

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

APPENDIX 25 (WITHHOLDING AGENT FACTORS)

Material:

Income Tax Application Rule 10(6)

Income Tax Act, Section 215

Excerpt from Information Circular 76-12R6, p. 1-2

Limitations on Benefits - Article XXIX A

Legislation --- Income Tax Application Rules, R.S.C. 1985, c. 2, s. 10

Application of Part XIII of amended Act

10.

(6) Limitation on non-resident's tax rate -- Notwithstanding any provision of the amended Act, where an agreement or convention between the Government of Canada and the government of any other country that has the force of law in Canada provides that where an amount is paid or credited, or deemed to be paid or credited, to a resident of that other country the rate of tax imposed thereon shall not exceed a specified rate,

(a) any reference in Part XIII of the amended Act to a rate in excess of the specified rate shall, in respect of such an amount, be read as a reference to the specified rate; and

(b) except where the amount can reasonably be attributed to a business carried on by that person in Canada, that person shall, for the purpose of the agreement or convention in respect of the amount, be deemed not to have a permanent establishment in Canada.

Exception -- corporate immigration

(1) Withholding and remittance of tax -- When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Part were read without reference to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.

Proposed Amendment -- 215(1)

215.

(1) Withholding and remittance of tax -- When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Act were read without reference to subparagraph 94(3)(a)(viii) and to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.

Application: Bill C-10 (Second Senate Reading December 4, 2007; requires re-introduction) (Part 1 -- NRTs and FIEs), s. 38, will amend subsec. 215(1) to read as above, applicable to trust taxation years that begin after 2006, and to trust taxation years that begin

- (a) after 2000, if the trust makes a valid election under para. (a) of the Application of the amendment to s. 94;
- (b) after 2001, if the trust makes a valid election under para. (a) or (b) of the Application of the amendment to s. 94;
- (c) after 2002, if the trust makes a valid election under any of paras. (a) to (c) of the Application of the amendment to s. 94;
- (d) after 2003, if the trust makes a valid election under any of paras. (a) to (d) of the Application of the amendment to s. 94;
- (e) after 2004, if the trust makes a valid election under any of paras. (a) to (e) of the Application of the amendment to s. 94; and
- (f) after 2005, if the trust makes a valid election under any of paras. (a) to (f) of the Application of the amendment to s. 94.

Technical Notes: Subsection 215(1) provides that, where a resident of Canada pays or is deemed to pay an amount to a non-resident person in respect of which the non-resident person is liable for withholding tax under Part XIII, the payer is required to withhold the tax from the amount and remit it to the Receiver General on behalf of the non-resident.

Subsection 215(1) is amended to ensure that, where an amount is paid or credited (or deemed to be paid or credited) to a trust that is deemed, by paragraph 94(3)(a), to be resident in Canada for the purpose of determining the trust's liability for tax under Part XIII, the payer is required to withhold the tax that would otherwise be payable by the trust and to remit it to the Receiver General.

For more detail on the application of Part XIII to trusts deemed, under paragraph 94(3)(a), to be resident in Canada, and to payers of amounts to such trusts, see the commentary on subsection 94(3) and (4) and subsections 216(4.1).

This amendment applies to trust taxation years that begin after 2006. It also applies to trust taxation years that begin

- * after 2000 if the trust makes a valid election under the coming-into-force provision of new section 94,
- * after 2001 if the trust makes a valid election under the coming-into-force provision of new section 94,
- * after 2002 if the trust makes a valid election under the coming-into-force provision of new section 94,
- * after 2003 if the trust makes a valid election under the coming-into-force provision of new section 94,
- * after 2004 if the trust makes a valid election under the coming-into-force provision of new section 94, and
- * after 2005 if the trust makes a valid election under the coming-into-force provision of new section 94.

(1.1) Exception -- corporate immigration -- Subsection (1) does not apply in respect of a dividend deemed to be paid under paragraph 128.1(1)(c.1) by a corporation to a non-resident corporation with which the corporation was dealing at arm's length.

(2) Idem [amount paid by agent] -- Where an amount on which an income tax is payable under this Part is paid or credited by an agent or other person on behalf of the debtor either by way of redemption of bearer coupons or warrants or otherwise, the agent or other person by whom the amount was paid or credited shall, notwithstanding any agreement or law to the contrary, deduct or withhold and remit the amount of the tax and shall submit therewith a statement in prescribed form as required by subsection (1) and shall thereupon, for purposes of accounting to or obtaining reimbursement from the debtor, be deemed to have paid or credited the full amount to the person otherwise entitled to payment.

