Docket: 2008-2729(IT)I

BETWEEN:

PAUL SEARS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 5, 2009, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:	Roger Haineault
Counsel for the Respondent:	Jill Chisholm

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2006 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 20th day of July 2009.

"François Angers"

Angers J.

Citation: 2009 TCC 344
Date: 20090720
Docket: 2008-2729(IT)I

BETWEEN:

PAUL SEARS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] The appellant's claim for moving expenses for his 2006 taxation year was disallowed by the Minister of National Revenue (the Minister) by Notice of Reassessment dated September 4, 2007 and Notice of Confirmation dated May 28, 2008. The taxpayer is appealing to this Court.

[2] On or about November 1, 2006, the appellant, through his union, secured employment in Alberta. A pipefitter and welder by trade, he had to undergo tests for a period of one week before commencing the new job.

[3] The appellant resided with his wife and children at 61 Waynes Way in St. John, New Brunswick. His family never moved to Alberta. The house in St. John was never sold and, at the time of the hearing, the appellant had returned from Alberta and had been residing at 61 Wayne Way in St. John since February 2009.

[4] The moving expenses claimed by the appellant are for the journey to Alberta begun on November 8, 2006. The appellant did not have any receipts concerning these expenses, but has provided a summary which shows gasoline expenses that he guessed to have been between $800 and $900, meal expenses that he estimated at $30 a day for five days and expenses for four nights' accommodation at about $100 per night, plus an additional five nights for the testing period.

[5] The appellant took with him what he described as being everything that you can fit in a car: clothes, tools, a microwave oven, a small fridge and a television. Once the testing was completed, he stayed at a camp provided by his employer. The camp was described by the appellant as something similar to a motel. Although each employee had his own room, the bathroom was shared with another employee. An individual could have a microwave oven in his room, but a kitchen was available for the entire group of employees, and there was a games room, a lounge, a bar and a big television room. The appellant likened the camp to a small village.

[6] The appellant also testified that on every second weekend, when he had time off, he stayed with relatives in their apartment on 82 Street in Edmonton. He did not pay rent when there. On the T-1M(06) form attached to his 2006 tax return, the appellant gave these relatives' address as his new home address in Edmonton, Alberta.

[7] The appellant had been working at his new job for seven months when he returned to St. John on a leave of absence. During his stay in St. John, he was employed by two different employers and earned approximately $22,000. He termed his stay a working vacation. He returned to Alberta in the fall of 2007 and stayed at his employer's camp. He moved out of the camp in January 2008 when he rented an apartment. Although his wife visited him on occasion, she never went to live in Alberta, except for a three-month stay in the summer of 2008. The appellant returned to St. John, New Brunswick, in February 2009 and has been there ever since, at the same address as before.

[8] While in Alberta, the appellant did not get an Alberta driver's licence and did not apply for medical coverage from Alberta. He did buy a motor vehicle while there that was licensed and insured in Alberta. He did not open a bank account nor did he have a mailing address in that province. His tax returns for 2006, 2007 and 2008 were all filed by him as a New Brunswick resident and he used his St. John, N.B., address. All the T4s received from the appellant's various employers for the 2006, 2007 and 2008 taxation years indicated his St. John, N.B., address.

[9] The issue to be decided is whether the appellant is entitled to claim his moving expenses for the 2006 taxation year. Put differently, the issue could be stated as being whether the appellant was ordinarily resident in St. John, N.B., during all of the 2006 taxation year.

[10] Moving expenses may be deducted by a taxpayer if they are incurred in respect of an eligible relocation. Subsection 62(1) of the *Income Tax Act* (the "*Act*")

sets out conditions governing the deduction of this expense, and the phrase "eligible relocation" is defined in subsection 248(1) of the *Act*. Subsection 62(1) and the definition of “eligible relocation” read as follows:

