Docket: 2008-1402(IT)G

BETWEEN:

IVAN DENISOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on February 1, 2 and 3, 2010, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

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| Counsel for the Appellant: | Aaron Rodgers |
| Counsel for the Respondent: | Benoit Mandeville |

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**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 2001 taxation year is allowed in part and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The appeals from the assessments made under the *Income Tax Act* for the 2002 and 2003 taxation years are dismissed with costs in accordance with the attached Reasons for Judgment.

Signed at Quebec, Quebec, this 16th day of August 2010.

"François Angers"

Angers J.

Citation: 2010 TCC 101
Date: 20100816
Docket: 2008-1402(IT)G

BETWEEN:

IVAN DENISOV,

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and

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Respondent.

## REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal of the appellant's assessments in respect of his 2001, 2002 and 2003 taxation years. The assessments were issued on the basis of the respondent's assumption that, for tax purposes, the appellant was a resident of Canada during the three years in issue and that he earned during those years taxable income in the amounts of $326,233, $190,771 and $431,619 respectively. These taxable income amounts were determined by means of a net worth assessment conducted in 2004 by one Mario Côté, an auditor for the Canada Revenue Agency.

[2] The issues are whether the appellant was a resident of Canada in the three years in question, and if he was, then whether the Minister was justified in including the above amounts in the appellant's income and in assessing penalties for his failure to file tax returns for the three years in issue and to report his income.

[3] The unreported income for the three taxation years in question was determined through a review of the appellant's banking transactions in the three Canadian bank accounts he held in Canada with the Royal Bank of Canada and the Toronto Dominion Bank. His personal expenses were calculated through the use he made of his credit cards (four in total) and through the withdrawals from the bank accounts, some of which withdrawals were identifiable (bank charges, interest) and others were unexplained. In this regard, the numbers can be found in Schedules V and VI to the net worth calculations, attached to these Reasons.

[4] The auditor met the appellant for the first time on July 19, 2004. At that time, the appellant informed the auditor that he was a Canadian citizen and that he resided or lived in Canada. He also said he had no income from Canadian or other sources and that he travelled a lot, but just for pleasure. He did not mention any travels to Russia or indicate that he may have been a student. At this point, it is important to mention that the appellant is a citizen of the Russian Federation who came to Canada in 1995 as a student. He became a Canadian citizen in February 1999 and has never reported any income in Canada from 1995 to the present date.

[5] The auditor was later contacted by the appellant's accountant, who provided information to the effect that the appellant's brother was sending him money and submitted documents evidencing his brother's Russian tax return as well as a declaration from the appellant's brother that he had in fact transferred money to the appellant. The auditor wrote to the Russian authorities and received from them information indicating that the appellant's brother had declared income 15 to 20 times less than the amount it had been represented as being the amount of money allegedly transferred by the appellant's brother was insufficient to explain the amount of unreported income determined through the net worth assessment. In addition, some of the alleged transfers of money from the appellant's brother were made outside the relevant taxation years. The auditor disregarded the transfer explanation.

[6] In October 2004, the auditor presented to the appellant's representative his proposed assessment. Eleven months went by and no further representations or explanations were forthcoming from anyone regarding the net worth assessment. The appellant's representative did, however, inform the auditor at some point during the audit that the appellant was not a resident of Canada during the three taxation years under appeal.

[7] In the relevant taxation years, the appellant had a cellular phone in Canada with Rogers Wireless Inc. In the 2001 and 2002 taxation years, he had a credit card in Canada issued by the Royal Bank of Canada, and in the 2003 taxation year, he had credit cards issued by the Royal Bank of Canada, CIBC, the Toronto-Dominion Bank and the Amex Bank of Canada. The appellant also had during the relevant years a passport and a social insurance card issued by the Canadian government.

[8] The auditor undertook a thorough examination of the appellant's cellular phone bills, his credit card purchases, his stamped passport and his customs documents in order to determine the number of days the appellant was present in Canada.

According to the auditor, the number of days the appellant was in Canada was 234 in 2001, 103 in 2002 and 196 in 2003.

