
Liability for the Tax on SIFT Partnerships: A Rejoinder

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PRÉCIS

Dans un récent article de cette publication, Brian Bloom et Brandon Wiener soutenaient que le libellé du paragraphe 197(2) de la Loi de l'impôt sur le revenu, qui assujetti à l'impôt de la partie IX.1 les sociétés de personnes intermédiaires de placement déterminées, est déficient parce que le terme « redevable » est utilisé plutôt que le libellé d'imposition habituel : « un impôt doit être payé ». Le présent article suggère que leur argument voulant que le terme « redevable » ne signifie qu'un risque potentiel d'impôt (qui ne sera imposé qu'après une cotisation par le ministre) n'est pas conforme au concept général d'assujettissement dans la Loi et la jurisprudence. L'assujettissement à l'impôt, est-il soutenu, signifie une véritable obligation, même virtuelle, de payer de l'impôt qui est cristallisé et qui devient exigible au moment de la cotisation. Ceci est le résultat qui se dégage de la jurisprudence et qui est conforme aux dispositions de la Loi imposant des pénalités. Le contexte et l'objet du paragraphe 197(2) renforcent cette conclusion.

ABSTRACT

In a recent article in this journal, Brian Bloom and Brandon Wiener argued that the language of subsection 197(2) of the Income Tax Act, which imposes part IX.1 tax on specified investment flowthrough partnerships, is deficient because it uses the words "liable to" rather than the usual charging language, "a tax . . . shall be paid." This article suggests that their argument that "liable to" means only a potential risk of tax (which will be imposed and charged only on further assessing action by the minister) is not consistent with the general concept of liability in the Act and the jurisprudence. Liability for tax, it is argued, means a real, if inchoate, obligation to pay tax that is crystallized and becomes due on assessment. This is the result that flows from the jurisprudence, and it is consistent with the provisions of the Act imposing penalties. The context and the purpose of subsection 197(2) reinforce this conclusion.

KEYWORDS: TAX ADMINISTRATION ■ TAX LIABILITY ■ PENALTIES ■ SELF-ASSESSMENT ■ ASSESSMENTS ■ TAX COLLECTIONS

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INTRODUCTION

Subsections 2(1) and (3) of the Income Tax Act¹ provide that “an income tax shall be paid” on the taxable income of Canadian residents and certain non-residents.² As Bloom and Wiener point out in a recent article in this journal,³ subsection 197(2), the charging provision for the tax imposed under part IX.1 on specified investment flowthrough (SIFT) partnerships, departs from this form, using the words “is liable to a tax.” Bloom and Wiener then argue at length that these words may not be effective to impose the tax because “liable to” means potentially subject to or at the risk of. They maintain that a person “liable to” a tax is under no obligation to pay the tax unless some further action is taken by the minister. This is the situation with respect to penalties, which are only imposed by assessment. In Bloom and Wiener’s view, the charging language used elsewhere in the Act creates an immediate obligation to pay tax, without the precondition of assessment action by the minister. By contrast, the various penalty provisions in the Act, by virtue of the “liable to” language, do not, in their view, create any obligation until the minister assesses. The words of subsection 197(2) therefore do not in themselves impose tax, and it is not constitutionally acceptable for tax to be imposed at the discretion of the minister. Bloom and Wiener further argue that this apparent deficiency in part IX.1 may not, or should not, be cured by the courts either on a textual, contextual, and purposive analysis of subsection 197(2) or on a strict “literalist” interpretation.

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 Prior to 1948, the corresponding statutory provision read, “There shall be assessed, levied and paid, upon the income”—the original wording of section 4 of the Income Tax War Act, SC 1917, c. 28, reflecting the initial absence of a self-assessment mechanism.

3 Brian Bloom and Brandon Wiener, “Has Parliament Failed To Charge the ‘Tax on SIFT Partnerships?’” (2011) 59:1 *Canadian Tax Journal* 1-23.

It will be argued here that none of these positions is well founded. First, “liable to” has meanings that go beyond mere risk to import an actual obligation and the creation of liability to tax or penalties. Second, there is a well-established relationship in the Act between liability to tax or penalties and the obligation to pay tax or penalties. The creation of liability to tax (or penalties) creates an inchoate obligation to pay tax, crystallized through the assessment process. Thus, if the “liable to” language creates a tax liability, it will validly impose the tax. Third, the context and purpose of subsection 197(2) is sufficiently certain to overcome any deficiency that may exist in the text itself, and the alternative literalist interpretation for which Bloom and Wiener evince sympathy has been decisively rejected in Canada.

THE MEANING OF “LIABLE TO”

Bloom and Wiener suggest that the words “liable to” in a tax statute merely import a risk of taxation as a result of satisfying certain criteria, such as residence. In doing so, they rely almost exclusively on David Ward’s argument that “liable to tax” in the model treaty of the Organisation for Economic Co-operation and Development (OECD)⁴ means “at . . . risk of being taxed.”⁵ They then contrast the use of this language with the traditional charging language, “A . . . tax shall be paid,” which, they argue, creates a “present, unconditional obligation on a taxpayer to pay an amount.”⁶ It is argued here that the traditional charging language in fact creates a *liability* to tax, which becomes payable on assessment, and that the words “liable to” in the context of the Act operate with similar effect.

Ward’s interpretation relied solely on Fowler’s *Modern English Usage*, 2d ed. Both the *Concise Oxford Dictionary of Current English*, 7th ed., and the *Canadian Oxford Dictionary*, 2d ed., however, define “liable” to mean, variously, “legally bound,” “answerable for,” “amenable to,” or “subject to (a tax or penalty),” in addition to “apt” or “likely.” *Webster’s New World Dictionary*, 2d college ed., gives the primary meaning of “liable” as “legally bound or obligated.” There is also support for such a more robust meaning for “liable” in jurisprudence considering the Act. In *Royal Bank v. Tuxedo Transport Ltd.*, the court considered what it meant for a person to be “liable to make a payment” under subsection 224(1) and held that the taxpayer, to be such a person, must be “bound or obliged by law or by equity to make a payment.”⁷ In *National Trust Co. v. R.*, considering the same provision, it was found that

4 Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital: Condensed Version* (Paris: OECD, July 2010).

5 See Bloom and Wiener, *supra* note 3, at 4 and note 13, citing David A. Ward, “The Use of OEEC-OECD Historical Documents in Interpreting Tax Treaties,” subsequently published in Philip Baker and Catherine Bobbett, eds., *Tax Polymath: A Life in International Taxation: Essays in Honour of John F. Avery Jones* (Amsterdam: International Bureau of Fiscal Documentation, 2010), 3-17, at 16.