(3) Idem [amount paid to agent] -- Where an amount on which an income tax is payable under this Part was paid or credited to an agent or other person for or on behalf of the person entitled to payment without the tax having been deducted or withheld under subsection (1), the agent or other person shall, notwithstanding any agreement or law to the contrary, deduct or withhold therefrom the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the person entitled to payment in payment of the tax and shall submit therewith a statement in prescribed form, and the agent or other person shall thereupon, for purposes of accounting to the person entitled to payment, be deemed to have paid or credited that amount to that person.

(4) Regulations creating exceptions -- The Governor in Council may make regulations with reference to any non-resident person or class of non-resident persons who carries or carry on business in Canada, providing that subsections (1) to (3) are not applicable to amounts paid to or credited to that person or those persons and requiring the person or persons to file an annual

return on a prescribed form and to pay the tax imposed by this Part within a time limited in the regulations.

(5) Regulations reducing deduction or withholding -- The Governor in Council may make regulations in respect of any non-resident person or class of non-resident persons to whom any amount is paid or credited as, on account of, in lieu of payment of or in satisfaction of, any amount described in any of paragraphs 212(1)(h), (i) to (m) and (q) reducing the amount otherwise required by any of subsections (1) to (3) to be deducted or withheld from the amount so paid or credited.

(6) Liability for tax -- Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.

Source:

CCH Tax/Federal Income Tax/Bulletins, Circulars and Rulings/Information Circulars/IC 76-12R6
Applicable Rate of Part XIII Tax on Amounts Paid or Credited to Persons in Countries with which Canada has a Tax Convention

IC 76-12R6**Applicable Rate of Part XIII Tax on Amounts Paid or Credited to Persons in Countries with which Canada has a Tax Convention**

November 02, 2007 [French Version]

APPLICATION

This circular replaces Information Circular 76-12R5 dated November 26, 2001. The information in this circular relates to existing legislation and to conventions that are in force or that are signed but not yet in force, as of February 28, 2006.

GENERAL INFORMATION

INTRODUCTION

1. This circular is for the information and guidance of persons who pay or credit amounts subject to tax under Part XIII of the *Income Tax Act* (the "Act") of Canada to residents in countries with which Canada has a tax convention; such residents are either the beneficial owners (see ¶ 4 below) of such amounts or are the non-resident agents or nominees of those beneficial owners. It is also intended for Canadian residents who pay amounts subject to Part XIII tax to a Canadian resident agent or nominee of the non-resident beneficial owners if the payer knows that the beneficial owners are non-residents in countries with which Canada has a tax convention.

It is the payer's responsibility to withhold and remit Part XIII tax at the appropriate rate and the payer is liable to the Crown for any deficiency. Therefore, it is important for a payer to refer to the specific convention or protocol to determine its effective date (see Appendix E for effective dates) as well as to verify the applicable rate for applying and remitting the Part XIII withholding tax on amounts paid/credited.

Taxable amounts paid or credited to payees in countries with which Canada does not have a tax convention are subject to the withholding tax rates provided for in Part XIII of the Act. The same applies to payees in countries with which Canada has a tax treaty that is not yet in effect.

For instructions on how and when to: remit the withholding tax; report and reduce the amount of the withholding, and, obtain refunds, see Part II of the current version of Information Circular 77-16, *Non-Resident Income Tax*. (See also footnotes 48 to 50 for pension and annuity payments.)

Note — Since the release of the earlier version of this circular, the Department of Finance has adopted the practice of making Canada's tax conventions available online at http://www.fin.gc.ca/treaties/treatystatus_e.html. This development has significantly enhanced the ease with which taxpayers can access treaty information. The footnotes to the Appendices of this Circular have, in many cases, been shortened to reflect this new information source.

