Docket: 2008-331(IT)G

BETWEEN:

GEORGE TRIESTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on January 26, 2012, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

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| Counsel for the Appellant: | John David Buote |
| Counsel for the Respondent: | Brent Cuddy |

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**JUDGMENT**

The appeals from the reassessments made under the *Income Tax Act* with respect to the 2000, 2001, 2002 and 2003 taxation years are dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 21st day of March 2012.

"Lucie Lamarre"

Lamarre J.

Citation: 2021 TCC 91
Date: 20120321
Docket: 2008-331(IT)G

BETWEEN:

GEORGE TRIESTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from reassessments made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**ITA**) for the 2000, 2001, 2002 and 2003 taxation years. In his Canadian tax returns for those years, the appellant claimed non-resident status and reported nil taxable income.

[2] The notice of confirmation (Exhibit A-1, Tab 28) states that the Minister considered the appellant to be a resident of Canada pursuant to Article IV of the Canada-United States Tax Convention (**Convention**) and therefore to be subject to tax in Canada pursuant to section 2 of the ITA.

[3] The sole issue before me is whether, during the period at issue, the appellant was a resident of the United States (**US**), as claimed by the appellant, or of Canada, as claimed by the respondent, under Article IV of the Convention. The relevant provisions of Article IV read as follows:

*Canada–United States Tax Convention*

*Article IV*

*Residence*

**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.

**2.** Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

(a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both States or in neither State, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);

(b) If the Contracting State in which he has his centre of vital interests cannot be determined, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

(c) If he has an habitual abode in both States or in neither State, he shall be deemed to be a resident of the Contracting State of which he is a citizen; and

(d) If he is a citizen of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

[4] The appellant is an American citizen and it is not disputed that he was a deemed resident of Canada by virtue of paragraph 250(1)(*a*) of the ITA, as he stayed in Canada more than 183 days in each of the years at issue. However, under subsection 250(5) of the ITA, the appellant will be deemed not to be a resident of Canada if he is a resident of the US under the Convention, hence the importance of the appellant's residence status under Article IV of the Convention.

[5] Subsections 2(1) and (2), paragraph 250(1)(*a*) and subsection 250(5) of the ITA read as follows:

**INCOME TAX**

**DIVISION A — LIABILITY FOR TAX**

**2. (1) Tax payable by persons resident in Canada** — An income tax shall be paid, as required by this Act, on the taxable income for each taxation year of every person resident in Canada at any time in the year.

**(2) Taxable Income** — The taxable income of a taxpayer for a taxation year is the taxpayer's income for the year plus the additions and minus the deductions permitted by Division C.

. . .

**250. (1) Person deemed resident** — For the purposes of this Act, a person shall, subject to subsection (2), be deemed to have been resident in Canada throughout a taxation year if the person

(*a*) sojourned in Canada in the year for a period of, or periods the total of which is, 183 days or more;

. . .

**250. (5) Deemed non-resident** — Notwithstanding any other provision of this Act (other than paragraph 126(1.1)(*a*)), a person is deemed not to be resident in Canada at a time if, at that time, the person would, but for this subsection and any tax treaty, be resident in Canada for the purposes of this Act but is, under a tax treaty with another country, resident in the other country and not resident in Canada.

[6] The facts relied upon by the Minister and admitted by the appellant are set out in paragraph 6 of the Reply to the Notice of Appeal as follows:

6. In determining the Appellant's tax liability for the Period, the Minister made the following assumptions of fact:

a) at all material times, the Appellant was a citizen of the United States of America;

b) the Appellant came to Canada in May, 1999, and began working full-time as an independent contractor under contract with Onsite Engineering and Management Inc. ("Onsite") to render personal services at the Ontario Power Generation Inc. ("OPG") site in Pickering, Ontario, for an indefinite duration;

c) all of the Appellant's business income for the 2000, 2001, 2002 and 2003 taxation years in the amounts of $232,878, $380,513, $334,824 and $242,917 (the "Amounts") respectively was derived from services rendered in Canada;

d) the Appellant stayed in Canada 333, 331, 333 and 337 days in the 2000, 2001, 2002 and 2003 taxation years respectively;

e) from May 18, 1999, to November 2002[1], the Appellant rented and lived at a rental property at Royal Avenue in Pickering, Ontario;

