Docket: 2007-1938(IT)G

BETWEEN:

LORD ROTHERMERE DONATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 22, 2008, at Montreal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Nicolas Cloutier
Counsel for the Respondent:	Susan Shaughnessy

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* (**Act**) and pertaining to withholding tax under Part XIII of the Act, the notices of which are dated February 5, 2007, are dismissed, with costs.

Signed at Ottawa, Canada, this 3rd day of February 2009.

"Pierre Archambault"

Archambault J.

Citation: 2009 TCC 70
Date: 20090203
Docket: 2007-1938(IT)G

BETWEEN:

LORD ROTHERMERE DONATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Archambault J.

[1] Lord Rothermere Donation (**LRD**) is appealing two assessments dated February 5, 2007 issued by the Minister of National Revenue (**Minister**) pursuant to Part XIII of the *Income Tax Act* (**Act**). The assessments were with respect to the refund of the Part XIII tax on a non-resident which had been remitted to the Minister on July 13, 2001 and September 19, 2001. The only issue raised by these appeals is whether the Minister computed the interest on the tax refund in accordance with subsections 227(7) and 164(3) of the Act. More particularly, the point to be determined is what the proper starting day is for computing the interest on the refund of the Part XIII tax.

[2] The appeal proceeded on the basis of a Partial Agreed Statement of Facts. I reproduce here paragraphs 1 to 12 of this statement, which I believe are relevant for our purpose:

> 1. The Appellant was established in 1930 under the laws of the Province of Quebec by the First Viscount Rothermere, on behalf of his issue.

2. In June of 2001, in conjunction with the imminent repeal of the non-resident owned investment corporations (the "**NRO**") regime, the Appellant caused the winding up and received the distributed assets of two (2) NRO's of which it was the sole shareholder.

3. The Appellant had sought an advance income tax ruling to obtain confirmation that no non-resident withholding tax was payable pursuant to section 104(11) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "***I.T.A.***"), on the basis that there were no definitively ascertainable persons to whom payments were deemed to be made. The Rulings Directorate of the Canada Customs and Revenue Agency, as it was named then, (the "**Agency**") declined to rule on the issue.

4. In view of the apparent uncertainty of the Agency as to whether withholding tax was payable, the Appellant remitted, with forms NR4: *Statement of amounts paid or credited to non-residents of Canada*, $14,163,648.75 (25% of a $56,654,595 deemed dividend) to the Agency on July 13, 2001 and $302,917.15 (25% of a $1,211,688.61 deemed dividend) on September 19, 2001, as a prudent measure to avoid potential interest and penalties pursuant to subsection 227(9) *I.T.A.*

5. On December 7, 2001, the Appellant filed two (2) forms NR7-R: *Applications for Refund of Non-Resident Part XIII Tax Withheld* pursuant to subsection 227(6) *I.T.A.* for the refund of the non-resident withholding tax above.

6. The applications were received by the Agency on December 10, 2001 for the amount of $14,163,648.75, and on December 13, 2001 for the amount of $302,917.15.

7. On February 12, 2003, the Agency issued two (2) assessments denying the Appellant's applications.

8. On or about May 7, 2003, the Appellant objected to the two (2) assessments above.

9. On February 5, 2007, the Agency issued two (2) reassessments to the Appellant pursuant to subsection 165(3) *I.T.A.*, cancelling the earlier two (2) assessments and granting the refund of the withholding tax above.

10. The two (2) reassessments were sent by mail.

11. On February 15, 2007, the Agency sent to the Appellant a refund cheque dated February 14, 2007, in the aggregate amount of $17,807,906.03, by mail at the address appearing on the notices of objection:

Lord Rothermere Donation 15001
c/o Mr. Alec Anderson, Conyers, Dill & Pearman
Clarendon House
2 Church Street
Hamilton, HM CX
Bermuda

12. The refund of the withholding tax above was calculated by the Agency as follows:

Amount of remittance	$14,163,648.75	$302,917.15
Date of the remittance by the Appellant	July 13, 2001	Sept. 19, 2001
Date the applications were received by the Agency[1]	Dec. 10, 2001	Dec. 13, 2001
Date of the reassessments granting the refund	Feb. 5, 2007	Feb. 5, 2007
Interest from date of the applications to the date of the reassessments (at rate prescribed by the *Income Tax Regulations*)	$ 4,362,056.97	$ 93,063.20
Withholding tax pursuant to part XIII on interest	($1,090,514.24)	($ 23,265.80)
Total amount refunded:	$17,435,191.48	$372,714.55

. . .

