Date: 20091119

Docket: A-217-08

Citation: 2009 FCA 341

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
TRUDEL J.A.

BETWEEN:

CAROLE PECHET

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on October 7, 2009.

Judgment delivered at Ottawa, Ontario, on November 19, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Background

[1] This is an appeal from the judgment of Valerie Campbell J. (the Judge), dated April 11, 2008, dismissing Ms. Pechet's appeals from Notices of Reassessment dated April 3, 2003 issued under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) for the 1997, 1998, 1999, 2000 and 2001 taxation years. The decision under appeal is reported as *Pechet v. The Queen*, 2008TCC208.

[2] The appeal deals with the rights and obligations under the Act of a non-resident who receives rental payments in Canada from a Canadian resident and how these rights and obligations interplay with those of the Canadian resident. The provisions of the Act relevant to this appeal are found in Part XIII entitled *Tax on Income from Canada of non-resident persons*, and as they read for the years in question, are appended to these reasons.

[3] The statutory scheme set out in Part XIII of the Act can be described as follows:

- Part XIII of the Act opens with a charging provision (section 212). Relevant to this appeal is paragraph 212(1)(*d*), which imposes a 25 per cent income tax on rental income received by non-resident persons from a person resident in Canada for the use, or a right to the use, in Canada of property belonging to the non-resident.
- Although Part XIII tax is levied on the non-resident person, subsection 215(1) requires the tax payable by the non-resident to be deducted at source by the Canadian resident and remitted forthwith to the Receiver General of Canada.
- A Canadian resident who fails to withhold and remit is liable to pay, as Part XIII tax on behalf of the non-resident, the whole amount not deducted or withheld (which can be recovered later from the non-resident (subsection 215(6))). The Canadian resident is also liable for a penalty under subsection 227(8) and for interest under subsection 227(8.3) on the amounts not deducted or withheld.

- While not liable for the penalty, the non-resident person is jointly and severally liable with the Canadian resident for any interest payable on the amounts not deducted or withheld (subsection 227(8.1) of the Act).
- By virtue of subsection 227(10), the Minister may at any time assess any amount payable under subsections 8.1 or 8.3.

[4] The above delineation would be incomplete without also addressing the non-resident's obligation to report the rental income and the choice of payment offered under Part XIII. This is where subsection 216(1) of the Act comes into play.

[5] Subsection 216(1) allows a non-resident, within two years after the end of the year in which the income in question was received, to file a return and to pay regular Part I tax on the net income from real property in Canada in lieu of paying a 25 per cent Part XIII tax on the gross amount as required by section 212. In most cases, the difference between the Part XIII tax remitted by the Canadian resident and the Part I tax liability originating from the section 216 return will result in a subsequent refund to the non-resident.

[6] In the case at bar, the appellant elected to file a return under section 216 under the circumstances expressed by the Judge at paragraph 2 of her reasons:

> [2] […] the Appellant was a non-resident of Canada during the relevant taxation years. She had a 50% interest in a partnership that owned a commercial rental property in Edmonton, Alberta. The Appellant received her share of the rental payments paid to the partnership but no amounts were withheld and remitted pursuant to Part XIII of the *Income*

> *Tax Act* (the *Act*). On May 29, 2002, the Appellant filed income tax returns under subsection 216(1), for the 1997 to 2001 taxation years, which showed that no Part I tax was owed by the Appellant in respect to any of these taxation years. By Notices of Assessment dated April 3, 2003, the Appellant was assessed Part XIII withholding tax and arrears interest on the Part XIII withholding tax that would have been payable by the Appellant, absent the filing of the section 216 returns. Also on April 3, 2003, Notices of Reassessment were issued to reverse the Part XIII withholding tax but not the arrears interest (reasons for judgment at paragraph 2).

[7] Under Part XIII, the amount of the withholding-arrears interest at stake is $4,518.58 (Statement of Agreed Facts, appeal book, page 33 at paragraph 13).

