1960
Nov. 16
1962
April 2
June 8

BETWEEN:

EDWIN L. SCHUJAHN .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 29, 139(4)—Appellant not "ordinarily resident" in Canada from date of his removal to United States of America though his family remained in Canada to end of that year—Appeal allowed.

Appellant, a United States citizen employed by a corporation of that country was moved to Toronto, Ontario by his employer in 1954. He purchased a house in Toronto and lived there with his wife and family until he was promoted to a higher position in the company in July 1957. He left Toronto for Minneapolis on August 2, 1957 taking only his personal effects with him. As he was unable to sell his house at that time he left his wife and children in Toronto in order that the house would not be vacant and so easier to sell. He resigned his club membership in Toronto. The house was sold in February, 1958, at which time his family rejoined him in the United States. Between August 2, 1957 and the end of the year 1957, the appellant was in Canada only three times, for a week-end on his way overseas, for a few days on his return and for a week at Christmas. The respondent assessed appellant for tax on his full 1957 income, from which assessment he appealed to this Court.

Held: That the appellant ceased to be resident or "ordinarily resident" in Canada in August 1957 despite the fact that his wife and son remained in Canada until the sale of his house, and therefore is entitled to the deductions allowed by s. 29 of the *Income Tax Act*, R.S.C. 1952, c. 148 from August 2, 1957 to the end of the year.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Noël at Ottawa.

D. A. Hanson for appellant.

Paul Boivin, Q.C. and *Roger Tassé* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

NOËL J. now (June 8, 1962) delivered the following judgment:

This is an appeal under the *Income Tax Act* R.S.C., 1952, c. 148, from an assessment for the year 1957 and turns on the question as to whether the appellant was residing or ordinarily resident in Canada during the whole of such year.

The appellant is an American citizen who worked and lived in Minneapolis, in the United States of America, until the year 1954. He is employed by General Mills Inc., a company with world-wide affiliations and whose head office is situated in Minneapolis, U.S.A. The company decided to start doing business in Canada in the year 1954 and purchased a piece of land in Toronto on which it built a plant; in the year 1954 the appellant was transferred from Minneapolis, U.S.A., the American parent company, to the Canadian subsidiary in Toronto, for the purpose of taking charge of the Canadian operations. Upon leaving with his family he gave up his resident membership in a Minneapolis club and moved to Toronto where he purchased a house at 38 Lambeth Road. He and his family lived in Toronto at the above address from the year 1954 to August 2, 1957 upon which date he was recalled and returned to the parent company in Minneapolis as assistant to the Vice-President. His wife and one son, however, remained in Toronto in their home until it was sold in February 1958 because, as he explained, "he had been advised that it would be difficult to sell an empty house, more difficult than one that was lived in, and the market was badly depressed." On this sale he sustained a loss of $6,000. The appellant upon hearing of his transfer back to Minneapolis contacted, in July 1957, a firm of real estate agents in Toronto, Kay & Fenn, and told them to try to sell his house. He also resigned his family membership in the Granite Club in Toronto. Upon his arrival in Minneapolis, U.S.A., he sought residence there and took with him his clothes, radio and his photographic equipment, which appears to be a hobby with him. He took steps to rejoin a club he formerly belonged to in Minneapolis as a resident member. He also states that he had been advised by senior officers of General Mills Inc. that his recall to Minneapolis was on a permanent basis.

He had a car of his own which he took with him to Minneapolis but until February 1958, he left a car in Toronto which his wife used but which was registered in his name. He admits also of having a small bank account with the Royal Bank in Toronto during the period of August 2, 1957 to December 31 of the same year for the purpose of paying mortgage payments on his home and other bills, and a smaller account with the Bank of Nova Scotia which

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his wife used for household bills. This last account would probably run up to as high as $200 at a maximum at any time.

Between August 2, 1957 and the end of 1957 he was in Toronto on three occasions only: (1) early in October or late September 1957 on his way to a business trip to England (for a weekend); (2) on his way back to the States, he flew Trans-Canada direct to Toronto (spent 3 or 4 days); (3) he came back for the Christmas holidays (spent a week). In the meantime, he lived until Christmas of 1957 in the Minneapolis Athletic Club in Minneapolis, U.S.A., but after Christmas moved into a small hotel, the Sheraton.

An agreement to sell his house in Toronto was signed on January 10, 1958, the settlement accomplished on February 25, 1958 and the next day, February 26 of the same year, his wife and son joined him in Minneapolis, U.S.A. Upon his wife's and son's arrival in Minneapolis in February 1958, they bought a house and signed the papers in the month of March 1958, and as he puts it "as soon as she came down, she took over the job of finding a house and we own a house there now".

