Has Parliament Failed To Charge the “Tax on SIFT Partnerships”?

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ABSTRACT
Part IX.1 of the Income Tax Act attempts to impose a tax on a “specified investment flow-through” (SIFT) partnership, in order that such a partnership and its investors be taxed in a manner similar to a public corporation and its shareholders. The purported charge to tax in part IX.1 provides that a SIFT partnership “is liable to a tax.” The authors argue that the term “liable to,” from a textual and contextual perspective, connotes a possibility or
probability of incurring some thing, rather than an obligation to do that thing. Acknowledging that it would be astonishing for Parliament to have failed to charge part IX.1 tax, the authors argue that, owing to the very nature of a charge, as well as from normative and constitutional perspectives, a charge to tax must be drafted unambiguously and must clearly impose an obligation to pay the tax, and that it would be inappropriate for a court employing the so-called modern rule of interpretation to rely on purpose to save a charge. The authors, referring to recent jurisprudence of the Federal Court of Appeal and the Supreme Court of Canada, further argue, focusing squarely on principles of interpretation, that the “modern” rule itself may not even justify having resort to purpose in this case to override conflicting text. They conclude by noting that there is Supreme Court precedent for denying a tax claim on the basis that the legislation in question failed to impose a tax even though the intention to tax was clear, and that Parliament should not adopt retroactive changes to the law as a fix for deficient drafting.

KEYWORDS: CHARGES • PARTNERSHIPS • PENALTIES • RETROACTIVE • STATUTORY INTERPRETATION • TAX LEGISLATION

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Do, or do not. There is no try.

Jedi Master Yoda, Star Wars, Episode V: The Empire Strikes Back

This article examines the so-called “Tax on SIFT Partnerships” in part IX.1 of the Income Tax Act in relation to the seemingly paradoxical question: When is a “tax” not a tax?

THE ISSUE

Part IX.1 of the Act attempts to impose a tax on certain publicly listed partnerships, referred to as “SIFT partnerships.” We say “attempts” because we are having difficulty locating the charge to tax—that is, the provision by which Parliament in fact

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this article are to the Act.

2 In 2006, the government announced a new taxation regime for “specified investment flow-through” entities or SIFTs, better known as income trusts and publicly traded partnerships. The
imposes the tax. Obviously, there is no tax without an actual levy.\(^3\) In the case of the Act, every tax contained therein\(^4\) (insofar as we can tell) is imposed by way of a provision commanding that a tax “shall be paid”\(^5\) or that a person “shall pay” a tax\(^6\) or that a tax “is payable.” This language, employed in charging provisions of other taxing statutes as well,\(^8\) is unequivocal and unconditional; it leaves no doubt that a tax has been charged.

Part IX.1 “tax,” on the other hand, is purportedly charged by virtue of subsection 197(2) of the Act, which, in its English and French versions, provides in part as follows:

Every partnership that is a SIFT partnership for a taxation year is liable to a tax under this Part equal to the amount. . . .

Toute société de personnes qui est une société de personnes intermédiaire de placement déterminée pour une année d’imposition est redevable, en vertu de la présente partie, d’un impôt égal à la somme. . . . [Emphasis added.]

Subsection 197(4) sets out an obligation on the part of a member of a partnership that is “liable to pay tax” under part IX.1 to file a return containing an estimate of the SIFT partnership’s tax payable, while subsection 197(7) provides that a SIFT partnership is required to pay, by its balance-due day, its tax payable under part IX.1. Each of these provisions presupposes that a SIFT partnership has a tax payable; yet, as discussed below, subsection 197(2) does not clearly impose a tax.\(^9\)
TEXTUAL AND CONTEXTUAL MEANING OF “LIABLE TO A TAX”

The “liable to” formulation employed in subsection 197(2) as an apparent charge to tax is quite unusual, both from a textual standpoint and in the context of the Act.

While the word “liable,” when used alone, may mean responsible at law, the particular expression “liable to” generally implies a possibility or probability of incurring something because of position, nature, or particular situation. Thus, when followed by the word “to,” the word “liable” is synonymous with “apt,” and both these words may then be used nearly interchangeably with “likely.” The plain meaning of the expression “liable to tax” has been explained by David Ward as follows:

The dictionary [Fowler’s Modern English Usage] refers the reader to the word “apt” for [the] proper use [of “liable”] and discusses the proper use of the words “apt, liable, likely, prone and calculated” stating that when “liable” is followed by “to” with the infinitive it may have a meaning in the sense of being exposed to a risk:

“It may perhaps be laid down that apt is the right [word to be used] except when the infinitive expresses not merely an evil, but an evil that is one to the subject... and therefore liable is right, in: We are [liable] to be overheard (being overheard is an evil to us).”

Therefore, the expression in Article 4(1) [of the model tax convention of the Organisation for Economic Co-operation and Development (OECD)] of being “liable to tax” (which is a cryptic way of saying “liable to be taxed”), because tax is usually considered by taxpayers as an evil to them, properly understood in the English language means, applying Fowler’s analysis, that [a] person is at a risk of being taxed by reason of the criteria mentioned. It does not mean that the person is actually taxed.

Accordingly, the expression “liable to” connotes two ideas: (1) that a person has satisfied certain factual preconditions (typically, at law, a person performs some act that he is obliged not to perform, or omits to perform some act that he is obliged to perform), which (2) gives rise to a possibility or probability of something (adverse) being incurred by that person. For example, (1) a person who fails to honour his contractual obligations (2) is apt or likely to be sued.

The manner in which the “liable to” language is primarily employed in the Act is perfectly consistent with this plain meaning. First, it signifies that a taxpayer has failed to comply with some pre-existing obligation under the Act, and second, it

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10 See, for example, National Trust Co. v. R, [1998] 4 CTC 26 (FCA).
11 Webster’s Ninth New Collegiate Dictionary.
12 Ibid.
refers to an amount that a taxpayer need not self-assess, since it may only potentially be incurred; that is, the obligation to pay the amount crystallizes only upon assessment by the minister. As explained by Laskin J of the Supreme Court (in dissent, though not necessarily on this particular point), “to say that a person is liable to a penalty is merely to expose him to the risk thereof; only when the necessary action or step is taken to exact it does it become effective.”

Indeed, the “liable to” language appears to inhabit (almost) every penalty provision under the Act. For example, subsection 162(1) provides that every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is “liable to a penalty.” The use of the “liable to” language in connection with a penalty, in contradistinction to the standard “shall pay” formulation utilized in a charge to tax, signals both that a taxpayer can outright avoid the penalty by complying with his extant obligations under the Act and that, even when the penalty has been triggered, it is only a conditional or potentially payable amount, which the taxpayer need not pay unless and until he is assessed. In our view, the use of the “liable to” language here is in recognition of the fact that penalties, unlike taxes, are fault-based, and thus that the minister should be afforded the discretion not to levy them in the appropriate circumstances.

