RESIDENCE

The Canada Revenue Agency Pursues Individuals Who Claim Canadian Residence

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There has been a recent increase in the number of Tax Court of Canada (TCC) appeals by individuals whose claims to Canadian residence have been disallowed by the Canada Revenue Agency (CRA). (This is in contrast to the more common situation of an individual who claims not to be a Canadian resident to avoid Canadian tax.) These individuals have little or no taxable income and claim that they are eligible for cash refunds such as the Child Tax Benefit and the Goods and Services Tax Credit, the latter intended to offset the cost of the GST for lower income families. Both credits are only available to Canadian residents. The first five cases discussed below deal with these claims.

Two were successful appeals by the taxpayer. Mr. Perlman won his appeal, despite being away from Canada for sixteen years. Mrs. Fatima s successful appeal was fully justified. Ms. Manotas and Mr. Vegh each had poor cases that were dismissed, and Ms. Snow had mixed success.

The remaining four cases discuss appeals by individuals who disputed assessments under which the CRA asserted that they were Canadian residents. Three appeals were rejected *Denisov*, *Trieste* and *Mullen*. Mr. Hamel, with facts in his favour, won his appeal.

Several decisions suggested that when an individual gives evidence in a tax appeal, and the evidence is described by the Court as inconsistent, evasive, incomplete or self-serving, the appeal is unlikely to succeed, which is as it should be. Another problem for the taxpayer arises when an appellant has previously filed a Canadian personal tax return for the disputed year as a resident, but subsequently claims non-residence for that year.

Perlman v. R.[1]

Mr. Perlman claimed to be a Canadian resident, eligible for the Child Tax Benefit. This was disputed by the CRA. For technical reasons, not relevant here, the onus at the trial was on the CRA to establish that, on a balance of probabilities, he was not a resident of Canada.

The facts were that Mr. Perlman left Canada in 1994, when he was 22-years old, to marry and to study in Israel, initially for a two-year period. This was extended to 16 years, during which he continued to study in Israel, accompanied by his family. He maintained many ties with Canada, including a basement apartment, where the family kept their personal effects and where they stayed periodically when they returned to Canada.

Other ties included Canadian bank accounts, a Canadian Registered Educational Savings Plan, a significant investment account managed in Canada, credit cards, a safety deposit box, provincial health insurance and his personal library.

Mr. Perlman held only a Canadian passport. Neither he nor his children had Israeli citizenship, nor did he file an Israeli tax return. He consistently filed a Canadian personal tax return, reporting his worldwide income.

The key point discussed by the Court was the 16-year absence from Canada. An important consideration was that there was no date to which the CRA could point during the 16-year period and claim: That was the date he became a non-resident. Neither the Court nor the CRA could locate any precedent that turned on the length of time the taxpayer spent

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[1] 2010 TCC 658.

outside Canada by an individual who had a continued and evidenced intention to return.

Mr. Perlman s appeal was allowed, although the Court described it as a difficult case.

Comment: this decision may set a useful precedent in circumstances where an individual spends many years away from Canada, but has a clear intention to return and has maintained his or her ties with Canada.

In two failed subsequent appeals (discussed below) *Snow* and *Vegh* the appellants attempted to rely on this decision. In each case, the facts were different, the onus was on the appellant to prove the case, and the appellant lost.

Manotas v. R.[2]

Ms. Manotas appealed from a redetermination by the CRA that she was not eligible to receive the Canada Child Tax Benefit (CCTB) and the GST Credit for years 2005 through 2007 and that all of her income earned outside Canada should be excluded from her declared income. The basis for the redetermination was the CRA s conclusion that she was not a resident of Canada in those years, and consequently was ineligible to receive the CCTB and the GST credit.

Ms. Manotas was born in Colombia, came to Canada in 1995 and became a Canadian citizen. She married a Canadian citizen of Italian origin and lived in Canada until 2001, when her husband took a research position in Italy. She moved there with him and their son. They took an 8-year lease on an apartment and, when the lease expired, continued to live there on a monthly tenancy. She became an Italian citizen in 2007. She had a part-time secretarial position in Italy.

Her ties to Canada included using her parents address in Canada as a mailing address, some few possessions left at her parents apartment, student loans, a Canadian credit card, a bank account with a balance of $175, a Canadian driver s license and a Canadian passport. She maintained no social or religious memberships in Canada.