[My emphasis.]

Statutory provisions

[3] First, it is useful to reproduce the key relevant provisions of the Act in order to resolve the issue raised by these appeals :

227(6) **Excess withheld, returned or applied.** Where a person on whose behalf an amount has been paid under Part XII.5 or XIII to the Receiver General was not liable to pay tax under that Part or where the amount so paid is in excess of the amount that the person was liable to pay, the Minister shall, on written application made no	227(6) **Restitution ou application de l'excédent.** Lorsqu'une personne pour le compte de qui un montant a été versé au receveur général en vertu des parties XII.5 ou XIII n'était pas redevable d'un impôt en vertu de cette partie, ou que le montant ainsi versé excède l'impôt dont elle était redevable, le ministre doit, sur demande écrite

[1] Although the Act provided, before June 2003, that interest started to accrue 45 days after the day on which an application was filed, the Minister applied the interest from the day the applications were received.

later than 2 years after the end of the calendar year in which the amount was paid, pay to the person the amount so paid or such part of it as the person was not liable to pay, unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.	faite au plus tard deux ans suivant la fin de l'année civile où le montant a été versé, payer à cette personne le montant ainsi versé ou la partie de ce montant dont elle n'était pas redevable, à moins qu'elle ne soit tenue de faire un paiement à Sa Majesté du chef du Canada, ou soit sur le point de l'être, auquel cas le ministre peut appliquer le montant par ailleurs payable selon le présent paragraphe à ce paiement et avise la personne en conséquence.
227(7) **Application for assessment.** Where, on application under subsection (6) by or on behalf of a person to the Minister in respect of an amount paid under Part XII.5 or XIII to the Receiver General, the Minister is not satisfied (*a*) that the person was not liable to pay any tax under that Part, or (*b*) that the amount paid was in excess of the tax that the person was liable to pay, the Minister shall assess any amount payable under that Part by the person and send a notice of assessment to the person, and sections 150 to 163, subsections 164(1) and (1.4) to (7), sections 164.1 to 167 and Division J of Part I apply with any modifications that the circumstances require.	227(7) **Demande de cotisation.** Le ministre établit une cotisation pour tout montant payable par une personne en vertu des parties XII.5 ou XIII et lui envoie un avis de cotisation si, après étude d'une demande faite par la personne, ou en son nom, en application du paragraphe (6), relativement à un montant versé au receveur général en vertu de cette partie, il n'est pas convaincu : *a*) soit que la personne n'était pas redevable d'un impôt en vertu de cette partie; *b*) soit que le montant versé au receveur général excédait l'impôt dont la personne était redevable. Les articles 150 à 163, les paragraphes 164(1) et (1.4) à (7), les articles 164.1 à 167 et la section J de la partie I s'appliquent alors, avec les adaptations nécessaires.
164(3) **Interest on refunds and repayments.** Where under this section an amount in respect of a taxation year (other than an amount or portion thereof that can reasonably be	164(3) **Intérêts sur les sommes remboursées**. Lorsque, en vertu du présent article, une somme à l'égard d'une année d'imposition est remboursée à un contribuable ou imputée sur un