[9] On cross-examination, the auditor acknowledged that the use of the cellular phone by the appellant in July 2001 had to be reduced to 6 days from 31, thereby reducing the number of days for 2001 from 234 to 209. The auditor also acknowledged that 5 days should be subtracted for 2003 with respect to the use of the appellant's cellular phone in Canada.

[10] Upon his arrival in Canada in early 1995, the appellant, with two of his friends, incorporated a federal corporation as shown by the Quebec register of corporations. The same register also reveals that the corporation was registered on June 10, 1997 and lost its corporate status in May 1999. The appellant invested some money in that corporation, which operated a nightclub, in 1998, but he left the corporation when more money was needed to keep it afloat.

[11] The appellant also incorporated, in 1999, another company called D.I.A Trading Inc. – Commerce D.I.A. Inc., with the intent of importing and exporting textiles. That company, according to its income tax returns and financial statements, was not very active and never showed any profit. It was struck off the register in December 2008.

[12] In the summer of 2000, the appellant went back to Moscow with his Canadian girlfriend. They moved into an apartment that the appellant owned and that had been purchased for him by his father. Although his girlfriend returned to Canada in the fall, the appellant says that he stayed in Moscow as he recalls participating in the New Year celebration. According to the appellant, he stayed in Moscow, except for a short trip he made to Finland on July 11, 2001, going there by train and returning by car (Exhibit R-3, Tab 52). He later made a trip to Canada, according to his passport, on July 25, 2001, and stayed approximately one month.

[13] For the period from January 2001 to July 2001, the appellant's Canadian cellular phone invoices showed numerous phone calls from within Canada. It was on the basis of those invoices that the auditor for Revenue Canada concluded that the appellant was present in Canada from the month of March 2001 to September 18, 2001. The bills indicated no calls from September 18 to October 29, 2001 or from December 4, 2001 to January 20, 2002, which left November 2001 as a month in which calls were made on the Canadian cellular phone.

[14] The appellant also produced his Russian cellular phone invoices (Exhibit A-7) from 2001 to 2003 inclusive, which show calls made in Russia. According to the appellant, the Canadian cellular phone had been left with his Canadian girlfriend and was used by her during the spring and summer of 2001. He himself used the Canadian cellular phone in August while he was here, and he left it with a friend when he left Canada in early September. Neither the friend nor the girlfriend was called as witnesses.

[15] The appellant moved in with his Russian girlfriend, Ksenia Denisova, in Moscow, in September 2001. He had written admission exams in June 2001 and was admitted to the University of Moscow (MESI) for September. He made a short trip to Berlin and to Finland in October and eventually came to Canada on October 29, 2001. After consulting with real estate agents, and given the fact that real estate values had gone down, he decided to purchase a condominium apartment (condo) in Verdun. Since he was coming to Canada for vacations, he felt it would be cheaper to use the condo than to stay in hotels.

[16] The deed to the condo is dated November 29, 2001. It identifies the appellant as a businessman residing on Kensington Avenue in Westmount, which is where the apartment he occupied with his former girlfriend was located. The appellant did not move into the condo as he rented it to the vendor until August 2002.

[17] The purchase price of the condo was $109,000. The appellant borrowed $59,000 from the Industrial Alliance Life Insurance Company and paid the remaining $50,000 by means of a cash withdrawal from his bank account, which explains a withdrawal shown under the heading "unexplained withdrawals" in the net worth assessment.

[18] According to the record of cellular phone use and according to his own testimony, the appellant returned to Russia in the first days of December 2001. He spent New Year's Day 2002 in Moscow and made a one-day trip to Finland in January 2002. He came to Canada on January 21, 2002 for approximately two weeks to pick up the documents relating to the condo purchase. He stayed at the apartment on Kensington Avenue. That visit is confirmed by Exhibit R-3, Tab 53 and Exhibit A-3, which show no calls on his Canadian cellular phone before January 20, 2002 and none after February 3, 2002. In fact, there were no further calls on his Canadian cellular phone until July 25, 2002, when he came to Canada for a three-week period. He took whatever personal belongings remained in the apartment on Kensington Avenue and moved them to the condo in Verdun. He returned to Russia in the middle of August in order to continue his studies at the University of Moscow and to prepare

for his upcoming marriage to Ksenia Denisova, and he worked for a furniture company in Moscow. A work record from that company indicates that the appellant worked there from February 2, 2001 to March 31, 2004. His salary for that period was 90,385.14 roubles, from which income tax was deducted.

