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The Bijural Revision Services Unit (Taxation and Comparative Law) of the Legislative Services Branch of the Department of Justice is pleased to keep you posted on the most recent harmonization and bijuralism news.

Jurisprudence

Cautionary Tales for Taxpayers that Cease to Exist in Private Law

The legal status and capacity of entities rests in large measure within the sphere of private law. Two recent decisions illustrate the impact of this on the application of the federal *Income Tax Act*,[1] and serve as cautionary tales for taxpayers and their advisors.

In *S. Cunard & Company Limited v. Attorney General of Canada*,[2] the Federal Court dismissed the application for judicial review of the Minister of National Revenue's decision denying the taxpayer's request for a late filing of Form T2057 under subsection 85(7.1). The problem: the election must be made jointly by the vendor and the purchaser, and the purchaser (612482 NB Limited) was voluntarily dissolved in July 20, 2004.

The Minister's delegate was prepared to accept a late-filed election on condition that it was established that the purchaser had the legal capacity to execute the election, notwithstanding its dissolution in 2004.[3] However, efforts to revive the dissolved purchaser were unsuccessful. New Brunswick's *Business Corporations Act*[4] does not provide rules for the revival of corporations which have been voluntarily dissolved.

In *Clearwater Seafoods Holdings Trust v. The Queen*,[5] the appellant sought an order substituting Clearwater Seafoods Incorporated for the appellant in appeals before the Tax Court of Canada. The appeals had been filed by the appellant trust in June 2011. In October of the same year, the units of the trust were acquired by Clearwater Seafoods Incorporated under a plan of arrangement and the trust was wound up. Clearwater Seafoods Incorporated acquired the assets and assumed the liabilities of the income trust.

D'Arcy J. of the Tax Court of Canada concluded that the requested substitution could not be made and dismissed the taxpayer's motion. He observed that neither the Tax Court of Canada Rules nor the Act allow for the requested substitution. Turning then to the common law, Justice D'Arcy concluded that:

> *[29] In my view, an agreement by which a party assumes another party's tax liability cannot be binding on the Minister.*
>
> *(...)*
>
> *[31] In* National Trust Co. v. Mead, [[1990] 2 SCR 410] *Wilson J. wrote the following:*
>
> > *The common law has long recognized that while one may be free to assign contractual benefits to a third party, the same cannot be said of contractual obligations. This principle results from the fusion of two fundamental principles of contract law: 1) that parties are able to make bargains with the parties of their own choice*

[1] RSC 1985, c 1 (5th Supp), as amended, hereinafter the "Act"). Unless otherwise stated, statutory references throughout are to the Act.
[2] 2012 FC 683.
[3] *Ibid* at para [10].
[4] SNB 1981, c B-9.1, section 136.
[5] 2012 TCC 186.

> *(freedom of contract); and 2) that parties do not have to discharge contractual obligations that they had no part in creating (privity of contract). (. . .)*
>
> *[32] That Seafoods Inc. may now have the legal obligation, as between itself and the Trust, to pay any income tax debt of the Trust does not change the fact that any such debt is still owed by the Trust to the Crown. Further, the assumption/assignment of any such debt does not result in the transfer by the Trust of its rights of appeal in respect of the relevant assessments.*

The Tax Court declined to address the further question of whether the Clearwater Seafoods Holdings Trust still had standing to pursue the appeal in its own right.[6]

The *Clearwater Seafoods* decision is under appeal.[7]

A Succession is not a Trust

Subsection 116(3) of the Act requires non-resident taxpayers who dispose of certain taxable Canadian property to provide notice of such disposition to the Minister not later than 10 days following the disposition. At issue in *Lipson v. The Queen*[8] was whether two non-resident individuals (the "Taxpayers") were required to give such notice on receiving distributions from a Quebec succession.

In 2003, 2004, 2005 and 2007, the taxpayers received distributions from the succession arising on their mother's death. The deceased was a resident of Quebec at the time of her death, and her succession was established under, and governed by, the Civil Code of Québec. The Taxpayers filed subsection 116(3) notices of disposition only for the 2007 distribution. In 2008, the Minister assessed penalties[9] against the Taxpayers for failing to provide the required notices of disposition regarding the 2004 and 2005 distributions. None of the distributions triggered Canadian tax consequences in and of themselves.[10]

The Minister's position was that on receiving capital distributions from the succession the Taxpayers had disposed of a "taxable Canadian property" that was a capital interest in a trust, and were therefore subject to the notice requirement. The central issue was whether a person's right as an heir or legatee under a Quebec succession is a "capital interest in a trust" thus bringing such right within the definition of taxable Canadian property.[11]