considered to arise from the operation of section 122.5, 122.61 or 126.1) is refunded or repaid to a taxpayer or applied to another liability of the taxpayer, the Minister shall pay or apply interest on it at the prescribed rate for the period beginning on the day that is the latest of (*a*) where the taxpayer is an individual, the day that is 45 days after the individual's balance-due day for the year, . . . (*c*) where the taxpayer is . . . (ii) an individual, the day that is 45 days after the day on which the individual's return of income for the year was filed under section 150, (*d*) in the case of a refund of an overpayment, the day the overpayment arose, and . . .	autre montant dont il est redevable, à l'exception de tout ou partie de la somme qu'il est raisonnable de considérer comme découlant de l'application des articles 122.5, 122.61 ou 126.1, le ministre paie au contribuable les intérêts afférents à cette somme au taux prescrit ou les impute sur ce montant, pour la période allant du dernier en date des jours visés aux alinéas suivants jusqu'au jour où la somme est remboursée ou imputée, sauf si les intérêts ainsi calculés sont inférieurs à 1 $, auquel cas aucun intérêt n'est payé ni imputé en vertu du présent paragraphe : *a*) le quarante-cinquième jour suivant la date d'exigibilité du solde qui est applicable au contribuable pour l'année, s'il est un particulier; [...] *c*) si le contribuable est : [...] (ii) un particulier, le quarante-cinquième jour suivant celui où sa déclaration de revenu pour l'année a été produite en conformité avec l'article 150; *d*) dans le cas d'un remboursement d'un paiement en trop d'impôt, le jour où il y a eu paiement en trop; [...]
164(7) **Definition of "overpayment"**. In this section, "overpayment" of a taxpayer for a taxation year means (*a*) where the taxpayer is not a corporation, the total of all amounts paid on account of the taxpayer's	164(7) **Sens de paiement en trop.** Au présent article, un paiement en trop fait par un contribuable pour une année d'imposition est égal au montant suivant : *a*) si le contribuable n'est pas une société, le total des sommes versées sur les montants dont le contribuable est

liability under this Part for the year minus all amounts payable in respect thereof; and . . .	redevable en vertu de la présente partie pour l'année, moins ces mêmes montants; [...]
150(1) **Filing returns of income − general rule.** Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer, . . . (*c*) **Trusts or estates** − in the case of an estate or trust, within 90 days from the end of the year; . . .	150(1) **Déclarations− règle générale**. Sous réserve du paragraphe (1.1), une déclaration de revenu sur le formulaire prescrit et contenant les renseignements prescrits doit être présentée au ministre, sans avis ni mise en demeure, pour chaque année d'imposition d'un contribuable : [...] *c*) **Successions ou fiducies** − dans le cas d'une succession ou d'une fiducie, dans les 90 jours suivant la fin de l'année; [...]
150(2) **Demands for returns**. Every person, whether or not the person is liable to pay tax under this Part for a taxation year and whether or not a return has been filed under subsection (1) or (3), shall, on demand from the Minister, served personally or by registered letter, file, within such reasonable time as may be stipulated in the demand, with the Minister in prescribed form and containing prescribed information a return of the income for the taxation year designated in the demand.	150(2) **Mise en demeure de produire une déclaration**. Toute personne, qu'elle soit ou non assujettie à l'impôt visé par la présente partie pour une année d'imposition et qu'une déclaration ait été produite ou non en vertu du paragraphe (1) ou (3), doit, sur mise en demeure du ministre, signifiée à personne ou envoyée sous pli recommandé, produire auprès du ministre, dans le délai raisonnable fixé par la mise en demeure, une déclaration de revenu pour l'année d'imposition y mentionnée, selon le formulaire prescrit et renfermant les renseignements prescrits.
248(1) In this Act **"balance-due day"** of a taxpayer for a taxation year means, (*a*) where the taxpayer is a trust, the	**248(1)** Les définitions qui suivent s'appliquent à la présente loi. **« date d'exigibilité du solde »** L'une des dates suivantes applicable à un contribuable pour une année d'imposition : *a*) si le contribuable est une fiducie, le

day that is 90 days after the end of the year,	90e jour suivant la fin de l'année;

[My emphasis.]

Position of the parties

[4] Pursuant to subsection 227(7) of the Act (Part XIII), the computation of interest payable as result of assessments made by the Minister must be done in accordance with subsection 164(3) of the Act (Part I) "with any modifications that the circumstances require" (" avec les adaptations nécessaires ").

[5] The dispute between the parties results from the different interpretation and scope that they give to the words "with any modifications that the circumstances require" (**disputed expression**) as applicable to subsection 164(3) of the Act. A reading of this subsection in the context of Part I reveals that the Minister is to start computing interest from the latest of several specified days. According to counsel for the respondent, it is apparent that its purpose is to allow the Minister an "interest-free period" including an "interest-free processing period". The reasons for adopting the rule for the interest-free processing period were set out at page 145 of *The Budget 1992*, *Budget Papers,* tabled in the House of Commons by the Honourable Don Mazankowski, Minister of Finance, on February 25, 1992:

> INTEREST FREE PROCESSING PERIOD
>
> > Each year the government issues over 12 million personal income tax refunds. Currently, interest is paid on tax refunds as of the filing deadline, which is generally April 30th of the following year. Late returns earn refund interest as of the date filed. In other countries, there is an interest free period after the filing deadline for processing returns and sending out refunds. It is proposed that the same approach be adopted in Canada.
> >
> > Under the proposed procedure, interest will not start to accumulate until 45 days after the filing deadline (or 45 days after actual filing if it is later). The change is to become effective for tax returns filed after 1992.
>
> [My emphasis.]