6 Bloom and Wiener, *supra* note 3, at 8.

7 [1999] 3 CTC 393, at 411 (BCSC), per Burnyeat J.

“liable” and “liability” point to a debtor status with the person liable to pay being the debtor. A person who is liable to pay has the quality of a debtor.⁸

“Liable” is therefore a word of multiple meanings, and it cannot be defined by reference to one particular usage, however relevant that usage may be to the interpretation of a tax treaty.⁹ It would certainly be open to a court to find that the term “liable to” in subsection 197(2) in fact imposes a liability to tax, not the mere risk of tax. The word “liable” is also closely connected with the cognate concept of liability—the *Concise Oxford Dictionary of Current English*, 7th ed., defines “liability” as “being liable.” A person who is “liable” therefore has a “liability,” which is a liability “for” or “to” something. The concept of liability has a well-settled meaning in the context of the Act—liability to or for tax.¹⁰ As discussed in the following section, it is liability to tax that is created by the charging language used elsewhere in the Act. This is consistent with the decision of the Federal Court of Appeal in *Oceanspan Carriers Limited v. The Queen*, where it was stated:

[I]t is necessary to revert to first principles as disclosed by the scheme of Divisions A to D inclusive, of the Act, the most basic one of which is that both residents and non-residents are liable to pay tax on income earned from a source inside Canada. A non-resident who has no income from any source in Canada is not liable to pay tax in Canada. Both residents and non-residents who derive income from Canadian sources are included, by definition, in the term “taxpayer,” whether liable to pay tax or not. Their income is computed in accordance with Division B. By virtue of subsection 2(2) to ascertain their “taxable income” they are entitled to the deductions and exemptions referred to in Division C. It is only at the conclusion of that exercise that it is determined whether or not they are “liable to pay tax.”¹¹

A person “liable to pay tax” is therefore not merely at risk of being subject to tax but is a person with taxable income who is in fact subject to tax. On this basis, subsection 197(2) would be on all fours, in substance, with the other charging provisions of the Act.

LIABILITY AND PAYMENT UNDER THE ACT

The distinction between the liability to tax, in the abstract, in a particular year and an enforceable obligation to pay amounts on account of that tax has been recognized for some time. The distinction is important, and one that Bloom and Wiener do not

8 [1997] 1 CTC 2549, at 2556 (TCC), per Sobier J.

9 As Ward has pointed out, a treaty is not to be interpreted in the same manner as a statute: see David A. Ward, “Introduction to the Law Relating to Tax Treaties,” in Davies, Ward & Beck, *Ward’s Tax Treaties 1996-1997* (Toronto: Carswell, 1996), 3-67, at 14-19.

10 As discussed below, the words “liable to” were clearly used in the Income War Tax Act, supra note 2, to refer to a liability to tax in the same way that “liability for the tax” is used, for example, in subsection 152(3) of the current Act.

11 87 DTC 5102, at 5105 (FCA), per Urie J (emphasis in original).

take into account in their apparent assertion that the normal charging language creates an obligation to pay tax without ministerial action. The existence of liability to tax does not in itself create an obligation to pay tax or give the tax authorities the right to pursue collection action,¹² and liability to tax does not create an immediately enforceable obligation to make payment. For example, under section 160, the liability to pay tax of one taxpayer becomes the liability of a transferee of property from a taxpayer so liable, but no amount becomes payable until an assessment is raised. In addition, penalties for repeated failures to comply with the Act are triggered where a penalty for the same action or inaction is “payable” at the time of the subsequent failure. There is a clear distinction between liability to tax and the obligation to make payment of the amount of the liability, so that it is not necessary that there be an obligation to immediately pay an amount for there to be a valid charge to tax.

While the distinction between liability and payment is well established, there are real or apparent inconsistencies both in the jurisprudence considering the distinction and in the statutory provisions relating to penalties, which are discussed below.

The Statutory Framework

The administrative provisions of successive income tax statutes reflect the conceptual framework established in 1917 in the Income War Tax Act.¹³ Those provisions and, in particular, the nexus between assessment and the creation of a tax debt payable have remained substantially unchanged since then, albeit in more complex form. Under the 1917 Act, a person “liable to taxation” was required to make a return of income by February 28 in each year (section 7(1)). The minister was required, on or before April 30 of each year, to determine the “several amounts payable for the tax” and to send the taxpayer a notice of assessment setting out those amounts. The tax was payable within one month of the date of mailing of the notice of assessment with interest for late payment (section 10(1)). In so assessing, the minister was not bound by the return and could determine the tax to be paid notwithstanding the return, or that no return was filed (section 10(2)). The “taxes and all interest and costs assessed or imposed” then became a debt due to the Crown (section 20). Any person “liable to pay the tax” continued “to be liable” and in the case of a failure to file a return or an incorrect or false return or failure to pay the tax, the minister was empowered to assess the person for “the tax, or such portion thereof as he may be liable to pay” (section 10(3)).

12 See, for example, F.E. LaBrie, *The Principles of Canadian Income Taxation* (Toronto: CCH Canadian, 1965), at 9, who comments with respect to section 2 of the Income Tax Act, RSC 1952, c. 148, as amended (the general charging provision in that statute, which is substantially identical to section 2 of the current Act) and the heading preceding it, “It will be observed that this section, although appearing under the heading ‘Liability for Tax,’ does not impose liability to pay tax on anyone. That liability is imposed elsewhere, primarily by secs. 49 and 50 [which corresponded to the instalment and payment provisions of subsections 156(1), 156.1(4), and 157(1)] which require individuals and corporations to pay tax each taxation year at the times there mentioned.”

13 *Supra* note 2.

By 1920, the system effectively became one of self-assessment; tax filers liable to pay tax or surtax were required to pay at least one-quarter of that amount on filing the return, necessitating calculation of the amount payable by the taxpayer.¹⁴ The explicit requirement to estimate tax payable in the return was added in 1936.¹⁵ The minister was required to examine the return and “verify or alter” the tax as estimated by issuing a notice of assessment. This statutory scheme has remained unchanged in its essentials to the present day and incorporates three concepts: liability for tax; crystallizing or fixing that liability by assessment as a specific amount payable; and treating the amount so assessed to be payable as a debt due to the Crown, in respect of which various means of collection are applicable.

