Docket: 2003-4665(IT)G

BETWEEN:

ALEXANDRE DUBÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 14, 15 and 16, 2006, at Roberval, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Martin Dallaire

Counsel for the Respondent: Sophie-Lyne Lefebvre

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 1997, 1998, 1999, 2000, 2001 and 2002 taxation years is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of December 2007.

"François Angers"

Angers J.

Translation certified true
on this 19th day of March 2008.

Erich Klein, Revisor

Citation: 2007TCC393
Date: 20071206
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REASONS FOR JUDGMENT

Angers J.

[1] The appellant is appealing assessments and reassessments for the 1997 to 2002 taxation years. For 1997 to 1999, the appellant did not include in his taxable income investment income received from the Caisse populaire Desjardins de Pointe-Bleue (the "Caisse"). The Minister of National Revenue (the "Minister") therefore added this income to the appellant's taxable income. According to the appellant, however, this income is non-taxable. For 2000, 2001 and 2002, the appellant included his investment income from the Caisse in his returns but claimed a deduction for the same amounts. The Minister refused the deduction claimed by the appellant for his investment income from the Caisse.

[2] The Minister also imposed a penalty for late filing for the 1997, 1998, 2000 and 2001 taxation years. The appellant sent the Canada Revenue Agency (the "Agency") his income tax return for the 1997 taxation year in July 1998, for the 1998 taxation year in August 1999, for 2000 in December 2001 and for the 2001 taxation year in July 2002. The penalty for late filing is respectively 7%, 8%, 10% and 6% of the tax payable for each of those taxation years.

[3] The appellant's investment income for each of the taxation years in question is $19,956 for 1997, $12,115 for 1998, $73,210 for 1999, $82,303 for 2000, $80,116 for 2001 and $49,530 for 2002.

[4] The appellant is an Indian and maintains that, under section 87 of the *Indian Act* (R.S.C. 1985, c. I-5) (the "IA") and paragraph 81(1)(*a*) of the *Income Tax Act* (the "Act"), his investment income is not taxable. The issue is therefore whether this investment income from the Caisse is taxable or not and whether the Minister was justified in imposing a late-filing penalty on the appellant for the 1997, 1998, 2000 and 2001 taxation years.

[5] It is admitted that the appellant is an Indian. His income tax returns show as his address 1 Wapol Street on the Obedjiwan Indian reserve. There is no financial institution on this reserve. The appellant uses the services of a credit union for the purposes of his business and for personal purposes. This credit union is located on the Mashteuiatsh reserve, also known by the name of Pointe-Bleue, from which the name of the Caisse is derived.

[6] The Obedjiwan reserve is located approximately 300 kilometres from the Pointe-Bleue reserve and the Pointe-Bleue reserve is 6 kilometres from Roberval. According to the 2003 *Quebec Indian and Inuit Communities Guide*, the Obedjiwan reserve has 2,107 members, of whom 1,798 live on the reserve and 309 off-reserve. Its members are Attikamek Indians. The Pointe-Bleue reserve has 4,622 members according to the same guide, including 1,983 who live on the reserve and 2,635 who live off-reserve. Its members are Montagnais Indians. The same guide, for 1999, indicates that the Pointe-Bleue reserve had 4,365 members, of whom 2,557 lived off-reserve, and that the Obedjiwan reserve had 1,879 members, of whom 319 lived off-reserve. These figures correspond to data from the year prior to the publication of the Guide.

[7] The appellant has been a member of the Obedjiwan reserve since birth. He is married and the father of 4 children, the youngest being 16 years old and the eldest 30 years old. He claims to be a resident of the reserve even though, for a few years, he owned a residence in St-Félicien and then in Roberval. He acquired these homes to enable his children to attend schools in St-Félicien. His spouse and two of his children lived in these homes during the school year, which is ten months of the year. The appellant acknowledges having also lived in them, but says that he returned to Obedjiwan almost every weekend.

