UNIVERSITY OF VICTORIA
FACULTY OF LAW

The FAPI regime and CFC Rules under the BEPS Action Plan 3:

Where Does the Business of "Managing Intellectual Property" Stand?

by

Yaroslavna Nosikova

June 2015

ABSTRACT

The paper reviews how the current Canadian FAPI ("Foreign Accrual Property Income") regime applies to income derived from intellectual property ("IP"). The paper then compares the Canadian regime to the proposed CFC ("Controlled Foreign Company") rules under Base Erosion an Profit Shifting ("BEPS") Action Plan 3.Canada does not explicitly list IP income under the FAPI regime. Instead, IP income from a foreign affiliate ("FA") is treated as either royalty income or income from sale of property and related services. IP income will likely not be taxed when it is distributed by a Controlled Foreign Affiliate ("CFA") as a dividend to a Canadian parent, if the FA is located in the designated treaty country, and its income is not passive income. Depending on the business arrangement between the Canadian-resident parent corporation and its FA, income from any of the categories may be characterized as either active or passive income. To constitute active income, one of the common requirements is for a FA to not engage in business transactions with the Canadian-resident parent corporation or other related Canadian residents. FAPI regime also offers re-characterization rules under paragraph 95(2)(a) of the *Act* that put Canada at a competitive advantage with other countries that have implemented patent box regimes. Finally, the current Canadian FAPI regime is comparable with the CFC rules under BEPS Action Plan 3. One of the main distinctions is that Canada does not require a FA to perform R&D activity and have skilled employees under the FAPI regime. However, given that Canada has alternative safeguards that are also proposed by BEPS Action Plan 3, Canada is in line with CFC rules. The FAPI regime would benefit from further clarifications as to how certain rules apply to IP income.

TABLE OF CONTENT

INTRODUCTION

The income derived from intellectual property ("IP")[1] is highly mobile and can be transferred abroad without a significant impact on the operations of the business.[2] By transferring IP from a parent corporation to one or more subsidiaries and managing this property in low-tax jurisdictions, multinational enterprises ("MNEs") can minimize their overall taxes.[3] For example, only 37 of Burger King's 13,000 restaurants are situated in Switzerland. However, Burger King's Swiss subsidiary recorded a profit of $127.6 million in 2012.[4] That was greater than the U.S. resident parent company global net income of $117.7 million that year.[5]

As explained by Richard Anderson and quoted in the New York Times, "… most of the assets that are going to be relocated as part of a global repositioning are intellectual property... because that is where most of the profit is".[6] Thus, effective management of a global IP portfolio can significantly reduce an MNE's tax burden and increase shareholder value, provided that the income earned from IP can be taxed in a low-tax jurisdiction without attracting immediate Canadian tax and repatriated to Canada at a minimal cost.

---

[1] In this paper, IP refers to non-tangible intellectual property, including patents, copyrights, trademarks, industrial designs, trade secrets and knowhow.

[2] Rachel Griffith, Helen Miller, and Martin O'Connell, "Corporate Taxes and the Location of Intellectual Property" (Katholieke Universiteit Leuven, March 2011) (available on the Web at ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/innovationpatenting2011/papers/Miller.pdf), at 1.

[3] John H. Mutti and Harry Grubert, "The Effect of Taxes on Royalties and the Migration of Intangible Assets Abroad" in *National Bureau of Economic Research* (Cambridge, MA, 2007), no. 13248, at 112.

[4] Americans for Tax Fairness, "Report finds that Burger King "Inversion" will allow company to dodge $400 million to $1.2 billion in U.S. taxes over four years", reproduced in *Tax Notes Today* on December 8, 2014 (Washington, DC: Tax Analysts)(electronic database), no 2014-28924, at 8.

[5] Ibid.

[6] David Cay Johnston, "Key company Assets Moving Offshore" (The New York Times, November 22, 2002) (article available on the Web at http://www.nytimes.com/2002/11/22/business/key-company-assets-moving-offshore.html).

On April 3, 2015, as part of its Action Plan on Base Erosion and Profit Shifting ("BEPS"), the OECD released a discussion draft called "BEPS Action Plan 3: Strengthening Controlled Foreign Company Rules" (the "OECD Draft").[7] The OECD Draft proposes that countries make changes in their controlled foreign company ("CFC") rules to discourage MNEs from shifting certain types of income to foreign subsidiaries in low-tax jurisdictions. In particular, the OECD Draft addresses issues around taxation of income derived from IP in the form of royalties and digital sales of goods and services.[8]

Under the *Income Tax Act* ("*Act*"),[9] Canada has an extensive set of CFC rules, called the foreign accrual property income ("FAPI") rules. Under the FAPI regime, a Canadian resident shareholder is generally required to include, in its income for a taxation year, its share of the passive income of its controlled foreign affiliate ("CFA"), as it is earned by the CFA.[10] The FAPI regime is interconnected with a second set of rules that addresses the taxation of dividends received from a foreign affiliate ("FA") by a Canadian-resident shareholder.

This paper examines the treatment of royalty income and income from the digital sale of goods derived by a CFA of a Canadian-resident corporation under the FAPI regime. First, the paper will provide a brief overview of the relevant aspects of the FA rules in the Canadian tax system. In Part II, the basic elements of the structure by which a foreign subsidiary of a Canadian-resident taxpayer can commercially exploit IP will be discussed. Then, in Part III, the paper looks at how Canada treats foreign IP income and income from sales of goods and services

[7] Organisation for Economic Co-operation and Development, *BEPS Action 3: Strengthening CFC Rules* (Paris: OECD, April 3, 2015).
[8] Ibid at paras 107-114.
[9] Unless otherwise stated, statutory references in this paper are to the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as *"Act"*).
[10] Subsection 91(1).

derived by a foreign subsidiary of a Canadian-resident corporation. Finally, Part IV briefly compares the relevant provisions under the current Canadian FAPI regime to the proposed recommendations under the OECD Draft.

I. OVERVIEW OF THE FOREIGN AFFILIATE SYSTEM

A non-resident corporation is, generally, not subject to Canadian tax in respect of foreign-source income. Under subsection 90(1) of the *Act*, the profits of a non-resident corporation are taxed in Canada only when they are distributed to a Canadian-resident shareholder as a dividend:

> **Dividend from non-resident corporation**
>
> **90. (1)** <u>In computing the income</u> for a taxation year of a taxpayer resident in Canada, <u>there is to be included any amount received</u> by the taxpayer at any time in the year <u>as</u>, on account or in lieu of payment of, or in satisfaction of, <u>a dividend</u> <u>on a share</u> owned by the taxpayer of the capital stock <u>of a non-resident corporation</u>. [Emphasis added].

The FA rules, however, have two exceptions on taxation of foreign income in Canada that are relevant for the purposes of this paper. First, under paragraph 113(1)(a) of the *Act*, the active income from a tax information exchange agreement ("TIEA") countries or a treaty (the “designated treaty countries”) is not taxed even when distributed by a CFA as a dividend to a Canadian parent:

> **Deduction in respect of dividend received from foreign affiliate**
>
> **113. (1)** Where in a taxation year a corporation resident in Canada has received <u>a dividend</u> on a share owned by it of the capital stock of a foreign affiliate of the corporation, there <u>may be deducted</u>

> from the income for the year of the corporation for the purpose of computing its taxable income for the year, an amount equal to the total of
>
> **(a)** an amount equal to such portion of the dividend as is prescribed to have been paid out of the exempt surplus, as defined by regulation (in this Part referred to as "exempt surplus") of the affiliate [...] [Emphasis added].

Second, under subsection 91(1) of the *Act*, the passive income from a CFA of the parent Canadian-resident corporation of an MNE is taxed by Canada as it accrues:

> **Amounts to be included in respect of share of foreign affiliate**
>
> **91. (1)** In computing the income for a taxation year of a taxpayer resident in Canada, there shall be included, in respect of each share owned by the taxpayer of the capital stock of a controlled foreign affiliate of the taxpayer, as income from the share, the percentage of the foreign accrual property income of any controlled foreign affiliate of the taxpayer, for each taxation year of the affiliate ending in the taxation year of the taxpayer, equal to that share's participating percentage in respect of the affiliate, determined at the end of each such taxation year of the affiliate.

