Docket: 2009-1192(IT)G

BETWEEN:

RICHARD LEWIN
RE: THE J.J. HERBERT FAMILY TRUST # 1,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 9, 2011, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Benoît Bourgon
Counsel for the Respondent:	Pascal Tétrault

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* is allowed with costs and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of October 2011.

"Paul Bédard"

Bédard J.

Citation: 2011 TCC 476
Date: 20111025
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BETWEEN:

RICHARD LEWIN_,
RE: THE J.J. HERBERT FAMILY TRUST # 1,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] The J.J. Herbert Family Trust # 1 (the "Trust") was settled on June 3, 1991 under the laws of the Bahamas. At the time the Trust was settled, William Abdalla, Jean-Jacques Herbert and the appellant were the trustees. Jean-Jacques Herbert (the "Beneficiary") was at all relevant times a non-resident of Canada. In 2001, the Trust received a preferred share dividend in the amount of $2,200,003. On September 11, 2011, the trustees of the Trust adopted the following resolution (the "Resolution"):

> WHEREAS The J.J. Herbert Family Trust No. 1 (the "**Trust**") received a dividend in an amount of $2,200,003 CDN in 2001; and
>
> WHEREAS the dividend was considered by the trustees to be on account of capital as it relates to the distribution of all, or substantially all, the assets of the payor; and
>
> WHEREAS the trustees hereby declare that the dividend of $2,200,003 CDN be paid to Mr. Jean Jacques Herbert as capital beneficiary of the Trust and that Mr. Jean Jacques Herbert shall have the right at any time to require payment of the amount of the dividend by the Trust to himself at any time.

[2] In its 2001 income tax return, the Trust reported the preferred share dividend. However, the Trust declared it as being payable to a beneficiary under paragraph 104(6)(*b*) of the *Income Tax Act* (the "*Act*"). Therefore, the Trust did not pay any Part I tax on the amount of the preferred share dividend in 2001. In its 2001 income tax return, the Trust calculated Part XIII tax payable in the amount of $550,000.75, being the amount that had become payable to a non-resident beneficiary in the year. This Part XIII tax was never withheld or remitted to the Receiver General. On January 12, 2002, the appellant resigned as a trustee of the Trust. On January 18, 2002, the Trust paid an amount of $2,206,042 to the Beneficiary.

The Issues

[3] The issues are the following:

a. As a result of the Resolution, was the Trust liable for the Part XIII tax in 2001?

   i. In other words, was the dividend amount paid or credited — within the meaning of paragraph 212(1)(*c*) of the *Act* — by the Trust to the Beneficiary in 2001?

b. Is the appellant liable for the unpaid Part XIII tax that was never withheld or remitted by the Trust?

   i. In other words, did the appellant authorize or otherwise cause — within the meaning of subsection 227(5) of the *Act* — the Trust to pay the dividend amount to the Beneficiary while having direct or indirect influence over the disbursements, property or business of the Trust?

Brief Answer

[4] The appeal should be allowed for the following reasons:

a. The Trust was not liable for Part XIII tax in 2001 because the Resolution did not result in the dividend amount being paid or credited to the Beneficiary in that year. It resulted rather in the amount becoming payable. However, payable should not be held to be equivalent to paid or credited.

b. The appellant should not be held to be personally liable for the unremitted Part XIII tax because the Resolution did not authorize that the dividend amount be paid. At the time the amount *was* paid — in 2002 — the appellant was no longer a trustee of the Trust and was not in a position to directly or indirectly cause the amount to be paid to the Beneficiary.

The Respondent's Position

[5] The respondent contends that:

a. Part XIII tax was payable by the Trust by virtue of paragraph 212(1)(*c*) of the *Act*, and that, therefore,

b. the appellant was personally liable for that tax amount by virtue of paragraphs 215(5) and 227(5) of the *Act*.

[6] Subsection 104(13) of the *Act* applies to residents of Canada and requires that any amounts that have become payable to a beneficiary during the taxation year be included in the beneficiary's income. Furthermore, when an amount becomes payable to a beneficiary (resident or non-resident) during a particular taxation year, the trust may deduct it from its income for the year.[1] Subsection 104(24) of the *Act* provides that an amount is not payable to a beneficiary unless either it was paid to the beneficiary during the year or the beneficiary acquired the right to enforce its payment during the year.

[7] The respondent refers to subsections 104(13) and 104(24) of the *Act* in arguing that the dividend amount was payable to the Beneficiary during the 2001 taxation year.[2] The appellant does not dispute this. In fact, the Trust filed its 2001 tax return on the basis that the amount had become payable to the Beneficiary in 2001.

