Federal Court of Appeal  Cour d'appel fédérale

Date: 20121206

Docket: A-130-12

Citation: 2012 FCA 320

CORAM: **NADON J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

GEORGE TRIESTE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 4, 2012.

Judgment delivered at Toronto, Ontario, on December 6, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] For reasons cited as 2012 TCC 91, 2012 DTC 1125, the Tax Court of Canada dismissed the appellant's appeal from assessments made under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) in respect of the 2000, 2001, 2002 and 2003 taxation years. The sole issue before the Tax Court was where the appellant resided during the years at issue. The appellant claimed to be a resident of the United States, while the respondent claimed the appellant was a resident of Canada. The Judge of the Tax Court applied Article IV of the *Canada-United States Tax Convention* (Convention) and,

for detailed reasons, concluded that the appellant was a resident of Canada during the years at issue. The Judge reached this result by finding that:

a) the appellant had a permanent home available to him both in the United States and Canada;

b) she could not determine whether the centre of his vital interests was closer to the United States or Canada; and

c) the appellant's habitual abode was in Canada.

[2] In the result, the Judge dismissed the appeal with costs.

[3] In my view, this appeal turns on the applicable standard of appellate review. As this is an appeal from a Tax Court judgment rendered after a trial, the standard of review is correctness for questions of law. Findings of fact or mixed fact and law may only be set aside if the Judge made a palpable and overriding error or an extricable error of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[4] The appellant asserts two principal errors.

[5] First, the appellant submits that the Judge applied the wrong test in order to determine the centre of vital interests. The correct test is said to be that applied by the Tax Court in *Hertel v. Minister of National Revenue*, [1993] 2 C.T.C. 2050, 93 DTC 721.

[6] In my view, however, *Hertel* does not establish any separate or new test to determine the centre of vital interests. The test to be applied under the Convention is one of fact: in which, if any, state does the individual have closer personal and economic relations?

[7] Second, the appellant argues that the Judge failed to consider whether if, in addition to his habitual abode in Canada, the appellant also had a habitual abode in the United States.

[8] Although I am able to see the nuances which counsel for the appellant invites us to apply to the evidence, I am unable, taking a hard look at that evidence, to conclude that the Judge made a palpable and overriding error in concluding that the appellant did not have a habitual abode in the United States.

[9] I am further of the view that the Judge made no error of law in regard to the test applicable to determine the existence of a habitual abode, which was most recently stated by this Court in *Lingle v. Canada*, 2010 FCA 152, 403 N.R. 337 at paragraph 6.

[10] As I have not been persuaded that the Judge erred in law in her interpretation of Article IV of the Convention, or that she made any palpable and overriding error in her understanding of the evidence or her application of the Convention to the evidence, I would dismiss the appeal with costs.

"Eleanor R. Dawson"

J.A.

"I agree
M. Nadon J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-130-12
STYLE OF CAUSE:	GEORGE TRIESTE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 4, 2012
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. SHARLOW J.A.
DATED:	December 6, 2012

APPEARANCES:

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