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SUBJECT XXXXXXXXXXXX Termination Payment

SECTION 212(1)(d)

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Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: Will paragraph 212(1)(d) of the Act apply to the payment by Canco to Forco as the result of their Mutual Termination Agreement?

POSITION: Yes

REASONS: The payment will be made in lieu of payment of rent for the right to use in Canada, a property.

March 10, 2015

XXXXXXXXXX TSO

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HEADQUARTERS

Income Tax Rulings

Directorate

Attention: XXXXXXXXXXXX

L. Carruthers

A/Large File Case Manager

(613) 670-9000

2015-057429

Payment in consideration for the termination of XXXXXXXXXXXX

We are writing in response to your email dated XXXXXXXXXXXX which was forwarded to us by the Large Business Audit Division of the International and Large Business Directorate (ILBD) of the Compliance Programs Branch (CPB). In your email, you asked whether Part XIII tax will apply to a payment to be made (the Early Termination Payment as described below) by XXXXXXXXXXXX ("Canco") to XXXXXXXXXXXX ("Forco") as the result of their Mutual Termination Agreement which terminated the XXXXXXXXXXXX of XXXXXXXXXXXX properties situated in Canada (the "Canadian XXXXXXXXXXXX Property"). We also acknowledge the further information you sent by email the last of which was received on XXXXXXXXXXXX.

Facts

Our conclusion is based on our understanding of the facts as outlined below:

1. Canco is a resident of Canada for purposes of the Income Tax Act (the "Act");
2. Neither Forco nor its sole owner is a resident of Canada for purposes of the Act;
3. Commencing in XXXXXXXXXXXX, Canco XXXXXXXXXXXX for the Canadian XXXXXXXXXXXX Property (the "XXXXXXXXXX");
4. Canco XXXXXXXXXXXX the Canadian XXXXXXXXXXXX Property to XXXXXXXXXXXX ("LP") (the "XXXXXXXXXX");

5. LP XXXXXXXXXXXX real property XXXXXXXXXXXX as contemplated under the XXXXXXXXXXXX;

6. Canco XXXXXXXXXXXX from LP the Canadian XXXXXXXXXXXX Property together with the real property XXXXXXXXXXXX referred to above (the "XXXXXXXXXX");

7. Pursuant to Sections XXXXXXXXXXXX of the XXXXXXXXXXXX Master Agreement between Canco and LP regarding the XXXXXXXXXXXX, Canco shall pay a "Termination Payment" (as defined in Section XXXXXXXXXXXX of the Mutual Agreement) if it decides to terminate the XXXXXXXXXXXX for XXXXXXXXXXXX under circumstances constituting an "Early Termination" (as defined in Sections XXXXXXXXXXXX of the Mutual Agreement);

8. The Termination Payment for XXXXXXXXXXXX, as computed pursuant to Section XXXXXXXXXXXX of the Master Agreement, would be calculated as:

XXXXXXXXXX

9. On XXXXXXXXXXXX, LP assigned, transferred and set over unto Forco all of its right, title, and interests in, and Forco assumed all of LP's obligations under, the XXXXXXXXXXXX and Master Agreement;

10. As a result of the XXXXXXXXXXXX:

a. Canco is liable for making direct payments to Forco for obligations under the XXXXXXXXXXXX,

b. Forco is liable for making direct payments to Canco for obligations under the XXXXXXXXXXXX,
and

c. Canco is liable for making XXXXXXXXXXXX payments to the XXXXXXXXXXXX for obligations under the XXXXXXXXXXXX;

11. Pursuant to paragraph 212(1)(d) and subsection 215(1) of the Act, Canco withheld and remitted to the Canada Revenue Agency Part XIII withholding tax from the payments, as described in subparagraph 10(a) above, it made to Forco;

12. XXXXXXXXXXXX;

13. On XXXXXXXXXXXX, Canco, Forco and LP entered into the Mutual Termination Agreement which triggered:

a. an Early Termination (as that term is defined for the purposes of Section XXXXXXXXXXXX of the Master Agreement) for each of the XXXXXXXXXXXX, and

b. a Termination Payment with respect to each of the XXXXXXXXXXXX (in the aggregate, the "Early Termination Payment"); and

14. The amount of the Early Termination Payment, calculated in accordance with the terms of the Master Agreement, is anticipated to be \$XXXXXXXXXXXX.

Conclusion

Based on our understanding of the relevant circumstances as described above, in our view, the Early Termination Payment will be made by Canco to Forco as consideration for the termination of the XXXXXXXXXXXX under which rent would have been payable for the use of the Canadian XXXXXXXXXXXX Property. As such, it is our further view that the Early Termination Payment will be an amount paid by a resident of Canada (Canco) to a non-resident of Canada (Forco) in lieu of payment of rent for the use of, or for the right to use in Canada, a property (Canadian XXXXXXXXXXXX Property) such that Part XIII withholding tax will apply pursuant to paragraph 212(1)(d) of the Act.

Our conclusion is, in our view, supported by the Federal Court of Appeal's decision in *Transocean Offshore Limited v The Queen* (2005 FCA 104). In that case, the Court dismissed the taxpayer's appeal from an assessment made under Part XIII of the Act where the tax had been assessed on a payment made as consideration for the anticipatory breach of an agreement under which rent would have been payable for the use in Canada of an offshore drilling rig.

For your information, a copy of this Memorandum is being sent to Leslie Bafia of the Legislative Application Section of the Large Business Audit Division of ILBD/CPB. Moreover, unless exempted, a copy of this memorandum will be severed using the Access to Information Act criteria and placed in the Canada Revenue Agency's electronic library. A severed copy will also be distributed to the commercial tax publishers, following a 90-day waiting period (unless advised otherwise to extend this waiting period), for inclusion in their databases. The severing process will remove all material that is not subject to disclosure, including information that could disclose the identity of the taxpayer. Should the taxpayer request a copy of this memorandum, they may request a severed copy using the Privacy Act criteria, which does not remove taxpayer identity. Requests for this latter version should be e-mailed to LPRA-PLAR ITR-DDI Access Team-Équipe d'Accès. In such cases, a copy will be sent to you for delivery to the taxpayer.

Lori M. Carruthers CPA, CA

Section Manager

for Division Director

International Division

Income Tax Rulings Directorate

Legislative Policy and Regulatory Affairs Branch

cc. Leslie Bafia

Legislative Application Section

Large Business Audit Division

ILBD/CPB