Docket: 2015-1302(IT)G

BETWEEN:

LANDBOUWBEDRIJF BACKX B.V.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 5, 2017, at London, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Keith M. Trussler Linda M. Smits
Counsel for the Respondent:	Joanna Hill

JUDGMENT

The appeal from the assessment made under the *Income Tax* Act for the 2009 taxation year is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is liable for Part 1 tax but not Part IV tax.

Signed at Ottawa, Canada, this 17th day of July 2018.

"Guy Smith"

Smith J.

Citation: 2018 TCC 142
Date: 20180725
Docket: 2015-1302(IT)G

BETWEEN:

LANDBOUWBEDRIJF BACKX B.V.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

[These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment signed on July 17, 2018 and to delete the wording appearing in the pagination header, the last line of paragraph 8, and the 7th line of paragraph 37.]

Smith J.

I. Introduction

[1] The Appellant is a limited liability company incorporated under the laws of the Kingdom of Netherlands (the "Netherlands"). It appeals from an assessment made by the Minister of National Revenue (the "Minister") for the 2009 taxation year under Part I and Part XIV of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "Act"). The assessment relates to a capital gain realized from the disposition of a partnership interest in a dairy-farm operation located in Strathroy, Ontario.

[2] Prior to the actual hearing of the appeal, the Minister conceded that the Appellant should not have been assessed concurrently for both Part 1 tax (as a resident) and Part XIV branch tax (as a non-resident). As a result, the issues in this appeal can be summarized as follows:

i) Was the Appellant a resident of Canada for tax purposes in 2009 and therefore liable to pay the Part I tax on the capital gain arising from the disposition of its partnership interest in the farm operation located in Canada?

ii) If the Appellant was a resident of Canada, was it deemed to have disposed of its partnership interest pursuant to section 128.1 of the Act, and if so effective from what date?

iii) If the Appellant was not a resident of Canada in 2009, was Part XIV branch tax applicable or is the gain exempt under the terms of the *Canada-Netherlands Income Tax Convention* (the "Canada-Netherlands Tax Treaty" or the "Tax Treaty")?

II. The facts

[3] The material facts are not in dispute and the parties delivered a Partial Agreed Statement of Fact, attached hereto as "Schedule A".

[4] The Appellant was incorporated on October 7, 1997 by Michiel Backx and Marian Backx (the "Backxes") who were spouses of one another and residents of the Netherlands (Michiel passed away in 2014). They were the only shareholders and directors.

[5] At the time, the Backxes owned and operated a dairy farm in the Netherlands, a portion of which had been purchased from Michiel's father in 1994 (the "Netherlands Farm"). Michiel had operated this farm in partnership with his father commencing in 1979.

[6] The Netherlands Farm was transferred to the Appellant shortly after the date of incorporation. As part of the consideration for the transfer, a life annuity having a term of 46 years was created in favour of the Backxes.

[7] The Backxes then immigrated to Canada in May 1998 and, prior to doing so, the Appellant sold the bulk of the Netherlands Farm to a third party. The Backxes resigned as directors and Marian's sister, Anna Van Gorp ("Ms. Van Gorp"), a resident of the Netherlands, was appointed as director. The Backxes remained as shareholders.

[8] Having immigrated to Canada, as noted above, the Backxes purchased an existing dairy-farm operation in Strathroy, Ontario. The transaction was structured such that the Backxes owned a 51% interest and the Appellant owned the remaining 49% interest (the "Farm Partnership"). The acquisition was financed in part by the Appellant and by December 31, 1998, it had contributed a total of

$2,975,000 to the partnership. From 1998 to the 2009 taxation year, it filed tax returns as a non-resident and paid taxes on its **share** of the partnership income.

[9] On November 9, 2009, the Backxes incorporated "Backx Dairy Farms Limited ("Backx Limited") under the laws of the Province of Ontario. The Backxes were the only directors and owned all the common shares. They transferred their 51% interest in the Farm Partnership to Backx Limited.

