Docket: 2018-1327(IT)G

BETWEEN:

DAVID NONIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 9, 2020, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Mark Feigenbaum Josh Shapiro, student-at-law
Counsel for the Respondent:	Andrew Miller

JUDGMENT

WHEREAS the Court has published its reasons for judgment on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal with respect to the 2015 and 2016 taxation years is allowed; and,

2. Costs are awarded provisionally to the Appellant subject to the right of either party to make written submissions thereon within 30 days of the date of this judgment, whereupon the Court may consider such submissions and vary its provisional cost award, failing which this provisional cost award shall become final.

Signed at Ottawa, Canada, this 14th day of April 2021.

"R.S. Bocock"

Bocock J.

Citation: 2021TCC31
Date: 20210414
Docket: 2018-1327(IT)G

BETWEEN:

DAVID NONIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. INTRODUCTION

[1] This appeal concerns the amount of Canadian income tax a non-resident should pay related to employment income earned from a Canadian employer. The Appellant, Mr. Nonis, is a non-resident of Canada and a citizen and resident of the United States. He earned employment income under contract from a Canadian entity from 2013 through to 2018. In 2013 and 2014, Mr. Nonis filed and paid Canadian income tax. The amount of Canadian income tax was prorated to the number of days spent in Canada performing services to earn such income. For those years, the Minister accepted that basis for assessing Canadian income tax. Mr. Nonis' received notice from his Canadian employer on April 12, 2015 (the "Notice Date") that no further active services were required of him in order to fulfill his contract. Mr. Nonis never returned to Canada in furtherance or performance of the employment contract.

[2] After the Notice Date, Mr. Nonis sought to file and pay taxes based upon the proration formula used in 2013 and 2014, but adjusted it to the fewer days he spent in Canada in 2015 and 2016: 37 days and zero, respectively. The Minister reassessed Mr. Nonis asserting that the historical proration used in 2013 and 2014, was a reasonable allocation in order to determine taxable Canadian income for the two subsequent taxation years.

II. FACTS: "… and now for the rest of the story"

[3] Normally, before the Tax Court of Canada, one's employment history, status and situs are invariably unknown to the public, at least before trial. Mr. Nonis is an exception. From January 9, 2013 until April 12, 2015, he was the general manager of the Toronto Maple Leafs. Maple Leafs Sports and Entertainment ("MLSE"), his employer, concluded a written employment agreement with him on January 9, 2013. The initial term lasted from that date to June 30, 2016. Through an early extension agreement signed in June 2013, MLSE extended the term of employment until June 30, 2018.

[4] The ebbs and flows of professional sport and for MLSE and the Maple Leafs, particularly the ebbs, caused MLSE, in its sole discretion and without cause, to terminate the need for Mr. Nonis to report for work or provide further active duties or services to MLSE after the Notice Date. In Mr. Nonis' words during testimony by video link, MLSE told him simply, "go home". The employment contract guaranteed continued salary benefits for the balance of the contractual plus one year of medical coverage. This salary continuation frames the dispute between the Crown and Mr. Nonis: during this period, what was what Mr. Nonis' earned taxable employment income in Canada, given his absence and non-resident status?

[5] MLSE's "without cause" termination of the need for Mr. Nonis' active services was in accord with the agreement. An excerpt from the agreement provides as follows:

> MLSE shall have the right to terminate your employment with MLSE upon notice from LSE "without cause". If your employment is terminated without cause under paragraph 8(c) hereof, subject to the last sentence of this paragraph 8(c), MLSE will maintain your group health benefit coverage, excluding disability and life insurance, until the earlier of: (i) the date you commence alternate employment or engagement' and (ii) one year from the date of termination; and equal to your regular salary until June 30, 2016; provided, however, that you shall use your best efforts to mitigate the amount of payments which MLSE may owe you under paragraph 4, by seeking other employment or engagement of services and maximizing your then current income. If this Agreement is terminated by MLSE under this paragraph 8(c) prior to June 30, 2016, any income earned by you during the period from the date of termination through June 30, 2016 resulting from employment with the NHL, AHL, OHL, Division 1 college, or at the international hockey level, or a position in a league office, including without limitation , as a coach, assistant coach, president and general manager, vice president, president, coach, advisor, director of player personnel, director of hockey operations, or a similar position, shall be deducted from the payments owed by MLSE during that period. All other payments and benefits under paragraphs 5, 6, and 7 shall cease immediately upon termination, except any bonuses earned to the date of termination. The periodic payments made to you under this paragraph 8(c) will

> include any entitlement you may have to severance or separation pay, if any, under any legislation. You agree to notify MLSE immediately if and when you are successful in securing alternate employment following the termination of this Agreement under this paragraph 8(c).

[6] Potentially correlative to paragraph 8(c) are the NHL by-laws, and specifically 15.1(b), which provide as follows:

> 15.1(b) Except as provided in subsection (iii) below, no Member Club or any officer, shareholder, partner, employee, agent or representative thereof, shall – directly or indirectly – tamper, negotiate with, make an offer to or discuss employment with any non-playing employee of another Member Club, or his agent or representative who is employed in the capacity of General Manager, Coach, Supervisor of Scouting, Scout or any other employee, including "Assistants" to any of the above, whose primary function related to scouting, drafting, procurement or coaching of playing personnel.

[7] Violating NHL by-laws carries sanctions. There are substantial fines (up to 5 million dollars), loss of draft-pick rights and the like for the offending "Member Club".