Relevant portions of subsection 216(1)

[8] For ease of reference and to allow for a better understanding of the parties' arguments, I reproduce only the necessary portions of subsection 216(1), the keywords being "thereupon" and "in lieu of". It reads as follows:

Alternatives re rents and timber royalties	Choix relatif aux loyers et redevances forestières
216. (1) Where an amount has been paid during a taxation year to a non-resident person or to a partnership of which that person was a member	**216.** (1)Dans le cas où une somme a été versée au cours d'une année d'imposition à une personne non-résidente ou à une société de personnes dont elle était un associé,
…	[…]
that person may,	elle peut,
…	[…]
file a return of income under Part I	produire sur formulaire prescrit une déclaration de revenu en vertu de la partie I,
…	[…]
and the non-resident person shall,	la personne non-résidente est dès lors
…	tenue, au lieu de payer l'impôt en vertu de
thereupon be liable, in lieu of paying tax under this Part on that amount, to pay	la présente partie sur ce montant, de payer l'impôt en vertu de la partie I pour

tax under Part I for the year as though	l'année comme si :
...	[…]
(emphasis added)	(je souligne)

Position of the parties

[9] The appellant's thesis is that:

> … subsection 216(1), after the Appellant filed her Part I income tax returns, made the Appellant liable for Part 1 income tax *instead of* or *in place of* any Part XIII liability and, as a result, extinguished any Part XIII income tax liability that the appellant was required to pay (appellant's memorandum of fact and law at paragraph 38).

[10] It follows that if the appellant was not liable to pay tax under Part XIII by virtue of her election under subsection 216(1), there was no obligation on the part of the Canadian resident to withhold and remit any amount under subsection 215(1). Consequently, neither the Canadian resident nor the appellant could be liable for arrears interest on the withholdings. Hence, the appellant takes the position that the Judge erred as the reassessments should have been quashed and the appeals allowed.

[11] At the hearing of the appellant's appeal to this Court, the respondent took no issue with the appellant's proposed definition of the phrase *in lieu of*. The respondent conceded that the phrase means *in the stead of, instead of,* or *as a substitute for*.

[12] However, the parties disagree on the effect of an election under subsection 216(1). The appellant contends that the non-resident's liability for Part XIII income tax is simply eliminated or

extinguished once the election has been made (appellant's memorandum of fact and law at paragraph 39). The respondent, on the other hand, argues that the focus of subsection 216(1) is on the payment of the tax thereby rejecting the appellant's proposal that "liability under Part XIII is, by reason of the filing of a s. 216 return, *void ab initio*" (respondent's memorandum of fact and law at paragraph 21).

[13] So, the real issue is one of timing. At what moment is the non-resident's liability for tax under Part XIII substituted for liability under Part I? Is it from the date of the filing of the return for a given taxation year ("thereupon liable to pay tax under Part I"), as argued by the respondent and as found by the Judge? Or, as argued by the appellant, does the election under subsection 216(1) displace Part XIII entirely for that particular taxation year, thereby extinguishing all obligations of the non-resident under that Part of the Act?

[14] The answers to these questions raise a further concern regarding the role of the Canadian resident in the scheme described above.

[15] At the hearing, the appellant conceded that section 216 of the Act does not absolve the Canadian resident from withholding and remitting. However, this was the extent of the concession. Staying true to her position, the appellant hastened to add that consequences would not always ensue for the non-resident if the Canadian resident defaulted from his or her obligation.

[16] Indeed, there would be no consequences when the non-resident elects to file a return under subsection 216(1). Therefore, subsection 227(8.1) would not be engaged and the appellant would not be responsible for withholdings interest arrears. Otherwise, the appellant adds, her tax liability along with that of the Canadian resident for Part XIII income tax "… would continue to exist *ad infinitum*, pursuant to subsection 215(6) since that liability is predicated solely on whether the [Canadian resident] complied with the section 215(1) withholding requirements" (appellant's memorandum of fact and law at paragraph 57).

[17] According to the appellant, this perpetual Part XIII income tax would also result in income tax being owed by both the Canadian resident (under Part I) and the non-resident (under Part XIII) on the same source of income (rental payments). Therefore, the interest under Part XIII would continue to run indefinitely. Likewise, the Canadian resident's debt for the arrears interest would also continue to run indefinitely as "no amount of Part XIII tax would ever be paid to the Receiver General either by the [Canadian resident] on the non-resident's behalf, [or] by the non-resident after the section 216 return is filed" (appellant's memorandum of fact and law at paragraph 58). So, "the most reasonable way of interpreting [subsection] 227(8.3) would be to conclude that no Part XIII income tax was ever payable for the purposes of section 215 after a section 216 return is filed" (*ibid*. at paragraph 59).