The “liable to” language is also employed in, for example, subsections 215(6) and 227.1(1), which address the failure to withhold amounts as required by the Act. Here too the expression is used to denote a responsibility that arises only if the taxpayer, or the corporation of which the taxpayer is a director, fails to comply with an existing, distinct obligation (to withhold) under the Act, and in neither case is the taxpayer required to self-assess the amount that he is thereby liable to pay.

15 The only exception that we could find was the penalty apparently imposed by virtue of subsection 204.82(4) upon a labour-sponsored venture capital corporation registered under part X.3. Subsection 204.82(4) provides, “Where a corporation is liable under subsection (3) to pay a tax for a taxation year, the corporation shall pay, in addition to the tax payable under that subsection, a penalty for the year equal to that tax” (emphasis added). The suggestion here is that once the pre-existing condition is satisfied (that is, the corporation is at risk of paying tax under subsection 204.82(3)), the liability for the “penalty” exists automatically; that is, the minister has no discretion as to whether or not to assess the penalty.
16 Pillar Oilfield Projects Ltd. v. Canada, [1993] GSTC 49 (TCC). Such a discretion would be inconsistent with the notion of a tax, which is something that the minister must levy regardless of the circumstances (see, for example, Re Canadian Red Cross Society, 2007 CanLII 7578 (Ont. SCJ)). It is interesting to note in this regard that the Canada Revenue Agency (CRA) is of the view that it cannot “waive” a penalty after 10 calendar years following the end of a taxation year owing to the limitation in subsection 220(3.1). However, since the CRA is not obliged to assess a penalty in the first place, the 10-year limitation should apply only to the cancellation of a penalty once assessed. That is, the word “waiver” in subsection 220(3.1) should, we submit, be read only in connection with “interest,” not a penalty.
17 In Oceanspan Carriers Ltd. v. The Queen, [1987] 1 CTC 210, at 215 (FCA), the Federal Court of Appeal held that the definition of “taxpayer” in subsection 248(1) refers to “resident individuals
This understanding of the meaning of the term “liable to” as used in the Act is supported by the recent judgments of the Tax Court of Canada and the Federal Court of Appeal in Exida.Com Limited Liability Company v. The Queen, where the matter at issue was the application of the penalty contained in subsection 162(2.1). That provision reads as follows:

(2.1) Notwithstanding subsections (1) and (2), if a non-resident corporation is liable to a penalty under subsection (1) or (2) for failure to file a return of income for a taxation year, the amount of the penalty is the greater of
(a) the amount computed under subsection (1) or (2), as the case may be, and
(b) an amount equal to the greater of
(i) $100, and
(ii) $25 times the number of days, not exceeding 100, from the day on which the return was required to be filed to the day on which the return is filed.

[Emphasis added.]

At the Tax Court of Canada, Woods J held that the phrase “liable to a penalty under subsection (1) or (2) for failure to file a return of income for a taxation year” in subsection 162(2.1) applied to a non-resident corporation carrying on business in Canada that failed to file a return on time, even though the corporation had no unpaid tax (and thus there would be no amount payable under subsection 162(1) or (2)), since “the non-resident corporation is potentially subject to a penalty.” In other words, the corporation became “liable to” the penalty under subsection 162(1) or (2) once it failed to comply with its obligation to file its return on time, although the penalty was only conditionally or potentially payable (because the minister could exercise his discretion not to assess it or, as in this case, because the formula

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or corporations who may be liable to pay tax at some time whether or not they are, at any given time, liable therefor” (emphasis in original). In reaching this conclusion, the court presumably felt that it was achieving the right result in that particular case, since it prevented a corporation from carrying forward losses, incurred in years before it became a Canadian resident and while it carried on no business in Canada, against its taxable income earned while a resident of Canada. Nevertheless, this result was achieved, we respectfully submit, by ignoring the plain meaning of the definition of “taxpayer” and, worse still, by rearranging its wording so that, as can be seen in the above quotation, the words “liable to” appear, through some legerdemain, before the words “whether or not,” whereas they appear after those words in the actual definition:

- Subsection 248(1):
  “taxpayer” includes any person whether or not liable to pay tax.

- Oceanspan redraft:
  “taxpayer” includes any person liable to tax whether or not that person pays tax.

The Oceanspan redraft arguably changes the plain meaning of “taxpayer,” from a person who may or may not be within the ambit of the relevant charge to tax, to a person who is within the ambit of the relevant charge but who may or may not have actual tax payable for the year.

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18 2009 TCC 373; aff’d. 2010 FCA 159.
19 Ibid. (TCC), at paragraph 59.
would produce a nil amount). Of particular interest to the interpretation of the apparent charge in subsection 197(2) is the court’s observation that the interpretation of subsection 162(2.1) that was suggested by the taxpayer “essentially equates the terms ‘liable’ and ‘payable’” and that “the use of different terminology in the relevant subsections . . . seems to suggest that a different meaning was contemplated.”

The Federal Court of Appeal dismissed the taxpayer’s appeal from the Tax Court’s decision but held, instead, that the taxpayer was subject to the residual penalty imposed under subsection 162(7) and not the penalty under subsection 162(2.1). It is interesting for our purposes that the Federal Court of Appeal did not appear to take issue with Woods J’s interpretation of the phrase “liable to a penalty” as meaning “potentially subject to a penalty”; rather, it was of the view that a non-resident corporation that fails to file a tax return in circumstances where it has no taxes to pay is not “potentially subject” to a penalty under subsection 162(1) or (2). In other words, while Woods J was of the view that a corporation is “potentially subject” to the relevant penalty where it fails to file a return on time, the Federal Court of Appeal held that the corporation must both fail to file a return and have unpaid tax in order to be so “potentially subject.”

The imposition of a tax under the Act, as opposed to a penalty or other potentially payable amount, does not depend upon the existence (or the breach) of a pre-existing obligation; on the contrary, the requirement to pay tax is the pre-existing obligation that gives rise to the Act’s other potentially payable amounts, such as penalties for failing to pay one’s taxes in a timely manner or amounts for failing to withhold taxes. More specifically, taxes are not triggered by other obligations under the Act, but generally by a taxpayer’s status or personal attributes, such as his residence, or by certain events, such as the earning of income by the taxpayer. Furthermore, the obligation to pay tax exists automatically from the time it is imposed, not by virtue of an assessment. Therefore, when imposing a tax under the Act, Parliament has, with the exception of the putative “tax” under part V, discussed

20 Note that in Gour, Allison & Associates Inc. v. The Queen, 2009 TCC 174, Miller J, dealing with the very same question as that before Woods J in Exida.Com, came to the exactly opposite conclusion. Though apparently accepting that the expression “liable to a penalty” means merely being exposed to the risk of a penalty, the court found that the taxpayer was not exposed to the risk of a penalty under subsection 162(1) because it in fact had no unpaid tax. Respectfully, we find the reasoning in Exida.Com to be much more compelling.

