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TAX FOR THE Owner-Manager

"Habitual Abode" Not Always Where the Heart Is

In Canada, federal income tax is levied on the worldwide income of taxpayers who are resident in Canada. There is a common-law test for residence, and there are statutory rules that deem a person to be resident in Canada. For example, paragraph 250(1)(a) deems a taxpayer to be resident in Canada throughout a taxation year if the taxpayer sojourns in Canada in that taxation year for a period of, or for periods that total, 183 days or more. However, a person who normally would be considered a resident of Canada under the common-law test or under the statutory deeming rules is deemed not to be a resident of Canada if he or she is considered a resident of another country under one of Canada's international tax treaties.

If a person is considered a tax resident of two countries, the tax treaty between those countries generally provides tiebreaker rules so that the person is deemed to be a resident of only one of the two countries. For example, article IV(2) of the Canada-US tax treaty states that a dual-resident individual will be deemed to be a resident of the country where (applying the following rules sequentially) (1) he or she has a permanent home, unless he or she has a permanent home in both countries or in neither country; (2) his or her personal and economic relations (that is, his or her centre of vital interests) are closer, unless that cannot be determined; (3) he or she has a habitual abode, unless he or she has a habitual abode in both countries or in neither country; (4) he or she is a citizen, unless he or she is a citizen of both countries or of neither country; or (5) by mutual agreement of the competent authorities of both countries. (The tiebreaker rules in the Canada-US treaty generally follow the OECD model treaty.)

The recent decision of the TCC in *Trieste* (2012 TCC 91) sheds further light on the "habitual abode" tiebreaker rule. Mr. T was a US citizen who, over the years, had taken temporary jobs in the nuclear industry all over the United States. In May 1999, he moved to Canada and began working as an independent contractor for a US company that was providing services to Ontario Power Generation in Ontario.

From May 1999 to June 2000, Mr. T lived in a condominium in Ontario with two co-workers. During that period, he and his wife purchased a home in Tennessee. Although he had been working in Canada on a temporary basis, in January 2000 he signed a full-time contract of indefinite term with the US company providing services to Ontario Power Generation.

In June 2000, Mr. T and his wife bought a condominium in Ontario, where Mr. T lived and his wife lived periodically. They sold this condominium six months later. Around that time, Mr. T's wife moved back to the United States for medical treatment, and Mr. T purchased another condominium in Ontario. His wife generally remained in the United States and visited him in Canada only occasionally. In 2002, Mr. T purchased a house in Ontario and lived there until he moved back to the United States in 2005. He sold the Ontario house in 2006.

In the taxation years at issue (2000-2003), Mr. T stayed in Canada for approximately 330 days in each year. He visited his family and friends in the United States approximately once a month and on public holidays. On his visits to the United States, he usually fixed things around the house and went skeet shooting at a gun club where he maintained his membership. However, he also became friends with two of his co-workers in Canada and went skiing and biking with them in his free time.

Although Mr. T had personal effects and a car in Canada, his car was insured and registered in the United States, and he used his US driver's license. His wife had her own car in Tennessee. Mr. T had medical coverage in Tennessee, but in 2003 he became eligible for Ontario medical coverage. He had bank accounts and significant investments in the United States, including the bank account where he deposited payments for the services he was providing in Canada. However, he also had a Canadian bank account, mortgage, and credit card.

Interestingly, for US tax purposes, Mr. T had filed IRS form 2555 ("Foreign Earned Income") and claimed foreign tax credits on the basis that Canada was his tax home. For Canadian tax purposes, he claimed that he was not a resident of Canada. Unconvinced, the CRA assessed him as a resident of Canada.

If not for the treaty tiebreaker rules, Mr. T would have been considered a resident of both Canada and the United States under the Canada-US treaty because he sojourned in Canada for more than 183 days in each year and he was a US citizen. Therefore, the TCC had to base its decision on the tiebreaker rules in the treaty.

The TCC held that Mr. T was a resident of Canada. It quickly found that the first two tiebreaker tests were not conclusive: Mr. T had a permanent home available to him in both countries, and the centre of his vital interests was unclear. On the basis of Canadian jurisprudence, passages from the OECD commentary, and various other sources, the court held that his habitual abode was in Canada because he "spent a lot more time in Canada, did not work elsewhere during that period, and, in the settled routine of his life, regularly and customarily lived in Canada while periodically returning to the US." Further, the court held that his visits to the United States once a month and on public holidays were insufficient to make the United States his habitual abode. The court adopted the meaning of "habitual abode" articulated by the FCA in *Lingle* (2010 FCA 152): "a stay of some substance in the jurisdiction as a matter of habit . . . where the taxpayer normally lives."

In reaching its decision, the TCC noted that although one's habitual abode is not determined by a simple frequency test (that is, how many days one spends in each country), frequency is not irrelevant. This aspect of the decision stands in contrast to the meaning of "ordinarily inhabited" in the principal-residence context, where infrequent stays can satisfy the test.

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