[19] When the appellant married Ksenia Denisova on October 5, 2002, they both came to Canada for their honeymoon three weeks later. At that time, the appellant's wife was pregnant and was advised by her doctors that travelling was not recommended. The appellant said he returned to Russia around November 15, 2002 to pursue his studies and to work. The Canadian cellular phone was left with his wife in Canada, which explains its use from October 2002 to June 2003, as shown by Exhibit A-3.

[20] According to the appellant, he came back to Canada on December 27, 2002 to spend the Christmas holidays with his wife. He returned to Russia at the end of January and came back with his mother for the birth of his child, which occurred on March 18, 2003. Two months later, his wife and daughter returned to Moscow and he followed on June 6, after he had completed the paperwork relating to the birth of his child in Canada.

[21] His passport shows that in June and July he made short trips to Finland, but came to Canada on August 12, 2003 for about one month. It was during that visit that the appellant made various applications to obtain credit. He was indebted to friends and others, from whom he had borrowed money to pay for his wife's medical needs when she was in Canada. He met someone through an advertisement and that person assisted him in obtaining credit. Although the appellant says he applied everywhere, the documentary evidence shows only his ING Direct and Scotiabank applications, to which were attached notices of assessment from the Canada Revenue Agency. The appellant did sign the ING Direct application but says he has no knowledge of and never saw the notices of assessment attached to that application. It turns out that these notices of assessment were falsified documents as no such notices were ever issued to the Appellant. The notices indicated that the appellant had an annual income of over $100,000 a year. The appellant testified that he had no knowledge of these falsified notices of assessment and had simply relied on the aforementioned person to obtain credit.

[22] The appellant returned to Russia on September 11, 2003 and came back to Canada a few days later, eventually returning to Russia on September 20 for the remainder of the year and until April 2004.

[23] The documentary evidence confirms that the appellant has been the co-owner of an apartment in Moscow since 1993 and that he paid the utilities for that apartment from January 1, 2000 to March 31, 2009. He has a Russian passport for travel both within Russia and outside Russia.

[24] On July 10, 1991, the appellant was given an employment record book which indicates that he began work as marketing director on February 2, 2001, that he left that employment on March 31, 2004 for personal reasons, and that he became the executive director of a corporation on June 2, 2004. The appellant also has a medical insurance card from the government of Russia. As for his Quebec medical coverage, his card was cancelled on January 1, 2002. The appellant has had a Russian driver's licence since 1995. That licence was renewed on April 30, 2002 and its expiry date is April 30, 2012. He also has a Quebec driver's licence, which he kept because it allows him to ride motorcycles.

[25] There is also written confirmation from the University of Moscow that the appellant had been a student at the university since 2001 and that he was, at the date of that certificate, a fourth year student. He received his diploma on December 21, 2007.

[26] The appellant's wife, Ksenia Denisova, is a resident of Russia. She met the appellant in the summer of 2001 in Russia. She recalls that he left Russia for Canada in the middle of July 2001 and returned in the middle of September. The reason for the trip was to end his relationship with his Canadian girlfriend. The witness and the appellant were both students and moved in together at the appellant's apartment in September 2001. At the time, the appellant had work that that had to do with furniture, but she could not elaborate. At the end of October 2001, the appellant, she said, made another trip to Canada, but was with her in Russia to celebrate the New Year.

[27] According to Ms. Denisova, the appellant made two trips to Canada between January and October of 2002. On cross-examination, she stated that she did not know why he came to Canada and added that she did not ask him. After their marriage in October 2002, she came to Canada with the appellant on October 25 for what she described as a kind of honeymoon, but her intention was to live in Canada. She had a visitor's visa that was valid for 6 months. As we know, Ms. Denisova was pregnant at the time. She said the appellant returned to Russia at the end of October to write exams and to work. He came back to Canada in March 2003, just prior to the birth of their child. Ms. Denisova left Canada when her visa expired in April 2003, and the appellant stayed in Canada until June 2003. According to Ms. Denisova, later in

2003, he made two further trips to Canada of 10 and 15 days. In April 2004, Ms. Denisova became a landed immigrant and moved to Canada. In July 2004, they were both back in Canada, but she could not recall how long the appellant stayed. They eventually separated in December 2004.