[8] Mr. Nonis' tax filings for 2015 and 2016 followed the same rubric for his 2013 and 2014 filings, but for one critical change: the number of days present in Canada earning employment income was reduced because of the reduced number of days present in Canada. Both returns reflected Mr. Nonis' non-resident status. As filed by Mr. Nonis, the comparative proration between Canada and the US as to the location where services were performed relative to the source of income was as follows:

	2013 and 2014	2015	2016
Percentage of Income from Canadian sources	39.25%	10.14%	Nil
Income from non-Canadian sources	60.75%	89.86%	100%

[9] The mechanics of filing for Mr. Nonis are a bit backwards by virtue of his non-residency and his employer's status as a Canadian taxpayer. This is not relevant to the issue of Mr. Nonis' liability for tax or the validity of the Crown's assessment. However, Mr. Nonis' returns, as filed, reflected a refund position. MLSE, as a Canadian employer, was required to remit the usual income tax deductions for Mr.

Nonis as a full time Canadian resident employee despite his non-residency. In short, the deductions at source were identical to those of a Canadian resident. Administratively, in reassessing Mr. Nonis' return for 2015 and 2016, the Minister's agents denied a large portion of the deduction for income asserted to be "earned" in the USA. Consequentially, this reduced the refund claimed by Mr. Nonis against employer remitted installments of tax deducted at source.

[10] One might well ask, why has the Minister rejected Mr. Nonis' proration of income earned in the US in 2015 and 2016? The sequenced logic of the Crown's position is described in considerable detail below; the high-level response is simple: Mr. Nonis cannot prorate the income from MLSE based upon days in Canada to earn it because he falls within a specific "resident" deeming provision under the Act. The Minister asserts that paragraph 115(2)(c.1) "captures" non-residents in receipt of sums under certain contracts or arrangements which are deductible by a Canadian payor under the Act. As explained in the expanded reasons described below, the Crown asserts, this specific deeming rule reasonably applies to Mr. Nonis to make him a deemed resident.

[11] By contrast, Mr. Nonis asserts that the more general rule in previous subsections of 115 apply: assessing as income the quantum measure of duties or services of a non-resident "performed or exercised in Canada" under subsection 115(1) and 115(2)(e)(i).

[12] The refined issue is: does the specific non-resident rule in paragraph 115(2)(c.1) apply to Mr. Nonis and supplant the general calculation of a deduction for remuneration earned inside and outside of Canada within subsection 115(1)?

III. THE PARTIES' POSITIONS: "… a Question of Law"

a) The Legislation

[13] Relevant to this appeal and the submissions of the parties are the following excerpts from the ITA.

[14] Part I of the Act levies the general liability for tax on a non-resident by virtue of subsection 2(3) which provides:

> **Tax payable by non-resident persons**
>
> **2 (3)** Where a person who is not taxable under subsection 2(1) for a taxation year

> **(a)** was employed in Canada,
>
> **(b)** carried on a business in Canada, or
>
> **(c)** disposed of a taxable Canadian property,
>
> at any time in the year or a previous year, an income tax shall be paid, as required by this Act, on the person's taxable income earned in Canada for the year determined in accordance with Division D.
>
> **Editorial note**: A non-resident's Part I income is computed in accordance with the rules provided in Division D (ss. 115 through 116.). However, most forms of passive investment income are subject to withholding tax under, Part XIII. In either case, the non-resident's tax liability under the Act may be.

[15] Non-residents are directed to Section 115 of the Act: *non-resident's taxable income in Canada*. The editorial comments are included because they figure prominently in the parties' submissions. Specifically, the following excerpts, relied upon differently by the parties, apply to this appeal:

> **DIVISION D -Taxable Income Earned in Canada by Non-Residents**
>
> **Non-resident's taxable income in Canada**
>
> **115 (1)** For the purposes of this Act, the taxable income earned in Canada for a taxation year of a person who at no time in the year is resident in Canada is the amount, if any, by which the amount that would be the non-resident person's income for the year under section 3 if
>
> **(a)** the non-resident person had no income other than
>
> **(i)** income from the duties of offices and employments performed by the non-resident person in Canada
>
> **(v)** in the case of a non-resident person described in subsection 115(2), the total determined under paragraph 115(2)(e) in respect of the non-resident person, and […]
>
> **Idem**
>
> **115 (2)** Where, in a taxation year, a non-resident person was
>
> **(c.1)** a person who received in the year an amount, under a contract, that was or will be deductible in computing the income of a taxpayer subject to tax under this Part and the amount can, irrespective of when the contract was entered into or the form

or legal effect of the contract, reasonably be regarded as having been received, in whole or in part,

> **(i)** as consideration or partial consideration for entering into a contract of service or an agreement to perform a service where any such service is to be performed in Canada, or for undertaking not to enter into such a contract or agreement with another party, or
>
> **(ii)** as remuneration or partial remuneration from the duties of an office or employment or as compensation or partial compensation for services to be performed in Canada,

the following rules apply:

(d) for the purposes of subsection 2(3) the non-resident person shall be deemed to have been employed in Canada in the year,

(e) for the purposes of subparagraph 115(1)(a)(v), the total determined under this paragraph in respect of the non-resident person is the total of

> **(i)** any remuneration in respect of an office or employment that was paid to the non-resident person directly or indirectly by a person resident in Canada and was received by the non-resident person in the year, except to the extent that the remuneration is attributable to the duties of an office or employment performed by the non-resident person anywhere outside Canada
>
> **(v)** amounts described in paragraph 115(2)(c.1) received by the non-resident person in the year, except to the extent that they are otherwise required to be included in computing the non-resident person's taxable income earned in Canada for the year, and […]

Editorial note: subparagraph 115(1)(a)(v) and s. 115(2) extend the provisions of s.2(3) to certain non-resident employees, students, and researchers and, in effect, subject certain amounts received by them to Part I tax. The net amount calculated as a result of the provisions in s.115(2) is included in "taxable income earned in Canada" under s.115(1), and by reasons of s. 2(3), this amount is subject to Part I tax.