21 Supra note 18 (TCC), at paragraph 51.

22 Ibid. (FCA), at paragraph 30.

23 It is trite law that a taxpayer’s obligation to pay tax arises by reason of the operation of the Act itself and that the assessment merely fixes the amount of tax that the taxpayer is already obligated to pay pursuant to the Act. This is specifically confirmed by subsection 152(3), which provides that “[l]iability for the tax [imposed] under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.” See, for example, Lambert v. The Queen, [1976] CTC 611 (FCA); The Queen v. Simard-Beaudry Inc. et al., 71 DTC 5511 (FCTD); and Terra Nova Properties Ltd. v. MNR, 67 DTC 5064 (Ex. Ct.). Subsection 152(3) applies equally to part IX.1 pursuant to subsection 197(6).
below, thus far confined itself to using language that denotes a present, unconditional obligation on a taxpayer to pay an amount. It should be noted that the French version of subsection 197(2), which employs the language « est redevable ... d’un impôt », while perhaps more closely implying the notion that a tax must be paid, is also unusual from a textual standpoint and in the context of the Act. The term « redevable d’un impôt » which appears to translate literally as “liable for tax,” is more equivocal than the phraseology « doit être payé », « est tenue de payer », or « est payable » that is generally used in charging provisions in the Act. Indeed, the expression « redevable d’un impôt » appears generally to be used in the Act in reference to some tax already charged by virtue of some other provision. For example, subsection 189(6) provides that « [c]haque contribuable redevable d’un impôt au titre de la présente partie [V] » must, inter alia, pay to the receiver general the amount of tax payable by the taxpayer under that part for the year; and subsection 183(1) states that « [l]a société qui est redevable d’un impôt en vertu de la présente partie [II] » must file with the minister a return for the year not later than the due date for the corporation’s part I tax return. At the very least, it does not seem that the French version of subsection 197(2) is sufficiently less ambiguous than its English counterpart that it could assist in the construction of that provision.

On a closing note, it is instructive to consider the Canada Revenue Agency’s (CRA’s) interpretation of the cognate “liable to tax” language used in the context of the residence article of Canada’s tax treaties:

It remains CRA’s position that, to be considered “liable to tax” for the purposes of the residence article of Canada’s tax treaties, a person must generally be subject to the most comprehensive form of taxation as exists in the relevant country. This, however, does not necessarily mean that a person must pay tax to a particular jurisdiction. There may be situations, where a person’s worldwide income is subject to a contracting state’s full

24 Pursuant to subsection 248(2), as interpreted by the courts (see, for example, Lambert, supra note 23), the references to “tax payable” in part IX.1 are references to tax payable as fixed by assessment under that part. If subsection 197(2) were read so as to require an assessment in order to levy the tax, then part IX.1 would represent a fundamental break from the Act’s self-assessment regime, under which taxpayers must declare their income and pay their taxes without the need for an assessment. Further, an issue would arise as to whether Parliament has (im)properly delegated its taxing authority to the minister, since this alternative reading would mean that it was the combination of the Act and the assessment that created the tax, not the Act alone (see, in this regard, Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General), 2001 SCC 15).

See, for example, subsection 2(1).

26 See, for example, subsection 186(1).

27 See, for example, subsection 206(1).

28 Admittedly, the phrase is sometimes used as a purported charge to tax (as, for example, in subsection 206.3(1) and paragraph 218.3(2)(b)).

29 See, for example, Canada v. Agazarian, 2004 FCA 32.
In accordance with Ward’s explanation, quoted earlier, the CRA seems to be opining that liability to tax represents a taxpayer’s state of being potentially subject to tax in a country by virtue of coming within the ambit of that country’s charge to tax, even though the taxpayer may not be currently subject to tax on his taxable income by that country owing to, for example, an exemption attributable to the nature of his particular income-earning activities. If, as the CRA suggests, being “liable to tax” merely refers to a taxpayer’s potential for taxation by a country by reason of the applicability of the charging provisions of that country’s tax laws, then a SIFT partnership’s liability to tax under subsection 197(2) would logically depend on the existence of a distinct charge to tax under part IX.1 in order for the scheme to work as intended.


31 In Exida.Com, supra note 18, Woods J referred to Perry v. Canada (National Revenue), 2008 FCA 260, as supporting a different conclusion from the one she reached in Exida.Com. In Perry, the Federal Court of Appeal noted, in obiter, that the income of a non-resident trust (within the ambit of section 94) that was not the type of income on which such a trust must pay tax, since it was neither Canadian-source income nor foreign accrual property income, was not income that was “liable to tax” in Canada in the hands of the trust or its beneficiaries within the meaning of the second reference to that expression in article IV(1) of the Canada-US treaty (Convention Between Canada and the United States of America with Respect to Taxes on Income and Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007); thus, the trust was not a resident of Canada under the treaty. Contrary to the comments of Woods J, the obiter in Perry can be construed as being consistent with the holding in Exida.Com and the CRA’s interpretation of the “liable to tax” language in the residence article of Canada’s tax treaties, since the trust was not considered a resident of Canada under the Canada-US treaty because the income that was earned by the trust (in contradistinction to the section 94 trust itself) was not at risk of being taxed in Canada in the hands of either the trust or its beneficiaries.

32 See, in this regard, Robert Couzin, Corporate Residence and International Taxation (Amsterdam: International Bureau of Fiscal Documentation, 2002), at 106ff. Couzin notes that the preferred meaning of the expression “liable to tax” as employed in the OECD model tax convention is “liable to be liable to tax,” meaning that the person is exposed to the possibility of being subject to tax.