[8] The respondent submits that due to two facts, namely, (1) that the Trust had an obligation to pay the amount, and (2) that the Resolution is [TRANSLATION] "more than a simple accounting entry", the conditions for the application of

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1 Subsection 104(6) of the *Act*.

2 *Réprésentations écrites of the respondent* (REI), at para. 9.

paragraph 212(1)(*c*) of the *Act* have been met[3]. In other words, because of these two facts, the Resolution amounted to a payment or credit.

[9] Paragraph 212(1)(*c*) of the *Act* reads as follows:

> 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,
>
> . . .
>
> (*c*) income of or from an estate or a trust to the extent that the amount
>
> (i) is included in computing the income of the non-resident person under subsection 104(13), except to the extent that the amount is deemed by subsection 104(21) to be a taxable capital gain of the non-resident person, or
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> (ii) can reasonably be considered (having regard to all the circumstances including the terms and conditions of the estate or trust arrangement) to be a distribution of, or derived from, an amount received by the estate or trust as, on account of, in lieu of payment of or in satisfaction of, a dividend on a share of the capital stock of a corporation resident in Canada, other than a taxable dividend;
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> (Emphasis added.)

[10] The respondent gives two very specific meanings to the verbs "to pay" and "to credit", as used in the legislation.

[11] According to the respondent, "to pay" means to disburse an amount of money in fulfilment of an obligation. [4] In addition, the respondent contends that "to credit" as used in subsection 212(1) of the *Act* refers to a situation where a creditor has the right to enforce immediate payment of a sum but grants the debtor deferral of the payment until some future date.

[12] In support of this interpretation of "to credit", counsel for the respondent relies on Judge Rip's decision in *Wenger's v. M.N.R.*[5] In that case, Judge Rip was required

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3 REI, at para. 16.

4 REI, at para. 11.

5 *Wenger's Ltd v. M.N.R.*, 1992 CarswellNat 400, [1992] 2 C.T.C. 2479, 92 DTC 2132 (*Wenger's*).

to interpret the effect of import and sales contracts between a Canadian company and a Soviet business entity. The issue before Judge Rip was a question of fact. The overall issue in the case involved determining the nature of payments made between the entities and whether those payments constituted interest. Thus, Judge Rip needed to determine the moment at which the Canadian company became the owner of the imported goods. At that moment, interest would have begun to accumulate, since payment for the goods was not made until later. It was in this context that Judge Rip made the following comments with regard to sales made on "credit" at paragraphs 71-73 (CarswellNat):

> 71 At least two of the contracts produced declare the interest to be paid by the purchaser is for "credit". The payment clauses in other contracts produced refer to a period after the goods are withdrawn from consignment for the goods to be "fully paid" and indicate an interest rate to accrue until payment is "fully" made by the purchaser.
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> 72 The *Shorter Oxford Dictionary on Historical Principals* defines the word "credit" as "... confidence in a buyer's ability and intention to pay at some future time, for goods, etc., entrusted to him without present payment".
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> 73 The word "credit" assumes that the grantor of the credit, the creditor, is entitled to receive immediate payment but grants the debtor the right to pay at some later date. A creditor may receive interest because of the relationship he has with the debtor, such as vendor and purchaser. In general, a vendor is entitled to interest on the unpaid purchase money until actual payment (Volume 42, paragraph 200).

[13] According to the respondent, the fact that, in *Wenger's*, Judge Rip reiterated his interpretation of "credit" from *Gillette Canada Inc. v. The Queen*,[6] lends credence to the assertion that "to credit" for the purposes of subsection 212(1) of the *Act* means the granting of a deferral of payments immediately due.

[14] In *Gillette*, the issue was whether a debt restructuring gave rise to an amount "paid or credited" to a non-resident. Judge Rip wrote:

> 13 . . . If, on the other hand, an analysis of the facts with regard to subsection 212(13.1) leads to the conclusion that an actual payment or credit has occurred, then other provisions of Part XIII, including paragraph 214(3)(*a*), must be considered to determine whether the character of that payment or credit requires a tax to be paid.

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6 [2001] 4 C.T.C. 2884, 2001 DTC 895 (CCI) (*Gillette*).