> **62(1) Moving expenses** — There may be deducted in computing a taxpayer's income for a taxation year amounts paid by the taxpayer as or on account of moving expenses incurred in respect of an eligible relocation, to the extent that
>
> (*a*) they were not paid on the taxpayer's behalf in respect of, in the course of or because of, the taxpayer's office or employment;
> (*b*) they were not deductible because of this section in computing the taxpayer's income for the preceding taxation year;
> (*c*) the total of those amounts does not exceed
>
> (i) in any case described in subparagraph (*a*)(i) of the definition "eligible relocation" in subsection 248(1), the total of all amounts, each of which is an amount included in computing the taxpayer's income for the taxation year from the taxpayer's employment at a new work location or from carrying on the business at the new work location, or because of subparagraph 56(1)(*r*)(v) in respect of the taxpayer's employment at the new work location, and
> (ii) in any case described in subparagraph (*a*)(ii) of the definition "eligible relocation" in subsection 248(1), the total of amounts included in computing the taxpayer's income for the year because of paragraphs 56(1)(*n*) and (*o*); and
> (*d*) all reimbursements and allowances received by the taxpayer in respect of those expenses are included in computing the taxpayer's income.
>
> **248(1)** "Eligible relocation" means a relocation of a taxpayer where
>
> (*a*) the relocation occurs to enable the taxpayer
> (i) to carry on a business or to be employed at a location in Canada (in section 62 and this subsection referred to as "the new work location"), or
> (ii) to be a student in full-time attendance enrolled in a program at a post-secondary level at a location of a university, college or other educational institution (in section 62 and in this subsection referred to as "the new work location"),
> (*b*) both the residence at which the taxpayer ordinarily resided before the relocation (in section 62 and this subsection referred to as "the old residence") and the residence at which the taxpayer ordinarily resided after the relocation (in section 62 and this subsection referred to as "the new residence") are in Canada, and
> (*c*) the distance between the old residence and the new work location is not less than 40 kilometres greater than the distance between the new residence and the new work location

except that, in applying subsections 6(19) to (23) and section 62 in respect of a relocation of a taxpayer who is absent from but resident in Canada, this definition shall be read with reference to the words "in Canada" in subparagraph (a)(i), and without reference to paragraph (*b*).

[11] "Moving expenses" is defined in subsection 62(3) of the *Act* as including the following:

62(3) Definition of "moving expenses" — In subsection (1), "moving expenses" includes any expense incurred as or on account of

(*a*) travel costs (including a reasonable amount expended for meals and lodging), in the course of moving the taxpayer and members of the taxpayer's household from the old residence to the new residence,
(*b*) the cost to the taxpayer of transporting or storing household effects in the course of moving from the old residence to the new residence,
(*c*) the cost to the taxpayer of meals and lodging near the old residence or the new residence for the taxpayer and members of the taxpayer's household for a period not exceeding 15 days,
(*d*) the cost to the taxpayer of cancelling the lease by virtue of which the taxpayer was the lessee of the old residence,
(*e*) the taxpayer's selling costs in respect of the sale of the old residence,
(*f*) where the old residence is sold by the taxpayer or the taxpayer's spouse or common-law partner as a result of the move, the cost to the taxpayer of legal services in respect of the purchase of the new residence and of any tax, fee or duty (other than any goods and services tax or value-added tax) imposed on the transfer or registration of title to the new residence,
(*g*) interest, property taxes, insurance premiums and the cost of heating and utilities in respect of the old residence, to the extent of the lesser of $5,000 and the total of such expenses of the taxpayer for the period
    (i) thoughout which the old residence is neither ordinarily occupied by the taxpayer or by any other person who ordinarily resided with the taxpayer at the old residence immediately before the move nor rented by the taxpayer to any other person, and
    (ii) in which reasonable efforts are made to sell the old residence, and
(*h*) the cost of revising legal documents to reflect the address of the taxpayer's new residence, of replacing drivers' licenses and non-commercial vehicle permits (excluding any cost for vehicle insurance) and of connecting or disconnecting utilities,

but, for greater certainty, does not include costs (other than costs referred to in paragraph (*f*)) incurred by the taxpayer in respect of the acquisition of the new residence.