4 (1) For the purposes of this Act,

> **[…]**
>
> **(b)** where the business carried on by a taxpayer or the duties of the office or employment performed by a taxpayer was carried on or were performed, as the case may be, partly in one place and partly in another place, the taxpayer's income or loss for the taxation year from the business carried on,

> or the duties performed, by the taxpayer in a particular place is the taxpayer's income or loss, as the case may be, computed in accordance with this Act on the assumption that the taxpayer had during the taxation year no income or loss except from the part of the business that was carried on in that particular place or no income or loss except from the part of those duties that were performed in that particular place, as the case may be, and was allowed no deductions in computing the taxpayer's income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that part of the business or to those duties, as the case may be, and except such part of any other deductions as may reasonably be regarded as applicable thereto.

b) The Respondent's Position in Detail

i) Specific deeming provisions apply to Mr. Nonis' income in 2015 and 2016.

[16] For non-residents, "taxable income earned in Canada" is determined pursuant to the provisions at Division D of the Act. Subsection 115(1) falls under Division D. These provisions establish for a non-resident the amount of that person's income that is subject to tax under Part I, which includes Canadian-source employment and business income, and taxable capital gains on taxable Canadian property. To calculate a non-resident's "taxable income earned in Canada", subsection 115(1) of the Act outlines at paragraphs (a) to (c) the conditions that apply in computing that amount, and paragraphs (d) to (f) list the deductions available for the purposes of refining that amount.

[17] The Respondent takes the position that the Appellant was, for the purposes of subsection 2(3) of the Act, "employed in Canada" in 2015 and 2016. The Respondent argues that, while the general principle is that non-residents are taxable only on their Canadian-source income and that employment income is usually considered to be sourced where the employment is exercised or performed, Parliament in no way meant to restrict the Minister's taxing authority to duties performed in Canada alone.

[18] Parliament's intent is first evident at subsection 2(3) of the Act where the reference to "a previous year" brings amounts of income listed at section 115 of the Act under the taxing provisions of Part I without those amounts having been earned from employment in Canada or received on account of Canadian service employment income earned in a previous year. Canadian tax is payable on such amount in the year in which it was received. But for subsection 2(3) of the Act, such an amount might otherwise escape taxation if the amount were received in a year

subsequent to the year in which the person was employed in Canada. Subsection 2(3) is clear that these amounts do not escape taxation.

ii) Parliament was clear: exercise of duties in Canada

[19] By using a deeming provision, Parliament's clear intention is to subject certain non-residents to tax in Canada even though they may not, in fact, perform employment duties in Canada and therefore are not, strictly speaking, "employed" in Canada. This "deeming provision" used to create a legal fiction, cannot be contradicted or "rebutted". The facts as declared by the legislature govern, even in the face of irrefutable evidence to the contrary. By virtue of the definition of "employed" at subsection 248(1) of the Act, a non-resident who is deemed, pursuant to s. 115(2)(d) of the Act to be "employed in Canada" under s. 2(3) of the Act is deemed to have been "performing the duties of an office or employment" in Canada.

iii) Contextually, this interpretation stands

[20] While refutable, the deeming provision at subsection 6(3) places the burden on the taxpayer to show that the amount received cannot "reasonably be regarded" as consideration for entry into the employment, remuneration for service or consideration for restrictions on the activities of the employee. The inclusion of section 3, and therefore sections 5 and 6 of the Act, for the purposes of determining a non-resident's "taxable income earned in Canada" under 115(1), and the broad language contained in these provisions, supports the argument that the scheme of the Act, its object, purpose and Parliament's intention are to allow the Minister to assess tax on amounts such as those received by the Appellant from MLSE throughout the 2015 and 2016 taxation years.

iv) A closer examination of 115(2)(c.1)

[21] The Respondent takes the position that the Appellant received amounts that are captured by paragraph 115(2)(c.l) of the Act resulting in the Appellant being deemed, pursuant to paragraph 115(2)(d), to be "employed in Canada" under subsection 2(3) of the Act. According to subparagraph 115(l)(a)(v) of the Act, once it is established that a non-resident person is deemed to be "employed in Canada" under paragraph 115(2)(d), that person's "taxable income earned in Canada" is determined pursuant to paragraph 115(2)(e) of the Act.

[22] The Respondent asserts that the Appellant received "taxable income earned in Canada" as the amounts received by him throughout 2015 and 2016 are captured by

either subparagraph 115(2)(e)(i) or subparagraph 115(2)(e)(v), the latter of which refers to amounts described at paragraph l l5(2)(c.l) of the Act. Because the test at paragraph 115(2)(c.l) applies both for the purposes of deeming the Appellant to be "employed in Canada" and to determine his "taxable income earned in Canada" the following analysis applies to both determinations. Subparagraph 115(2)(e)(i) only applies for the purposes of the "taxable income earned in Canada" test.

[23] Accordingly, under paragraph 115(2)(c. l) of the Act, a non-resident person will be deemed "employed in Canada" and will have received "taxable income earned in Canada" where, among other things, the person received amounts as "consideration", "remuneration" or "compensation". Subparagraph 115(2)(e)(i), which applies only for determining "taxable income earned in Canada", identifies "any remuneration in respect of an office or employment that was paid to the non-resident person directly or indirectly by a person resident in Canada and was received by the non-resident person in the year". Parliament's use of the words "remuneration", "consideration" and "compensation" in these provisions supports the Minister's assessment of the Appellant's 2015 and 2016 taxation years.

[24] With the exception of "compensation", which is defined at subsection 147. 1(1) of the Act and is limited to the application of sections 147.1, 147.2 and 147.3, none of these terms are defined under the Act. The term "remuneration" is defined at regulations 100(1) and 1106(1) of the *Income Tax Regulations*. While the latter of these two definitions is of little assistance, regulation 100(1) defines "remuneration" as including “any payment that is in respect of salary or wages, or commissions or other similar amounts […] paid to an officer or employee or former officer or employee”. Despite not being conclusive, it is accepted that a statute and its regulation can be mutually informing.

v) Supported by authorities

[25] The Respondent submitted various authorities in support of this interpretation. In its *Mastech Quantum Inc*. decision, the Federal Court of Appeal relied on the following definitions of “remuneration” in determining whether a worker was engaged in insurable and pensionable employment under paragraph 6(g) of the *Employment Insurance Act* and subsection 34(1) of the *Canada Pension Plan*.