[15] He then went on to reproduce dictionary definitions of the word "credit" and adopted the definition provided in *Cie minière Québec Cartier v. M.N.R.*[7] In that case, the verb "to credit" was interpreted, with respect to subsection 212(1) of the *Act*, to mean that an amount has been made "available to" or placed "at the disposal of" a non-resident beneficiary. Judge Rip continued, in *Gillette*:

> 16 The definition of the word "credit", however, by its very name suggests a creditor-debtor relationship. Funds or goods must either have been received by the debtor or be available to the debtor with the understanding that the debtor may defer immediate payment. An extension of a loan by a creditor to a debtor comes within the meaning of the word "credit". The word "credit" in paragraph 212(13.1)(*b*) refers to something more than a mere accounting entry. . . .
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> . . .
>
> 26 I agree with the respondent that the conversion of the Oral-B debt to the Gillette France debt constituted a payment. The conversion created a debt. As part of the debt conversion the appellant delivered money's worth to the Partnership in order to discharge its obligation. In any event, there was at least a credit since on the conversion of the "Oral-B note" to the Gillette France debt the appellant made available to the Partnership funds to repay the note with the understanding that the repayment was deferred.

[16] The respondent inferred from these passages, particularly paragraph 16, that:

> La notion de « porte à son crédit » étend la portée de « paie » que l'on retrouve à l'article 212 de la *Loi de l'impôt sur le revenu*. Le paiement d'une somme implique l'exécution d'une obligation alors que le fait de porter au crédit d'une personne présuppose qu'une personne (le créditeur) a droit immédiatement à la somme, mais qu'elle consent, à la personne qui doit effectuer le déboursement (le débiteur), à ce que la somme soit payée à un moment futur.[8]

[17] To reiterate, according to the respondent, "credits" in section 212 of the *Act* means the act of a creditor in permitting a debtor to pay at a later date an amount due immediately.[9]

[18] Applying this definition to the facts herein, the respondent contends that the Resolution had the effect of making the amount payable immediately.[10] In the

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7 1984 CarswellNat 354 at paras. 65 and 71, [1984] C.T.C. 2408, 84 DTC 1348 (*Cie minière*).

8 *Notes écrites additionnelles de l'intimée* (NAI), dated June 27, 2011, at para. 1.

9 Hearing transcript, p. 135.

10 REI, at para. 15.

respondent's view, the fact that the Beneficiary consented to it being paid at a future date meant that the amount was credited to the Beneficiary.[11] Therefore, counsel concludes that as of September 11, 2001 — the date of the Resolution — the amount was credited to the Beneficiary and the conditions for the application of subsection 212(1) of the *Act* were met. [12]

[19] The respondent maintains that the appellant is personally liable for the unpaid Part XIII tax of the Trust. In support of this position, counsel relies on subsection 227(5) of the *Act*. That provision reads as follows:

> Where a specified person in relation to a particular person (in this subsection referred to as the "payer") has any direct or indirect influence over the disbursements, property, business or estate of the payer and the specified person, alone or together with another person, authorizes or otherwise causes a payment referred to in subsection 135(3), 135.1(7) or 153(1), or on or in respect of which tax is payable under Part XII.5 or XIII, to be made by or on behalf of the payer, the specified person
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> . . .
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> (*b*) is jointly and severally liable with the payer to pay to the Receiver General
>
> (i) all amounts payable by the payer because of any of subsections 135(3), 135.1(7), 153(1) and 211.8(2) and section 215 in respect of the payment, and
>
> (ii) all amounts payable under this *Act* by the payer because of any failure to comply with any of those provisions in respect of the payment; and . . . .

[20] It is the respondent's position that the appellant had a direct or indirect influence over the disbursements, property or business of the Trust and caused the amount to be paid to the Beneficiary.[13] Counsel contends that by adopting the Resolution the appellant caused the amount to be paid. The respondent accordingly urges the Court to hold that the appellant is liable for the unpaid Part XIII tax.

Analysis

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11 NAI, at para. 2.
12 REI, at para. 16.
13 REI, at para. 26.

[21] The respondent's position is largely based on a misreading and misapplication of the provisions in question. Specifically, the respondent is conflating the concepts of an amount "payable" (within the meaning of subsection 104(13) of the *Act*) and an amount paid or credited (within the meaning of subsection 212(1) of the *Act*).

[22] Additionally, the respondent's interpretation of the word "credited" is necessarily wrong since it would lead to the absurd result that an amount is "credited" to a beneficiary (by a trust) at the moment when the *beneficiary* "credits" the *trust* by deferring payment of an allocated benefit. In other words, it leads to a perfectly upside-down result.

[23] Furthermore, because the respondent's position conflates the concepts of "payable" and "paid", when viewed in the light of paragraph 214(3)(*f*) of the *Act*, it leads to an equally absurd interpretation of that provision, as I shall demonstrate below.

[24] The respondent rightly asserts that the legal obligation to pay that was created by the Resolution was unconditional.[14] Article 1497 of the *Civil Code of Québec* (the "*CCQ*") explains the concept of a conditional obligation:

> An obligation is conditional where it is made to depend upon a future and uncertain event, either by suspending it until the event occurs or is certain not to occur, or by making its extinction dependent on whether or not the event occurs.

