Date: 20080915

Docket: A-503-07

Citation: 2008 FCA 260

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

HUGH WILLIAM PERRY, IN HIS CAPACITY OF TRUSTEE OF THE 2005 ROBERT JULIEN FAMILY DELAWARE DYNASTY TRUST

Appellant

and

CANADA (THE MINISTER OF NATIONAL REVENUE)
and
CANADA REVENUE AGENCY

Respondents

Heard at Montréal, Quebec, on September 10, 2008.

Judgment delivered at Ottawa, Ontario, on September 15, 2008.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Gibson J. of the Federal Court (the Applications Judge), dismissing an application for judicial review and relief in the nature of *mandamus* (the application) to have the residence of the 2005 Robert Julien Family Delaware Dynasty Trust (the Trust) determined pursuant to paragraph 4 of Article IV of the *Convention Between Canada and the United States of America With Respect to Taxes on Income and on Capital* signed at Washington on September 26, 1980, as amended (the Convention).

[2] The Applications Judge dismissed the application on grounds that it was time-barred given that it had been brought 18 months after the Canadian Revenue Agency's (the CRA's) first refusal to settle the residence of the Trust in accordance with Article IV of the Convention, and that it was premature as the provision of the Canadian *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, (the ITA), which would deem the Trust to be a resident of Canada, had yet to be (and has still not been) enacted.

[3] In support of the appeal, Hugh William Perry, in his capacity as trustee (the appellant), contends that no time limit applies in this case since what is alleged is a continuous failure to perform a public duty. Furthermore, the Applications Judge erred in holding that the request for determination of residency pursuant to the Convention was solely based on the proposed amendment to section 94 of the ITA and was therefore premature. According to the appellant, the request also contemplates dual residency under the current section 94 of the ITA.

[4] It is only necessary to address the second argument raised by the appellant in order to dispose of the appeal. The salient facts against which to assess this argument are as follows.

[5] The existing section 94 of the ITA sets out rules that deem a non-resident trust to be a Canadian resident and that deem its taxable income to be the total of its Canadian source income or foreign accrual property. In particular, the section applies if a non-resident trust has acquired property from a person resident in Canada and where the non-resident trust has one or more beneficiaries (referred to as "persons beneficially interested in the Trust" that are resident in

Canada). Notably, a person who might become beneficially interested at a future time as a result of the exercise of any discretion under the Trust is deemed to be a person beneficially interested. Subparagraph 248(25)(b)(ii) provides:

(25) For the purposes of this Act, (*b*) … a particular person or partnership is deemed to be beneficially interested in a particular trust at a particular time where ii) because of the terms or conditions of the particular trust or any arrangement in respect of the particular trust at the particular time, the particular person or partnership might, because of the exercise of any discretion by any person or partnership, become beneficially interested in the particular trust at the particular time or at a later time,	(25) Les règles suivantes s'appliquent dans le cadre de la présente loi : b) […] une personne ou société de personnes donnée est réputée avoir un droit de bénéficiaire dans une fiducie à un moment donné dans le cas où, à la fois : (ii) en raison des modalités de la fiducie ou de tout arrangement la concernant à ce moment, la personne ou société de personnes donnée pourrait acquérir un droit de bénéficiaire dans la fiducie à ce moment ou ultérieurement en raison de l'exercice d'un pouvoir discrétionnaire par une personne ou une société de personnes,

[6] The proposed section 94 of the ITA provides that if a Canadian resident contributes property to a non-resident trust, then the trust is deemed to be resident in Canada for certain purposes and the contributor, the trust and any Canadian beneficiaries may be jointly and severally or solidarily liable to pay Canadian tax on the world-wide income of the trust.

[7] Concerned with the possibility that the Trust would be deemed to be a Canadian resident pursuant to the ITA, the appellant, through his counsel, by letter to the CRA dated February 23,

2005, requested that the residence of the Trust be settled pursuant to paragraph 4 of Article IV of the Convention. Paragraph 4 of Article IV of the Convention reads as follows:

IV(4.) Where by reason of the provisions of paragraph 1 an estate, trust or other person (other than an individual or a company) is a resident of both Contracting States, the competent authorities of the States shall by mutual agreement endeavor to settle the question and to determine the mode of application of the Convention to such person.	IV 4. Lorsque, selon les dispositions du paragraphe 1, une succession, une fiducie ou une autre personne (autre qu'une personne physique ou une société) est un résident des deux États contractants, les autorités compétentes des États contractants s'efforcent d'un commun accord de trancher la question et de déterminer les modalités d'application de la Convention à ladite personne.

