Docket: 2003-3891(IT)G

BETWEEN:

LEONARD RAY BARTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 27 and 28, 2005, at Ottawa, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	William G. D. McCarthy
Counsel for the Respondent:	Rosemary Fincham

JUDGMENT

The appeals from the assessment made under the *Income Tax Act* ("*Act*") for the 1997 taxation year and from the reassessments made under the *Act* for the 1995, 1996 and 1998 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 1st day of May 2007.

"Lucie Lamarre"

Lamarre J.

Citation: 2007TCC222
Date: 20070401
Docket: 2003-3891(IT)G

BETWEEN:

LEONARD RAY BARTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from an assessment and reassessments made by the Minister of National Revenue ("Minister") under the *Income Tax Act* ("*Act*") for the appellant's 1995 through 1998 taxation years. During that period, the appellant filed his income tax returns as though he was residing exclusively in the United States of America ("USA"). The Minister assessed and reassessed the appellant on the basis that he was a resident of Canada liable to pay tax in Canada on his world income.

[2] The sole question at issue is whether from 1995 to 1998 the appellant was a resident of Canada within the meaning of the *Act*.

Facts

[3] The appellant, a Canadian citizen originally from the province of Saskatchewan, obtained a teaching certificate there. He also has a Bachelor of Science degree in Applied Electronics from Bradley University, Illinois, USA. The appellant testified that he obtained as well a Master of Science degree in Industrial Education from the same university under a full-time residential program there. He

has in addition a Master of Business Administration degree ("MBA") from Pacific Western University in the USA, which he earned while working in Ontario. In 1987, he also received a PhD in Social Change from Walden University of Minneapolis, Minnesota, USA, for which he did his residency in the province of Quebec.

[4] The appellant testified that he was employed with the Canadian Imperial Bank of Commerce ("CIBC") as manager of performance and configuration responsible for the national online network until 1993, in which year he was laid off by that bank. In subsequent years, he had a few short contract assignments and other employment in Toronto and Western Canada.

[5] In August 1994, he accepted a three-month assignment in Fort Worth, Texas, USA. He put his house in Oakville, Ontario, up for sale, and it was sold in September 1994. His wife joined him in Texas at that time. They rented an apartment there until the end of the work assignment in October 1994. The appellant then accepted a one-year contract in New York city, starting November 28, 1994, for the development of new services in the telecommunications area. This contract was with a company by the name of Nynex. He signed a rental agreement on December 6, 1994, for a self-contained suite in a home, half of which was occupied by the owners, located at 78 Jefferson Blvd., Edison, New Jersey, USA (Exhibit A-1, Volume 1, Tab 22).

[6] The appellant was working in the USA under a "TN Visa" issued by the US government on a yearly basis to non-Americans for the period of their employment in the USA. In November 1995, at the end of his contract with Nynex, he started working for AT&T in New Jersey as a telecommunication and business analyst. The location of this work was closer to where he lived in New Jersey. He worked there under fixed-term contracts until the month of November 1997, when he was offered, and accepted, full-time employment with AT&T. This employment lasted until the first week of 1999, when he accepted employment with a start-up company in Ottawa by the name of Eftia O.S.S. Solutions. He found this new job during one of his visits to Ottawa, when he came across an ad by that small company in the *Ottawa Citizen*. He applied and was hired. The appellant left his employment with AT&T and gave up his apartment in New Jersey. He moved to 47 Bertona Street in Ottawa (then Nepean), where he still lives.