[8] In the early 1980s, the appellant decided to go into business on the recommendation of his band council. Answering a call for tenders, the appellant offered his services for the transport of residents in need of medical care from the Obedjiwan reserve to Roberval. The successful bidder had to obtain the approval of the band council. He was offered a one-year contract with a year-to-year renewal clause, subject to certain conditions, including agreement on the rate.

[9] According to the transportation permit issued to the appellant by the Commission des transports du Québec for the period from March 27, 1997, to March 26, 2002, the authorized route was a forestry road connecting the Obedjiwan reserve and Roberval and crossing the territory of La Tuque. The appellant was also authorized to make pick-ups in Roberval for various communities, including Alma and Chicoutimi, provided that the travel was for medical purposes and that there was a contract in force between the appellant and the band council.

[10] The appellant had also held since March 11, 1998, a permit from the Commission des transports du Québec allowing him to provide a transportation service to the general public from the Obedjiwan reserve to St-Félicien, using a pre-established route.

[11] To provide this transportation service, the appellant operated from four to six vehicles, including 15-passenger minibuses, and employed three full-time and two part-time drivers. He had to go off the reserve for banking services since no such service was offered on the Obedjiwan reserve. This is why he did his banking with the Caisse on the Pointe-Bleue reserve near Roberval. According to the appellant, he uses that credit union because it is on a reserve and he knows someone who works at the Caisse.

[12] The appellant used the services of Ms. Dominique Boily, a principal with Samson Bélair Deloitte & Touche, to prepare his tax returns. According to the appellant, Ms. Boily, or her firm, has prepared his tax returns since 1997. However, only since 2000 has Samson Bélair Deloitte & Touche been identified on the appellant's tax returns as the firm paid to prepare his tax returns. Another firm prepared the returns in previous years. However, Ms. Boily's services have been used by the appellant since 1996 to review his file and provide him with an opinion on whether his income was taxable or not. To that end, Ms. Boily contacted Revenue Canada to obtain instructions on the tax treatment of the appellant's employment income. Moreover, Ms. Boily again asked for an interpretation in March 1999 when the appellant's situation with regard to the operation of his

business and with regard to his personal life changed, more specifically on his acquiring a secondary residence in St-Félicien for his own needs and those of his family. In both cases, the Canada Customs and Revenue Agency (as it was then called) offered the opinion that, in light of the information provided, the appellant's income would not be taxable. The Agency also emphasized that it was not bound by its comments and that a final determination for any given year could only be made following an audit.

[13] According to Ms. Boily, the income reported on the appellant's tax returns is net income. No financial statement is included with the returns since the income was not taxable. Ms. Boily's firm relied solely on the information provided by the appellant, which consisted of the financial statements he had prepared himself.

[14] The house in St-Félicien was purchased around 1996. The appellant kept it for about five years before purchasing another in Roberval. The Roberval home has been on the market for about a year. These houses were occupied by his spouse and two of his children to enable the latter to attend the local schools and participate in sports activities, such as hockey for his sons. He acknowledges that he also lived in them.

[15] The appellant uses the Caisse's services for the purposes of his business and his personal purposes and has a separate account for each. He also uses credit cards issued by the Caisse and obtained hypothecary loans for the purchase of the houses in St-Félicien and Roberval.

[16] The interest income generated by the appellant's investments is substantial and is the result of substantial investments made in 1998 in particular. A detailed table of the appellant's investments since 1997 was filed (Exhibit I-11). It discloses that substantial amounts were deposited in 1997 and 1998; thus his interest income in the years in question came from the deposits made in those two years. Asked about the source of the funds, the appellant initially stated that it was business income and then said that he did not know where the money came from and that he would have to, as he put it, look into his affairs.