[12] Both parties have submitted lists of authorities that provide a review of relevant factors that have been considered by the courts over the years with regard to the concept of "ordinarily resident", and they have presented submissions as to how each of these factors supports their respective positions. The fact remains, though, that each case must be considered on its own facts, by weighing and balancing all of the relevant factors. From the various cases, it appears that the concept of "ordinarily resident" requires a consideration of whether the taxpayer has a settled, ordinary routine of life in the particular location (see *Calvano v. The Queen*, 2004 TCC 227). I have extracted from those various cases the relevant factors that were considered, none of which is necessarily determinative in itself:

- duration of stay (depending on whether ties with the old location (residence) were severed);
- accommodation;
- community connections maintained or severed;
- social and economic ties;
- transfer of mail;
- driver's license;
- health cards;
- vehicle registration;
- taxpayer's family;
- were significant attachments left behind?
- were the taxpayer's significant belongings moved?
- where the taxpayer ate, slept and lived during the time in question.

[13] That being said, I also find it helpful to cite some passages from certain cases in which the deductibility of moving expenses was the issue. In *Rennie v. M.N.R.*, 1989 CarswellNat 438, [1990] 1 C.T.C. 2141, Christie A.C.J. (as he then was) focussed on the phrase "ordinarily resided" and said at paragraphs 11 to 13:

> 11 I do not believe that the concept of a person being capable of having more than one residence can be applied in the interpretation of the provisions of section 62 already cited in the manner propounded by the appellant. Those provisions relate to each other and constitute a framework that permits persons within it to deduct moving expenses. It is not the word "residence" that governs, but rather the phrase "ordinarily resided". These are the factors that give rise to deductibility: the commencement of employment at a place in Canada that precipitates a move by the taxpayer from the place in Canada where he ordinarily resided before the move to a place in Canada where he ordinarily resided after the move. The requirement regarding the distance of 40 or more kilometres must be met. Also, subject to specified qualifications, the taxpayer may deduct amounts paid by him as moving

expenses incurred in the course of making the move in computing his income for the year in which he made the move or for the immediately following taxation year.

12 In *Thomson v. Minister of National Revenue*, [1964] S.C.R. 209, [1946] C.T.C. 51, 2 DTC 812 (S.C.C.), the meaning of the words "ordinarily resident" in paragraph 9(a) of the *Income War Tax Act* was considered. Mr. Justice Estey said at page 70 (D.T.C. 813):

> A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives.

Mr. Justice Rand said at page 64 (D.T.C. 815):

> 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.

In 1984 the place where, in the settled routine of the appellant's life, he normally lived was Victoria. That was his residence in the course of his customary mode of life at that time. He had moved from Montreal three years earlier and apart from a visit or visits there — the number or duration of which is not in evidence — his home was in Edmonton or Victoria. There is no evidence that the appellant was in Montreal at all in 1984. All of this clearly establishes that in that year the appellant was ordinarily resident in Victoria.

13 <u>While there is judicial authority for the proposition that for some purposes a person may have more than one residence (although only one domicile), I know of no authority that holds that a person can be ordinarily resident in two places at the same time</u>. Nor is there anything in the wording of section 62 that suggests that possibility for the purpose of deducting moving expenses. Indeed what is essentially envisaged by the section is a taxpayer commencing to be employed and by reason thereof <u>moving a prescribed minimum distance with the consequent termination of his then place of ordinary residence and the creation of a new and different place of ordinary residence</u>. This is not what transpired regarding the appellant in 1984.

[Emphasis added.]

[14] In contrast, in *Cavalier v. R.*, [2002] 1 C.TC. 2001, Judge Bowie allowed the appellant to deduct moving expenses in respect of a move to and from his temporary residence for the purposes of taking up employment on a four-month contract. After

citing *Rennie* and another decision of this Court, *Hippola v. The Queen*, [2002] 1 C.T.C. 2156, he concluded as follows at paragraph 22:

> I conclude from these cases that in order to be "ordinarily resident" a taxpayer need not have formed the intention to remain permanently, or for any particular length of time, at the new place of residence. Nor need he move all his household effects, or be accompanied by the members of his immediate family.

