Docket: 2005-2032(IT)I

BETWEEN:

DOROTHY WERNER BLAUER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on evidence tendered in the form of written questions and sworn answers

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Mark Heseltine Kiran Kaur Bhinder Tyler Lord Marla Teeling

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JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1998 to 2003 taxation years are allowed, without costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 31st day of December, 2007.

"J.E. Hershfield"

Hershfield J.

Citation: 2007TCC706
Date: 20071231
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BETWEEN:

DOROTHY WERNER BLAUER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] The Appellant resided and was employed in Canada before becoming disabled and leaving for Israel in 1998. As a resident of Israel she received periodic wage loss replacement payments from Sun Life Insurance Company of Canada (the "WLR payments") and *Quebec Pension Plan* disability payments (the "QPP payments"). The WLR payments received in the 1998 through 2003 taxation years were assessed as taxable income earned in Canada pursuant to section 115 of Part I of the *Income Tax Act* (the "*Act*") and the QPP payments received in the 1998 through 2002 taxation years were assessed a withholding tax pursuant to section 212 of Part XIII of the *Act*. The Appellant asserts that such receipts are not taxable in Canada.

[2] The facts in this appeal are straightforward and not in dispute.[1] Prior to the periods in question, the Appellant was employed by the Canada Customs and Revenue Agency. She performed the duties of her employment in Canada and her

[1] These appeals were heard on evidence tendered in the form of written questions and sworn answers. This approach was adopted as the most efficacious way to proceed given that the Appellant was unable to attend at a hearing in Canada. The evidence before the Court tendered in this fashion has not proven contentious.

employer made contributions on her behalf to a wage loss replacement plan which the parties do not contest is a disability insurance plan (the "Plan"). That is, it is not contested that the WLR payments are periodic disability payments made pursuant to a disability insurance plan. The Plan was administered by Sun Life Insurance Company of Canada (Sun Life). Sun Life was the recipient of the employer's contributions.[2] The Appellant was a resident of Israel when she received the subject WLR and QPP payments.

[3] Dealing firstly with the WLR payments, the Appellant argues that subsections 2(3) and 115(1) of Part I of the *Act* require non-resident persons in her circumstances to pay tax only in respect of amounts received for performing duties in Canada of an office or employment but not in respect of amounts received by virtue of not being able to perform those duties. She insists that receiving compensation for the loss of income from employment does not meet the express requirements of those provisions to be included under Part I in calculating taxable income for Canadian tax purposes. Being unable to render services, the payments received were in lieu of or were to replace remuneration for services rendered and are not amounts received for performing duties in Canada of an office or employment.

[4] The relevant provisions relied on by the Appellant read as follows:

> **2(3) Tax payable by non-resident persons.**
>
> Where a person who is not taxable under subsection (1) for a taxation year
>
> (a) was employed in Canada,
>
> ….
>
> at any time in the year or a previous year, an income tax shall be paid, as required by this Act, on the person's taxable income earned in Canada for the year determined in accordance with Division D.
>
> **DIVISION D – Taxable Income Earned in Canada by Non-Residents**
>
> **SECTION 115: Non-resident's taxable income in Canada**
>
> **(1)** For the purposes of this Act, the taxable income earned in Canada for a taxation year of a person who at no time in the year is resident in Canada is the amount, if any, by which the amount that would be the non-resident person's income for the year under section 3 if
>
> (a) the non-resident person had no income other than

[2] Although not reflected in the reassessment, the fact that the Appellant also contributed to the Plan would reduce the amount taxable in Canada under Part I even if the Respondent's theory of how subparagraph 115(1)(*a*)*(i*) operates were to prevail.

> (i) incomes from the duties of offices and employments performed by the non-resident person in Canada and, if the person was resident in Canada at the time the person performed the duties, outside Canada,
>
> ….
>
> exceeds the total of
>
> ….

