, nor was it known whether the CRA will do so.

The appeal was dismissed. The Supreme Court observed that the capital contribution was a transaction between a Canadian entity and a Dutch entity governed by Dutch law. A Canadian court would apply Dutch law to ascertain the legal rights and obligations of the parties to the transaction. The Supreme Court noted that there was no obvious reason not to apply Dutch law to the parties' subsequent modification of the transaction, as the parties had intended. The Supreme Court further noted that the CRA had not assessed taxes owing on the basis of a deemed dividend pursuant to the Foreign Affiliate Dumping Rules. It had not undertaken an audit of the taxes owing by KH Canada. KH Canada's concern that the CRA would reassess was entirely hypothetical. In addition, the Supreme Court held that the capital contribution was governed by foreign law and had been completely nullified, "*ab initio*", pursuant to Dutch law. In holding so, it concluded that an order for rescission would only repeat or reinforce that which has already occurred and dismissed the appeal. Furthermore, the Court added that in the event that the CRA issues a notice of reassessment to KH Canada requiring it to pay tax based on the capital contribution, KH Canada will have the right to appeal the assessment to the Tax Court of Canada ("TCC") and obtain judicial recognition of the nullification of the capital contribution in that forum. In the circumstances of this case, an appeal to the TCC would constitute an adequate alternative remedy. There is no reason to doubt that the TCC would analyze the facts and the law correctly.

Kraft Heinz Canada ULC v. Canada (AG)

2022 DTC 5059

Appeal From Denial of Canada Child Benefit Allowed

The Appellant, a mother of three children, had claimed the Canada Child Benefit for the months of January 2019 to June 2021. The Minister had initially paid the benefit to the Appellant; however, the Minister later concluded the Appellant and her husband shared custody and re-determined the Appellant's entitlement to the benefit. The Minister argued that the Appellant would not be entitled to the full Canada Child Benefit because she shared custody in respect of her children and thus was only entitled to half of the benefit.

The appeals were allowed. In determining whether the Appellant was entitled to claim the full Canada Child Benefit in respect of her children in the months of January 2019 to June 2021, the Court observed that the definition of "shared-custody parent" was amended in 2021, retroactive to 2011. Consequently, a parent can be a shared-custody parent if he or she resided with the child at least 40% of the time in a month or on an approximately equal basis. The new definition contemplates a situation where a parent normally meets the 40% threshold but temporarily slips below it in a given month because, for example, of illness, vacations, or something similar. Based on the evidence adduced before the Court, it was clear the Appellant's husband essentially never cared for the children during the day on weekdays when they were on school vacation. The care that would otherwise have been provided by the children's school was left to be provided by the Appellant. The remaining four months of the year, the Appellant was responsible for the care of the children for significant amounts of extra time. The Court held that, under the given circumstances, it was not appropriate to consider the Appellant's husband's care to have been approximately equal during any of those months. In addition, the Court held that the children did not reside with the Appellant's husband at least 40% of the time during the months of December 2019 and March 2020 and therefore allowed the appeals.

Friesen v. The Queen

2022 DTC 1036

FCA Holds That "Straddle" Transactions Must Be Related To a Business

In a "straddle transaction" one enters into a pair of contracts to buy and sell the same amount of foreign currency at different but close future dates. One realizes the contract in a loss position before year's end, crystallizing the loss for tax purposes, then realizes the gain contract in the new year, locking in the gain. The Respondent applied this strategy for taxation years 2000 through 2006; he was reassessed in 2014, after the normal period, and denied losses of some $48 million. In this matter, the CRA sought to reopen the years in question for reassessment. The taxpayer prevailed in the Tax Court, which held that the sole aim of the arrangement was tax avoidance, not profit (2021 DTC 1011). However, the Tax Court also held that the trading activities were a source of income and thus gave rise to a business.

The appeal was allowed. The Tax Court misinterpreted binding precedent. The Supreme Court's *Stewart* case established a two-step test for business activity: (1) Is the activity a personal endeavour or in pursuit of profit? (2) If not, is the source of income a business or property? The Tax Court held that the taxpayer's trades were directed solely at tax avoidance, but felt compelled by *Stewart* to find that he was also conducting a business, meaning he could claim business losses from the straddle. In fact, *Stewart* holds precisely the opposite. The binding precedent is *Moloney v. The Queen*, in which, as here, the activity was set up to appear as though it was commercial in nature, when in fact the only activity actually engaged in was that of avoiding tax. Finally, the CRA could reopen the reassessments and impose penalties given the taxpayer's wilful blindness, evidenced among other things by his failure to obtain a formal legal opinion.

The Queen v. Paletta (Estate)

2022 DTC 5057

Appeal of Assessment Denying Application of S. 126(1) in Relation To Foreign Tax Credits Dismissed

This is an appeal of an income tax reassessment raised against the appellant with respect to the 2018 taxation year. The assessment related to the addition of real property rental revenue earned with respect to a building located in France. The only issue was whether the appellant was entitled to deduct a foreign tax credit in the determination of income tax payable in Canada by the appellant for taxation year 2018 in accordance with subsection 126(1) of the *Income Tax Act*. It is important to note that new tax collection measures were enacted in France. Up until 2018, the tax payable on such revenues was only remitted in the following year; accordingly, tax payable with respect to the 2018 year was paid in 2019. Beginning in 2019, tax was paid through installments payable through deductions at source during the year. To avoid double taxation in 2019, the French government enacted a "Modernization of collection procedures tax credit" in relation to revenues earned in 2018, following those changes in tax collection procedures. Evidence showed that the appellant benefited from this credit and accordingly did not pay tax in France in relation to his 2018 income. The respondent therefore considered that international agreements and measures to avoid double taxation did not apply and the rental revenue earned in 2018 was subject to Canadian income tax as it applies generally to worldwide revenue. The appellant considered that he should be entitled to deduct the amount of the "Modernization of collection procedures tax credit" received in calculating his Canadian income tax for 2018.

The appeal was dismissed. The argument of the appellant was that subsection 126(1) relates to foreign income tax remitted during 2018 and not only to foreign income tax paid in relation to 2018 earnings. This hinges on the correct interpretation of the words "for the year" in subsection 126(1), which determines the foreign tax credit, in reference to income tax payable by the Canadian resident "for the year". The appellant argued that tax paid in relation to rental income earned on the rental of the French building, remitted, as required then, in 2018 qualifies as tax "paid for the year" for subsections 126(1) and 126(7) purposes. On the other hand, the respondent considers that "for the year" refers to "taxation year" and to payments made in relation to a given taxation year. As the appellant did not pay any French income tax for the 2018 taxation year (in view of the French credit received) subsection 126(1) was not applicable. After reviewing all the facts and evidence as well as jurisprudence, the Tax Court sided with the respondent. Indeed, the Court stated that subsection 126(1) clearly indicates that the word "year" therein means "taxation year". The Court added that the term "taxation year" is used in the beginning of the subsection and that it would have been repetitive to use "taxation year" at each mention of the word "year". The appellant offered other arguments related to international treaties between France and Canada entered into to avoid double taxation which the Court also dismissed, having ruled them as not being applicable since there was no double taxation with respect to the 2018 taxation year's rental income. Accordingly, the Tax Court affirmed the reassessment, and dismissed the appeal with costs.

Marin v. The Queen

2022 DTC 1032

TAX NOTES

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