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OUR FILE: 5641-1 GSF

Mr. Sam Gargan
 M.L.A., Deh Cho
 Legislative Assembly
 Yellowknife, N.W.T.

PERSONAL & CONFIDENTIAL
 BY HAND

October 23, 1990

Dear Mr. Gargan:

Re: Tax Rebates

We have had the opportunity of reviewing the letter of Sandy Harris, Research Officer of the Legislative Assembly of the Northwest Territories, addressed to yourself regarding property tax exemption under Treaties 8 and 11. We are also aware of the "isolated" examples of individuals in the Northwest Territories who filed grievances with Revenue Canada with respect to taxes levied on personal income. We agree with Ms. Harris that section 87 of the Indian Act is the definitive piece of legislation in these matters. At the same time, however, we cannot agree with her assumptions and speculations as to the legal reasons for the success of these grievances.

Section 87 of the Indian Act states:

"87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province ...the following property is exempt from taxation, namely:

- (a) the interest of an Indian or a band in reserve or surrendered lands; and
- (b) the personal property of an Indian or band situated on a reserve;

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property..."

In Ms. Harris' opinion, set out at the bottom of page 1 of her letter, "The key word in this provision for the Indians of the N.W.T. is the 'surrendered lands'." With respect, we disagree.

Insofar as income tax is concerned, the key words in this section are, rather, those appearing in paragraph (b): "the personal property of an Indian or band situated on a reserve". Paragraph (a) refers to "the interest of an Indian or a band in reserve or surrendered lands" and therefore does not apply to personal income. An "interest" in land is more often associated with property taxes. Income, however, is personal property of an Indian and therefore paragraph (b) of section 87 applies.

But the enquiry cannot stop there. Subsection 90(1) of the Indian Act helps to define "personal property" and relates directly to subsection 87(b). It provides that:

"90.(1) For the purposes of sections 87 and 89, personal property that was

- (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
- (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve."

A number of court decisions have considered the combined effect of sections 87 and 90 of the Indian Act and, in turn, created basic parameters for exemption eligibility under section 87(b).

In order to qualify for the exemption in section 87 of the Indian Act, the subject of the tax for which the exemption is claimed must:

- 1) be personal property;
- 2) belong to the Indian or band; and
- 3) be situated on a reserve.

With respect to income tax, the subject of the tax is "income". Does this meet the above criteria?

In 1983, the Supreme Court of Canada decided in the case of Nowegijick v. The Queen that "income" is personal property and therefore exempt from taxes pursuant to section 87 where the other



two conditions are met. Clearly, the second condition was met, as income earned by an Indian must "belong to the Indian". Whether the income of the Indian in Nowegijick was situated on a reserve was not at issue in this case. The Court stated (and the Federal Government admitted) that the income of an Indian is situated on a reserve where the residence or place of the employer is also on a reserve. This is because income is a debt and the location of a debt is at the location of the debtor. The employer is the debtor who owes money to the employee. As a result, employers whose residence or head office is on a reserve automatically cause the income or "debt" to be situated on the reserve. Nowegijick's employer was indeed situated on a reserve, and so Nowegijick was exempted from paying income tax.

It is therefore our opinion that the parameters of the definition of "situated on a reserve" determine the parameters of the exemption for income tax under section 87 of the Indian Act. Nowegijick confirms what is perhaps the obvious principle that paycheques drawn from an employer situated on the reserve are exempt from income tax. But what about those employers who are situated off the reserve?

As noted earlier, section 90 applies to section 87 of the Indian Act. Its effect is to broaden the notion of "situated" beyond what most would consider to be its everyday meaning: certain personal property situated off a reserve that meets either of the conditions set out in section 90 "shall be deemed always to be situated on a reserve". These two conditions include any personal property that was:

- "(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
- (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty..."

In Greyes v. The Queen, a 1978 decision of the Federal Court, Trial Division, the Judge held that as the scholarship received by the Plaintiff, Greyes, to attend the University of Calgary, was earned as a result of an agreement between the Plaintiff's Indian band and the Federal Government (i.e. Her Majesty) the scholarship was deemed to be personal property by section 90(1) of the Indian Act within the meaning of section 87 of the Act.

Subsection 90(1) of the Indian Act was also applied by the Federal Court, Trial Division, in the 1988 case of Williams v. The Queen. There, the Appellant taxpayer, Williams, a registered

Indian living on a reserve, was assessed income tax on benefits paid under the Unemployment Insurance Act. The benefits were earned as a result of on-reserve employment. Some of the benefits were paid as a part of an on-reserve job creation scheme funded by the Unemployment Insurance Commission. As the job creation project was financed by an agreement between the Canada Employment and Immigration Commission and the Penticton Indian Band, benefits paid under the agreement would therefore be deemed to be located on the reserve pursuant to section 90(1) of the Indian Act. As a result, they were held to be exempt from taxation pursuant to section 87 of the Indian Act. The application of section 90 of the Act in these circumstances was, however, the secondary grounds for exempting the Unemployment Insurance benefits from taxation.

Foremost in the Court's decision to exempt taxation liability were a number of factors indicating that the residence or place of the employer was not conclusive in determining whether the personal property (i.e. the unemployment benefits) was situated on the reserve. Even though the payments came from Ottawa, and would therefore be considered to be personal property situated off the reserve according to the statements of the Supreme Court of Canada in Nowegijick, the Court in Williams found that a number of other factors caused the personal property to be situated on the reserve. Those factors included the fact that the taxpayer lived on the reserve, that his benefits derived from on-reserve employment, that the job creation scheme was based on the reserve and the fact that the intent of the Indian Act was to exempt Indians from taxation.

The structure of the exemption from income tax provided to Indians pursuant to section 87 and section 90 of the Indian Act as a result of these cases may be summarized as follows:

- * 1) Where the employer is located on the reserve, an Indian employee is automatically exempted from income tax (Nowegijick).
- 2) Where the employer is located off the reserve, there is no exemption from income tax unless at least one of the following conditions is met:
 - * (a) The income is paid to the Indian or a band pursuant to the terms of a treaty or agreement between a band and Her Majesty, for example employees of a band council who are paid by DIAND pursuant to an agreement between the band and the Federal Government (Greyes); or

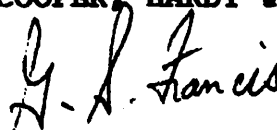
- (b) Sufficient factors exist to change the situs of the personal property (i.e. income) from the residence or place of the employer off the reserve to the Indian on the reserve. Such factors include the residence of the taxpayer Indian, whether his income is derived from on-reserve employment, whether the Indian's employment is related to the reserve, and the fact that the intent of the Indian Act is to exempt Indians from taxation (Williams).

By inserting the circumstances of the individual Indian taxpayer into the above structure, one should be able to determine whether or not there is exemption from personal income tax pursuant to section 87 of the Indian Act.

We trust the foregoing is satisfactory to answer any concerns you may have with respect to income tax exemptions for Indians under the Indian Act. If you require clarification or any further assistance please do not hesitate to contact our office.

Yours truly,

COOPER, HARDY & REGEL



Gregory S. Francis
Student-at-Law

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