33 In the recent case of TD Securities (USA) LLC v. The Queen, 2010 TCC 186, Boyle J held that a single-member US limited liability company (LLC) was a US resident for the purposes of the Canada-US treaty (supra note 31) and thus was “liable to tax” in the United States within the meaning of article IV of the treaty, despite its being a disregarded entity for US tax purposes and thus not even potentially taxable in the United States. Boyle J employed a contextual and purposive analysis of the treaty to conclude that the LLC was liable to tax in the United States by virtue of the fact that all of its income was being taxed in the United States in the hands of another entity, its US grandparent corporation. Strictly speaking, this means that an entity may be considered “liable to tax” under the Canada-US treaty even though it is not even at risk of paying tax. See, in this regard, Ward, supra note 13.
Therefore, on the basis of the plain meaning of the expression “liable to” and the manner in which it is used throughout the Act and Canada’s tax treaties, and interpreted by the courts, commentators, and the CRA, one would have expected to find a separate or distinct charging provision in part IX.1 accompanying the rule in subsection 197(2). The notion that a person or entity is “liable to” a tax seems to presuppose the existence of a valid charge to tax that has given rise to that liability. The suggestion that a provision that states that a person or entity is “liable to” a tax itself constitutes a charge to that tax appears, at best, to be circular, since, arguably, the liability for the tax could not exist without the pre-existing charge.

**COMPARISON WITH PART XI TAX**

It should be noted that the Act sometimes employs the term “liable” with a view to identifying the person who bears the responsibility to pay a tax. For example, subsection 206(3) provides that every person who is the holder of a registered disability savings plan at the time that a tax is imposed by subsection 206(1) (which imposes a tax where a trust governed by the plan disposes of property for less than fair market value or acquires property for more than fair market value) is jointly and severally “liable to pay the tax.” However, a tax is not intended to be charged by virtue of these kinds of provisions; rather, the provision is intended to specify who is responsible for paying a tax distinctly charged.

It is instructive to contrast the “liable to pay the tax” language quoted above with the “liable to a tax” language used in subsection 197(2). The former language effectively establishes what the taxpayer is liable for or bound to do, the answer being “to pay the tax,” whereas the latter language establishes what the taxpayer is liable to, the answer being “a tax.” The distinction, though perhaps subtle, is significant, since being liable to do some thing connotes being legally obligated or bound to do that thing, while being liable to a thing, as explained, connotes being at risk of exposure to that thing.  

It is interesting to compare the provisions relating to part XI tax with the provisions in part IX.1:

206(1) *A tax is payable under this Part* for a calendar year in connection with a registered disability savings plan if, in the year, a trust governed by the plan

(a) disposes of property for consideration less than the fair market value of the property at the time of the disposition, or for no consideration; or

(b) acquires property for consideration greater than the fair market value of the property at the time of the acquisition.

206(2) *The amount of tax payable* in respect of each disposition or acquisition described in subsection (1) is

(a) the amount by which the fair market value differs from the consideration; or

(b) if there is no consideration, the amount of the fair market value.

34 It is this nuance that arguably saves the alternative levies contained in subsections 218.3(2) and (3) with respect to capital distributions made by mutual funds to non-resident investors. Presumably, it is precisely the alternative nature of these levies that prompted Finance to employ the “liable to” language in these provisions.
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(3) Each person who is a holder of a registered disability savings plan at the time that a tax is imposed under subsection (1) in connection with the plan is jointly and severally, liable to pay the tax. . . .

207(1) Every person who is liable to pay tax under this Part for a calendar year shall within 90 days after the end of the year

(a) file with the Minister a return for the year under this Part in prescribed form and containing prescribed information including

(i) an estimate of the amount of tax payable under this Part by the person for the year, and

(ii) an estimate of the amount of any refund to which the person is entitled under this Part for the year; and

(b) pay to the Receiver General the amount, if any, by which the amount of the person’s tax payable under this Part for the year exceeds the person’s allowable refund for the year. [Emphasis added.]

As can be seen, the constituent elements of a tax are clearly articulated:

1. subsection 206(1) charges or imposes the tax;
2. subsection 206(2) establishes the amount of the tax;
3. subsection 206(3) establishes the persons responsible for paying that tax; and
4. subsection 207(1) sets out when the tax must be paid.

It is noteworthy that all of this is accomplished without reference to an assessment. The accompanying table compares the scheme of the provisions in part XI with that of the provisions in part IX.1.

<table>
<thead>
<tr>
<th>Elements of a tax</th>
<th>Part XI</th>
<th>Part IX.1</th>
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<tbody>
<tr>
<td>1. Imposition of the tax</td>
<td>206(1)</td>
<td>?</td>
</tr>
<tr>
<td>2. Computation of the amount of tax payable</td>
<td>206(2)</td>
<td>197(2)</td>
</tr>
<tr>
<td>3. Identification of the person responsible for paying or liable to pay the tax</td>
<td>206(3)</td>
<td>197(2)</td>
</tr>
<tr>
<td>4. Time by which the tax must be paid</td>
<td>207(1)</td>
<td>197(7)</td>
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</tbody>
</table>

The clear implication is that the imposition of a tax under the Act and the attribution of the responsibility for payment of the tax are, conceptually, two distinct elements, despite the fact that they are sometimes combined in the same provision. The problem with part IX.1, however, is that it seems to conflate these separate notions, assuming that liability for payment of a tax equates with the actual imposition of that tax. With respect, that is at best a questionable proposition, and thus it appears, to us at least, that part IX.1 may indeed be lacking a charge.

THE CURIOUS CASE OF PART V "TAX"

The only other provision that we have identified which employs the language of “liable to” as an apparent means of charging a tax under the Act is subsection 188(1.1). This provision applies to a registered charity in respect of which the minister issues a notice of intention to revoke the registration (or in respect of which it
is determined that a certificate served in respect of the charity under section 5(1) of the Charities Registration (Security Information) Act\textsuperscript{35} is reasonable), and provides that the charity is “liable to a tax” equal to the fair market value of all of the assets of the charity—that is, in essence, all of the charity’s assets are forfeited.

There are several noteworthy attributes to this so-called revocation tax. First, the charity may, in the year (or perhaps over a longer period) following the end of the taxation year in respect of which the tax applies, reduce the amount of tax by amounts expended on charitable activities and by the fair market value of property transferred to an eligible donee.\textsuperscript{36} Second, in general terms, the tax does not apply if the minister abandons the intention to revoke or if, within one year from the end of the taxation year in respect of which the tax applies, the minister (re)registers the charity.\textsuperscript{37}

In light of these attributes, the “liable to a tax” language in subsection 188(1.1) appears to support, not detract from, the arguments made above. First, it is questionable whether part V “tax” even constitutes a tax, since Parliament’s authority to tax, derived from section 91(3) of the Constitution Act, 1867,\textsuperscript{38} requires, inter alia, that the levy in question be intended to raise monies for a public purpose.\textsuperscript{39} Inasmuch as the affected charity is provided every opportunity to eliminate the tax payable, it appears that the “tax” under part V is less about raising revenue for public purposes than it is about regulating conduct. Second, as is the case with other amounts under the Act in respect of which the “liable to” language is employed, the part V “tax” is merely a conditional or potentially payable amount, since it does not apply unless and until the minister exercises his discretion to issue a notice of revocation (or neglects to exercise his discretion to abandon the notice), and the charity can reduce the amount payable to nil by making certain expenditures or effecting certain transfers, even after it has been assessed this so-called tax. Therefore, the apparent absence of a revenue-raising purpose underlying the “revocation tax,” its overt, nuclear-scale deterrence feature, and its conditionality all suggest that it is more in the nature of a penalty than a tax, in which case the “liable to” language is entirely appropriate.