[7] When the appellant sold his house in Oakville in September 1994, he initially put his furniture in storage in Oakville. Eventually, he transferred the furniture to Bertona Street, where his daughter was living. She, at the time, had just finished her university degree and was working for Nortel in Ottawa. The appellant's younger son, Terry, was attending Guelph University in Ontario, and was still financially dependent on his father. Terry would come back to Bertona Street for holidays. According to the appellant, during the time that he worked in the USA, the 1,100 square foot three-bedroom detached house on Bertona Street was rented by his daughter. In fact, an application for rental accommodation with respect to that property was signed by her, Cheryl Anne Barton, on April 15, 1995 (Exhibit R-1, Tab 1). It appears, however, that on her Canadian tax returns the appellant's wife claimed a credit for the rental payments on 47 Bertona Street (Exhibit R-1, Tabs 31 to 34). The telephone directory entry for that address was under the name of the appellant and his wife (Exhibit R-1, Tabs 39 to 42).

[8] The appellant said that his wife lived with him in New Jersey at least 70% of the time in 1995 and 50% in subsequent years. In 1998, she would have spent more time in Canada because of her mother's illness; her mother in fact died in December 1998. However, it seems that she did not stay very long in the USA during the whole period, not just in 1998. This is fairly understandable, as she herself did not have a TN Visa. She was only able to stay in the USA on her husband's TN Visa. This meant that she could not work nor hold a bank account or credit cards nor own property in the USA. In Canada, the proceeds of the sale of the house in Oakville were deposited in her bank account and she used her Canadian credit cards. She did not even renew her Canadian passport when it expired in 1997.

[9] In fact, it appears that the appellant's wife, Veronica Anne, was not living in New Jersey with the appellant, but resided mainly on Bertona Street with her daughter. As a matter of fact, the appellant acknowledged that he came back at least 64 times to see his family in Ontario during the four-year period from 1995 through 1998. He made the 10-hour drive (one way only) on Fridays, driving back to New Jersey on Sundays, at least once a month. The appellant had access to the Bertona Street house during the entire period. He and his wife had their own bedroom in the house and he left some of his possessions there.

[10] The appellant said that he purchased two cars in the USA, one for him and one for his wife. She drove using her Canadian driver's licence, as she was not eligible to hold an American driver's licence. Although he did not cancel his Canadian driver's licence, the appellant obtained a licence from the State of New Jersey. The appellant also took out private medical coverage for him and his wife in the USA. They did not, however, cancel their Ontario medicare card (OHIP card).

[11] In New Jersey, the appellant was involved in professional associations, such as the Project Management Institute, New York Chapter, and the American Association of Retired Persons, whose members were able to contribute to a retirement plan in the USA.

[12] The appellant had two bank accounts in the USA but never kept more than $1,000 in those American bank accounts. He had a personal bank account in Canada through which he paid his Canadian debts, in particular a $40,000 loan that he carried for over two years. He also had Canadian credit cards on which he owed substantial amounts of money that he reimbursed over time. After his first year in the USA, he was able to obtain two American credit cards, but with low credit limits, and one line of credit in that country. The appellant used the Bertona Street address as a mailing address. He said that he had the telephone service at Bertona Street listed under his and his wife's name in order to get a credit rating for a telephone calling card in the USA. However, this statement was weakened in cross-examination when it was established that he had obtained his USA calling card before renting the house on Bertona Street.

[13] The appellant filed non-resident alien federal income tax returns in the USA and resident income tax returns for the State of New Jersey. Those returns were prepared by a local accountant. In his US federal income tax returns, the appellant stated that his address in the country where he was a permanent resident was 47 Bertona Street, Nepean, Ontario, Canada (Exhibit A-1, Tab 5, p. 26). He also indicated in his US returns that he was a resident of Canada entering and leaving the USA at frequent intervals.

[14] In a Determination of Residency Status (Leaving Canada) form he filled in on October 14, 1998, for the Canada Customs and Revenue Agency ("CCRA") (Exhibit A-1, Tab 66), the appellant indicated, among other things, that his wife would be remaining in Canada and was living at 47 Bertona Street, in Nepean, that

his son was in Canada, and that he would be keeping his driver's licence issued in Canada. When he objected to the reassessments, the appellant was asked to complete the same questionnaire again. This was done with the help of his professional advisor in April 2003. This time he did not mention that his wife would be remaining in Canada and that his son was in Canada, nor did he mark the box indicating that he would be keeping his Canadian driver's licence.