[25] Baudouin explains suspensive conditions in the following terms:

> . . . La condition suspensive fait dépendre la naissance de l'obligation de l'arrivée de l'événement ou de la certitude qu'il ne se produira pas; elle retarde donc la création du lien entre les parties (article 1497).[15]. . .

[26] The appellant pointed to three conditions that prevented the immediate payment of the amount: (1) the deposit of the treasury bills; (2) the redemption of the preferred shares; and (3) the issuance of the certificate required by subsection 159(2) of the *Act*. However, none of these uncertainties is of the sort that would render conditional the legal obligation to pay the amount. If it were argued that they are legal conditions, they would likely be in the nature of a "*condition purement potestative*", that is, a condition which is not upheld by the courts as a legally

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14 NAI at para. 27.

15 Pierre-Gabriel Jobin and Nathalie Vézina, *Les Obligations*, 6th ed. (Cowansville : Éditions Yvon Blais, 2005) at para. 612 (*Les Obligations*).

effective condition.[16] As Baudouin explains, these kinds of conditions are not valid in law:

> **614 – Introduction -** Toute condition doit, pour être valide, remplir certaines exigences fixées par la loi. Elle ne doit pas engager le débiteur de façon purement potestative, être impossible, ou encore pécher contre la loi ou l'ordre public.
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> **A. La condition potestative**
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> **615 – Condition purement potestative -** La condition « casuelle », dont la réalisation dépend uniquement d'un événement extérieur, s'oppose à la condition « potestative » (ou « facultative »), dont la réalisation dépend de l'exercice discrétionnaire de la volonté d'une des parties.
>
> Il y a, à première vue, antinomie complète entre l'élément d'imprévisibilité de la condition et l'élément discrétionnaire de l'acte d'une des parties. On ne saurait donc admettre comme valable la condition qui dépend, pour sa réalisation, du seul acte de volonté du débiteur, c'est-à-dire de l'exercice de son seul pouvoir discrétionnaire. La personne qui accepte d'exécuter une obligation « si elle le veut » ne s'engage pas véritablement et sérieusement, puisqu'elle a le pouvoir d'acquitter l'obligation selon son bon vouloir ou son caprice. Cette condition est connue classiquement sous le nom de condition purement potestative et entraîne la nullité de l'obligation qui en dépend (article 1500).[17]

[27] Clearly, the kinds of conditions invoked by the appellant would fall under the category of "*conditions purement postestatives*" since their fulfilment depends entirely on the discretionary exercise of the will of one of the parties. That is, so long as the appellant undertook the actions listed, the conditions would be fulfilled. Even the third condition — the obtaining of the certificate — depends solely on the will of the appellant since the Canada Revenue Agency ("CRA") has taken the position that it is not necessary to obtain this certificate if the payer withholds sufficient funds to discharge any debts owing to the CRA.[18]

[28] However, the above analysis is moot. The respondent portrays the appellant as asserting that the three conditions are legal conditions that prevent the Resolution from making the amount payable, but this is a straw man version of the appellant's real argument. The appellant never argued that the three conditions set out above render the obligation to pay the amount conditional in the sense referred to by the *CCQ*, article 1497. Counsel for the appellant clarifies as follows:

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16 *Lemire v. Laroche*, [1971] C.S. 673, AZ-71021180.

17 Jobin and Vézina, *op. cit.*, at paras. 614-615.

18 ARC, Information Circular IC82-6R8.

> . . . L'appelant n'a jamais prétendu et ne prétend toujours pas que l'obligation résultant de la résolution du 11 septembre 2011 [*sic*] était « *conditionnelle* » au sens des articles 1497 à 1507 du Code civil du Québec. Selon nous, l'Intimée fait erreur et ne veut que semer la confusion en faisant de l'obligation créée par la résolution une obligation dite « *conditionnelle* » sous prétexte que la somme de 2 200 003 $ n'était pas « *mise à la disposition* » de J.J. Herbert « *inconditionnellement* ».[19]

[29] Since there is no genuine disagreement between the parties on this point, the Court should conclude that the Resolution created an unconditional obligation on the part of the Trust to pay the amount to the Beneficiary.

[30] Since an amount payable is defined in subsection 104(24) of the *Act* as including any amount whose payment a beneficiary was entitled to enforce during the year, the creation of an unconditional obligation to pay an amount of money is the essence of an amount that has become payable under paragraph 104(13)(*a*) of the *Act*. That being so, at the moment that the Resolution was passed the amount became payable to the Beneficiary for the purposes of paragraph 104(13)(*a*) of the *Act*.