[My emphasis]

[8] Article IV(1) defines the term “resident of a Contracting State” as follows:

1. For the purposes of this Convention, 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, place of incorporation or any other criterion of a similar nature, but in the case of an estate or trust, only to the extent that income derived by such estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries.	1. Au sens de la présente Convention, l'expression «résident d'un État contractant» désigne toute personne qui, en vertu de la législation de cet État, est assujettie à l'impôt dans cet État, en raison de son domicile, de sa résidence, de son siège de direction, de son lieu de constitution ou de tout autre critère de nature analogue mais, dans le cas d'une succession ou d'une fiducie, seulement dans la mesure où les revenus que tire cette succession ou cette fiducie sont assujettis à l'impôt dans cet État, soit dans ses mains soit dans les mains de ses bénéficiaires.

[My emphasis]

[9] The relevant portions of the February 2005 letter state (Appeal Book, Tab. 4, p. 69):

> We hereby request that the residence of the Trust be settled in accordance with paragraph 4 of Article IV of the *Convention Between Canada and The United States of America With Respect to Taxes on Income and on Capital Signed on September 26, 1980, as Amended by the Protocols Signed on June 14, 1983, March 28, 1984, March 17, 1995 and July 29, 1997* (the Convention).
>
> The Trust is an irrevocable discretionary trust settled pursuant to a trust agreement dated February 1, 2005 among Mrs. Delia Moog as Grantor, Mr. Hugh William Perry as Initial Trustee and Christiana Bank & Trust Company as Initial Administrative Trustee (the Trust Agreement), a copy of which is attached for your review.
>
> ….
>
> The Trust does not own any taxable Canadian property and does not carry on business in Canada. The Trust's income solely originates from sources within the United States. The Trust has no plan to own taxable Canadian property, to carry on business in Canada or to have any income from Canadian sources.
>
> The Trust is a United States person within the meaning of section 7701(a)(30) of the *Internal Revenue Code* because a court within the United States is able to exercise primary supervision over the administration of the Trust pursuant to Section 8.1 of the Trust Agreement and a United States person (Mr. Perry) has the authority to control all substantial decisions of the Trust. As a United States person, the Trust is subject to tax in the United States on its worldwide income and is therefore a resident of the United States for the purposes of the Convention.
>
> Although the Trust does not have any Canadian beneficiary, the Trust is likely deemed to be a person resident in Canada for certain purposes under subsection 94(1) of the *Income Tax Act* (ITA) because the Trust acquired property from a Canadian resident (Mrs. Moog) and persons resident in Canada not dealing at arm's length with Mrs. Moog might become beneficially interested in the Trust as a result of the exercise of the power of appointment in Section 5.1(kk) of the Trust Deed.
>
> On October 30, 2003, a Notice of Ways and Means Motion to amend provisions of the ITA relating to the taxation of non-resident trusts and foreign investment entities (the "Proposed Rules") was tabled in the House of Commons. If and when the Proposed Rules come into force, they will retroactively apply to trust taxation years that begin after 2002. Because the Trust received a contribution of property from a Canadian resident (Mrs. Moog), the Trust would be deemed to be resident in Canada for certain purposes under subsection 94(3) of the Proposed Rules.

…

> In our view, the Trust should not be subject to tax in Canada solely because it received property from a Canadian resident who is not and cannot become a beneficiary thereof.
>
> …
>
> The case at hand is clearly not the type of planning that the Department of Finance was attempting to curb when it introduced the Proposed Rules. Therefore, the relief sought would not contravene any tax policy objective.
>
> [My emphasis]

[10] After being advised by the CRA, by letter dated June 17, 2005, that the Canadian competent authority, would not endeavour to settle the issue of double residency under the proposed section 94 of the ITA (Appeal Book, p. 74), the appellant sought the assistance of the Internal Revenue Service (the IRS), the United States competent authority. The IRS contacted the CRA with the view of discussing the issue, but was eventually advised by CRA as follows (Appeal Book, p. 419):

> Section 94 of the *Income Tax Act* (the Act) contains anti-abuse rules that are designed to prevent the use by taxpayers of non-resident trusts to avoid Canadian tax. Bill C-33, which is currently before Canada's Parliament, is proposing amendments to ensure that the objectives of Section 94 are met. Under the new rules, a non-resident trust will be regarded as Canadian resident trust if a contributor to the trust is a Canadian resident or if there is a Canadian resident beneficiary. These changes are proposed to apply to taxation years that begin after 2006. As a result of the changes, trusts that might have previously been determined to be resident in only one State may now be dual resident under the Treaty.
>
> Section 94 is designed to encourage fair and neutral outcomes that protect the Canadian tax base. As such, Canadian tax policy officials do not want to invite any circumvention of the Section 94 rules. In light of this imperative, we have not been able to satisfy ourselves that it would be prudent to cede Canada's taxation rights through the Competent Authority process under Article IV(4).