[17] The Caisse, where the appellant did business, was founded in 1965. Between 1996 and 2002, it had about 3,000 members. In 2006, it had 4,600 members, of whom about 4,200 were Aboriginals who lived on the reserve and about 400 were neither Aboriginals nor residents of the reserve. There are no restrictions on who can become a member of the Caisse. Although the majority of the Caisse's members are Aboriginals, its staff does not ask clients who wish to open an

account if they are Aboriginals. Nor do they ask them to disclose their Certificate of Indian Status number. The membership list does not indicate whether the members are Aboriginals or not. Indeed, the percentage of Aboriginal members is based on an estimate by the Caisse's management. Of its members, 30% are residents of the Obedjiwan reserve. The Caisse's primary territory is Pointe-Bleue, but there is nothing preventing a non-resident from becoming a member.

[18] The Caisse has two membership categories: regular members and associate members. Regular members reside within the Caisse's territory and are entitled to vote at the Caisse's meetings. Associate members do not reside within the Caisse's territory and while they can attend meetings, they may not vote. There is no other restriction. Despite this difference, the appellant was apparently a regular member, even though he does not reside on the Pointe-Bleue reserve. It would appear that the Caisse's territory is larger than that of the Pointe-Bleue reserve.

[19] The Caisse's board of directors is composed of seven members who were, at the time of the hearing, all Aboriginals and residents of Pointe-Bleue. The evidence did not show if the Caisse's bylaws require that the board of directors be composed of Aboriginal members. As for the position of director, there is no requirement that an Aboriginal hold this position, or that the Caisse's employees be Aboriginals. If individuals have the same qualifications, an Aboriginal would be given preference.

[20] The Caisse has three main sources of revenue: revenue from deposits and investments it makes with the Fédération des caisses populaires Desjardins (the "Federation"), with which it is affiliated, certain investments being mandatory for all the credit unions, namely, the investment fund and the liquidity fund; revenue generated from loans made to its members; and accessory products, such as administration fees, the sale of travellers cheques and brokerage fees.

[21] The Caisse's balance sheet produced as evidence reveals that it has the same level of funds invested with the Federation as it has paid out in loans to its members. The Caisse had liquid assets and investments in the amount of $34.9 million and $39 million in 2004 and 2005 respectively.

[22] Term deposits with the Federation are managed solely by the Federation and represent the surplus savings that the Caisse is unable to lend to its members. In this instance, the Caisse has had surpluses for several years.

[23] As for the investments and deposits with the Federation, these are participation deposits, mandatory deposits, liquidity deposits, etc. In terms of the loans to members, they consist of on-reserve housing loans and off-reserve hypothecary loans, and consumer loans, investment loans such as lines of credit, and business loans, both on and off the reserve.

[24] The Caisse received deposits from its members in the order of $51 million and $55 million in 2002 and 2003 and made loans in the order of $39 million and $40 million in these same years. Thus it loans about 75% of the deposits it receives from its members or 75% of what it takes in. The excess liquidities are invested with the Federation, which explains the asset shown on the balance sheet and to which I referred earlier.

[25] The Caisse does not have status as an Aboriginal business and pays deposit insurance premiums for all its members. Each year since 2003, it has given $75,000 in donations and sponsorships to the Pointe-Bleue and Obedjiwan communities or reserves. The proportion of loans to its Aboriginal members is 77%.

Analysis

[26] The issue is therefore whether the investment income of an Indian is property situated on an Indian reserve and whether it should be excluded from the Indian's income pursuant to paragraph 81(1)(*a*) of the Act, which provides as follows:

> 81(1) Amounts not included in income — There shall not be included in computing the income of a taxpayer for a taxation year,
>
> (*a*) Statutory Exemptions — an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada.

[27] Section 87 of the IA also provides a tax exemption. That section reads as follows:

> 87.(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:
>
> (*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (*b*) the personal property of an Indian or a band situated on a reserve.
>
> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

[28] For paragraph 87(1)(*b*) of the IA to apply, three elements must therefore be present: being an Indian within the meaning of the IA, having possession of personal property, and that property being situated on a reserve. In the present case, it is admitted that the appellant is an Indian and that the investment income is personal property. The dispute relates to the question of whether the property is in fact situated on a reserve. This question has been the subject of many decisions of the Tax Court of Canada and the Federal Court, and numerous legal principles have been developed in the case law.