[10] On November 30, 2009, the Appellant disposed of its interest in the Farm Partnership to Backx Limited for proceeds of $4,500,000, paid by the issuance of a promissory note and resulting in a capital gain of $1,739,049. The memorandum of agreement approving the transaction was signed on behalf of the Appellant by Ms. Van Gorp in the Netherlands.

[11] Following the closing, Backx Limited wrote to the Minister to disclose the transaction pursuant to subsection 116(5.02) of the Act and its position that the partnership interest was "treaty-protected property" pursuant to subsection 116(6.1) of the Act.

[12] The Minister acknowledged that the partnership interest was "treaty-protected property" within the meaning of subsection 248(1) of the Act and that Backx Limited, as purchaser, was not required to withhold tax pursuant to subsection 116(5) of the Act. In other words, the Minister agreed that the partnership interest was "treaty-protected property" as a result of the Canada-Netherlands Tax Treaty.

[13] In issuing the assessment as described above, the Minister took the position that the partnership interest was not "treaty-protected property" as defined in subsection 248(1) of the Act, and proceeded to assess the Appellant under Part I and Part XIV of the Act, as aforesaid.

III. Positions of the Parties

A. Position of the Appellant

[14] The Appellant argues that it is a resident of the Netherlands based on the common law rule that a corporation's residence is to be determined on the basis of the location of its central management and control.

[15] The Appellant argues that it was incorporated in the Netherlands and that its directors have always resided there. It argues that it was a non-resident on the basis of the following:

a. The Appellant was incorporated in the Netherlands;

b. At the time of its incorporation, the Appellant's shareholders and directors were all resident of the Netherlands;

c. At all times since its incorporation, its director(s) have resided in the Netherlands;

d. The Appellant was incorporated as a result of a plan devised by professional advisors in the Netherlands, and this plan was devised before the Appellant's shareholders immigrated to Canada;

e. Initially, the business of the Appellant involved holding, and later, selling farm assets in the Netherlands;

f. When the Appellant became involved in a Canadian Farm Partnership, its role was limited to a financial contribution and a contribution of certain farm equipment;

g. The Appellant holds an annuity in the Netherlands, as a result of which it is necessary for the Appellant to maintain its corporate existence for the life of the annuity;

h. The Appellant held a bank account in the Netherlands;

i. The Appellant filed annual tax returns in the Netherlands;

j. The Appellant's annual financial statements were prepared in the Netherlands;

k. In deciding to sell its interest in the Canadian Farm Partnership, all parties involved relied on the advice received from professional advisors; and

l. All transactional documentation related to the sale of the Appellant's partnership interest was signed on behalf of the Appellant by its director in the Netherlands.

[16] The Appellant argues that from 1998 to 2009, it consistently filed as a non-resident for Canadian tax purposes and was assessed on that basis. While acknowledging that the Minister is not bound by those assessments, the Appellant argues that a finding that it was a resident of Canada for the 2009 taxation year would be contrary to the Minister's own assessments which are deemed to be valid and binding.

[17] If the Court finds that the Appellant was a resident of Canada, the Appellant argues that it must also determine when it first become a resident of Canada as a result of the deemed disposition rules set out in section 128.1 of the Act, since this would have an impact on the calculation of the capital gain, if any, realized on the sale of the partnership interest.

[18] If the Court finds that the Appellant was a non-resident, the Appellant argues that it should not be subject to Part XIV branch tax since paragraph 110(1)(f) of the Act allows a taxpayer to deduct any amount that is exempt from income tax in Canada by virtue of a provision contained in a tax convention that has force of law in Canada. The Appellant argues that the gain is treaty-protected on the basis of Articles 1, 6 and 13 of the Canada-Netherlands Tax Treaty and would only be taxable in the Netherlands by virtue of Article 13(7) of the Treaty.

[19] In conclusion, the Appellant argues that it was at all material times a non-resident for Canadian tax purposes and consequently, the reassessment under Part I should be vacated.