[11] The appellant subsequently brought the underlying application before the Federal Court seeking *inter alia* to compel the CRA to endeavour to settle the residence of the Trust through competent authority negotiations pursuant to paragraph 4 of Article IV of the Convention.

[12] As previously mentioned, the Applications Judge dismissed the application on the ground that it was time-barred and that in any event the application was premature given that it pertained to a provision of the ITA (proposed section 94) which had yet to be enacted.

Analysis and Decision

[13] As to the first ground, I agree with counsel for the appellant that his application can possibly be viewed as an attack on CRA's ongoing failure to perform a statutory duty, and that as such, it is not subject to the 30-day limitation under subsection 18.1(2) of the *Federal Courts Act* (Compare *Krause v. Canada*, [1999] 2 F.C. 476 (F.C.A.) per Stone J.A. at paras. 24 and 25). I now turn to the second ground.

[14] As I understand the position of the appellant, no challenge is directed against the Applications Judge's conclusion that it would be inappropriate to require the CRA to endeavour to settle the residence of the Trust under a provision of the law that has yet to be adopted by Parliament. Rather, the position is that the Applications Judge overlooked evidence which shows that the residence of the Trust under the existing subsection 94(1) of the ITA was also in issue.

[15] In this respect, the appellant relies on a letter from the IRS, a copy of which is attached to the reasons of the Applications Judge as Appendix D, which according to the appellant indicates that subsection 94(1) currently in force was discussed during a meeting which took place on July 11, 2006 between the CRA and the IRS:

> Further, we were advised at this meeting that the Canadian Ministry of Finance had specifically removed this case and all others like it: we assume cases under section 94(1) and 94(3) of the *Income Tax Act* (Canada), from competent authority negotiations. In other words we are advised that his case will not be considered for resolution by the Canadian Competent Authority.
>
> [Emphasis by appellant]

[16] However, as counsel for the respondents points out, this statement which was made by an IRS official some four months after the meeting in question took place is based on an assumption as to the position adopted by CRA officials during the meeting. The transcript of the notes taken during that meeting suggests that the subject matter was limited to proposed section 94 (Appeal Book, pages 206, 207). I note in particular the fact that the issue for discussion is described as "Non-Resident Trusts and Proposed Section 94 of the Income Tax Act" (*idem*).

[17] Although the matter is not entirely free from doubt, it cannot be said that the Applications Judge overlooked evidence or committed a palpable and overriding error when he held that the appellant was seeking relief under proposed section 94, rather than section 94 as it reads today (Reasons, para. 25). This conclusion was open to the Applications Judge on the record before him.

[18] In any event, there would have been no basis for invoking Article IV(4) of the Convention with respect to current section 94 even if that had been the intention. Pursuant to Article IV(1) of the

Convention, the term “resident of a Contracting State”, in the case of a Trust is restricted to a “trust … liable to tax in that State, either in its hands or in the hands of its beneficiaries”. Liability for tax under current section 94 is restricted to income derived from a Canadian source, or foreign accrual property income. In this case, it is acknowledged that the Trust has no Canadian source income, and there is no suggestion that the Trust has foreign accrual property income.

[19] As there is no existing liability to tax under current section 94, the appellant Trust is not a resident of Canada pursuant to Article IV(I) and therefore not a dual resident under Article IV(4) of the Convention. It follows that no dual residency issue arises under Article IV(4) of the Convention with respect to the current section 94.

[20] I would dismiss the appeal with costs.

“Marc Noël”

J.A.

“I agree.
Gilles Létourneau J.A.”

“I agree.
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-503-07
(APPEAL FROM AN ORDER OF THE HONOURABLE Mr. JUSTICE GIBSON DATED OCTOBER 18, 2007, NO. T-2206-06.)	
STYLE OF CAUSE:	Hugh William Perry, in his capacity of Trustee of the 2005 Robert Julien Family Delaware Dynasty Trust
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 10, 2008
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Létourneau J.A. Trudel J.A.
DATED:	September 15, 2008

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