[29] Therefore, it is possible today to determine the state of the law on this issue, which has to do primarily with the taxation of the investment income of Indians. The Federal Court of Appeal decision in *Recalma v. The Queen*, 98 DTC 6238, is the leading case on the issue of whether or not investment income is excluded from taxable income. This decision restates the principles enunciated in *Williams v. The Queen*, [1992] 1 S.C.R. 877 (QL). These principles are known as the connecting factors for determining the *situs* of property. *Recalma* has been applied and followed in Tax Court of Canada and Federal Court decisions (see *Lewin v. The Queen*, [2001] T.C.J. 242 and [2002] F.C.J. 1625, *Sero and Frazer*, [2001] T.C.J. 345 and 2004 FCA 6, and *Large v. The Queen*, [2006] TCC 509).

[30] It is important to be mindful of how the tax exemption granted to Indians in the two above-quoted statutory provisions has been interpreted in a number of important judgments, and in particular, to bear in mind the limits placed on the tax exemption by the Supreme Court of Canada in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at page 36.

> Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

[31] This being said, in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (QL), La Forest J. commented on the Crown's obligation to Aboriginal peoples that arises from the signing of the Royal Proclamation of 1763. He describes that obligation as an obligation to not dispossess Indians of their property. However, in his analysis of the interpretation of the IA, he stated the following, at paragraphs 88, 91, 92 and 112:

Paragraph 88:

> It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

Paragraphs 91 and 92:

> . . . But I would reiterate that in the absence of a discernible nexus between the property concerned and the occupancy of reserve lands by the owner of that property, the protections and privileges of ss. 87 and 89 have no application.
>
> 92. I draw attention to these decisions by way of emphasizing once again that one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements. The Alberta Court of Appeal in *Bank of Nova Scotia v. Blood*, [1990] 1 C.N.L.R. 16, captures the essence of the matter when it states, at p. 18, in reference to s. 87, that: "In its terms the section is intended to prevent interference with Indian property on a reserve."

Paragraph 112:

> A reading of the *Indian Act* shows that this provision is but one of a number of sections which seek to protect property to which Indians may be said to have an entitlement by virtue of their right to occupy the lands reserved for their use. In addition to the protections relating to Indian lands to which I have already drawn attention, the range of property protected runs from crops raised on reserve lands to deposits of minerals; see ss. 32, 91, 92, 93. These sections restrict the ability of non-natives to acquire the particular property concerned by requiring that the Minister approve all transactions in respect of it. As is the case with the restrictions on alienability to which I drew attention earlier, the intent of these sections is to guard against the possibility that Indians will be victimized by "sharp dealing" on the part of non-natives and dispossessed of their entitlements.
>
> [Emphasis added.]

[32] At paragraph 123, La Forest J. goes into greater detail regarding the concept of *situs*:

> The conclusion I draw is that it is entirely reasonable to expect that Indians, when acquiring personal property pursuant to an agreement with that "indivisible entity" constituted by the Crown, will recognize that the question whether the exemptions of ss. 87 and 89 should apply in respect of that property, regardless of *situs*, must turn on the nature of the property concerned. If the property in question simply represents property which Indians acquired in the same manner any other Canadian might have done, I am at a loss to see why Indians should expect that the statutory notional *situs* of s. 90(1)(*b*) should apply in respect of it. In other words, even if the Indians perceive the Crown to be "indivisible", it is unclear to me how it could be that Indians could perceive that s. 90(1)(*b*) is meant to extend the protections of ss. 87 and 89 in an "indivisible" manner to all property acquired by them pursuant to agreements with that entity, regardless of where that property is held. What if the property concerned is property held off the reserve, and was acquired by the Indian band concerned simply with a view to further business dealings in the commercial mainstream?