[5] Referring to the express language in subparagraph 115(1)(*a*)(*i*), the Appellant asserts that the WLR payments were not income from duties of offices and employments performed anywhere. They are periodic disability insurance payments. The Respondent on the other hand relies on paragraph 6(1)(*f*) of the *Act* which brings disability insurance payments into income from employment.

[6] The Appellant acknowledges that the WLR payments or a portion of them would be income from an office or employment by virtue of paragraph 6(1)(*f*) of the *Act* had she been a resident of Canada when they were received. However she maintains that this provision is applicable to residents only and does not invoke any provision of the *Act* that would make it taxable when received by a non-resident. Paragraph 6(1)(*f*) reads:

> **SECTION 6: Amounts to be included as income from office or employment.**
>
> **(1)** There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:
>
> ….
>
> (f) **Employment insurance benefits** - the total of all amounts received by the taxpayer in the year that were payable to the taxpayer on a periodic basis in respect of the loss of all or any part of the taxpayer's income from an office or employment, pursuant to
> (i) a sickness or accident insurance plan,
> (ii) a disability insurance plan, or
> (iii) an income maintenance insurance plan
> to or under which his employer has made a contribution, not exceeding the amount, if any, by which
> (iv) the total of all such amounts received by the taxpayer pursuant to the plan before the end of the year and
> (A) where there was a preceding taxation year ending after 1971 in which any such amount was, by virtue of this paragraph, included in computing the taxpayer's income, after the last such year, and

(B) in any other case, after 1971,
exceeds
(v) the total of the contributions made by the taxpayer under the plan before the end of the year and
(A) where there was a preceding taxation year described in clause (iv)(A), after the last such year, and
(B) in any other case, after 1967;

[7] Looking back at subsections 2(3) and 115(1), the Appellant asserts that paragraph 6(1)(*f*) does not in any way deem her to have actually performed the duties of an office or employment, something she insists is required by the express language of subparagraph 115(1)(*a*)*(i*).

[8] What must be decided then in this appeal is the proper construction of these provisions. The analysis starts with subsection 2(3) which imposes a tax liability on non-residents "for a year" if they were employed in Canada "at any time in the year *or a previous year*" (emphasis added). It requires that tax be paid as required "by this *Act"* on the taxable income earned in Canada for the year "as determined in accordance with Division D" which in this case is to say "as determined under subparagraph 115(1)(*a*)(*i*)". That subparagraph would include amounts earned from employment duties performed in Canada in a previous year. The year to which the provision is directing itself, however, is clearly the year of receipt of the payment and the payment must be taxable income earned in Canada for that year (the year of receipt of the payment) as determined under subparagraph 115(1)(*a*)(*i*). The question then is whether *that subparagraph* (as opposed to paragraph 6(1)(*f*)) determines that the subject payments are taxable income earned in Canada in the year the payments are received.

[9] Subsection 115(1) prescribes that "taxable income earned in Canada for a taxation year" is the amount that would be the non-resident's income if that person had, pursuant to subparagraph (*a*)(*i*), *no other income* than "incomes from the duties of offices and employments performed by the non-resident person in Canada". In the Appellant's case, the income it catches is income from work "performed" in Canada while a resident but paid for after she ceased to be a resident. In her circumstances it catches "no other income" – i.e. it does not catch disability insurance benefits paid in lieu of or to replace lost employment income even though such amounts are included as employment income by paragraph 6(1)(*f)*.

[10] That subsection 6(1) is more inclusive relative to subsection 115(1) can readily be seen by looking at subsection 5(1). That subsection reads as follows:

> **SECTION 5: Income from office or employment.**
>
> **(1)** Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.