> The Shorter Oxford Dictionary (3rd Ed.) defines "remunerate" and "remuneration" as follows: l. trans. to repay, requite, make some return for (services etc.) 2. to reward (a person), to pay (a person) for services rendered or work done, hence remuneration, reward, recompense, repayment, payment, pay. In the Black's Law

> Dictionary, (7th Ed.) "remuneration" is defined as: l. Payment; compensation; 2. The act of paying or compensating.

[26] In its *CAN-AM Services & United Truck Rental (Re) decision*, the Canada Labour Relations Board was called on to determine its jurisdiction to order that a sum in lieu of insurance be paid by the employer to the discharged employee. This issue involved the interpretation of the word "remuneration" found in paragraphs 96.3(c) and 96.3(d) of the *Canada Labour Code*. In its analysis, the Board found:

> The question is whether the more restricted wording in 96.3(c) and (d) lend themselves to vesting the Board with jurisdiction to make such an award. The word "remuneration" has been variously defined and the one common element to all of the definitions is that remuneration is wider than simply wages. In Magasin Coop de Trois-Pistoles v. Syndicat des employés de Magasin Coop de Trois-Pistoles (CSN), reported in Droit du Travail Express, No. 84T-494, July 18, 1984, Mr. Léonce E. Roy, sitting as a single arbitrator, said:
>
> > "Remuneration is not strictly the counterpart of work, but rather the totality of what is paid by the enterprise where work is performed, and salary, in the strict sense, is only one element..."

[27] At paragraph 115(2)(c.l) of the Act, Parliament employs the expression "reasonably be regarded" to describe the amounts of consideration or partial consideration, remuneration or partial remuneration, and compensation or partial compensation. Parliament's use of "reasonably be regarded" is informative of its intention to tax the amounts paid to the Appellant throughout 2015 and 2016 under Part I of the Act.

[28] The Respondent asserts this broad approach is further supported by the use at paragraph 115(2)(c.l) of the expression "irrespective of when the contract was entered into or the form or legal effect of the contract". Absent the use of "or arrangement", this same usage was examined and interpreted by the Tax Court of Canada in the following manner:

> The phrase "irrespective of when the contract or arrangement was made or the form or legal effect thereof" requires the Court to take into account the economic impact or consequences of all of the above. This latter factor is what the Appellant relies upon in arguing that the economic substance of the arrangement is that the Appellant received $l7.5 million in consideration of its agreeing to pay $225 million to APCJ in 2030. The difference represents compensation for the use of the $l7.5 million over the period, or in other words, compensation for the time value of money, which is the key reason why interest is paid.

vi) Respondent's interpretation applied to the facts

[29] On the Notice Date, MLSE advised the Appellant that he was no longer required to report to work and fulfill the duties described in the Employment Agreement. Prior to the Notice Date, the Appellant received annual base salary amounts by way of periodic payments, meaning the Appellant was paid his salary twice a month, on the fifteenth and last day of the month. The Appellant also received group health benefit coverage from MLSE.

[30] The evidence is that the Appellant was "terminated without cause" on the Notice Date within the meaning ascribed in the Employment Agreement. Accordingly, the Appellant continued to receive the following:

a) MLSE continued until June 30, 2018 to pay the Appellant the annual base salary amounts owing under the Employment Agreement by way of the same periodic payments schedule, and

b) MLSE maintained the Appellant's group health benefit coverage, excluding disability and life insurance, until the earlier of two dates that was no later than one year from the date of termination.

[31] As such, the Appellant is deemed by virtue of paragraph 115(2)(d) to be "employed in Canada" for the purposes of subsection 2(3) of the Act. The amounts paid by MLSE to Appellant throughout 2015 and 2016 are also "taxable income earned in Canada" pursuant to subparagraph 115(l)(a)(v) and paragraph 115(2)(e) of the Act and is liable to Part I tax on those amounts.

vii) The Minister has apportioned income reasonably between the two jurisdictions

[32] If Mr. Nonis was employed in Canada and all amounts from MLSE are taxable income earned in Canada, then the Respondent asserts the Minister's apportionment was reasonable. The deeming impact of the legal fiction of a factual non-resident deemed to be employed in Canada led the Minister to carry forward the previous 39.25% proration in taxation years 2015 and 2016. This is proper. It cannot be zero. Further subsection 2(3) deems employment duties to have occurred in Canada. Actually, the Minister was entitled to assess 100% of the 2015 and 2016 amounts. Instead, the Minister acted more reasonably and chose 39.25%. Lastly, no alternative calculation has been offered.

viii) Mr. Nonis' remedy, if any, lies to the south

[33] The *Canada-United States Tax Convention* was entered into, *inter alia*, to prevent double taxation, fiscal avoidance and fiscal evasion. The elimination of double taxation is achieved not only by way of international bilateral agreements; it can be done unilaterally by states withdrawing their claims. This unilateral action is generally achieved when the Resident State provides a credit for taxes incurred in the Source State. This is the foreign tax credit approach followed by the United States and Canada.

[34] The fundamental principle of interpretation of domestic statutes and international treaties are the same: the words used must be given their ordinary meaning in light of their context and purpose. In the case of the Appellant, Canada is within its right to tax the proportion of the amount he received from MLSE throughout 2015 and 2016 and that qualify under Canadian domestic law as "taxable income earned in Canada". This is so in light of the recognized general scheme of the *Canada-United States Tax Convention* and its Article XV(l), which states:

> Subject to the provisions of Articles XVIII (Pensions and Annuities) and XIX (Government Services), salaries, wages and other remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may he taxed in that other State.