THE EFFECT OF A FAILURE TO CHARGE

Should Parliament indeed have failed to charge the part IX.1 tax, then, it seems, the members of a SIFT partnership would be required to file a return under subsection 197(4) but they would estimate the partnership’s tax payable as nil. The partnership

\begin{itemize}
\item \textsuperscript{35} SC 2001, c. 41, section 113.
\item \textsuperscript{36} Subsections 188(1.1) and (1.2). It is difficult to reconcile the notion of a “winding-up period” in subsection 188(1.1), which provides for a period that could seemingly last longer than one year to reduce the tax payable, and subsection 189(6.2), which allows reduction of the tax payable only within the one-year period in cases where the minister issues an assessment within that one-year period.
\item \textsuperscript{37} Subsection 188(2.1).
\item \textsuperscript{38} (UK), 30 & 31 Vict., c. 3.
\item \textsuperscript{39} See, for example, \textit{Eurig Estate (Re)}, [1998] 2 SCR 565.
\end{itemize}
would not be required to pay any amount to the receiver general under subsection 197(7).

Moreover, under subsection 96(1.11), the allocation of partnership income to a partner would apparently still be reduced by the partner’s share of taxable non-portfolio earnings, and the partnership would be deemed to have received a dividend from a taxable Canadian corporation equal to the amount of the taxable non-portfolio earnings. In other words, the taxable non-portfolio earnings of the SIFT partnership would bear only tax in the partners’ hands, but at the same rate as is applicable to dividends. Therefore, the effect of a failure to charge, in this case, is to reduce the overall tax that would otherwise be payable in the absence of the “tax” on SIFT partnerships; admittedly, an astonishing result.

**THE INTERPRETATION OF A “CHARGING” PROVISION**

The imposition of a requirement to file a return estimating tax payable under part IX.1, the establishment of a deadline for the payment of that tax payable, and even the title of part IX.1—“Tax on SIFT Partnerships”—are clear indications of Parliament’s intention to levy a tax on SIFT partnerships. The critical question, however, is whether (good?) intentions are enough.

The traditional rule of interpretation for tax statutes was that tax legislation must be strictly construed. In the leading case, *Partington v. Attorney-General*, Lord Cairns articulated the guiding principle as follows:

> If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

Similarly, dealing in particular with a charge to tax, the Judicial Committee of the Privy Council stated in *Oriental Bank Corporation v. Wright* that “the rule [of interpretation

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40 It is interesting to note that the tax is intended to be imposed on the SIFT partnership itself, and not on its members. Though a partnership may not be a person at law, it is nevertheless a relationship between two or more persons that is recognized at law; thus, there seems to be no legal impediment to making a partnership a taxable entity—indeed, partnerships that are not Canadian partnerships may be required to pay part XIII tax under subsections 212(1) and (2) through the application of the rule in subsection 212(13.1) (which deems a partnership other than a Canadian partnership to be a non-resident person in respect of a payment made by a Canadian resident to that partnership). However, it is not entirely clear against whom the CRA could seek to collect the tax in the event that the partnership was unable to pay. Presumably, the governing partnership law would make the partners responsible for the partnership’s debts, including its tax debts (although, in the case of limited partners, only to the extent of their contribution to the partnership).

41 (1869) LR 4 HL 100, at 122. See also *Tennant v. Smith*, [1892] AC 150, at 154 (HL).
is] that the intention to impose a charge on the subject must be shewn by clear and unambiguous language.\[42\]

The rationale for the principle was explained in Canadian Northern Ry. Co. v. The King by Brodeur J of the Supreme Court of Canada:

A law imposing taxation should always be construed strictly against the taxing authorities, since it restricts the public in the enjoyment of its property.\[43\]

However, beginning perhaps with the Supreme Court’s decision in Stubart Investments Ltd. v. The Queen,\[44\] and culminating with its decisions in Canada Trustco Mortgage Co. v. Canada\[45\] and Mathew v. Canada,\[46\] the rule that tax legislation must be strictly construed was eventually replaced by the so-called modern rule of statutory interpretation, to the effect that the Act must be interpreted according to a textual, contextual, and purposive analysis to find a meaning that is harmonious with the Act as a whole.\[47\] This evolution in the development of the rules for interpreting tax legislation was (apparently) prompted by the recognition that the purpose of tax legislation was no longer simply to raise funds with which to cover government expenditure, but also to further social and economic policies:

In Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, at pp. 573-79, the Court recognized that in the construction of taxation statutes the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.\[48\]

While it may be a question of degree, we think that it is the role of government that has changed over time rather than the role of taxing statutes, which, fundamentally, remain revenue raisers to cover the cost of government expenditures and only secondarily serve as a means of encouraging selected commercial and social activities. The growing role of governments—their insinuation, for better or for worse, into a myriad of social, economic, and regulatory activities that heretofore were either undertaken by the community or simply unknown—has swelled governments’
appetite for revenues to cover their ever-increasing functions and costs. Therefore, if anything, the role of taxing statutes as revenue raisers has assumed even greater importance today than in the past.

Arguably, the enhanced redistributive and regulatory functions assumed by, and expected of, modern governments eventually resulted in society’s widespread (albeit still somewhat grudging) acceptance of taxation as an unqualified necessity, rather than as merely a necessary evil, and, as a corollary, the courts began to perceive taxing statutes as ordinary rather than penal instruments. Yet, whatever societal mutations may have prompted the modern rule, one thing is clear: taxing statutes are first and foremost directed at the raising of revenues for a public purpose and the charge to tax is the very mechanism by which this is accomplished.

Even if taxation is properly regarded as an unqualified necessity, and even if taxing statutes are more appropriately perceived as ordinary rather than penal instruments, charging provisions cannot be framed as a mere suggestion or request for payment. On the contrary, charging provisions must create an obligation; that is, they must compel the payment of an amount. The specific language by which the tax is charged cannot, we submit, admit of any alternative interpretation, since compulsion and ambiguity are fundamentally incompatible notions. Thus, regardless of the interpretative approach employed—strict, modern, or other—the results should always converge when dealing with the very language by which a tax is charged.