Subject to other provisions in Part I, section 5 provides that income for a year from employment is limited to the "salary, wages and other remuneration" received in the year. For residents, Part I expands this restricted definition of income from employment in subsection 6(1) whereas for non-residents Part I narrows it in subsection 115(1). Reference in subparagraph 115(1)(*a*)(*i*) to income from duties performed is not a reference to such expanded employment income inclusions. The trigger in subparagraph 115(1)(*a*)(*i*) for inclusion appears quite clearly, on its face at least, to be that the payment must be for employment duties "performed". Accordingly, I agree with the Appellant's assertion that the subject payments (being disability insurance payments or payments for loss of income from employment due to being *unable to perform* services) are not payment for duties "performed" and nothing in the *Act* deems them to be so.

[11] The Respondent's position on the other hand is that section 6 of the *Act* deems the WLR payments to be employment income which must mean they are to be treated for the purposes of Part I as remuneration for services or duties performed. I believe it is fair to say that section 6 does have the effect of deeming the WLR payments to be employment income as an adjunct to section 5. Certain amounts set out in paragraphs 6(1)(*a*) through (*l*) are prescribed to be included in income "as income *from* employment" and that includes the WLR payments described in paragraph 6(1)(*f*). However, that is not necessarily sufficient to bring those payments within the scope of subparagraph 115(1)(*a*)(*i*) which requires not that the payments be income from employment but rather that they must be a certain type of employment income; namely, income from duties "performed". That, in my view, specifically and without ambiguity, excludes other categories of income from employment that are only treated as included in employment income by virtue of the inclusions in section 6.

[12] The Respondent's position that subparagraph 115(1)(*a*)(*i*) covers incomes included in section 6 as employment income is however supported by the decision of this Court in *Watts v. Canada.*[3] In that case, a non-resident received *Canada*

[3] 2004 TCC 535.

Pension Plan disability payments and, like in the case at bar, periodic wage loss replacement plan payments from a plan contributed to by the employer. After finding that the periodic wage loss replacement plan payments were caught by paragraph 6(1)(*f*), the Court went on to find such payments to be subject to the operative maximum tax treaty rate of 15%. Such limitation presumes that subparagraph 115(1)(*a*)(*i*) applies to disability payments received by non-residents by virtue of paragraph 6(1)(*f*) in the same way that paragraph applies to residents. This is found in paragraph 20:

> 20 … The result is that the Wage Loss Replacement Plan payments by National Life are caught by paragraph 6(1)(*f*) of the *Income Tax Act*. Moreover, they fall within the definition of pension as provided in paragraph 3 of Article XVIII of the *Canada-U.S. Income Tax Convention (1980)* and Canada may therefore tax them. Under paragraph 2 of Article XVIII, Canada's right to tax is limited to 15%.

[13] It appears to me that the argument before me was not made in *Watts*. On that basis the finding in the *Watts* case is less persuasive than it might otherwise be. Still, on the basis of that case, the conclusions that I have drawn so far deserve closer scrutiny. That takes me to consider two aspects of statutory interpretation that might assist in the analysis. Firstly, an argument can be made that the words "incomes from the duties of offices and employments performed by the non-resident" require a broader construction of the word "from" than argued by the Appellant. Secondly, an argument can be made that disability insurance, paid to a non-resident as part of a broader superannuation or retirement plan, would constitute a pension taxable under Part XIII of the *Act* as opposed to Part I of the *Act*.

[14] With respect to the argument that the words "incomes from the duties of offices and employments performed by the non-resident" require a broader construction of the word "from", I note that I have recently considered a case where I did just that. In *Datex Semiconductor Inc. v. Canada (Minister of National Revenue)*,[4] I considered the meaning of the word "from" in the context of a different issue that arose under the *Canada Pension Plan* (*CPP*). In that case, the place *from* which a payment was being made would determine if earnings were pensionable. In the context of that case, I applied a broad construction of the meaning of the word "from" finding that it meant the source of the payment:

> [41] In the context of paragraph 16(1)(b), once it can be said that a place is the *source* of the payment then it can be said that it is the place *from* where the payment

[4] [2007] T.C.J. No. 128; 2007 TCC 189.