[31] The respondent placed a great deal of emphasis and relied heavily on the decision in *Wenger's*.[20] She relied on paragraphs 16 and 26 of that decision to argue that "credited" means the creation of a debtor-creditor situation where the creditor permits the debtor to defer payment of the amount owed.

[32] However, the facts in *Wenger's* are very dissimilar to the facts currently before the Court. The question before Judge Rip related to the legal characterization of import/sale contracts between a Canadian company and a Soviet entity. Because payment and delivery of the goods were not concurrent, it was necessary for Judge Rip to determine if certain amounts paid (over and above the actual purchase price) were in the nature of "surcharges" or were actually interest paid on goods provided on credit. Judge Rip therefore had to determine whether the sale of the goods was a sale on "credit". He did not have to determine the meaning of "credited" for the purposes of subsection 212(1) of the *Act*.

[33] The word "credit" in the *Wenger's* context has a much different meaning than "credits" in the phrase "pays or credits" in subsection 212(1) of the *Act*. In *Wenger's*, the term has the meaning of a loan or financing. On the other hand, in

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19 *Réponse de l'appelant aux notes et autorités de l'intimée*, dated July 14, 2011, at p. 6. *RA*.

20 *Supra* note 5.

subsection 212(1) of the *Act*, "credits" is paired with "pays" and implies the fulfilment of an obligation.[21]

[34] The respondent gave too broad an application to *Wenger's*. That decision interpreted the noun "credit" in a particular context, it cannot be seen as having defined the verb form "credits" as used in subsection 212(1) of the *Act*.

[35] The respondent relies on the *Gillette* case to support her contention that a creditor-debtor relationship arises from the fact that an amount is "credited" for the purposes of subsection 212(1) of the *Act*. In his decision, Judge Rip said the following:

> [16] The definition of the word "credit", however, by its very name suggests a creditor-debtor relationship. Funds or goods must either have been received by the debtor or be available to the debtor with the understanding that the debtor may defer immediate payment. An extension of a loan by a creditor to a debtor comes within the meaning of the word "credit". The word "credit" in paragraph 212(13.1)(*b*) refers to something more than a mere accounting entry. . . .

[36] Judge Rip was of the opinion that the conversion of one debt instrument into another debt instrument constituted a "credit" for the purposes of paragraph 212(13.1)(*b*) of the *Act*. However, he did not state that every time a debtor-creditor relationship is created an amount is "credited" for the purposes of subsection 212(1) of the *Act*. In fact, the reason he felt that the debt conversion constituted a credit was that the repayment of the original loan followed by the issuance of another placed funds at the disposal of the non-resident.[22] He wrote:

> [26] I agree with the respondent that the conversion of the Oral B debt to the Gillette France debt constituted a payment. The conversion created a debt. As part of the debt conversion the appellant delivered money's worth to the Partnership in order to discharge its obligation. In any event, there was at least a credit since on the conversion of the "Oral B note" to the Gillette France debt the appellant made available to the Partnership funds to repay the note with the understanding that the repayment was deferred.
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> (Emphasis added.)

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21 As detailed below, "credits" in subsection 212(1) must be given the meaning of the fulfilment of an obligation, not the creation or postponement thereof.

22 It could be said that the conversion at least notionally placed funds at the disposal of the non-resident since, on the conversion, the original loan disappeared, leaving funds available for the issuance of the replacing loan.

[37] This is, in fact, an application of the definition of the verb "to credit" that this Court adopted in *Cie minière*. It was therefore the fact that the Canadian resident permitted a novation — which entailed the placing of funds at the disposal of the non-resident — that constituted a credit.

[38] Moreover, Judge Rip expressly accepted the definition of the verb "to credit' from *Cie minière*, namely, that an amount is "credited" by someone (here, the trust) to someone else (here, a non-resident beneficiary) if the former puts a sum of money at the latter's disposal.[23] This definition fits perfectly with the interpretation adopted by the CRA and with the meaning that I propose at paragraph 50 below.

[39] Furthermore, the granting of credit in the sense in which it occurs in *Wenger's* takes place from the point of view of the creditor — or, in *Wenger's*, of the seller of the goods. As must always be the case, the creditor grants credit to the debtor. However, in the context of subsection 212(1) of the *Act*, the crediting takes place from the point of view of the debtor. It is the debtor — i.e., the Trust — that pays or credits an amount to the creditor (the Beneficiary of the Trust). This clearly implies that "credited" should be treated as a near synonym of "paid" – that is, it refers to the fulfilment of the obligation to pay the amount to the Beneficiary.