[20] With respect to the reassessment under Part XIV of the Act, the Appellant argues that the sale of its partnership interest was treaty-exempt and therefore should be deducted pursuant to paragraph 110(1)(f) of the Act for purposes of calculating the Appellant's tax liability under subsection 219(1) of the Act.

[21] In the alternative, the Appellant argues that if the Court finds that the Appellant was a resident of Canada such that it ought to be taxed on the gain realized on the sale of the partnership interest, it should also find that the Appellant did not become a resident until 2009 and as a result would have been deemed to have disposed of all its property at that time such that the gain realized from the sale would be reduced to nil.

[22] In the further alternative, the Appellant argues that if the Court finds that the Appellant became a resident of Canada at an earlier date, the reassessment should be referred back to the Minister for reconsideration and reassessment to take into account its move to Canada and any deemed disposition that would have occurred as a result.

B. Position of the Respondent

[23] The Respondent had initially taken the position that the Appellant was liable as a non-resident because it had disposed of a taxable Canadian property pursuant to paragraph 3(2)(c) of the Act. In the alternative, the Respondent argued that the disposition was taxable on the basis that the Appellant was a resident of Canada.

[24] As noted above, the Respondent abandoned its initial position and indicated that it would only be relying on the alternate argument that the Appellant was a resident of Canada because its central management and control was located in Canada.

[25] As a result, the Respondent also conceded that the Appellant should not have been assessed concurrently for both Part I tax as a resident and Part XIV branch tax as a non-resident and consequently, that the Appellant would only be liable for Part XIV tax if the Court concluded that the Appellant was a non-resident of Canada for tax purposes.

[26] The Respondent argues that the only issues before the Court are whether the Appellant was a resident of Canada and therefore liable to pay tax on the capital gain realized on the disposition of its interest in the Farm Partnership or, in the alternative, if the Appellant was not a resident in Canada in 2009, whether it was liable to pay Part XIV branch tax on the disposition.

[27] It is the Respondent's position that although the Appellant was registered and incorporated in the Netherlands, it was managed and controlled by the Backxes in Canada, and its sole director, Ms. Van Gorp, performed only administrative tasks in the Netherlands.

[28] The Respondent also argues that the determination of residency in accordance with the central management and control test, does not trigger section 128.1 of the Act (resulting in a deemed disposition of all the Appellant's assets) and the Court is not required to address this issue. This is so since the common law test for residency and the Canada-Netherlands Tax Treaty recognize

that a corporation may be resident in more than one country based on different criteria and that its residence may differ from one taxation year to the next if relevant facts have changed.

IV. Analysis

A. Was the Appellant a resident or non-resident of Canada?

[29] As noted by Sharlow JA in *St. Michael Trust Corp v. Canada*, 2010 FCA 309 *("St. Michael Trust")* (para. 52) and repeated by the Supreme Court of Canada in *Garron Family Trust (Trustee of) v. R.*, 2012 SCC 14 *("Garron Family Trust*") (para. 7), "Canada, like many countries, has chosen residence as the principal basis for imposing income tax" and "the policy reason for that choice . . . is that a person who enjoys the legal, political and economic benefits of association with Canada should bear the appropriate share of the costs of that association".

[30] Subsection 2(1) of the Act provides that "income tax shall be paid, as required by this Act, on the taxable income of every person resident in Canada at any time in the year." Taxable income includes capital gains.

[31] Subsection 2(3) provides that a person who is not a resident of Canada and therefore not taxable under subsection 2(1) for a taxation year, must nonetheless pay tax on Canadian source income including the taxable portion of a capital gain realized on the disposition of property that meets the definition of "taxable Canadian property", unless that property also meets the definition of "treaty-protected property" in subsection 248(1) and is exempt from Canadian income tax by virtue of an international tax treaty. In that case, subparagraph 110(1)(f)(i) of the Act provides for a deduction of the amount that would otherwise be taxable.