Therefore, the critical issues for the Canadian corporation in planning its global IP strategy are:

A. Is the income derived from IP passive or "property" income?

B. Is IP income derived from a jurisdiction with which Canada has a TIEA or a tax treaty?

II. CANADIAN PARENT- CONTROLLED FOREIGN AFFILIATE MODEL

Canada's international tax policy allows Canadian businesses the flexibility to structure their affairs in a way that will reduce their global tax cost.[11] Thus, Canadian parent corporations often establish complicated structures in other jurisdictions, incurring the legal and administrative costs of setting up and maintaining corporations or branches, hiring and managing employees, and engaging and paying professional advisors.[12]

A. THE BASIC MODEL

As summarized in Part I of the paper, to obtain a maximum potential tax benefit from exploiting IP, a CFA has to derive its income from an active business in a country with which Canada has a tax treaty or TIEA. This type of income will not be subject to the FAPI regime. In addition, income will also have to be from an exempt surplus pool, dividends form which will be distributed to a taxpayer free of an additional corporate tax in Canada.

A Canadian-resident parent corporation ("Canco") will commonly set up two or more CFAs ("IPco#1" and "IPco#2") in the designated treaty countries (Figure 1). IP, developed through research and development ("R&D") activities in Canada, may then be transferred to IPco#1 by either an outright sale or an exclusive license.[13]

---

[11] Marc Darmo and Angelo Nikolakakis,"The New Rules on Limitation on Benefits and Fiscally Transparent Entities," in *Report of Proceedings of Sixty-First Tax Conference*, 2009 Conference Report (Toronto: Canadian Tax Foundation, 2010), 26:1-59, at 44.
[12] Ibid, at 43-44.
[13] Tony Ancimer, "Cross-Border Intellectual Property Strategies", in *Report of Proceedings of the Fifty-Seventh Tax* Conference, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2005) , 38:1-38, at 7.

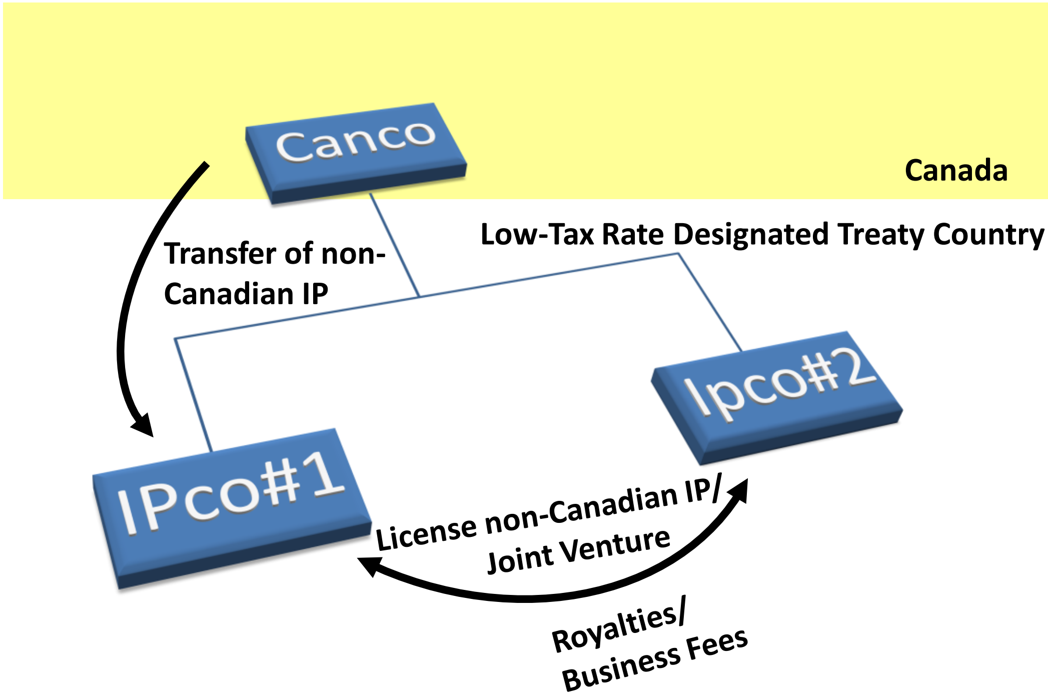

Figure 1: The basic structure between Canadian-resident parent corporation, Canco, and two of its FAs, IPco #1 and IPco# 2.

Each method of transferring IP abroad has its advantages and disadvantages that are beyond the scope of this paper. In general terms, under an outright sale, IPco#1 becomes the new owner of IP and it does not need to remit royalty payments back to Canco. However, the gain on the transfer of the ownership of IP to a CFA will be subject to taxation by Canada. Under an exclusive license,[14] a licensee receives an authorization to use IP to the exclusion of all others, sometimes including even an IP owner, Canco. Thus, Canco will usually only transfer IP that protects rights outside Canada ("non-Canadian IP") to ensure that it can derive benefits from

[14] For example, in the copyright context, see definition of "exclusive license" in section 2.7 of the *Copyright Act*, RSC 1985, c. C-42.

Canadian IP in its home country. Other reasons for excluding the transfer of the Canadian IP are discussed below.

B. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

In the example, Canco transfers the non-Canadian IP rights to IPco#1 by an outright sale. Then, IPco#1 will license the rights to non-Canadian IP to IPco#2. One must ensure that the IP rights can be adequately protected in the foreign jurisdiction.[15] Generally, the IP rights have to be officially registered in each jurisdiction where an IP holder chooses to have a monopoly for a limited period of time to exploit its IP.[16] The value of IP may be significantly reduced if it is not so protected.[17]

In addition, if the IP rights are not properly maintained, these rights might not receive legal protection against unauthorized exploitation by others. For example, in *Promafil Canada Ltée v Munsingwear Inc*, the Federal Court of Appeal ("FCA") looked at whether the gradual change in the shape of a registered penguin trademark from a corpulent to a slimmer penguin would result in the abandonment of registered rights to the trademark.[18] In coming to the conclusion that the rights in the trademark would still be protected, the FCA held that "[o]bviously, with every variation the owner of the trademark is playing with fire … [b]ut cautions variations can be made without adverse consequences".[19] Finally, to maximize the commercial value of IP, Canco alone or together with IPco#1, must continue to enhance the content of IP portfolio through on-going R&D activities.

---

[15] Derek A. Kurrant, "High Tech in the Oil Patch: Planning Considerations for Transferring Technology Offshore" (2000) 13:1 *Canadian Petroleum Journals*, available on Taxnet Pro (Toronto: Thomson Reuters) (online database).
[16] Stephen J. Perry and T. Andrew Currier, *Canadian Patent Law* (Markham: LexisNexis Canada, 2012), at 58.
[17] Supra note 15.
[18] *Promafil Canada Ltée v. Munsingwear Inc.*, [1992] FCJ No 611.
[19] Ibid at para 12.

III. INTELLECTUAL PROPERTY INCOME: PASSIVE OR ACTIVE?

Once IPco#1 is incorporated in a low-tax designated treaty country, the next requirement is to structure business activities of IPco#1 in way that will identify the business as "active" under the Canadian tax law.

Under subsection 95(1) of the *Act*,

> **95(1) "active business"** of a foreign affiliate of a taxpayer means *any business* carried on by the foreign affiliate *other than*
>
> (a) <u>an investment business</u> carried on by the foreign affiliate,
>
> (b) <u>a business that is deemed</u> by subsection (2) <u>to be a business other than an active business</u> carried on by the foreign affiliate, or
>
> (c) <u>a non-qualifying business</u> of the foreign affiliate; [Emphasis added].