[40] Thus, the two senses of the word "credit" are incompatible. It is difficult to see how the respondent can suggest that the noun "credit" as defined in *Wenger's* should be treated as synonymous with the verb "to credit" as used in subsection 212(1) of the *Act*. With one the situation is seen from the point of view of the creditor while with the other it is seen from the point of view of the debtor. If the respondent's argument and definition were to be accepted, the result would be that the creditor of the Trust — that is, the Beneficiary — would be the only entity or person in a position to credit the amount since it is the creditor who must grant the debtor the right to defer payment. The beneficiary would thus be determining, for the purposes of subsection 212(1) of the *Act*, whether to credit the amount to himself. This is clearly an unintended and absurd application of the provision. This reason is sufficient to reject the respondent's definition of "credited" as involving a situation where the creditor has permitted a payment to be deferred.

[41] However, there is yet another reason for rejecting the respondent's definition. That definition would mean that an amount "payable" (under subsection 104(13) of the *Act*) would always be an amount "credited" under subsection 212(1) of the *Act*. The reason for this has to do with the definition of an amount payable in 104(24) of

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23 *Supra*, note 7, at paras. 63-71.

the *Act*. An amount payable includes any amount whose payment the beneficiary was entitled to enforce. If the beneficiary could enforce payment but did not, then (if we accept the respondent's definition) the amount would also have been "credited" to the Beneficiary. Thus amounts "payable" and amounts "credited" would always be equivalent.

[42] This conflation of amounts "payable" and amounts "credited" is also troubling when one considers the existence of paragraph 214(3)(*f*) of the *Act*. That provision reads as follows:

> Deemed payments -- For the purposes of this Part,
>
> . . .
>
> (*f*) where subsection 104(13) would, if Part I were applicable, require any part of an amount payable by a trust in its taxation year to a beneficiary to be included in computing the income of the non-resident person who is a beneficiary of the trust, that part shall be deemed to be an amount paid or credited to that person as income of or from the trust on the earlier of
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> (i) the day on which the amount was paid or credited, and
> (ii) the day that is 90 days after the end of the taxation year
>
> and not at any subsequent time when the amount was actually paid or credited;

[43] The effect of paragraph 214(3)(*f*) of the *Act* is therefore to deem a. amounts payable to beneficiaries to be b. amounts paid or credited to beneficiaries, once certain conditions are met. However, there is no point in deeming these two types of amounts to be equivalent if they are already equivalent on their own. To put it another way, if they were already equivalent concepts then there would be no need to use different words to describe them. They must therefore, of necessity, be different concepts that may be deemed to be equivalent in certain circumstances. There is no reason to deem "b" to be "b". If the respondent's definition were accepted, paragraph 214(3)(*f*) of the *Act* would become futile.

[44] The presumption against useless legislative provisions is a long-standing principle of Canadian law. In 1949 the House of Lords said the following:

> . . . it is to be observed that though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the

> presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.[24]

[45] And Lamer C.J. of the Supreme Court of Canada wrote in *R v. Proulx*:[25]

> . . . It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage. . . .

[46] If this principle of legislative interpretation endorsed by the Supreme Court is to be taken seriously, it is difficult to see how this Court could endorse an interpretation that would render paragraph 214(3)(*f*) of the *Act* completely superfluous.

[47] The McCarthy Tétrault Commentary states the following regarding the function of paragraph 214(3)(*f*) of the *Act*:

> Income from a Trust (paras 214(3)(f) and (f.1))
>
> Several provisions of Part XIII deal with the imposition of non-resident withholding tax in respect of income from a trust. See paragraph 212(1)(*c*) and subsections 212(9), (10) and (11). Paragraph 214(3)(*f*) deals in particular with the determination of the time when income from a trust is to be regarded as having been paid or credited to a non-resident beneficiary. The provision states that where subsection 104(13) would require an amount payable by a trust in a particular taxation year to be included in computing the income of a non-resident beneficiary, the amount shall be deemed paid or credited on the earlier of the day on which it actually was paid or credited and 90 days after the end of the taxation year, and not at any subsequent time when it was actually paid or credited. In effect, unless the amount payable by the trust to the non-resident beneficiary has already been paid, a 90-day grace period is added to the end of the taxation year in which the amount has become payable.[26]

[48] If the respondent's interpretation were accepted, this 90-day grace period would be judicially written out of the legislation.

[49] The way in which the provisions of the *Act* are structured suggests that the legislator intended certain tax consequences to attach at the time of the creation of a trust's obligation to pay an amount to a beneficiary, and other tax consequences to attach at the time that the obligation is actually discharged and funds leave the trust

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24 *Hill v. William Hill (Park Lane) Ld.*, [1949] A.C. 530 at pages 546-547.