[32] The Court must first determine whether the Appellant was a resident of Canada and it is not disputed that the common law test for making that determination is the central management and control test: *British Columbia Electric Railway v. R., [1945] C.T.C. 162 (Can, Ex. Ct.); Crossley Carpets (Canada) Ltd. v. Minister of National Revenue, (1967) 67 D.T.C. 522 (Can. Tax App. Bd.); St. Michael Trust Corp, opcit.,* affirmed by the Supreme Court of Canada in *Garron Family Trust, opcit.*

[33] Central management and control is usually found to reside in the board of directors, even though the directors may be under significant influence from

shareholders or others: *St. Michael Trust* (paras. 54-55), *Birmount Holdings Ltd. v. R.* (1978), 78 DTC 6254, at para. 33 ("*Birmount*") and *Bedford Overseas Freighters Ltd. v. Minister of National Revenue*, [1970] CTC 69, 53 ("*Bedford")*. However, if significant management decisions are taken by a person who is not a director, the place where the person resides or operates may be determined to be the residence of the corporation: *St. Michael Trust*, para. 56.

[34] As further explained by Sharlow JA, in *St. Michael Trust*:

> [54] As to the residence of a corporation, it was determined over 100 years ago that in considering that question, the jurisprudence relating to the residence of an individual was instructive. In the leading case of *De Beers Consolidated Mines Ltd. v. Howe*, [1906] A.C. 455, Lord Loreburn said this (at page 458):
>
> > In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills v. Nicholson* and the *Cesena Sulphur Co. v. Nicholson* [(1876) 1 Ex D. 428], now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.
> >
> > It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading.
>
> [55] It remains the case to this day that, for income tax purposes, the residence of a corporation is determined primarily by finding the location of the corporation's central management and control, which is a question of fact. The relevant factors include the legal indicia of the place where the corporation's management and control should be exercised (as disclosed, for example, by the corporation's governing law and constating documents). Where a corporation is actually managed and controlled by its directors in the manner contemplated by its governing law, the residence of a corporation usually will be determined as the

> place where the corporate directors exercise their management and control responsibilities.
>
> [56] However, that may not be the result if the facts disclose that the corporation is not in fact managed and controlled as its governing law requires. In that regard it is relevant to consider the nature of the decision making authority actually exercised by the directors. If significant management decisions are in fact taken by a person who is not a director, the place where that person resides or operates may be determined to be the residence of the corporation. Thus, for example, if it is established that management and control is exercised in fact by a shareholder operating out of another country, the corporation may be found to be resident where the shareholder resides: see Unit Construction Co. Ltd. v. Bullock, [1960] A.C. 351.
>
> [My emphasis.]

[35] In *Unit Construction Co. Ltd. v. Bullock, [1960] A.C. 351*, ("*Unit Construction*"), three corporations had been incorporated and carried on business in Kenya and the directors resided there. However, the House of Lords determined that the corporations were subsidiaries of an English corporation and held that they were effectively controlled in England by the directors of the parent company. It appears that credible evidence of *de facto* control from England was readily available to the Court.

[36] This is to be contrasted with the decision in *1143132 Ontario Ltd. v. The Queen, 2009 TCC 477* (relied upon by the Appellant) ("1143132 Ontario"), a transfer pricing case involving the sale of products to Canada and the United States that were channeled through a subsidiary incorporated in Barbados. Its limited role was to send bills and collect payments using agents, but there were no employees and the directors were inactive. The appellant claimed that the subsidiary was a resident of Canada. The Court did not agree and, applying a *de jure* test, found that "it was well accepted that it is the role of directors to manage a corporation" and that "in the absence of any evidence to the contrary", it was necessary "to proceed on the basis that it was the directors who managed the Corporation". The Court noted that there was insufficient evidence to establish that central management and control of the Barbados corporation was located in Canada.