f) in November, 2002,[2] the Appellant purchased and lived at 183 Lake Drive, Unit 219, Ajax, Ontario (the "Property");

g) the Appellant sold the Property on February 27, 2006;

h) the Appellant has personal and household effects, including an automobile, in Canada;

i) the Appellant owned banking and credit card accounts at Canadian financial institutions;

j) the Appellant has hospitalization and medical coverage from the Province of Ontario;

k) the Appellant claimed a Form 2555 – Exclusion of Foreign Earned Income amount in each of his United States Individual Income Tax Returns for the 2000, 2001, 2002 and 2003 taxation years; and

l) the Appellant continued to work and live in Canada beyond December 31, 2003.

[7] There is no dispute that the appellant had a permanent home available to him in both States. The question for me to determine, is therefore to which State the appellant's personal and economic relations (centre of vital interests) were closer, and, if this cannot be determined, in which State the appellant had an habitual abode in those years. If none of this can be established, the appellant will be considered to have been a resident of the US by reason of his American citizenship.

Facts disclosed at hearing

[8] The appellant, who does not have a degree from a college or university, had worked on nuclear submarines in a shipyard in the US for 13 years. He then worked in nuclear power plant facilities in various parts of the US. Most of the positions he

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1 In court, the appellant testified that he lived in the rental property until June 2000.

2 The Transfer/Deed of Land indicates that the property was purchased on December 8, 2000 (Exhibit R-1, Tab 12).

held over the last 25 years of his career were temporary positions, which entailed much travel and many moves (relocations) in the US. Prior to coming to Canada, he had been working for about five years on a contract basis for Onsite Engineering & Management Inc. (**Onsite**) at the nuclear facilities in Colorado and in Oak Ridge, Tennessee, where he lived. The appellant and his wife purchased a house in Oak Ridge on July 2, 1999 (Exhibit A-1, Tab 9).

[9] On April 30, 1999, the appellant was engaged by Onsite to perform work for Ontario Power Generation (**OPG**) in Ontario (Exhibit A-1, Tab 1). According to the appellant, it was an 18-month contract (Transcript, pp. 32-33). He was granted an employment authorization by Citizenship and Immigration Canada for the period from May 15, 1999 to May 15, 2000 (Exhibit A-1, Tab 2). The appellant moved into a rented condominium in early May 1999, where he stayed for about six months, living with two individuals who had also worked with him previously in Oak Ridge.

[10] On January 1, 2000, a consultant agreement was entered into between Onsite and the appellant for an indefinite period of time to provide engineering and management services to OPG on a boiler cleaning project at the Pickering nuclear generating station (Exhibit A-1, Tab 4). It appears that his work visa was extended to December 31, 2005 (Exhibit A-1, Tabs 6 and 7). From June 2000 onward, the appellant's wife periodically lived with him in Canada and they acquired a condominium (the **Cumberland property**) in Ajax, Ontario, that was sold in December 2000 (as shown by the capital gain declared in their joint US tax return, Exhibit A-1, Tab 23, p. 84). The mortgage on that property was discharged on February 28, 2001 (Exhibit A-1, Tab 12). At that time, the appellant's wife went back to Tennessee for medical care. The couple had kept their home in Oak Ridge, Tennessee, at their disposal, and their personal effects were there.

[11] On December 8, 2000, the appellant purchased a condominium on Lake Driveway in Ajax, Ontario. His wife visited and stayed with him there a few times. He returned to his house in Oak Ridge, Tennessee, once a month and for holidays (Christmas and New Year's, the Fourth of July weekend, the Labour Day weekend). He continued seeing his family and friends in the US and pursuing during his visits there, his main hobby, skeet shooting, through his gun club membership in Tennessee.

[12] In Canada, he had a couple of friends from work with whom he shared common interests, such as skiing and biking. He drove his car, which was registered and insured in the US, and used his American driver's license. His wife had her own car in Tennessee.

[13] The appellant had quite a few investments in the US. He kept these investments along with his American credit cards as well as his American bank accounts, in which his remuneration from Onsite was deposited directly. In Canada, he opened one personal bank account and a mortgage account for the condos, and he had one Canadian credit card. He was eligible for coverage under the Ontario Health Insurance Plan (**OHIP**) from November 4, 2003 to December 31, 2005 (Exhibit A-1, Tab 20). It appears that, during the period 2000-2003, virtually all his visits to a doctor's office were made at a medical clinic in Pickering, Ontario (Exhibit A-1, Tab 21). During that same period, the appellant kept his health insurance coverage in Tennessee, as can be seen from the Blue Cross Blue Shield of Tennessee claims report (Exhibit A-1, Tab 22).