Under the provisions of the Act, most “taxpayers” (not limited to persons liable to pay tax)¹⁶ are required to file returns of income under section 150, in which they are further required to estimate the amount of tax payable (section 151). Tax payable must be paid by the taxpayer’s “balance-due date” (to the extent that it has not already been paid by withholding at source or by instalment).¹⁷ Initially, this will be the tax payable as estimated in the return. The minister is required to examine the return of income; assess tax, interest, and penalties (if any) payable; and determine the amount of refunds and certain other amounts (subsection 152(1)). After examining the return, the minister is required to send a notice of assessment to the tax filer (subsection 152(2)). The minister is not bound by the information in a return and may assess notwithstanding the return or whether any return has been filed (subsection 152(7)). Liability for tax is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made (subsection 152(3)). An amount payable as determined in a notice of assessment that remains unpaid is payable forthwith (section 158). Amounts payable under the Act are debts due to the Crown, recoverable in the courts or using the collection provisions of the Act (section 222).

Liability for Tax

The distinction between a taxpayer’s liability for tax and the precise amount of that liability as fixed by assessment was definitively identified by Jaccett P in *Terra Nova Properties Ltd. v. MNR*,¹⁸ a 1967 decision of the Exchequer Court. In that case, the taxpayer corporation had successfully appealed its assessment for the relevant year and, in consequence, had received a refund together with interest as provided in the statute. The taxpayer argued that the interest received in respect of the refund was not includible in the taxpayer’s income because it was not “interest” for the purpose

14 SC 1920, c. 49, section 10.

15 SC 1936, c. 38, section 15.

16 See the definition of “taxpayer” in subsection 248(1).

17 Paragraph 155(1)(a), subsection 156.1(4), and paragraphs 157(1)(b) and 157(1.1)(b).

18 67 DTC 5064 (Ex. Ct.) (a case in which two future judges of the Tax Court, Messrs. Couture and Mogan, were counsel).

of the relevant statutory provision dealing with the inclusion of interest in computing income, and that the overpayment giving rise to the refund did not arise until the successful appeal of the original assessment. There was therefore no amount in respect of which interest could arise until that time. Jackett P stated:

The fallacy that underlies the appellant's contention, in my view, is the failure to distinguish between the actual *amount* of the taxpayer's income tax liability for a particular year as imposed by the substantive provisions of the Act, on the one hand, and, on the other hand, the *determination* of that amount by the Minister's assessment thereof, while it remains in force, by the judgment of the Tax Appeal Board, while it remains in force, or by the judgment of this Court while it remains in force, or, ultimately, by the Supreme Court of Canada. The actual liability is a constant amount that does not change as long as the facts and the substantive law remain unchanged. The assessed amount as varied by judicial decision, which is the amount which the Minister and all others concerned are bound to assume to be the actual amount of the liability, can change from time to time by virtue of new assessments or judicial decisions.¹⁹

Jackett P added that the actual amount of the taxpayer's liability is "as a practical matter, the amount at which it is ultimately determined."²⁰ On this view, the overpayment of tax existed from the time the taxpayer first paid the amount of tax initially assessed, so that an amount existed in respect of which interest could arise. Accordingly, the taxpayer was unsuccessful.²¹

The liability of a taxpayer to pay tax under the Act is therefore the product of the application of the relevant provisions of the Act to the income-earning activities of the taxpayer during the year and hovers, so to speak, like a Platonic form, over the taxpayer until it is fixed and given substance by assessment as finally determined, if necessary, through the appeal process and the courts.²² The liability thus exists at least from the end of the relevant taxation year, even though it cannot be finally determined until the end of the assessment and appeal process. It is not a mere risk but a reality, albeit inchoate. This reasoning, for example, underlies the operation of subsection 160(1), which applies to transfer the tax liability of one taxpayer to a non-arm's-length transferee of property without fair market value consideration,

19 *Supra* note 18, at 5066.

20 *Ibid.*, at note 2.

21 The conclusion in *Terra Nova Properties* is, of course, consistent with the provisions of the Act imposing interest and providing for refunds, which, in each case, calculate the amounts in respect of the tax payable as finally determined by assessment or appeal, from the date on which the tax or instalment was first due and payable.

22 In *Dominion of Canada General Insurance Company v. The Queen*, 84 DTC 6197, at 6202 (FCTD), per McNair J, the distinction was described as follows: "The liability to pay tax must be distinguished from the mechanical operation of assessment and the determination or calculation of tax liability. Assessment is the procedural means for achieving the tax result. The question of tax liability or not in any taxation year is dependent upon the law as it applied in that year."

even where the amount of the tax liability has not been fixed by assessment at the time the transfer of property is made.

In reaching the decision in *Terra Nova Properties*, Jackett P also relied on the provisions of what is now subsection 248(2),²³ which provides:

In this Act, the tax payable by a taxpayer under any Part of this Act by or under which provision is made for the assessment of tax means the tax payable by the taxpayer as fixed by assessment or reassessment subject to variation on objection or on appeal, if any, in accordance with the provisions of that Part.

Jackett P also referred to the 1956 decision of the Exchequer Court in *Subsidiaries Holding Co. Ltd. v. The Queen*²⁴ (a case in which he had appeared as counsel for the Crown). In that case, on the basis of the facts and the relevant statutory provisions, the taxpayer corporation had apparently overpaid its tax for the year but had failed to file a timely objection to the assessment for the year, so that the year had become statute-barred. The issue was whether the taxpayer had made an “overpayment” of tax for the purposes of the refund provisions. At the time, “overpayment” was defined in a manner similar to the current definition in subsection 164(7) to mean all amounts paid on account of tax less all amounts “payable under this Act.” The argument of the taxpayer, in effect, was that, in paying the amount assessed by the minister, it had paid an amount greater than its liability for tax and that this should be considered an overpayment. In rejecting the taxpayer’s position, Cameron J stated:

One final comment should be made in respect to the meaning of the phrase “amounts payable under this Act.” The amounts referred to are undoubtedly amounts of tax (plus interest and penalties, if any). It would seem proper, therefore, to read the phrase as if it were “the amounts of tax payable under this Act”; and applying thereto the definition of “tax payable” found in section 127(1)(ay) [now subsection 248(2)], there seems little doubt that the phrase means the amount of tax payable as fixed by the assessment. Such an interpretation, it seems to me, is entirely consistent with the other provisions of the Act in that the validity and binding effect of the assessment are maintained and all disputes between the taxpayer and the Minister as to the amount of tax which the former is liable to pay fall to be determined under the sections relating to objections and appeals from assessments, which I think was clearly the intention of the Act. I can find nothing in this section which suggests that the Minister in computing refund [sic] should for that purpose make any computation as to tax liability other than that which he has done in and by his assessment.²⁵

The distinction so clearly made by Jackett P in *Terra Nova Properties* between liability for tax and amounts actually payable (and therefore debts due to the

23 Section 139(1)(ba) of the 1952 Act, supra note 12, referred to in *Terra Nova Properties*, supra note 18, at 5066, note 1.