RATE OF TAX TO BE WITHHELD

2. Appendices A & C indicate the applicable withholding rates for various amounts paid or credited to

persons who reside in countries with which Canada has a tax convention in force. Appendices B & D indicate the applicable withholding rates for amounts paid or credited to persons who reside in countries with which Canada has negotiated or renegotiated a tax convention that has been signed but has not entered yet into force. Appendix E provides the various relevant dates for the tax conventions in force, i.e. when a convention was signed, when it entered into force and when it took effect. Appendix F lists countries that are in the process of negotiating a tax convention with Canada or renegotiating an existing one. For a country listed in Appendix B, D or F, tax should generally be withheld at the rate of 25%, unless a tax convention between Canada and that country already exists and the appropriate rate is specified in Appendix A or C. See ¶ 3 also. **See the relevant statutory provisions of the Act for specific exemptions from the withholding tax.**

NEGOTIATION AND RENEGOTIATION OF TAX CONVENTIONS

3. It should be noted that the negotiation of new tax conventions and renegotiation of existing conventions between Canada and other countries is an ongoing process. Therefore, the Appendices may not reflect the current status of every convention, particularly Appendix F that may not list all the conventions in the process of being negotiated or renegotiated. *It should also be noted that in some cases, the provisions of the tax conventions may be effective retroactively.* As indicated in Appendix E, the entry into force of new and renegotiated conventions and the application date for the new withholding rates are announced by news releases issued by the Department of Finance. Refer to the Department of Finance website at http://www.fin.gc.ca/treaties/tre-atystatus_e.html, for the current status of convention negotiations.

BENEFICIAL OWNERSHIP

4. The payer can accept the name and address of the payee as being that of the beneficial owner unless there is a reasonable cause to suspect otherwise. While not exhaustive, the presence of any of the following criteria will be regarded as reasonable cause to question whether the payee is the beneficial owner:

- (a) the payee is known to act, even occasionally, as an agent or nominee (other than an agent or nominee described in ¶s 9);
- (b) the payee is reported as "in care of" another person, or "in trust";
- (c) the mailing address provided for payment of interest or dividends is different from the registered address of the "owner"

In any doubtful case, a certificate, as described in ¶ 5(b), is required to be completed and forwarded to the payer by the payee in order that a lower rate of withholding tax, in accordance with a tax convention, can be applied. Otherwise the 25% rate will apply.

The Canada Revenue Agency (CRA) will accept the payee as beneficial owner of amounts paid to non-residents if the payee is an insurance corporation or pension trust that invests solely on its own behalf and includes such amounts in computing its revenue.

Protocol Amending the Convention Between Canada and the United States of America With Respect to Taxes on Income and on Capital Done at Washington on 26 September 1980, as Amended by the Protocols Done on 14 June 1983, 28 March 1984, 17 March 1995 and 29 July 1997

This electronic version of the Canada-United States Protocol signed on September 21, 2007, is provided for convenience of reference only and has no official sanction.

Article 25

Article XXIX A (Limitation on Benefits) of the Convention shall be deleted and replaced by the following:

**Article XXIX A
Limitation on Benefits**

1. For the purposes of the application of this Convention by a Contracting State,
 - (a) a qualifying person shall be entitled to all of the benefits of this Convention; and
 - (b) except as provided in paragraphs 3, 4 and 6, a person that is not a qualifying person shall not be entitled to any benefits of this Convention.
2. For the purposes of this Article, a qualifying person is a resident of a Contracting State that is:
 - (a) a natural person;
 - (b) a Contracting State or a political subdivision or local authority thereof, or any agency or instrumentality of any such State, subdivision or authority;
 - (c) a company or trust whose principal class of shares or units (and any disproportionate class of shares or units) is primarily and regularly traded on one or more recognized stock exchanges;
 - (d) a company, if five or fewer persons each of which is a company or trust referred to in subparagraph (c) own directly or indirectly more than 50 percent of the aggregate vote and value of the shares and more than 50 percent of the vote and value of each disproportionate class of shares (in neither case including debt substitute shares), provided that each company or trust in the chain of ownership is a qualifying person;
 - (e)
 - (i) a company, 50 percent or more of the aggregate vote and value of the shares of which and 50 percent or more of the vote and value of each disproportionate class of shares (in neither case including debt substitute shares) of which is not owned, directly or indirectly, by persons other than qualifying persons; or
 - (ii) a trust, 50 percent or more of the beneficial interest in which and 50 percent or more of each disproportionate interest in which, is not owned, directly or indirectly, by persons other than qualifying persons;

where the amount of the expenses deductible from gross income (as determined in the State of residence of the company or trust) that are paid or payable by the company or trust, as the case may be, for its preceding fiscal period (or, in the case of its first fiscal period, that period)

directly or indirectly, to persons that are not qualifying persons is less than 50 percent of its gross income for that period;

(f) an estate;

(g) a not-for-profit organization, provided that more than half of the beneficiaries, members or participants of the organization are qualifying persons;

(h) a trust, company, organization or other arrangement described in paragraph 2 of Article XXI (Exempt Organizations) and established for the purpose of providing benefits primarily to individuals who are qualifying persons, or persons who were qualifying persons within the five preceding years; or

(i) a trust, company, organization or other arrangement described in paragraph 3 of Article XXI (Exempt Organizations) provided that the beneficiaries of the trust, company, organization or other arrangement are described in subparagraph (g) or (h).

