Federal Court of Appeal | Cour d'appel fédérale

Date: 20100610

Docket: A-418-09

Citation: 2010 FCA 152

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

RONALD H. LINGLE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, B.C., on June 3, 2010.

Judgment delivered at Ottawa, Ontario, on June 10, 2010.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The Tax Court of Canada (Tax Court) was called upon to decide pursuant to the *Canada-United States Income Tax Convention (1980)* (Convention) whether the appellant was required to pay in Canada income tax on his business income. The taxation years in issue were 2004 and 2005.

[2] Article IV(2) of the Convention sets out five tie-breaker rules to assist in determining the jurisdiction in which the income tax is to be paid. The Article reads:

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

(*a*) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both States or in neither State, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);

(*b*) if the Contracting State in which he has his centre of vital interests cannot be determined, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

(*c*) if he has an habitual abode in both States or in neither State, he shall be deemed to be a resident of the Contracting State of which he is a citizen; and

(*d*) if he is a citizen of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

2. Lorsque, selon les dispositions du paragraphe 1, une personne physique est un résident des deux États contractants, sa situation est réglée de la manière suivante:

a) Cette personne est considérée comme un résident de l'État contractant où elle dispose d'un foyer d'habitation permanent; si elle dispose d'un foyer d'habitation permanent dans les deux États ou ne dispose d'un tel foyer dans aucun des États, elle est considérée comme un résident de l'État contractant avec lequel ses liens personnels et économiques sont les plus étroits (centre des intérêts vitaux);

b) Si l'État contractant où cette personne a le centre de ses intérêts vitaux ne peut pas être déterminé, elle est considérée comme un résident de l'État contractant où elle séjourne de façon habituelle;

c) Si cette personne séjourne de façon habituelle dans les deux États ou si elle ne séjourne de façon habituelle dans aucun des États, elle est considérée comme un résident de l'État contractant dont elle possède la citoyenneté; et

d) Si cette personne possède la citoyenneté des deux États ou si elle ne possède la citoyenneté d'aucun d'eux, les autorités compétentes des États contractants tranchent la question d'un commun accord.

(Emphasis added)

[3] As the Tax Court judge pointed out at paragraph 8 of her reasons for judgment, the parties agreed that the appellant had a permanent home in both Canada and the United States during the relevant periods. They also agreed that they could not use the second tie-breaker as it was not possible to determine in which country the appellant had his centre of vital interests. So the matter fell to be determined on the concept of 'habitual abode" found in the third tie-breaker. As the judge put it at paragraph 10 of her reasons for judgment, the narrow issue "in this appeal is whether the appellant under the tie-breaker rules also had an 'habitual abode' in the United States as well as in Canada".

[4] The Tax Court found that the appellant did not have an "habitual abode" in the United States for the purposes of the Convention: see paragraph 30 of the reasons for judgment. I am in substantial agreement with the findings and conclusion of the Tax Court.

[5] The definition and interpretation of "habitual abode" involves a question of law reviewable on the standard of correctness. However, the application of the definition to the facts of the case to determine whether the appellant had an "habitual abode" in both jurisdictions raises a question of mixed fact and law which is immune from review by this Court unless there is an overriding and palpable error: see *Housen v. Nickolaisen*, [2002] 2 S.C.R. 235. I see no such error on the facts of this case.

[6] It would be unwise to attempt to set out a rule or a series of criteria which could fit all situations. The determination in each case will depend on the facts and circumstances of the case.

The concept of “habitual abode”, as evidenced by the clearer French version of the text (séjourne de façon habituelle) involves notions of frequency, duration and regularity of stays of a quality which are more than transient. To put it differently, the concept refers to a stay of some substance in the jurisdiction as a matter of habit, so that the conclusion can be drawn that this is where the taxpayer normally lives.

[7] This is consistent with the French definition of “habituelle” found in Le Petit Robert 2006:

> 1. Qui tient à l’habitude par sa régularité, sa constance.
> 2. Qui est constant, ou très fréquent.