[6] The operation of subsection 164(3) is summarized at pages 243-44 of the *Amendments to the Income Tax Act and Related Statutes*, *Explanatory Notes*, issued by the Honourable Don Mazankowski, Minister of Finance, in June 1992, as follows:

> Subsection 164(3) of the Act provides for the payment of interest on tax refunds. For individuals, the interest is computed for the period beginning on the latest of (i) the day the taxpayer's return for the year is required to be filed (the "due date") (ii) the day the return is filed and (iii) the day the overpayment arose, and ending on the day the refund is made. The amendments to subsection 164(3), which apply to refunds relating to returns of income filed after 1992, provide that, in the case of individuals, no interest is paid on tax refunds for the 45-day period after the later of the due date of the return and the day on which the return is filed.

[7] In applying subsection 164(3) of the Act to the facts of this case, counsel for LRD argued that paragraph 164(3)(*a*) was not applicable because there was no "balance-due day". Nothing could be owing after the end of the year by a non-resident taxpayer liable for Part XIII tax because all the tax has been withheld at source. Indeed, pursuant to sections 212 and 215 of the Act, any income tax payable is required to be remitted forthwith at the time a person pays an amount that is subject to Part XIII.[2] A person liable for Part XIII tax does not have to wait until the end of the year to see what other income might be subject to Part XIII tax. In addition, there are no deductions that are relevant in computing the Part XIII tax given that it is computed on the gross amount paid to the non-resident.

[8] Counsel for the respondent stated that she was not relying on paragraph 164(3)(*a*) of the Act to justify the Minister's assessments. Instead, she

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[2] Subsections 212(1) and 215(1) read as follows:

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 . . .

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 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.

[My emphasis.]

relied on subparagraph 164(3)(*c*)(ii). In her view, the Form NR7-R , Application for Refund of Non-Resident Part XIII Tax Withheld, should be treated as a return of income for the purposes of that subparagraph and therefore interest should be calculated from a day that is 45 days after the day on which these applications were filed, that is, 45 days after December 10 and 13, 2001. That day would be later than the date determined pursuant to paragraph 164(3)(*d*), which is the day on which the overpayment arose. Here, the overpayment arose when the $14,163,648.75 and the $302,917.15 were paid to the Minister on July 13, 2001 and September 19, 2001 respectively.[3]

[9] Counsel for the respondent argued that the written application (the NR7-R) used to obtain the refund should be treated as a return of income because subsection 227(7) states that section 150 applies "with any modifications that the circumstances require". I fail to see how a reference to section 150, which requires certain taxpayers to file a return of income, helps the Minister's case. I asked both counsel to give me an example of the usefulness of section 150 for the purposes of subsection 227(7), but was not given any.

[10] In support of her argument, counsel for the respondent also cited the following analysis made by an author in commenting on the scope of the application of the rules found in subsections 227(6) and 227(7) of the Act:[4]

> **Refund Interest on Part XIII Tax**
>
> A non-resident may claim a refund of overpaid part XIII tax by filing a claim with the minister in accordance with the provisions of subsection 227(6). Such a refund would clearly represent an overpayment within the meaning of subsection 164(7) since the amount paid on behalf of the non-resident would exceed his liability. Subsection 227(6) itself, however, provides no credit interest for such refunded amounts. Subsection 227(7) requires the minister to issue an assessment under part XIII if, upon review of a refund application, the minister is not satisfied that the person was not liable to pay any part XIII tax or that the amount paid was in excess of the tax that the person was liable to pay. Upon issuing the assessment, a number of rules in part I apply with appropriate modifications. The cross-reference to the provisions in Part I is apparently designed to give the taxpayer appeal rights when the minister does not process the refund application as requested. Subsection 164(3),

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[3] There is no dispute between the parties that such overpayment arose when payment was made by LRD in July and September 2001.