[18] Finally, the appellant contends that the co-existence of Part I and Part XIII liability for tax would lead to a "double charging of arrears interest, once on the unpaid Part XIII tax and secondly, on any Part I income tax not paid from the filing due date" (*ibid.* at paragraph 61).

The decision of the Tax Court

[19] Faced with these arguments, the Judge looked at the inter-relationship between the obligation of the Canadian resident under subsection 215(1) to withhold and remit, and the right of the appellant to avail herself of an elective Part I return under section 216 (reasons for judgment at paragraphs 6-7).

[20] To do so, she embarked on an exercise of legislative interpretation using the unified textual, contextual and purposive analysis described in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. This was the correct approach to the issue at bar, that is, the interpretation of provisions found under Part XIII of the Act.

[21] Under the textual branch of her analysis, the Judge found that the words “in lieu of” “connote the continued existence of, but substitution for, Part XIII tax” (reasons for judgment at paragraph 11). The Judge thereby rejected the appellant’s argument that section 216 “sets up an alternative tax regime to the Part XIII regime” (reasons for judgment at paragraph 12). Rather, she concluded that “subsection 216(1) provides only a limited alternative for calculating the tax which non-residents may owe and must ultimately pay in respect to their Part XIII tax liability” (reasons for judgment at paragraph 17).

[22] Under the contextual approach, the Judge addressed and rejected the appellant’s comparisons between the phrase “au lieu de” in the French version of several provisions in the Act and the use of

"in lieu of" or "instead of" in the English version of those provisions (reasons for judgment at paragraphs 18-20).

[23] The Judge held that the phrase "in lieu of" must be read alongside the word "thereupon", which "suggests that prior events would be unaffected by the subsequent filing of the subsection 216(1) return, meaning that interest would accrue at the very least up to the filing date" (reasons for judgment at paragraph 15).

[24] The Judge discussed the appellant's *perpetuity* argument as a contextual consideration. Recognizing the difficulty associated with eliminating the interest arrears and the interest accruing on those arrears once a subsection 216(1) tax return has been filed, the Judge accepted that under the scheme of the Act "… interest on the subsection 215(1) amounts would not continue to accrue beyond the point where the ultimate tax debt was settled" (reasons for judgment at paragraph 22). However this would not eliminate the interest arrears owing to this point nor would it stop interest from accruing on those arrears.

[25] Nonetheless, the Judge dismissed the appellant's arguments in these terms:

> It would appear that Parliament has made a conscious decision not to include any provisions addressing relief measures. The Parliamentary intent is that the Canadian resident/payor of rents to a non-resident is to withhold certain prescribed amounts from those rental payments and remit them forthwith to the Receiver General so that the Minister has the temporary benefit of those amounts. Since there is no analogous provision in either the *Act* or the *Regulations* in respect to Canadian residents who pay amounts directly to non-residents, this suggests that

> residents must always withhold and remit subsection 215(1) amounts (reasons for judgment at paragraph 23).

[26] After completing the contextual branch of her analysis, the Judge considered the purpose behind the sections under examination. She found that the purpose behind the provisions is to place on the Canadian resident the responsibility to remit the tax due on all payments made to non-residents without taking into account the tax position of the non-resident "in order to shift the burden of enforcing compliance away from the Receiver General" (reasons for judgment at paragraph 26). In her mind "retroactively" eliminating the obligation to withhold and remit, following an election under subsection 216(1) "could encourage non-compliance and introduce a measure of unintended risk and uncertainty within the system" (reasons for judgment at paragraph 26).

[27] Ultimately, she noted, "the Appellant is not being charged interest because she retained money that rightfully belonged to the Minister but rather she is jointly and severally liable for the interest on the subsection 215(1) amounts that the [Canadian resident] did not withhold and remit as required by the relevant provisions in the *Act*" (reasons for judgment at paragraphs 24 and 31).

Issue and Standard of Review

[28] The issue is whether the Judge misinterpreted the relevant provisions of the Act in the context of Ms. Pechet's appeals. The interpretation of the Act is a question of law subject to appellate review on a standard of correctness.

