Docket: 2009-2472(IT)I

BETWEEN:

JOHN MYLES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 21, 2010, at Victoria, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Matthew Canzer

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* is allowed, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to moving expenses, as claimed, for 2007.

Signed at Toronto, Ontario, this 2nd day of February, 2010.

"G. A. Sheridan"

Sheridan J.

Citation: 2010TCC60
Date: 20100202
Docket: 2009-2472(IT)I

BETWEEN:

JOHN MYLES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, John Myles, is appealing the disallowance of his claim for moving expenses under paragraph 62(1)(*a*) of the *Income Tax Act* (the "*Act*"):

> **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: [Emphasis added.]

[2] The term "eligible relocation" is defined in subsection 248(1) of the *Act*, the relevant portions of which read:

> **"eligible relocation"** means a relocation of a taxpayer where
>
> (a) the relocation occurs to enable the taxpayer
>
> (i) … to be employed at a location in Canada (in section 62 and this subsection referred to as "the new work location"), or
>
> …

> (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
>
> …
>
> [Emphasis added.]

[3] There is no dispute that Mr. Myles moved from Abbotsford, British Columbia (the "old residence" under the definition above) to take a new job in Victoria, British Columbia. The only question is whether that "eligible relocation" terminated in September 2006 when he and his wife moved into a rented apartment in Victoria (the "Victoria Flat"), or in April 2007 when they took possession of the house they ultimately purchased in that city (the "Victoria House").

[4] The Minister's position is that Mr. Myles "ordinarily resided" in the Victoria Flat as of September 2006 and was entitled to the moving expenses claimed for that taxation year only. The Minister disallowed the 2007 moving expenses because the requirements of paragraphs (*a*) and (*c*) of the definition of "eligible relocation" were not satisfied; namely, the move from the Victoria Flat to the Victoria House was not for new employment; and the distance between the two was less than 40 kilometers.

[5] Mr. Myles' position is that he never "ordinarily resided" in the Victoria Flat; his time there was merely a transitory part of the overall move from Abbotsford to Victoria.

[6] Mr. Myles testified on his own behalf and was an entirely credible witness.

[7] For the reasons set out below, I am satisfied that Mr. Myles did not ordinarily reside in the Victoria Flat during the period September 2006 to April 2007 and that, for the purposes of the definition of "eligible relocation", his "new residence" was the Victoria House which he moved into in April 2007.

[8] In 2004, Mr. Myles and his wife, Natalie, were living in Abbotsford in a house they had owned for some 25 years. At that time, he was working as a consultant with an architectural firm and commuting daily between Abbotsford and Vancouver.

Because this was adversely affecting his health, he and his wife decided some drastic changes were in order. He found a new job, exchanging self-employment in Vancouver for a salaried position in Victoria. Central to the plan was to find a new home in Victoria close to his workplace.

[9] Mr. Myles took up his new position in Victoria in May 2005. Mrs. Myles was still working in Abbotsford and, in any case, had to stay behind to sell their Abbotsford home, so from May 2005 to September 2006, Mr. Myles rented rooms in Victoria, returning home to Abbotsford every weekend.

[10] The sale of the Abbotsford House was crucial to their relocation plans. First of all, Victoria housing prices were higher and the real estate market more active than in Abbotsford. Without the equity from the sale of their Abbotsford home, they would have been unable to make an offer without conditions, a prerequisite to being competitive in the Victoria market.

[11] Thus it was that in April 2006, they tried selling the Abbotsford home privately but ultimately had to seek the help of an agent. Meanwhile, Mr. Myles began taking bits and pieces of their household with him on his weekly trips back to Victoria.

[12] In September 2006, a month before the closing date of the sale of their house in Abbotsford, Mr. and Mrs. Myles rented the Victoria Flat, the main floor of a three-unit rental property and moved all of their belongings to Victoria. The Victoria Flat was rented on a month-to-month, short-term basis. Because they no longer had a home in Abbotsford, they arranged for mail delivery at the Victoria Flat. Indeed, Mr. Myles was careful to use the Victoria Flat address when completing his 2006 income tax return. They also arranged for newspaper delivery.

[13] To say the Victoria Flat cramped their style is an understatement. Their home in Abbotsford had been quadruple the size of the 700-square-foot Victoria Flat; that meant that most of their things remained in boxes, stored in a garage on the property (as it happened, the garage flooded in November 2006 and the contents had to be moved to a commercial storage site) with the surplus spilling over into the living room, dining room, spare bedroom and any other available space in the Victoria Flat.

[14] Given these crowded conditions, the Myles, along with their dog and two cats, did not “settle in” the way they might have in other circumstances. Mr. Myles did not unpack his woodworking equipment; they did not hook up the stereo; they learned to maneuver around the large upright freezer that graced their tiny kitchen. It goes

without saying that they did not decorate. Nor did they make overtures to their new neighbours.

[15] What they did do was devote every spare moment to finding a new home in Victoria. They found a realtor; walked the neighbourhoods; went to open houses; scanned the real estate listings on the internet and in the local paper. Eventually, their efforts paid off and in April 2007, they and their domesticated menagerie moved into the Victoria House.