[4] Scheuermann, Scott L., "Interest on Unpaid and Overpaid Amounts", *Corporate Management Tax Conference 1988, Income Tax Enforcement, Compliance, and Administration,* Canadian Tax Foundation, page 10:29.

> however, is also picked up by cross-reference. Accordingly, the rather strange result is that if the refund claim is allowed by the minister, the taxpayer gets no refund interest, whereas if the minister disputes the claim, which the taxpayer eventually establishes, credit interest will be payable from the day on which the refund claim was made.[67]
>
> ---
>
> [67] It is not entirely clear how paragraphs 164(3)(a) and (c) will be interpreted when necessary modifications are made. Since there is no date, however, by which a return under part XIII must be filed, it appears that paragraph 164(3)(c) (referring to the date on which the return [application] is filed) would produce the date from which credit interest would run.
>
> [My emphasis.]

[11] Counsel for LRD disagreed with this interpretation of the respondent's because, under Part XIII, a non-resident does not have to file any income tax return. Income tax returns are clearly for taxpayers who are liable for Part I tax. An NR7-R form is not a return of income. A non-resident individual would be required to file a return of income only if he had tax payable by virtue of his having been employed in Canada, having carried on a business here or having disposed of taxable Canadian property.[5] Counsel also stated that the NR7-R is not a prescribed form pursuant to section 150 of the Act. Rather, it is prescribed by subsection 227(6).[6]

[12] So the issue here is whether subparagraph 164(3)(*c*)(ii) is applicable as a result of subsection 227(7) of the Act. Is the rule that subsection 164(3) applies "with any modifications that the circumstances require" broad enough to support the computation of interest made by the Minister on the refund of the Part XIII tax?

[13] Counsel for LRD cited many court decisions in support of his position that it is not. All these decisions deal with the Latin expression *mutatis mutandis* (**Latin expression**) which, in counsel's view, is equivalent to the disputed expression, which has been used in the Act since the amendment made to subsection 227(7) in 1985.[7] The part following paragraph (*b*) in subsection 227(7) formerly read as follows:

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[5] Or, in my opinion, if the Minister had demanded such a return pursuant to subsection 150(2) of the Act.

[6] Unlike subsection 150(1), subsection 227(6) of the Act does not require the use of a prescribed form. It only requires a "written application".

[7] S.C. 1985, c. 45, s. 117(1), applicable after 1984.

> . . . the minister shall assess that person for any amount payable by him under Part XIII and send a notice of assessment to that person, whereupon Divisions I and J of Part I are applicable *mutatis mutandis*.
>
> [My emphasis.]

[14] The approach taken by these court decisions is well illustrated in *Ketz v. The Queen*, 79 DTC 5142. In *Ketz*, the taxpayer was a non-resident who made an election pursuant to subsection 216(1) of the Act (Part XIII) to pay taxes on his rental income under Part I as though he were a person resident in Canada. This allowed him to have his taxes computed on his rental income on a net basis as opposed to having them computed on a gross basis in accordance with the rule applicable under Part XIII of the Act. When he sold the property in 1976, recaptured capital cost allowance was added to his income. Mr. Ketz claimed the benefit of the general averaging clause to alleviate the impact of recapture. The relevant provision was subsection 118(1), which read in part as follows:

> 118(1) Notwithstanding section 117, where, in the case of an individual who was resident in Canada throughout the taxation year immediately preceding a particular taxation year (which particular taxation year is hereafter in this section referred to as the "year of averaging"), any excess remains when
>
> . . .
>
> [My emphasis.]

[15] The Minister denied Mr. Ketz the benefit of this provision on the basis that he was not a resident of Canada throughout the taxation year immediately preceding the particular year. The claim by Mr. Ketz was based on subsection 216(3), which provided that "Part I is applicable *mutatis mutandis* to payment of tax under this section". Justice Dubé of the Federal Court — Trial Division, summarized the argument of the taxpayer Ketz as follows at page 5144:

> Plaintiff's learned counsel provided the Court with some definitions of *mutatis mutandis* which were quite acceptable to counsel for the Minister and to the Court.
>
> *Hausman v. Waterhouse*, 182 N.Y.S. 249, 251, 191 App. Div. 850.
>
> > The words "*mutatis mutandis*" mean "with the necessary changes in detail to conform to a single vital change".
>
> *Copeland v. Eaton*, 95 N.E. 291, 209, Mass. 139, Ann. Cas. 1212B, 521.

