

Non-Resident Withholding `In Respect of` Services Rendered in Canada



Federal [Income Tax Regulations](#) (Sec. 105(1)) require employers to withhold 15% from fees, commissions, and other amounts they pay to non-residents “in respect of services rendered in Canada.” While this may sound straightforward enough, in the real world it’s not always easy to [determine which, if any, payments to a non-resident this rule covers](#). In 1983, the Supreme Court of Canada ruled that the words “in respect of” must be given the “widest possible scope.” Ever since, the CRA has had broad discretion to penalize taxpayers for failing to withhold. But the “in respect of” language can be stretched only so far. Here are 2 cases to give you a sense of the reach of the “in respect of” requirement.

Withholding IS Required

This case from 2000 and exemplifies what had previously been the typical attitude of courts to non-resident withholding.

Situation

A U.S. company called Marco Entertainment organizes a figure skating show starring Olympics silver medalist, Elvis Stojko. The show tours Canada. Marco pays each stadium owner a licence fee to rent the facility. The stadium owner controls the sale of tickets and concessions. After the event, it totals up the licence and other fees and remits the rest of the proceeds from the show to Marco. The government assesses penalties against the stadium owners for failing to withhold 15% of the payments remitted to Marco. The owners claim that it was unnecessary to withhold under Section 105(1) because they didn’t receive “services” from Marco.

Ruling

The Tax Court rules that Marco did provide services and withholding was thus required.

Reasoning

Producing a show counts as delivering services, the court reasoned. After all, without the producer there’s no show. The owners claimed that any services provided were provided to the audience, not to the stadium owners. But even if this were true,

it wouldn't change things. According to the court, for purposes of Section 105(1), it doesn't matter who actually receives the services. As long as there were services provided, the services were rendered in Canada and the payment to the non-resident was in connection with those services, the payment meets the "in respect of" requirement and is subject to 15% withholdings.

[*Ogden Palladium Services \(Canada\) Inc. v. The Queen*](#), 2001 CanLII 483 (TCC).

Withholding Is NOT Required

This case with a contrasting ruling represents the current, more restrictive approach taken by courts in interpreting the "in respect of" rule.

Situation

During the tax year, a BC lumber company pays \$14 million in fees to U.S. consultants and withholds 15%. The company doesn't withhold from the amounts it remits to cover the consultants' out-of-pocket expenses, including travel and time spent traveling to Canada. The CRA claims the reimbursement payments are "in respect of services rendered in Canada" and imposes penalties on the company for its failure to deduct. It also claims the company violated the law by accepting the invoices at face value without insisting that the consultants submit vouchers or other backup documentation as required by CRA Information Circular 75-6R2.

Ruling

The Tax Court rules that the company didn't violate Section 105(1).

Reasoning

Payments to reimburse consultants for disbursements and travel are not income earned in Canada subject to withholding. If they were, it would create a "considerable disincentive" for foreigners to provide services to Canadian clients, the court explains. Nor was the company's failure to insist on documentation of the information listed on the invoices for out-of-pockets a violation. Although 75-6R2 requires such documentation, the *Income Tax Act* doesn't. The court notes that while CRA Information Circulars "serve a useful purpose" in explaining the Agency's policies, they're not laws and can't "impose requirements on taxpayers beyond those created by the Act."

[*Weyerhaeuser Company Limited v. The Queen*](#), 2007 TCC 65 (CanLII).

Takeaway: Err on the Side of Caution

The rules governing "in respect of" withholdings from non-resident payments are subtle, complex and dependent on the specific circumstances involved. **Rule of Thumb:** When in doubt, err on the side of caution. If it's a question of whether to withhold or not withhold, withhold. If it's a question of how much to withhold, withhold the larger amount. Keep in mind that the consequences of tax overpayments are less serious and easier to correct than underpayments. Although this is good advice for any tax situation, it applies particularly to non-resident withholdings where CRA has historically been sensitive to and aggressive in rectifying violations. Many companies have learned this lesson the hard way. Don't be one of them.