

Potential Refunds of Withholding Tax on Related Party Interest Payments

The Fifth Protocol (the “**Protocol**”) to the *Canada-US Income Tax Convention* (the “**Treaty**”) came into force on December 15, 2008. Among the changes introduced by the Protocol are several positive amendments to the Treaty that will result in the eventual elimination of non-resident withholding taxes on certain cross-border payments made between Treaty residents.

Payments of Interest Between Related Treaty Residents

Of particular relevance to US-resident taxpayers that have lent funds to residents of Canada with which they are “related”, the Protocol provides for the gradual reduction of Canadian non-resident withholding tax on non-participating interest payments made in respect of such debts. The relevant withholding tax reduction is being phased in over a three-year period, as set out below:

Interest Paid In	Maximum Withholding Tax Rate
2008	7%
2009	4%
2010 and later	0%

Refunds of Overpayments

As the Protocol came into effect late in 2008, some Canadian-resident debtors may have withheld and remitted excess tax in respect of non-participating interest payments made to related US-residents between January 1, 2008 and the date the Protocol came into effect.

Where excess Canadian tax has been withheld and remitted, certain US-resident taxpayers may wish to seek a refund of such withholding tax from the Canada Revenue Agency. For instance, where Canadian tax has been withheld at the historical Treaty rate of 10% on non-participating interest payments made on or subsequent to January 1, 2008, the US-resident recipient of such interest payments may be entitled to claim a refund equal to at least 3% of such payments.

A claim for a refund of excess withholding tax should be submitted by the recipient of the relevant interest payments no later than two years after the end of the calendar year in which the excess tax was initially paid. For payments made in 2008, the deadline for filing the required refund request will be December 31, 2010.

For further information regarding a taxpayer’s eligibility to claim a refund of excess non-resident withholding tax, or for assistance in preparing an eligible refund claim, please contact your McMillan lawyer or one of the members of the McMillan Tax Law Group listed below.

A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

About McMillan LLP's Tax Law Group

Our Tax Law Group ranks among the best in Canada and includes individuals who have been recognized internationally as leading advisers in The Martindale-Hubbell Legal Directory and The Canadian Legal LEXPERT Directory. Always sensitive to our clients' business objectives, we provide comprehensive and pragmatic Canadian tax advice on a wide variety of matters, including corporate reorganizations, mergers and acquisitions, securities, structured financing and derivative products, leasing, and cross-border transactions. Routinely advising clients on compliance matters, we are experienced in negotiating disputes with revenue authorities and litigating tax issues.

For further information, please contact one of the following members of our Tax Law Group:

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