Justice Jorré began by stating that, under the Civil Code of Québec, the concepts of trust and succession are clearly different, and suggested that even in common law jurisdictions, it is not clear that an estate arising on death automatically gives rise to a trust.[12]

The Court then proceeded with its analysis of subsection 104(1) of the Act:[13]

> *In this Act, a reference to a trust or estate (in this subdivision referred to as a "trust") shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property, but ...*
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> ---
>
> *Dans la présente loi, la mention d'une fiducie ou d'une succession (appelées « fiducie » à la présente sous-section) vaut également mention, sauf indication contraire du contexte, du fiduciaire, de l'exécuteur testamentaire, de l'administrateur successoral, du liquidateur de succession, de l'héritier ou d'un autre*

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[6] *Ibid* at para [34] ff.
[7] A-342-12.
[8] 2012 TCC 20.
[9] Under subsection 162(7).
[10] *Ibid* para [36].

[11] During the relevant taxation years (2004 and 2005), the subsection 248(1) definition of "taxable Canadian property" included, at paragraph (*h*), "a capital interest in a trust (other than a unit trust) resident in Canada." Note that the definition of taxable Canadian property was amended significantly by SC, 2010, c 12, s 22). After March 4, 2010, capital interest in a trust resident in Canada will only be a taxable Canadian property if certain Canadian asset thresholds are met: see paragraph (*d*) of the current definition.
[12] Supra note 8 at para [17] (see especially footnote 2).
[13] In interpreting subsection 104(1), the Court read the term "estate" in the English version as comprising Quebec successions. See footnote 3 of the judgment, *supra* note 8, where Justice Jorré writes: "I note that the French language text uses the word 'succession' for the English word 'estate'. In reading the two languages together, it is clear that the reference to an estate also includes a succession in Québec."

> *représentant légal ayant la propriété ou le contrôle des biens de la fiducie. Toutefois …*

Justice Jorré also made a detailed analysis of related definitions in the Act; of the particular challenge of imposing tax obligations on trusts, estates and successions (none of which are legal entities); and of the purpose of subsection 104(1) in that context.

The Court rejected the Crown's argument that subsection 104(1) of the Act defines "trust" for tax purposes as including estates and successions. According to Justice Jorré, the phrase "a reference to a trust or estate (in this subdivision referred to as a "trust")…" serves a practical purpose, intended to simplify drafting, and does not equate trusts and estates for all purposes of the Act.[14]

Based on the foregoing, the Tax Court of Canada concluded that the Taxpayers did not dispose of taxable Canadian property that is a capital interest in a trust when they received distributions from the Quebec succession. As such, they had no obligation to provide the notice under subsection 116(3) and the Minister's penalties were improperly imposed.

The Crown has not appealed this decision.[15]

Update - Envision Credit Union

On March 19th, the Supreme Court of Canada heard the appeal of Envision Credit Union.[16] At issue is whether the undepreciated capital cost balances of predecessor corporations flow through to the merged entity in cases where the merger is not subject to the rules at subsection 87(1) of the Act. [17]

Legislation

Bill C-48

On March 27th, the Standing Committee on Finance presented its report on Bill C-48 to the House of Commons. Part 4 of the bill proposes bijural amendments to the *Income Tax Act* and Part 5 includes proposals that ease the common law requirements for gifts to qualified donees.[18]

Publication

Tax Law is not a Silo

The *What's New* feature on the Federal Court of Appeal's web site contains current, topical information. Among the items featured are speaking notes of Mr Justice Evans entitled "Judicial Confessions or How I Learned to Love the *Income Tax Act*," in which he rightly notes that tax law "is not a silo," and describes the impact of bijuralism, stating as follows,

> *Tax law is […] parasitic, in the sense that it must be applied to relationships and transactions governed by other bodies of law: contract, property, and corporate law, for example*.[19]

[14] Supra note 8 at paras [27]-[29].
[15] See however the CRA comments at the STEP Canada 2012 National Conference Roundtable (Question 11).
[16] Docket # 34619.
[17] For a summary of the decision appealed from see: "Relevance of Corporate Law Principles Affirmed" *The Link*, No. 38 (June 2012) 3-4.
[18] See "Bijural Amendments Back on Parliament's Agenda" and "Easing of Common Law Requirement for Gifts in Certain Circumstances" in *The Link*, No. 39 (January 2013) 1-2.
[19] Speaking Notes prepared by the Honourable John M. Evans for an address to the annual meeting of the Ontario Bar Association, Tax Law Section on June 10, 2011 in Toronto, Ontario.