is made regardless of the method of transfer of funds. The *Canadian Oxford Dictionary*[5] offers a definition of "from" as:

> *expressing* separation or *origin*, followed by: **1 a** a person, place, time, etc. that is the staring point of motion or action… **b** the starting point of an extent in time. **2** a place, object, etc. whose distance or remoteness is reckoned or stated … **3 a** *a source* … (emphasis added)

> [42] This supports the view that the place of administering or generating payments can be considered as a relevant nexus in determining where a payment has been made "from". Applying this nexus relieves concerns about absurd results should the provision be read so literally as to require that funds for payment actually have to be physically located at the employer's establishment. …..

[15] As well, in *Sutcliffe v. the Queen* [6] Justice Woods took a broader view of the word "from" as used in subparagraph 115(1)(*a*)(*i*):

> [128] Although income such as sickness and vacation pay are received *because* of sickness and vacation in the sense of accruing during these periods, the remuneration is also received because the employee has agreed to perform services for the employer. The appellant would not be entitled to any sickness or vacation pay if he had not agreed to perform duties as a pilot.
>
> [129] The only reasonable interpretation of subparagraph 115(1)(*a*)(*i*) in my view is that the appellant's remuneration that accrues during off-duty periods, including statutory vacation pay, is from duties performed. The essence of the relationship between an employee and employer is that services are rendered in consideration of payment for those services.
>
> [130] The connection between remuneration paid and services rendered enables employers to deduct remuneration paid and requires employees to be taxed on it. I reject the argument of the appellant that some portion of the remuneration has no income-earning nexus in Canada.

[16] In my view, these cases are distinguishable from the present case. In the case of disability insurance payments or wage loss replacement payments, the essence of the employment relationship is not that services were rendered in consideration of those payments. Wage loss replacement payments like those in the case at bar are made by a third party in consideration of premiums paid to it. They are not paid

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[5] 2d ed., *s.v.* "from".

[6] [2006] 2 C.T.C. 2267; 2005 TCC 812.

in consideration of services rendered. In the case at bar, the consideration paid by the employer for services rendered was the premium it paid to Sun Life. The fact that services were rendered in consideration of the employer paying premiums in order to have Sun Life insure the Appellant against the happening of an uncertain event does not make the insurance benefits received income "from" duties performed. They are disability insurance benefits not income from duties performed. In *Sutcliffe*, services were rendered in consideration for vacation pay being paid by the employer to the workers and accordingly were found to be income from duties performed.

[17] Further, distinguishing the case at bar from my decision in *Datex*, I do not see any absurdities resulting from limiting the meaning of the phrase "income from" to "income deriving directly from the stipulated source – namely duties performed by the non-resident person". That such a construction may give rise to a gap in the charging provisions of the *Act* is not an absurdity. At best it might be faulty drafting but even that is speculative given that the fault may lie elsewhere such as in section 212. This takes me to the second aspect of this expanded analysis that I have said needs to be considered given the decision of this Court in *Watts*, namely whether periodic disability insurance payments, arising out of a plan for employees who are forced to leave their jobs due to a disability, are pensions that must under the scheme of the *Act* be dealt with under Part XIII of the *Act* as opposed to Part I of the *Act* when they are paid to a non-resident.

[18] If periodic disability benefits arising from a plan established for employees are pensions and are thereby subject to Part XIII of the *Act*, they would be subject to a 25% withholding tax pursuant to paragraph 212(1)(*h*) (and, incidentally, they would be subject to limitations on the rate of withholding pursuant to the *Canada-Israel Income Tax Convention* (the "Treaty")).[7] If that were the case, it would be unmistakably clear that such disability payments cannot be included as taxable income under Part I of the *Act*. The same amount cannot be subject to tax under both such Parts of the *Act*. If one finds that it is unclear into which Part of the *Act* the payments fit, it is for Parliament to resolve. It appears to me that this is the very situation with which I am faced and this is not merely an academic musing on my part.