Under paragraphs 95(2)(a.1), (a.3) and (b) of the *Act*, some of the business activities that may be relevant to the management of IP include: "income from sale of property",[20] "income from Canadian [..] lease obligations"[21] and income from "provision […] of services or of an undertaking to provide services"[22].

In this paper, the issue is whether the income derived from IP held by IPco#1 and IPco#2, as royalties, or form the sale of property or provision of services, is characterized as income from an investment business or a business other than an active business income under subsections 95(1) and (2) of the *Act*, such that it will fall under the FAPI regime.

[20] Paragraph 95(2)(a.1).
[21] Paragraph 95(2)(a.3).
[22] Paragraph 95(2)(b).

A. ROYALTY INCOME

One of the common ways by which a CFA may derive income from IP is in the form of royalties. Royalties are payments made to acquire a license for the use of the IP rights where the payments for such use are contingent upon the extent or duration of use or as a percentage of profits or sales by the user.[23] In the given example, the income of IPco#1 will consist of royalties from IPco#2 (Figure 1).

1. *Investment Business*

When the principal purpose of the business is to derive income from royalties, the business will likely constitute an investment business. Under subsection 95(1) of the *Act*,

> **95(1) "investment business"** of a foreign affiliate of a taxpayer <u>means a business</u> carried on by the foreign affiliate in a taxation year [...] to be a business <u>other than an active business</u> carried on by the foreign affiliate and other than a non-qualifying business of the foreign affiliate) the **principal** <u>purpose of which</u> is to <u>derive income from property</u> (including interest, dividends, rents, **royalties** or any similar returns or substitutes for such interest, dividends, rents, royalties or returns) [...] [Emphasis added].

The word "principally" has previously been interpreted in other contexts.[24] In respect of investment tax credits, the Tax Court in *Transport Jacques Lemieux v MNR* held that "the word "principally" would seem to cause little difficulty in that it means for the most part or, expressed as percentage, over 50 per cent." [25] Similarly, the Canada Revenue Agency ("CRA"), in

[23] *Hasbro Canada Inc. v. R.*, [1999] 1 CTC 2512, at para 22 (TCC).
[24] Dale S. Meister, "Exploiting Intellectual Property: Revising the Investment Business Concept" (2002) 50:5 *Canadian Tax Journal* 5:1703-1718, at 1710.
[25] *Transport Jacques Lemieux v MNR*, 91 DTC 503 (TCC) at para 7.

paragraph 3 of *Interpretation Bulletin* IT-443, "Leasing Property- Capital Cost Allowance Restrictions"[26], stated that:

> 3. The word "principally" in the definition of leasing property in Regulation 1100(17) means "primarily" or "chiefly". In establishing whether a depreciable property is used principally for a given purpose, the determining factor is the proportion of time that the property is used for that purpose. Property used more than 50% of the time for the purpose of gaining or producing gross revenue that is rent, royalty or leasing revenue is considered to be used principally for that purpose [Emphasis added].

Also, in the context of standby charges for employees of an automobile dealer, in *McKay et al v MNR*, the Tax Court referred to the *Shorter Oxford English Dictionary* to define "principally" as "in the chief plainly, above all; for the most part, in most cases".[27]

As set out at the top of Figure 2 below, under subsection 95(1) of the *Act*, royalty income will not be considered income from an investment business, and will likely be active business, when the business is conducted principally with arm's-length persons, consists of certain enumerated activities, including the licensing of property and employs more than five full-time employees:

> **95(1)** "**investment business**" [...] means a business carried on by the foreign affiliate in a taxation year [...] to be a business other than an active [...] the principal purpose of which is to derive income from property (including interest, dividends, rents, **royalties** [...], **unless** it is established by the taxpayer or the foreign affiliate that, throughout the period in the taxation year during which the business was carried on by the foreign affiliate,

[26] *Interpretation Bulletin* IT-443, "Leasing Property -Capital Cost Allowance Restrictions", March 14, 1980, at para 3. See also CRA document no.9802364, July 1998 on qualified small business corporations shares.
[27] *McKay et al v MNR*, 90 DTC 1064 (TCC) at par 26.

(*a*) <u>the business (other than any business conducted principally with persons with whom the affiliate</u> **does not deal at arm's length**) is [...]

(ii) [...] the leasing or **licensing of property** [...]

(*b*)(i) the affiliate [...]carries on the business (the affiliate being, in respect of those times, in that period of the year, that it so carries on the business, referred to in paragraph (*c*) as the "operator") [...]

[...] **and**

(*c*) the operator employs

(i) **more than five employees full time** in the active conduct of the business, [...] [Emphasis added].

In the given example, IPco#1 will derive active business income from royalties if it complies with all of the above requirements.

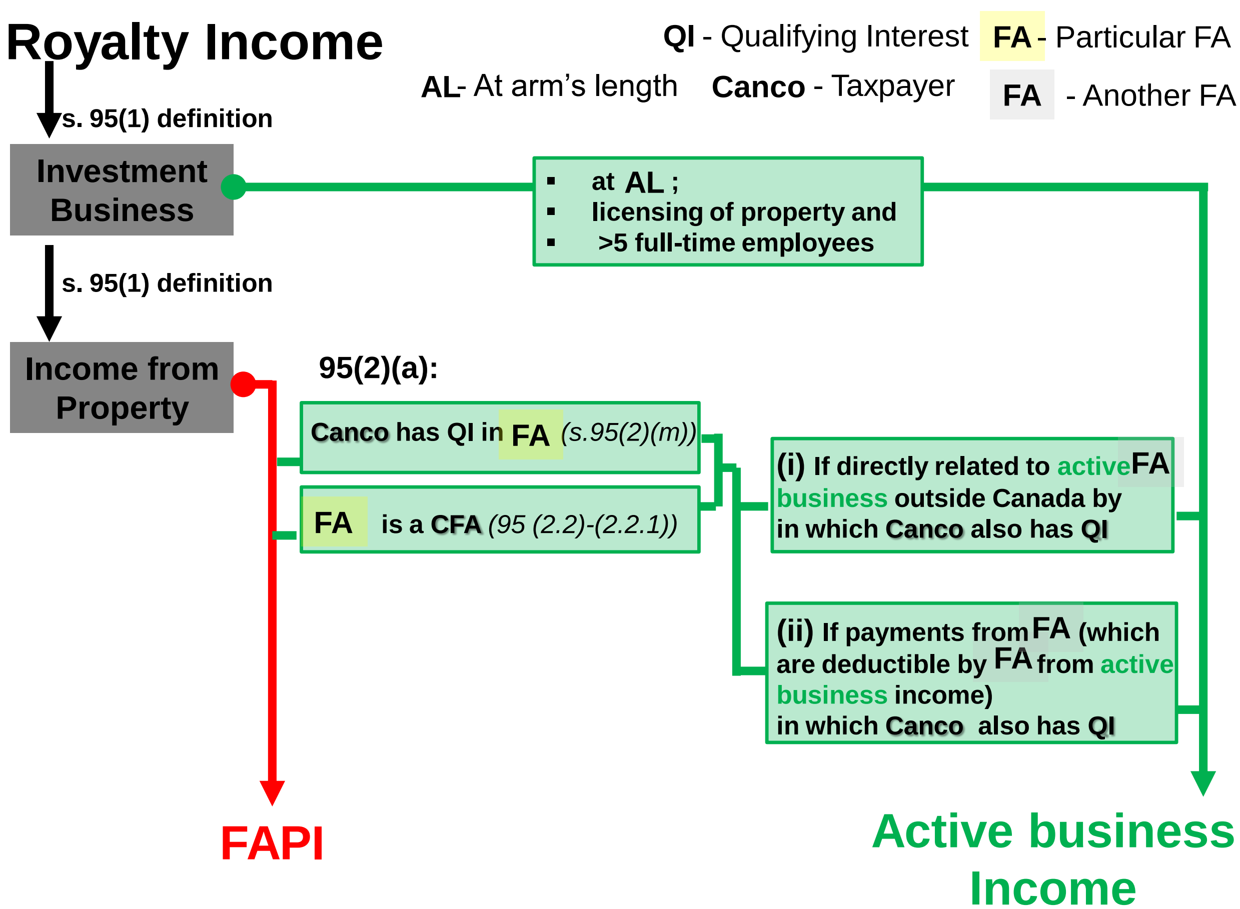

Figure 2: The chart setting out how royalty income is taxed under the FAPI regime.