24 56 DTC 1141 (Ex. Ct.).

25 Ibid., at 1148.

Crown)²⁶ was unfortunately muddled somewhat in the decision of Noël J in *The Queen v. Simard-Beaudry Inc. et al.*²⁷ In that case, the taxpayer had acquired, pursuant to a purchase agreement, assets of another corporation and in consideration had agreed to assume the debts of the vendor corporation, including its “liability” for income taxes incurred before 1965. Subsequent to the date of the agreement, the vendor corporation was reassessed for an increased amount of tax for years prior to 1965. The relevant provision in the purchase agreement referred to “all the debts and obligations of the Vendor of every kind and sort whatsoever including any liability for income and corporation taxes incurred prior to January 1, 1965.”²⁸

The taxpayer corporation took the position that, because the vendor corporation’s tax liability for the years in question had been fixed by reassessments made after the date of the agreement, no liability for taxes existed at the time of the agreement. The position taken by the taxpayer was clearly wrong in light of the jurisprudence cited above because the agreement referred to “liability” for tax, which arises independently of an assessment or reassessment. In expressing this conclusion, however, Noël J stated:

As to [the taxpayer’s] second argument, namely that the debt arising from re-assessment of the taxpayer dates only from the time that the taxpayer is assessed, and that it did not, accordingly, exist at the time the agreement was made, it seems to me that the answer to this is that the general scheme of the *Income Tax Act* indicates that the taxpayer’s debt is created by his taxable income, not by an assessment or re-assessment. In fact, the taxpayer’s liability results from the Act and not from the assessment. *In principle*, the debt comes into existence the moment the income is earned, and even if the assessment is made one or more years after the taxable income is earned, the debt is supposed to originate at that point. Here, the re-assessments issued in August 14, 1969, for income earned in previous years seem to me to be at most a confirmation or acknowledgement of the amounts owing for these earlier years. Indeed, in my opinion, the assessment does not create the debt, but is at most a confirmation of its existence.²⁹

With respect, the references to “debt” in this passage are consistent with the prior jurisprudence only if they are read as references to “liability.”³⁰ Because the agreement in question referred to “liability for income and corporation taxes” and not to “debts” in respect of taxes, Noël J’s references to “debt” are in obiter and reflect an unfortunate confusion in terminology. This conclusion is strengthened by the curious

26 A distinction, one suspects, that Jackett P had made with similar precision in his argument as counsel in *Subsidiaries Holding*.

27 71 DTC 5511 (FCTD).

28 *Ibid.*, at 5512.

29 *Ibid.*, at 5515 (emphasis added).

30 Although the assumed liabilities were those at the end of 1964, tax estimated by the taxpayer would not have been payable until its subsequent payment due date and could not have been a debt at December 31, 1964.

reference to a debt coming into existence “[i]n principle.” It is also worth noting that there is no reference in the reported judgment to the prior jurisprudence or to the provisions of the equivalent of subsection 248(2). As will be seen, this portion of the decision, which has been quoted more frequently than Jackett P’s in *Terra Nova Properties* (which, in my view, is the more correct interpretation of the law), has unfortunately led to occasional confusion in subsequent cases.

In *The Queen v. Wesbrook Management Ltd.*,³¹ the Federal Court of Appeal considered both the *Simard-Beaudry* and the *Terra Nova Properties* decisions and interpreted the former in a manner consistent with the latter. The judgment repeats the quotation above from *Simard-Beaudry* and comments:

It follows from this proposition, says the appellant, that the liability of a “responsible representative” for the amount for which some other taxpayer is liable under the Act does not depend upon such other taxpayer having been assessed for such amount. That is also a proposition with which we would be inclined to agree.³²

It is submitted that, in reading “debt” in the decision of Noël J as “liability,” the Federal Court of Appeal in *Wesbrook* correctly interpreted the law. The court proceeded to cite the quotation above from the decision of Jackett P in support of the proposition that “[w]hile an assessment is by no means a condition of liability to pay tax, an assessment, once issued, and unless and until varied by competent authority, has the effect of fixing the liability for tax.”³³

The resulting nexus between an assessment and the existence of a tax debt subject to the collection provisions of the Act has been confirmed in subsequent cases.³⁴ In *The Queen v. Cyrus J. Moulton Ltd.*,³⁵ the taxpayer had received a demand from the minister, made under subsection 224(1), to pay amounts otherwise payable to a subcontractor, one Micucci, to the Crown on account of the subcontractor’s tax debt. The taxpayer argued successfully that the minister had not shown that the subcontractor was in fact liable to make a payment under the Act, which was a precondition for the section 224 garnishment notice. Collier J stated:

In my view the whole scheme of the assessment and collection provisions of the Act supports the view of [sic] some formal initiating (and appealable) step must be taken by the Minister against an alleged defaulter such as Micucci before the extraordinary collection remedy of garnishment proceedings can be resorted to.³⁶

31 96 DTC 6590 (FCA).

32 Ibid., at 6592.

33 Ibid.

34 See, for example, *Riendeau v. The Queen*, 91 DTC 5416, at 5417 (FCA); aff’g. 90 DTC 6076 (FCTD). See also the discussion of the *Exida.com* and *Wichartz* cases below, under the heading “Penalties.”

35 76 DTC 6239 (FCTD).

36 Ibid., at 6244-45.

In *Lambert v. The Queen*,³⁷ the taxpayer was reassessed for the 1968-1971 taxation years and duly filed objections to the reassessments. The minister registered a certificate under section 223 and seized property of the taxpayer in reliance thereon. Subsequently, new assessment notices were issued in respect of those taxation years in respect of amounts of tax at least equal to the amounts assessed in the original reassessments. The taxpayer took the position that the subsequent assessments nullified the previous reassessments and, therefore, the section 223 certificate. After briefly reviewing the statutory scheme for filing, payment, assessment, and collection of tax, the court concluded that the new assessments did not affect the validity of the section 223 certificate, stating:

As appears from our review of the provisions of the Act, there is a difference between

- (a) a liability under the Act to pay tax, and
- (b) an “assessment” (including a reassessment or a further assessment), which is a determination or calculation of the tax liability.