[37] In the earlier case of *Bedford Overseas Freighters Ltd. v. Minister of National Revenue, 1970 CarswellNat 236* (Exchequer Court of Canada) ("*Bedford*"), the appellant argued that all major decisions were made by a non-resident shareholder and that the role of its directors in Canada was merely formal, procedural and clerical. The Court did not agree finding that (para. 53) "the

management of the business of the company and the controlling power and authority **over** its affairs were vested in its Canadian directors and they exercised that power and authority in Canada, albeit in large measure to carry out . . . instructions and policy decisions made elsewhere". More importantly, the Court concluded that the directors in Canada "attended to business and legal affairs of the company which were required in connection with and were essential to the company's business venture of owning and operating vessels."

[38] It is clear that the Court in *Bedford*, was convinced on the basis of the evidence before it that the *de jure* directors residing in Canada exercised effective management and control and that there was no reason to derogate from the basic proposition that directors are deemed to assume that role.

[39] In the more recent UK decision of *Wood v. Holden [2006] S.T.C. 443 (Eng. C.A.)*, ("*Wood*") a holding company had been incorporated in the Netherlands to facilitate the sale of shares of a UK operating company whose shareholders were also resident of the UK. The Dutch company had only one director who signed all documents in the Netherlands. The UK Court of Appeal concluded that the Dutch company was a resident in the Netherlands because its central management and control was located there. Lord Justice Chadwick indicated that:

> 27. In my view the judge was correct in his analysis of the law. In seeking to determine where "central management and control" of a company incorporated outside the United Kingdom lies, it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs are "usurped" – in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And, in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an "outsider" in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions and the role of an outsider who dictates the decisions which are to be taken. In that context an "outsider" is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through which the relevant constitutional organ fulfils its function.
>
> [My emphasis.]

[40] The Court of Appeal referred to an "outsider" who is "proposing, advising and influencing decisions" as opposed to "an outsider who dictates the decisions which are to be taken" by the company. It is the latter person "who is not a

participant in the formal process" or "constitutional organs" who can be said to have "usurped" the role of the *de jure* directors.

[41] The Court concluded that there was no evidence that anyone had "usurped" the role of the Dutch director (a bank) and in particular no evidence that someone had "dictated the decision which [it] was to make" (para. 41).

[42] Whether this Court adopts the use of the word "usurped" or not, it is apparent that cogent evidence is required to displace the well-established notion that *de jure* directors hold primary responsibility for the management and control of a company. Such evidence must clearly establish that the "outsider" (*Wood, supra.*) has "effective" or "independent" management and control.

[43] In this instance, Ms. Van Gorp admitted that she had no experience in farming and no prior business experience. She accepted the title of director to assist the Backxes and received remuneration of 500 Euros per year from 2007 to 2011, increasing to 1500 Euros thereafter. When she paid bills on behalf of the Appellant, she did so based on instructions from the Backxes, particularly her sister. When she delivered financial documents to either the Netherlands accountants or tax planners, she did so at the request of the Backxes. It was clear from her testimony that she did not actually participate in the decision to invest in the Farm Partnership in 1998. She merely implemented instructions. It is also clear that she did not participate in the decision to dispose of the Farm Partnership in 2009. When she executed the required documentation in the Netherlands, she did so to implement a decision made by the Backxes in Canada.

[44] This seems consistent with the testimony of Marian Backx who confirmed that she and her now deceased husband had decided to immigrate to Canada sometime in 1997 and had sought the assistance of tax advisors prior to the incorporation of the Appellant and disposal of the Netherlands Farm. Thereafter, the decision to acquire the farm operation in Ontario was made by the Backxes as was the decision to use the proceeds of sale of the Netherlands Farm held by the Appellant to acquire the dairy-farm operation in Canada and establish the Farm Partnership. That the Backxes relied on professional advisors does not change the fact that it was they, and not Ms. Van Gorp, who made those decisions.