The only matter in dispute between The Minister of National Revenue and the appellant is as to whether or not the latter was a resident of Canada for the whole of the year 1957 or, to put it more concisely, whether he remained a resident of Canada from and after August 2, 1957. The appellant admits that for the taxation year 1957, which is in appeal, up until August 2, 1957, he was a resident in Canada for income tax purposes within the meaning of section 139(4) of the *Income Tax Act*. However, he submits that when he left Toronto on August 2, 1957, to take another appointment in the United States, he then ceased as of that date to be a resident of Canada and that, consequently, he is entitled to the benefits of section 29 of the *Income Tax Act* and should not report as income the revenue he has earned in the United States from August 2, 1957 to December 31, 1957. Sections 139(4) and 29 of the *Income Tax Act* read as follows:

139(4) In this Act, a reference to a person resident in Canada includes a person who was at the relevant time ordinarily resident in Canada.

29. Where an individual was resident in Canada during part of the taxation year, and during some other part of the year was not resident in Canada, was not employed in Canada and was not carrying on business in Canada, for the purpose of this Act, his taxable income for the taxation year is

(a) his income for the period or periods in the year during which he was resident in Canada, was employed in Canada or was carrying on business in Canada computed as though such period or periods were the whole taxation year

minus

(b) the aggregate of such of the deductions from income permitted for determining taxable income as may reasonably be considered wholly applicable to such period or periods and of such part of any other of the said deductions as may reasonably be considered applicable to such period or periods.

The terms "resident" and "ordinarily resident" have been the subject of a number of decisions in the English courts, in the Exchequer Court and the Supreme Court of Canada. A very able and thorough study of these decisions has been made in a judgment of the learned President of the Exchequer Court, in the case of *Percy Walker Thomson and The Minister of National Revenue*[1], which was confirmed by the Supreme Court of Canada[2]. In both these decisions, a number of cases dealt with by the English courts and some Canadian decisions were analyzed and it is possible to draw from them a number of conclusions of which some may be applicable to the present instance. There is no definition in the act of "resident" or "ordinarily resident" and these terms should receive the meaning ascribed to them by common usage.

It is quite a well settled principle in dealing with the question of residence that it is a question of fact and consequently that the facts in each case must be examined closely to see whether they are covered by the very diverse and varying elements of the terms and words "ordinarily resident" or "resident". It is not as in the law of domicile, the place of a person's origin or the place to which he intends to return. The change of domicile depends upon the will of the individual. A change of residence depends on facts external to his will or desires. The length of stay or the time present within the jurisdiction, although an element, is not always conclusive. Personal presence at sometime during the year, either by the husband or by the wife and family, may be essential to establish residence within it. A residence

[1] [1945] C.T.C. 63. [2] [1946] S.C.R. 209.

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elsewhere may be of no importance as a man may have several residences from a taxation point of view and the mode of life, the length of stay and the reason for being in the jurisdiction might counteract his residence outside the jurisdiction. Even permanency of abode is not essential since a person may be a resident though travelling continuously and in such a case the status may be acquired by a consideration of the connection by reason of birth, marriage or previous long association with one place. Even enforced coerced residence might create residential status.

From this it follows that the terms "resident" and "ordinarily resident" are very hard to define and as put by Rand J. in re *Thomson and The Minister of National Revenue*[1]:

> 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 preponderence 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 the question of its application.

And at p. 225 he adds:

> 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 circumstances but also accompanied by a sense of transitoriness and of return.

It was decided in *Murphy In re Income Tax Act (Manitoba)*[2] that:

> To determine whether a person has ceased to be resident of any particular place, the duration of his previous residence, his connections with that community and his interest in it are circumstances to be considered.

The English decisions however from which many of the above-mentioned findings have been drawn are subject to some reserve in that the finding of the Commissioners on a question of fact is final and cannot be reviewed by the

[1] [1946] S.C.R. 224.

[2] (1933) 41 Man. Rep. 621.

higher courts, the jurisdiction of which is limited to questions of law only. And in many of these English cases Their Lordships stated that they felt that although they would have probably come to a different conclusion had they been the Commissioners they could not possibly intervene.

The situation before this Court is of course different. The Court can hold, based on the facts disclosed by the evidence, that the appellant was or was not resident or ordinarily resident in Canada during the period under review. It was also pointed out in the *Thomson* case that Rule 3 of the General Rules applicable to all the Schedules of the English *Income Tax Act* may have had an effect on the result arrived at in some of the English cases.

Indeed this rule provides:

> That every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad.

In the present instance there is no such rule and this appeal must be decided strictly on its facts in relation to the common ordinary meaning of the words "resident" or "ordinarily resident".