It follows that a reassessment of tax does not nullify the liability to pay the tax covered by the previous assessment as long as that tax is included in the amount reassessed.*

* A reassessment might, of course, reduce or eliminate the tax payable, in which event, the taxpayer, would, of course, have an appropriate recourse.³⁸

The one case that is at odds on its face with the proposition that a tax debt arises only on assessment is the decision of the Saskatchewan Court of Queen’s Bench in *The Queen v. The Sands Motor Hotel Limited et al.*³⁹ In that case, the minister sought an order under the Business Corporations Act (Saskatchewan) (BCA) setting aside certain payments by the taxpayer corporation to its shareholders and prohibiting distributions on the basis that the distributions would render it unable to pay its income tax. In order to succeed in the relevant application, the minister had to show that the Crown was a “complainant” within the meaning of the BCA. The court found that a creditor of a corporation fell within the definition of “complainant.” The taxpayer corporation took the position that the minister was not a creditor at the time the impugned payments were made because no assessment or reassessment had yet been made. Citing the passage quoted above from the decision of Noël J in *Simard-Beaudry*, McLellan J stated:

I agree with the reasoning of Noël, A.C.J. In my opinion there was a debt owing at the time that the letter was written to the taxpayer on September 12, 1981 [a letter from the minister advising the taxpayer that he proposed to tax the sale of the taxpayer’s property on income account], although the exact amount of that debt had not yet been ascertained.⁴⁰

37 76 DTC 6373 (FCA).

38 *Ibid.*, at 6375.

39 84 DTC 6464 (SKQB).

40 *Ibid.*, at 6466.

It is unclear how much weight should be given to this judgment, given that it was made for the purposes of the provincial corporation statute and not for the purposes of the Act. It also runs contrary to the following statement by Collier J in *Moulton*:

Counsel for the plaintiff conceded his argument would go this far: if the Minister of National Revenue responsibly determined, in his mind only, that Micucci was liable to make a payment under the *Income Tax Act*, that would be a sufficient starting point for him to issue a requirement under ss. 224(1) provided the other stipulations were complied with; neither demand, certificate, nor assessment are pre-requisites.

I cannot conceive that to be the law. When one examines the other collection provisions of the *Income Tax Act*, beginning at section 222, it seems to me there must be some formal initiating step or action taken by the Minister in order to create a liability “to make a payment,” sufficient to warrant the issue of a requirement similar to the January 15, 1973, letter [the subsection 224(1) demand].⁴¹

Thus, the collection provisions of the Act cannot be accessed without action by the minister (and therefore, by implication, no tax debt exists until that time).⁴² Whether, in *Sands Motor Hotel*, the minister’s letter indicating the intention to assess would so qualify is unclear. It may be that, for the purposes of the BCA, it would be sufficient.

Restriction on Collection and Collection in Jeopardy Provisions

Where a taxpayer is liable for the payment of an amount assessed under the Act, the provisions of section 225.1 allow the taxpayer (other than a large corporation) to delay payment of the amount in issue (and allow a large corporation to delay payment of 50 percent of the amount in issue) while it is under objection or under appeal up to the Tax Court level. It is clear that these provisions operate only in respect of amounts assessed pursuant to a notice of assessment by the minister, since subsection 225.1(1.1) defines “collection-commencement day” as a date determined with reference to the day of mailing of a notice of assessment. Similarly, the provisions of section 225.2, which allow the minister to override, with judicial approval, the provisions of section 225.1 where the collection of an amount assessed would be jeopardized by a delay in collection, appear to assume the issuance of a notice of assessment.⁴³ Given that the provisions of sections 225.1 and 225.2 assume that an assessment has been raised, in a case such as *Bechtold*⁴⁴ (discussed below), where an amount was found to

41 *Supra* note 35, at 6244.

42 But see the discussion below considering whether a tax debt can be created by the taxpayer’s self-assessment action or by certain other provisions of the Act.

43 Subsection 225.2(3) allows action to be taken prior to the receipt of the notice of assessment by the taxpayer if the receipt in itself is likely to jeopardize collection, and deems the judicially authorized amount to be an amount payable under the Act; however, it is unclear if this provision assumes the existence of a notice of assessment or merely the calculation of an amount by the minister.

44 *Infra* note 49.

have become payable under the Act without the issuance of a notice of assessment, they would have no application. It is worth noting that “liable” in this context refers to an actual obligation to pay tax assessed and not a mere risk of exposure to tax.

Self-Assessment

All of the jurisprudence surveyed above considered the effect of an assessment or reassessment by the minister. It is at least arguable, however, that a tax debt can be created by the self-assessment of an amount by a taxpayer. Under a self-assessment system such as Canada’s, the inchoate liability for tax arising by virtue of the operation of the applicable statutory provisions is fixed first by the taxpayer’s self-assessment, subject to further assessment or reassessment by the minister. Under sections 150 and 151, a taxpayer is required to file a return that includes the taxpayer’s estimate of tax payable and, to the extent that such estimated tax has not been paid by source deduction or instalment, to pay such amount on the taxpayer’s balance-due date. Any such amount so estimated that is not paid on the balance-due date clearly is an amount payable under sections 155 to 157,⁴⁵ as the case may be, and therefore is a “tax debt” within the meaning of subsection 222(1).⁴⁶ This would also have been the case under section 222 as it read between 1972 and 2004,⁴⁷ since the estimated tax would have been an amount payable in respect of taxes. While there appear to be no reported cases dealing with such a situation, it seems that the minister could initiate collection action based on self-assessment of tax payable by the taxpayer.

Individual taxpayers who carry on business in a year can generally defer filing the tax return for the year from April 30 to June 15 of the following year pursuant to subparagraph 150(1)(d)(ii). Notwithstanding, the balance-due date for such an individual taxpayer remains April 30 of the year following the taxation year.⁴⁸ This effectively requires the individual to calculate any unpaid balance by the April 30 deadline in order to avoid incurring interest or, possibly, penalties. It is unclear whether this constitutes a self-assessment of tax that could, at least in theory, give rise to collection action; however, as a practical matter, the provision appears to be relevant only for the purpose of calculating interest and penalties.

The possibility of collection based on self-assessment was alluded to in *Bechtold Resources Limited v. MNR*,⁴⁹ a case involving part VIII tax payable in respect of scientific research tax credits. Under the relevant provisions of the Act, a taxpayer carrying

45 Each of which uses the words “shall pay.”

46 The use of the term “estimate” may be somewhat misleading. What the taxpayer is required to do is to calculate an amount that is specified in the return and that, whether an “estimate” or not, becomes a debt due and collectible.

47 During those years, section 222 read, in part, “All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty.” (SC 1970-71-72, c. 63, as amended, and the 1985 version of the Act prior to its amendment by SC 2004, c. 22, section 50.)