She gave evidence that she had visited Canada four or five times since 2001, with her children, staying for 3-4 weeks at her parents apartment. Her expressed intention to return some day to Canada was described by the Court as both vague and self-serving.

The Court took account of the fact that no information or evidence was provided with respect to Ms. Manotas husband s wishes or intentions about returning to live in Canada.

The Court noted that Ms. Manotas chose to file returns declaring her income in Canada each year and that, on her departure, the Minister expressed the view that she was a factual resident of Canada, but the Court stated that individuals cannot establish Canadian residence by filing a tax return and that the CRA was not bound by a conclusion formed a decade ago.

The Court held that she ceased to be a Canadian resident in 2001 and dismissed the appeal.

Comment: a clear case of a non-resident of Canada unsuccessfully claiming to be a resident so as to claim cash benefits available only to residents.

Fatima v. R.[3]

Mrs. Fatima appealed a determination by the CRA that she was not entitled to the CCTB from March 2006 to June 2008, when she lived in Pakistan. She also appealed a determination with respect to benefits under the *Universal Child Care Benefit Act.* The latter appeal was quashed because the TCC did not have jurisdiction. The question to be decided in this appeal was whether Mrs. Fatima was a Canadian resident from March 2006 to June 2008.

Mrs. Fatima was originally from Pakistan. She married Khalid Mahmood in February 1998. He immigrated to Canada in July 1997, but she stayed in Pakistan until August 2005, to assist with a sick family member. She then moved to Canada. Mr. Mahmood visited Pakistan when he could and they had three children during that period. Mr. Mahmood was unexpectantly offered a job in Pakistan. The family left Canada in February 2006, returning in 2009, and remained in Canada

[2] 2011 TCC 408.

[3] 2012 TCC 49.

since then. The CRA had determined that Mr. Mahmood remained a Canadian resident while in Pakistan, and was consequently subject to tax on his worldwide income, because he maintained significant residential ties with Canada. The Court noted that one would generally expect spouses to reside in the same country for tax purposes unless they lived apart.

The CRA suggested that Mrs. Fatima never became settled in Canada during the six months before the family went to Pakistan.

The Court was satisfied that, based on the evidence as a whole, Mrs. Fatima was a Canadian resident during the period at issue, with a settled life in Canada, which did not change when the family went to Pakistan on a temporary basis.

Mrs. Fatima s appeal was allowed.

Comment: based on many earlier Tax Court appeals, the CRA seems to take the view that, absent special circumstances, a married couple living together have the same tax residence. In this case, they took the (surprising) position that a wife living with her husband, who had himself been determined to be a tax resident in Canada, was herself non-resident.

Furthermore, the CRA normally takes the position that a short-term move to another country, followed by a return to Canada, does not terminate tax residence in Canada. Here they took the contrary position.

Both these rather surprising positions taken by the CRA could be propounded in future tax appeals, to suggest that the CRA s views on these matters have changed.

Clearly, the Court came to the correct conclusion, although one has to wonder why the CRA pursued Mrs. Fatima in these circumstances.

Snow v. R.[4]

Ms. Snow appealed a determination by the CRA for the years 2005 through 2008 that she was not entitled to the CCTB and the GST Credit for these years because she was not a resident of Canada while the family was in New Zealand.

Ms. Snow was born in New Zealand, grew up in Canada and married a Canadian. In 2003, the family left for New Zealand because her husband, Dr. Lewis, was accepted into a master s program at the University of Otago. Three years later, having obtained his master s degree, he pursued doctoral studies at the same university, which took another five years. In 2011, immediately after Dr. Lewis completed his studies, the family returned to Canada; the Court accepted evidence that this had been their intention all along.

The family moved to New Zealand in 2003 only with what they could pack in suitcases. The Court accepted Ms. Snow s testimony that in New Zealand they lived a rather Spartan existence because they did not want to acquire more possessions than necessary in order to simplify the move back to Canada.

The family did not visit Canada during the eight years they were in New Zealand, but her parents visited them often.

The Court accepted the fact that all the family s significant roots were in Canada (friends and family). The Court noted that Ms. Snow did not show that her customary mode of living was not in New Zealand during 2007 and 2008, or that she retained sufficient residential ties in Canada to continue to be a resident .