[15] The appellant explained that when he left Canada for his work in the USA he did not have any particular plans to retire. He would let life take its course. He had a retirement plan with AT&T but he also had a registered retirement savings plan in Canada. Moreover, he acknowledged that his wife did not want to stay in the USA. All their family and social ties were in Canada. He said that his own loyalties were to Canada and that he was in the USA to address an economic imperative. He went to the USA only for his work.

[16] The appellant's wife reported all the investment income from the proceeds of the sale of the house (in the vicinity of $219,000) in her Canadian tax return. She also claimed the appellant as a dependent in 1996 and 1997, entering "zero" as the appellant's net income (Exhibit R-1, Tabs 31 and 32).

Analysis

[17] The sole question here is whether the appellant was ordinarily resident in Canada during the period from 1995 to 1998.

[18] There were some contradictions in the appellant's evidence. Confronted with the second questionnaire filled out in 2003 (Exhibit A-1, Tab 74), in which it was no longer indicated that his wife would be remaining in Canada, contrary to what he had indicated previously in the first questionnaire filled out in 1998 (Exhibit A-1, Tab 66), the appellant finally acknowledged in cross-examination that his wife did in fact live in Canada most of the time. She stayed in the family house on Bertona Street. It seems obvious from her tax returns that it was she who paid the rent. The telephone was listed under the appellant's and his wife's name. The evidence revealed that the appellant returned at least once a month, on weekends, to see his family (he drove alone, not being accompanied by his wife, as can be seen from the extract from the integrated customs enforcement system traveller history showing all entries at land border crossings from January 1, 1995, through December 31, 1998 (Exhibit R-1, Tabs 44 and 45)). The appellant's son in

Canada was still financially dependent on him, and all the appellant's siblings and friends were in Canada. The appellant recognized that he was in the USA for work only and that he did not have any other ties there.

[19] Although the appellant said that he left Canada for an indefinite period of time, it is clear that his wife did not see things the same way. They were still a united family. This is evidenced by the huge number of long distance phone calls between the members of the family (Exhibit A-1, Tabs 30, 31 and 32). It was a 10-hour drive, just one way, for the appellant to come and visit his family. It seems quite reasonable to say that the appellant, in mind and fact, never left Canada. As Rand J. stated in *Thomson v. M.N.R.*, [1946] S.C.R. 209, at page 225:

> But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. . . .

[20] I am of the view that the appellant maintained his ordinary mode of living, with his family and social relations, interests and conveniences, in Canada. His children and his wife were all living in Canada; he had a home available to him in Canada; and he came back very often, despite the long drive, in order to live, as far as possible, a normal family life. His habits of life continued to be centered on Canada. As soon as he found an opportunity to work in Canada, he accepted it, although this meant leaving a secure employment in the USA. Apart from his retirement plan in the USA, most of his savings were in Canada. He never gave up his Canadian health card or his Canadian driver's licence. He maintained close personal and economic ties with Canada throughout. I therefore find that the appellant never ceased to reside in Canada during the period at issue. The same conclusion by this Court in a similar situation was accepted by the Federal Court of Appeal in *Gaudreau v. The Queen*, 2005 FCA 388.

[21] In conclusion, the assessment and reassessments must be confirmed on the basis that the appellant was a resident of Canada during the years 1995 to 1998 and thus had to declare his world income and pay tax accordingly when filing his Canadian tax returns. The appeals are dismissed with costs.

Signed at Ottawa, Canada, this 1st day of May 2007.

"Lucie Lamarre"

Lamarre J.

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STYLE OF CAUSE:	LEONARD RAY BARTON V. HER MAJESTY THE QUEEN
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DATES OF HEARING:	October 27 and 28, 2005
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	May 1st , 2007

APPEARANCES:

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Counsel for the Respondent:	Rosemary Fincham

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