[29] The main question in this appeal remains what it was in the Court below: how does the filing of a section 216 income tax return by a non-resident affect the application of that non-resident's Part XIII tax liability? (reasons for judgment at paragraph 7).

Analysis

[30] I agree generally with the Judge's reasons and conclude as she did: the appellant's interpretation of the relevant provisions of the Act undermines the legislative intent regarding the taxation of non-resident persons.

[31] In addition, I conclude that the appellant's theory that the non-resident should be viewed as never having been a taxpayer under Part XIII, once an elective return has been filed, is not supported by the overall scheme of the Act.

[32] In addition to the Part XIII scheme that I have described above (see paragraph 3 of these reasons), the Act provides for a second distinct scheme under which non-residents carrying on business in Canada are taxable under Part I for their Canadian source business income (see subsection 2(3) and sections 115 and following of the Act). In such a case, the non-residents assess their own liability for Part I tax, which is determined in the same manner as for Canadian residents except that the tax is limited to Canadian source income.

[33] Under the Part XIII scheme, Parliament not only imposes a specific tax (flat rate of 25 per cent of the gross amount), but also provides for the manner in which it is to be collected. "Withholding is

the only feasible way to tax the income of non-residents who do not carry on business in Canada" (Krishna, Vern, *The Fundamentals of Canadian Income Tax*, 9th ed. (Toronto: Thomson Carswell, 2006) at page 1405).

[34] Commenting on the withholding tax, Professor Krishna writes:

> The withholding tax regime for passive income is a difficult compromise between two conflicting policy objectives. We want to tax non-residents fairly but without opening the door to tax evasion.
> …
>
> To resolve the conflict between administrative feasibility and fairness towards non-residents we permit various deviations from the general scheme for the taxation of passive income (*ibid*. at pages 1405 and 1406).

[35] Among these deviations or adjustments are the special elections that allow for the net income taxation of rental income and other properties.

[36] Against this background, I find that subsection 216(1) merely allows the non-resident to pay his or her non-business Canadian source income under Part I, that is, it permits the non-resident to claim those Part I deductions available to residents in computing income under section 3. It does not eliminate the responsibility of the Canadian resident to withhold and remit, as accepted by the appellant, or the consequences associated with the failure to do so.

[37] Under normal circumstances, the Canadian resident will have remitted the flat rate tax forthwith, which means in practice, on or before the 15th day of the month following the month the

rental amount was paid or credited to the non-resident (see Information Circular 77-16R4), unless the non-resident has met the conditions of subsection 216(4) and filed with the Minister an undertaking in prescribed form, which is not the case here. The withholding and remitting duties of the Canadian resident are an on-going process independent of the non-resident's choice to elect his or her method of payment under subsection 216(1) for a particular taxation year. As stated before, that choice may take place within two years after the end of the year in which the income in question was received.

[38] Despite that election for any taxation year, the non-resident remains a Part XIII taxpayer. The non-resident is the recipient of non-business Canadian source income for which he or she is being taxed and also for which the general Part XIII scheme has been adopted by the legislator. As there may be no business assets in Canada or none of sufficient value to effectively enforce payment of their fiscal debt, the withholding tax is tantamount to a prepaid tax ensuring that non-residents governed by Part XIII will meet their tax obligations under the Act. Therefore, I disagree with the appellant's proposition that her election under subsection 216(1) serves as an opting-out mechanism (appellant's memorandum of fact and law at paragraph 34).

[39] It seems to me that the appellant's statutory interpretation is predicated solely on her own personal circumstances: a non-resident who has used the voluntary disclosure provisions of the Act to file her income tax returns under Part I after having received rents, over the course of several years, from a Canadian resident who had not withheld or remitted. As a non-resident, the appellant had the benefit of these withholdings, but by virtue of her election under subsection 216(1), wants to

free herself from her joint and several liability for the withholdings arrears because her ultimate tax liability under Part I happens to be nil.

[40] It is in that context that the appellant argues that unintended results flow from the Judge's interpretation of the provisions of Part XIII.