Ms. Snow relied on the *Perlman* case discussed above. The Court noted that, in *Perlman*, the burden of proof had been reversed and that there are many factual differences between Mr. Perlman s circumstances and Ms. Snow s.

The Court decided that Ms. Snow remained tax resident in Canada only during the 2005 and 2006 base taxation years. She was not resident in Canada thereafter.

Comment: it is surprising that there is no reference in the judgement to Article 4 of the Canada-New Zealand Income Tax Convention, since Ms. Snow appears to have been resident in both countries. One might have expected Ms. Snow to contend that she had a permanent home available to her in both jurisdictions since, prior to departure from Canada, the family lived in the basement of the home belonging to her parents and she

[4] 2012 TCC 78.

could have asserted that it remained available for their use.

The next test in the Convention is where her personal and economic relations are closer. As noted above, the Court accepted the fact that all the family s significant roots were in Canada. Since Ms. Snow worked in New Zealand on a very occasional basis and Dr. Lewis only worked during the last two years of his doctoral program, it would seem that her personal and economic relations may have been closer to Canada.

Had the Convention been considered by the Court, it is possible that the outcome might have been different.

Ms. Snow appeared for herself, without counsel, and may not have been aware of the Convention. The Court did not discuss its possible application, nor did counsel for the CRA.

In the *Perlman* case, neither the CRA nor the Court could find a date when Mr. Perlman ceased to be a Canadian resident. In this case, the Court made an assumption that January 1, 2007, the date when her husband decided to continue his studies in New Zealand, was the date she became a non-resident of Canada.

With respect, the Court s decision is surprising. Even though both Dr. Lewis and Ms. Snow gave evidence (accepted by the Court) that they always planned to return to Canada after Dr. Lewis completed his studies, and in fact they did so, the Court decided that Ms. Snow was a resident of Canada only during 2005 and 2006. It is not clear what happened on January 1, 2007 to turn her into a non-resident of Canada, merely because that was the date the Court assumed that her husband committed to the doctoral program. Other jurisprudence suggests that the taxpayer s intention to return to Canada should have been a very significant factor in determining that her Canadian residence continued.

One could speculate that the decision might have been different had Ms. Snow employed counsel to represent her.

Vegh v. R.[5]

Mr. Vegh appealed from a CRA re-determination that he was not entitled to the CCTB for his two sons for the years 2002 through 2007, because he was not a resident of Canada during that period. He claimed to be a factual resident of Canada.

Mr. Vegh raised various constitutional arguments, which were dismissed. He had human rights complaints pending before both the Ontario Human Rights Tribunal and the Canadian Human Rights Commission, which the TCC had no jurisdiction to deal with.

Mr. Vegh, born in Canada, is a Canadian citizen. In May 2000, he left Canada to teach English in China on an 11-month contract and returned for one three-week vacation. The Court found that, when he left Canada, he had no evident intention of returning. Before leaving for China, he had been living in Canada in his stepfather s home. His business ventures had failed and he had declared bankruptcy. He owned no property in Canada. He kept his Ontario driver s licence and Canadian bank account, with little money in it.

He did not file Canadian tax returns until 2006, when he filed as a resident for 2004 and 2005. The Court made no specific reference to these filings in its decision, but they must have been a factor. He also filed Canadian returns for 2008 and 2009.

He married in 2002, in Canada, a Chinese citizen with no connection to Canada and returned to China with her. He claimed to have been on a Chinese visitor visa from 2003 onwards.

The Court had reservations about Mr. Vegh s evidence concerning his activities in China from 2003 on. There were Court references to dishonesty on some level, serious concerns about his overall credibility on key issues and considerable vagueness and inconsistencies. The Court concluded that it was very cautious about accepting any of his testimony, and that his evidence appears to be a transparent attempt to look more like the taxpayer in *Perlman* (see above).

It was not disputed that Mr. Vegh became a Canadian resident in October 2008, when he

[5] 2012 TCC 95.

returned to Canada once his wife had landed immigrant status. They subsequently returned to China to live.

The Court distinguished this case from *Perlman* on the facts, noting particularly that Mr. Perlman gave credible testimony, kept an apartment and possessions in Canada and always intended to return after completing his education. (The same judge decided both cases.)

