# Price v The Queen, 2012 FCA 332

### Pilots Flying through Canadian Airspace - How to Allocate Income as Between "earned in Canada" and "earned outside of Canada" for Air Canada Pilots?

*Price v The Queen*, 2012 FCA 332

**[NOTE**: Statutory amendment effective 2013 and on - see below]

The taxpayer-pilot (who was a non-resident during the relevant time) appeals from the judgment of the TCC, challenging the allocation principles set out in *Sutcliffe v The Queen*, 2005 TCC 812. Particularly, at issue was whether flight time only, or actual service time (flight time and off-flight time) ought to be considered in making an allocation as between income earned in Canada and outside of Canada.

The FCA upheld the decision of the TCC, and thus the apportionment of income in accordance with *Sutcliffe* and the collective agreement which ties earnings to flight time. Additionally, the FCA held that subsection 115(1)(a)(i) refers not only to subsection 5(1) income, but also for those inclusions by subsection 6(1) for non-residents as well as residents.

**FACTS**

The taxpayer was a non-resident former pilot who principally flew international routes. Before the decision in *Sutcliffe* no portion of the international flights resulted in income earned in Canada, whereas after the time spent in Canadian air space is now deemed income earned in Canada. The taxpayer didn't challenge this interpretation, but only the allocation guidelines provided in *Sutcliffe,* arguing that the allocation ought to be calculated from the moment that the pilot's duties begin with the departure of the flight and until the end of the duties upon arrival at the home base or its equivalent. In essence, not only flight time, but also off-flying hours ought to inform the allocation.

A secondary issue was whether the taxpayer being paid disability payments in 1999 would be subject to Canadian tax, given his non-resident status and the decision in *Blauer v. The Queen*, 2007 TCC 706.

**TCC Decision**

The TCC held that in order to challenge the apportionment by the Minister on the basis of *Sutcliffe*, the taxpayer had to demonstrate that the method he proposed was more reasonable. However, given that the allocation method in *Sutcliffe* was based on the collective agreement between the pilots and Air Canada where remuneration is based on flight time, the most reasonable method is one that reflects the pay structure contained in the contact of employment (para 9).

As with regards to the disability payments, the TCC didn't find it was bound by *Bauer*, and

relying on *The Queen v. Savage*, [1983] 2 S.C.R. 428 and *Hurd v. The Queen*, [1982] 1 F.C. 554 (C.A.) conclude that the income is taxable pursuant to sections 3 and 115. The conclusion was based on the nexus between the performance of duties in Canada and any material acquisition that confers an economic benefit to the taxpayer, and allocated the disability payments 50% within and 50% outside of Canada.

**ANALYSIS**

In *Sutcliffe*, the TCC set out the following rules for the apportionment of income on non-resident Air Canada pilots:

> (a) the income earned in relation to the portion of any flight (domestic or international) flown in Canadian airspace is income earned in Canada;
>
> (b) the income earned in relation to the portion of any flight (domestic or international) flown outside Canadian airspace is income earned outside of Canada;
>
> (c) the income which is related to specifically paid duties not related to any flight is deemed income earned in Canada or outside Canada depending on where the duties are actually performed, and
>
> (d) the remuneration not related to specific duties (such as vacation pay, sick pay, etc.) is prorated to the income earned in Canada and outside Canada as determined above, and is allocated accordingly.

The FCA was unable to find an error of law of fact in the TCC's reasoning that the apportionment method preferred, based on the method set out in the collective agreement, is flight time rather than total travel time. The system for Air Canada pilots is largely based on the minutes recognized as flight time, and this is the method of allocation confirmed by the FCA.

Turning to the issue of disability payments, the FCA stated that the benefits of the plan are captures by paragraph 6(1)(f) of the ITA. In *Bauer* the TCC was of the view that subparagraph 115(1)(a)(i) "does not include all payments that are made employment income when earned by a non-resident but rather it incudes only a certain type of employment income; namely income from the performance of the duties of office or employment.".

The FCA didn't follow the reasoning set out in *Bauer*, and noted that subparagraph 115(1)(a)(i) specifically refers to section 3 which refers to the income from office or employment. Income from office or employment is then further refined in subsections 5(1) and 6(1) of the ITA, and these provisions should be interpreted together in a manner that ensures a consistent and harmonious meaning to the notion of income from an office or employment. The FCA saw no reason why the matters include in income via subsection 6(1) should not also be include in the income of a non-resident, where they are linked to the duties of an office or employment performed in Canada. The words "duties" and "performed" in subparagraph 115(1)(a)(i) simply distinguish between income earned within and outside of Canada.

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**Notice of Ways and Means Motion** to Implement certain provisions of the budget tabled on March 21, 2013 and other measures, provides at section 8:

> 8. (1) Section 115 of the Act is amended by adding the following after subsection (2.3):
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> Non-resident employed as aircraft pilot
>
> (3) For the purpose of applying subparagraph (1)(a)(i) to a non-resident person employed as an aircraft pilot, income of the non-resident person that is attributable to a flight (including a leg of a flight) and paid directly or indirectly by a person resident in Canada is attributable to duties performed in Canada in the following proportions:
>
> (a) all of the income attributable to the flight if the flight departs from a location in Canada and arrives at a location in Canada;
>
> (b) one-half of the income attributable to the flight if the flight departs from a location in Canada and arrives at a location outside Canada;
>
> (c) one-half of the income attributable to the flight if the flight departs from a location outside Canada and arrives at a location in Canada; and
>
> (d) none of the income attributable to the flight if the flight departs from a location outside Canada and arrives at a location outside Canada.
>
> (2) Subsection (1) applies to the 2013 and subsequent taxation years.