[14] The appellant's contract with Onsite at the OPG location ended in 2005, at which time, it would appear, he returned to Tennessee. He testified that during the whole period he worked in Canada he had no intention of staying here afterwards. He kept sending out résumés to various companies in the US in an attempt to get back with his family.

[15] The appellant filed tax returns in the US during the entire period at issue. However, he claimed foreign income tax credits through the foreign earned income exclusion on the US Form 2555 filled out for each year at issue, on which he indicated that his tax home was Canada for 2001, 2002 and 2003 (Exhibit R-2, Tab 21). As a result, the US Internal Revenue Service (**IRS)** refused to grant US residency certification and did not consider the appellant a resident of the US for the years 2002 and 2003 (Exhibit R-2, Tab 11).

[16] Mr. Gord Arsenault, who was a cost/schedule analyst at the Pickering nuclear station at the same time as the appellant worked there, testified. He said that the appellant was among a group of Americans that came up to work on various projects for Ontario Hydro for very good remuneration. He said that none of them were here on a permanent basis and that, more particularly, with respect to the appellant, it was always his impression that he was going to return to the US.

[17] Ms. Giorgiana Vaughan, the appellant's daughter, confirmed that her father went back home to Tennessee once a month and for holidays. She said that, during the years at issue, whenever he went back he worked on such things as building a deck on the back of the house. She took care of his father's banking in the US during those years.

Analysis

[18] As I said at the beginning, the parties agreed that the sole issue is whether the appellant was a resident of Canada by virtue of Article IV of the Convention.

[19] It is accepted by both parties that the appellant had a permanent home available to him in both countries.

[20] The next step is therefore to determine in which State the appellant had his centre of vital interests.

[21] I agree with counsel for the appellant that the appellant maintained personal and economic relations with the US. The home in Tennessee that he kept at his disposal and where his personal effects were and where his wife stayed while undergoing medical treatment, his health coverage, his membership in his gun club, his bank accounts in which his remuneration was deposited, his investments and his credit cards in the US, plus his vehicles registered and insured in the US all show his attachment, both personal and economic, to that country.

[22] I also agree, however, with counsel for the respondent that the appellant had personal and economic relations with Canada as well during the period at issue. He worked for an American company (**Onsite**), true, but the services were rendered to OPG in Pickering, Ontario, and it was OPG that ultimately paid Onsite for those services. Moreover, the contract under which they were rendered was for an indefinite period. The appellant purchased two condominiums in Canada, on which he realized a capital gain, or at least he did on the first one, as disclosed in his American tax return. He had one personal bank account in Canada plus a mortgage account for his properties. He had one Canadian credit card. He developed personal relationships with a couple of people at work, and he went biking or skiing with one of them during his leisure time. He eventually obtained health insurance coverage with OHIP. In his US tax returns, he claimed the foreign income tax credits available to non-resident US citizens.

[23] The question, therefore, is: With which State were the appellant's personal and economic relations closer? I agree with the respondent that this is not something that can be clearly determined one way or the other. The appellant referred to *Gaudreau v. R.*, 2005 FCA 388, 2005 CarswellNat 3818, affirming 2004 TCC 840, 2004 CarswellNat 4775. It was I who decided that case at first instance, and in considering

the centre of vital interests, I referred to the OECD Model Tax Convention on Income and on Capital, stating the following at paragraph 37 of my decision:

> 37 The OECD *Model Tax Convention on Income and on Capital* has received worldwide recognition as a basic reference document in the application and interpretation of tax conventions (see *Crown Forest Industries Ltd. v. R.* (1995), 95 D.T.C. 5389 (S.C.C.), at page 5398). In its condensed version of January 28, 2003, it is stated in paragraph 15 of the "Commentary on Article 4" that:
>
> > 15. If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

[24] I think the present case differs from the situation in *Gaudreau*. Here, the appellant testified that he had relocated himself and his family many times in the past. His home in Tennessee was purchased in July 1999, that is, after he first came to Canada under his first contract with Onsite to work in Pickering, Ontario. In *Gaudreau*, the taxpayer and his wife were Canadian citizens who owned the paternal house inherited from the wife's parents in Canada. The taxpayer did not purchase a property in Egypt, the country where he was assigned work, while the appellant in the present case purchased two condominiums during his assignment in Canada, and we know that on one of these he made a capital gain. The appellant also had social relations and activities in Canada.