The Court s decision was that Mr. Vegh ceased to be a resident of Canada when he first left in 2000 and was a non-resident until October 2008.

The Canada-China Tax Treaty was discussed in the decision. The Court held that it did not apply because of the Court s determination that Mr. Vegh was not a factual resident of Canada during the period in dispute. Furthermore, it was not clear to the Court that Mr. Vegh could be considered a resident of China during the period, as he did not pay tax in China on his worldwide income. Consequently, Article 4(2) of the Treaty, dealing with dual residents, did not apply.

Mr. Vegh s appeal was dismissed.

Comment: it is clear from the judgement that Mr. Vegh had a very poor argument in claiming continued residence in Canada after leaving for China. His evidence obviously was not helpful. The decision seems correct, particularly since the Court did not believe Mr. Vegh s testimony.

Attempting to use the *Perlman* decision, before the same Judge who had decided that case, when the facts were so very different, did not impress the Court.

One puzzling point does arise from this judgement. The CRA has always asserted that a taxpayer cannot be resident nowhere. However, in this case, since Mr. Vegh was held by the Court not to be a resident of Canada, nor a resident of China, where was he resident? This could be an interesting argument to raise in a future tax appeal if the CRA contended that the taxpayer could not be resident nowhere. See, also, the *Mullen* case discussed below, where the Court noted that everyone must have a residence.

Denisov v. R.[6]

Mr. Denisov was assessed by the CRA as a Canadian resident for the years 2001, 2002 and 2003, which he denied.

His appeal dealt with issues other than the question of his residence. They included net worth assessments totalling almost $950,000 in the three-year period, and questions raised about alleged substantial transfers of funds from family members in Russia. These matters are not discussed here.

Mr. Denisov came to Canada in 1995 as a student, became a Canadian citizen in 1999 and had never reported any income in Canada up to the date of the appeal.

The number of days he spent in Canada were estimated by the CRA auditor based on cellular phone records and Mr. Denisov s passport and customs documents. There was a minor dispute about the CRA s figures 234 days in 2001, 103 in 2002 and 196 in 2003. In its judgement, the Court noted that it was unnecessary to determine whether he spent sufficient days in Canada to trigger the deeming provision in paragraph 250(1)(*a*) of the Income Tax Act[7] (which applies at 183 days).

In the summer of 2000, Mr. Denisov returned to Moscow with his Canadian girl-friend. There was some dispute about the date in 2001 on which he returned to Canada.

Mr. Denisov moved around a great deal during the period under appeal. Some of the specific dates that the CRA auditor estimated were disputed by Mr. Denisov.

The Court noted that the appellant admits to being a resident of Canada during the few years immediately preceding the three taxation years at issue. The Court then asked whether the circumstances were such that he ceased to be a resident of Canada for the three following years, concluding that they were not.

The facts indicating Canadian residence were very compelling:

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[6] 2010 TCC 101.

[7] R.S.C. 1985, c. 1 (5th Supplement), as amended, hereinafter referred to as the Act. Unless otherwise stated, statutory references in this article are to the Act.

The first time Mr. Denisov met the CRA auditor on July 19, 2004, he told the auditor he was a Canadian citizen and that he resided or lived in Canada.

He had a Canadian cell phone, one Canadian credit card in 2001 and 2002 and four such cards in 2003, and he had Canadian bank accounts.

He had a Canadian passport and social insurance number.

He kept personal belongings and personal property in Canada.

He had a Quebec driver s licence and Quebec medical insurance card. The latter was cancelled on January 1, 2002.

In 1995, he incorporated a Canadian federal corporation and invested money in it. He left the corporation in 1998. He incorporated another Canadian corporation in 1999, which was not very active. It was in the business of importing and exporting textiles. The corporation was struck off the register in 2008.

He purchased a condominium apartment in Verdun (Quebec) in November 2001. The deed identified him as a businessman living in Westmount, a suburb of Montreal. He borrowed $59,000 from a Canadian lender. He moved into the condo in August 2002.

He attempted to obtain credit from two Canadian financial institutions in 2003. The two applications were accompanied by falsified CRA Notices of Assessment indicating his annual income as over $100,000.

When his wife visited Canada, he gave her money, a credit card and a cell phone and purchased a car for her use.