Given the nature of IPco#1's licensing activities, its business will likely constitute licensing of property, where, under subsection 95(1) of the *Act*,

> **95(1)** "**licensing of property**" includes authorizing the use of or the production or reproduction of property <u>including information or any other thing;</u> [Emphasis added].

However, the exact meaning of the term "property including information or any other thing" remains unclear. In *Rapistan Canada Ltd v Minister of National Revenue*, the Supreme Court of Canada held that information is not property if it takes the form of knowhow. [28] It has been suggested to broaden the licensing property definition, by changing it to "property, information or any other thing" to ensure that licensing knowhow is also covered.[29]

Finally, IPco#1 must have more than five full-time employees in its licensing business.[30] With technological innovations, many businesses now conduct their activities electronically over the Internet without having any physical presence in the country of a subsidiary. If IPco#1 is a small subsidiary or is at the early stages of development, this part of the exception may be difficult to satisfy.

---

[28] *Rapistan Canada Ltd. v. Minister of National Revenue,* [1974] CTC 495 (FCA); aff'd. 76 DTC 6177.

[29] Alan Rautenberg, "Income Tax Aspects of Intellectual Property Transactions," in *Report of Proceedings of Fifty-fifth Tax conference*, 2003 Conference Report (Toronto: Canadian Tax Foundation, 2003), 35:1-27, at 27.

[30] Independent contractors are distinct from employees: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 SCR 983 at para 47. More interesting is the test of "more than five full-time employees" that has been applied by the courts in different ways. In Hughes & Co. Holdings Ltd. v. The Queen, 94 DTC 6511 (FCTD) (*Hughes*), the Federal Court Trial Division held that "more than five full-time employees" means at least six full-time employees. However, in *489599 BC Ltd v The Queen*, 2008 DTC 4107 (TCC), the Tax Court of Canada declined the decision in *Hughes* and concluded that "more than five full-time employees" requirement can be met with the employment of five full-time employees and one part-time employee.

As set out in the bottom part of Figure 2, if royalty income does not qualify under an investment business exception, it may still be income from active business if it meets the exceptions in the income from property.

2. *Income from Property*

Under subsection 95(1) of the *Act*, income from an investment business is included in income from property, and is considered FAPI:

> **95(1)** "**investment business**" of a foreign affiliate of a taxpayer means a business carried on by the foreign affiliate in a taxation year (other than a business deemed by subsection (2) to be a business other than an active business carried on by the foreign affiliate and other than a non-qualifying business of the foreign affiliate) the principal purpose of which is to derive **income from property** (including interest, dividends, rents, **royalties** or any similar returns [...] [Emphasis added].

However, income from an investment business may qualify as active business income if it complies with the re-characterization rules under subparagraphs in 95(2)(a) of the *Act*. First, as laid out in Figure 2, under 95(2)(a), either a Canadian-resident taxpayer or a related Canadian corporation must have a qualifying interest[31] in a FA or a FA must be a CFA of Canco:

> **95(2)** For the purposes of this subdivision,
>
> **(a)** in computing the income or loss from an active business for a taxation year of a particular foreign affiliate of a taxpayer in respect of which the taxpayer has a qualifying interest throughout the year or that is a controlled foreign affiliate of the taxpayer throughout the year, there shall be included any income or loss of the particular foreign affiliate for the year from sources in a

[31] Under subsection 95(2)(m), a "qualifying interest" is defined as the ownership of "(i) not less than 10% of the issued and outstanding shares (having full voting rights […] of the affiliate, and (ii) shares of the affiliate having a fair market value of not less than 10% of the fair market value of all the issues and outstanding shares of the affiliate". See also subsection 95(2)(n).

> country other than Canada that would otherwise be income or loss from property of the particular foreign affiliate for the year to the extent that […] [Emphasis added].

Since IPco#1 may commonly be used to license IP to all other members of the MNE, a foreign subsidiary and the licensee are usually related because they are controlled by the same person or a group.

Once the qualifying interest requirement is satisfied, the second step in Figure 2 is to determine whether IPco#1 qualifies under exceptions in either subparagraph 95(2)(a)(i) or 95(2)(a)(ii) of the *Act*. These rules will generally apply when there is more than one FA and the activities of these FAs, when viewed as a whole, constitute a single foreign active business.[32]

In particular, under subparagraph 95(2)(a)(i) of the *Act*, property income of a foreign affiliate is re-characterized as active business if the income is derived from activities directly related to the foreign business of another FA of the Canadian-resident in which the taxpayer also has a qualifying interest, to the extent that the amounts would be included in computing the non-Canadian active business earnings of the other affiliate:

> **95(2)(a)(i)** the income or loss
>
> (A) is derived by the particular foreign affiliate from activities of the particular foreign affiliate, or of a particular partnership of which the particular foreign affiliate is a member, to the extent that the activities occur while the particular affiliate is a qualifying member of the particular partnership that can reasonably be considered to be directly related to active business activities carried on in a country other than Canada by

[32] Supra note 15.

> (I) another foreign affiliate of the taxpayer in respect of which the taxpayer has a qualifying interest throughout the year, […] [Emphasis added].

Alternatively, under subparagraph 95(2)(a)(ii) of the *Act*, income from property will be deemed to be active business if the income is derived from the amount received from another FA, such as IPco#2, of a taxpayer, Canco, in which the taxpayer also has a qualifying interest, to the extent that the amounts are deductible by the other affiliate in computing its non-Canadian active business earnings:

> **95(2)(a)(ii)** the income or loss is derived from amounts that were paid or payable, directly or indirectly, to the particular foreign affiliate or a partnership of which the particular foreign affiliate was a member
>
> (A) [..]
>
> (B) by
>
> (I) another foreign affiliate of the taxpayer in respect of which the taxpayer has a qualifying interest throughout the year, to the extent that those amounts that were paid or payable are for expenditures that were deductible by that other foreign affiliate in computing the amounts prescribed to be its earnings or loss for a taxation year from an active business (other than an active business carried on in Canada), […] [Emphasis added].

Thus, under subparagraph 95(2)(a)(ii) of the *Act*, so long as the royalty payments are deducted by IPco#2 in relation to its active business income, IPco's#1 royalty income will likely be re-characterized as income from active business.

In summary, if royalty income received by IPco#1 is from an active business either based on an investment business or income from property exceptions, this income will not be subject to the FAPI rules. Also, royalty income from an active business would be included in IPco's#1 exempt surplus and can be distributed to Canco free of Canadian tax.