[33] In *Williams, supra*, Gonthier J. made the exemption provided in section 87 subject to the manner in which Indian taxpayers choose to organize their affairs, particularly as regards the choice to situate their property on or off a reserve. At paragraphs 18 and 19, he comments as follows:

> Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the

> Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.
>
> The purpose of the *situs* test in s. 87 is to determine whether the Indian holds the property in question as part of the entitlement of an Indian qua Indian on the reserve. . . .

[34] In his judgment, Gonthier J. describes the legal analysis that must be applied to determine whether taxation violates section 87 of the IA. He addresses the issue of the weighting of the connecting factors at paragraph 37:

> . . . The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the *Indian Act*; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian qua Indian on a reserve.
>
> [Emphasis added.]

[35] Lastly, at paragraph 61, Gonthier J. explains how the *situs* of the property in question is to be determined:

> Determining the *situs* of intangible personal property requires a court to evaluate various connecting factors which tie the property to one location or another. In the context of the exemption from taxation in the *Indian Act*, there are three important considerations: the purpose of the exemption; the character of the property in question; and the incidence of taxation upon that property. Given the purpose of the exemption, the ultimate question is to what extent each factor is relevant in determining whether to tax the particular kind of property in a particular manner would erode the entitlement of an Indian qua Indian to personal property on the reserve.

[36] These are the connecting factors reiterated in *Recalma*, *Lewin* and *Sero and Frazer*, and which have been used to decide whether investment income should be excluded from taxable income on the ground that it is situated on a reserve. In *Recalma*, *supra*, at page 6240, the Federal Court of Appeal affirmed the judgment of Judge Hamlyn of this Court and recognized four factors to be considered in determining the *situs* of investment income.

> So too, where investment income is at issue, it must be viewed in relation to its connection to the Reserve, its benefit to the traditional Native way of life, the

> potential danger to [*sic*] the erosion of Native property and the extent to which it may be considered as being derived from economic mainstream activity. In our view, the Tax Court judge correctly placed considerable weight on the way the investment income was generated, just as the Courts have done in cases involving employment, U.I. benefits and business income. Investment income, being passive income, is not generated by the individual work of the taxpayer. In a way, the work is done by the money which is invested across the land. The Tax Court judge rightly placed great weight on factors such as the residence of the issuer of the security, the location of the issuer's income generating operations, and the location of the security issuer's property. While the dealer in these securities, the local branch of the Bank of Montreal, was on a Reserve, the issuers of the securities were not; the corporations which offered the Bankers' Acceptances and the managers of the Mutual Funds in question were not connected in any way to a Reserve. They were in the head offices of the corporations in cities far removed from any reserve. Similarly, the main income generating activity of the issuers was situated in towns and cities across Canada and around the world, not on Reserves. In addition, the assets of the issuers of the securities in question were predominantly off Reserves, which in case of default would be most significant.
>
> Less weight was properly accorded by the Tax Court judge, in this case of investment income, to factors such as the residence of the taxpayer, the source of the capital with which the security was bought, the place where the security was purchased and the income received, the place where the security document was held and where the income was spent. We can find no fault with the reasoning of the Tax Court judge in the way he balanced the various connecting factors involved in this case in the light of the purpose of the legislation.
>
> Thus, in our view, taking a purposive approach, the investment income earned by these taxpayers cannot be said to be personal property "situated on a reserve" and, hence, is not exempt from income taxation.
>
> [Emphasis added.]