[28] When she first came to Canada, the appellant provided Ms. Denisova with money, a credit card and a cellphone. He also purchased a car for her use.

[29] The first question that needs to be answered is whether the appellant was a resident of Canada during the three taxation years at issue, namely the 2001, 2002 and 2003 taxation years. It is important in this connection to look at some of the cases that have dealt with this issue, particularly the often-cited decision of the Supreme Court of Canada in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, [1946] C.T.C 51, in which Rand J. held as follows at pages 224 – 25 (S.C.C.), 63 - 64 (C.T.C.):

> 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.
>
> 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.
>
> 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.
>
> 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".

[30] Subsection 2(1) of the *Income Tax Act* (the "*Act*") says that a person who was resident in Canada at any time in the year is to pay income tax on his or her taxable income, and according to subsection 250(3) of the *Act*, such a person includes a person who was, at the relevant time, ordinarily resident in Canada. An individual who is ordinarily resident in Canada is considered to be factually resident in Canada. As seen above, Rand J., in the *Thomson* decision stated the following:

> 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.

[31] The Court must therefore consider certain factors in determining this issue. In *Gaudreau v. Canada*, [2004] T.C.J. No. 637 (QL), at paragraphs 24 and 25, Lamarre J. of this Court summarized as follows some of the factors to be considered:

> Accordingly, as suggested by counsel for the appellant, the question is to determine where, during the period at issue, the appellant, in his settled routine of life, regularly, normally or customarily lived. One must examine the degree to which the appellant in mind and fact settled into, maintained or centralized his ordinary mode of living, with its accessories in social relations, interests and conveniences, at or in the place in question.
>
> This is mainly a question of fact. In The Queen v. Reeder, 75 DTC 5160 (F.C.T.D.), referred to by the appellant, the court listed some factors considered to be material in determining the question of fiscal residence, at page 5163:
>
> > . . . 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.
>
> The matter of ties within the jurisdiction asserting residence and elsewhere runs the gamut of an individual's connections and commitments: property and investment,

> employment, family, business, cultural and social are examples, again not purporting to be exhaustive. Not all factors will necessarily be material to every case. They must be considered in the light of the basic premises that everyone must have a fiscal residence somewhere and that it is quite possible for an individual to be simultaneously resident in more than one place for tax purposes.

[32] And finally, I refer to remarks by Rip J. of this Court, as he then was, in *Snow v. The Queen*, 2004 DTC 2784, at paragraph 18, where he states, on the issue of residence:

> A person may be resident of more than one country for tax purposes. The nature of a person's life and the frequency he or she comes to Canada are important matters to consider in determining one's residence. The words "ordinarily resident" in s.s. 250(3) refer to the place where, in the person's settled routine of life, the person normally or customarily lives. The intention of a taxpayer, while obviously relevant in determining the "settled routine" of a taxpayer's life, is not determinative. A person's temporary absence from Canada does not necessarily lead to a loss of Canadian residence if a family household remains in Canada, or possibly even if close personal and business ties are maintained in Canada.

[33] In the present case, the appellant admits to being a resident of Canada during the few years immediately preceding the three taxation years at issue. Therefore, are the circumstances of this case such that the appellant ceased to be a resident of Canada for the three following years? Did the appellant, following his departure from Canada in the year 2000, maintain significant residential ties while Canada when he was abroad?

[34] During the three taxation years at issue, the appellant had a dwelling or a place of abode available to him in Canada, namely the apartment he kept on Kensington Avenue in Westmount and, as of 2001, the condominium he purchased in Verdun. In addition to that, he kept personal property and personal belongings in Canada. In the relevant taxation years, the appellant had a driver's license and a medical insurance card issued by the Province of Quebec. The medical insurance card was eventually revoked, according to the appellant. He also had a Canadian passport, a Canadian social insurance card, Canadian bank accounts, credit cards issued by Canadian banks, a Canadian cellphone and, obviously, a mailing address in Canada.