48 Subsection 156.1(4), and paragraph (c) of the definition of “balance-due day,” in subsection 248(1).

49 86 DTC 6065 (FCTD).

on scientific research and development could issue securities to which were attached the right to claim scientific research tax credits by the holder, in an amount designated by the issuer to the minister when the securities were issued. On making the designation, the taxpayer became liable to part VIII tax equal to 50 percent of the amount designated, payable at the end of the month following the month in which the securities were issued.

In *Bechtold*, the taxpayer issued securities and made and filed the required designation on January 17, 1985. Tax under part VIII then became payable and due on February 28, 1985. On March 26, 1985, the minister issued an assessment for the part VIII tax and subsequently took collection action, all prior to the end of the taxation year of the taxpayer corporation in which the due date fell. The taxpayer sought to quash the assessment on the basis that an assessment could not be made prior to the end of the taxation year. In its decision, the court restated the principle that

[l]iability to pay tax or to pay any amount on account of tax does not depend on any Notice of Assessment. It has long been firmly established that liability is created by statute and exists regardless of whether there has been an assessment by the Minister.⁵⁰

The court then proceeded to quote the statement of Noël J in *Simard-Beaudry* discussed above. Without determining whether the minister was entitled to assess prior to the end of a taxation year, the court found that the minister's collection action was justified on the basis that the relevant provisions of part VIII provided that the taxpayer "shall . . . pay" the amount in question:

The words "shall . . . pay" obviously create a strict obligation to pay. An amount "on account of its tax" must mean a part of the tax. In other words, it must relate to a payment on account of the total tax ultimately determined to be payable.⁵¹

The amount payable under part VIII was therefore undoubtedly an "amount payable under the Act," whether or not on account of tax, and was therefore a tax debt that was enforceable through appropriate collection action. This conclusion does not turn on the suggestion in *Simard-Beaudry* that a tax liability and a tax debt are one and the same. The specific provisions of part VIII made a determinable amount (the amount specified in the designation made and filed by the taxpayer) payable on the due date. In addition, in *Bechtold*, the taxpayer had arguably self-assessed by filing the required designation under part VIII in which it calculated the amount of tax payable (although the court in *Bechtold* treated the designation as "information supplied by the taxpayer" as referred to in subsection 152(7), in which the taxpayer had admitted liability for the amount in question).

50 Ibid., at 6069.

51 Ibid.

Instalments and Source Withholdings

In addition to the payment of tax on assessment by the minister (or self-assessment by the taxpayer in the tax return), the Act requires, in specified circumstances, the payment of instalments under sections 155 through 157 and the remittance of source deductions under sections 153, 116, and 215. In each case, the statutory language, “shall . . . pay” or “shall . . . remit” makes an amount payable by the relevant taxpayer at or within the time provided. Such amounts are payable without assessment or further action by the minister. With respect to instalment payments, because the taxpayer is permitted to determine the amount of the payment (based on the anticipated tax payable for the year), and is not required to justify or account for the amount paid at the time of the payment, it is not practically possible for the minister to determine, before the taxpayer files the annual return, whether any amount is payable in addition to the instalments actually paid or remitted. As a result, it does not appear that there is any scope for applying the collection provisions of the Act to such amounts. By contrast, an employer that has deducted income tax or Canada Pension Plan and employment insurance contributions must file a T4 (“Summary of Remuneration Paid”) return each year,⁵² summarizing the deductions made and the remittances paid in the year and identifying any unremitted balance due. Such balance due presumably could be the subject of collection action by the minister without the necessity of an assessment.

The one partial exception is the little-used section 226 of the Act, which applies where the minister suspects that a taxpayer has left or is about to leave Canada. In that case, the minister can demand payment of taxes, interest, and penalties for which the taxpayer is liable or would be liable if the time for payment had arrived, and on the serving of notice of such demand, the taxpayer is required to pay such amounts forthwith. This provision effectively allows the minister to assess prior to the end of the taxation year or any relevant balance-due date (the issue raised but not resolved in *Bechtold*).

Penalties

There were no penalties in the 1917 Act as originally enacted, but only criminal sanctions. Civil penalties were added to the 1917 Act in 1919.⁵³ The language imposing penalties has generally remained unchanged since then: a person failing to meet the required standard will be “liable to a penalty”⁵⁴ by virtue of the default or error. This is language similar to that creating liability for tax. It is suggested that,

52 See regulation 200.

53 SC 1919, c. 55, section 5. The language used in the 1919 amendment, “subject to a penalty,” was replaced in 1922. See SC 1921, c. 33, section 2.

54 However, see subsection 204.82(4), which provides that, where a corporation is subject to tax under subsection 204.82(3), it “shall pay . . . a penalty for the year.”

similar to liability to tax, liability to a penalty arises as a result of the application of the particular penalty provision to the acts or omissions of the taxpayer at the time that such acts or omissions occur, and remains inchoate until fixed by assessment. The penalty will then become payable upon assessment or reassessment under section 158.⁵⁵

This conclusion is consistent with the statement of Laskin J in *MNR v. Panko*, with reference to a predecessor provision to subsection 163(2), that

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.⁵⁶

It is also consistent with the reasoning of Woods J in *Exida.com Limited Liability Company v. The Queen*.⁵⁷ In that case, the taxpayer was a non-resident corporation assessed a penalty pursuant to subsection 162(2.1) for failure to file a tax return, notwithstanding that it had no unpaid tax for the relevant year. Subsection 162(2.1) imposes a penalty “if a non-resident corporation is liable to a penalty under subsection [162](1) or (2) for failure to file a return of income for a taxation year.” The taxpayer argued that it could not be liable to a penalty under subsection 162(1) or (2) because the penalty imposed under those provisions was computed by reference to unpaid tax and was therefore nil.

Woods J found that the term “liable” as used in subsection 162(2.1) had a broad meaning:

According to *The Oxford English Dictionary*, 2nd ed., the primary meaning of “liable” is:

Bound or obliged by law or equity, or in accordance with a rule or convention; answerable; legally subject or amenable to.

Similarly, the Federal Court of Appeal adopted a broad meaning of “liable” in a legal context in *The Queen v. National Trust Company*, 98 DTC 6409 at para. 46:

The ordinary meaning of the word “liable” in a legal context is to denote the fact that a person is responsible at law.⁵⁸

Woods J then rejected the argument that the terms “liable” and “payable” were to be equated, stating:

55 Subject, of course, to the provisions of section 225.1, which suspend collection action during objections and appeals up to the Tax Court level.

56 71 DTC 5255, at 5260 (SCC).