[35] Indeed, the Respondent argues that the same analysis as that which applies to the language of section 115 of the Act applies to the interpretation of Article XV(l). On the same basis, the amounts received by the Appellant from MLSE are "salaries, wages and other remuneration" within the meaning of Article XV(l). Moreover, the Commentary and Explanatory Notes to Article 15(1) of the Model Convention, which is identical to Article XV(l) save for the absence of "similar" in the latter provision, provide that Canada, by virtue of being the State in which the Appellant's employment was exercised, has the right to tax the income so derived. The Technical Explanation to Article XV confirms the same and points to the exception at paragraph 2, which, in this case, does not apply. Also, under the legal fiction created by paragraph 115(2)(d) and subsection 2(3) of the Act, the Appellant was "performing the duties of [...] employment" in Canada. There is no basis to differentiate between the use of "exercised" in Article XV of the *Canada-United States Tax Convention* and "performing" in the Act.

[36] Having the right under its domestic law to tax the amounts the Appellant received in 2015 and 2016 from MLSE, the relief from the double taxation that ensues is not to ignore the application of the Act and indeed Article XV(1) of the *Canada-United States Tax Convention*. Instead, the relief available to the Appellant is found at Article XXIV(1) of the *Canada-United States Tax Convention*, which states:

> In the case of the United States, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of the law of the United States (as may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; […]

[37] The Technical Explanation to Article XXIV and the Model Convention Commentary to Article 23, its equivalent in substance, support the view that relief from the double taxation caused by the Minister's assessments is to be had by virtue of a tax credit under the *Internal Revenue Code* against the Appellant's income for the 2015 and 2016 taxation years. This is also how this Court and others have interpreted Article XXIV of the *Canada-United States Tax Convention*.

[38] Accordingly, there is no basis under *Canada-United States Tax Convention* to allow the appeal by vacating the assessments. Canada was within its rights under the *Canada-United States Tax Convention* to assess tax on the amounts received by the Appellant from MLSE in 2015 and 2016. The relief from the double taxation caused by the combination of these assessment and the Appellant's US tax filings is to be obtained in the United States.

c) The Appellant’s Position

[39] Simply, Mr. Nonis was a non-resident who earned employment income from efforts expanded and exercised in the US and Canada, during the years in question, albeit exclusively to an employer domiciled in Canada.

[40] The Respondent’s confusion arises around the intended target of the relatively new provision: 115(2)(c.1). It relates to professional athletes who receive initial large signing bonuses, particularly in major league baseball, and then comparatively smaller annual salaries paid annually thereafter. Logically, if a US resident receives that bonus prior to arrival in Canada with a Canadian franchise, in the absence of 115(2)(c.1), such amounts, although relevant, related and reflective of the

expenditure of effort and services, to be performed in Canada, would not become income earned in Canada. Paragraph 115(2)(c.1) prevents this avoidance. This is borne out by the technical notes release when 115(2)(c.1) was introduced.

[41] Factually, the salary continuance of Mr. Nonis was not a signing bonus. Neither was the salary paid before April 12, 2015. Both were employment income under a contract of employment paid during its currency. The method for assessing Canadian tax in 2013 and 2014 was reasonable. It was based upon the days in residence in Canada to perform services and earn the concordant, prorated income. This is the consistent and logical basis upon which Mr. Nonis filed in 2015 and 2016.

[42] From a public policy perspective, the Minister's position if adopted by this Court will dramatically alter the law. It will catch all non-residents whose employment is terminated, but who have negotiated salary continuance after they have fully left Canada and returned to their state of residence.

[43] The Canada/US tax treaty does not apply. Mr. Nonis was a non-resident, not a resident required to pay tax in another jurisdiction. This is employment income of a non-resident and how much is attributable to services performed and effort expended in Canada.

[44] The direction of subsection 2(3) is clear. If one is a non-resident, calculate the income and then the deduction in 115(2)(d). Similarly, subsection 6(3) does not relate to employment income, but rather "fringe" or other benefits as part of compensation.

[45] Lastly, the Appellant's position is reasonable and apparent. The days spent in Canada are not zero in 2015, but rather the actual workdays, where Mr. Nonis was present in Canada versus actual work days present in the US. It is 2016, when no days were spent in Canada expending effort or performing services for MLSE. This too is consistent and reasonable.

IV. ANALYSIS

[46] To restate, the issues in this appeal are:

i) Is the non-resident, Mr. Nonis, deemed to be a resident taxpayer employed in Canada for the purposes of subsection 2(3) of the Act such that 115(2)(c.1) applies?; and

ii) If so, is the salary continuance received by the factual non-resident but deemed resident taxable as Canadian income for the years 2015 and 2016?

a) Certain agreed and disputed facts

[47] The Court agrees with both counsel on the following facts and conclusions:

i) Mr. Nonis was and remains a non-resident of Canada;

ii) The amounts paid under the employment contract were income arising from office or employment;

iii) These amounts paid under the employment contract continued unabated in all of 2015, and except for the discontinuance of certain health benefits, in all of 2016;

iv) Mr. Nonis ceased to provide any meaningful service or attendances for MLSE after the Notice Date (April 12, 2015), with the exception of remaining at home (in the US).

[48] These following facts or conclusions of mixed fact and law, whether relevant or determinative, were disputed between the parties during submissions concerning the period of salary continuation:

i) Whether Mr. Nonis was without obligation to notify MLSE of entreaties from other NHL member clubs after the Notice Date; and,

ii) Whether Mr. Nonis had any duties or obligations to MLSE after the Notice Date.

