Docket: 2019-1378(IT)G

BETWEEN:

BLACKBERRY LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on October 23, 24, 25, 30 and November 1, 2, 8 and 9, 2023 at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Kristen Duerhammer Salvatore Mirandola Justin Kutyan
Counsel for the Respondent:	Christina Ham Katherine Savoie Yanick Houle

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JUDGMENT

WHEREAS THE COURT has published its reasons for judgment on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal regarding the 2010 taxation year is allowed on the following basis:

a. Section 95(2) of the *Income Tax Act* does not capture the services provided to the Appellant by its foreign affiliates because:

i. The services performed by the Appellant's foreign affiliates at a fee for the Appellant are not foreign accrual property income; or, in the alternative,

ii. The services provided by the Appellant's foreign affiliates fall within the exception enumerated in subsection 95(3) because they are factually found to be in connection with the sale of goods and manufacturing;

2. Costs are provisionally awarded to the Appellant in accordance with a Type A appeal under the *Tax Court of Canada Rules* (*General Procedure*), subject to the Appellant's right to make written submissions for enhanced costs within 30 days of this judgment and the Respondent's right to respond within 30 days thereafter to any such written submissions by the Appellant; neither written submissions shall exceed 10 pages (excluding authorities); provided that should no submissions be made, this provisional cost order shall become final.

Signed at Ottawa, Canada this 25th day of September, 2024.

"R.S. Bocock"

Bocock J.

Citation: 2024 TCC 123
Date: 20240925
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BETWEEN:

BLACKBERRY LIMITED,

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and

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Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. INTRODUCTION

[1] This appeal concerns the foreign accrual property income ("FAPI") rules, and related FAPI regime under the *Income Tax Act* ("*ITA*"). The Minister assessed the Appellant, BlackBerry Limited ("BlackBerry Canada" or "Appellant"), approximately $17.1 million of FAPI in taxation year 2010. The assessed FAPI relates to research and development ("R&D") services specifically provided by US affiliates to BlackBerry Canada, a Canadian world-wide head of family corporation operating a world-wide business.

[2] Further, the Minister effectively reduced to nil the US corporate tax paid by Blackberry Canada's US affiliate corporations ("US Affiliates") when determining the foreign accrual tax ("FAT") deduction.

[3] Succinctly, the statutory dispute centres around the following two FAPI issues:

1. Does the US $17.1 million earned by the US affiliates from R&D services rendered to BlackBerry Canada in connection with IT development constitute FAPI under 95(2)(b) and therefore income of BlackBerry Canada?

2. And, if so, may BlackBerry Canada deduct the foreign tax asserted to have been paid by its US Affiliates, the FAT, against FAPI under 91(4) or is such FAT deemed nil by 91(1)?

II. **THE FACTS**

[4] Various past or present key executives of BlackBerry Canada testified before the Court concerning BlackBerry Canada's world-wide business structure. While a slavishly sequenced summary of testimony by each witness is not a usual practice of this Court, in the present appeal it reflects how this massive enterprise was operated, organized and managed.

(a) BlackBerry's structure and acquisitions

[5] Mr. Chris Wormald was Vice-President of Strategic Alliances for BlackBerry Canada during the 2010 taxation year. Mr. Wormald testified that he managed BlackBerry Canada's strategic and important relationships during this period. Mr. Wormald was tasked with leading BlackBerry Canada's acquisitions and investments related to other technology companies.

[6] During this period, BlackBerry Canada was in a "technology race" of sorts and, because of this, was constantly developing and creating new technology. When BlackBerry Canada did not have the technology in-house or did not have the time required to develop the necessary technology, Mr. Wormald explained that his team would seek out availabilities in the market and acquire and absorb companies with the required technology.

[7] Mr. Wormald and his team would develop the "strategic rationale" for the acquisition of these companies and plan their eventual integration into BlackBerry Canada. Mr. Wormald testified that BlackBerry Canada acquired these companies for two main reasons: the technology and the employees who developed the technology. According to Mr. Wormald, the merger agreements had incentives for the companies if they retained certain "key" employees after their acquisition by BlackBerry Canada.

[8] Mr. Wormald described that, in some cases, the employees would move to BlackBerry Canada's headquarters in Waterloo, Ontario. However, in other cases, the acquired companies would remain where they were and become subsidiaries of BlackBerry Canada. The new employees vastly preferred the latter plan.

[9] In relation to the four US subsidiaries, which are the subject US Foreign Affiliates, (BlackBerry US, Arizan Corporation ("Arizan"), Ascendant Telecommunications ("Ascendant") and Dash Navigation Inc. ("Dash")), Mr. Wormald testified that their technology and their employees were integrated into BlackBerry Canada but that the companies remained in their original US locations.

In 2020, the relevant BlackBerry Canada and BlackBerry corporate structure worldwide, including the US, was as depicted in the chart attached as Appendix "A" to these reasons.

(b) The Virtual reality of "phones"

[10] Mr. David Yach was Chief Technology Officer for BlackBerry Canada during the 2010 taxation year. During that period, Mr. Yach testified that he oversaw BlackBerry Canada's software team, comprised of some 5000 employees.

[11] Mr. Yach explained that during the relevant period BlackBerry Canada would manufacture prototypes at their facility in Waterloo, Ontario and that the prototypes would then be shipped to BlackBerry's product development centres. According to Mr. Yach, the product development centres were responsible for ensuring that all product components, including software and hardware, were functioning together.

[12] Manufacturing and mass production of the actual BlackBerry devices were performed by third party manufacturing facilities. The facility in Waterloo, Ontario developed the prototypes but the product development centres, the prototype facility, and the manufacturing facilities all interacted in the manufacturing of devices.

[13] In relation to the acquisition of technology companies, Mr. Yach explained that his department's role included evaluating their technology and determining the acquired companies "fit" within BlackBerry Canada's overall structure. A description of the multitudinous "on the go" projects in 2010 is described below as lifted from the Scientific Research and Experimental Development ("SR&ED") disclosure schedule of BlackBerry Canada:

> This program focuses on BlackBerrys that are in the latter stages of development. The intent is to develop BlackBerrys with capabilities that exceed existing devices in terms of:
>
> Networks on which they can operate: UMTS, HSDPA, HSUPA, iDEN, CDMA 1X/EVDO and EDGE/GSM/GPRS. The inclusion of other communication capabilities including WiFi and Bluetooth, Comprehensive multimedia capabilities, High-resolution, high-contrast displays, Processing performance and data storage capacity, Navigation and data input methods, Low power consumption for extended battery life, More robust construction using new materials and assembly methods. Advances, realized through the development of the following project families; Apex (Pearl Flip), Gemini (Curve 8520), Javelin (Curve 8900), Meteor (Bold 9000), Niagara (Tour 9630), Odin (Storm 9500/9530), Onyx (Bold 9700), Orion (Curve 8350i), and Thunder (Storm 9500/9530) include:

