

**2009 IFA TRAVELLING LECTURESHIP ON ROYALTIES BY NATHAN BOIDMAN
APPENDICES TO LECTURE OUTLINE**

APPENDIX 21 (RE PARAGRAPH 212(1)(d))

Material:

The text of Paragraph 212(1)(d) – Current Law

The text of proposed amendments as set out in Bill C-10

212.

(1) Tax -- Every non-resident person shall pay an income tax of 25% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,

(d) **rents, royalties, etc.** -- rent, royalty or similar payment, including, but not so as to restrict the generality of the foregoing, any payment

(i) for the use of or for the right to use in Canada any property, invention, trade-name, patent, trade-mark, design or model, plan, secret formula, process or other thing whatever,

(ii) for information concerning industrial, commercial or scientific experience where the total amount payable as consideration for that information is dependent in whole or in part on

(A) the use to be made of, or the benefit to be derived from, that information,

(B) production or sales of goods or services, or

(C) profits,

(iii) for services of an industrial, commercial or scientific character performed by a non-resident person where the total amount payable as consideration for those services is dependent in whole or in part on

(A) the use to be made of, or the benefit to be derived from, those services,

(B) production or sales of goods or services, or

(C) profits,

but not including a payment made for services performed in connection with the sale of property or the negotiation of a contract,

(iv) made pursuant to an agreement between a person resident in Canada and a non-resident person under which the non-resident person agrees not to use or not to permit any other person to use any thing referred to in subparagraph (i) or any information referred to in subparagraph (ii), or

(v) that was dependent on the use of or production from property in Canada whether or not it was an instalment on the sale price of the property, but not including an instalment on the sale price of agricultural land,

but not including

(vi) a royalty or similar payment on or in respect of a copyright in respect of the production or reproduction of any literary, dramatic, musical or artistic work,

(vii) a payment in respect of the use by a railway company or by a person whose principal business is that of a common carrier of property that is railway rolling stock as defined in the definition "rolling stock" in section 2 of the *Railway Act*

(A) if the payment is made for the use of that property for a period or periods not expected to exceed in the aggregate 90 days in any 12 month period, or

(B) in any other case, if the payment is made pursuant to an agreement in writing entered into before November 19, 1974;

(viii) a payment made under a *bona fide* cost-sharing arrangement under which the person making the payment shares on a reasonable basis with one or more non-resident persons research and development expenses in exchange for an interest in any or all property or other things of value that may result therefrom,

(ix) a rental payment for the use of or the right to use outside Canada any corporeal property,

(x) any payment made to a person with whom the payer is dealing at arm's length, to the extent that the amount thereof is deductible in computing the income of the payer under Part I from a business carried on by the payer in a country other than Canada, or

(xi) a payment made to a person with whom the payer is dealing at arm's length for the use of or the right to use property that is

(A) an aircraft,

(B) furniture, fittings or equipment attached to an aircraft, or

(C) a spare part for property described in clause (A) or (B);

Proposed Amendment -- 212(1)(d)(iv)

(iv) unless paragraph (i) applies to the amount, made pursuant to an agreement between a person resident in Canada and a non-resident person under which the non-resident person agrees not to use or not to permit any other person to use any thing referred to in subparagraph (i) or any information referred to in subparagraph (ii), or

Application: Bill C-10 (Second Senate Reading December 4, 2007; requires re-introduction) (Part 2 -- technical), subsec. 179(5), will amend subpara. 212(1)(d)(iv) to read as above, applicable to amounts paid or credited after October 7, 2003.

Technical Notes: Paragraph 212(1)(d) describes various amounts, in the nature of rent, royalties and similar payments, on which tax under Part XIII of the Act is imposed. Subparagraphs 212(1)(d)(vi) through (xi) list payments to which the tax does not apply. Three changes have been made to paragraph 212(1)(d).

First, subparagraph 212(1)(d)(iv), which concerns payments made in respect of an agreement between a person resident in Canada and a non-resident person under which the non-resident person agrees not to use or not to permit any other person to use any thing referred to in subparagraph (d)(i), is amended so that it does not apply to certain restrictive covenant amounts to which new paragraph 212(1)(i) applies.

Proposed Amendment -- 212(1)(d)(viii), (ix)

Application: Bill C-10 (Second Senate Reading December 4, 2007; requires re-introduction) (Part 3 -- bijuralism), subsec. 268(2), will amend subparas. 212(1)(d)(viii) and (ix) by substituting "interest, or for civil law a right," for "interest" in subpara. (viii) and "tangible, or for civil law corporeal, property" for "corporeal property" in subpara. (ix), to come into force on Royal Assent.

Technical Notes: See under 12(4).

Proposed Addition -- 212(1)(d)(xi)(D)

(D) air navigation equipment utilized in the provision of services under the *Civil Air Navigation Services Commercialization Act* or computer software the use of which is necessary for the operation of that equipment that is used by the payer for no other purpose;

Application: Bill C-10 (Second Senate Reading December 4, 2007; requires re-introduction) (Part 2 -- technical), subsec. 179(6), will add cl. 212(1)(d)(xi)(D), applicable to payments made after July 2003.

Technical Notes: Second, subparagraph 212(1)(d)(xi), which currently provides that Part XIII tax does not apply to payments made to an arm's length person for the use of property that is an

aircraft, certain attachments thereto as well as to spare parts for such property, is amended, applicable after July 2003, to also apply to air navigation equipment utilized in the provision of services under the *Civil Air Navigation Services Commercialization Act*, and to computer software that is necessary to the operation of that equipment that is used by the payer for no other purpose.

Letter from Dept. of Finance, May 13, 2003:

Dear [xxx]

This letter responds to submissions received in respect of a financing transaction in which [xxx] proposes to enter into a lease leaseback arrangement with U.S. investors in respect of its [xxx].

In order to facilitate this financing structure you have asked that the exemption from non-resident withholding tax presently available for rent payments made in respect of [aircraft] and attached equipment be extended to [xxx]. You have submitted that such an exemption would be consistent with the current exemption for [aircraft] and is required to facilitate [xxx] participation in a financing structure that delivers U.S. tax benefits for investors outside of Canada.

Based on your assurance that the proposed lease financing transaction referred to in your submission meets all of the requirements of the U.S. Internal Revenue Code, I am prepared to recommend Parliament approve an amendment to the *Income Tax Act* to provide for an expansion of the list of equipment, presently eligible for exemption from non-resident withholding tax under section 212(1)(d) of the *Income Tax Act*, to include [xxx] utilized pursuant to the [xxx]. If Parliament approves this recommendation, it would have effect for the 2003 and subsequent taxation years.

Yours very truly,

John Manley, Minister of Finance

Proposed Addition -- 212(1)(d)(xii)

(xii) an amount to which subsection (5) would apply if that subsection were read without reference to "to the extent that the amount relates to that use or reproduction";

Application: Bill C-10 (Second Senate Reading December 4, 2007; requires re-introduction) (Part 2 -- technical), subsec. 179(7), will add subpara. 212(1)(d)(xii), applicable to 2000 *et seq.*

Technical Notes: Third, new subparagraph 212(1)(d)(xii) clarifies that subsection 212(5), which is amended as described below, is the sole provision in Part XIII that applies the tax to payments for rights in or to use a film or video that is used or reproduced in Canada. This change applies for the 2000 and subsequent taxation years.