25 [2000] 1 S.C.R. 61 at para. 28.

26 Canada Tax Service, Vol. 15 (Toronto: Carswell, 2011), at p. 214-118.

(particularly in the case of non-resident beneficiaries). I would suggest that subsection 104(13) of the *Act* refers to the point in time at which a trust incurs the obligation to pay a beneficiary, while both the terms "pays" and "credits" in subsection 212(1) of the *Act* refer to the moment when the obligation is discharged — that is, when the trust essentially gives up possession of the funds necessary to pay the obligation.

[50] Paragraph 104(13) of the *Act* attaches certain tax consequences to the creation of an unconditional obligation on a trust to pay an amount to a beneficiary. These include, among other things, the inclusion of the amount in the income of the beneficiary and the ability to deduct from the trust's income the amount that has become payable during the year. Part I of the *Act* does not create tax consequences that apply at the moment that the obligation is created and different tax consequences that apply at the time that it is fulfilled. Rather, it mandates both that the taxpayer include the amount payable in his income and that the trust be permitted to deduct it from its income at the same moment in time, that is, the moment at which the obligation to pay is created.

[51] However, because Part I deals with beneficiaries that are resident in Canada while Part XIII deals with non-resident beneficiaries, the Minister must be assured of being able to collect from the latter category of beneficiaries. Subsection 212(1) of the *Act* therefore imposes a withholding tax on the (resident) trust at the time that funds actually leave the country. Thus, subsection 104(13) of the *Act* has consequences at the time the obligation is created, while subsection 212(1) of the *Act* creates further consequences at the time that it is fulfilled.

[52] Even though she applied it incorrectly to the facts of the case, the respondent recognized this dualism, as shown by the following excerpt:

> 22. La Résolution a eu pour effet de créer une obligation juridique de la Fiducie à l'égard de J.J. Herbert. L'obligation se définit de la façon suivante :
>
> > Elle est le lien de droit, existant entre deux ou plusieurs personnes, par lequel une personne, appelée débiteur, est tenue envers une autre, appelée créancier, d'exécuter une prestation consistant à faire ou à ne pas faire quelque chose, sous peine d'une contrainte juridique.
>
> 23. L'exécution de l'obligation se traduira par le paiement de la somme de 2 200 003 $ lorsque J.J. Herbert en aura choisi le moment. Conséquemment, le 11 septembre 2001, la somme de 2 200 003 $ était à la disposition de J.J. Herbert[27].

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27 NAI.

[53] The respondent recognizes that the Resolution created an obligation on the Trust towards the Beneficiary. However, it is curious that the respondent states only that payment of the amount would constitute fulfilment of the obligation. Subsection 212(1) of the *Act* refers to amounts either paid or credited; it therefore seems odd for the respondent to omit amounts "credited" when referring to how the obligation may be fulfilled. It would appear that the legislator envisaged two ways in which the obligation to pay could be fulfilled and therefore result in funds leaving the country and therefore create the need to impose Part XIII tax: the amount could be either paid or credited to the non-resident beneficiary.

[54] The respondent is referring to one but not the other method of fulfilling the obligation to pay leads to confusion.[28] The respondent wishes to ascribe to the verb "to credit" in subsection 212(1) of the *Act* a meaning relating to the *creation* of an obligation. However, by placing the verb form "credits' in the same provision as "pays", the legislator, it would appear, intended both terms to refer to the *fulfilment* of the obligation.

[55] On the other hand, the courts have clearly stated that "credits" and "pays" are not synonyms. In the *Berry*[29] case, M. J. Bonner of the Tax Review Board wrote the following on the subject of section 212 of the *Act*:

> The arguments advanced on behalf of the appellant seem to have been based on the unstated assumption that the word "credits" as used in section 212 of the *Income Tax Act* means the same as the word "pays" as used in that section. As I read that provision the words are used disjunctively and, in the absence of any argument directed towards showing that the words "or credits" should be regarded as surplusage and that the section should be read as restricted to the imposition of tax on payments alone, I can find no reason for accepting the unstated assumption.

[56] However, the fact that "credited" and "paid" are not synonyms does not mean that "credited" should refer to the creation of the obligation. As I stated above, the respondent's argument ends up confusing the concepts of an amount "credited" and an amount "payable".

[57] Interestingly, a more appropriate interpretation of "credited" has already been advanced by the CRA, and it is in fact its long-standing position:

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28 This is especially so considering that the respondent recognizes that "La notion de 'porte à son crédit' étend la portée de 'paie' que l'on retrouve à l'article 212 de la *Loi de l'impôt sur le revenu*." See NAI, at para. 1.