> First CDMA BlackBerry with a flip-form factor, and with dual displays (Apex), Mechanisms compensating for air volume leakage to maintain audio quality (Gemini), First product released on RIM's newest EDGE HW/SW platform (Javelin), First BlackBerry using 3G radio protocol stack developed solely by RIM (Meteor), First BlackBerry with an integrated lens and display (Meteor), First product with next generation high speed Xscale applications processor, Next generation full QWERTY BlackBerry with seamless roaming between CDMA/EVDO and GSM/EDGE/UMTS networks, R99 Quality of Service roaming standards compliant, with dual-transfer mode (DTM) enabling simultaneous call, email receipt, and SMS messaging in GSM networks (Niagara), First BlackBerry with Receive Diversity, improving RF performance, data throughput, and enabling networks to support more subscribers (Niagara), DARP (Downlink Advanced Receiver Performance) support, increasing network capacity (Niagara), Full multi-media functionality, supporting MP3, AAC, AAC+, eAAC+, WMA, H.263, with HAC compliance in CDMA and GSM modes (Niagara), Firs iDEN device to include WiFi, and only iDEN device with internal antenna (Orion), First touch-screen BlackBerry including full keypad and tactile feedback (Thunder), First BlackBerry with 3 air interfaces: CDMA, GSM, WCDMA, supporting HSUPA and EVDO-REV-A, with seamless multi-mode roaming (CDMA to HSDPA) (Thunder), First dual-core processor BlackBerry (Thunder).

[14] Regarding the US Affiliates, Mr. Yach testified that Arizan's technology was integrated into BlackBerry Canada products a year after acquisition. Arizan employees were then integrated into BlackBerry Canada and the respective employees began to expand effort on other BlackBerry Canada products.

[15] According to Mr. Yach, Ascendant's technology was ultimately not commercially viable and was therefore never integrated into BlackBerry Canada's products. Despite this, it had been aspirationally acquired for such purpose.

[16] After the acquisition of Dash, Mr. Yach testified that Dash employees and technology were integrated into BlackBerry Canada's traffic mapping team and that this integration eventually lead to the BlackBerry Traffic App integrated into handheld devices.

(c) R&D at its heart and soul

[17] Mr. Eric Vaz was the Manager of the Government Relations Group at BlackBerry Canada during the 2010 taxation year. Mr. Vaz stated that he was responsible for compiling labour allocations and technical narratives for the SR&ED tax credit claims.

[18] According to Mr. Vaz, the labour allocations and technical narratives compiled by his team were also used for a similar US version of the SR&ED tax

credit. R&D work was mostly done by BlackBerry Canada at their facility in Waterloo, Ontario but subsidiaries all over the world were involved in this work. According to Mr. Vaz, there were three product development centres in the US that did a large portion of this work.

[19] Mr. Vaz explained BlackBerry Canada's "product development process" and the different "phases" within the product development process. These phases included: the research and concept evaluation phase, the definition and planning phase, the design and implementation phase and the commercialization phase.

[20] The majority of R&D occurred at both the design and implementation phase. In Mr. Vaz's experience, R&D continuously occurred at the commercialization phase where the US product development centres would liaise with the major phone carriers to complete the required testing of the handheld devices. The following list illustrates the integration of research and development in manufacturing undertaken and owned by BlackBerry Canada concerning the undertaking of the world-wide enterprise:

Key Intangible Utilized	**Entity Responsible**
BB HH Intangibles	Entrepreneur/Owner (BlackBerry Canada)
Relay Intangibles	Entrepreneur/Owner (BlackBerry Canada)
BES/CAL Intangibles	Entrepreneur/Owner (BlackBerry Canada)
Key Functions Performed	
R&D	As Entrepreneur/Owner (BlackBerry Canada)
Manufacturing and Repair	As Entrepreneur directly and using third parties (BlackBerry Canada)

Selling/General/Admin Services	BlackBerry Canada performs SG&A functions for the group
Distribution	As Entrepreneur BlackBerry Canada
Key Risks Assumed	Entity Responsible
R&D Activities Risks	Borne by BlackBerry Canada
Manufacturing Activities Risks	Borne by BlackBerry Canada
General Distribution Risks	Risks include foreign exchange risk, credit risk and inventory risks. Borne by BlackBerry Canada for its customers, the BlackBerry Canada Distributors
Warranty Risk	Ultimate risk borne by BlackBerry Canada as manufacturer
Services Activities Risks	None as all costs are recovered by BlackBerry Canada (with a markup)
Infringement Risks BlackBerry Canada	BlackBerry Canada Responsible as the owner of the IP
All other IP risks	BlackBerry Canada Entrepreneur. Risks can be significant given competition, technological change, etc.

[21] In relation to manufacturing, Mr. Vaz testified in cross-examination that the Waterloo, Ontario facility, in conjunction with other world-wide product development centres, developed the "formula" for the handheld devices, which was then provided to the third-party contract manufacturers for mass production.

(d) How to "account" for the profit

[22] Mr. Tim Rollins was a senior member of BlackBerry Canada's Tax Group during the 2010 taxation year. Mr. Rollins stated that he oversaw BlackBerry Canada's global tax group during that period.

[23] Mr. Rollins testified that BlackBerry US acted as a limited risk distributor for BlackBerry Canada. According to Mr. Rollins, almost all of BlackBerry Group's intellectual property ("IP")was owned by BlackBerry Canada.

[24] In the case of the US subsidiaries, Mr. Rollins explained that after technology companies were acquired, BlackBerry Canada would license or purchase the existing IP and then acquire as its own any new IP developed after the acquisition date.

[25] In the case of Arizan, it was granted BlackBerry Canada a non-exclusive right to their IP. An exclusive right was unavailable as there were existing licenses to the intellectual property. In the case of Dash, BlackBerry Canada paid Dash a one-time licensing fee for the use of its IP, ideally to be integrated into the handheld devices.

[26] Mr. Rollins testified that BlackBerry US, Arizan, Ascendant and Dash provided research and development services to BlackBerry Canada with respect to IP owned by BlackBerry Canada. The cost for these services was referable to transfer pricing and arms length-pricing principles. The price paid by BlackBerry Canada to the US subsidiaries was cost plus a specified percentage of eight percent (8%). The description below reveals the comparative revenue from US sales in 2010, with all amounts expressed in US dollars [with some additional descriptors added for clarification]:

> With BlackBerry [Canada's] business model, [BlackBerry] Canada earned revenue of approximately $8 billion from the US in the Taxation Year, comprised of revenues that [BlackBerry] Canada earned from BlackBerry US [including its subsidiaries] for the distribution of BlackBerry Handheld Devices by BlackBerry US.

III. **THE LAW**

(a) The Statute

[27] The relevant excerpted provisions of the *Income Tax Act*, RSC 1985, c.1, as amended (the "*Act*") provide as follows:

1) PART I – INCOME TAX

2) DIVISION B – COMPUTATION OF INCOME

Section 91(1)

Amounts to be included in respect of share of foreign affiliate

91 (1) In computing the income […] of a taxpayer resident in Canada, there shall be included, in respect of each share owned by the taxpayer of a controlled foreign affiliate as income […] the foreign accrual property income of any controlled foreign affiliate […].