In this regard, there is, we submit, a significant difference in kind between the very provision by which the government seeks to impose a tax and the myriad of provisions that set out the details in connection therewith—such as the measurement of the quantum of the liability or the due date for its payment—including, in particular, various modifications or exclusions from the general liability in pursuit of a particular social or economic policy. While reference to context and purpose may be justified in the latter case, where the debate centres on whether a taxpayer has successfully deferred or reduced a tax unambiguously imposed on him, it is less so where the very issue is whether the government has levied a tax in the first place; in this case, the more fundamental and immutable question being asked is whether Parliament has exercised its power to expropriate private property belonging to the taxpayer without compensation and under threat of sanction, and not simply whether, in so exercising that power, Parliament intended the particular deferral or reduction. In our view, it is not an acceptable answer to the former question to say that, on the basis of context and purpose, Parliament appears to have intended to tax or, what amounts to the same thing, that it tried its best. In this regard, it has been rather ominously observed that the power to tax is the power to destroy—indeed, witness the extinctive effect that the introduction of the SIFT rules has had on SIFTs.\(^49\) We think that, regardless of the prevailing interpretive approach, the provision (or, more accurately, the portion of the provision) by which Parliament seeks

\(^{49}\) From the words of counsel Daniel Webster and Marshall CJ of the US Supreme Court in the constitutional law case of *McCulloch v. State of Maryland*, 17 US 316 (1819).
to exercise such an extraordinary power should be clear and unequivocal with no leniency shown for error or ambiguity. “There is no try.”

Even outside the tax context, there is an open constitutional question as to how much, if any, reliance can be placed by a court on “purpose” in the interpretation of a provision in the face of conflicting text, since, in relying on what it perceives as the purpose of a provision in order to overcome any textual deficiencies, the court may, at some point, be transgressing into the legislative function.

The question arises because the exercise of the legislative function, under our constitution, is not supposed to be a collaborative effort between Parliament and the courts; in particular, “the power of taxation is exclusively in Parliament.” Therefore, from a constitutional perspective, the question in the present case is: At what point does reliance by a court on the purpose of part IX.1 in the interpretation of the “liable to” language in subsection 197(2) become tantamount to assisting Parliament in charging the “tax on SIFT partnerships”? Expressed differently, when does reliance on purpose by a court exceed the recognized boundaries of the interpretive spectrum that runs from strict constructionist to teleologist, such that the court is no longer employing the purpose of part IX.1 merely to elucidate Parliament’s intent with respect to subsection 197(2), but rather employing purpose as a means of imposing a tax that Parliament has itself failed to impose under part IX.1?

In answering this question, it is helpful to recall the Supreme Court’s admonition to the lower courts, in Canada Trustco, to refrain from using an interpretive methodology in relation to GAAR that would effectively transform judges into tax policy makers, since undue reliance on purpose in construing any legislative provision could have a similar transformative effect and thereby risk encroachment on the legislative function. Thus, there is a genuine constitutional issue as to whether, and if so, in what circumstances, it is appropriate for purpose to effectively trump conflicting text, an issue made more acute when interpreting a putative charge to tax, considering that a charge is the very provision through which Parliament channels its exercise of the taxing power, the efficacy of the other, ancillary tax provisions merely rising and falling with that charge.


51 “The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the roles of reviewing judges. The Income Tax Act is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the Income Tax Act would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament’s intent.” Canada Trustco, supra note 45, at paragraph 41.
The danger in relying too heavily on purpose in the face of conflicting text is evident from the decision of the Ontario Court of Appeal in *R v. Budget Car Rentals (Toronto) Ltd.* In that case, the court employed a purposive approach to determine that the words “liable to any penalty” in the following provision (authorizing municipal bylaws regulating parking) created an offence for the owner of a vehicle where the owner’s vehicle had been illegally parked by another person:

The driver of a vehicle, not being the owner, is liable to any penalty provided under a by-law passed under this paragraph and the owner of the vehicle is also liable to such a penalty unless at the time the offence was committed the vehicle was in the possession of a person other than the owner or his chauffeur without the owner’s consent.

The court justified its conclusion as follows:

I have pointed out earlier that if a penal statute is open to two equally reasonable interpretations, then the respondent should have the benefit of the interpretation which will not subject it to the penalty. However s. 460, para. 8(b) would not appear to be capable of two equally reasonable interpretations. If the appellant’s interpretation is adopted that the words “liable to any penalty provided under a by-law” are wide enough to create an offence by the owner, then the result is consistent with the object of the legislation which is to control parking on highways by the use of meters. On the other hand if the respondent’s interpretation is accepted that s. 460, para. 8(b) does not create an offence by the owner, then the only way in which the penalty could be enforced against the owner, other than by amending the statute, would be for the appellant to endeavour to recover the penalty in Small Claims Court. This would be a highly impractical remedy. The tremendous volume of parking tags issued, coupled with the need for street by street surveillance to obtain the driver’s name, would make the by-law unenforceable for all practical purposes. In short the interpretation favourable to the respondent is not an equally reasonable one.

With respect, we cannot find any such charge on a vehicle owner in the above-quoted provision, and the fact that the absence of a charge may make the regulatory scheme impracticable does not justify the invention of one by a court. Whatever may be its understanding of the legislative scheme, it is not the court’s constitutional role to “fill the gap” and create an offence, given, in particular, that the risk always

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52 (1981), 121 DLR (3d) 111 (CA).
54 Supra note 52, at 124-25 (emphasis added).
55 With respect, the court’s explanation as to why it felt entitled to rely on purpose—specifically, that “strict” construction of a penal statute means that where a person is charged with an offence, the conduct must be clearly demonstrated to fall within the kind of conduct that is proscribed by statute, but not that the meaning that is to be given to language employed in the statute is to be determined in accordance with a “stricter” rule of construction than the ordinary rule (ibid., at 117)—appears to reflect confusion between statutory interpretation of a penal statute and burden of proof.
exists that the court is simply wrong in its understanding that the legislature in fact intended to do so. Moreover, legislative intent is not always as lucid as that underpinning the regulation of municipal parking, and, as evinced by the following caution from the Supreme Court, in this respect tax statutes are notoriously opaque: “Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the [Income Tax] Act.”

In our view, the “liable to a tax” formulation employed in subsection 197(2) is language ill suited to the charging of a tax, and it is not the courts’ role to charge the tax for Parliament under the guise of a purposive interpretation of that provision or of part IX.1.

Setting aside the above charge-specific, normative, and constitutional issues and focusing squarely on interpretation, text (and, in our view, context), as discussed, suggests that Parliament may not have successfully charged a tax in part IX.1, whereas purpose may suggest otherwise.