[41] These unintended results that I have described earlier (at paragraphs 16-18 of these reasons) are also listed under paragraphs 57 through 61 of the appellant's memorandum of facts and law: perpetuity of Part XIII income tax, perpetuity of interest, and double interest liability. The appellant's arguments are based particularly on her interpretation of subsections 227(8.3) and 227(8.1), which read:

Interest on amounts not deducted or withheld	Intérêts sur les montants non déduits ou non retenus
227. (8.3) A person who fails to deduct or withhold any amount as required by subsection 135(3), 135.1(7), 153(1) or 211.8(2) or section 215 shall pay to the Receiver General interest on the amount at the prescribed rate, computed	227. (8.3) La personne qui ne déduit pas ou ne retient pas un montant conformément aux paragraphes 135(3), 135.1(7), 153(1) ou 211.8(2) ou à l'article 215 doit payer au receveur général des intérêts sur ce montant calculés au taux prescrit :
…	…
(*b*) in the case of an amount required by subsection 135(3) or 135.1(7) or section 215 to be deducted or withheld, from the day on which the amount was required to be deducted or withheld to the day of payment of the amount to the Receiver General; and…	*b*) s'il s'agit d'un montant visé aux paragraphes 135(3) ou 135.1(7) ou à l'article 215, pour la période commençant le jour où le montant aurait dû être déduit ou retenu et se terminant le jour de son paiement au receveur général;

…	…
Joint and several liability	Solidarité
227. (8.1) Where a particular person has failed to deduct or withhold an amount as required under subsection 153(1) or section 215 in respect of an amount that has been paid to a non-resident person, the non-resident person is jointly and severally liable with the particular person to pay any interest payable by the particular person pursuant to subsection 227(8.3) in respect thereof.	227. (8.1) Dans le cas où une personne ne déduit pas ou ne retient pas un montant conformément au paragraphe 153(1) ou à l'article 215 sur un montant payé à une personne qui ne réside pas au Canada, ces deux personnes sont solidairement tenues au paiement des intérêts payables par la première sur ce montant conformément au paragraphe 227(8.3).

a) Perpetuity of Part XIII income tax (appellant's memorandum of fact and law at paragraph 57)

[42] This argument must fail as I agree with the Judge that the change in tax liability occurs upon the filing of the Part I return. *Thereupon*, the taxpayer ceases to be liable for tax under Part XIII. Therefore, there is no period of time when the non-resident's tax liability exists concurrently under both Parts on the same source. Normally, according to the scheme, the withholdings which were made and remitted by the Canadian resident under Part XIII will be applied, by virtue of subsection 216(2), to the new liability of the non-resident under Part I and will generally give rise to a refund.

b) Perpetuity of interest (appellant's memorandum of fact and law at paragraphs 58-60)

[43] This argument must also fail. The Judge addressed it as follows:

> … The Appellant suggests that (…) the only way to stop interest from accruing indefinitely is to pay the subsection 215(1) withholding amounts. According to the Appellant, this cumbersome result in respect to subsection 227(8.3) can be avoided if one concludes that no Part XIII tax would ever be payable for the purposes of section 215 after a section 216 return is filed. While this is true, expediency is not a canon of statutory interpretation. To stop interest from accruing indefinitely, the Appellant would have to pay the subsection 215(1) amounts on behalf of the Canadian resident, then apply these amounts to the Appellant's Part I tax owing, by way of subsection 216(2) and finally, obtain a refund (also through subsection 216(2)) (reasons for judgment at paragraph 22).

[44] Once again, I agree with her, as this is indeed how the scheme works. When withholdings are not remitted, the Canadian resident is liable for interest on the unpaid amount from the date they ought to have been remitted to the date of payment; the non-resident remains jointly and severally liable for this interest, which forms the basis of the reassessments at issue. Although technically interest on the withholdings arrears could accrue indefinitely, there is no evidence on record that the Minister has claimed any amount that would justify this rather speculative argument from the appellant.

[45] The Canadian resident who has not withheld and remitted the flat rate tax will never do so since the monies have already passed into the non-resident's hands. It certainly explains why the Minister is claiming the withholdings arrears interest up to the date of payment from the appellant.

[46] As for the Part XIII interest, the appellant's election under subsection 216(1) triggered her new liability to pay tax under Part I of the Act. From that moment on, the appellant no longer owed *taxes* calculated under Part XIII on the gross income from her rental property. So, necessarily, with

the new calculation of the net income came a new principal sum under Part I. The election did not, however, affect her continued joint and several liability for the interest under Part XIII.