It was previously argued that, with subparagraph 95(2)(a)(ii) of the *Act*, Canada has one of the most generous residence-country exemption systems in the world for repatriated foreign earnings.[33] In fact, it was suggested that the re-characterization rules mimic a patent box regime, a regime that aims to reward successful innovations by providing a preferential tax treatment to IP.[34]

OECD considers patent boxes in BEPS Action 5, called "Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance".[35] In particular, BEPS Action 5 emphasizes the important balance between the appropriate substantial activity requirements, with respect to preferential tax regimes, such as patent boxes, and the determination whether such regimes constitute harmful tax practices. In basic terms, one of the approaches, the "nexus approach", proposes to determine whether IP income is eligible to receive tax benefits by establishing a link between the qualifying expenditure incurred by a subsidiary in relation to IP assets and the income received from those IP assets.[36] This approach has several restrictions that exclude some types of IP assets and qualifying expenditures. [37] Thus, the taxpayer may be ineligible to qualify for the tax benefits under the preferential regime. Provided

[33] Nick Pantaleo, Finn Poschmann, and Scott Wilkie, *Improving the Tax Treatment of Intellectual Property Income in Canada*, C.D. Howe Institute Commentary no. 379 (Toronto: C.D. Howe Institute, April 2013) (available on the Web at: *www.cdhowe.org/pdf/Commentary_379.pdf)*.
[34] Jim Shanahan, "Is it time for your country to consider the 'patent box'?," *PwC's Global R & D Tax Symposium on Designing a Blueprint for Reducing the After-Tax Cost of Global R & D*, May 23, 2011 (available on the Web at: http://download.pwc.com/ie/pubs/2011_is_it_time_for_your_country_to_consider_the_patent_box.pdf).
[35] OECD, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance (OECD Publishing, OECD/G20 Base Erosion and Profit Shifting Project, September 16, 2014).
[36] Ibid at 29.
[37] For example, trademarks are excluded from this definition. Ibid at 31.

that Canadian re-characterization rules do not have restrictions on types of IP and related expenditures, all of FA's IP income that meets these rules, will qualify as an active business. Thus, Canada appears to be quite competitive with the formal patent box regimes of other countries.[38]

3. *Lease Obligation*

As alluded earlier in Part III, under paragraph 95(2)(a.3) of the *Act*, income from a lease obligation is deemed to be income from a business other than an active business. Under subsection 95(1) of the *Act*,

> **95(1)** "**lease obligation**" of a person includes an obligation under an agreement that authorizes the use of or the production of property, <u>including information or any other thing</u>.

Therefore, a licensing agreement will likely be considered a lease obligation, subject to interpretation of the term "including information or any other thing".[39]

As mentioned in Part III(A)(i) of the paper, under the definition of investment business, a FA that licenses IP in foreign jurisdictions will likely not have its royalty income classified as FAPI if the licensees are at arm's-length and a FA has more than five full-time employees. However, as illustrated in Figure 3, if a FA licenses its IP to a Canadian resident, whether arm's length or non-arm's length, paragraph 95(2)(a.3) of the *Act* deems the income earned from the licensing business to be FAPI. Under this provision, a FA must include in its FAPI, income

---

[38] Supra note 34.

[39] See an interpretation of the term "including information or any other thing" in relation to "licensing property" term discussed in Part III(A)(i) of this paper.

derived directly or indirectly from lease obligations of Canadian-resident persons or in respect of a business carried on in Canada. The de minimis exception applies if more than 90 percent of the gross revenue of a FA is derived directly or indirectly from licensing of an intangible property (or IP) to arm's-length non-residents (Figure 3).

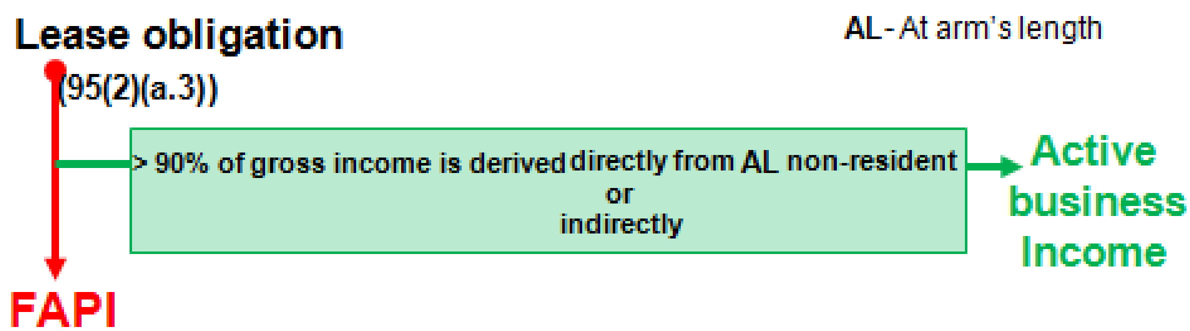

Figure 3: Taxation of income from "lease obligation" under subparagraph 95(2)(a.3) of the *Act*.

In summary, to determine whether royalty income constitutes FAPI, one has first to determine if royalty income is from an investment business, and then if it is income from property. As a result of this Russian dolls effect, where royalty income has to go through at least two activity categories, Brian Arnold recommends that the definition of investment business be dropped and the FAPI definition be expanded to include specific sources of passive income, such as royalty income from IP.[40] While there appears to be some overlap between these two provisions, it is unclear whether creating an IP income category, under the FAPI definition, would assist in the application of these provisions.

---

[40] Brian J. Arnold, *Reforming Canada's International Tax System: Towards Coherence and Simplicity*, 1st Ed. (Canadian Tax Foundation, 2009). See also Nick Pantaleo, "Enhancing the Competitiveness of Canada's International Tax System (Part 10)" (PwC's Tax Exchange Blog, September 21, 2012) (available on the Web at http://pwc.typepad.com/tax_exchange/2012/09/enhancing-the-competitiveness-of-canadas-international-tax-system-part-10-.html).

Finally, to avoid uncertainty as to whether royalty income from the license agreements will be treated as active business income, IPco#1 may also consider structuring its activities with IPco#2 or other third parties as joint ventures rather than as a licensing agreement (Figure 1). Then, income received from joint venture would constitute income from a business rather than royalty income. It may also be helpful if IPco#1 bears some economic risks in respect of the development and exploitation of the technology.[41]

B. INCOME FROM SALE OF PROPERTY AND RELATED SERVICES

In addition to royalty income, FAs can also exploit IP through other activities, such as sales of goods and provision of services. Given that these other types of activities are based on the underlying IP asset, it may be difficult to identify the income derived from each activity.

1. *Sale of Property and Services Related to the Sale of Property*

Generally, income from services and sales is considered active business income. However, as mentioned in Part III of the paper, under paragraph 95(2)(a.1) of the *Act*, income from the sale of property and services related to the sale of property will be deemed to be income other than from active business:

> **95(2) (a.1)** in computing <u>the income from a business other than an active business</u> for a taxation year of a foreign affiliate of a taxpayer <u>there shall be included the income</u> of the affiliate for the year <u>from the sale of property</u> (<u>which</u>, for the purposes of this paragraph, <u>includes the income</u> of the affiliate for the year <u>from the performance of services as an agent in relation to a purchase or sale of property</u>) […] [Emphasis added].

[41] Supra note 15.

In particular, these activities will be deemed to be FAPI if it is reasonable to conclude that the cost of the property is relevant in computing income from a business carried on in Canada by the Canadian corporation or a related person. For example, IPco#1, in its IP portfolio, may own the rights to the copyright software and license it to Canco. Then, IPco#1 may also provide technical assistance to Canco in relation to the copyright software.

Figure 4 sets out two relevant exceptions to the rule under paragraph 95(2)(a.1) of the *Act*. First, if more than 90 percent of the affiliate's gross revenue from the sale of property is from sales to arm's-length persons or to a non-resident person for resale to arm's length persons, the FA's income from the sales is considered active business income:

> **95(2)(a.1)** in computing the income from a business other than an active business for a taxation year of a foreign affiliate of a taxpayer there shall be included the income of the affiliate for the year from the sale of property (which, for the purposes of this paragraph, includes the income of the affiliate for the year from the performance of services as an agent in relation to a purchase or sale of property)
>
> […]
>
> <u>unless more than 90% of the gross revenue</u> of the affiliate for the year <u>from the sale of property</u> is derived <u>from the sale</u> of such property […] <u>to persons with whom the affiliate deals at arm's length</u> (which, for this purpose, includes a sale of property to a non-resident corporation with which the affiliate does not deal at arm's length for sale to persons with whom the affiliate deals at arm's length) […] [Emphasis added].

