Deeming Provisions*

Author : admin

Deeming Provisions in the *Income Tax Act*

The ITA often "deems" a certain matter to be a particular way, but the word "deem" is not defined in the ITA. Most commonly, "deeming" rules create legal fictions - the matter deemed is treated as if it was the matter deemed, irrespective of reality. The Supreme Court of Canada in R v *Verrerre*, [1978] 2 SCR 838, stated:

> [...] A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word “includes” in certain definitions; however, “includes” would be logically inappropriate and would sound unreal because of the fictional aspect of the provision. [...]

The effect of creating a legal fiction is wide-ranging (eg. a dividend includes a deemed dividend; a disposition includes a deemed disposition), and one must always be on the lookout for the effect of deeming provisions where the word deemed doesn't appear. This is because some deeming provisions apply for purposes of the entire ITA, and some apply only for limited purposes. Furthermore, a legal fiction required one to consider:

- whether the legal fiction supplants reality or whether it merely supplements it
- whether the legal fiction require or allows us to also import facts/circumstances necessarily related to the fiction and/or potentially related to the fiction?

Although the creation of legal fictions is the most often recognised role of deeming provisions, it is not the only one. One can categorize deeming provisions into four groups on the basis of their function (R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada, 2008):

- To create a legal fiction by declaring that something exists, has certain properties, or has occurred regardless of the truth of the matter;

- To declare the law;
- To create a legal presumption by declaring that certain facts are to be taken as established; and
- To confer a discretion.

When a deeming rule is used to create a legal fiction, the ITA generally aims to treat two transactions equally when the two are different in legal substance but are analogous in economic effect (eg. deemed dividend rule in section 84).

When a deeming rule is used to declare the law, it creates an irrebuttable presumption regarding the meaning of a certain word or expression. The ITA uses deeming rules in this way to conclusively clarify the meaning of a term that may be ambiguous or may imply a value judgment - thus it eliminates any possible controversy as to the application of a provision.

When a deeming rule declares certain facts as established, it creates a presumption that accepts something as fact without the benefit of evidence. The presumption created by such a rule may be either rebuttable or irrebuttable. An irrebuttable presumption of fact creates a legal rule because if facts are deemed to be a certain way, the legal consequences necessarily follow in all circumstances. A rebuttable presumption is used to deal with areas of evidentiary difficulty.

When a deeming rule confers discretion, it allows the designated or empowered person(s) to do something (usually relates to a decision).

It may not always be clear as to whether the deeming rule is creating a legal fiction or whether it is creating a presumption of fact, or declaring the law. Each perspective on the purpose of the deeming rule may give rise to a different interpretation of the effect of the deeming rule in question, and thus lead to divergent arguments as to tax consequences.

Note that deeming provisions are generally narrowly construed, such that results other than those specifically deemed are not imputed by a court.

* Some of the material in this section has been adapted from a great article that appeared in the Canadian Tax Journal: MN Kandev & J Lennard, "Interpreting and Applying Deeming Provisions of the Income Tax Act" (2012) 60:2 Can Tax J 275.

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

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