[7] Such limitation would also apply if the WLR payments were taxable pursuant to section 115 under Part I (i.e. not treated as pensions for the purposes of the *Act*) but treated as pensions for the purposes of the Treaty.

[19] Indeed, although the parties did not refer me to it, there is a decision of this Court that found, in what appears to be a comparable case, that employee disability payments were pension benefits. In *Levert v. Canada*,[8] this Court considered the case of a resident of Canada receiving disability payments under group life insurance provided to the United Steel Workers of America Staff Pension Plan by a third party insurer and disability benefits from the trustee of that pension plan. The Court at paragraph 25 found both such United States payment sources to be pension benefits under paragraph 56(1)(*a*). The inclusive language of paragraph 56(1)(*a*) applicable to pension receipts of residents is virtually identical to the language in paragraph 212(1)(*h*) applicable to pension payments to non-residents. On the assumption that the third party insurance funded disability payments in *Levert* are comparable to the wage loss replacement payment in *Watts*, I am faced with two conflicting findings of this Court. The decision in *Watts* suggests that the WLR payments are insurance benefits, not pension benefits, and taxable under section 115 of Part I whereas the decision in *Levert* suggests that they are pension benefits taxable under section 212 of Part XIII. Had the Respondent argued in the alternative for the application of Part XIII, there would be further support for that position. The Dictionary of Canadian Law, third edition, cites *Webb v. Webb*[9] where Lysyk J. said a pension "…includes periodic money payments payable on involuntary retirement due to disability occasioned by illness or injury as well as retirement due to age …". As well, as these Reasons will confirm in respect of the next issue dealing with the QPP payments, disability payments under government regulated pension plans are readily treated as pensions benefits subject to Part XIII tax.[10]

[20] Regardless, I do not have the benefit of argument. This is an informal procedure case. The assessing position was not that Part XIII applied and no argument was made that it does apply. However there is a point to my taking the analysis this far. That point is that under the scheme of the *Act* as a whole,

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[8] [2001] T.C.J. No. 523 (T.C.C.).

[9] (1985), 49 R.F.L. (2d) 279 at 285; 70 B.C.L.R. 15 (S.C.).

[10] In the international context, certain disability payments will be treated as pensions. Conceptually at least, that might point to Canadian tax being imposed under section 212 as opposed to section 115. As will be seen later in these Reasons dealing with the QPP payments, the situation is clearer in the case of a government funded or statutory retirement plan that includes disability provisions. Such plans are subject to Part XIII tax and would be subject to treaty limitations applicable to pension benefits either by express reference in the applicable treaty or by virtue of section 5 of the *Income Tax Conventions Interpretation Act* which defines periodic pension payments in a manner that would include disability payments from such plans.

paragraph 212(1)(*h)* might well be applied more readily to the present situation than subparagraph 115(1)(*a*)(*i*) so that there is no tax slippage or gap in the legislation in finding that subparagraph 115(1)(*a*)(*i*) does not apply. At the least, a purposive construction analysis could no more suggest that the subject disability insurance payments fit into the ambit of subparagraph 115(1)(*a*)(*i*) than it could suggest that they fit into the ambit of paragraph 212(1)(*h*). It is a matter of pure speculation then to suggest how the scheme of the *Act* might assist in the construction of subparagraph 115(1)(*a*)(*i*). The temptation to use a purposive interpretation approach to read subparagraph 115(1)(*a*)(*i*) so as to avoid the tax slippage that will result in this case by not applying it may therefore be a misplaced initiative. In such circumstance, it would be an impermissible intrusion into the domain of Parliament for this Court to remedy such ambiguity without having any well founded sense of the nature of the remedy intended by Parliament. Even if the drafters of the legislation have left a gap in the tax net, it would not be incumbent on me in these circumstances to remedy it.[11]