[37] This approach was followed by this Court in *Lewin*, *supra*, and by the Federal Court of Appeal in *Sero and Frazer*, *supra*. In *Sero and Frazer*, Sharlow J.A. also considered certain criticisms regarding *Recalma*, but saw in these none that could change her finding that the investment income was not situated on a reserve. In fact, only Linden J.A., in *Recalma*, and Judge Tardif, in *Lewin*, recognized the possibility that investment income might be generated on a reserve. In *Recalma*, Linden J.A. stated the following at page 6240:

> . . . The result may, of course, be otherwise in factual circumstances where funds invested directly or through banks on reserves are used exclusively or mainly for loans to Natives on reserves. When Natives, however worthy and committed to their traditions, choose to invest their funds in the general mainstream of the economy,

> they cannot shield themselves from tax merely by using a financial institution situated on a reserve to do so.
>
> [Emphasis added.]

[38] In *Lewin*, at first instance, Judge Tardif stated the following at paragraph 36:

> If it had been a financial institution created solely for the purposes, concerns and needs of the Indians living on the reserve and if the bulk of its income had primarily been reinvested on the reserve to strengthen, develop and improve the social, cultural and economic well-being of the Indians living there, the situation could have been different.

[39] Coming back, then, to the four criteria enunciated by Linden J.A. in *Recalma* for determining the *situs* of investment income, the first three must certainly be met, but the fourth is the most important, and it is the extent to which the income is derived from economic mainstream activity or solely or mainly from Aboriginal economic activity. The four criteria are:

1. the investment income's connection to the reserve (residence, source of income, etc.);
2. the benefit of the investment income to the traditional Native way of life;
3. the potential danger of the erosion of Native property;
4. the extent to which the investment income may be considered as being derived from economic mainstream activity.

[40] In the present case, counsel for the appellant addressed all of the factors considered by Judge Hamlyn at first instance in *Recalma*. He argued that the factor of the Indian's residence carries more weight here than it did in *Sero and Frazer* where the two appellants did not live on a reserve. He also argued that, in this case, the appellant's source of income is the reserve and that this fact is important because it sets this case apart from other cases. He further argued that the investment vehicle, namely, the Caisse populaire de Pointe-Bleue, is a connecting factor that distinguishes this case from *Recalma* because neither a bank nor speculative investments are involved here. Even though in *Lewin* a credit union was also involved, counsel for the appellant identified several elements on the basis of which *Lewin* can be distinguished from the present case. He raised the fact that, in *Lewin*, the credit union was controlled by members outside the reserve, not to mention the other facts, cited earlier, which that case has in common with *Recalma* and which set those cases apart from this one. Counsel for the appellant laid great emphasis on the fact that 75% of the Caisse's funds are loaned to its

members and that this percentage should be considered when determining the proportion of the appellant's investment income that should be subject to tax.

[41] For her part, counsel for the respondent points out that it is a matter of determining the *situs* not of the certificates of deposit but rather of the investment income or interest income earned from them. It is necessary to show the existence of a sufficiently strong connection with the reserve. She argues that the income-generating activities must be clearly connected to a reserve in order for the investment income to constitute property situated on a reserve. She goes on to say that an overly broad scope should not be given to sections 87 and 89 because these provisions are simply intended to protect the property rights of Indians from interference and hindrance by society at large. She reminds the Court that the connecting factors analyzed in *Recalma* were important but that the Court did not grant the exemption sought. She reiterates that the Court must attribute considerable weight to the residence of the issuer of the securities, the location of the issuer's income-generating activities, and the location of the issuer's property, and less weight to factors such as the taxpayer's place of residence, the source of the capital, and where the securities were bought and the income received. Counsel for the respondent addressed each of the factors in the light of the evidence adduced and argues that in the case at bar there are not enough factors connecting the appellant's investment income to a reserve.