[8] This is also consistent with the commentary on Article IV(2) of the OECD Model where it is stated that in comparing the stays in two States to determine if and where the individual has an “habitual abode”, “the comparison must cover a sufficient length of time for it to be possible to determine whether the residence in the two States is habitual and to determine also the intervals at which the stays take place”: see *Model Tax Convention on Income and on Capital*, OECD Committee on Fiscal Affairs, vol. 1, July 2008, at page C(4)-6.

[9] In paragraph 52 of his memorandum of fact and law and at the hearing, the appellant submitted that the Tax Court judge applied the wrong test in that she went on to examine the social and economic ties which he had in Canada and the United States during the relevant periods. In doing so she confused the second and the third tie-breaker. He finds evidence of the judge’s error in the following sentence at paragraph 30 of the judge’s reasons for judgment:

> Considering all the facts before me, his connections with the United States were weak when compared to his settled routine in Canada.

[10] This sentence is taken out of context and read in isolation. When the sentence is replaced in its proper context, the appellant's argument simply has no merit. What the judge was saying in that sentence is that the appellant did not have a settled routine in the United States while he had one in Canada which showed that he did regularly, customarily or normally live in Canada.

[11] The judge's impugned sentence came at the end of paragraph 30 of her reasons for judgment which I reproduce:

> [30] It follows that the proper approach to determining whether the Appellant had an habitual abode in the United States is to enquire whether he resided there habitually, in the sense that he regularly, customarily or usually lived in the United States. Paragraphs 27 to 32 of the Agreed Statement of Facts and Issue contain pertinent statements which assist in the determination of whether the Appellant "normally lived" in the United States. It was agreed between the parties that the Appellant "consistently and repeatedly returned to his home in Canada for the majority of the days in this period." In the settled routine of his life "he regularly, normally and customarily lived in Canada." He "did not have any other contracts clients or business in the USA." In addition, he spent only 69 days out of 623 days in the relevant period at his home in the United States. It is interesting that these agreed statements explicitly state that the Appellant "normally … lived in Canada" – which answers the definition that the Avery Jones article suggested for the expression "habitual". The Appellant's stays at the Ransom House were in the nature of periodic visits with his "normal" place of residence being in Canada throughout the period. He did not have an habitual abode in the United States for the purposes of the Treaty because he did not regularly, customarily or normally live in the United States. Considering all the facts before me, his connections with the United States were weak when compared to his settled routine in Canada. Accordingly, the Appellant was a resident in Canada during this period and as such he is taxable on his business income earned as a consultant.

[12] To the extent that the sentence *per se* could be found to be ambiguous, it is, however, clear from a reading of the reasons as a whole and paragraph 30 that, at the point where the sentence occurs, the judge had already concluded that the appellant did not have an "habitual abode" in the United States "because he did not regularly, customarily or normally live in the United States": see paragraph 30.

[13] The appellant argued that the proper test to be applied for determining where a taxpayer has his "habitual abode" is to look at where he or she "is habitually present". He relies upon a tentative conclusion of Dr. J.F. Avery Jones who, the appellant says, is currently a judge on the United Kingdom First Tier Tax Tribunal. In a paper presented at the Fifth Annual International Taxation Symposium in the United States, Dr. Avery Jones reviewed the elusive concept of "habitual abode" and concluded:

> Perhaps an habitual abode really means 'is habitually present", which would be much clearer.

[14] The Tax Court found that the appellant "regularly, normally and customarily lived in Canada": see paragraph 30 of the reasons for judgment. By the appellant's proposed test, the Tax Court found that he was habitually present in Canada, but not in the United States.

[15] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-418-09
(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED MAY 27, 2009, DOCKET 2008-1278(IT)G.)	
STYLE OF CAUSE:	RONALD H. LINGLE v. THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 3, 2010
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	June 10, 2010

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