[35] The appellant was also, at all relevant times, the sole shareholder of DIA Trading Inc., which he incorporated on October 14, 1999 and in which he invested $28,650. That corporation owned a motor vehicle, which was used by the appellant.

[36] In the deed to the condo that he purchased in November 2001, the appellant declared that he resided on Kensington Avenue in Westmount, Quebec. He also made the same declaration in the contract of loan and hypothec (Tab 37 of Exhibit R-3) and added that he was a businessman. When he sold the condo in September 2004, he declared that he was residing in Verdun, Quebec. On a loan application made to Scotia Bank in August 2003 (Tab 49 of Exhibit R-3), his address was shown as being in Verdun, Quebec, and his employer as being DIA Trading (his corporation); that application was accompanied by false notices of assessment (Tab 50 of Exhibit R-3).

[37] Moreover, during the period in question, the appellant returned to Canada several times and on more than an occasional basis. During his visit in October and November 2001, he purchased of the condominium in Verdun. In July 2002, he came over to empty the apartment he had in Westmount and to move his possessions into the condo. In October 2002, he came back with his wife, and they lived in the condo. His wife stayed in Canada until April 2003 to give birth to their child, and the appellant spent a significant amount of time in Canada after the birth of his child. Moreover, the appellant's wife testified that her intent was to come to live in Canada. On the appellant's visit in August 2003, he applied to obtain credit from certain financial institutions. Those facts indicate clearly that, instead of severing his residential ties with Canada, the appellant, during the period in question, created some new ones.

[38] When the appellant met with the auditor in July 2004, his spontaneous response when asked about his nationality and place of residence was to say that he was a Canadian citizen and that he resided in Canada. That statement was made outside the relevant period but nonetheless expresses his state of mind at the time.

[39] The underlying question in this entire matter is really why the appellant would have needed to have so much money transferred to him in Canada during the relevant three years if he was not a resident of Canada. In terms of economic ties, it becomes very difficult to explain this financial need here in Canada if one accepts the argument that he was no longer a resident of Canada. The total amount of unreported income determined through the net worth assessment is $948,623 for the three years in question, during which the appellant says he was not a resident of Canada. The fact that the appellant may have spent many days in Russia during the relevant years, that he owned an apartment in Moscow, that he owned a motor vehicle in Russia, that he held a Russian passport, that he had a cellphone in Russia, that he got married there, etc., is not sufficient to allow me to conclude that the appellant no longer had economic ties with, and personal relations in Canada during the relevant three years. In my opinion, the appellant never severed his residential ties with Canada upon his

departure from Canada in the year 2000. He continued to be a resident in Canada and therefore a person ordinarily resident in Canada and subject to income tax in Canada on his worldwide income for the three taxation years at issue. In light of this conclusion, it is not necessary for me to determine whether the Appellant spent a sufficient number of days in Canada to trigger the application of the deeming provision in subsection 250(1) of the *Act*.

[40] Counsel for the appellant argued that should the appellant be held to have been a resident of Canada during the relevant taxation years, he should be held to have also been a resident of Russia during the same period. If the appellant was a resident of both countries, the tie-breaker rule found in Article 4 of the Canada-Russia tax treaty will apply to determine in which of the two countries the appellant will be considered to have been resident for tax purposes. In the event that the appellant, as a result of the application of Article 4 of the tax treaty, is considered to have been a resident of Russia, he will be deemed not to have been resident of Canada for the purposes of the *Act*.

[41] Counsel for the respondent argued that the provisions of Article 4 of the tax treaty cannot apply as there is no evidence regarding Russian law to assist the Court in determining if the appellant was a resident of Russia during the relevant taxation years and subject to Russian tax. He suggested that foreign law needs to be proven through an expert. Counsel relied on the case of *The Queen v. Crown Forest Industries Limited*, 95 DTC 5389 (S.C.C) in support of his position that Russian law with respect to residence and taxation has to be proven.