[49] After the Notice Date, Mr. Nonis' obligations to MLSE diminished meaningfully. However, certain runoff obligations marched along with salary continuation: Mr. Nonis' obligations to notify of new employment, of contact from other Member Clubs to discuss opportunities and, to comply with the direction and obligation to remain "at home" pending further discussions with other Member Clubs, speculatively even recall perhaps from MLSE. The employment agreement and NHL rules speak to this, the Court cannot ignore it.

[50] And quite apart from what the contract said, the parties certainly performed it in such a fashion. Mr. Nonis dutifully "went home" and watchfully waited for contact from other Member Clubs. As well, testimony indicated that MLSE received such notification from Mr. Nonis during the period after Mr. Nonis was approach by

a Member Club. MLSE also confirmed in writing for the Minister/CRA the number of days in Canada (for CRA) in 2015 and 2016 spent by Mr. Nonis in the performance of his duties. This is inconsistent with a complete severance of contractual ties and obligations upon the Notice Date which fell early in 2015.

b) The Act generally, residency and taxation of non-residents

[51] As cited by the Respondent in their submissions, an examination of the primary taxing statute requires a nuanced approach by referencing the longstanding direction of the Supreme Court of Canada[1]:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. V. Canada, [1999] 3 S.C.R. 804, at paragraph 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[52] There is no dispute that Mr. Nonis was factually a non-resident in all taxation years. The Act has a precise structure for taxation of non-residents. Specifically, with respect to employment income, Canadian income tax is to be paid by non-residents upon the taxable income "earned" in relation to services "performed" in Canada.

[53] Generally then, non-residents pay tax only on employed income from Canada where the employment is performed in Canada.

c) The Minister's "chain of logic"

[54] The Minister has departed from this general rule through an elaborately constructed sequence of legal conclusions simplistically listed below:

[1] *Canada Trustco Mortgage Co. v. Canada* [2005] 2 SCR 601 at paragraph 10.

i) Subsection 2(3) incorporates income amounts at section 115 into Part I even though not earned in Canada in that taxation year;

ii) By analogy paragraphs 115(2)(a),(b),(b.1),(c) and (c.1) expand otherwise non-taxable income to be included as Canadian income;

iii) Further in 115(2)(d), taxpayers are thereafter deemed to be "employed in Canada" under 2(3) of the Act;

iv) By so deeming Mr. Nonis "employed in Canada" he is concurrently deemed to be performing the duties of an officer in Canada;

v) Subsection 115(1) incorporates section 3 of the Act to determine a non-resident's income in Canada;

vi) Section 3 implicitly references sections 5 and 6;

vii) Section 5 and 6 direct certain inclusions; specifically subsection 6(3) deems, purposeful to section 5, amounts whether received during the course of employment or, more broadly, any amount received before during or after employment;

viii) Unless Mr. Nonis shows that the amount cannot "reasonably be regarded" as broadly based consideration in respect of employment paid at any time, Mr. Nonis "taxable income in Canada" permits taxation of the entire amounts received by Mr. Nonis from MLSE in 2015 and 2016 taxation years;

ix) The Minister has not been so bold. Through a discretionary remission tempered by reasonableness, the Minister reduced the assessment of income earned in Canada to the previously assessed proration applicable to duties exercised in Canada by Mr. Nonis in 2013 and 2015.

[55] By contrast, the Appellant submits the entire and simple direction the Court and Minister need is found within subsection 115(1). Specifically, Mr. Nonis' employment income was income from office or employment, calculated as if the Appellant had no other income for the year "other than incomes from the duty of employments performed by the non-resident person in Canada", all nicely enunciated in subsection 115(1).

[56] Further, section 4(1)(b) directs, where duties are performed by a taxpayer in both Canada ("one place") and a different country ("another place"), the taxpayer's

income is calculated from the duties performed in the one place versus another place. On this combined basis, Mr. Nonis' taxable income in each jurisdiction is simply based upon the ratio of days to perform his services in Canada to those spent in the United States, his country of residency. These are 37 days of 365 in taxation year 2015 and zero in 2016.

[57] The broad issue before the Court is whether Mr. Nonis' Canadian tax, as a factual non-resident, is to be assessed and calculated based upon those services performed in Canada, under sub-paragraph 115(1)(a)(i), or based upon a "fictional (as that word was deployed by Respondent's counsel)" deemed residency arising from the nature of the remuneration, consideration or compensation, under sub-paragraphs 115(2)(c)(i) or (ii).

d) Tax liability in Canada for non-residents

[58] Mr. Nonis is a non-resident. This fact is not in dispute. Still, Mr. Nonis may still be liable to pay Canadian income tax. Whereas a non-resident is not required to pay Canadian income tax on their worldwide income, a non-resident must pay Canadian tax on the income earned from employment services performed in Canada.[2] The non-resident's taxable income earned from employment in Canada includes any income from a Canadian employer in that year.[3] Although the Act makes an exception for income earned from a Canadian employer for work performed outside of Canada, which is subject to income tax by a foreign country,[4] the Act also deems a non-resident to have been employed in Canada in the year for the purpose of determining their tax liability.[5]

[59] Ultimately, paragraph 4(1)(b) of the Act provides a formula for determining a non-resident's income tax liability. According to paragraph 4(1)(b) of the Act, if a taxpayer works partly in Canada and partly in another country in the same taxation year, the taxpayer's taxable Canadian income for the year is the amount earned while working physically in Canada. This reasonable allocation of income appeared to be the inception point of the Minister's calculation of the Appellant's taxable Canadian income for the 2013 and 2014 taxation years. However, paragraph 4(1)(b) of the Act does not inform or direct the Minister's decision to depart from this and take a historical average of the Appellant's physical presence in Canada in order to calculate the Appellant's Canadian income tax liability in subsequent years. Instead,

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[2] *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 2(3)(a) ("ITA").
[3] *Ibid* at s 115(1)(a)(v).
[4] *Ibid* at s 115(2)(e).
[5] *Ibid* at s 115(2)(d).

that departure is fully provided by the invocation of the legal logic and sequencing described above: deemed resident; full inclusion of all income and, only then, a reasonable exclusion of certain amounts to reduce income to a discretionary amount reflective of amounts in previous years with different factual scenarios.

i) Textual Conflict

[60] So which applies? One sub-paragraph directs the Minister to the performance of duties in one jurisdiction versus another. The other, by virtue of a more specifically targeted amendment requires the full taxation of all remuneration paid under the contract where a nexus to Canada exists. Thereafter, the Minister may reduce the inclusion, but need not unless reasonable.

