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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

Court of Appeal Rules in *Prévost Car Inc.*

At issue in this case was whether, for purposes of the Canada-Netherlands Income Tax Convention, a Dutch holding company ("Dutchco") was the "beneficial owner" of dividends paid by a corporation incorporated under the laws of, and resident in, the Province of Quebec. The Tax Court of Canada held that Dutchco was the beneficial owner and that, as a result, the Quebec resident payor, Prévost Car Inc. was entitled to apply the reduced 5% rate of Canadian withholding tax on dividends paid to Dutchco. On February 26, 2009, the Federal Court of Appeal dismissed the Crown's appeal (2009 FCA 57).

Writing for the Court, Décary J.A. observed at par. [8] of his reasons that, in his search for the meaning of the terms "beneficial ownership" and "bénéficiaire effectif," Associate Chief Justice Rip of the Tax Court (as he then was) closely examined "their ordinary meaning, their technical meaning and the meaning they might have in common law, in Québec's civil law, in Dutch law and in international law." In the latter regard, Justice Décary expressed his agreement with the parties that, in interpreting the Model Convention, it was appropriate in the circumstances to rely on OECD documents issued subsequent to its adoption. On the main issue of who is the "beneficial owner," Justice Décary, at par. [13], endorsed Associate Chief Justice Rip's view that "the 'beneficial owner' of dividends is the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received" (2008 TCC 231, par. [100]).

It is not known whether the Crown will seek leave to appeal the decision to the Supreme Court of Canada. In the meanwhile, readers may wish to note that there is another case before the Tax Court of Canada on the issue of beneficial ownership: *Velcro Canada Inc.* (2007-1806 (IT)G). The *Velcro* case is being held in abeyance pending the outcome in *Prévost Car*.

International

Advisory Panel Releases its Findings

In its April 2008 consultation document, the Panel expressed general concern over the meaning of the term "beneficial owner," a term often used in tax treaties to restrict treaty benefits to those residents of a treaty country who beneficially own the income in question. Our last issue outlined the difficulty that exists in interpreting this term and the related bijural concerns that may arise if treaty terms are to be defined according to Canadian domestic law.

The Advisory Panel on Canada's System of International Taxation Panel released its report entitled *Enhancing Canada's International Tax Advantage* on December 8, 2008. On the matter of defining "beneficial owner," the Panel's final report states only that the Panel had "heard that it might be best to wait for a globally agreed definition before taking unilateral action in this regard" (para. 5.66).

The Panel also noted that Canada has a number of tools at its disposal, in tax treaties, in domestic law and in international jurisprudence to police treaty shopping, and suggested that developments in this area be monitored. The Panel's 115-page report, the Executive Summary and many of the submissions made to the Panel can be found on the Panel's website: www.apcsit-gcrcfi.ca.

Income Tax Act

Analysis of the Concept of Acquisition Underway

The Bijural Revision Services Unit is in the midst of a detailed review of the income tax concepts of "acquisition" and "disposition." In the *Income Tax Act* (Canada) (hereinafter the "Act"), the concept of disposition is generally invoked to trigger tax liability, i.e. stock option benefits, capital gains, income, recapture, and/or filing obligations, i.e. notices, elections. The term "disposition", in relation to property, is the subject of an extensive, but non-exhaustive, definition in subsection 248(1) of the Act. The scope of the term is then further expanded by the fact that it includes any "transaction or event entitling the taxpayer to proceeds of disposition." The term "proceeds of disposition" is defined in section 54 of the Act, and the reference to that term effectively extends the concept of disposition to include, *inter alia*, involuntary dispositions of property (such as theft, destruction or expropriation) entitling a taxpayer to compensation. Finally, there are also numerous provisions that deem dispositions to have occurred, sometimes where there has been no actual change in ownership. Deemed dispositions often serve to crystallize a tax liability at a given point in time.

For its part, the term "acquisition" is used in two contexts: in relation to property and in relation to control of a corporation. In the former context, the acquisition of property is most often a prerequisite for entitlement to certain tax benefits such as capital cost allowance, interest deductibility and investment tax credits. However, it can also be used as a basis for establishing liability, i.e. penalties on the acquisition of non-qualified investments by an RRSP. In stark contrast to the concept of disposition and the web of definitions that lend substance to the term, there is no general definition of "acquisition" in the Act. Perhaps the closest one comes to a definition is in subsection 256(7) of the Act, which sets out situations that are deemed *not* to result in an acquisition of control of a corporation.

It is evident that Parliament has taken a significantly different approach in its treatment of two terms that, at first glance, seem almost unavoidably connected. The relative lack of statutory direction on the meaning of "acquisition" has, however, created a situation where there is greater reliance on private law in interpreting that term. This in turn brings to light differences between the civil law and common law, differences which can result in disparity in the application of the Act from province to province. The common law concept of "beneficial ownership" is an example of a fundamental distinction between the civil law and the common law. In common law provinces, this concept may be invoked to establish an acquisition of property where a taxpayer has acquired the attributes of ownership (possession, use and risk), a circumstance which, if the laws of the Province of Quebec applied, might not result in an acquisition.

Legislation

Parliament reconvened on January 26th

Harmonization measures which ceased to exist on the dissolution of the 39th Parliament last fall have not yet been re-introduced. As such, at the time of writing, there were no harmonization proposals before Parliament.