[42] I do not think that, pursuant to the *Crown Forest* decision, that expert evidence is required in order to establish Russian tax law requirements as regards residence. In *Crown Forest*, the facts are very different from those in the present case. The courts were dealing there with the residency status in the U.S. and Canada of a third-party corporation registered in the Bahamas and the court of first instance had used expert evidence to establish residency requirements. The present case deals with the residency of a physical person. In *Crown Forest*, at page 5395, the Supreme Court wrote that "*the criteria for determining residence in Art. IV.1 involve more than simply being liable to taxation on some portion of income (source liability); they entail being subject to as comprehensive a tax liability as is imposed by a state*". Under the approach in *Crown Forest*, the appellant must establish that he was, by reason of his domicile, residence or any other criterion of a similar nature, subject to as comprehensive a Russian tax liability as is imposed by Russia under its domestic legislation.

[43] Article 4 of the Canada-Russia tax treaty reads as follows:

> For the purposes of this Agreement, the term "**resident of a Contracting State**" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

[44] In addressing a similar question the late Chief Judge Garon of this Court, in *McFadyen v. Canada*, [2000] T.C.J. No. 589 (QL), at paragraphs 134-38, wrote the following with respect to the *Crown Forest* decision and the test to be applied:

> The next question is whether the Appellant was a resident of Japan in the present circumstances pursuant to Article 4 of the Canada-Japan Income Tax Convention Act, 1986, R.C.S. 1985, c. 48, Part II, Schedule III, which states :
>
> 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that Contracting state, is liable to tax therein, by reason of his domicile, residence, place of head of (sic) main office, place of management, or any other criterion of a similar nature.
>
> With respect to treaty interpretation, the Supreme Court of Canada stated some general principles in Crown Forest (supra) in considering Article IV, paragraph 1 of the Canada-U.S. Income Tax Convention (1980). The latter portion of Article IV is identical to Article 4, paragraph 1 of the Canada-Japan Income Tax Convention. On behalf of the Supreme Court of Canada, Justice Iacobucci commented as follows at paragraphs 22 and 40:
>
> > 22. In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties.
> >
> > [. . .]
> >
> > 40. . . . the criteria for determining residence in Article IV, paragraph 1 involve more than simply being liable to taxation on some portion of income (source liability); they entail being subject to as comprehensive a tax liability as is imposed by a state. In the United States and Canada, such comprehensive taxation is taxation on world-wide income.
>
> The facts in the Crown Forest case are not similar to those of the present case. It is sufficient to say that in the Crown Forest case the Court was dealing with Article IV paragraph 1 of the Canada-U.S. Income Tax Convention (1980) in the context of the residency status of a third party Bahamian corporation that Canada and the

> Government of the United States of America, as an internevor, successfully claimed was not a resident of the United States because it was not subject to comprehensive taxation in the United States.
>
> It is therefore apparent from the decision of the Supreme Court of Canada in the Crown Forest case, that the test for purposes of the Canada-Japan Income Tax Convention, is not residence in the sense of the Canadian common law but rather a consideration in accordance with Article 4, paragraph 1 of the Canada-Japan Income Tax Convention, of the single criterion of whether the Appellant is taxable in Japan under its domestic legislation "by reason of his domicile, residence ... or any other criterion of a similar nature". (I have omitted the words in that cited portion of Article 4 that apply to a body corporate or other entity). If the Appellant is liable to tax under Article 4 of the Canada-Japan Income Tax Convention, he is a resident of Japan.
>
> The liability to tax referred to in Article 4 paragraph 1 of the Canada-Japan Income Tax Convention has been interpreted by the Supreme Court of Canada in Crown Forest to mean "as comprehensive a tax liability as is imposed" in Japan.

[45] The wording of Article 4, paragraph 1 of the Canada-Russia tax treaty is almost identical to that of Article 4, paragraph 1 of the Canada-Japan convention (see *supra*).

[46] A review of the evidence submitted by the appellant, particularly Exhibit A-5 that was introduced to establish the appellant's residential ties with Russia, does not show, in my opinion, that the appellant was subject to a comprehensive tax liability imposed by Russia. The only documents that refer to the federal tax service of Russia are one at Tab 5 of Exhibit A-5 stating that the appellant was registered by a tax organization on December 29, 2007 in conformity with the dispositions of the Tax Code of the Russian Federation and another at Tab 12, being a certificate from the appellant's employer confirming that income tax was withheld from his salary and transferred to budget during his period of employment from 2001 to 2004. The certificate also reveals that his salary was 90,385.14 roubles and that the tax withheld was 11,750 roubles. In terms of Canadian dollars, his salary would have been less than $10,000 for the period. That indicates a very small amount of work for such a long period.