Amounts deductible in respect of foreign taxes

91 (4) [where] […] an amount […]has been included in computing the income of a taxpayer for a taxation year […] (in this subsection referred to as the "income amount"), there may be deducted in computing the taxpayer's income for the year the lesser of

(a) the product obtained when

(i) the portion of the foreign accrual tax applicable to the income amount […]

is multiplied by

(ii) the taxpayer's relevant tax factor for the year, and

(b) the amount, if any, by which the income amount exceeds […] the income amount.

Definitions for this Subdivision

95 (1) In this Subdivision,

active business of a foreign affiliate of a taxpayer means any business carried on by the foreign affiliate other than
[…]

(b) a business that is deemed by subsection (2) to be a business other than an active business carried on by the foreign affiliate, or
[…]

foreign accrual property income of a foreign affiliate of a taxpayer, for any taxation year of the affiliate, means the amount determined by the formula

[…]

foreign accrual tax […] means, subject to subsection 91(4.1),

(a) the portion of any income or profits tax that may reasonably be regarded as applicable to that amount and that is paid by

(i) the particular affiliate,

[…]

(b) any amount prescribed in respect of the particular affiliate or the shareholder affiliate, as the case may be, to be foreign accrual tax applicable to that amount; (*impôt étranger accumulé*)

income from an active business of a foreign affiliate of a taxpayer for a taxation year includes the foreign affiliate's income for the taxation year that pertains to or is incident to that active business but does not include
[…]

(b) the foreign affiliate's income for the taxation year from a business that is deemed by subsection (2) to be a business other than an active business of the foreign affiliate, or
[…]

Determination of certain components of foreign accrual property income

95 (2) For the purposes of this Subdivision,
[…]

(b) the provision, by a foreign affiliate of a taxpayer, of services […]

(i) is deemed to be a separate business, other than an active business, carried on by the affiliate, and any income from that business […] is deemed to be income from a business other than an active business, to the extent that the amounts paid […] for those services or for the undertaking to provide services

(A) are deductible[…] by

(I) any taxpayer of whom the affiliate is a foreign affiliate, or
[…]

Definition of services

95 (3) For the purposes of paragraph 95(2)(b), services includes […] but does not include
[…]

(b) services performed in connection with the purchase or sale of goods;
[…]

(d) the manufacturing or processing outside Canada, in accordance with the taxpayer's specifications and under a contract between the

> taxpayer and the affiliate, of tangible property, or for civil law corporeal property, that is owned by the taxpayer if the property resulting from the manufacturing or processing is used or held by the taxpayer in the ordinary course of the taxpayer's business carried on in Canada.

(b) The high-level issues

[28] The three issues to be determined are:

first, regarding FAPI:

i. is the $17.1 million US in services FAPI within the meaning of paragraph 95(2)(b)(i)?

ii. if so, are the services excluded under paragraph 95(3)(b) or (d)?

second, regarding FAT deductions:

iii. even if (i) or (ii) apply and FAPI is payable, does a FAT deduction exist for some or all of the $17.1 million US assessed as FAPI?

(c) The parties' respective views in brief

(i) The Respondent

1) The payments for services are FAPI

[29] The Respondent asserts that emphasis must be placed on a textual interpretation when the tax provisions are part of a particular scheme of the *Income Tax Act* that "is drafted with mind-numbing detail" rather than on a textual, contextual, and purposive interpretation. Specifically, the R&D services income falls under the precise and unequivocal words of sub-clause 95(2)(b)(i)(A)(I) because it is caught by the letter of the law as the BBUS services fall within the definition of services in subsection 95(3).

[30] The statutory context and the legislative history of the FAPI regime support the plain language interpretation of paragraph 95(2)(b)(i) and subsection 95(3) having regard to:

a) Canada's international tax system;

b) Foreign affiliate taxation regime under the *Income Tax Act*;

c) The FAPI definition; and,

d) The legislative evolution of paragraph 95(2)(b) and subsection 95(3).

2) The payments for services are not excluded under paragraphs 95(3)(b) or (d)

[31] The services were not performed in connection with the sale of BlackBerry handheld devices. The connection put forward by BlackBerry Canada does not fit into the type of nexus to which paragraph 95(3)(b) refers. The legislation requires a direct connection between the services performed and the sale of the goods; to wit: the French version of the expression provides "à l'occasion de" favours the Minister's more restrictive interpretation.

[32] The R&D services were not part of the manufacturing or processing of BlackBerry handheld devices made outside Canada.

[33] A purposive analysis supports the plain language interpretation of the deeming provisions at ss. 95(2)(b) and 95(3).

3) No FAT deduction because no applicable US tax was paid by BBUS as a whole

[34] No US income tax "that may reasonably be regarded as applicable to" the R&D services income was paid by BlackBerry Canada's US Foreign Affiliates. This is so because the credit for increasing research activities (the "CIRA") must be allocated to the entities that generated it (and only to them) for FAT calculation purposes despite the consolidated income tax approach and treatment afforded in the US.

(ii) The Appellant

1) The text of 95(2)(b) is not clear

[35] In contrast, the Appellant asserts a plain language reading of paragraph 95(2)(b) of the Act, when applied to the facts of this Appeal, reveals an ambiguity (namely whether the deductibility of the amounts paid or payable in respect of the provision of services applies on a service-by-service basis or aggregated net basis). This ambiguity is resolved (and BlackBerry Canada's interpretation prevails) when

the text is tested against other indicators of legislative meaning, such as context and purpose.[1]

2) The underlying purpose of the FAPI regime

[36] The FAPI regime balances two competing objectives: to prevent erosion of the Canadian tax base and to protect the competitiveness of Canadian businesses operating abroad. On the one hand, it is an anti-avoidance regime designed to prevent the economic distortions that are created when taxpayers make decisions based on tax rather than commercial rationality. On the other hand, it cannot cast too wide a net, such that the competitiveness of Canadian multinationals would be unnecessarily hindered.

[37] The Respondent's interpretations of paragraph 95(2)(b) and subsection 95(3) turn these notions on their head and incentivize taxpayers like BlackBerry Canada to sacrifice commercial rationality to avoid the FAPI rules, which is the opposite of what BlackBerry Canada did. The Respondent's interpretations satisfies neither objective and spawn the very economic distortions this anti-avoidance regime is supposed to avoid. Parliament could not have intended this result in enacting paragraph 95(2)(b) and subsection 95(3).

[38] Alternatively, should 95(2)(b) yield the FAPI, BlackBerry Canada's interpretation of paragraph 95(2)(b), by contrast, is consistent with the provision's objectives because it considers the economic effect of the suite of services performed by the foreign affiliates (rather than considering each service in isolation) in order to assess whether this base erosion provision applies. Because the suite of services provided by the US affiliates to BlackBerry Canada resulted in a net income inclusion (rather than deduction) to BlackBerry Canada, there is no related deductible amount or base erosion for the purposes of paragraph 95(2)(b).