[21] Accordingly, I am faced simply with the issue already addressed – whether subparagraph 115(1)(*a*)(*i*) catches the WLR payments. At the risk of repeating myself I find I am unable to expand the meaning of the phrase “incomes from” in subparagraph 115(1)(*a*)(*i*) to include income “attributable to” or “originating or derived from” a source that was the performance of employment duties. The subject WLR payments are insurance payments that are taxed as employment income (when received by residents) by virtue only of the express inclusion in section 6. That inclusion does not rely on finding a nexus between the payments and the duties performed – it is express. Without that express inclusion (in the case of non-residents), a nexus is required. The nexus of disability payments to the performance of duties is simply too tenuous in my view to be caught by the express language of subparagraph 115(1)(*a*)*(i*). This is not a case where finding a derivative nexus is appropriate. Subsection 2(3) bars taxing non-residents in

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[11] In discussing the filling of legislative gaps generally, M.J. Hamilton J.A. of the Nova Scotia Court of Appeal in *R. v. M.J.R.*, [2007] N.S.J. No. 305 (N.S.C.A.) at paragraph 19 endorsed the following view: “With respect to courts filling in possible gaps in legislation, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada Ltd., 2002) states at page 136: “…While courts are willing to correct drafting errors, they are reluctant to fill gaps in legislation. This reluctance is grounded in two factors. First … gaps are taken to embody the actual intentions of the legislature, which the courts are bound to respect. It is up to the legislature rather than the courts to effect any desired change. Second, where inadvertent or not, gaps result from provisions or schemes that are under-inclusive, and correcting under-inclusiveness would require courts to legislate.”

respect of amounts not set out as included in Division D of Part I of the *Act*. The inclusion in that Division should be evident. To suggest that the inclusion is evident would require my finding, after applying a unified, textual, contextual and purposive approach to its interpretation, a legislative purpose to so tax non-residents on the receipt of disability insurance benefits. No such purpose is evident. The legislative scheme of Division D of Part I is to tax only amounts received as part of the consideration paid by employers for services rendered - not third party insurance payments.

[22] I am fully aware that there are other arguments that could recommend a different conclusion than the one I have reached. One such argument I have considered is the drafter's use of the word "from" as opposed to "for" in subparagraph 115(1)(*a*)(*i*). A Parliamentary intention to exclude amounts paid because duties could not be performed would be clearer if what was included was a payment "for" duties performed. The contrasting use of the word "from" which is also used in the preamble of subsection 6(1), has a nuance that may well recommend the derivative approach suggested by the Respondent. On the other hand, words such as "in lieu of" could have been used as was done for example in subsection 212(4). Amounts paid "in lieu of" payment for a service performed are expressly dealt with in that subsection in the context of withholding tax on management fees. Such language might have been employed in subparagraph 115(1)(*a*)(*i*) to underline an intent, if there was one, to include wage loss replacement payments or disability insurance payments under Division D of Part I. Another argument might refer to the fact that the Appellant was not taxed on the employer's contributions to the Plan by virtue of subparagraph 6(1)(*a*)(*i*). The Appellant has thus escaped tax on an employment benefit on the basis no doubt that the insurance benefits would be taxed. Arguably this should support a finding that the scheme of the *Act* is to tax the disability payments regardless of one's residency at the time the payments are made.

[23] However, such arguments have not dissuaded me from the view that subparagraph 115(1)(*a*)(*i*) should not be so dissected and reconstructed as to bring into the tax net that which on its face it does not purport to include. The subject provision has a clear purpose that can readily be seen without engaging in such an exercise. In a few words it, together with subsection 2(3), catches a great number of targeted circumstances without searching for more. In addition to targeting the Appellant's case had she received deferred remuneration, subparagraph 115(1)(*a*)(*i*) covers a non-resident who worked in Canada *while* a non-resident (whether paid currently or on a deferred basis). As well, it covers a resident of Canada who earned employment income working abroad who, after giving up

Canadian residency, received deferred compensation for the work performed while a resident. These are the *clear* targets of the subject provision. There is no compelling reason then to seek a further legislative purpose particularly where, as discussed, the asserted purpose is not self evident. There is as well the residual presumption in favor of the taxpayer. If it were necessary for me to do so, I would say that the residual presumption in favor of the taxpayer overrides the temptation in this case to side with a revenue raising construction or one that regulates against tax slippage. While I do not in fact resort to such presumption, I believe in this case it would be appropriate to do so were it necessary.

