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by Merle Alexander



Income Tax Rules for Aboriginal People

Do Aboriginal People Pay Income Tax?

Just like other Canadians, most Aboriginal people have to pay income tax every year. But there are some exceptions.

What are the Exceptions?

Five things must be in place before Aboriginal people do not have to pay taxes:

1. They are “Indians”¹ as defined in the *Indian Act*; and
2. They live on a reserve as defined in the *Indian Act*; and
3. They also work on a reserve; and
4. Their employer lives on a reserve; and
5. Their work is intimately connected to the reserve or is an integral part of reserve life.

It might seem that many Aboriginal people meet these requirements, but that is not the case. Here is why.

Aboriginal People in Context

Who are “Indians”?

Métis and Inuit, who make up about 35 percent of Canada’s 976,305 Aboriginal people, are not Indians as defined by the *Indian Act*. Only Aboriginal people who are entitled by law to register as “Indians” are eligible for the tax exemption—if they have registered.

¹ Indian people include those who are registered under the *Indian Act* and known as Registered Indians or Status Indians. Status Indians are entitled to have their names included in the Indian Register (an official list maintained by Indian and Northern Affairs Canada) and are entitled to certain rights and benefits under federal law.

There are about 558,000 registered Aboriginals, usually called “status Indians.” These people make up a little more than half the total Aboriginal population in Canada.

On-reserve v. Off-reserve

To be eligible for the exemption the law says status Indians must live on a reserve—and that’s only about 29 percent of all status Indians.

Employment

But being a status Indian and living on a reserve still is not enough—status Indians living on a reserve must also work there, and that work must contribute to their community. Approximately 54,000 status Indians meet this requirement.

So of Canada’s Aboriginal population of 976,305, only 54,365 are status Indians who live and work on a reserve, doing work that is connected to the reserve or its way of life. This means only 5.6 percent of all Aboriginal people in Canada potentially meet the five basic requirements that must be satisfied in order to qualify for a tax exemption.

It is helpful to look at the historic origins of the *Indian Act* in order to understand why the *Indian Act* provides an exemption from taxation for Aboriginal people who fall within the definition of “Indian” (section 2 of the *Act*).

History of the Indian Act

The five requirements come from both section 87 of the *Indian Act* and the courts’ interpretation of it. The origin of section 87 goes back to Canada’s early policy of protecting Indians and their lands from “alienation.” This meant that Aboriginal land could not be sold to anyone except the federal Crown (the government). The rule was put in place to protect Aboriginals from giving up their land to the early settlers for much less than it was worth.

It first appeared in section 4 of the *Act for the protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass or injury*, which was passed in 1850. This *Act* was amended in 1874.

In both the original and amended *Act*, the legislation clearly demonstrates that there was never any intention of giving special treatment to Aboriginal people, except in connection with protecting their land and personal property from alienation.

The Law Today

The *Indian Act* tax exemption operates through two pieces of federal legislation, the *Indian Act* and the *Income Tax Act*.

The Indian Act

Section 87 of the *Indian Act* says that unless a government, federal or provincial, passes a law that says otherwise, status Indians who own, occupy, possess or use the following property, namely: 87(1)(a) the interest of an Indian or a band in reserve and or surrendered land; or (b) the personal property of an Indian or a band situated on a reserve are exempt from taxation.

Section 90 of the *Act* says personal property that was purchased by the Crown with Indian money or money given by Parliament to Indians or to a band is considered to be land “situated on a reserve.”

Nothing in the *Indian Act* says that employment income of status Indians is exempt from taxation. It is because of how the courts have interpreted the *Act* that the general exemption from taxation now includes employment income in the five situations listed above.

Income Tax Act

Paragraph 81(1)(a) of the *Income Tax Act* excludes from the income of a taxpayer:

... an amount that is declared to be exempt from income tax by any other enactment of Parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada.

The *Indian Act* is an “enactment of Parliament” and section 87 is an exemption established under that federal legislation. This means the *Indian Act* exempts the personal property of a status Indian on a reserve from taxation and the *Income Tax Act* confirms this exemption.

The Legal Test

Situated on a Reserve—The “Connecting Factors Test”

In 1992, the Supreme Court of Canada heard an important case, *Williams v. Canada*, and decided there must be sufficient connecting factors between a status Indian’s employment income and the reserve for income to be considered “situated on a reserve” and eligible for tax exemption.

The court said the first step in deciding this is to identify the connecting factors. The next step is to decide how important each of these factors should be, and the court gave guidelines about how to do this.