3) The R&D services are connected to the tangible product sold

[39] BlackBerry Canada's interpretation of the exclusion of subsection 95(3) is consistent with the purpose of protecting international competitiveness of tangible economic activities taking place abroad. The US R&D services fall within the

[1] As an example, *La Presse Inc v Quebec*, 2023 SCC 22 at para 23.

broadly worded exceptions of services performed in connection with the sale of goods and manufacturing or processing services outside of Canada.

4) A FAT deduction is warranted on a reasonable basis

[40] Finally, if the Minister's FAPI inclusion stands, BlackBerry Canada should be entitled to a foreign accrual tax deduction that reflects a reasonable allocation of the US tax paid on the R&D services income, an allocation properly grounded in principles underlying US consolidated tax reporting. BlackBerry Canada provides two such allocations that are both more consistent with these principles than the Minister's allocation.

IV. **COMPETING EXPERT EVIDENCE: CALCULATING BASE EROSION**

[41] Two experts provided evidence concerning alternative commercial models and tax structures not chosen by BlackBerry Canada, but proffered as examples of potential tax base erosion.

(a) Mr. Brad Rolph

[42] In his expert report and during his testimony at the hearing, Mr. Rolph set out four alternative transfer pricing structures that could have been used by BlackBerry Canada in lieu of its chosen structure. Mr. Rolph is a partner with Grant Thorton LLP's international Transfer Pricing section. Until 2022, he was National Leader in Canada for Grant Thornton.

[43] In the first alternative, Mr. Rolph testified that BlackBerry Canada could have acquired the existing IP, rather than license it, and transferred all US research and development personnel to Canada.

[44] In the second alternative, Mr. Rolph testified that BlackBerry US could have kept the acquired IP from the other US subsidiaries and moved only certain key research and development personnel to Canada.

[45] In the third alternative, Mr. Rolph testified that BlackBerry Canada could have entered into a cost-sharing arrangement with BlackBerry US in which all owned IP would be contributed to the arrangement.

[46] In the fourth alternative, Mr. Rolph testified that the BlackBerry Group could have moved its IP to Ireland and made 'BlackBerry Ireland' the owner of its IP.

[47] After describing each alternative, Mr. Rolph then compared the amount of Canadian corporate tax paid by BlackBerry Canada in the 2010 taxation year, to what he believed BlackBerry Canada likely would have paid had it implemented one of the alternative structures.

[48] Mr. Rolph's conclusion was that if the BlackBerry Group had implemented any of the four alternative structures, BlackBerry Canada would have paid less Canadian income tax in the 2010 taxation year.

(b) Dr. Brian Becker

[49] Dr. Brian Becker, on behalf of the Respondent, submitted a rebuttal report to Mr. Rolph's opinions. Dr. Becker is President of Precision Economics LLC, domiciled in Washington, DC. He has almost three decades of experience. He has a PhD from the Wharton School of the University of Pennsylvania and a BA in Mathematics from Johns Hopkins University.

[50] In his testimony and his rebuttal report, Dr. Becker concluded that Mr. Rolph made multiple assumptions that affected the accuracy of his calculations of the resulting tax liability of the alternative IP structures presented.

[51] Dr. Becker testified that Mr. Rolph's calculations did not consider the cost of moving the IP owned by the US Affiliates to Canada. Dr. Becker estimated the value of BlackBerry Canada's IP during the relevant period at some 30 billion US dollars. According to Dr. Becker, this sum was not considered in Mr. Rolph's report.

[52] Dr. Becker also testified that Mr. Rolph failed to consider the cost of moving personnel from the US to Canada. According to Dr. Becker, Mr. Rolph assumed that the relocation of personnel would be costless and with full compliance. Dr. Becker noted that Mr. Rolph failed to consider costs associated with the reduction of key personnel, employee severance payments, and employee relocation.

[53] According to Dr. Becker, since the acquisition of competent employees was usually a key term in the agreements, losing employees post-acquisition due to relocation would be costly for BlackBerry Canada and should have been considered by Mr. Rolph.

[54] In response to Dr. Becker's critique related to the cost of moving the acquired IP, Mr. Rolph testified that BlackBerry Canada already owned BlackBerry US' IP

and, that for the other three subsidiaries, the IP transfers had happened in prior fiscal years and were already reflected in BlackBerry Canada's records.

[55] In relation to the costs associated with the movement of personnel, Mr. Rolph testified that these costs would have been reflected in previous fiscal years, that they would have been borne by BlackBerry Canada and that they would have been fully deductible by BlackBerry Canada. Mr. Rolph concluded that these costs were immaterial and would not have impacted his analysis.

(c) Mr. Jankun on US tax accounting

[56] It is noted that Mr. Edward Jankun was called as an expert witness by the Appellant. He testified on aspects of US tax law and accounting treatment of the credit for increasing research activities ("CIRA") and net operating losses ("NOLs"). He did so specifically in respect of BlackBerry's US Affiliates and the filing of their consolidated financial statements and US tax returns. There was no rebuttal witness and his testimony was not generally disputed.

(d) Dr. Jack Mintz ultimately did not testify although twice proffered

[57] Dr. Jack Mintz did not testify in this trial, although proffered in two different capacities. A separate *voir dire* Order and reasons for order were published by the Court. The Order excluded Dr. Mitnz and his expert report because the testimony was inadmissible for the grounds stated.[2]

[58] Subsequently, Appellant's counsel sought to call Dr. Mintz as a factual witness. Counsel suggested that Dr. Mintz, as chair of the Technical Committee on Business Taxation and a prime contributor and co-author to the final report[3], could offer historical background facts and clarity to the Technical Report.

[59] The Court gave reasons from the bench allowing Dr. Mintz to testify under clear constraints. The Technical Report, as an extrinsic evidentiary artifact, was admitted as such into evidence. Both counsel referred to it throughout, as has the Court in these reasons for judgment. As such, Dr. Mintz was not to be permitted to provide his individual, personal opinion on the Technical Report. If the Technical Report is vague or unclear, it remains so because it is an extrinsic, circumstantial aid

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[2] *BlackBerry Limited v. HMK*, 2023 TCC 137.

[3] Technical Committee on Business Taxation, *Report of the Technical Committee on Business Taxation* (December 1997).

to statutory interpretation, but clearly it is not the law. Dr. Mintz could provide background on the committee composition, meeting frequency and the issues faced before it issued the report.[4] Beyond that, the Court would not hear his evidence. Ultimately, Dr. Mintz was not called to testify by BlackBerry Canada.

V. **ANALYSIS OF ISSUES**

(a) Is the text ambiguous or sufficiently clear?

[60] Generally, emphasis must be placed on a textual interpretation when the tax provisions are part of a particular scheme of the *Income Tax Act* that "is drafted with mind-numbing detail" rather than on a textual, contextual, and purposive interpretation.