[24] Accordingly, I agree with the Appellant's argument. The language of subparagraph 115(1)(*a*)(*i*) does not include all payments that are employment income when earned by a non-resident but rather it includes only a certain type of employment income; namely, income from the performance of the duties of an office or employment. There is no ambiguity. That provision should not be taken to include other categories of employment income such as the WLR payments (i.e. disability insurance benefits) irrespective of their inclusion for residents by virtue of section 6. The essence of such payments is not that they are consideration for services rendered. They are disability insurance benefits not income from duties performed. If the legislative intent was to be more inclusive under Part I of the *Act*, an intent that is far from clear to me, Parliament, not this Court, must address that concern. For all these reasons I am allowing the appeal in respect of the WLR payments.

[25] Turning to the QPP payments I note that at paragraph 18 of *Watts*, the Court found that the *Canada Pension Plan* payments in that case were not income from an office or employment by virtue of paragraph 6(1)(*f*) but that they were nevertheless taxable as income by reason of paragraph 56(1)(*a*) of the *Act* which states:

> **56(1) Amounts to be included in income for year** -- Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year;
>
> > **(a) pension benefits, unemployment insurance benefits, etc.** -- any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,
> >
> > (i) a superannuation or pension benefit including, without limiting the generality of the foregoing,
> >
> > (A) the amount of any pension, supplement or spouse's or common-law partner's allowance under the *Old Age Security Act* and the amount of any similar payment under a law of a province,
> >
> > (B) the amount of any benefit under the *Canada Pension Plan* or a provincial pension plan as defined in section 3 of that Act,

…

[26] I agree with the decision in *Watts* that the payments out of the *CPP* are pension benefits and are included in income under clause 56(1)(*a*)(*i*)(*B*) even if the payments are in respect of disability. That clause, applicable to provincial plans as well, deals with any amount received on account of *any* benefit. The QPP payments are such amounts regardless that they relate to a disability.

[27] That said, the Respondent is not relying and cannot rely on section 56 as it applies only to residents. The Respondent seeks rather to impose a withholding tax on the QPP payments under section 212 of Part XIII.

[28] As provincial pension plans are included in clause 56(1)(*a*)(*i*)(*C*) as a superannuation or pension benefit, they are argued to be included in paragraph 212(1)(*h*). Paragraph 212(1)(*h*) states:

> **SECTION 212: [Taxation of non-residents].**
>
> **(1) Tax**. 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, or in satisfaction of,
>
> ….
>
> (h**) Pension benefits** -- a payment of a superannuation or pension benefit, other than
>
> ….

[29] Here the Respondent runs into a similar argument as encountered in respect of the WLR payments; namely, pension benefits are not expressly defined to include provincial pension plans for the purposes of taxing non-residents under subsection 212(1) as they are for the purposes of taxing residents under subsection 56(1). While I have accepted the argument that the less inclusive language in subsection 115(1) applicable to non-residents was fatal to the Respondent's position to apply an inclusion provision applicable to residents, I did not do so to the exclusion of the potential application of subsection 212(1), had it been argued. Indeed in the case of a government pension plan, the application of that provision seems clear. The Canadian Oxford Dictionary for example defines "pension" as "a regular payment made *by a government* to people above a specified age, *to the disabled*, or to such a person's surviving dependants" (emphasis added). As well, the Court in *Watts* concluded at paragraph 18 that the statutory regime administered by the *CPP* was not an insurance regime so that the disability payments out of the *CPP* were pension benefits. This finding stands on its own for the purposes of