29 *Berry v. Minister of National Revenue*, [1981] CTC 2253 at p. 2255, 81 DTC 224 at p. 226.

> 5. The words "credits" and "credited" cover any situation where a resident of Canada or, in certain cases, a non-resident (see 8 below) has set aside and made unconditionally available to the non-resident creditor an amount due to the non-resident such as where
>
> (a) a tenant or agent deposits rents in a bank account on behalf of a non-resident landlord;
> (b) a bank credits interest to the savings account of a non-resident;
> (c) an insurance or trust company deposits a pension or annuity payment in the bank account of a non-resident; or
> (d) the amount due is applied by the resident (or deemed resident) against an amount owing by the non-resident. . . .[30]

[58] It is likely that this interpretation of "credited" is the correct one. The examples provided by the CRA in its Information Circular are ones that refer to the fulfilment of the obligation to pay. They are situations where sums of money have actually been put aside or deposited in an account of the beneficiary. In those examples, the funds have therefore been unconditionally placed at the disposal of the beneficiary. Practically speaking, the beneficiary is in "possession" of the funds.

[59] These kinds of practical considerations are of the same nature as the three unfulfilled "conditions" enumerated by the appellant that prevented the payment of the amount to the Beneficiary in 2001. Because the appellant was not actually in possession of the necessary funds, those funds could not actually be paid or credited to the Beneficiary until the treasury bills were cashed and the preferred shares redeemed. Thus, the appellant is correct in pointing to the taking of these steps as being necessary before the amount could have been paid or credited.

[60] Furthermore, the examples provided by the CRA involve to situations where it is the debtor that has credited the amounts to the creditor. As I decided above, this is the only interpretation that does not lead to the absurd result of the beneficiary being able to credit an amount to himself.

[61] It is therefore my contention that the Court should adopt the definition of "credited" suggested by the CRA and interpret it as meaning: the unconditional placing of funds — on a practical level — at the disposal of the Beneficiary in fulfilment of the Trust's obligation to pay. This definition is consistent with both the scheme of the legislation and the leading case of *Cie minière*.

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[30] Canada Revenue Agency, Information Circular, 1C77-16R4 -- Non-Resident Income Tax, dated May 11, 1992.

[62] The respondent also argues that subsection 227(5) of the *Act* applies to the appellant in view of the fact that he authorized the payment of the amount. Counsel submits that the Resolution "authorized or otherwise caused" the amount to be paid to the Beneficiary. However, this is simply not tenable given the facts of the case. The Resolution created the obligation on the part of the Trust to pay the amount to the Beneficiary. It did not authorize its payment. It is not an accurate statement to say that a resolution creating an obligation is the same thing as a resolution authorizing the fulfilment of that obligation.

[63] Therefore, even if the Court accepted the respondent's argument that the Resolution "credited" the amount to the Beneficiary (which I am of the opinion is incorrect), the Resolution clearly did not authorize the payment of the amount. Unfortunately for the respondent's position, subsection 227(5) of the *Act* attaches liability for unremitted Part XIII tax only to trustees who authorized a payment to a non-resident beneficiary or otherwise caused such a payment to be made. Unlike subsection 212(1) of the *Act*, which applies to amounts paid *or* credited, subsection 227(5) of the *Act* clearly states that it applies only to amounts paid.

[64] The Latin maxim "*expressio unius est exclusio alterius*", also known as the principle of implied exclusion, states that where the legislator causes a provision to apply to a number of categories but fails to include one that could easily have been included, one may infer that the legislator intended to exclude that category from the application of the provision. As Noël J.A. of the Federal Court of Appeal stated:

> [96] The rule is that the expression of one thing in a statute usually suggests the exclusion of another (*expressio unius est exclusion alterius*). Pursuant to this maxim, if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended.[31]

[65] One should therefore assume that the legislator intended subsection 227(5) of the *Act* to exclude from its application situations where a trustee has credited an amount to a non-resident beneficiary. Subsection 227(5) of the *Act* applies to trustees who directly or indirectly cause a *payment* to be made to a non-resident beneficiary of a trust.

[66] For these reasons, the appeal is allowed with costs.

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31 *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, [2005] 2 F.C.R. 654, 2004 FCA 424.

Signed at Ottawa, Canada, this 25th day of October 2011.

"Paul Bédard"

Bédard J.

CITATION:	2011 TCC 476
COURT FILE NO.:	2009-1192(IT)G
STYLE OF CAUSE:	Richard Lewin Re: The J.J. Herbert Family Trust # 1 and Her Majesty the Queen
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	May 9, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	October 25, 2011

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