[61] In part, BlackBerry Canada's argument is that the transfer pricing rules and the FAPI rules applied together lead to economic distortions, especially in instances where there is no base erosion. BlackBerry Canada submits that occurs on the facts in this case.[5]

[62] In response, the Respondent in oral submissions adduced into evidence an academic article which maintains that base erosion rules should be maintained as a backstop to the transfer pricing rules.[6]

[63] Further, the Respondent provided the following specific citations from the "Advisory Panel on Canada's System of International Taxation" which highlights the deficiencies raised by BlackBerry above:

> "4.124 However, the Panel believes that the base erosion rules (and the rules regarding the sales of goods and services between foreign affiliates carrying on active businesses) are not appropriate to the extent they impede the efficient business operations of Canadian companies. While acknowledging that certain relieving provisions have been introduced in recent years to prevent certain of these types of income from being treated as FAPI, the Panel believes more can be done. RECOMMANDATION 4.6: Review the scope of the base erosion and investment

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[4] Transcript of oral submissions and reasons for in-trial order concerning *voir dire* of Dr. Jack Mintz's admissible testimony as a factual witness.

[5] Appellant's Submissions at para 57.

[6] The *Chaire de recherché en fiscalité et en finances publiques* of the Université de Sherbrooke in its submissions addressed to the Advisory Panel on Canada's System of International Taxation (July 14, 2008), at. p. 17.

> business rules to ensure they are properly targeted and do not impede bona fide business transactions and the competitiveness of Canadian businesses." [7]

[64] The Respondent's response to BlackBerry Canada, by way of the "Panel's" recommendation, is that Parliament was aware of the inconsistencies and deficiencies raised by the Appellant as they relate to the application of the transfer pricing and FAPI provisions but chose not to make any changes, even after an Advisory panel made a specific recommendation for them to do so.

[65] As 95(2)(b) is a specific provision with specific limited exceptions, the Respondent argues that an emphasis must be placed on the textual interpretation of the provision.[8]

[66] The Respondent argues that an ambiguity cannot be raised by relying on the purpose of the provision. As is provided in *Placer Dome Canada Ltd. v Ontario*: "Reference to the purpose of the provision 'cannot be used to create an unexpressed exception to clear language'".[9]

[67] The version of 95(2) passed by Parliament versus the semblance of a version described at length by Respondent's counsel may be contrasted in the two columns below:

The version as Parliament passed the legislation	How Respondent's counsel would read it
For the purposes of this Subdivision, (b) the provision by a foreign affiliate of a taxpayer, of services or of an undertaking to provide services (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	**First Deeming Provision** (a) The provision of services (b) By a foreign affiliate (c) Is deemed to be a separate business other than an active business carried on by the affiliate

[7] Canada, *Advisory Panel on Canada's System of International Taxation, Final Report: Enhancing Canada's International Tax Advantage* (Ottawa: Department of Finance, December 2008), at para 4.117.
[8] *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 at para 11.
[9] *Placer Dome Canada Ltd. v Ontario*, 2006 SCC 20 at para 23.

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	**Second Deeming Position** (d) To the extent that the amounts paid that are consideration for those services (e) Are deductible (f) In computing the income of the taxpayer in Canada of who the affiliate is a foreign affiliate (g) That income is deemed to be income from a business other than an active business

[68] In argument, the Court requested Respondent's counsel to explain in detail why manifest clarity of the subsection was present given counsel's submitted "re-worked" unambiguous extraction. Counsel stated that "clarity" is apparent if the synopsis of interpretation focuses upon the "double deeming" within subsection 95(2).

[69] The Court finds this contrived. The necessity of rearranging the section to suit one's argument of unequivocacy logically belies a provision's asserted embedded clarity and unambiguous meaning. The exchange between counsel and the bench extracted from the Court transcript during oral submissions highlights such a conclusion:

> MS. HAM:
>
> […] let's look at 95(2)(b)(i)(A)(I) […] when we break it down it starts off with the provision of services […]
>
> […] So, we have two conditions there, services, services by a foreign affiliate. What happens if we have those two elements? Well, this is where -- this is why I call it the double deeming.
>
> The first deeming of this provision -- or the first aspect happens, is deemed to be a separate business other than an active business carried on by the affiliate. So, that's the first aspect, Your Honour.
>
> […] the second aspect of this provision […] The second Act -- and now, this is where sometimes I wonder if maybe I would have maybe done a slightly better job as a legislature or as a writer, but maybe not.

JUSTICE BOCOCK: You would have made it more precise?

MS. HAM: I think I would have used maybe more bullets and then maybe that would have complicated things. But my - my point, Your Honour, is simply that -- so, the next aspect is the way -- the way I'll break it down-- at least the way it's easier for myself to understand is that -- to the extent that there is an amount or there are amounts that are paid, those amounts are in consideration for services to the extent that those amounts that are paid […]

[…]

[…] There are two things that happen, provision by a foreign affiliate of services, one, is deemed to be a separate business other than an active business carrying on (inaudible)

MS. HAM: Yes, Your Honour.

[…] Then you went to two and I had noted a lot of other words in there, so....

[…] So, well I just kind of flipped them, Your Honour. So, basically....

[…]

MS. HAM: Okay. So, Your Honour -- so, what I simply did, Your Honour, I just kind of flipped things around.

[…] Tell me what you did.

[…] obviously -- so, if I can start again -- start at the beginning. So, again, we start at B, that part is relatively clear, "Provision of services by a foreign affiliate", so we have a first deeming which is the "Deem to be a separate business other than an active business carried out by an affiliate". That's the first deeming part, Your Honour.

[…]

[…] So, I'm going to just kind of skip everything between that comma and the next comma.

[…]

MS. HAM: Apologies, Your Honour. So, and then -- and then -- so, when we satisfy those -- these three elements starting from "To the extent", what happens then -- and this it the portion in between the two commas that I had skipped, Your Honour. It's because - that's what I call the second deeming aspect of this provision.

> […]
>
> MS. HAM: So, I almost wish I had maybe one of those old retro overhead projectors, Your Honour, so I can highlight in different colours on the list for you.
>
> JUSTICE BOCOCK: Or word box.
>
> MS. HAM: Yeah, exactly. But -- so -- and just -- so just, Your Honour, to be clear, the only reason why I just kind of flip the "to extent" and "the deeming" is just I find it a little more comprehensible that way for my brain. But, I mean, that's -- that's me.
>
> […]

[70] Lest anyone feel common law courts should eschew and limit oral argument, the foregoing shines as a stellar reason to the contrary. The "word order gymnastics" needed to gain clarity within the subsection are plainly evident. Unfortunately, the text *per* se in the subsection is not so.

[71] The Respondent's argument that only textual interpretation must be used is not acceptable where the textual interpretation leads to an absurd result that is contrary to the provision's context, object and purpose where there is potential ambiguity in the provision. As submitted by BlackBerry Canada, ambiguity exists as to the interpretation of "services" when it comes to a foreign affiliate that provides multiple services to a Canadian owner/taxpayer and *vice versa*.