57 2009 TCC 373; aff'd. 2010 FCA 159. While the Federal Court of Appeal affirmed the decision of Woods J on other grounds, Bloom and Wiener correctly observe that her reasoning on this point was not apparently challenged: see supra note 3, at 7.

58 *Exida.com*, supra note 57 (TCC), at paragraphs 47-48.

In paragraph 162(2)(c), the term “payable” is used to make it clear that the more onerous penalty for a repeated failure does not apply unless there was actually a penalty owing for a prior year.⁵⁹

Although not stated explicitly, this clearly implies that the penalty would not become “payable” until there was an assessment by the minister. Woods J then concluded, on a contextual and purposive analysis, which took into account the legislative intent, that the wording “liable to a penalty under subsection [162](1) or (2) for failure to file a return of income for a taxation year” should encompass the circumstances in these appeals. In other words, subsection 162(2.1) should apply if a non-resident corporation is potentially subject to a penalty under subsection 162(1) because it has failed to file a tax return on time.

On appeal of the decision, the Federal Court of Appeal found there was a “fundamental drafting error”⁶⁰ in subsection 162(2.1), which vitiated the intent of the provision. A non-resident corporation which had no tax payable could not be “liable” to a penalty under subsection 162(1) or (2), a condition precedent to the application of subsection 162(2.1). None of this is inconsistent with the discussion by Woods J of the relation of liability and payment—the Federal Court of Appeal simply found that the words of the provision did not create any inchoate liability to a penalty in the first place.

A similar result was reached in *M. Wichartz v. Canada*,⁶¹ where the taxpayer admittedly late-filed her 1984 through 1988 tax returns. The minister assessed late-filing penalties in respect of the 1984 through 1987 years after the due date for filing the 1988 return and, at the same time, assessed a penalty for repeated failure under subsection 162(2). Sobier J drew the same distinction between liability for a penalty and a penalty being payable as Woods J made in *Exida.com*, stating:

An analogy to liability for income taxes might be helpful. It is clear that an assessment does not create liability for income tax. The provisions of the Act create the liability for that tax. Similarly, the Act creates the liability for the penalty. Simply because the taxpayer is liable for a penalty upon failure to file a return, it does not necessarily follow that the penalty is payable at that time.

Paragraph 162(2)(c) of the Act speaks of the penalty being payable “before the time of failure.” While the Act creates the liability for the penalty at the time of failure, it becomes payable by reason of an assessment. The definition of “tax payable” in subsection 248(2) of the Act shows that “tax payable” means that the taxes are payable by a taxpayer “as fixed by an assessment.” While the phrase “tax payable” has no bearing on the liability for tax, it is important when dealing with the question of when this liability must be paid. It must be paid after an assessment has been made and not before.

59 *Ibid.*, at paragraph 50. Subsection 162(2) imposes a penalty for repeated failure where a taxpayer fails to file a return at a time when “a penalty was payable” under subsection 162(1) or (2) in respect of any of the three preceding taxation years.

60 *Exida.com*, supra note 57 (FCA), at paragraph 28.

61 [1995] 1 CTC 2866 (TCC).

The same reasoning would seem reasonable here. Although the appellant was liable for the penalty with respect to the three taxation years preceding, such penalties were not payable by her until after the assessment, namely June 2, 1989, while the failure to file occurred on April 30, 1989. Accordingly, at the time of the failure, no penalty was payable by the appellant, and therefore the appellant was not liable for a penalty under subsection 162(2) of the Act.⁶²

The Act contains a number of penalties that apply when elections or designations are late-filed or amended. Typically, the statutory provisions require the taxpayer to estimate the penalty in the late-filed or amended designation or election, and to pay the estimated penalty at the time of filing. They also require the minister to examine each such filing, assess the penalty, and send a notice of assessment. Any amount by which the penalty assessed exceeds the amount previously paid in respect of the penalty is payable forthwith.⁶³ Other similar penalties diverge from this pattern. Subsections 66(12.74), (12.741), and (14.4), which deal with late-filed forms relating to flowthrough resource expenditures, late renunciation of such expenditures, and late designations, respectively, contain no requirement to estimate tax but require, in the case of subsections 66(12.74) and (14.4), that the taxpayer pay the penalty at the time of filing and, in the case of subsection 66(12.741), that the taxpayer pay the penalty within 90 days of the relevant time. Subsection 146(13.1) provides that the issuer of a registered retirement savings plan is “liable to a penalty” in certain circumstances but contains no specific reference to the time of payment or assessment. Subsection 149(7.1) provides that a non-profit corporation carrying on scientific research and development may be “liable to” a late-filing penalty in respect of an information return but similarly contains no specific provisions dealing with the time of payment or assessment. These inconsistencies in drafting are presumably unintended and, arguably, should be rectified.

Penalties for Repeated Failure

One of the corollaries of the conclusion suggested above—that penalties, like taxes, become payable only on assessment—relates to those provisions of the Act that impose additional penalties for repeated failures, namely, subsections 162(2) and (8) and subsections 227(8) and (9). In the case of each of these provisions, the additional

62 Ibid., at 2868. The Canada Revenue Agency has accepted this view in CRA document no. 2002-0178707, January 10, 2003, which states: “We are of the view that the phrase ‘a penalty was payable’ in paragraph 162(2)(c) of the Act should be interpreted as meaning ‘a penalty was assessed.’ The Technical Notes of the Department of Finance for subsection 162(2) of the Act clearly indicate this is the intended interpretation. Furthermore, this interpretation was adopted by the Tax Court of Canada in the informal procedure decision in *M. Wichartz v. The Queen*, 96 DTC 3251.”

63 See, for example, subsections 48.1(3) and (5); 85(7) and (9); 83(3) and (5); 93(5), (5.1), and (7); 96(5), (5.1), and (7); 110.6(26), (27), and (30); and 131(1.1) and (1.4). The penalty for late-filed, amended, or revoked elections under subsection 220(3.5) omits the requirement to estimate the penalty, but similar assessment and payment provisions are included in subsection 220(3.6).

penalty for repeated failure is triggered when a person makes the error or omission in question, at a time when “a penalty was payable” under the same provision in the year or during some other specified period. As discussed above, because of the precondition that a penalty for a previous offence be “payable,” such penalty for repeated offences will not be applicable unless the minister has in fact assessed a penalty in respect of the previous failing. By contrast, in subsection 162(10.1), the precondition for the additional penalty provided therein is that “a person or partnership is liable to a penalty under subsection (10),” thus eliminating the need for a prior assessment. This difference in treatment appears to be intentional.⁶⁴ The repeated penalty provisions in subsections 188.1(3) and (8), applicable to registered charities, were enacted in 2005, with references to prior assessment of penalties similar to those that were removed earlier from subsections 162(2) and (8) and subsections 227(8) and (9). Thus far, no amendment of that wording has been introduced.