The evidence here discloses that the taxpayer's house in Toronto was occupied by the appellant's wife and child until February 1958 when it was sold; at all times from August 2, 1957, until the end of the 1957 taxation year he had a home where he could return at any moment as of right; he in fact returned on three occasions: before going to Europe on a business trip, then on his way back and a few days around Christmas. A car belonging to him but used by his wife, remained in Toronto until the latter's departure; he maintained two bank accounts, one for his mortgage payments on the house in Toronto and the other for his wife's household expenses. On the other hand, in July 1957, he put up his house in Toronto for sale, resigned his membership in a Toronto club, transferred all his personal belongings, clothes and hobbies to Minneapolis, re-applied for and obtained resident membership in his club in Minneapolis, brought his own car back and allowed his wife to stay in Toronto as caretaker for the home and in order to insure its sale.

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The majority of the cases reviewed dealt with taxpayers whose original abode was either in the United Kingdom or Canada and who took up residence in other countries. As pointed out by Taschereau J. in the *Thomson* case at p. 218:

> Moreover in the majority of these cases, the taxpayer was held liable not because his visits to England were of such a nature that they were considered sufficient to qualify him as a "resident", but for the reason that he had never ceased to be a resident of England, and that his occasional absence had never deprived him of the status of British resident.

In the present instance we are dealing with the case of a man whose original residence was in the United States; he was sent to Canada to take charge of a new operation for his company and once the Canadian company was properly set up and running smoothly, he was called back to the parent company to take over new responsibilities and there and then, but for the sale of his house in Toronto, severed himself entirely from Canada.

From the evidence, I am satisfied that the only reason why the appellant's wife and son remained in Toronto until February 1958 was for the sole purpose of insuring the sale of the house and that the retaining of two bank accounts, one for the mortgage payments and the other for his wife's household expenses, as well as the use of one of his cars by his wife, was a logical consequence of the necessary means taken by him to sell his house in Toronto.

The three visits made by the appellant during the period under review were, as far as the Christmas visit is concerned, of such a singular occurrence and as far as the stopovers, of such a transitory and incidental nature, that I fail to see how this could be construed as implying residence in Canada. I would see here the simple gesture of a husband who has changed residence but visits with his family when going through the city where they had to temporarily live.

The circumstances of the present case are somewhat similar to an English decision in re *Rex v. Aldrington, Houghton, and Hove Income Tax Commissioners*[1]. The applicant in this case was the owner of a freehold of No. 4 King's Gardens, Hove, and had in fact resided there until 1907. After that year he had removed to Berkshire; but from 1907 to 1911 he had been regularly assessed to income

[1] [1916] L.J. 1753.

tax under Schedule (A) as owner, as well as to inhabited-house duty as occupier; the house was fully furnished and ready for residence; application for returns of income tax were regularly addressed to the applicant at the address, including the year 1911, and returned duly filled up; in 1913, in making certain affidavits relating to the estate of his deceased wife, the applicant had described himself as of No. 4 King's Gardens, Hove. In reply, the applicant stated that he had never lived at Hove since 1907, and had in that year instructed local agents to sell or let the house furnished, and that the documents referred to in 1913 were filled in by his solicitors. Lord Reading, at p. 1755, in his decision states:

> Upon the evidence I am, however, convinced of the truth of the explanation of the use by the applicant of the address in question, and am satisfied he has not resided there since 1907.

I do feel that the situation here is somewhat similar to the above case and I am convinced of the truth of the reasons why the appellant's wife and son remained in Toronto after the appellant had himself definitely taken residence in Minneapolis, U.S.A.

Had the retention of the house in Toronto and the fact that the appellant's wife and child remained there been indicative of something other than that of wishing to sell the house without sustaining too great a loss, I would be inclined to hold as a matter of fact that the appellant had two residences for taxation purposes, one in Toronto and another in Minneapolis, U.S.A. However, such is not the case, indeed from the evidence it appears that as of August 2, 1957 the house in Toronto became, as far as the appellant is concerned, merely a house to sell and his wife and son remained there for that sole purpose, departing as soon as it was sold.

I therefore feel that the appellant, in this case, has established to my satisfaction that he had on August 2, 1957 divorced himself completely from his residence in Canada and that the fact of his wife and son remaining in Canada until the sale of his house was explained in a satisfactory manner. For the reasons which I have set forth above, I am of the opinion that the appellant must succeed and I therefore find that the appellant did not reside in

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Canada from August 2, 1957 to December 31 of that year and that, therefore, he is entitled to the deductions provided by section 29 of the *Income Tax Act*. Therefore, there will be judgment allowing the appeal and declaring that the appellant is entitled for the year 1957, but from August 2, 1957 only, to the deductions provided by section 29 of the *Income Tax Act*. The appellant is also entitled to the costs of the appeal.

Judgment accordingly.