(b) A contextual and purposive analysis

[72] The Appellant and the Respondent seem to agree on the main purpose of the FAPI provisions: to prevent base erosion.[10]

[73] The Appellant's argument is sensical at a high level. There is ambiguity in the interpretation of "services" and consideration of the net income inclusion provided by BlackBerry's US Affiliates to determine if the targeted mischief occurs. Factually, there is no base erosion. Further, the use of US subsidiaries for R&D appears not to impact capital export or import neutrality in this case: income reverts to BlackBerry Canada and the US is not a low tax jurisdiction.

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[10] Respondent's Written Submissions dated November 7, 2023 at para 210 ["Respondent's Submissions"] and Appellant's Written Submissions dated November 7, at para 51 2023 ["Appellant's Submissions"].

[74] With regard to a purposive analysis, the Respondent argues that a purposive analysis supports the plain language reading of the provision.[11] Under their interpretation, the purpose of the FAPI provisions is to avoid the deferral of income earned in another jurisdiction or base erosion.[12] As an example, the Respondent cites a specific exception within the FAPI provisions (95(3)(c)) that, even though it did not contribute to base erosion, it was only made an exception upon amendment of the Act.[13] Essentially, the argument is that certain non-tax motivated structures may be caught and not excluded by the provisions, but that is just the will of Parliament, and so be it.[14] This harshly ignores the basket and exchange of services agreement between operating parent and foreign subsidiary corporations.

[75] Ultimately, the services provided are not FAPI in BlackBerry's US Affiliates' hands. It simply defies sense to, in this case, apply a provision whose two main objects, base erosion prevention and competitive advantage, are not only not achieved, but consequentially appear countermanded by applying the FAPI provisions.

[76] The provision is unclear whether only the R&D services paid for by the taxpayer are to be considered or whether all services provided between the foreign affiliate and the taxpayer should be considered. Some balance is required. Interpreting the provision to designate only the net income paid to the foreign affiliate as FAPI grants this balance and limits the application of the provision solely to situations where a net positive amount is paid from Canada to the foreign affiliate. In doing so, all services between the taxpayer and foreign affiliates as well as payment for those services are aggregated and considered. This interpretation captures as FAPI those payments made for services by the taxpayer to its foreign affiliate where the foreign affiliate is not in turn making payments to the taxpayer, an unreciprocated arrangement which would erode the Canadian tax base, the very mischief to be prevented. Where the foreign affiliate is also making payments to the taxpayer for related services and where these payments are more than the payments

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[11] *Canada v Loblaw Financial Holdings Inc.*, 2021 SCC 51 at para 29 [*Loblaw*], citing Nick Pantaleo and Michael Smart, "International Considerations", in Heather Kerr et al., *Tax Policy in Canada* (Toronto: Canadian Tax Foundation, 2012), at p. 12:14.

[12] *Loblaw*, supra at para 29; *CIT Group Securities (Canada) Inc. v The Queen*, 2016 TCC 163 at para 87; Brian J. Arnold, *Reforming Canada's International Tax System: Toward Coherence and Simplicity*, Canadian Tax Paper No. 111 – 2009, at p. 139.

[13] Department of Finance Comfort Letter (September 14, 2001).

[14] Phil Halvorson, "Tax Policy and Subparagraph 95(2)(b)(ii)" in *Canadian Tax Highlights*, vol 18, N^{o}3 (Canadian Tax Foundation, March 2010) at pp. 4 – 5.

made by the taxpayer to the foreign affiliate, a desireous situation occurs, as it does in this appeal.

(c) Do the 95(3)(b) and (c) exceptions apply?

"In connection with the sale of goods": paragraph (b)

[77] The Respondent argued that the services performed in connection with the sale of BlackBerry handheld devices do not fit into the type of connection to which s.95(3)(b) refers.

[78] BlackBerry Canada's argument that "in connection with" should be interpreted broadly relies on a Supreme Court of Canada decision which ascribes to the phrase equivalency to the meaning given to the phrase "in respect of". Such meaning is "probably the widest of any expression intended to convey some connection between two related subject matters".[15]

[79] The Federal Court of Appeal and the TCC have also applied broad interpretations to the phrase. In the Federal Court of Appeal decision, the court found that legal services acquired by shareholders of a corporation to challenge and recover remuneration that was paid to former executives were in connection with the termination of commercial activity and eligible for ITCs – as the funds used to pay the former executives came from the sale of the corporation.[16] In *Hasbro* [17], the TCC was required to determine whether payments made by the appellant were "in connection with the sale of property or negotiation of a contract". The TCC found that "the locating of manufacturers, the negotiating of purchase orders and the supervising of production and delivery were all undertaken in connection with the sale of toys and games from the Far East manufacturers to Hasbro."[18]

[80] The Respondent relies on the French version of the provision and the term "à l'occasion de" rather than "relativement à" ("in connection with") as an example to argue that a broad meaning should not be applied to "in connection with".[19] The Respondent argues that the French version of the legislation, "in the course of" actually refers to "the process of carrying out of the things which must be undertaken

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[15] *Nowegijick v Her Majesty the Queen*, [1983] 1 SCR 29 at para 30.
[16] *ONEnergy Inc. v Her Majesty the Queen* 2018 FCA at paras 14, 15 and 23.
[17] *Hasbro Canada Inc. v Her Majesty the Queen*, [1991] 1 CTC 2512 (TCC) [*Hasbro*]
[18] *Hasbro*, supra at paras 44-45.
[19] Respondent's Submissions at para 101.

to carry out the related subject matter".[20] However, in the "course of selling goods" is susceptible to the same arguments concerning the link between all the exchanged services and the production of the ultimately sold products.

[81] BlackBerry Canada's interpretation of subsection 95(3) is consistent with the purpose of protecting international competitiveness of tangible economic activities taking place abroad. The US R&D services fall within the broadly worded exceptions of services performed in connection with the sale of goods.

[82] The Respondent argues that the R&D services are too remote from the sale of goods "even if they may have contributed to their design and manufacturing and allowed the products to be marketable and competitive" such that "they were not undertaken to carry out the related subject matter".[21]

[83] As well, the Respondent argues that 95(3)(b) requires the manufacturing or processing of "tangible property" and therefore the intangible property, even if manufactured by the US subsidiaries, does not fit within the definition.[22] Tenneco, a Federal Court of Appeal decision from 1991 was cited by the Respondent in support of this argument. It is distinguishable on the basis that it does not relate to the new technology-based world – certainly the manufacturing of automotive parts in the 1980s, specifically mufflers, as was the case in *Tenneco*, is different from the compressed virtual manufacturing of cutting edge smartphones in the early 2000s.

[84] Moreover, in certain cases, the R&D services provided by the US Affiliates were essential and necessary for the sale of BlackBerry products in the US. For example, there was clear testimony that carriers were "effectively the only way to sell smartphones" in the US. Therefore, carrier testing, as undertaken by the US Affiliates, was necessary for the sale of smartphones in the US. This denotes a much closer, more modern and integrated connection between the R&D services and the sale of goods which was overlooked by the Respondent's characterization. Even a determination factually of where the "product" was manufactured and sold is vague beyond a general locus of North America.