[47] Tabs 9 and 10 of Exhibit A-5 are demand letters sent by the appellant to the Russian authorities requesting a confirmation of his status as a resident of the Russian Federation for tax purposes for the three years at issue, but no certificate providing such confirmation was obtained or produced in evidence. The evidence does not disclose whether the appellant filed any tax returns in Russia for the three relevant

years. Russian income tax law and its application to the appellant have not, in my opinion, been established.

[48] In my opinion, and for the above reasons, the appellant has not established that for the purposes of Article 4 of the Canada-Russia tax treaty, he was subject to a comprehensive tax liability imposed by Russia. I therefore conclude that during the relevant three taxation years, he was not a resident of Russia for the purposes of the Canada-Russia tax treaty.

[49] Having found that the appellant was a resident of Canada and not a resident of Russia for the purposes of the tax treaty, I will now deal with the net worth assessment and the penalties assessed against the appellant for the three relevant taxation years.

[50] I will deal first with the $50,239 cash withdrawal made by the appellant on November 28, 2001 for the down payment on the purchase of his condominium property in 2001. The auditor readily admitted that there should be, and the respondent consented to, an adjustment for the 2001 taxation year as that amount had at first been considered as an unexplained withdrawal; the purpose of the withdrawal has, however, been identified, as detailed above.

[51] It is clear that the $50,239 was counted twice and both parties admit that an adjustment is necessary in those circumstances.

[52] With respect to the remaining net worth numbers, they are made up of personal expenses of $122,940, $65,658 and $133,266 and unexplained withdrawals of approximately $95,000, $123,145 and $297,433 for the years 2001, 2002 and 2003 respectively. The evidence heard did not provide any explanation for the withdrawals or indicate how the appellant met his personal expenses. In fact, the only evidence submitted with regard to the source of the money came from the appellant, who stated that it all came from transfers from his family. Deposits through bank accounts were identified in some cases as coming from his mother in Russia and in others as coming from companies in which his brother was involved, in Russia as well. Neither his mother nor his brother was called as a witness to corroborate the appellant's testimony, identify the transfers, explain why they were made and identify the Russian companies.

[53] The explanation provided by the appellant was that the transferred funds were to cover for his cost of living. A review of the purchases made through the credit cards may provide some support for that explanation as far as his personal expenses

are concerned, but it does not shed any light on the unexplained withdrawals. Considering his claim that he spent very little time in Canada over the three-year period in question, his sojourns here were, I must say, very costly. It is difficult to comprehend, given the amount of money the appellant claims to have received from his family and given the little time he says he spent in Canada during the three taxation years at issue, that the sums he received were insufficient to meet his needs and that he still had to make applications to borrow money. There is something missing here in terms of why so much money was transferred, and there is no room for any logical explanation.

[54] The only evidence, other than the appellant's testimony, is a declaration (Exhibit R-3, Tab 45) by his brother dated November 15, 2004, which was sent to the auditor. The appellant's brother certified that he transferred to his brother, in Canada, during the period from 1999 to 2003, $400,000 in U.S. funds as gratuitous assistance from the family. The appellant's brother did not testify and the information received by the auditor indicates that the brother in question may not have had sufficient income to be able to make the transfers. In any event, the declaration is unsworn and carries very little weight.

[55] There is some evidence of the appellant's family's financial means, but nothing allowing actual dollar figures to be determined. The fact that no members of his family were called to testify and to provide corroboration of their financial ability to make the transfers and also to explain why the appellant was in need of so much money during the three years at issue leads me to infer that their evidence would have been unfavourable to the appellant.

[56] The explanations provided by the appellant as to the source of all that money are insufficient to meet his burden of proof. The unexplained withdrawals were left unexplained, no reliable evidence having been presented in that regard. All that was provided was unsubstantiated evidence concerning amounts of money transferred from family members to cover the appellant's cost of living in Canada, which amounts I cannot ascertain with any accuracy.