[16] In these circumstances, it cannot be said that Mr. Myles "ordinarily resided" in the Victoria Flat. There being no statutory definition of the term "ordinarily resident", its meaning has developed in the jurisprudence. In *Thomson v. Minister of National Revenue*[1], Estey, J. held that:

> 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 "soujourns" 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. It is not the length of the visit or stay that determines the question. …[2]

[17] Having thus noted the fact-specific nature of the inquiry, after reviewing the evidence in some detail, Estey, J. went on to conclude that the taxpayer, a retired businessman of some means who divided his time between houses in North Carolina and New Brunswick, had been "ordinarily resident" in Canada during his time in East Riverside:

> In 1932 he spent the summer months at St. Andrews, New Brunswick, and again in 1933 and 1934. In the latter year he built and furnished another residence, at a cost of approximately $90,000, at East Riverside near Rothesay, New Brunswick. This residence at East Riverside was built in order that his wife might have the opportunity of visiting and enjoying the friendship of her relatives and friends in Saint John and Rothesay, and that he himself might enjoy the golf course near the residence. He employed a family who occupied the servants' quarters throughout the year, and though the rest of the house was closed during the appellant's absence,

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[1] [1946] S.C.R. 209.

[2] Above, at pages 231-232.

> they looked after the premises. His practice was to move into this residence in the Spring and remain until some time in the Fall of each year. ...
>
> This residence at East River was maintained in a manner that made it always at his disposal and available at any time. When there his activities of life were centred about that point. It was to and from there he made his visits to other places. He and his family were then living there. It would appear that the appellant was maintaining more than one residence to which he could and did come and go as he pleased.[3]
>
> …
>
> The appellant selected the location, built and furnished the residence for the purpose indicated, and has maintained it as one in his station of life is in a position to do. In successive years his residence there was in the regular routine of his life acting entirely upon his own choice, and when one takes into consideration these facts, particularly the purpose and object of his establishing that residence, the conclusion appears to be unavoidable that within the meaning of this statute he is one who is ordinarily resident at East Riverside, New Brunswick …[4]

[18] In the present matter, the same cannot be said of the Victoria Flat. Nothing about the way Mr. and Mrs. Myles conducted themselves while at the Victoria Flat was consistent with what had been their "settled routine" prior to the move to Victoria. They went from a spacious dwelling, full of furniture and effects, large enough to accommodate family, neighbours and pets to what was essentially a hotel room *cum* storage unit. Though not particularly comfortable, the Victoria Flat served the "purpose and object" of providing a base from which the Myles could devote themselves to finding an affordable permanent home close to Mr. Myles' workplace in Victoria. So focussed were they on this goal that they invested no time in establishing themselves in either the Victoria Flat or the neighbourhood, in general.

[19] In support of the Minister's position that Mr. Myles had got into a "settled routine" at the Victoria Flat, counsel for the Respondent pointed to the fact that he had his family with him, had his mail redirected and newspapers delivered to that address, and had slept and ate there. In some circumstances, such facts might well be capable of establishing a taxpayer had ordinarily resided in a particular location. That is not the case here. With only one bedroom available for habitation, Mr. Myles' sons could not stay with them during university breaks. Living cheek by jowl with packing boxes, denied access to a quarter century's belongings, unable to enjoy any of their

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[3] Above, at pages 230-231.

[4] Above, at page 232.

normal hobbies or social pursuits, Mr. and Mrs. Myles had not yet realized their goal of relocating to Victoria. In these circumstances, it can hardly be said that because the Victoria Flat was as close to Mr. Myles' workplace as the Victoria House, it was equally beneficial to his health. As for the mail delivery and newspaper subscription, I do not find these factors significant; as Mr. Myles submitted, he could have arranged for the same services had he been living in a hotel while he and his wife were house-hunting. The fact that he notified the Minister of his temporary address at the Victoria Flat shows only that he is a taxpayer who complies with his obligations under the *Act.* All in all, the evidence leads to the conclusion that the time the Myles spent at the Victoria Flat was merely part of their transition from their "old residence" in Abbotsford to a more tranquil lifestyle in the Victoria House, their "new residence" in Victoria.

[20] Counsel for the Respondent quite correctly reminded the Court that the purpose of the moving expense deduction is to facilitate Canadians in seeking employment in all parts of the country; it is not geared to underwrite casual, local moves. Nothing in the evidence supports the conclusion that Mr. Myles was out to abuse the statutory provisions. Indeed, I agree with his speculation that had his move not spanned two taxation years, the Minister might never have been troubled by the deductions claimed. And I note, in conclusion, that none of the amounts claimed are disputed by the Minister.

[21] The appeal is allowed and referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Myles is entitled to moving expenses, as claimed, for 2007.

Signed at Toronto, Ontario, this 2nd day of February, 2010.

"G. A. Sheridan"

Sheridan J.

CITATION:	2010TCC60
COURT FILE NO.:	2009-2472(IT)I
STYLE OF CAUSE:	JOHN MYLES AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Matthew Canzer

COUNSEL OF RECORD:

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Name:

Firm:

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