[42] It will be remembered that, in *Recalma*, Judge Hamlyn gave considerable weight to the appellants' place of residence, but that the Federal Court of Appeal considered the *situs* of the investment income and its connection to the reserve to have more weight. In the present case, the appellant's place of residence was the subject of a number of observations given the fact that the appellant owned a residence in St-Félicien and then in Roberval during the years in question. The appellant's spouse and children occupied the off-reserve residences for ten months of the year, that is, during the school year. The appellant also occupied these residences from time to time on weekends on account of the travel required by his work. In the summer, the family lived on the Obedjiwan reserve. The appellant's position that his St-Félicien and Roberval residences were secondary residences is difficult to accept when one considers that a principle residence is the place where one normally lives and that, in this case, the family spent ten months of the year in their off-reserve residence. We note that the appellant did not report any capital gain on the disposition of the St-Félicien residence.

[43] In addition, the nature of the appellant's income is a factor that may create a connection with the reserve. In the present case, the income generated by the

business is connected to a reserve because it comes from the activities of his business, which consists in the provision of a service to Aboriginals by Aboriginals, with the exception of a few off-reserve services. Where there is some difficulty in terms of a connection with the reserve is the fact that the Court is not able to conclude that the appellant's business is the source of the income deposited, which, in turn, generated investment income. The appellant was unable to establish the source of a quite considerable sum of money used to generate the investment income, and consequently I am unable to establish a connection with a reserve for this part of his investments.

[44] The place where the investment income is used raises certain questions when we consider the facts in this case. The appellant used a joint account, which he held with his spouse, for the family's needs on and off the reserve. Since the appellant's family lived off the reserve for most of the year, it is possible to infer that a large portion of the investment income was used off-reserve. Although the evidence shows that most of the income was reinvested, it does not allow us to conclude that the investment income was used on the reserve.

[45] Lastly, we must determine if the Caisse's activities have a connection to the reserve. It is clear from the evidence adduced that the Caisse populaire de Pointe-Bleue is situated on the reserve, that it serves Aboriginal clients, that it hires Aboriginal staff and that Aboriginals sit on its board of directors. However, it must also be acknowledged that the Caisse is not exclusively Aboriginal as regards its structure and mission. It has the same objectives as any other credit union, and these are explicitly stated in the statute governing credit unions. It is a co-operative that anyone may join and it offers its services to all its members, whether they are Aboriginal or not. The Caisse is subject to federal and Quebec legislation. The only distinctive characteristic of this credit union is that it is situated on a reserve and, in my view, that factor carries little weight in the present case.

[46] In the case at bar, it seems obvious to me that the investment income, in the form of the interest paid to the appellant, was beneficial to the traditional way of life of the Aboriginals living on the Obedjiwan or Pointe-Bleue reserves. However, as Judge Tardif pointed out in *Lewin*, the operations of the credit union that paid the appellant the interest did not serve only the interests of the reserve, and any banking institution situated off the reserve could have provided the same services. Judge Tardif went on to say that the services provided and offered by the credit union on the reserve were basically ordinary services related to the economic aspects of life; they had nothing to do with the Aboriginals' culture and traditional way of life.

[47] I do not believe that there is any potential risk here of erosion of Native property. The investment income is the product of capital invested with the Caisse and that capital is not threatened. It is the growth of that capital and the means used to accomplish that growth that are the object of the last factor, namely, whether the income-generating activity is tied to the economic mainstream and to what extent.

[48] The question at issue relates to this last factor, that is, the source of the investment income. In the context of this case, the appellant must show that the investment income was generated on the reserve. To that end, the appellant attempted to show that the Caisse has some autonomy in how it carries on its general operations beyond its obligations to the Federation. He stressed the fact that most of the Caisse's members are Aboriginals and that it is their capital that the Caisse invests. In my view, the appellant is seeking to show through these arguments the connection between the Caisse and the reserve and, possibly, to identify the source of the appellant's income, but does that adequately address the question of how the Caisse generates its investment income?