[57] As for the penalties assessed against the appellant, I find that the Minister was justified in assessing penalties for the three taxation years at issue. Where an appellant is unable to prove the source of income that has been the subject of a net worth assessment and the situation remains unexplained or the discrepancy remains inexplicable on a balance of probabilities, the Minister has discharged his burden of proof (See *Lacroix v. Canada*, 2008 FCA 241).

[58] The appeal for the 2001 taxation year is allowed in part and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with these reasons. The appeals for the 2002 and 2003 taxation years are dismissed with costs.

Signed at Quebec, Quebec, this 16th day of August 2010.

"François Angers"

Angers J.

# Schedule V

**Taxpayer:** DENISOV, Ivan
**Last audited year:** 2003-12-31

## STATEMENT OF PERSONAL EXPENSES

| On December 31st | 2001 | 2002 | 2003 |
|---|---|---|---|
| **Per RBC VISA monthly statements** | | | |
| *- Payments* | 96 714 | 51 109 | 89 975 |
| **Per CIBC VISA monthly statements** | | | |
| *- Payments* | - | - | 14 980 |
| **Per AMEX monthly statements** | | | |
| *- Payments* | - | - | 11 185 |
| **Per TD VISA monthly statements** | | | |
| *- Payments* | - | - | 3 392 |
| **Per RBC acc't # 501070** | | | |
| - Bank charges | 184 | 325 | 409 |
| - Miscellaneous | 9 697 | 6 120 | 9 299 |
| - Rogers Sans Fil | 440 | 48 | - |
| - Rent | 3 600 | 4 500 | - |
| **Per RBC acc't # 4505780 US (converted to CDN)** | | | |
| - Bank charges | 87 | - | 45 |
| - Miscellaneous | | | |
| - Interest | | | |
| - TD VISA US Dollar | 11 511 | - | - |
| **Per TD acc't # 3227447** | | | |
| - Bank charges | 11 | 27 | 33 |
| - Interest | 71 | 134 | 249 |
| - Miscellaneous | 361 | 293 | 742 |
| **Mortgage Interest (per schedule)** | 265 | 3 103 | 2 958 |
| **Other expenses** | | | |
| - Assumption: Included in the unexplained withdrawals | | | |
| **TOTAL PERSONAL EXPENSES:** | 122 940$ | 65 658$ | 133 266$ |

# Schedule VI

**Taxpayer:** DENISOV, Ivan
**Last audited year:** 2003-12-31

| for the exercise ended on the 31th of december | 2001 | 2002 | 2003 |
|---|---|---|---|
| **Withdrawal unexplain** | | | |
| **Per RBC acc't # 5010707** | | | |
| - Unexplained withdrawals | 96 208 | 17 172 | 72 176 |
| - Internet banking payment | 9 646 | 7 631 | 138 |
| - Transfer debit | - | - | 550 |
| - Unexplained cheques | 5 573 | 3 827 | 4 266 |
| **Per RBC acc't # 4505780 US (converted to CAD)** | | | |
| - Debit Antonina Denisov | 10 725 | 70 710 | 140 150 |
| - Unexplained withdrawals | 12 616 | 10 993 | 38 131 |
| - Unexplained cheques | 18 | 1 | - |
| **Per TD acc't # 3227447** | | | |
| - Unexplained withdrawals | 5 544 | 12 811 | 5 016 |
| - Unexplained cheques | 5 200 | - | 37 007 |
| | 145 530 $ | 123 145 $ | 297 433 $ |

| | |
|---|---|
| CITATION: | 2010 TCC 101 |
| COURT FILE NO.: | 2008-1402(IT)G |
| STYLE OF CAUSE: | Ivan Denisov and Her Majesty the Queen |
| PLACE OF HEARING: | Montreal, Quebec |
| DATES OF HEARING: | February 1, 2 and 3, 2010 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice François Angers |
| DATE OF JUDGMENT: | August 16, 2010 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Appellant: | Aaron Rodgers |
| Counsel for the Respondent: | Benoit Mandeville |

COUNSEL OF RECORD:

For the Appellant:

| | |
|---|---|
| Name: | Aaron Rodgers |
| Firm: | Spiegel Sohmer Inc.<br>Montreal, Quebec |

| | |
|---|---|
| For the Respondent: | Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Ottawa, Canada |