During the period, Mr. Denisov claimed connections with Russia:

He was a citizen of the Russian Federation with a Russian passport and driver s licence.

He owned an apartment in Moscow and paid the utilities for it from 2000 to 2009.

He owned a Russian motor vehicle and cell phone.

He had been admitted to the University of Moscow as a student in September 2001.

He worked for a furniture company in Moscow as marketing director from February 2, 2001 to March 31, 2004. His salary for the entire period was 90,385 roubles (less than Cdn$10,000), from which income tax was deducted. The Court noted that this indicates a very small amount of work for such a long period.

Most of the time that he did not spend in Canada during the three-year period was spent in Russia.

His wife was a resident of Russia, but travelled to Canada on a visitor s visa to give birth in Canada to their child.

He provided copies of letters sent to the Russian authorities requesting confirmation of his status as a resident of Russia for tax purposes for the three years. No such confirmation was obtained. There was no evidence as to whether he filed tax returns in Russia in the three-year period.

The Court held that Mr. Denisov was a resident of Canada during the three years at issue, noting that he admitted to being a resident of Canada during the four years immediately preceding those years. In the Court s opinion, he never severed his residential ties with Canada when he left in 2000, so he continued to be a Canadian resident for the three years 2001-2003.

As regards his claim to being also a Russian resident during the period, the Court held that he had not established that he was subject to a comprehensive tax liability imposed by Russia and that consequently, he was not a resident of Russia for the purposes of Article 4 of the Canada-Russia tax treaty.

The consequence of the Court s ruling was that the Canada-Russia tax treaty had no application, because, as asserted by the CRA, he was not a dual resident.

Mr. Denisov s appeal was dismissed for 2002 and 2003. For 2001, there was an agreed adjustment in respect of the calculation of the

net worth assessment, but in all other respects the assessment was upheld.

Comment: it is interesting to note that Mr. Denisov had never reported any income to the Canadian authorities up to the date of the appeal, but that he had managed to produce two (falsified) CRA Notices of Assessment for potential lenders.

In recent years, there has been increased emphasis by the CRA on asserting that an appellant is not a dual resident, and consequently, that the relevant tax treaty has no application. This is likely to be the CRA s position where a taxpayer claims to be resident in some country other than Canada, but has little or no proof of such residence. If the individual has not filed tax returns in the other country, reporting his or her worldwide income, the CRA is very likely to make this assertion.

The tiebreaker rules in a tax treaty do not become relevant until dual residence has been established in Canada and the other country.

Hamel v. R.[8]

Mr. Hamel was assessed by the CRA on the assumption that he was a resident of Canada during 2007 and subsequent years.

He left Canada in January 2007 to work in Qatar under an employment contract with a U.S. company. His work permit was valid until August 2010, after which he had to leave Qatar. His Canadian driver s licence was suspended many months before he left Canada. He did not attempt to renew it, but obtained one in Qatar.

Mr. Hamel kept a bank account, a credit card and investments in Canada. He gave up his health card in 2008. The Court noted that he disposed of all his own property before leaving. His two adult sons remained in Canada, one with a serious health problem. He divorced his wife (who remained in Canada) in early 2008. He gave evidence that he had had a very long stay earlier in China and that he had always dreamed of leaving Canada for good, but his son s health problems caused him to hesitate.

He returned to Canada from time to time while living in Qatar to see family and friends. He stayed in a hotel and rented a car.

The CRA s main argument was that every person must have a residence, that Mr. Hamel had not resided in Qatar, so he must have remained resident in Canada. The Court disagreed and stated that Mr. Hamel was a resident of Qatar.

The Court, in a lengthy judgement, referred to 13 earlier cases dealing with Canadian residence and to CRA *Interpretation Bulletin* IT-221R3, Determination of an Individual s Residence Status, all of which supported the Court s decision.

Having determined that Mr. Hamel had shown his intention to sever ties with Canada in mid-January 2007, the Court held that, on the preponderance of the evidence, he ceased to be a Canadian resident as of January 13, 2007, and allowed the appeal.

Comment: the key point here was that the taxpayer, when he gave evidence, satisfied the Court of his intention to leave Canada permanently.