[49] It is true that the Caisse loans money to its members and that many of these are Aboriginals. However, the Caisse has three main sources of income, the first being deposits and investments with the Federation. The Federation has a statutory obligation to put these funds in investment funds and liquidity funds that, in turn, are invested in the economic mainstream off the reserve. These investments with the Federation are managed solely by the Federation and the evidence shows that the Caisse populaire de Pointe-Bleue has had surpluses for several years. The evidence also reveals that approximately 25% of its members' deposits are invested with the Federation. The remaining 75% constitutes the Caisse's second source of income and is loaned to its members residing on the reserve and off the reserve, notably in the form of lines of credit and consumer loans. This type of loan by the Caisse is offered to all members, both Native and non-Native, living on a reserve or off-reserve. The departmental guarantees covering housing loans for Aboriginals are offered to all financial institutions located on or off a reserve and the Caisse populaire de Pointe-Bleue therefore does not hold a monopoly on housing loans on the Pointe-Bleue or Obedjiwan reserves. It should also be noted that, according to its financial statements, the Caisse has invested with the Federation funds equal to the amount of its loans to its members. Lastly, there is the income generated from accessory products such as administration fees and brokerage fees.

[50] It is true that, in the case at bar, a majority of the members of the Caisse populaire de Pointe-Bleue appear to be Aboriginals. I say "appear" because customers are not asked, when they open an account, if they are Aboriginals, and the Certificate of Indian Status number is not required. The percentage of Aboriginal members is based on an unofficial evaluation by the Caisse's management. Regardless, even if the majority of the Caisse's clients are Aboriginals, it must be acknowledged that these Aboriginal investors do not control the surpluses invested with the Federation and the Caisse cannot avoid its obligation to make these investments in the economic mainstream. The Caisse's bylaws cannot prescribe that its board of directors be composed solely of Aboriginals since the statute governing the Caisse provides that members of the board of directors must be elected by the Caisse's regular members. Accordingly, it is virtually impossible to distinguish this case from *Lewin* on this point.

[51] Counsel for the appellant suggests that, in the case at bar, it would be possible to break down the interest income into that generated by "Aboriginal" investments and that generated in the economic mainstream. We must remember that it is the income that must be connected to a reserve and not the benefit that it brings to Aboriginals. Even though the Caisse brings a benefit to Aboriginals, that does not necessarily mean that that benefit creates a factor connecting this property to the reserve, as is required by the case law. The idea of dividing income in order to create exempt portions was not accepted by the Federal Court of Appeal in *Akiwenzie v. Canada*, 2003 FCA 469, and *Monias*, 2001 FCA 239. Further, if we were to undertake that exercise, we would, among other things, have to determine whether the Aboriginals to whom the Caisse loans money live on or off the reserve in order to ascertain whether there is a connection with the reserve. Would it be possible, through the application of this formula, to find that there are sufficient activities on a reserve to allow one to conclude that the investment income is derived predominantly from the reserve? In my opinion, the exercise that would have to be engaged in to determine the exempt income involves too many imponderables and complexities to be practicable.

[52] For the appellant's investment income to be exempt, there would have to be connecting factors creating a primary connection with a reserve. No such factors exist in this case. Accordingly, the investment income is not tax-exempt. The appellant's tax returns for the 1997, 1998, 2000 and 2001 taxation years were indeed filed late and the Minister was justified in imposing a late filing penalty. The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 6th day of December 2007.

"François Angers"

Angers J.

Translation certified true
on this 19th day of March 2008.

Erich Klein, Revisor

CITATION:	2007 TCC 393
COURT FILE NO.:	2003-4665(IT)G
STYLE OF CAUSE:	Alexandre Dubé v. Her Majesty the Queen
PLACE OF HEARING:	Roberval, Quebec
DATES OF HEARING:	August 14, 15 and 16, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	December 6, 2007

APPEARANCES:

Counsel for the Appellant:	Martin Dallaire
Counsel for the Respondent:	Sophie-Lyne Lefebvre

COUNSEL OF RECORD:

For the Appellant:

Name:	Martin Dallaire
Firm:	Cain, Lamarre, Casgrain, Wells Saint-Félicien, Quebec

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada