Dysert v The Queen, 2013 TCC 57

Author : admin

Factual Resident, Deemed Resident, Treaty Tie-Breaker Rules

Dysert v The Queen, 2013 TCC 57

At issue was whether three American citizens who provided professional services to a Canadian corporation were taxable in Canada or not?

The Court found that the taxpayers sojourned in Canada for more than 183 days in a 12 month period and were deemed by the ITA to be residents of Canada. However, in applying the US-Canada tie breaker rules the court held that though they had permanent homes in both countries, the appellants center of vital interests was in the US and not Canada. Thus, they were deemed by 250(5) to be non-residents of Canada.

FACTS

The taxpayers provided professional consulting services to Syncrude on a two-year contract. Their professional careers had always been in the US. Other than the years they provided services to Syncrude they lived their entire lives in the US.

They had adult children, significant homes, their extended and immediate families and loved ones lived in the US. They had personal effects in the US, and financial assets in the US. Nothing in their lives was related to Canada at all before the contract.

After being recruited and agreeing to a contract with Syncrude, the appellants arrived in Edmonton with their suitcases and briefcases, leaving all their assets in the US. They leased modest accommodations in the same complex. They bought modest furniture and after the contract 90% of the furnishings they bought went to good will, only taking their clothing, books, technical manuals, and filing cabinets with them back to the US. They kept their US driver's licences and leased Toyotas from the same dealership, maintaining AAA not CAA coverage. They kept their US cell phones, life insurance and health insurance, though they obtained the Alberta health insurance that is made generally available to such temporary workers.

They each had one Canadian bank account used for day-to-day living expenses in Canada. They went back to the US almost monthly to visit family and conduct other business, their families coming to Alberta or very short periods of time. They were present in Canada for more than 183 days in the relevant years.

Taxpayers' Argument

The taxpayer's argued that they were not Canadian resident or deemed to be residents, and in any case the 'tie-breaker' rules in the Canada-US tax treaty results in them not being Canadian residents. They said that their apartments in Edmonton were not permanent homes, or that their center of vital interests was closer in the US, and that their habitual abodes were in the US.

Crown's Argument

The Crown took the position that the appellants were residents or deemed residents as sojourners in Canada and that the tie-breaker rule finds them to be Canadian residents because the Edmonton apartments were permanent homes, and they have closer personal and economic connections to Canada or have their habitual abode in Canada for the years in question

Court's Analysis

The court stated that, first, it would be necessary to determine if the Appellants were residents of Canada for the purposes of the ITA, which has two components (1) factual residents, (2) deemed residents. If the appellants are residents of Canada, then there is a need to see what the tie-breaker rules result in. The court summarized the tie-breaker rules in the Canada-US treaty:

> (i) The hierarchy of the paragraph 2 tie-breaker rules begins by deeming a dual resident to be a resident of the country in which he had a "permanent home available to him". It is conceded that each Appellant had a permanent home available to him in the US. The first issue to be decided under the Treaty is whether the Appellants also had permanent homes available to them in Canada. If their Alberta living arrangements did not constitute permanent homes, they will be deemed to be residents of the US, and not Canada, for purposes of the Treaty and the Treaty analysis will end there.
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> (ii) If their Alberta living arrangements are found to have also been permanent homes available to them, then paragraph 2(a) requires the Court to next determine whether their "centres of vital interest", being the country with which their "personal and economic relations were closer", can be determined. If it can be determined they will be deemed to have been residents of that country, and not the other country, and the Treaty analysis will end there.
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> (iii) If their centres of vital interest cannot be determined, the Court must determine whether they had an "habitual abode" in either or both countries. If they had an habitual abode in one country and not in the other, they will be deemed to have been residents of the former country, and not the latter, and the Treaty analysis will end there.

(iv) If they had “habitual abodes” in both Canada and in the US, or in neither country, the Appellants will be deemed to have been residents of the US, and not residents of Canada, for purposes of the Treaty by virtue of their sole US citizenship and no further inquiry need be made.

If after the application of the tie-breaker rules they remain Canadian residents, they are properly taxable as such in Canada, and if they are determined to be US residents then subsection 250(5) deems them to be non-residents.

Factual Residence

The Court referred to the decision in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, and identified the factors relevant to this determination as:

47 The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.

48 The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

49 For the purposes of income tax legislation, it must be assumed that every person has at all times a residence. It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.

50 But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of

the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

Estey, J.

71 A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question. Even in this statute under section 9(b) the time of 183 days does not determine whether the party sojourns or not but merely determines whether the tax shall be payable or not by one who sojourns.

Kerwin, J.

2 There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage. When one is considering a Revenue Act, it is true to state, I think, as it is put in the Standard Dictionary, that the words "reside" and "residence" are somewhat stately and not to be used indiscriminately for "live", "house" or "home". The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". By the same authority "ordinarily" means "1. In conformity with rule; as a matter of regular occurrence. 2. In most cases, usually, commonly. 3. To the usual extent. 4. As is normal or usual". On the other hand, the meaning of the word "sojourn" is given as "to make a temporary stay in a place; to remain or reside for a time".

The court also referred to *The Queen v. Kenneth F. Reeder*, 75 DTC 5160:

13 While the Defendant here is far removed from the jet set, including any possible imputation of a preconceived effort to avoid taxation, the factors which have been found

in those cases to be material in determining the pure question of fact of fiscal residence are as valid in his case as in theirs. While the list does not purport to be exhaustive, material factors include:

(a) past and present habits of life;

(b) regularity and length of visits in the jurisdiction asserting residence;

(c) ties within that jurisdiction;

(d) ties elsewhere;

(e) permanence or otherwise of purposes of stay abroad.

And to *Gaudreau v. The Queen*, 2005 DTC 66:

33 I adopt the reasoning of Mahoney, J. in the *Reeder* case, at page 5163:

The Defendant was at a stage in life when he was highly mobile. He was able, willing, even eager, to travel. In that, he was not atypical of his contemporaries and the relevant factors must be considered in that context. It is not contested that he was, before March 29, 1972 and has, since December 1, 1972, been resident in Canada. Throughout, his ties of whatever description have all been with Canada, save only those ties, undertaken during the term of his absence, which were necessary to permit him and his family to enjoy an acceptable and expected lifestyle while in France. That absence was temporary even though, strictly speaking, indeterminate in length. The ties in France were temporarily undertaken and abandoned on his return to Canada.

I am satisfied that had the Defendant been asked, while in France, where he regularly, normally or customarily lived, Canada must have been the answer. I find that the Defendant was resident in Canada throughout all of 1972.

34 In my view, the same can be said here. Throughout his sojourn in Egypt, the appellant's ties were all with Canada, save only those ties, undertaken during the term of his absence, which were necessary to permit him and his wife to enjoy an acceptable and expected lifestyle while in Egypt. As a matter of fact, the ties in Egypt were temporarily undertaken and abandoned on his return to Canada. As Rip, J. stated in the above cited passage from *Snow*, supra, a person's temporary absence from Canada does not necessarily lead to a loss of Canadian residence when close personal and economic ties are maintained in Canada. I therefore conclude that the appellant was ordinarily resident in Canada during the years at issue

And to *Mahmood v. The Queen*, 2009 TCC 89:

> [60] The evidence does show that the Appellant had some ties to Canada in the years in question. His mother lived in a condominium which he owned. He stayed in the condominium when he came to Canada. One of his sons also lived there, along with his sister, who stayed there from time to time. The Appellant used the Canadian financial system to deposit funds, exchange currency and ultimately pay the foreign suppliers of his business. He attended the local mosque near the condo that he owned in Canada. He had a car available to him that was parked at the condo. He went on camping trips with friends and visited Niagara Falls at least seven times.
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> [61] In my view, these facts are not sufficient to make the Appellant a resident of Canada for the purposes of the *Act*. The condominium, while owned by the Appellant, was really his mother's home and not his own. His mother has lived there the entire time. The Appellant lives at the family home in Guyana with his wife and his three children.
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> [62] The Appellant's Canadian activities are similar to the activities of other non?residents carrying on business in Canada. One can be a non-resident of Canada and own real estate in Canada at the same time. Section 116 of the *Act* and Part XIII deal with these cases. The former provision applies when a non-resident sells property and the latter when a non-resident collects, among other things, rental income.
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> [63] In the event that I am wrong and Canada is the Appellant's home in the same way Guyana is, I find that the tiebreaker rule in paragraph 4(2)(*a*) of the Convention makes him a resident of Guyana for the purposes of the *Act*. The Appellant's family and economic interests are more closely tied to Guyana than to Canada.

The court then applied the law identified to the facts and determined that none of the appellants were factual residents for the time period in question.

Deemed Residents

The court then turned to the question of whether the appellants were deemed to be Canadian residents by the nature of their more than 183 stays in Canada, pursuant to paragraph 250(1)(a). The Court stated that "to sojourn generally means to temporarily stay, visit, reside or remain, in a place for a time. The nature of sojourning is an unusual intermittent stay, and is marked by a sense of transitoriness and of return to one's usual, ordinary residence." The Court also agreed that day trips for work to Canada are not sojourning, but said that living in Canada is not the same as day trips to work, and concluded that the appellants were sojourning in Canada on the days they were present. Thus, they were deemed residents.

Canada-US Tax Convention

The Court began by referring to the *Vienna Convention on the Law of Treaties* and stated that it "provides that a treaty is to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It also authorizes regard to subsequent practice in the application of the treaty in certain circumstances and for certain purposes, as well as the use of other supplementary means of interpretation when the interpretation of the treaty otherwise leads to a result which is manifestly absurd or unreasonable."

Interpreting tax treaties is different than interpreting tax statutes. The focus for tax treaties are the words of the treaty and the intention of the parties. The court quoted *Gladden Estate v. The Queen*, 85 DTC 5188, 5191:

> Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned.

"Liberalism has no role to play in the interpretation of treaties" (Coblentz v The Queen, 96 DTC 6431 (FCA)).

The Court then referred to *The Queen v. Prévost Car Inc.*, 2009 FCA 57, which referred to the interpretative importance of the OECD model treaty, and then referred to the comments of the OECD model treaty for Article IV:

> 4. Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on "residence" have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws.
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> 5. This manifests itself quite clearly in the cases where there is no conflict at all between two residences, but where the conflict exists only between residence and source or situs. But the same view applies in conflicts between two residences. The special point in these cases is only that no solution of the conflict can be arrived at by reference to the concept of residence adopted in the domestic laws of the States concerned. In these cases special provisions must be established in the Convention to determine which of the two concepts of residence is to be given preference.
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> 6. An example will elucidate the case. An individual has his permanent home in

State A, where his wife and children live. He has had a stay of more than six months in State B and according to the legislation of the latter State he is, in consequence of the length of the stay, taxed as being a resident of that State. Thus, both States claim that he is fully liable to tax. This conflict has to be solved by the Convention.

7. In this particular case the Article (under paragraph 2) gives preference to the claim of State A. This does not, however, imply that the Article lays down special rules on “residence” and that the domestic laws of State B are ignored because they are incompatible with such rules. The fact is quite simply that in the case of such a conflict a choice must necessarily be made between the two claims, and it is on this point that the Article proposes special rules.

[…]

9. This paragraph [2] relates to the case where, under the provisions of paragraph 1, an individual is a resident of both Contracting States.

10. To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State. The facts to which the special rules will apply are those existing during the period when the residence of the taxpayer affects tax liability, which may be less than an entire taxable period. For example, in one calendar year an individual is a resident of State A under that State’s tax laws from 1 January to 31 March, then moves to State B. Because the individual resides in State B for more than 183 days, the individual is treated by the tax laws of State B as a State B resident for the entire year. Applying the special rules to the period 1 January to 31 March, the individual was a resident of State A. Therefore, both State A and State B should treat the individual as a State A resident for that period, and as a State B resident from 1 April to 31 December.

11. The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, e.g. where the individual has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.

12. Subparagraph *a*) means, therefore, that in the application of the Convention (that is, where there is a conflict between the laws of the two States) it is considered that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that they stay is intended to be of short duration.

13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual,

rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all time continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.).

14. If the individual has a permanent home in both Contracting States, paragraph 2 gives preference to the State with which the personal and economic relations of the individual are closer, this being understood as the centre of vital interests. In the cases where the residence cannot be determined by reference to this rule, paragraph 2 provides as subsidiary criteria, first, habitual abode and then nationality. If the individual is a national of both States or of neither of them, the question shall be solved by mutual agreement between the States concerned according to the procedure laid down in Article 25.

15. If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

Permanent Home – the Court held that, with reference to *Wolf v The Queen*, 2002 FCA 96, that the Edmonton apartments rented (continuously available to them throughout the year, appropriately furnished, with parking, and placed to cook, eat, sleep) constituted permanent homes in Canada. They also had permanent homes in the US.

Centre of Vital Interests – This is a question of fact looking at personal and economic relations in the countries in question. The Court referred to *Gaudreau* (paras 38-40) and *Wolf* (para 20) and *Bujnowski v. The Queen*, 2005 TCC 90, 2006 FCA 32 (paras 6-8), in stating that closer ties do not mean more numerous ties – closeness is a focus on the depth and nature of the personal and economic relations. The court also referred to *Hertel v. Minister of National Revenue*, 93 DTC 721:

14 In determining his centre of vital interests, it is not enough to simply weigh or count the number of factors or connections on each side. The depth of the roots of one's centre of vital interests is more important than their number.

On the facts, the court concluded that the appellants center of vital interests was closer to the US than in Canada, deeming them to be residents of the US by subsection 250(5).

Habitual abode – did not have to consider.

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

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