> Where profits are defined by a certain article, all the provisions of which are to apply to the relations between the parties springing into existence after the expiration of the Contract "*mutatis mutandis*", these latter words mean "necessary changes in details to conform to a single vital alteration", and suggest a reversal of the relative positions of the parties under the Contract, which was to continue the same in all other respects.

Re Kipnes and Attorney-General for Alberta, (1966) 4 C.C.C. 387 (C.A.).

Earl Jowitt's Dictionary of English Law defines "*mutatis mutandis*" as "with the necessary changes in points of detail", and *Black's Law Dictionary*, 4th Edition, "with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like". (*Hausman v. Waterhouse* cited with approval.)

Petit Larouse [*sic*], 1976.

mutatis mutandis : en changeant ce qui doit être changé; en faisant les changements nécessaires.

Plaintiff proposed a draft of subsection 118(1) which would include the added words necessary to obtain the desired results. The proposed "changes in detail" appear in italics. For brevity's sake, the paragraphs and subparagraphs of 118(1) are not reproduced.

> 118. (1) Notwithstanding section 117, where, in the case of an individual who was *not* resident in Canada throughout the taxation year immediately preceding a particular taxation year (which particular taxation year is hereafter in this section referred to as the "year of averaging"), *but had, during the year immediately preceding the year of averaging, elected to file a return of income under this Part in the form prescribed for a person resident in Canada for that taxation year*, any excess remains

[My emphasis.]

[16] The position of the Crown was summarized thus by Dubé J., at page 5144:

> . . . The *Income Tax Act* provides that Part I is applicable *mutatis mutandis* to a person paying tax under section 216(1), that is with the necessary changes in detail, not with changes of substance.
>
> But, whereas subsection 216(1) applies to a non-resident person, subsection 118(1) applies to an individual who was a resident in Canada throughout the preceding

> year: it is common ground that the plaintiff was not a resident of Canada during his 1975 taxation year.
>
> Therefore, the defendant submits, subsection 216(3) is of no assistance to the plaintiff since residence for the previous year is an essential condition for the application of subsection 118(1), not merely a point of detail.
>
> [My emphasis.]

[17] Dubé J. rejected the argument of the taxpayer as follows at pages 5144-45 :

> In my view, in order to so transform subsection 118(1) as to have it apply to a non-resident, changes have to be brought about which would indeed go to the very substance of the provision. In the construction of statutes, words must be interpreted in their ordinary grammatical sense, in harmony with the scheme of the Act and the intention of Parliament, unless there be something in the context to show otherwise. Subsection 118(1) clearly applies to an individual who was a resident in Canada throughout the taxation year immediately preceding a particular taxation year. Plaintiff was not a resident of Canada in 1975, he merely had elected to file a return of income for that year under Part I as if he were a resident. If it had been the intention of Parliament to open the general averaging provisions of subsection 118(1) to non-residents, that intention would have been clearly spelled out in the statute.
>
> [My emphasis.]

Analysis

[18] As for all, or almost all, appeals from a tax assessment, the starting point is the key wording of the Act. I make this statement because too many times lawyers take the case law as their starting point in attempting to justify their position. Although the difficulty that this Court must resolve here is the proper interpretation of the disputed expression found in paragraph 227(7) of the Act, counsel for LRD referred only to decisions in which the courts had to apply the Latin expression. At the relevant time, this expression was no longer in the provisions to be applied.

[19] The disputed expression does provide a certain element of subjectivity, and therefore of uncertainty, as regards its application. To determine its scope, reference to rules of statutory interpretation is required.

[20] One key rule of interpretation is that referred to by Dubé J. in *Ketz, supra,* at page 5144 : "words [in a statute] must be interpreted in their ordinary grammatical

sense, in harmony with the scheme of the Act and the intention of Parliament." Another such rule is enunciated by Madam Justice McLachlin, as she then was, at paragraph 40 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622: " Where the provision at issue is clear and unambiguous, its terms must simply be applied".