[25] In my view, it is not possible to determine the country with which the appellant had closer personal and economic relations and I agree with the respondent that this question cannot be determinative of the issue.

[26] The next step, then, is to ascertain the country in which the appellant had an habitual abode.

[27] The appellant said that he had one in both countries. The respondent is of the view that his habitual abode was in Canada. The case of *Lingle v. R.*, 2010 FCA 152, 2010 CarswellNat 1605, affirming 2009 TCC 435, 2009 CarswellNat 2742, deals directly with this matter. The Federal Court of Appeal said the following at paragraphs 6, 7 and 8:

> 6 It would be unwise to attempt to set out a rule or a series of criteria which could fit all situations. The determination in each case will depend on the facts and circumstances of the case. The concept of "habitual abode", as evidenced by the clearer French version of the text (séjourne de façon habituelle) involves notions of frequency, duration and regularity of stays of a quality which are more than transient. To put it differently, the concept refers to a stay of some substance in the jurisdiction as a matter of habit, so that the conclusion can be drawn that this is where the taxpayer normally lives.
>
> 7 This is consistent with the French definition of "habituelle" found in Le Petit Robert 2006:
>
> 1. Qui tient à l'habitude par sa régularité, sa constance.
>
> 2. Qui est constant, ou très fréquent.
>
> 8 This is also consistent with the commentary on Article IV(2) of the OECD Model where it is stated that in comparing the stays in two States to determine if and where the individual has an "habitual abode", "the comparison must cover a sufficient length of time for it to be possible to determine whether the residence in the two States is habitual and to determine also the intervals at which the stays take place": see *Model Tax Convention on Income and on Capital*, OECD Committee on Fiscal Affairs, vol. 1, July 2008, at page C(4)-6.

[28] Mr. Lingle was also an American citizen. He worked for OPG at its nuclear plant in Pickering during the years 2004 and 2005.

[29] At first instance, Campbell J. of this Court concluded that Mr. Lingle did not have an habitual abode in the US for the purposes of the Convention. She expressed herself as follows at paragraphs 20 to 30 inclusive:

> [20] The relevant paragraphs, 16 to 20 from the Commentary on Article IV(2) of the OECD Model, provide:
>
> > 16. Subparagraph *b*) establishes a secondary criterion for two quite distinct and different situations:
> >
> > *a)* the case where the individual has a permanent home available to him in both Contracting States and it is not

possible to determine in which one he has his centre of vital interests;

*b)* the case where the individual has a permanent home available to him in neither Contracting State.

Preference is given to the Contracting State where the individual has an habitual abode.

17. In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.

18. The second situation is the case of an individual who has a permanent home available to him in neither Contracting State, as for example, a person going from one hotel to another. In this case also all stays made in a State must be considered without it being necessary to ascertain the reasons for them.

19. In stipulating that in the two situations which it contemplates preference is given to the Contracting State where the individual has an habitual abode, subparagraph *b)* does not specify over what length of time the comparison must be made. The comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual and to determine also the intervals at which the stays take place.

20. Where, in the two situations referred to in subparagraph *b)* the individual has an habitual abode in both Contracting States or in neither, preference is given to the State of which he is a national. If, in these cases still, the individual is a national of both Contracting States or of neither of them, subparagraph *d)* assigns to the competent authorities the duty of resolving the difficulty by mutual agreement according to the procedure established in Article 25.

[21] The Respondent contends that the Commentary, particularly paragraph 17, makes it clear that an individual will have an habitual abode in the State where one “stays more frequently”. By applying this test set out in the Commentary and considering the total of the Appellant’s stays in Canada and the United States, the Appellant’s habitual abode, according to the Respondent, is in Canada because that is where the Appellant “stays more frequently”.