[45] The Appellant argues that the decision to dispose of its interest in the Farm Partnership in 2009 was made on the advice of its professional advisors and was dictated in part by the terms of a settlement agreement reached with the Netherlands tax authority. I find that this does not in any way suggest that it was

Ms. Van Gorp, based on the advice of the Appellant's professional advisors, who decided to dispose of the partnership interest. It was the Backxes who made the final decisions.

[46] Marian Backx' testimony and indeed the evidence of various correspondence and communication with the Canadian-based advisors and the Netherlands-based accountants and tax advisors, all suggest quite clearly that it was the Backxes who assumed effective and independent control of the Appellant. In most if not all instances, Ms. Van Gorp was not even copied with the correspondence. This quite clearly suggests that she was a mere nominee who carried out clerical and administrative functions on behalf of the Backxes.

[47] On that basis, I conclude that the Appellant was a resident of Canada at the relevant time and thus liable for tax under Part 1 of the Act.

B. Are there any treat implications?

[48] One of the objects of the *Canada-Netherlands Income Tax Convention* (signed on May 27, 1986, as amended by Protocols, and also known as the *Convention between Canada and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*) is the avoidance of double taxation. It does so by exempting residents of one of the contracting States from income taxes imposed by the other on specified income and gains, subject to numerous conditions.

[49] For the purposes of this appeal, Article 4 is relevant since it addresses the issue of residence:

> 1. For the purposes of this Convention, the term "resident of one of the States" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.
>
> . . .
>
> 3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both States, the competent authorities of the States shall endeavour to settle the question by mutual agreement having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall be deemed not to be a resident of either State for the purposes of Articles 6 to 21 inclusive and Articles 23 and 24.

[50] The term "resident of one of the States" refers to a person who, "under the laws that State" (which I understand to mean Canada or the Netherlands) "is liable to tax therein by reason of his . . . place of management . . ." and this Court has already concluded that effective management and control of the Appellant was located in Canada. Article 13 refers to "Capital Gains" but paragraphs 1 to 4 do not apply because the Appellant is a resident of Canada. Article 13(7) of the Treaty states that "[g]ains from the alienation of any property . . . shall be taxable only in the State of which the alienator is a resident." As such, Canada is authorized to tax the Appellant's capital gain.

[51] However, the Appellant argues that it is a resident of the Netherlands where it is domiciled (though no expert evidence was lead on the issue of Dutch law) in which case it is possible to conclude that the Appellant "is a resident of both States". If the Appellant is liable for tax in both Canada and the Netherlands on the subject capital gain, then the competent authorities (as described in Article 4(3) of the Tax Treaty), and not this Court, must resolve the issue: *McFadyen v. the Queen*, [2000] 4 CTC 2573, para. 154; *Malcolm Fisher v. the Queen*, [1995] CTC 2011, para. 46.

[52] Since I have already concluded that the Appellant was a resident of Canada for tax purposes, I also conclude that the Tax Treaty does not have a direct bearing on this appeal.

C. Was there a deemed disposition of the Farm Partnership?

[53] As noted above, the Appellant argues that if the Court concludes that it was a resident of Canada, it must also determine the effective date, noting that the Respondent has refused to take a position on this issue other than to say that the Appellant was likely a dual resident or that the question is not relevant.

[54] Subsection 128.1(1) of the Act addresses changes in residence and provides as follows:

> 128.1 (1) For the purposes of this Act, where at a particular time a taxpayer becomes resident in Canada,
>
> . . .
>
> (b) the taxpayer is deemed to have disposed, at the time (in this subsection referred to as the "time of disposition") that is immediately before the time that is immediately before the particular time, of each property owned by the taxpayer, other than, if the taxpayer is an individual,

> (i) property that is a taxable Canadian property,
>
> (ii) property that is described in the inventory of a business carried on by the taxpayer in Canada at the time of disposition,
>
> (iii) property included in Class 14.1 of Schedule II to the *Income Tax Regulations*, in respect of a business carried on by the taxpayer in Canada at the time of disposition, and
>
> (iv) an excluded right or interest of the taxpayer, other than an interest described in paragraph (k) of the definition excluded right or interest in subsection (10),
>
> for proceeds equal to its fair market value at the time of disposition;
>
> (c) the taxpayer shall be deemed to have acquired at the particular time each property deemed by paragraph 128.1(1)(b) to have been disposed of by the taxpayer, at a cost equal to the proceeds of disposition of the property;