Under the second exception in subparagraph 95(2)(a.1)(i) of the *Act*, the property has to be manufactured, produced, grown, extracted, or processed in the country in which the affiliate's business is principally carried on and under whose laws the affiliate was formed or organized (Figure 4):

> **95(2)(a.1)** in computing the income from a business other than an active business for a taxation year of a foreign affiliate of a taxpayer there shall be included the income of the affiliate for the year from the sale of property (which, for the purposes of this paragraph, includes the income of the affiliate for the year from the performance of services as an agent in relation to a purchase or sale of property) where
>
> (i) it is reasonable to conclude that the cost to any person of the property (other than property that is designated property) is relevant in computing the income from a business carried on by the taxpayer or by a person resident in Canada with whom the taxpayer does not deal at arm's length **or** is relevant in computing the income from a business carried on in Canada by a non-resident person with whom the taxpayer does not deal at arm's length, and
>
> (ii) the property was not
>
> (A) manufactured, produced, grown, extracted or processed in the country
>
> (I) under whose laws the affiliate is governed and any of exists, was (unless the affiliate was continued in any jurisdiction) formed or organized, or was last continued, and
>
> (II) in which the affiliate's business is principally carried on,[…] [Emphasis added].

Thus, the taxpayer needs to have a FA in each country in which property is manufactured, produced, grown, extracted or processed.[42] However, even if IP was invented in the FA's home country, this exception may not apply, because IP may not be developed under any of those definitions. Thus, the scope of this exception appears to specifically address sale of

[42] Nelson Ong, Pierre Bourgeois and Michael Maikawa, "Sale of Property and Paragraph 95(2)(a.1)" *The Canadian Tax Journal* (2012) 3:679-699, at 691.

tangible property, and it is unclear whether creation and development of computer software may falls under the term "produced" or any other terms of the definition.

Join Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants have recommended that the scope of paragraph 95(2)(a.1) of the *Act* be restricted to tangible property because paragraph 95(2)(a.3) of the *Act* already addresses intangible property. Alternatively, this committee argues that the scope of the exception for "designated property" should be expanded to expressly include certain intangible properties. [43]

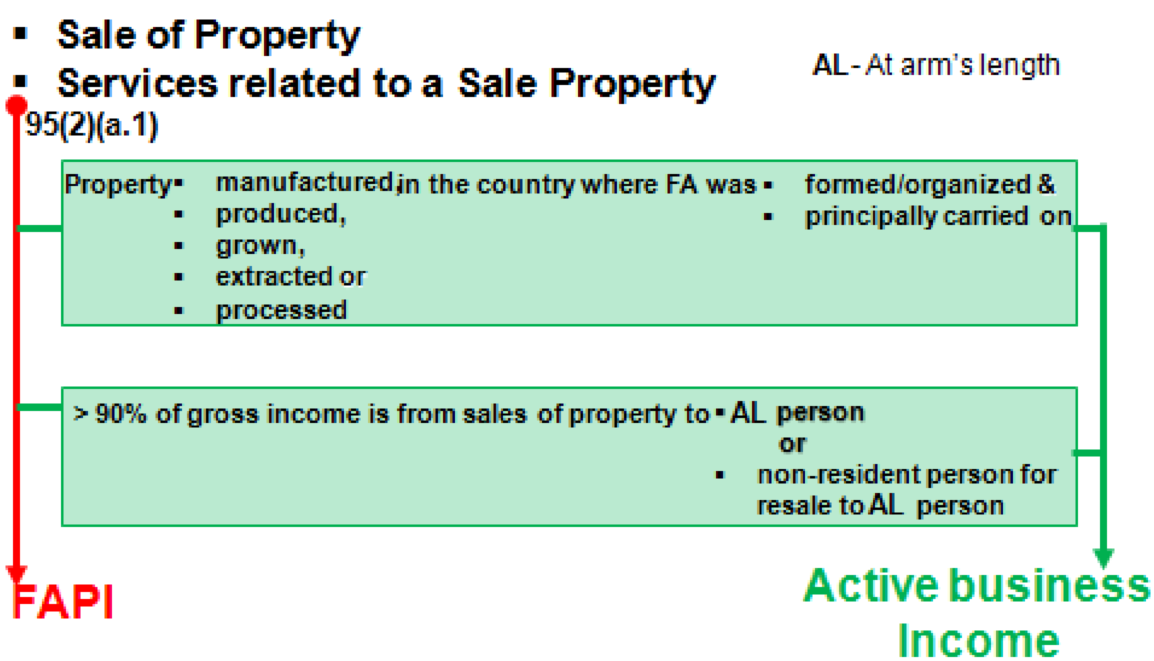

Figure 4: Taxation of income from sale of property and provision of services related to sale of property under subparagraph 95(2)(a.1) of the *Act*.

Ong, Bourgeios and Maikawa, in their paper, note 42, argue that when a FA carries out activities beyond mere purchasing, it is unclear why the income of a FA should fall within the

[43] Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants, "Report of the Joint Committee on the December 20, 2002 Foreign Affiliate Proposals," September 18, 2003 (the report available on the Web at https://www.cba.org/cba/submissions/pdf/03-37-eng.pdf), at 76.

scope of paragraph 95(2)(a.1) of the *Act*, regardless of where the products are manufactured, produced etc.[44] These requirements may be problematic because it may be impractical or undesirable to incorporate in a particular country.[45] For instance, in the oil and gas sector, it is not uncommon for a FA that is governed and exists under the laws of one country to hold resource property interests in another country and carry on business in that other country through a branch.[46]

Applying the two exceptions under paragraph 95(2)(a.1) of the *Act*, the goods should be manufactured in the home country where IPco#1 or IPco#2 were incorporated and in which it carries on its sales of property and provision of services related to the sale of property. FAs should also ensure that more than 90 percent of its gross income for the year from the sale of the goods and provision of services in relation to sale of goods is derived from these activities to persons that deal at arm's length with the FA.

2. *General Provision of Services*

In addition to services related to sale of property, paragraph 95(2)(b) of the *Act* sets out a different rule that deems income from provision of services, in general, to be FAPI. Specifically, this occurs when a FA provides services and the amount of consideration paid or payable for the services is deductible in computing the income from a business carried on in Canada, either by a person in relation to which a FA is a CFA or by a person related to that person:

> **95(2)(b)** the <u>provision</u>, by a foreign affiliate of a taxpayer, <u>of services</u> <u>or of an undertaking to provide services</u>

[44] Supra note 42, at 691-692.
[45] Ibid.
[46] Ibid.

> (i) is deemed to be a separate business, other than an active business, carried on by the affiliate, and any income from that business or that pertains to or is incident to that business is deemed to be income from a business other than an active business, to the extent that the amounts paid or payable in consideration for those services or for the undertaking to provide services
>
> (A) are deductible, or can reasonably be considered to relate to amounts that are deductible, in computing the income from a business carried on in Canada, by
>
> (I) any taxpayer of whom the affiliate is a foreign affiliate, or
>
> (II) another taxpayer who does not deal at arm's length with
>
> 1. the affiliate, or
>
> 2. any taxpayer of whom the affiliate is a foreign affiliate, or […] [Emphasis added].

The requirements under this provision may be difficult to meet for an MNE because subsidiaries may share service centres for cost-effectiveness and other administrative purposes. Also, it is common for some corporations to set up foreign subsidiaries in countries, such as India, with access to cheap labour to provide information technology or engineering services. Thus, in the circumstances where the bona fide services are provided for remuneration based on arm's-length principles, the automatic application of this section might not appropriate.[47]

Overall, as suggested in Part III(A) of the paper, each of the FAs, IPco#1 and IPco#2, should generally restrict its IP transactions to non-Canadians. Any management of Canadian IP should be carried on by Canco or other Canadian-resident persons.

[47] Pierre Bourgeois, "Planning for International Business Transactions, 1991-2011" (2011), vol. 59, *Canadian Tax Journal*, 2:331-352, at 350-351.

IV. BEPS ACTION PLAN 3 ON CONTROLLED FOREIGN COMPANY RULES: WHERE DOES CANADA STAND?

In July 2013, the *Action Plan on BEPS* asked OECD to develop 15 actions designed to provide the coherence of corporate income taxation at the international level.[48] In concern that some countries either do not have CFC rules or these rules do not counter BEPS in a comprehensive manner, Action 3 of BEPS Action Plan provides recommendations on the design of CFC rules to address the issue of base erosion and profit shifting. Under paragrap 84, OECD Draft advices that CFC rules must be capable of dealing with at least the following types of income:

- Dividends
- Interest and other financing income
- Insurance Income
- Sales and services income
- Royalties and other IP income.