[21] Before determining what scope should be given to the disputed expression, it is useful to review the amendments that have been made by Parliament to subsection 227(7) of the Act. When subsection 227(7) was amended in 1985, the Latin expression was replaced by "with such modifications as the circumstances require". This wording was changed again in 1997 when the word "such" was replaced by "any".[8] In the *The New Shorter Oxford English Direction on CD-ROM*, "any", when used as an adjective in the plural form, is defined as "some — no matter which, of what kind, or how many". No equivalent amendment was made to the French version. In my view, the disputed expression in the French and the English versions of subsection 227(7) does not obviously require that the modifications be limited to "points of detail" as was held to be the case in such decisions as *Ketz*. Had Parliament intended in 1985 that the former approach (**restrictive interpretation**), namely that taken by the courts with respect to the Latin expression, continue to be applied after 1984, it would have been easy to state "with such modifications in points of detail that the circumstances require". However, there must be some limits as to what modifications may be made as "the circumstances require".

[22] In determining what scope should be given to the disputed expression, it must first be noted that Parliament does not state, as it did prior to the amendment made in 1985, that Division I of Part I is applicable. With respect to the relevant year, the Act specifies which particular provisions of Division I are applicable for the purposes of subsection 227(7) of the Act, section 164 being among those provisions. Furthermore, not all of section 164 is applicable, only subsections 164(1) and (1.4) to (7). For example, subsection 164(1.1) allows a taxpayer who disputes an assessment under the Act by filing a notice of objection to obtain, in most cases, until the amount owing is settled, the repayment of his disputed taxes or the return of the security that he provided.[9] This provision does not apply to a non-resident subject to Part XIII tax pursuant to subsection 227(7) of the Act.

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[8] S.C. 1997, c. 25, s. 67(3), applicable April 25, 1997.

[23] By specifically referring to subsection 164(3) of the Act, Parliament intended, in my view, to apply to non-residents subject to Part XIII the tax policy governing the payment of interest to taxpayers (including non-residents) subject to Part I tax. This policy has been clearly described above and under it the Minister is entitled to an interest-free period, including an interest-free processing period, when a taxpayer subject to Part I tax claims a refund of taxes, whether paid by withholding at source, by instalment or by payment on the balance-due day. Under this policy, an ordinary individual taxpayer who files his tax return on April 1 and claims a refund of taxes previously paid by instalment that exceed his tax liability will not be able to receive interest from the day the overpayment arose, but only 45 days after April 30. It would be strange that the Act would treat non-resident taxpayers subject to Part XIII tax better than non-residents who are liable to Part I tax, and all the more so when one considers that a non-resident subject to Part XIII who makes a refund application pursuant to subsection 227(6) of the Act and whose claim is not contested by the Minister will not be entitled to any interest. However, it makes sense to me that the Minister would have to pay interest to a non-resident whose claim has first been denied by the Minister and later allowed by him, or by this Court (or a higher court). Given that administrative and judicial contestations of such a refund application may take several months or years, as was the case here, it is only normal that a non-resident be compensated for having lost the enjoyment of the amount of his overpayment.

[24] The interpretation put forward here by the Minister appears reasonable. The Minister contends that the following modifications (indicated in italics) that the circumstances require are to be made to subparagraph 164(3)(*c*)(ii):

> (ii) an individual, the day that is 45 days after the day on which the individual's *written application* for the year was filed under *subsection 227(6)*.

In other words, "return of income" is replaced by "written application" and "section 150" by "subsection 227(6)".

[25] It is true that a return of income is a document quite different in scope from a written application, such as an NR7-R. A return of income must be filed by taxpayers

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[9] However, the taxpayer will be liable for interest if the assessment is upheld.

who are subject to Part I for the purpose of disclosing all their different sources of income and claiming all the relevant allowable deductions. A non-resident subject to Part XIII determines his tax payable not on a net amount but on a gross amount, and that amount is taxed at a flat rate which does not vary depending on the level of income. There is no need to have in the NR7-R a statement of all the sources of income subject to Part XIII tax.

[26] However, there is similar information that has to be provided in both a tax return, such as a T1 filed by a non-resident, and an NR7-R application for a refund of Part XIII tax withheld. For instance, in the NR7-R, a taxpayer must provide details regarding the type of payment on which Part XIII tax was paid, the amount of such payment together with the amount of tax remitted, the amount of tax payable and the amount of the refund. In a T1, the taxpayer indicates on page 4 the net tax payable, deducts from that amount the total income tax deducted, including tax paid by instalments and, if applicable, enters the amount of the refund he is claiming.