This is essentially the situation dealt with in the recent decision of the Federal Court of Appeal in *Exida.Com*, discussed above. The court indicated that legislative history and context made it clear that the intention underlying subsection 162(2.1) was to impose the higher of the “alternative penalties” set out in paragraph 162(2.1)(b) when a corporation has no taxes payable. However, according to the court, “those charged with implementing this . . . aspect of the legislative plan failed in their task,” and such a fundamental drafting error could not be cured by a purposive interpretation:

> While a contextual and purposive analysis is useful in identifying, amongst the meanings which a word (or phrase) can have the one that best reflects Parliamentary intent, it cannot be used to give the legislative language a meaning which it cannot bear (see *Canada (Attorney General) v. Mowat*, 2009 FCA 309, at para. 99 and the cases referred to therein). This is particularly so when regard is had to the fact that subsection 162(2.1) is a penalty provision. The reasoning of the Tax Court Judge results in a penalty being levied under subsection 162(2.1) even though the stated condition precedent for its application—“if a non-resident corporation is liable to a penalty under subsection 162(1) or (2)”—is not met. No contextual or purposive analysis can justify such a result.

The Federal Court of Appeal’s position to the effect that context and purpose cannot be used to assign language a meaning that it cannot bear—which, though articulated in reference to a penalty, should apply as well in reference to a charge to tax—would, we submit, arguably preclude a judicial interpretation of the phrase

56 *Shell Canada Limited v. The Queen et al.*, 99 DTC 5669, at paragraph 43 (SCC).
57 Supra note 18 and the accompanying text.
58 Ibid. (FCA), at paragraph 28.
59 Ibid., at paragraph 32 (emphasis added).
“liable to a tax” in subsection 197(2) as constituting a charge to tax. As stated by the Supreme Court in Placer Dome Canada Ltd. v. Ontario (Minister of Finance), in elaborating upon the interpretive guidance that it supplied in Canada Trustco,

\[\text{[t]he interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision “cannot be used to create an unexpressed exception to clear language.”}\]

In the same cautionary vein, in relation to the role of “purpose,” is the following statement by the Supreme Court in Imperial Oil Ltd. v. Canada:

Despite this endorsement of the modern approach, the particular nature of tax statutes and the peculiarities of their often complex structures explain a continuing emphasis on the need to carefully consider the actual words of the ITA, so that taxpayers can safely rely on them when conducting business and arranging their tax affairs. Broad considerations of statutory purpose should not be allowed to displace the specific language used by Parliament (Ludco, at paras. 38-39).

However, even if the “liable to a tax” language could potentially support a charge, under the unified interpretive approach prescribed by the Supreme Court in Canada Trustco, one is also instructed to find a meaning for those words that is harmonious with the Act as a whole:

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... 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.

As demonstrated, if the words “liable to a tax” in subsection 197(2) are construed as creating a present, unconditional obligation upon a SIFT partnership, then their meaning appears to conflict—not harmonize—with the meaning attributed to the expression “liable to” as employed throughout the Act and in the residence article of Canada’s tax treaties. With regard to subsection 197(2)’s immediate context, we think it is noteworthy that none of its neighbouring provisions actually refer to the tax payable “under subsection 197(2)” and so, at best, they are neutral as to whether subsection 197(2) was itself intended to serve as a charge or, rather, as a provision that merely establishes the entity that is responsible for paying, and the amount of, a tax

60 2006 SCC 20, at paragraph 23.
62 Canada Trustco, supra note 45, at paragraph 10.
(intended to be) distinctly charged elsewhere under part IX.1. In our view, the rather unique nature of the taxing regime under part IX.1, which is intended, for the first time (without the aid of a deeming rule), to tax (certain) partnerships—that is, entities that are not generally considered persons at law or taxpayers under the Act—would have probably led Parliament to craft a taxing regime not unlike that in part XI.1 described above, whereunder the actual charging provision is distinct from the provision that allocates responsibility for payment of the tax, thereby sidestepping any concerns as to whether a tax can be imposed directly on a partnership. Accordingly, and quite significantly we think, subsection 197(2) is meaningful even if it is not construed as being intended to serve as a charging provision.

In any event, the expression “liable to” seems to have a generally accepted meaning textually and in the context of the Act and thus, even if the immediate context of subsection 197(2) is viewed as supporting the case that subsection 197(2) was intended to serve as a charge, that context should arguably not suffice to displace that clear meaning under the above-mentioned interpretive principles propounded by the Supreme Court. Moreover, it seems to us that to rely on what are, essentially, ancillary or derivative provisions to sustain their source is to put the cart before the horse and, respectfully, to rest the (putative) tax regime in part IX.1 upon a rather shaky legal foundation.

**WHAT WOULD A COURT DO?**

None of this is to say that, when faced with an argument by a SIFT partnership to the effect that part IX.1 has failed as a charge to tax, a court would in actual fact be inclined to vacate an assessment thereunder. As discussed, a court’s decision could turn on a number of factors, including

1. whether the court believes that subsection 197(2) was intended to serve as a charging provision in the first place or whether part IX.1 outright lacks a charge to tax;
2. whether the court considers a charging provision (or, at least, the portion thereof by which Parliament seeks to charge the tax) to be qualitatively different from other provisions of the Act such that it cannot tolerate any ambiguity and thus should effectively be strictly construed, and whether the court believes that it is open to it, after Canada Trustco, to so construe a provision; and
3. if a charge should not effectively be strictly construed—that is, if some degree of ambiguity may be tolerated in the language by which Parliament seeks to charge a tax—whether, in relation to text (and, in our view, context), a disproportionate reliance on purpose would be needed, in the court’s estimation, for the tax to be charged in this case.