[85] The Court finds that the payments were "in connection with the sale of goods". BlackBerry Canada and its US Affiliates interdependency of services isotopically

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[20] *Canada v Yonge-Eglinton Building Ltd.*, [1974] 1 FC 637 (FCA) at pp. 644-645.
[21] Respondent's Submissions at para 104, citing CRA, Technical Interpretations 9729770 (November 12, 1997).
[22] Respondent's Submissions at para 113.

approach the merged concept, however modern, of "service as a product and, indistinguishably, product as a service". During the relevant period, this was true of real time production of handheld devices so undistinguishably infused with real time R&D production that, by dizzying comingling, each of technical services support, development and production all merged into one process for the sale of goods across the two borders. Frankly, there could not be a closer connection. Further, personnel in any given entity within the US Affiliates were conjunctively preforming production, R&D, and aftermarket services without a forethought of distinction or question. BlackBerry and its subsidiaries, and particularly its US Affiliates, were a virtual amalgam of development, service and production.

"The manufacturing or processing outside Canada": paragraph (d)

[86] The Respondent's primary argument relies on extrinsic articles which state generally that the offshore manufacturing or processing exception was added for certain "toll manufacturing" arrangements. An example of "tolling" occurs when a Canadian parent uses a contracted foreign subsidiary to manufacture products for which the Canadian parent owns the underlying license.[23]

[87] It is difficult from a plain interpretation of this exception provision to see how the exception does not apply to the US Affiliates R&D operations in these circumstances, except to the extent that the Respondent argues that R&D may only rarely be manufacturing or processing. As noted above, in BlackBerry's overall operations, R&D and product development were conjunctively essential to manufacturing and processing.

[88] A more modern approach to the definition of "manufacturing" would be required for the US Affiliates work to be considered "manufacturing" and not research. BlackBerry differentiates "manufacturing" from "large scale manufacturing" and includes the research activities performed by the US Affiliates in the manufacturing process, aggregating all efforts needed, and none in isolation to determine the activity from which the business earns its income.[24] The Respondent has provided limited evidence that there exists some threshold for the manufacturing exception to apply in these modern factual circumstances; BlackBerry Canada's argument that the US Affiliates' provided services are part of the manufacturing

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[23] Jinyan Li, Arthur J. Cockfield & Scott Wilkie, *International Taxation in Canada*, 4th ed (Toronto: LexisNexis, 2018) at pp. 329 and 332; Angelo Nikolakakis, *Taxation of Foreign Affiliates* (updated 2023), ch. 3.3.5 online: (TaxnetPro) Thomson Reuters Canada.
[24] *Range Grain Co v Her Majesty the Queen*, [1997] 2 CTC 227 (TCC) at para 26.

process is reasonable and evident given the nature of the business towards which all such activities were marshalled. This marches along with the context of "manufacturing" new technology which is a more complicated, intertwined, comingled and concurrent hybrid of R&D and manufacturing process.

[89] The manufacturing and "in connection with" exclusions, based on the evidence in this appeal, show that the product development process was indistinguishably meshed with the manufacturing process across national borders. The US Affiliates were doing "real time" R&D to lead directly to, and in many cases concurrently with, the production and sales of the handheld devices (i.e. cell phones). Ongoing technical compliance was a condition of sale and "saleability" for the "mass manufacturing" of the phones, especially as it related to massive US carriers (IT and teleco providers) during this period; the US based IT and teleco providers were BlackBerry's main and largest purchasers in the world. These facts are unique to this case and provide the basis to conclude the services were essential to processing and manufacturing outside Canada.[25]

Some final observations regarding 95(3) generally

[90] It is important to note that 95(3) does not specifically define "services" but rather only excludes certain services.

[91] The US subsidiaries did not just provide "research services" to BlackBerry Canada but rather a bundle of services, including *inter alia* contract research and IP services, distribution services, carrier support services, manufacturing oversight support services, strategic IT support services; call centre services, and Latin American sales and technical marketing support services.[26]

[92] When considering the development of IP on a stand-alone basis, the connection reflects that characterized by the Respondent. However, when considering the totality of the services provided by the US Affiliates, it is clear that there is a very substantial factual link to the sale of goods.

[93] Since multiple services were provided between and among each US Affiliate and BlackBerry Canada, the Respondent's interpretation seems motivational of its "siloed" services logic, which favours a segregation of services but does not consider

[25] An overview of the evidence: Appellant's Submissions beginning at para 126.
[26] Paragraphs 31-32 of the Appellant's Submissions enumerates these services; some were also included in the Partial Agreed Statement of Facts.

the aggregated services exchanged in this appeal. Essentially, the Respondent's characterization only looks at the R&D services through a single lens. The evidence shows that the R&D services were in many instances necessary and temporally contemporaneous with and for the sale of the handheld phone devices in the US and in Canada. This includes teleco carrier testing and bug fixes among others, without which no sales would have occurred.

(d) Is there an allowable FAT deduction under 91(4)?

[94] Given the Court's above finding that FAPI did not arise, the following analysis is moot. For completeness, the Court provides its reasons.

[95] First, the Respondent asserts that no US income tax "that may reasonably be regarded as applicable to" the R&D services income was paid by BlackBerry Canada's US Foreign Affiliates because the CIRA (credit for increasing research activities) must be allocated to the entities that generated it (and only to them) for FAT calculation purposes (whatever the ultimate income tax treatment is in the US).

[96] The Appellant argues that the purpose of FAT is to achieve tax neutrality and avoid double taxation.[27] To qualify as FAT, 1) tax must be paid and 2) the tax paid must reasonably be regarded as applicable to the FAPI.

[97] Second, the Respondent states that NOLs (net operating losses) carried forward by Ascendant and Dash reduce their tax liability in respect of the R&D services paid for by BlackBerry Canada. Both companies have only ever carried out R&D services, even though the NOLs were carried forward from a period prior to the time when Dash and Ascendant became BlackBerry US subsidiaries.[28] In consequence, the Respondent argues that they had no taxable income and therefore no tax payable concerning the R&D services provided.

[98] Both parties cite the same decision for the proposition that an objective lens must be used to determine what is reasonable: "what is reasonable is not the

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[27] Michael G Bronstetter & Douglas R Christie, "The Fickle Finger of FAT: An Analysis of Foreign Accrual Tax" (2003), 51:3 Intl Tax Planning 1317 at 1318.

[28] Respondent's Submissions at para 233 referencing BlackBerry US' 2010 US Consolidated Income Tax Returns etc.

subjective view of either the respondent or the appellant but the view of an objective observer with a knowledge of all the pertinent facts".[29]

[99] The Appellant cites two decisions in support of their interpretation of "may reasonably be regarded as applicable to". In *Devon Canada* [30], as noted by Justice Rip, the main issue was whether "income earned through the subsidiary partnership" remains income that "may reasonably be regarded as being attributable to the production from the resource property for the purposes of 66.7(10)(j)(ii)". Further, applying the R&D credit did not reduce one single source of income but was rather applied against all sources of income.[31] How, therefore, can it be used to offset any tax paid in relation to the R&D services income only?