[47] In any event, as argued by the respondent, had the Minister sought, after the appellant's election, payment of interest on the *principal amount* owed under Part XIII before that election, the appellant could have argued that she no longer owed tax under Part XIII and raised a *Rand* defence based on Rand J.'s oft-cited definition of interest: "… interest is referable to a principal in money or an obligation to pay money. Without that relational structure in fact and whatever the basis of calculating or determining the amount, no obligation to pay money or property can be deemed an obligation to pay interest" (*Reference Re: Farm Security Act 1944 (Saskatchewan) S.6,* [1947] S.C.R. 394 at page 412; *Coughlan v. The Queen,* [2001] 4 C.T.C. 2004 at paragraph 14) (emphasis added).

c) Double interest liability (appellant's memorandum of fact and law at paragraph 61)

[48] For the same reasons, this last argument must also fail.

Conclusion

[49] My examination of the relevant provisions convinces me that they form an integrated scheme applicable to non-residents governed by Part XIII of the Act. When interpreted in the light of the statutory schemes, these provisions all contribute to accomplishing the intended goal of ensuring the settlement of tax debt by non-residents. This interpretation ensures the attainment of the object of

the Act “according to its true spirit, intent and meaning” (*Interpretation Act* (R.S.C., 1985, c. I-21), section 10).

[50] Therefore, I would dismiss this appeal. As the respondent is not seeking costs, none should be awarded.

"Johanne Trudel"
J.A.

“I agree.
John M. Evans J.A.”

“I agree.
Carolyn Layden-Stevenson J.A.”

APPENDIX

Income Tax Act (1985, c. 1 (5th Supp.))	*Loi de l'impôt sur le revenu* (1985, ch. 1 (5e suppl.))
PART XIII	PARTIE XIII
Tax	Impôt
212. (1) Every non-resident person shall pay an income tax of 25% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of, …	212. (1) Toute personne non-résidente doit payer un impôt sur le revenu de 25 % sur toute somme qu'une personne résidant au Canada lui paie ou porte à son crédit, ou est réputée en vertu de la partie I lui payer ou porter à son crédit, au titre ou en paiement intégral ou partiel : …
(*d*) rent, royalty or similar payment, including, but not so as to restrict the generality of the foregoing, any payment	*d*) du loyer, de la redevance ou d'un paiement semblable, y compris, sans préjudice de la portée générale de ce qui précède, un paiement fait :
…	…
Withholding and remittance of tax	Déduction et paiement de l'impôt
215. (1) When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Part were read without reference to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.	215. (1) La personne qui verse, crédite ou fournit une somme sur laquelle un impôt sur le revenu est exigible en vertu de la présente partie, ou le serait s'il n'était pas tenu compte du paragraphe 216.1(1), ou qui est réputée avoir versé, crédité ou fourni une telle somme, doit, malgré toute disposition contraire d'une convention ou d'une loi, en déduire ou en retenir l'impôt applicable et le remettre sans délai au receveur général au nom de la personne non-résidente, à valoir sur l'impôt, et l'accompagner d'un état selon le formulaire prescrit.

…

Liability for tax

(6) Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 215; 1994, c. 7, Sch. II, s. 177; 1999, c. 22, s. 77; 2001, c. 17, s. 174.

Alternatives re rents and timber royalties

216. (1) Where an amount has been paid during a taxation year to a non-resident person or to a partnership of which that person was a member as, on account of, in lieu of payment of or in satisfaction of, rent on real property in Canada or a timber

…

Assujettissement à l’impôt

(6) Lorsqu’une personne a omis de déduire ou de retenir, comme l’exige le présent article, une somme sur un montant payé à une personne non-résidente ou porté à son crédit ou réputé avoir été payé à une personne non-résidente ou porté à son crédit, cette personne est tenue de verser à titre d’impôt sous le régime de la présente partie, au nom de la personne non-résidente, la totalité de la somme qui aurait dû être déduite ou retenue, et elle a le droit de déduire ou de retenir sur tout montant payé par elle à la personne non-résidente ou portée à son crédit, ou par ailleurs de recouvrer de cette personne non-résidente toute somme qu’elle a versée pour le compte de cette dernière à titre d’impôt sous le régime de la présente partie.