[61] A more nuanced principle and analysis allows the Court a basis for interpreting these conflicting provision: *Canada Trustco*[6].

[62] Given the direction and framework outlined in Canada Trustco[7], what exactly did Parliament intend by enacting the general provisions of subsection 115(1) and the specific provisions of subsection 115(2)(c.1).

ii) Subsection 115(1) Context and Purpose

[63] As submitted by the Respondent herself, the technical notes concerning subsection 115(1)(a) through (c) provide specific assumptions to determine tax for non-residents who are subject to tax in another jurisdiction and those who are not. It is a general rule to determine "taxable income earned in Canada" based upon the performance of those services in the relevant jurisdictions.[8]

iii) Subsection 115(2) Context and Purpose

[64] Subsection 115(2) in contrast deals with specific and special situations where the general rule in 115(1) did and does not sufficiently apply in order to tax the reasonably allocable income arising from performance of services in or related to Canada.

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[6] *Supra*, paragraph 10.
[7] *Supra* note 1.
[8] Technical notes, section 115, March 2001.

[65] Specifically concerning subsection 115(2), the technical notes at the time of Parliament's passage are revealing.[9] The relevant excerpts are below:

> Subsection 115(2) deems certain non-residents to have been employed in Canada, making them subject to tax under Part I but providing special rules with respect to the calculation of their taxable income earned in Canada under subsection 115(1).
>
> Paragraph 115(2)(c.1) and subparagraph 115(2)(e)(v) are added to the Act to include a signing bonus or similar payment received by the non-resident in his taxable income earned in Canada. The new provisions apply where an amount, which is deductible under the Act to the payor, is received by a non-resident under a contract as consideration for entering into a contract of or for services to be performed in whole or in part in Canada or as consideration for undertaking not to enter into any such contract with someone else- subparagraph (c.1)(i). The new provisions also apply to remuneration from employment or as compensation for services to be performed in Canada- subparagraph (c.1)(ii).[10]

[66] Purposively, subsection 115(2)(c.1) and (e)(i) ensure that a benefit received concerning employment to be performed in Canada are included in income to be taxed in Canada. Amounts received for entering or forbearing an agreement, or payments disguised for doing or not so doing are caught by subparagraphs (i) and (ii). This wording embeds an element of prospectively and/or time sequence dislocation, for example, in the instance where a "signing bonus" is memorialized in a distinct or mis-matched instrument or entitlement. This is also incorporated by reference to "base salary" benefits reflecting the standard, and usually lower, periodic salary reduced or diminished by the lump sum, "disconnected nature" of the "signing" or "marquis" bonuses, conveniently reflected elsewhere and otherwise outside the reach of the Minister. Hence, the legislative purpose and goal "to include a signing bonus or similar payment received by the non-resident in his taxable income in Canada".

iv) The Minister's sequential conclusions reaching to 115(2) fall short in this appeal

[67] The Respondent submits Mr. Nonis was deemed employed in Canada because Parliament in no way restricted the Minister's taxing authority to duties performed in Canada alone.[11] Parliament's intent is evident at subsection 2(3) where it includes "a previous year" and brings amounts of income listed at section 115 of the Act

[9] Technical notes, section 115(2)(c) and (c.1).
[10] Technical notes, section 115(2)(c.1), 1982.
[11] Respondent's Written Submission – page 5, paragraph 19.

under the taxing provision of Part I without those amounts having been earned from employment in Canada in the year received.[12]

[68] How this illustration of Parliament's intention to unfetter the Minister's taxing authority to or from duties performed in Canada alone is not clear. If a non-resident ceases to be employed in Canada, and received Canadian-source employment income that was earned in a previous year, the Minister has the authority to tax that income because it was earned when the non-resident was employed in Canada. The Minister has no authority to tax the non-resident on income earned for the performance of duties outside of Canada, no matter who pays it. The relevant factor to be considered is whether the remuneration is attributable to duties performed in Canada. It makes no difference that the remuneration has other connecting factors to Canada; if the remuneration is not attributable to duties performed in Canada, it is not subject to Canadian tax.[13]

[69] The Respondent also states that Parliament's intention is evident through subsection 115(2), which subjects certain individuals to tax in Canada even though they may not, strictly speaking, be exercising their duties in Canada.[14] This is not convincing. Subsection 115(2) provides specific examples in which Parliament allows the Minister to tax non-residents on income earned through the performance of duties outside of Canada. These provisions are specific in whom or what they include. Specifying expressly a few situations where the Minister may tax non-residents on income earned through duties performed outside of Canada is not authority that Parliament intended to give the Minister unlimited power to tax non-residents on income earned from duties performed outside of Canada. If this were Parliament's intention, to be contextually consistent, each specific circumstance would be enumerated. The suggestion that remuneration under sections 5 and 6 were intended to allow the Minister to assess tax on income earned from duties outside of Canada is also not clear.