[100] Whether tax was paid and which amount of tax can reasonably be regarded as applicable to the FAPI are the main issues between the parties on this point. The contentious issue between both parties is how the US R&D credit should be treated by the Minister and what effect it should have on the total FAT deduction, given consolidation and the presence of NOLs and CIRAs.

[101] If the Court had found the R&D service fees were FAPI, the reflective amount would otherwise need to be included in BlackBerry Canada's income under 91(1) and would not be reduced by a FAT deduction. All of the deductions for the US tax paid by the US Affiliates related to CIRA or previous NOLs, which reduced the aggregate amount of US income tax paid by the US Affiliates as a whole to nil, and particularly concerning the R&D services reflective of the FAPI. The CIRA and NOLs arise from activities undertaken to create taxable earnings of each. This more logical interpretation, albeit moot given the above-noted determination, applies Canadian accounting rules to calculate reasonably a Canadian-based deduction: the FAT. No portion of income tax paid in the US and attributable to a US Affiliate is "on a reasonable basis" applicable to the R&D services provided by each to BlackBerry Canada. The Minister correctly calculated the FAT deduction.

VI. **Summary and Costs**

[29] Both Appellant's Submissions at para 145 (a) and Respondent's Submissions at para 226 citing *Bailey v Minister of National Revenue*, [1989] 2 CTC 2177 (TCC) at para 24 (p 2182).
[30] *Devon Canada Corp v R,* 2013 TCC 415 at para 23.
[31] Appellant's Submissions at para 167 citing Mr. Edward Junkun on October 30, 2023 at paras 20(b), 28 and 62 of testimony transcript.

[102] The service fees paid by BlackBerry Canada and earned by its US Affiliates were not FAPI because the amounts were a composite reciprocal set of services central to BlackBerry Canada's worldwide business of producing handheld phones. In the alternative, such services were paid in connection with the sale of goods or the manufacturing or processing of tangible property outside Canada. As such, the appeal is allowed.

[103] Lest there be concern of broadening FAPI inapplicability, there is a clear factual guardrail against that. Only factual instances bearing the following characteristics will prevent application of FAPI to foreign affiliate services:

i. there is an absence of Canadian tax base erosion arising from the paid foreign affiliate services;

ii. the integration, timing and incurrence of the services with production of goods are intertwined to a high degree which blurs a distinction and the otherwise separate character between the two;

iii. the R&D or other services provided by foreign affiliates are not unilaterally provided in the absence of necessary reciprocal services provided by the Canadian parent to its foreign affiliates in order to produce goods in the foreign jurisdiction;

iv. the Canadian taxpayer's commercial competitiveness and efficiency is enhanced and not diminished by the provision of services by the foreign affiliate;

v. the services are commercially essential to the business undertaking of the Canadian taxpayer.

[104] If the appeal had not succeeded on these grounds, it would have otherwise been dismissed because the payment of US tax on the FAPI is not reasonably attributable to the FAPI using a Canadian accounting rules based approach.

[105] Costs are provisionally awarded to the Appellant in accordance with the Tariff. If the Appellant wishes to do so, it may make brief written submissions within 30 days concerning costs beyond the Tariff. Should it do so, the Respondent may make responsive written submissions within 30 days after that 30 day period. Should submissions be received, the Court shall consider same. If no submissions are received, then this provisional cost award shall become final.

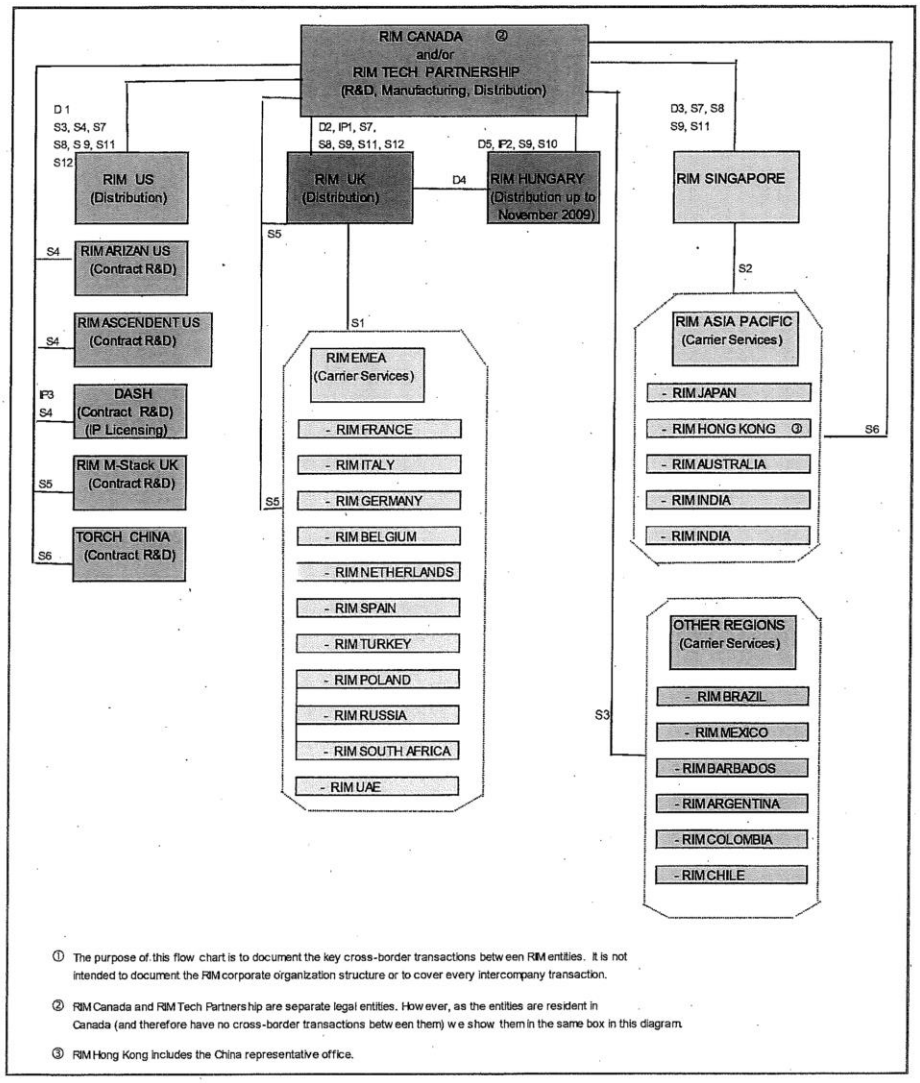
Signed at Ottawa, Canada this 25th day of September, 2024.

"R.S. Bocock"

Bocock J.

Appendix “A”

8.1 RIM's Key Intercompany Transaction Streams ①



① The purpose of this flow chart is to document the key cross-border transactions between RIM entities. It is not intended to document the RIM corporate organization structure or to cover every intercompany transaction.

② RIM Canada and RIM Tech Partnership are separate legal entities. However, as the entities are resident in Canada (and therefore have no cross-border transactions between them) we show them in the same box in this diagram.

③ RIM Hong Kong includes the China representative office.

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