3. Where a person is a resident of a Contracting State and is not a qualifying person, and that person, or a person related thereto, is engaged in the active conduct of a trade or business in that State (other than the business of making or managing investments, unless those activities are carried on with customers in the ordinary course of business by a bank, an insurance company, a registered securities dealer or a deposit-taking financial institution), the benefits of this Convention shall apply to that resident person with respect to income derived from the other Contracting State in connection with or incidental to that trade or business (including any such income derived directly or indirectly by that resident person through one or more other persons that are residents of that other State), but only if that trade or business is substantial in relation to the activity carried on in that other State giving rise to the income in respect of which benefits provided under this Convention by that other State are claimed.

4. A company that is a resident of a Contracting State shall also be entitled to the benefits of Articles X (Dividends), XI (Interest) and XII (Royalties) if:

(a) Its shares that represent more than 90 percent of the aggregate vote and value of all of its shares and at least 50 percent of the vote and value of any disproportionate class of shares (in neither case including debt substitute shares) are owned, directly or indirectly, by persons each of whom is a qualifying person or a person who:

(i) Is a resident of a country with which the other Contracting State has a comprehensive income tax convention and is entitled to all of the benefits provided by that other State under that convention;

(ii) Would qualify for benefits under paragraphs 2 or 3 if that person were a resident of the first-mentioned State (and, for the purposes of paragraph 3, if the business it carried on in the country of which it is a resident were carried on by it in the first-mentioned State); and

(iii) Would be entitled to a rate of tax in the other Contracting State under the convention between that person's country of residence and that other State, in respect of the particular class of income for which benefits are being claimed under this Convention, that is at least as low as the rate applicable under this Convention; and

(b) The amount of the expenses deductible from gross income (as determined in the company's State of residence) that are paid or payable by the company for its preceding fiscal period (or, in the case of its first fiscal period, that period) directly or indirectly to persons that are not qualifying persons is less than 50 percent of the company's gross income for that period.

5. For the purposes of this Article,

(a) The term "debt substitute share" means:

(i) A share described in paragraph (e) of the definition "term preferred share" in the Income Tax Act, as it may be amended from time to time without changing the general principle thereof; and

(ii) Such other type of share as may be agreed upon by the competent authorities of the Contracting States.

(b) The term "disproportionate class of shares" means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments or otherwise, in the earnings generated in the other State by particular assets or activities of the company;

(c) The term "disproportionate interest in a trust" means any interest in a trust resident in one of the Contracting States that entitles the interest holder to disproportionately higher participation in, or claim to, the earnings generated in the other State by particular assets or activities of the trust;

(d) The term "not-for-profit organization" of a Contracting State means an entity created or established in that State and that is, by reason of its not-for-profit status, generally exempt from income taxation in that State, and includes a private foundation, charity, trade union, trade association or similar organization;

(e) The term "principal class of shares" of a company means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company; and

(f) The term "recognized stock exchange" means:

(i) The NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Exchange Act of 1934;

(ii) Canadian stock exchanges that are "prescribed stock exchanges" or "designated stock exchanges" under the Income Tax Act; and

(iii) Any other stock exchange agreed upon by the Contracting States in an exchange of notes or by the competent authorities of the Contracting States.

6. Where a person that is a resident of a Contracting State is not entitled under the preceding provisions of this Article to the benefits provided under this Convention by the other Contracting State, the competent authority of that other State shall, upon that person's request, determine on the basis of all factors including the history, structure, ownership and operations of that person whether:

(a) Its creation and existence did not have as a principal purpose the obtaining of benefits under this Convention that would not otherwise be available; or

(b) It would not be appropriate, having regard to the purpose of this Article, to deny the benefits of this Convention to that person.

The person shall be granted the benefits of this Convention by that other State where the competent authority determines that subparagraph (a) or (b) applies.

7. It is understood that this Article shall not be construed as restricting in any manner the right of a Contracting State to deny benefits under this Convention where it can reasonably be concluded that to do otherwise would result in an abuse of the provisions of this Convention.