NOTE : Les dispositions d’application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. L.R. (1985), ch. 1 (5^{e} suppl.), art. 215; 1994, ch. 7, ann. II, art. 177; 1999, ch. 22, art. 77; 2001, ch. 17, art. 174.

Choix relatif aux loyers et redevances forestières

216. (1) Dans le cas où une somme a été versée au cours d’une année d’imposition à une personne non-résidente ou à une société de personnes dont elle était un associé, au titre ou en paiement intégral ou partiel de loyers de biens immeubles situés

royalty, that person may, within 2 years (or, where that person has filed an undertaking described in subsection 216(4) in respect of the year, within 6 months) after the end of the year, file a return of income under Part I in the form prescribed for a person resident in Canada for that year and the non-resident person shall, without affecting the liability of the non-resident person for tax otherwise payable under Part I, thereupon be liable, in lieu of paying tax under this Part on that amount, to pay tax under Part I for the year as though

au Canada ou de redevances forestières, cette peut, dans les deux ans suivant la fin de l'année ou, si elle a fait parvenir au ministre l'engagement visé au paragraphe (4) pour l'année, dans les six mois suivant la fin de l'année, produire sur formulaire prescrit une déclaration de revenu en vertu de la partie I pour une personne résidant au Canada pour l'année. Indépendamment de son obligation de payer l'impôt payable par ailleurs en vertu de la partie I, la personne non-résidente est dès lors tenue, au lieu de payer l'impôt en vertu de la présente partie sur ce montant, de payer l'impôt en vertu de la partie I pour l'année comme si :

(*a*) the non-resident person were a person resident in Canada and not exempt from tax under section 149;

a) elle était une personne résidant au Canada et non exonérée de l'impôt en vertu de l'article 149;

(*b*) the non-resident person's income from the non-resident person's interest in real property in Canada, timber resource properties and timber limits in Canada and the non-resident person's share of the income of a partnership of which the non-resident person was a member from its interest in real property in Canada, timber resource properties and timber limits in Canada were the non-resident person's only income;

b) son revenu tiré de ses droits sur des biens immeubles, des avoirs forestiers et des concessions forestières situés au Canada ainsi que sa part du revenu tiré par une société de personnes dont elle était un associé de droits sur des biens immeubles, des avoirs forestiers et des concessions forestières situés au Canada constituaient sa seule source de revenu;

(*c*) the non-resident person were entitled to no deductions from income for the purpose of computing the non-resident person's taxable income; and

c) elle n'avait droit à aucune déduction sur son revenu pour le calcul de son revenu imposable;

(*d*) the non-resident person were entitled to no deductions under sections 118 to 118.9 in computing the non-resident person's tax payable under Part I for the year.

d) elle n'avait droit à aucune déduction en application des articles 118 à 118.9 dans le calcul de son impôt payable pour l'année en vertu de la partie I.

…

Idem

216. (2) Where a non-resident person has filed a return of income under Part I as permitted by this section, the amount deducted under this Part from

(*a*) rent on real property or from timber royalties paid to the person, and

(*b*) the person's share of the rent on real property or from timber royalties paid to a partnership of which the person is a member

and remitted to the Receiver General shall be deemed to have been paid on account of tax under this section and any portion of the amount so remitted to the Receiver General in a taxation year on the person's behalf in excess of the person's liability for tax under this Act for the year shall be refunded to the person.

…

Idem

216. (2) Lorsqu'une personne non-résidente a produit une déclaration de revenu en vertu de la partie I ainsi que le permet le présent article, le montant déduit, en vertu de la présente partie :

a) d'une part, sur les loyers de biens immeubles ou sur les redevances forestières qui lui sont payés;

b) d'autre part, sur sa part du loyer de biens immeubles ou de redevances forestières versés à une société de personnes dont elle est un associé,

et remis au receveur général, est réputé avoir été payé au titre de l'impôt exigé par le présent article et toute partie du montant ainsi remis au receveur général en son nom au cours d'une année d'imposition en plus de l'impôt qu'elle est tenue de payer en vertu de la présente loi, pour l'année, doit lui être remboursé.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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