Needless to say, the court’s approach to these factors will inevitably be a function of the presiding judge’s view of his or her role as a judge. That being said, a Canadian court has previously vacated an assessment, or, more accurately, denied a claim for the recovery of a tax debt, on the basis that the putative tax legislation in question
in essence failed to impose a tax though the intention to tax was quite clear. Specifically, in *The King v. Crabbs*, the Supreme Court of Canada held that the regime contained in part VII of the Special War Revenue Act, which enacted a prohibition upon the transfer of certain securities without the necessary stamps having first been affixed, did not impose an obligation on the part of the persons affected by the prohibition to pay the Crown the cost of the stamps required. In the court’s view, notwithstanding that a certain provision in part VII referred to “the tax imposed by this Part,” and that “[t]here could . . . be no impropriety in speaking of the [relevant sections] as in a practical sense imposing a tax,” nothing in the legislation directly charged the persons affected by the prohibition with a civil obligation to pay the Crown. While *Crabbs* may have been decided under the strict construction rule prevailing at the time, we think that the general proposition for which it stands is as valid today as it was then: If there is no statutory language that clearly charges a tax, then it is not for the courts to impose the tax under the guise of a purposive interpretation. Moreover, and as discussed below, since the courts have, thus far, imposed few constraints on Parliament’s ability to pass tax laws with retroactive effect, any judicial reluctance to strike down a defective charge or to conclude that part IX.1 simply lacks a charge should, rather ironically, be counterbalanced by the fact that Parliament ultimately holds both the pencil and the eraser, and has been granted a wide berth by the courts to correct its mistakes. In any case, the decision by a particular SIFT partnership to seek to vacate an assessment under part IX.1 (perhaps after paying the tax so as to prevent interest charges from accumulating) would have to be made in conjunction with its legal counsel, taking into consideration the entirety of the facts and circumstances, including, in particular, the risk that Parliament may enact retroactive legislation to amend the wording of the (purported) charging provision and thereby render any successful attack a Pyrrhic victory.

**WHAT WILL PARLIAMENT DO?**

If subsection 197(2) is not intended to serve as a charge, it could serve as the provision that allocates responsibility for the payment, and determines the amount, of a tax distinctly charged by another provision that would be added to part IX.1. Alternatively, if subsection 197(2) is viewed as being a defective charge, then the defect could be remedied by amending the provision to replace the inappropriate “is liable to a tax” language with the proven “shall pay a tax” formulation so that the relevant portion of subsection 197(2) would read as follows:

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63 Of course, there is a significant body of jurisprudence in which a court has found a tax to be unconstitutional or otherwise ultra vires. See, for example, *Eurig Estate*, supra note 39; and *TimberWest Forest Corp. v. Campbell River (City)*, 2009 BCSC 1804.

64 [1934] SCR 523.

65 RSC 1927, c. 179.

66 Supra note 64, at 527.

Every partnership that is a SIFT partnership for a taxation year shall pay a tax under this Part equal to the amount. . . [Emphasis added.]

While the fixes may be simple, they raise the thorny issue of whether such a fix could be made retroactive to the effective date of the application of part IX.1.68 (Part IX.1 applies for a SIFT partnership’s taxation year that ends after 2006, unless the SIFT partnership existed on October 31, 2006, in which case part IX.1 applies beginning with the earlier of the partnership’s 2011 taxation year and its first taxation year in which it exceeds normal growth guidelines issued by the Department of Finance.)69

In this regard, the Supreme Court has recognized that, generally speaking, there is no constitutional impediment to enacting retroactive legislation (other than in criminal law),70 and it seems likely, given its recent track record, that the Department of Finance would not hesitate to recommend a retroactive amendment.71 Further, the government has specifically indicated that it would be appropriate to adopt retroactive changes to the Act where “the amendments are corrections of ambiguous or deficient provisions that were not in accordance with the object of the Act,”72 though it seems to us that to employ retroactive legislation as a panacea for deficient drafting is not the best way to administer a tax system, and conflicts with the objective of achieving consistency, predictability, and fairness in Canadian tax law.73

There may yet be an argument to the effect that the legislature cannot, through the enactment of retroactive legislation, interfere with a right that has actually been adjudicated.74 While a full discussion of that particular issue is beyond the scope of


69 See supra note 2.

70 See, for example, British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49.

71 Indeed, Finance has not been hesitant in the past to recommend retroactive tightening changes to tax law, even with respect to matters that were plainly in controversy. For example, in 2004, subsection 245(4) of the Act (which sets out the misuse-abuse branch of the GAAR) was amended to include references to the Income Tax Regulations, the Income Tax Application Rules, a tax treaty, and any other enactment relevant in the computation of tax, effective for transactions entered into after September 12, 1988, some 16 years prior to the date on which the amendment was introduced.


73 The standard set out by the Supreme Court in Canada Trustco, supra note 45. Arguably, though, retroactive legislation would achieve “fairness” here, in the sense that it would promote horizontal equity as between (any surviving) income funds and their investors, on the one hand, and competing corporate taxpayers and their shareholders, on the other.

74 Indeed, in Canada Trustco, supra note 45, at paragraph 7, the Supreme Court indicated that a retroactive amendment to section 245 of the Act had no application to the judgments under appeal: “Although this amendment was enacted to apply retroactively, it cannot apply at this stage
HAS PARLIAMENT FAILED TO CHARGE THE “TAX ON SIFT PARTNERSHIPS”? ■ 23

this article, it seems to us that if Parliament is considered to have a virtually unlimited power to employ retroactive legislation to override unfavourable court decisions and thus to overturn a particular litigant’s “adjudicated rights,” then it is Parliament, and not the Supreme Court of Canada, that is, in effect, the final arbiter of every case before the courts. This situation is particularly worrisome in tax and regulatory matters, where the government is the adverse party, since it would thereby occupy two roles in the judicial process, those of prosecutor and, ultimately, judge.75

CONCLUSION

There is, at the very least, a serious issue as to whether the “liable to” language can support a charge and if so whether, in employing the modern approach to interpret a charging provision, text should give way to purpose when they conflict. Therefore, in response to the question asked at the beginning of this article, a “tax” is not a tax when it lacks a charge to tax, which is, arguably, the case of the so-called “Tax on SIFT Partnerships” in part IX.1 of the Act.

of appellate review, after the parties argued their cases and the Tax Court judge rendered his decision on the basis of the GAAR as it read prior to the amendment [emphasis added].” While the Supreme Court’s statement is somewhat ambiguous—it is unclear whether it intended to articulate a principle regarding the legislature’s authority to interfere with an “adjudicated right” through retroactive legislation or whether it was merely commenting on the scope of appellate review—at the very least there appears to be a live question as to whether any such interference would, for example, be unconstitutional as violating fundamental principles such as the rule of law, judicial independence, and separation of powers (see, for example, Babcock v. Canada (Attorney General), 2002 SCC 57). Unfortunately, the Supreme Court lost an opportunity to shed light on this question when it recently refused leave to appeal from the Ontario Court of Appeal’s decision in Procter & Gamble Inc. v. Ontario (Finance), 2010 ONCA 149. See generally Simon Thang, “Policy Forum: Impact of Retroactive Legislation on the Litigant” (2010) 58:3 Canadian Tax Journal 609-30, for a discussion of whether particular legislative language is needed to interfere with “adjudicated rights.”

75 Moreover, any discussion as to the legitimacy of enacting retroactive legislation to interfere with “adjudicated rights” in the particular context of part IX.1 “tax” could not ignore the fact that the government that enacted part IX.1 had, before its election, specifically promised not to interfere with the taxation of SIFTs.