paragraph 212(1)(*h*) regardless that the express inclusion of such plans under section 56 are not present in paragraph 212(1)(*h*). That finding distinguished the wage loss replacement payments in that case which were not part of a statutory regime and were found to be "insurance" as opposed to a pension. While, I am not persuaded that the distinction made in *Watts* (statutory versus non-statutory plans) is necessarily determinative in identifying a pension benefit or payment, I am persuaded at least that payments out of a statutory regime such as that administered by the *CPP* are pension benefit payments as found in *Watts* and I will make no distinction on this point between the *CPP* and *QPP*. Paragraph 212(1)(*h*) therefore applies, as asserted by the Respondent, to impose a 25% withholding tax on the QPP payments subject to the impact of the Treaty.[12]

[30] There is a limitation in the Treaty on Canada's right to tax pension payments. The issue is whether the QPP payments are subject to that limitation which in turn depends on the definition of pensions as used in the Treaty. Here, I note that tax conventions are generally given a broad construction. It would be exceptional to find that the QPP payments were considered pension payments under the *Act* and not considered pension payments under a treaty. Indeed, the *Income Tax Conventions Interpretation Act* (the "*ITCI Act*") seems to confirm the status of the QPP payments as pension payments. The *ITCI Act* at section 5 defines "periodic pension payments", a phrase used in the Treaty, as a pension payment other than …

> (*d*) a payment to a recipient at any time in a calendar year under an arrangement, … where
>
> > (i) the payment is not …
> > (B) one of a series of annual or more frequent payments each of which is contingent on the recipient continuing to suffer from a physical or mental impairment, or ...

Stripped of the double-negative, the suggestion is that clause 5(*d*)(*i*)(*B*) in not excluding disability payments from pension payments means they must be included in the first place.[13]

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[12] The analysis concluding that the WLR payments were not taxable in Canada obviates the need to consider the impact of the Treaty on those payments. As noted earlier in these Reasons no argument was made that such payments were taxable under Part XIII.

[13] Arguably the payment must be a payment out of a "pension" before it can be a "periodic pension payment" which likely would exclude non-statutory disability plans not provided for as part of a retirement plan but, as already noted, it appears clear that "pensions" as used in section

[31] Based on the foregoing, paragraph 2 of Article XVIII of the *Canada-Israel Tax Treaty* limits Canada's right to tax the QPP payments as follows:

> 2. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the State in which they arise, and according to the law of that State. However, in the case of ***periodic pension payments*** or periodic annuity payments, the tax so charged shall not exceed the lesser of
>
> (a) 15 percent of the gross amount of the payment, and
>
> (b) the rate determined by reference to the amount of tax that the recipient of the payment would otherwise be required to pay for the year on the total amount of the periodic pension payments or periodic annuity payments received by him in the year, if he were resident in the Contracting State in which the payment arises.
>
> However, the limitations on the rate of tax mentioned above shall not apply to payments under an income-averaging annuity contract. (Emphasis added)

[32] Accordingly, in respect of the QPP payments, this matter is referred back to the Minister to determine and reassess the Appellant the lesser of the (a) and (b) amounts referred to in paragraph 2 of Article XVIII of the *Canada-Israel Tax Treaty* where the (b) amount is calculated in accordance with these Reasons.

[33] Given the circumstances of this appeal and the accommodations made to the Appellant by the Crown in the manner of proceeding, each party shall bear their own costs.

Signed at Ottawa, Canada, this 31st day of December, 2007.

"J.E. Hershfield"

Hershfield J.

212, in section 5 of the *ITCI Act* and in Article XVIII of the *Canada-Israel Tax Treaty* include at least a statutory plan such as the *QPP*.

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APPEARANCES:

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