Liability and Payment in Part IX.1

The relationship between liability and payment described above is maintained in part IX.1—assuming that the wording in subsection 197(2) is sufficient to create a liability to tax. Members of a SIFT partnership that is “liable to pay tax” under part IX.1 are required to self-assess by filing a return containing an estimate of tax payable by the partnership (subsection 197(4)), and the partnership is required to pay tax payable on the appropriate due date (subsection 197(7)). The administrative provisions in divisions I and J of part I are made applicable with appropriate modification (subsection 197(6)). It is suggested that, taking into account the dictionary meanings of “liable” and the judicial consideration of the concept of liability discussed above, a court should not have difficulty in finding the existence of liability to tax as Canadian courts have defined that concept. The distinction that Bloom and Wiener attempt to draw between liability to tax in the sense of mere risk and a

64 The additional penalties in subsections 162(2) and (8) and subsections 227(8) and (9) were added to the Act by SC 1988, c. 55, and were subsequently amended, by SC 1991, c. 49, section 245(1) in the case of subsections 162(2) and (8), and by SC 1993, c. 24, sections 132(1) and (3) in the case of subsections 227(8) and (9). When first enacted, each section used the words “had been assessed a penalty” or a variation thereof. The subsequent amendments replaced this language with the words “a penalty was payable.” The technical notes for the subsequent amendment of subsections 162(2) and (8) (Canada, Department of Finance, *Explanatory Notes to Legislation Relating to Income Tax* (Ottawa: Department of Finance, May 1991)) and the technical notes for the subsequent amendment of subsections 227(8) and (9) (Canada, Department of Finance, *Amendments to the Income Tax Act and Related Statutes: Explanatory Notes* (Ottawa: Department of Finance, June 1992)) make no reference to the change in wording from “had been assessed a penalty” to “a penalty was payable.” The CRA’s view, however, is that the technical notes suggest that the change in wording was not intended to change the effect of the provisions (see *supra* note 62). *Information Circular 77-16R4*, “Non-Resident Income Tax,” May 11, 1992, which discusses the additional penalty in subsections 227(8) and (9) in the context of a previous penalty having been assessed, has not been further revised since the amendment of those provisions.

requirement and enforceable obligation to pay tax imposed by the charging language alone does not exist—the charging language creates the inchoate liability, which is then fixed through the assessment and appeal process. There is ample scope in the multiple meanings of “liable” to create such liability.

JUDICIAL INTERPRETATION OF SUBSECTION 197(2)

The foregoing conclusion is reinforced by the textual, contextual, and purposive analysis that the Supreme Court of Canada has mandated for the interpretation of taxing statutes.⁶⁵ Assuming, for the sake of argument, that a textual analysis of subsection 197(2) were inconclusive about the imposition of part IX.1 tax, the context of subsection 197(2) for such an analysis would surely be part IX.1 as a whole. The provisions of that part, which include a definition of income, requirements to file returns and to estimate and pay tax, and provision for assessments and appeals, are consistent only with the imposition of a tax through the creation of liability to tax under subsection 197(2). Bloom and Wiener do not seem to seriously question that if a purposive analysis were undertaken, it would reveal an intention by Parliament to impose a tax. Their argument on that score is that it is not proper for the courts to rely on findings of legislative intent to rewrite defective legislation—in this context, by finding that the “liable to” language in subsection 197(2) is equivalent to the charging language used elsewhere in the Act. On the arguments put forward here, such reliance is not necessary. Finally, Bloom and Wiener argue that, even if, on a purposive analysis, the words used could be found to impose tax, they should not be so construed, because such approval of variant language would amount to finding a meaning that is not harmonious with the Act as a whole (as mandated by the Supreme Court in *Canada Trustco Mortgage Co. v. Canada*).⁶⁶ As argued, the use of the term “liable” elsewhere in the Act, including the various penalty provisions, is not inconsistent with such an interpretation. Though there are admittedly inconsistencies in wording, particularly in the penalty provisions, it is submitted that the reference in *Canada Trustco* must refer to more than minor inconsistencies in wording, with which the Act is replete. A proper application of the test in *Canada Trustco* should construe subsection 197(2) so as to apply the part IX.1 tax. One suspects that Bloom and Wiener are at least half-convinced of this themselves, because they conclude with remarks about statutory interpretation that are sympathetic to the old rules of strict construction set out in 19th and early 20th century cases,⁶⁷ including references to the destructive power of taxation (which presumably would more likely produce the interpretation that they favour). This approach is inconsistent with the

65 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54.

66 *Ibid.*

67 Bloom and Wiener, *supra* note 3, at 13-14.

modern rules of statutory interpretation established since *Stuart Investments Ltd. v. The Queen*,⁶⁸ and should be rejected. As Sullivan comments in *Driedger on the Construction of Statutes*,

[a]lthough *Stuart* was not the first case to condemn excessive literalism in the interpretation of tax legislation, it did so definitively and conclusively. There is no going back to the old approach.⁶⁹

According to Sullivan, under the modern rule,

[c]ourts must now have regard to the purpose of provisions contained in tax legislation. They must assume that each provision, each feature of the legislation has a particular rationale which should be understood before an interpretation is adopted. Other things being equal, an interpretation that promotes the purpose should be preferred over one that does not.⁷⁰

The purpose of part IX.1 is clear—to impose a tax on SIFT partnerships as part of a larger statutory scheme to remove any tax advantage from the use of certain flowthrough vehicles to avoid corporate-level tax. The statutory language used, as I have argued here, is adequate for the purpose, if not ideal, and it is to be expected that a court will uphold the legislation. Bloom and Wiener’s warning of the risks involved in a challenge to the validity of the tax⁷¹ should not be disregarded.

None of the above should, however, obscure the service that Bloom and Wiener have rendered in bringing this issue to light. The use by the Department of Finance of the charging language in part IX.1 without any explanation or justification of the departure from the normal language employed deserves to be criticized and to be questioned, not least because of the time and expense that will be incurred by taxpayers and their advisers in dealing with it.

68 *Stuart Investments Ltd. v. The Queen*, [1984] 1 SCR 536.

69 Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Markham, ON: Butterworths, 1994), at 405-6 (note omitted).

70 *Ibid.*, at 406.

71 Bloom and Wiener, *supra* note 3, at 21.