[70] Lastly, the Respondent's argument, that the amounts received by Mr. Nonis are captured under section 115(2)(c.1) and, as such, Mr. Nonis is deemed to be employed in Canada pursuant to section 115(2)(d), requires ignoring the context and purpose. This confusion was avoided in the technical notes to 115(2)(c.1). The technical notes explain that both paragraph 115(2)(c.1) and subparagraph 115(2)(e)(v) were added to include signing bonuses or similar payments received by

[12] Respondent's Written Submission - page 6, paragraph 20.
[13] *Sutcliffe v. HMQ*, 2005 TCC 812 at para 101.
[14] *Supra* note 12 at paragraph 21.

non-residents. It is in this context that 115(2)(c.1) has been applied.[15] While no jurisprudence exists concerning subparagraph 115(2)(c.1)(ii), the commentary concerning the complementary nature of both sections is noted by the Court; subparagraph (ii) should be read in tandem with subparagraph (i). Subparagraph 115(2)(c.1)(i) is intended to cover amounts received as consideration or partial consideration for entering into a (or forbearing another's) contract of service, or for entering into an agreement to perform a service where any such service or part is to be performed in Canada. While (i) covers consideration for "entering" into a contract or agreement, (ii) prevents non-capture where a signing bonus is represented as something else. For example, where a signing bonus is instead included as a separate secondary payment, aside from salary, which is portrayed as remuneration for services, such amounts would come within subparagraph (ii). This is also supported by the preamble in paragraph 115(2)(c.1) applicable to both sub-paragraphs where it stated "irrespective of … the form or legal effect of the contract …". By including this, Parliament was aware that signing bonuses may be represented as something else paid in a different period or in a different "place", to avoid their characterization as income for services otherwise provided under a correlative contract of employment performed in Canada.

V. CONCLUSIONS

[71] There are several additional reasons why the Minister's application of section 115(2)(c.1) in this appeal is not correct.

a) No unfulfilled Purpose of Subsection 115

[72] To accept the Respondent's interpretation would not necessarily render paragraph 115(2)(e) irrelevant; rather, it would make it redundant. This is because a non-resident would be deemed to be employed in Canada pursuant to paragraphs 115(2)(c.1) and (d), triggering 115(1)(a)(i). Section 248 defines "employed" as "performing the duties of an office or employment"[16]. Thus, being employed in Canada means performing the duties of an office or employment in Canada. Subparagraph 115(1)(a)(i) includes, "incomes from the duties of offices and employments performed by the non-resident person in Canada", which would result in subparagraph 115(1)(a)(i) applying to anyone that is deemed to be employed in

[15] *Khabibulin v. HMQ*, 2000 DTC 1426, 1999 Carswell Nat 2012 (TCC).
[16] *Supra* note 2, s 248.

Canada under paragraph 115(2)(d). Therefore, there would be no need to have paragraph 115(2)(e).

b) No signing bonus or distinct remuneration, consideration or compensation, exists

[73] There is only one contract before the Court. It was never changed or amended, aside from a term extension. It was exercisable in two jurisdictions (or places), at least until the Notice Date, and thereafter, in only one jurisdiction (or place), the USA. There are not two contracts, one payable a certain time in one place and a second payable at a different time in another, but one contract referable to services to be performed in only or partially in one place.

[74] Should the Respondent's argument be accepted, this type of second contract or distinct remuneration would be rendered identical with other types of singular contracts that are for services to be performed in Canada by non-resident employees. There would be no distinction between a contract which compensates an individual for entering or not entering into an agreement for services to be performed in Canada and a contract for services to be performed, in part or full, in Canada. Both types of contracts would deem the individual to be employed in Canada. As stated above, a broad interpretation of subparagraph 115(2)(c.1), taken to the full extent, would mean that any remuneration, compensation or consideration that is received for services to be performed in Canada, regardless of where the services are actually performed, would result in the non-resident being deemed employed in Canada. This "deemed resident/factual non-resident" would be, taxable on the portion of income that is received for services performed outside of Canada, subject to the "reasonableness" of the Minister.

[75] If Mr. Nonis is fully taxable, in Canada on his salary continuation payable, subject to the Minister's reasonable reduction, while he exclusively lives, in the US as a US resident, then all non-residents terminated with salary continuation under a single partly performed contract would be so also, despite the clear, undisputed cessation of any services "performed" in Canada because of an irrevocable departure from Canada.

c) Applying 115(2)(c.1) in this context is absurd

[76] If the Respondent's interpretation of paragraph 115(2)(c.1) is accepted, this would foreseeably cause consequences which Parliament did not intend. The Respondent argues that the amounts received by the Appellant are captured under

paragraph 115(2)(c.1). If this provision is interpreted broadly to include any remuneration, consideration or compensation, either for entering or not entering into an agreement, or for duties of an office or employment (other than in the context of the interpretation provided above), this would essentially result in any contract for some portion of services to be performed in Canada by a non-resident to trigger this provision and render a non-resident a resident to the full extent of all employment income, regardless of the extent of services the non-resident is actually providing by way of duties performed in Canada. The Respondent's asserted interpretation of various aspects of section 115 is contrary to the general rule and scheme of the *Act*: to tax a non-resident to the extent such duties are performed in Canada under a contract of employment.

VI. SUMMARY AND COSTS

[77] Based upon these reasons and analyses, the appeal is allowed.

[78] There is no dispute regarding the number of days Mr. Nonis performed his services in Canada in 2013 and 2014. Similarly, the Minister assumed the following in the Reply: after April 12, 2015 Mr. Nonis was "no longer required to report to work and fulfill his employment duties". Factually, this is partially correct. Mr Nonis was no longer required to report to work, physically and/or in Canada. He was however required to fulfill his residual duties. He did so in Canada in 2015 for 37 days and for none in 2016. This is the proper and consistent basis to tax Mr. Nonis' income in those years, reflective of the time he spent in Canada to perform those residual duties.

[79] Costs are awarded provisionally to Mr. Nonis subject to the right of either party to make written submissions thereon within 30 days of the date of this judgment, whereupon the Court may consider such submissions and vary its provisional cost award, failing which this provisional cost award shall become final.

Signed at Ottawa, Canada, this 14th day of April 2021.

"R.S. Bocock"

Bocock J.

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