

TAX TREATMENT OF FISHING LICENCES RETIRED PURSUANT GOV'T BUY BACK PROGRAMS

By Brad Caldwell, LLB

A recent decision of the Tax Court of Canada (*Winsor v. Canada* 2007 TCC 692) has created some uncertainty over the tax treatment of the funds received from the proceeds of the sale of fishing licences to government licence retirement programs.

This case involved the Atlantic Groundfish Retirement Program, (the "AGLRP") under which the Federal Government purchased fishing licences for the purpose of reducing the number of persons participating in the Atlantic groundfish fishery. In the year 2000, a Newfoundland fish harvester sold his lobster, ground fish and other miscellaneous fishing licences to the AGLRP and also agreed to permanently leave the commercial fishery in exchange for a total payment of \$120,000. Of the \$120,000 received, \$60,000 was allocated to the fishing licences. Although the groundfish licence was permanently extinguished, it was not clear on the evidence whether or not the other licences were extinguished. However, it was clear that the "Federal Government was not acquiring any of the licences so that it could carry on any fishing business" [para. 11].

Following the sale of the licences, the fish harvester treated the transaction as a sale of eligible capital property and filed an income tax return including one half of the amount allocated to the licences into income as provide for in s. 14(1) of the Income Tax Act. Upon this treatment being challenged upon assessment by the Canada Revenue Agency ("CRA"), the fish harvester appealed to the Tax Court of Canada for a determination of whether the funds received from the disposition of these licences should be treated as (a) a disposition of eligible capital property pursuant to s. 14(1) of the *Income Tax Act* or (b) a disposition of capital property pursuant to s. 38.

With respect to the issue of whether the sale was a disposition of eligible capital property, the court embarked upon a complicated review of the mirror image provisions of s. 14 of the *Income Tax Act* and concluded that "since the Federal Government was acquiring these licences for a non-commercial purpose no part of the amount received by the Appellant for his fishing licences would be . . . "cumulative eligible capital" . . . [para. 12].

With respect to the issue of whether the sale was a disposition of capital property, the court concluded that in order to treat the proceeds of sale of a fishing licence as a capital gain, it would first be necessary to determine whether a fishing licence was "property" for the purposes of the *Income Tax Act*. After a review of some of the more recent non-tax cases on the subject (including *Royal Bank of Canada v. Saulnier* 2006 NSCA 91, which has an appeal pending before the Supreme Court of Canada), the court concluded that a fishing licence was "property" for the purposes of the *Income Tax Act*. Since the licences could not be treated as eligible capital property pursuant to s. 14, and since the licences could be treated as property, the court ruled that the sale should be treated as a disposition of capital property.

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Although the reclassification of the proceeds of sale as a taxable capital gain instead of business income did not change the amount of tax payable by the fish harvester, the court noted that it did have some other possible positive and negative consequences. One positive consequence was that if the taxpayer had any allowable taxable capital losses available to him, he would be able to apply them to his capital gain from the sale of the licences. A negative consequence would be the reduction of the amount of earned income earned by the taxpayer for the purpose of determining his allowable RRSP contribution limit.

Several other possible negative consequences not mentioned by the court include: (a) the inability to offset a capital gain by purchasing replacement property in the year of sale as is the case with eligible capital property; and (b) capital gains are not eligible for the purpose of determining Canada Pension Plan contributions.

At this time, it is not clear how this case will be applied on the West Coast. It is arguable that this case is distinguishable because the Allocation Transfer Program on the West Coast purports to be for the purpose of providing communal aboriginal access to the “commercial fisheries” (See www.pac.dfo-mpo.gc.ca/tapd/atp_e.htm). There does not appear to be any intention to permanently retire licences as was the case for the groundfish licence in *Winsor v. Canada*. Whether this argument will prevail remains to be seen?

If one were considering selling a licence to the buy-back, it would be prudent to discuss this issue with one’s tax accountant. If the treatment of the sale as a capital gain is problematic, it might be possible to include a term in the sale agreement to the Allocation Transfer Program that the licence is being purchased for a specific aboriginal entity to use for the carrying on of a commercial fishing business. Given the uncertainty, it would also be prudent to obtain an advance ruling from the Canada Revenue Agency on the question.

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