“Intimately Connected to a Reserve” or “An Integral Part of Reserve Life”

In 1998, the Federal Court of Appeal added another factor to think about when deciding what factors should connect employment income to a reserve. In *Recalma v. R.*, they said it is important to look at whether the work is an integral part of reserve life and, if it is, whether it should be protected.

Since these cases, the way judges have interpreted the “connecting factors test” has made it difficult for status Indians to get exemptions from taxation, particularly when they work off a reserve.

Revenue Canada Guidelines

The Canadian Revenue Agency is the government authority responsible for administering and collecting taxes in Canada.

It published the *Indian Act Exemption for Employment Income Guidelines*, which is based on section 87 of the *Indian Act* and on how the courts have interpreted this section. The guidelines help status Indians determine whether their income is “situated on a reserve” and potentially exempt from taxation:

1. When at least 90 percent of the duties of an employment are performed on a reserve, all of the income of an Indian from that employment will usually be exempt from income tax.

2. When the employer is resident on a reserve and the Indian lives on a reserve, all of the income of an Indian from an employment will usually be exempt from Income Tax.
3. When more than 50 percent of the duties of an employment are performed on a reserve; and the employer is resident on a reserve, or the Indian lives on a reserve, all of the income of an Indian from an employment will usually be exempt from income tax.
4. When the employer is resident on a reserve, and is:
 - a. An Indian Band which has a reserve, or a tribal council representing one or more Indian Bands which have reserves; or
 - b. An Indian organization controlled by one or more such bands or tribal councils, if the organization is dedicated exclusively to the social, cultural, educational, or economic development of Indians who for the most part live on reserves; and
 - c. The duties of the employment are in connection with the employer's non-commercial activities carried on exclusively for the benefits of Indians who for the most part live on reserves; then all of the income of an Indian from an employment will usually be exempt from income tax.

These *Guidelines* affirm that status Indians must live on a reserve, work on a reserve and that their employer must live on the reserve to qualify for an exemption from income taxation. The *Guidelines* also provide a formula for identifying the percentage of work that must be performed on a reserve before income can be exempted from taxation.

Conclusion

While section 87 of the *Indian Act* provides an exemption from taxation to status Indians in limited circumstances, its purpose is not to give Aboriginal people

preferential treatment. Instead, its purpose is to protect Aboriginal land from alienation. Only 5.6 percent of the entire Aboriginal population in Canada meet the five requirements that must be satisfied in order to qualify for the section 87 exemption from income taxation. The case law demonstrates how difficult it is for a status Indian to get an exemption from taxation, which is why most Aboriginal people pay income tax. All of these factors clearly demonstrate that there is no blanket exception from the payment of taxes available to people of Aboriginal ancestry.

About the Scow Institute

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website at www.scowinstitute.ca.

Suggested Resource Materials

Aboriginal Origin, Age Groups and Sex for Population, for Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2001 Census - 20 percent Sample Data. Ottawa: Statistics Canada, January 21, 2003.

Richard H. Bartlett, "The Indian Act of Canada" (1978) 27 Buffalo Law Review 581 at 583.

Indian and Northern Affairs Canada, "Status Indians and Taxes," at http://www.aincinac.gc.ca/pr/info/info113_e.html, February 2002.

Statistics Canada, DIAND Core Census Tabulations, 1996, T-11.

An Act for the protection of the Indians of Upper Canada from the imposition, and the property occupied or enjoyed by them from trespass or injury. S.C. 1850, c.74.

The *Income Tax Act*, R.S.C. 1985, c. 45.

The *Indian Act*, R.S.C. 1985, c.1-5.

Canada Customs and Revenue Agency, *Information for Status Indians* (Ottawa: 2003).

Canada Customs and Revenue Agency, *Indian Act Exemption for Employment Income Guidelines* (Ottawa: 2003).

Amos v. R. [1999] 1 C.N.L.R. 7.

Bell v. R. [2000] 3 C.N.L.R. 32.

Folster v. Canada [1997] 3 C.T.C. 157.

Mitchell v. Peguis Indian Band [1990] 2 S.C.R. 85 at p. 131.

Monias v. R. [1999] 4 C.T.C. 2354.

Nowegijick v. R. [1983] 1 S.C.R. 29 at p. 38.

Recalma v. R. [1998] 3 C.N.L.R. 279.

Shilling v. MNR [1999] 176 D.L.R. (4th) 226.

Southwind v. Canada [1998] 2 C.N.L.R. 233.

Williams v. Canada, [1992] 3 C.N.L.R. 181.