[27] Given these similarities, it is not unreasonable, for purposes of subsection 227(7), to substitute for " return of income" in subsection 164(3) the words "written application" (e.g., an NR7-R). The result is, in my view, in harmony with the scheme of the Act and the intent of Parliament.

[28] In addition, given that tax under Part XIII of the Act is payable in full forthwith on payment of the income subject to that tax, a balance-due date is irrelevant. All Part XIII tax will already have been remitted on payment of any income and no balance will be owing after the end of the year, given that, for Part XIII tax purposes, level of income is not taken into account and no deductions are allowed in computing such Part XIII tax. Therefore, it is appropriate for the purposes of the application of subsection 227(7) to ignore the rule in paragraph 164(3)(*a*) of the Act. This is a modification that "the circumstances require". This result is also in harmony with the scheme of the Act and the intent of Parliament.

[29] Therefore, only two days are relevant here : the day that is 45 days after the day on which the application for a refund was received and the day on which the overpayment arose. Given that the NR7-Rs were received on December 10 and 13, 2001, which are obviously days that are later than July 13 and September 19, 2001, the Minister was entitled to compute the interest starting 45 days after the receipt of

the NR7-Rs. In point of fact, the interest was computed starting on the day on which the NR7-Rs were received and LRD therefore benefited from an additional period of interest over and above what was provided for in the Act.

[30] If this interpretation that I have adopted were to be considered ill-founded and if the restrictive interpretation adopted by the courts when applying the Latin expression were to be adhered to, as counsel for LRD claimed it should, then it could be said, in my view, that the modification suggested by the respondent would indeed go to the very substance of the provision, as Dubé J. put it in *Ketz*. Given that a tax return prescribed by section 150 is quite different from a written application under subsection 227(6) of the Act, a substitution of one for the other would not be a mere point of detail.

[31] However, if this restrictive interpretation were adopted, it would not assist LRD in having its appeal allowed. In my view, paragraph 164(3)(*a*) of the Act would then be applicable because to ignore its application would likewise amount to a modification going to the very substance of the provision. Read literally, this paragraph says that one of the days to be taken into account is the "balance-due day" and this term is defined in subsection 248(1) to mean, for a trust, "90 days after the end of the year[10]", so the day determined under 164(3)(*a*) of the Act would be 45 days after March 31, 2002.

[32] Since the phrase "balance-due day" used in paragraph 164(3)(*a*) of the Act is not defined in subsection 248(1) by any reference to an amount being outstanding or a balance being owing at a certain date, there would be no reason not to apply such a

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[10] Year, here, refers to a taxation year. This expression is defined in subsection 249(1):

> 249(1) **Definition of "taxation year"**. For the purpose of this Act, a "taxation year" is
> (*a*) in the case of a corporation, a fiscal period, and
> (*b*) in the case of an individual, a calendar year,
> and when a taxation year is referred to by reference to a calendar year, the reference is to the taxation year or years coinciding with, or ending in, that year.
>
> [My emphasis.]

The calendar year which is relevant here is the year the payments were made, that is, 2001.

clearly expressed rule. The expression "balance-due day"[11] implies a balance of taxes being due on that day, but does not require that such a balance actually be owed or that it could be owing. To be clearer, balance-due day is not defined by stating that "where the taxpayer is a trust and the trust has a balance owing at the end of the year, the day that is 90 days after the end of the year". The definition simply states that the balance-due day is 90 days after the end of the year. Ignoring such a clearly worded definition in subsection 248(1) and a similarly clearly worded provision in paragraph 164(3)(*a*) of the Act would be tantamount, in my view, to a modification going to "the very substance of the provision".

[33] So, if the restrictive interpretation were adopted, a day that is 45 days after March 31, 2002 would still be a day that would be later than July 13, 2001 and September 19, 2001. Therefore, not only would LRD fail to obtain the additional interest that it is seeking through these appeals, but the amount of interest determined pursuant to subsections 227(7) and 164(3) of the Act would be less than that actually paid by the Minister.

[34] For all these reasons, LRD's appeals are dismissed, with costs.

Signed at Ottawa, Canada, this 3rd day of February 2009.

"Pierre Archambault"

Archambault J.

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[11] I would add that the Act could have used any one of a number of neutral expressions to replace "balance-due day" and it would not have made any difference. Once an expression is defined, the expression itself is, in a way, irrelevant.

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