[55] I do not propose to elaborate on this issue other than to indicate that the subject capital gain was realized in 2009 (the taxation year under appeal) and I have already concluded that under Canadian law and for tax purposes, the Appellant was a resident of Canada during that taxation year. I agree with the Respondent, that this conclusion does not trigger a deemed disposition or an analysis of subsection 128.1(1), since there is no evidence that the Appellant actually ceased to be a resident of the Netherlands or was continued under Canadian law. As indicated by the Appellant itself, its corporate existence was intentionally maintained in the Netherlands.

[56] This is to be contrasted with the personal situation of the Backxes who appear to have severed their ties with the Netherlands in 1998 when they immigrated to and became residents of Canada.

[57] In the end, I find that it is more likely that the Appellant became a resident of Canada for tax purposes as early as 1998 (when the Backxes moved to Canada) and consequently, that the adjusted cost base of the Farm Partnership interest was correctly calculated from that date.

[58] The Appellant argues that it filed tax returns and paid taxes in Canada as a non-resident from 1998 to 2009 and that the Minister accepted those returns and issued assessments on that basis. The Appellant acknowledged that the Minister is not bound by those assessments. It is clear that the decision to file tax returns as a non-resident was made by the Appellant and not the Minister. As a result I find

that nothing turns of this argument. I will simply reiterate that it is more likely that the Appellant became a resident of Canada for tax purposes as early as 1998.

D. Does Part XIV tax apply?

[59] Since the Respondent has conceded that the Appellant should not have been assessed concurrently under Part 1 as a resident and under Part XIV as a non-resident and since I have already concluded that the Appellant was a resident of Canada during the subject taxation year, then clearly Part XIV tax does not apply and that part of the assessment should be vacated.

V. Conclusion

[60] For all the foregoing reasons, I would allow the appeal and refer the matter back to the Minister for reconsideration and reassessment on the basis that the Appellant is liable for Part 1 tax but not Part XIV tax.

[61] All circumstances considered, I exercise my discretion not to award costs.

Signed at Ottawa, Canada, this **25**th day of July 2018.

"Guy Smith"

Smith J.

SCHEDULE "A"

2015-1302(IT)G
TAX COURT OF CANADA

BETWEEN:

LANDBOUWBEDRIJF BACKX B.V.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS

The parties agree that, for the purposes of this proceeding only, the following facts may be accepted by the Court as true without the necessity of calling evidence as proof and without prejudice to the right to call evidence which does not contradict the facts below:

1. Landbouwbedrijf Backx B.V. (the "Appellant") was incorporated in the Netherlands on October 7, 1997.

2. Since May 8, 1998, the Appellant's address has been 91 Dorpsstraat 5113 TD Ulicoten Netherlands.

3. At the time of its incorporation and at all times material to this appeal, the Appellant's shareholders were Michiel and Marian Backx (the "Backxes").

4. The Backxes were married until Michiel's death on March 7, 2014.

5. At the time of its incorporation, the Backxes also were the Appellant's sole directors.

6. The Backxes resigned as the Appellant's directors on May 8, 1998.

7. The Backxes appointed Marian Backx's sister, Anna van Gorp, as the Appellant's sole director on May 8, 1998.

8. Since being appointed as director, Anna van Gorp has been a resident of the Netherlands. Her current address is 91 Dorpsstraat 5113 TD Ulicoten Netherlands.

9. Prior to 2007, Ann van Gorp was not compensated for her work as a director of the Appellant.

10. Since 2007, Anna van Gorp has been compensated for her work as a director of the Appellant. From 2007 until 2011, Anna van Gorp received 500 Euros per year. Since 2012, Anna van Gorp has received 1,500 Euros per year.