As mentioned in Parts III of the paper, Canada is consistent with CFC rules, in explicitly including the above types of income, except for IP income, under paragraphs 95(2)(a.1) (Income from Sale of Property), 95(2)(b) (Income from Provision of Services) and investment business under subsection 95(1) of the *Act*:

> 95(1)"**investment business**" of a foreign affiliate of a taxpayer means a business carried on by the foreign affiliate in a taxation year (other than a business deemed by subsection (2) to be a business other than an active business carried on by the foreign affiliate and other than a non-qualifying business of the foreign affiliate) the principal purpose of which is to derive income from property (including interest, dividends, rents, royalties or any similar returns or substitutes for such interest, dividends, rents,

[48] Supra note 7 at 1.

> royalties or returns), income from the insurance or reinsurance of risks, income from the factoring of trade accounts receivable, or profits from the disposition of investment property [..] [Emphasis added].

To ensure that IP income is properly captured under CFA rules and aligns with Action 3, Canada may consider Brian Arnold's proposal to explicitly include IP income under the FAPI definition.[49] However, as discussed in Parts I-III of the paper, IP income will still be likely captured under the other passive income categories.

Based on the concept that CFC rules are designed to apply on to "stripping of the base of the parent jurisdiction", the OECD Draft further proposes that the income should not be attributed under CFC rules "if it arises from value-creating activity in any jurisdiction other than the parent jurisdiction".[50] To determine whether the income arose from substantial activities undertaken by the CFC itself, the OECD Draft proposes three tests: (1) substantial contribution analysis, (2) employee and establishment analysis and (3) viable independent entity analysis.[51] The paper will now look at each test individually.

A. SUBSTANTIAL CONTRIBUTION ANALYSIS

In substantial contribution analysis, the focus is on whether the employees of a CFC have made a substantial contribution to income earned by a CFC. If this requirement is met, all income earned by that CFC would then be active income. As discussed in Part III(B)(1) of the paper, Canada has taken a similar approach for income derived from sale of property and services related to the sale of property, where under subparagraph 95(2)(a.1)(i) of the *Act*, the property has to be manufactured, produced, grown, extracted, or processed in the country in

[49] Supra note 40.
[50] Supra note 7 at para 85.
[51] Ibid at para 89.

which the affiliate's business is principally carried on, and under whose laws the affiliate was formed or organized. As explained below, this approach captures IP income under the CFA rules that would otherwise be treated as active income.

1. *Home Country Goods*

Income derived from IP often constitutes royalty income. However, when IP is shifted into a FA to which a FA added little or no value, IP income may be converted through contacts language from royalty income to sales and services income, and thus not investment business.[52] In particular, this happens when a traditional license agreement is modified so that rather than licensing IP to licensees, the transactions are framed as purchases of products and services. This way a licensor-licensee relationship is converted into one between a distributor and a dealer, where the "basic transaction is precisely the sale of product for a set price based on the level of monthly purchases".[53] These sales and services agreements would less likely be caught by the Canadian FAPI regime.

To avoid the outcome, where IP income is not consistently taxed, one of the recommendations in the OECD Draft is to treat income from sales and services as active only if it was not earned from a related party, and if a foreign subsidiary had the economic and business substance required to actually produce the goods or provide the services. The purpose of this rule is primarily to discourage a parent corporation from setting up a foreign subsidiary for the

[52] Supra note *7* at para 105.
[53] *Entre Computers Centers Inc. v. R.*, 97 DTC 846, at para 31 (TCC).

purpose of purchasing goods for resale to other members of the MNE or use in a business carried by the parent corporation in its home country.[54]

As set out in Part III(B) of the paper, Canada has similar rules in relation to sale of property and services. However, Canada also adds a distinction between general provision of services under paragraph 95(2)(b) of the *Act* and those in relation to the sale of property under paragraph 95(2)(a.1) of the *Act*. Nevertheless, the application of either provision may give rise to the same result.[55] Thus, Canada's current rules are in line with the OECD actions.

B. EMPLOYEES ESTABLISHMENT ANALYSIS

The employees and establishment analysis looks at whether the activities required to earn foreign subsidiary's IP income are located in the that jurisdiction. Specifically, it looks at the necessary number of employees with the requisite skills and the establishment of necessary business premises in the CFC jurisdiction.[56] Unlike viable independent entity and substantial contribution tests, the employees and establishment analysis has a more mechanical application. For example, as long as a CFC shows that it has skilled employees and research facilities to conduct R&D and other value creating activities to develop IP, a foreign subsidiary's IP income would constitute active business.

As discussed in Part III(A)(1) of the paper, Canada takes a similar approach in defining investment business under subsection 95(1) of the *Act*, where a FA must have more than five full-time employees. Canadian CFA rules, however, do not go as far as requiring the foreign

[54] Supra note 15.
[55] Thorsteinssons LLP, *Canadian Income Tax Act with Regulations, Annotated*, 98th ed. (Toronto: Wolters Kluwer, 2014 Autumn) at 673.
[56] Supra note 7 at 89.

subsidiary to have a set number of employees with the requisite skills. While having the skilled employees will more likely mean that a foreign subsidiary engages in the management and development of IP, this test, as mentioned above, does not require the subsidiary to actually manage and develop IP.

Under subsection 95(1) of the *Act*, the investment business does not also appear to have a requirement of establishment of necessary business premises. Instead, however, Canada takes a slightly different and more fact-intensive approach and requires a FA business to be licensing of property, an activity where a subsidiary would be engaged in the production or reproduction of property including information or any other thing. Furthermore, the investment business definition require that a FA conducts business with arm's-length persons. Overall, while the definition of investment business might differ from the employment and establishment analysis, Canada still appear to have a comprehensive set of CFA rules.

C. VIABLE INDEPENDENT ENTITY ANALYSIS

The viable independent entity analysis is more complex and fact- specific compared to the employees and establishment analysis. The viability independent entity analysis looks at whether a CFC is the entity which would be most likely, under normal commercial conditions, to own particular assets, or undertake particular risks, if the entities were unrelated. The OECD Draft proposes that, for IP income, this could involve consideration of all subsidiary's activities "to manage and control the development, enhancement, maintenance, protection, and exploitation of intangibles".[57] The CFC rules may also look at subsidiary's "location of

[57] Ibid.

capabilities and functions which enable [...it] to manage risks associated with that IP".[58] Thus, this test goes beyond the central management and control test and requires the entity to have the capabilities and to perform the key functions.

1. *R&D Activities Rule*

One of the key functions that is required for the management of an IP portfolio is R&D activities. Canada currently does not appear to demand R&D activity requirement under the FAPI regime. It has been suggested that R&D activities may not need to be performed directly by a FA for IP income to be characterized as active business income.[59] For example, if re-characterization rules, discussed in Part III of the paper, apply, a foreign subsidiary will derive active income from IP to which the subsidiary added little or no value.[60] However, Canada may reconsider an application of this factor in the future, based on the recommendations in BEPS Action 3, particularly if IP income will be explicitly captured under Canadian CFA rules.

D. RELATED PARTIES

In addition to these three tests, the OECD Draft also looks at whether the income is earned from a related party because then it is more likely to be shifted.[61] As discussed in Part III of the paper, Canada has extensively implemented this requirement throughout its CFA rules from the FA and CFA definitions to all the definitions of different types of income discussed in

---

[58] Ibid.

[59] Nathalie Brouard and Marc D. Milgrom, "Exploiting Intellectual Property Rights: A Myriad of Opportunities and Tax Issues," in *R & D Credits Today, Innovation Tomorrow*, 1999 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1999) 14:1-52, at 17.

[60] Supra note 7 at para 105.

[61] Ibid at para 93.

Part III (including income from investment business, income from property, income from lease obligations and income from sale of property and services related to sale of property).