Trieste v. R.[9]

Mr. Trieste was a U.S. citizen and a deemed resident of Canada under paragraph 250(1)(*a*) of the Act because he stayed, working in Canada, for more than 183 days in each of the years 2000 through 2003. However, under section 250(5) of the Act, he would be deemed not to be a Canadian resident if he were resident in the U.S. under the tie-breaker rules in Article IV of the Canada-U.S. tax treaty.

The CRA reassessed Mr. Trieste for the four years, on the basis that he was a resident of Canada under the Convention.

Both parties agreed that Mr. Trieste had a permanent home available to him in both the U.S. and Canada.

The second test under Article IV(a) of the treaty was where his personal and economic relations were closer (centre of vital interests). After reviewing the evidence and the submissions of counsel for both parties, taking

[8] 2011 TCC 357.

[9] 2012 TCC 91.

into account both jurisprudence and the Commentary to the OECD Model Tax Convention, the Court held that it was not possible to determine the country with which the appellant had closer personal and economic relations .

The Court s next step was to ascertain the country in which Mr. Trieste had an habitual abode (Article IV(b) of the treaty).

Mr. Trieste asserted that he had an habitual abode in both counties. If the Court had so decided, the next test would have been citizenship, and Mr. Trieste was a U.S. citizen (and not a Canadian citizen), so he would have been deemed a U.S. resident for tax purposes. The CRA contended that his habitual abode was in Canada.

The Court referred to the *Lingle* decision of the Federal Court of Appeal,[10] quoting extensively from both the TCC and the FCA judgements, and also referred again to the Commentary to the OECD Model Tax Convention. In particular, the judgement mentioned Paragraph 19 of the Commentary, which specifies: The comparison must cover a sufficient length of time for it to be possible to determine whether the *residence* in each of the two states is *habitual* (emphasis added by the Court). The Court also noted a possible ambiguity, which was clarified by the French text.

After extensive discussion of the term habitual abode, dictionary definitions and reference to Article 31(1) of the Vienna Convention on the Law of Treaties, the Court noted that Mr. Trieste spent only 69 days out of 623 days in the relevant period at his U.S. home and that the agreed statement of facts explicitly stated that Mr. Trieste normally lived in Canada.

The Court decided that Mr. Trieste s habitual abode was in Canada and was not in the U.S. Accordingly, he was held to be a resident of Canada during the period under appeal, and thus his appeal was dismissed.

The decision was appealed to the Federal Court of Appeal, which unanimously dismissed the appeal, holding that the Tax Court judge made no error of law, nor any palpable and overriding error.

Comment: the TCC judgement included a detailed and extensive discussion of the term habitual abode, which should be consulted by anyone relying on this term to justify his or her residence, particularly in view of the decision of the FCA.

Mullen v. R.[11]

There were two separate appeals, heard on common evidence.

The appeal for 1997 related to the taxability of stock options; the parties agreed that Mr. Mullen was not resident in Canada in that year. The late filing penalties imposed for 1997 were not appealed. That appeal is not discussed here.

The appeal for the years 1999 and 2001 related only to whether Mr. Mullen was ordinarily resident in Canada in those years.

Mr. Mullen filed his 1999 Canadian personal tax return as a Canadian resident, but later claimed that the return was incorrect.

In earlier years (from 1994), Mr. Mullen had been employed in China. In 1997, while working in China, he was offered a position in the U.S. by his employer, which he refused. His employment in China was terminated effective April 1998. He left China on March 2, 1998, when his entrance visa to China expired. He returned to Canada with his spouse. He still had a Foreign Residence Permit valid until November 30, 1999.

Mr. Mullen gave evidence that, before he left China, he negotiated an arrangement with the hotel in China where he had been living with his spouse in a furnished suite. The hotel would make a small suite available to him at no cost until April 1999. He gave evidence that he stored personal items at the hotel because he intended to continue his residency in China. He shipped his antique furniture to Canada. The Court noted that his evidence was that the number of boxes that he said he stored with the hotel increased from 3-4 to 5-6.

On their return to Canada, the Mullens moved to their former cottage, which had been occupied by their two adult children. Mr. Mullen purchased a home for each child and

[10] *Lingle v. R.*, FCA 152.