[15] In *Calvano v. Canada*, [2003] T.C.J. No. 785 (QL), Justice Miller reviewed some of the authorities in paragraphs 21, 22, 23 and 24 before arriving at his conclusion at paragraph 25, as follows:

> 21 The starting point on any discussion of "ordinarily resided" is the Supreme Court of Canada case of *Thomson v. M.N.R.* and particularly, Justice Estey's following comment, which can be found at pages 231-2:
>
> > A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference.
>
> 22 It is clear from a review of the cases that Justice Estey was absolutely right, that each case can only be determined after a review of all the relevant factors ...
>
> 23 . . . Whether a residence is intended to be temporary or permanent does not determine whether the residence constitutes "ordinarily resident." Simply because someone chooses to live somewhere temporarily, it does not automatically follow that they cannot be ordinarily resident there. Put in positive terms, one can be ordinarily resident on a temporary basis. The concept of "ordinarily resident" has more to do with the settled, ordinary routine of life than the permanence of the arrangement.
>
> 24 I agree with Justice Bowie's conclusion in the case of *Cavalier v. Canada* where he stated at paragraph 22:
>
> > I conclude from these cases that in order to be "ordinarily resident" a taxpayer need not have formed the intention to remain permanently, or for any particular length of time, at the new place of residence. ...

> Having said that, the length of stay in Coquitlam is one of a number of factors to consider in determining whether Mr. Calvano was ordinarily resident in Coquitlam.
>
> 25 The other relevant factors I rely upon in determining that he was ordinarily resident in Coquitlam are as follows:
>
> > (i) First, both Mr. Calvano and his wife and his son moved into this residence, leaving behind significant attachments in Ontario, such as school and hockey for the son, and close family ties for Mrs. Calvano.
> > (ii) All belongings were moved, at Army and Navy's expense, to this new residence. Nothing of significance was put in storage.
> > (iii) Driver's licence, health care coverage and bank accounts were all moved to British Columbia while in this residence.
> > (iv) There had clearly been a change of use in the Brampton property from one of principal residence to one of an income-producing property in March 1995 and it operated as such, yielding deductible losses in 1995 and 1996.
> > (v) For 19 months, this is where Mr. Calvano and his family ate, slept and lived, with only an occasional trip to Ontario.
> > (vi) During these 19 months, the Calvanos started and established a social life.
> > (vii) The property itself was chosen to accommodate the family's specific needs.
>
> These factors suggest to me this was considerably more than a transitory lay-by. This was, for well over a year, the settled routine of daily life for the Calvanos.

[16] Although Justice Miller said that one can ordinarily reside in a place on a temporary basis, he also stated that the more important question the Court must determine is whether the taxpayer had a "settled, ordinary routine of life" at the residence. In deciding that the appellant in that case ordinarily resided in Coquitlam, he took into account the various factors referred to above.

[17] In *MacDonald v. Canada*, 2007 TCC 250, Justice Webb of this Court disallowed the appellant's claim for moving expenses. The appellant was a pipefitter who had deducted his moving expenses in respect of his move from Nova Scotia to Alberta for the purpose of securing temporary employment. Justice Webb cited the *Calvano* decision, *supra*, and said at paragraph 11:

> Mr. MacDonald has failed to establish that he changed the place where he ordinarily resided in 2004 from Nova Scotia to Alberta. He maintained a Nova Scotia driver's licence in 2004. He continued to be covered by the provincial health insurance plan of Nova Scotia. He did not take all of his belongings with him to Alberta (he only took what he could take in his truck). His common-law spouse remained in Nova Scotia. He had and maintained three houses in Nova Scotia. He did not purchase any

> property in Alberta. He did not relocate his bank accounts to Alberta. He did not change his mailing address to Alberta.

[18] Justice Webb came to a different conclusion in *Persaud v. Canada*, [2007] T.C.J. No. 305 (QL), a case in which he considered that the amount of time spent in the new location was a factor that should be taken into account in determining whether or not an individual is ordinarily resident in the new location, as the longer the person is in the new location, the more likely it is that his or her settled, ordinary routine of life is in the new location.