E. INTELLECTUAL PROPERTY INCOME: ONE GIANT CATEGORY

Finally, as explained earlier in Part IV of the paper, income that is directly earned from the underlying IP asset is often difficult to separate from the income that is earned from its associated services and products.[62] The OECD Draft proposes to make no distinction between income from royalties, and income from IP related sales and services. Instead, income from this large category would be considered passive unless a relevant FA engages in the substantial activities (including development of IP) required to earn the income.[63]

The proposal to treat all income derived from IP as passive may help simplify some of the overlaps under the FAPI regime, such as those between royalties and lease obligations and sales of property and general services sections. On the other hand, as mentioned in Part IV(A)(2) of the paper, Canada's re-characterization rules, under subparagraph 95(2)(a) of the *Act*, place Canada in a competitive position in relation to other countries that have implemented patent boxes. Elimination of these sections may discourage innovations in Canada.

CONCLUSION

This paper looked at how Canada's current FAPI regime and the proposed new CFC Rules under BEPS Action Plan 3 apply to the income derived from IP. In particular, the paper

---

[62] Supra note 7 at para 107.
[63] Ibid at paras 106 and 112.

reviewed three main activities: licensing of the IP rights, sale of digital goods and provision of services. Depending on the set up between the Canadian-resident parent corporation and its FAs, income from any activity can be characterized as either active or passive income. Generally, FAs should avoid engaging in the business transactions with the Canadian-resident parent corporation or other related Canadian residents. The FAPI regime offers re-characterization rules under paragraph 95(2)(a) of the *Act* that put Canada at a competitive advantage with other countries that have implemented patent box regimes. The re-characterization rules also encourage multiple FAs of a Canadian-resident taxpayer to exploit IP through joint business ventures. Finally, the current Canadian FAPI regime is comparable to the CFC rules under BEPS Action Plan 3. The FAPI regime would benefit from further clarifications as to how certain rules apply to IP income.

BIBLIOGRAPHY

LEGISLATION

Copyright Act, RSC 1985, c. C-42.

Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended.

JURISPRUDENCE

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 SCR 983.

Buckerfield's Ltd v. Minister of National Revenue, [1964] CTC 504 (Ex. Ct.).

Entre Computers Centers Inc. v. R., 97 DTC 846 (TCC).

Hasbro Canada Inc. v. R., [1999] 1 CTC 2512 (TCC).

McKay et al v MNR, 90 DTC 1064 (TCC).

Promafil Canada Ltée v. Munsingwear Inc., [1992] FCJ No 611.

Rapistan Canada Ltd. V. Minister of National Revenue, [1974] CTC 495 (FCA); aff'd. 76 DTC 6177.

Transport Jacques Lemieux v MNR, 91 DTC 503 (TCC).

TECHNICAL INTERPRETATIONS

Interpretation Bulletin IT-443, "Leasing Property -Capital Cost Allowance Restrictions", March 14, 1980.

BOOKS

Arnold, Brian J., *Reforming Canada's International Tax System: Towards Coherence and Simplicity*, 1st Ed. (Canadian Tax Foundation, 2009).

Perry, Stephen J. and T. Andrew Currier, *Canadian Patent Law* (Markham: LexisNexis Canada, 2012).

Thorsteinssons LLP, *Canadian Income Tax Act with Regulations, Annotated*, 98th ed. (Toronto: Wolters Kluwer, 2014 Autumn) at 673.

JOURNAL ARTICLES

Arnold, Brian J. and James R. Wilson, "Aggressive International Tax Planning by Multinational Corporations: The Canadian Context and Possibly Responses" (2014), vol. 7, issue 29 *The School of Public Policy* 1-77.

Bourgeois, Pierre, "Planning for International Business Transactions, 1991-2011" (2011), vol. 59, *Canadian Tax Journal*, 2: 331-352.

Kurrant, Derek A., "High Tech in the Oil Patch: Planning Considerations for Transferring Technology Offshore" (2000) 13:1 *Canadian Petroleum Journals,* available on Taxnet Pro (Toronto: Thomson Reuters) (online database).

Meister, Dale S., "Exploiting Intellectual Property: Revising the investment business Concept" (2002) 50:5 *Canadian Tax Journal* 1703-1718.

Ong, Nelson, Pierre Bourgeois and Michael Maikawa, "Sale of Property and Paragraph 95(2)(a.1)" *The Canadian Tax Journal* (2012) 60:3. 679-699.

CONFERENCES AND SYMPOSIUM PROCEEDINGS

Ancimer, Tony, “Cross-Border Intellectual Property Strategies”, in *Report of Proceedings of the Fifty-Seventh Tax* Conference, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2005).

Brouard, Nathalie and Marc D. Milgrom, “Exploiting Intellectual Property Rights: A Myriad of Opportunities and Tax Issues,” in *R & D Credits Today*, *Innovation Tomorrow*, 1999 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1999) 14:1-52.

Darmo, Marc and Angelo Nikolakakis,”The New Rules on Limitation on Benefits and Fiscally Transparent Entities," in *Report of Proceedings of Sixty-First Tax Conference*, 2009 Conference Report (Toronto: Canadian Tax Foundation, 2010), 26:1-59.

Mutti, John H. and Harry Grubert, “The Effect of Taxes on Royalties and the Migration of Intangible Assets Abroad” in *National Bureau of Economic Research* (Cambridge, MA, 2007), no. 13248.

Rautenberg, Alan, “Income Tax Aspects of Intellectual Property Transactions,” in *Report of Proceedings of Fifty-fifth Tax conference*, 2003 Conference Report (Toronto: Canadian Tax Foundation, 2004), 35:1-27.

THESIS AND OTHER UNPUBLISHED WORKS

Griffith, Rachel, Helen Miller and Martin O’Connell, “Corporate taxes and the location of intellectual property” (Katholieke Universiteit Leuven, March 2011) (available on the Web at ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/innovationpatenting2011/papers/Miller.pdf).

INTERMANTIONAL INSTITUTONS PUBLICATIONS

Organisation for Economic Co-operation and Development, *BEPS Action 3: Strengthening CFC Rules* (Paris: OECD, April 3, 2015).

Organisation for Economic Co-operation and Development, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance (OECD Publishing, OECD/G20 Base Erosion and Profit Shifting Project, September 16, 2014).

ELECTRONIC SOURCES AND WEBSITES

Americans for Tax Fairness, “Report finds that Burger King “Inversion” will allow company to dodge $400 million to $1.2 billion in U.S. taxes over four years”, reproduced in *Tax Notes Today* on December 8, 2014 (Washington, DC: Tax Analysts)(electronic database), no 2014-28924.

Johnston, David Cay, “Key company Assets Moving Offshore” (The New York Times, November 22, 2002)(article available on the Web at http://www.nytimes.com/2002/11/22/business/key-company-assets-moving-offshore.html).

Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants, "Report of the Joint Committee on the December 20, 2002 Foreign Affiliate Proposals," September 18, 2003 (the report available on the Web at https://www.cba.org/cba/submissions/pdf/03-37-eng.pdf).

Pantaleo, Nick, “Enhancing the Competitiveness of Canada’s International Tax System (Part 10)” (PwC’s Tax Exchange Blog, September 21, 2012) (available on the Web at http://pwc.typepad.com/tax_exchange/2012/09/enhancing-the-competitiveness-of-canadas-international-tax-system-part-10-.html).

Pantaleo, Nick, Finn Poschmann, and Scott Wilkie, *Improving the Tax Treatment of Intellectual Property Income in Canada*, C.D. Howe Institute Commentary no. 379 (Toronto: C.D. Howe Institute, April 2013) (available on the Web at: www.cdhowe.org/pdf/Commentary_379.pdf).

Shanahan, Jim, “Is it time for your country to consider the "patent box"?”, *PwC’s Global R & D Tax Symposium on Designing a Blueprint for Reducing the After-Tax Cost of Global R&D*, May 23, 2011 (available in pdf at http://www.pwc.com).