11. The Appellant has no employees.

12. The Backxes immigrated to Canada in May 1998.

13. Prior to immigrating to Canada, the Backxes owned and operated a farm in the Netherlands.

14. Michiel Backx started farming in the Netherlands in partnership with his father in 1979. The Backxes purchased the Netherlands farm partnership from Michiel's parents in 1994.

15. The Backxes incorporated the Appellant to preserve capital to expand the Netherlands farm and transferred ownership of the Netherlands farm partnership to the Appellant.

16. As a result of the transfer of assets from the Netherlands farm partnership to the Appellant, the Appellant created a life annuity (the "Annuity") payable to the Backxes. The Annuity has a 46 year term.

17. Prior to immigrating to Canada in May 1998, the Backxes sold the bulk of the farming assets held by the Netherlands farm partnership and placed the proceeds of the sale with the Appellant, the entity that owned the assets at that time.

18. After immigrating to Canada, the Backxes purchased an existing dairy farm operation in Strathroy, Ontario, on June 15, 1998, and established Backx Dairy Farms as a partnership (the "Farm Partnership").

19. The Backxes, in partnership with each other, owned a 51% interest in the Farm Partnership.

20. The Appellant owned a 49% interest in the Farm Partnership (the "Partnership Interest").

21. The Appellant used the proceeds from the sale of the Netherlands farm assets as the capital for the start-up of the Farm Partnership.

22. As of December 31, 1998, the Appellant had contributed a total of $2,975,000 to the Farm Partnership.

23. The Appellant also made contributions of movable equipment to the Farm Partnership, as of December 31, 1998.

24. The Appellant used its share of the Farm Partnership profits to pay the Annuity to the Backxes.

25. In 2006, the Backxes dissolved their partnership and thereafter each individually owned a 25.5% interest in the Farm Partnership.

26. On November 9, 2009, the Backxes incorporated Backx Dairy Farms Limited ("Backx Limited"). At the time of incorporation, the Backxes were the sole common shareholders, directors, and officers of Backx Limited.

27. On November 30, 2009, the Appellant sold the Partnership Interest to Backx Limited for a purchase price of $4,500,000 (the "Sale").

28. The Memorandum of Agreement pertaining to the Sale was signed on behalf of the Appellant by the Appellant's sole director, Anna van Gorp, in the Netherlands.

29. The purchase price from the Sale was paid by promissory note.

30. By letter dated December 9, 2009, Backx Limited filed a Notice with the Minister of National Revenue (the "Minister") pursuant to subsection 116(5.02) of the *Income Tax Act* (Canada) (the "Act") to disclose its purchase of the Partnership Interest from the Appellant and its position that the Partnership Interest was a treaty protected property for the purpose of subsection 116(6.1) of the Act.

31. By letter dated January 27, 2011, the Minister replied stating that the Partnership Interest was a treaty protected property under section 248(1) of the Act and that Backx Limited was not required to pay tax under subsection 116(5) in respect of the transaction.

32. On January 1, 2010, Backx Limited purchased the Backxes's combined 51% interest in the Farm Partnership for $862,998. As a result, Backx Limited owned 100% of the Farm Partnership.

33. The Farm Partnership was wound up and Backx Limited carries out all of the farm operations.

34. The tax return filed by the Appellant in respect of the 2009 tax year was the last Canadian tax return that the Appellant has filed.

35. The Appellant continues to hold and make payments on the Annuity to the Backxes.

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DATED this 5th day of June, 2017

McKENZIE LAKE LAWYERS LLP
Per:

Linda M. Smits
Solicitor for the Appellant

DATED this 5th day of June, 2017

William F. Pentney, Q.C.
Deputy Attorney General of Canada
Per:

Joanna Hill
Counsel for the Respondent

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DATE OF AMENDED REASONS FOR JUDGMENT:	**July 25, 2018**
DATE OF JUDGMENT:	July 17, 2018

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