[19] More recently, in *Sampson v. Canada*, [2009] T.C.J. No. 158 (QL), Justice Campbell considered the appeal of a pipe welder who kept a home in Nova Scotia but travelled on four different occasions during the year at issue in order to obtain work. She found that the appellant continued to ordinarily reside in Nova Scotia throughout the year. As for the test to be applied, she had this to say at paragraph 10.

> Each case must turn on its own set of facts viewed as a whole. What may be relevant in one case, may not be in another. Duration of stay, accommodation, community connections maintained or severed, transfers of mail, licenses, health cards and vehicle registrations are just some of the factors which must be analyzed and considered. Of course, these factors assist the Court in determining the more subjective element of intention of the taxpayer as to whether the move encompasses the taxpayer settling into the trappings of a routine, day-to-day lifestyle in the new location. In light of this, there must be a finding that the residence of the taxpayer has, in fact, changed to be an eligible relocation as defined in subsection 248(1); otherwise, the taxpayer will not be able to bring himself within the ambit of the relevant provisions to make a claim for these moving expenses.

[20] Further on, she said that she believed that Parliament, in enacting section 62, had in mind relocations that have an element of permanency attached to them, as stated in the *Thomson* decision, *supra*. She went on to add, at paragraphs 16 and 17:

> This is apparent, when one looks at the types of expenses contemplated by this very provision including the transportation of household items, cost to cancel a lease or to sell a residence, legal expenses to purchase a new residence at the new location and cost to change resident addresses.
>
> In addition, it talks of meal costs up to a 15-day transitory period. If Parliament had intended that a taxpayer get the expenses upon moving from A to B with little else, I believe this provision would contain an entirely different wording and there would be no need for it to contain the words "ordinarily resident".

[21] Bearing in mind all these factors, I do not find that, in the present case, there is sufficient evidence to tip the scales in favour of the appellant. Although the length of his stay in Alberta may be in the appellant's favour, I do not find that his attachments to the old location were severed. The appellant continued throughout to use his St. John, New Brunswick, address as his mailing address. He filed his tax returns in New Brunswick and all his T4s showed the St. John, N.B., address. The address used in the new location was in fact the address of relatives of his that he visited every second weekend and not the actual address of a new residence.

[22] The appellant also kept his New Brunswick health card and his New Brunswick driver's license and vehicle registration, except for the vehicle purchased in Alberta. As for accommodation, the appellant was living in a camp provided for by his employer, which arrangement was contingent upon the appellant staying in his employment with that employer. When the appellant left New Brunswick, he took with him no more than the personal belongings that he could fit into his car, and so it is fair to say that most of his significant belongings were left behind.

[23] The appellant in this case did eat, sleep and live in Alberta during this first stay, but that factor alone is insufficient to allow one to conclude that the appellant was ordinarily resident in the new location. The other factors are necessary for a determination that the appellant acquired a settled, ordinary routine of life in the new location. In *Thomson*, *supra*, the Supreme Court of Canada, Rand J. in the first quotation below, gave "ordinarily resident" the following interpretation:

> 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.

In the same decision, Kellock J. wrote:

> "Ordinarily" is defined as "in conformity with rule or established custom or practice", "as a matter of regular practice or occurrence", "in the ordinary or usual course of events", "usually", "commonly", "as is normal or usual".

[24] The interpretation given by Justice Miller of this Court, in *Calvano, supra*, is in line with the above interpretation. The Court must determine whether the taxpayer has a settled, ordinary routine of life in the new location. That cannot be the case

when the taxpayer does not sever social and economic ties with the old location and leave behind all the other aspects of a normal and customary mode of life. In the present case, the evidence leads me to conclude that the appellant's mode of life in the new location constituted occasional or casual residence inconsistent with what is intended and required in order to qualify for a moving expenses deduction under section 62 of the *Act*.

[25] The appeal is dismissed.

Signed at Edmundston, New Brunswick, this 20th day of July 2009.

"François Angers"

Angers J.

CITATION:	2009 TCC 344
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