[11] 2012 TCC 139.

took a non-interest bearing charge on the properties. He also purchased two vehicles. He then sold the cottage to his spouse for $2 and she transferred it to their children, taking back a demand mortgage, on which no payments were ever made. He transferred the two vehicles to his children via a numbered company.

He obtained an entrance visa to China which expired on June 27, 1999, and he began an unsuccessful job search there and (apparently) elsewhere in the region.

In May 1999, he purchased a furnished condominium in Thailand. His evidence was that his spouse joined him in Thailand in September 1999 and they were resident there until the end of 2001. However, for part of that period, the condominium was rented out to vacationers. He owned the condominium until 2006.

In June 2001, Mr. Mullen purchased a condominium in Costa Rica and he and his spouse obtained temporary residence status there. They returned to Canada in January 2002 to live.

In the course of its analysis, the Court stated: For the purposes of income tax legislation, it must be assumed that every person has at all times a residence. This statement is discussed below.

The Court noted that the Appellant was jet setting to avoid paying taxes in Canada, but noted some factors supporting his position, such as certain ties with Thailand a hospital membership card, a newspaper subscription and a Shopper Card. However, the Appellant s ties with Canada were extensive, with many examples included in the analysis.

Mr. Mullen s passport showed admission to Thailand on May 15, 1999 as a visitor who could remain for only 30 days. The purchase agreement for the condominium in Thailand indicated that he was resident in Canada.

After detailed discussion of Mr. Mullen s whereabouts during the periods under appeal, the Court noted that his evidence was not supported by any documentary evidence and that the cross-examination suggested that he was in Canada longer than he had indicated in his evidence. Furthermore, the Appellant s testimony was self-serving and was not corroborated. Another adverse factor was: The Appellant was not forthright or cooperative with the [CRA] auditor and I have drawn a negative inference from his actions.

The Court concluded that Mr. Mullen was not resident in China in 1999 and that there was no evidence that he had established ties in Thailand beyond those necessary for his lifestyle. His ties with Canada were extensive and the Court believed that he never severed those ties, nor did he actually intend to sever them.

The decision of the Court was that Mr. Mullen ordinarily resided in Canada in 1999 and 2001. The Court concluded that he made a misrepresentation in his 1999 tax return by failing to report any of his gains from the exercise of his stock options, even gains from options granted while he was employed and resident in Canada, totalling over $850,000. This misrepresentation was held to be attributable to wilful default, so the CRA had met the onus permitting reassessment beyond the normal reassessment period.

As regards penalties, the Court held that the CRA had satisfied the onus to show, on a balance of probabilities, that Mr. Mullen had knowingly made an omission when he filed his 1999 tax return, and so he was liable for a gross negligence penalty of 50% of the underpaid tax. He did not provide a due diligence defence for his failure to file his 2001 tax return.

The Court noted that neither counsel made a treaty argument before me when dismissing the appeal.

The decision has been appealed by the taxpayer to the FCA.

Comment: it seems that the Court was influenced by the quality of Mr. Mullen s evidence and by his dealings with the CRA auditor. The fact that he filed a tax return for 1999 as a Canadian resident was presumably also a factor.

It is not clear why no treaty arguments were raised by counsel. I contacted counsel for Mr. Mullen to ask him about this point. He replied that we can t comment on strategy until the dust settles, and even then, the

privilege belongs to the client. The reader must therefore draw his or her own conclusions on this point.

The gross negligence penalty was upheld, as explained above, not because Mr. Mullen claimed unsuccessfully to be a non-resident, but because he did not report his taxable stock option gains in his tax return for 1999.

The Court s statement that everyone must always have a residence was noted earlier. It is interesting to contrast this with the decision in the *Vegh* case above, since Mr. Vegh appears to have been resident nowhere in the Court s opinion.

Conclusion

The CRA has continued to disallow claims of Canadian residence by individuals with little or no taxable income, who want to take advantage of cash refunds available to low-income families (notably the Child Tax Benefit and the Goods and Services Tax Credit). The CRA has successfully defended its position in the courts in most of these appeals.

Ironically, the CRA s position in these appeals is the direct opposite of its position when a taxpayer has substantial income from sources outside Canada, and the CRA seeks to tax that income by treating the taxpayer as being resident in Canada.

We shall continue to see more of these cases, with the CRA on either side of the residence fence depending on the taxpayer s facts.