[22] However, a careful review of the relevant paragraphs of the Commentary does not support the Respondent's narrow interpretation of these provisions. Paragraph 16 of the Commentary explains that habitual abode is the secondary criterion that will determine a taxpayer's residence where the initial analysis respecting permanent home and centre of vital interests remains inconclusive. Paragraph 17 explains that habitual abode will determine one's residence where an individual has permanent homes available in both States but has an habitual abode in one State but not in the other. Where this occurs, the individual will stay more frequently in the place where he has his sole habitual abode. This paragraph clarifies that frequency of stay is relevant to the determination of whether an individual has an habitual abode in a given State. However, it is clear that this paragraph does not go so far as to suggest that frequency of stay or counting the number of stays in each State is the determining or sole factor to be considered.

[23] Paragraph 19 of the Commentary, in my view, is more relevant in interpreting the meaning of "habitual abode". This provision specifies that "The comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual". [Emphasis added].

[24] The analysis respecting habitual abode, offered by John F. Avery Jones *et al*., in the article entitled "Dual Residence of Individuals: The Meaning of the Expressions in the OECD Model Convention", [1981] British Tax Review 15, supports the foregoing approach. At page 113 of this article, it states:

> Turning now to the third test of the State in which the taxpayer has an habitual abode, there are two relevant meanings of the noun "abode" in English, either a place such as a house, or a more abstract concept of residing, an example of the latter being:
>
> > "May never glorious sun reflex his beams
> > Upon the country where you make abode".
>
> Neither usage is common although the *Oxford English Dictionary* does not describe either as obsolete. The use of the adjective "habitual" shows clearly that the latter use is intended because it is meaningless to refer to an habitual house. The French official text is much clearer: *où elle séjourne de façon habituelle*, literally meaning where one habitually stays. …

This article is particularly instructive where at page 116 it states:

> According to the OECD Model, the correct way of applying the test is to ask of each State whether the taxpayer has an habitual abode there, just as one asks whether he has a permanent home. The

> commentary on the other hand suggests that it is a test more in the nature of the State with which his personal and economic relations are closer, that is to say it is a comparative test: in which State is his abode more habitual? This is probably an unintended result of the commentary which goes on to say: "The comparison must cover a sufficient length of time for it to be possible to determine *whether the residence in each of the two states is habitual*… The passage to which we have added italics is, it is submitted, the correct test to be applied under paragraph *(b)*, and the reference to it being a comparison is misleading. This interpretation is also supported by the fact that the OECD Model goes on to deal with the position of the taxpayer having an habitual abode in both States; if the test merely involved a comparison of the time spent in each State this could occur only when the time spent in each was identical or nearly so, which does not seem likely to have been the intention. It seems that by using the expression "habitual," what is meant is whether living in each State is normal. …
> (Emphasis added.)

[25] Where there are two official versions of a treaty in two languages, the Vienna Convention on the Law of Treaties (Can. T.S. 1980 No. 37), Art. 33(4), allows a comparison of the texts in order to adopt "…the meaning which best reconciles the texts having regard to the object and purpose of the treaty…". In the French version of the *Treaty*, Article IV(2)(b) provides:

> (b) Si l'État contractant où cette personne a le centre de ses intérêts vitaux ne peut pas être déterminé, elle est considérée comme un résident de l'État contractant où elle séjourne de façon habituelle;
> (Emphasis added.)

[26] The French version when translated literally means "where one stays in an habitual way". This version largely removes any ambiguity that may be present in the English version.

[27] The word "habitual" is described in the Canadian Oxford Dictionary (2nd ed. 2004) as "done constantly or as a habit" or "regular, continual, usual". Black's Law Dictionary (5th ed. 1979) defines "habitual" as "customary, usual, of the nature of a habit". The Appellant argues that any interpretation to be given to the term "habitual" should not require an element of frequency. At paragraph 5.9 of the Appellant's written Argument, he stated:

> The concept of "habitual" does not have any sort of "frequency test" attached to it. Depending on the circumstances, a taxpayer may stay at an abode "habitually" if he stays there once a week, once a month or once a year.

[28] I agree that the interpretation of habitual abode embodies more than simply a determination of which State an individual "stayed more frequently". However, I do not agree that "frequency" is irrelevant to an interpretation of habitual abode. Paragraphs 9 and 10 of the Commentary to Article IV(2) illustrate the context in which the tie-breaker rules are to be considered:

> 9. This paragraph relates to the case where, under the provisions of paragraph 1, an individual is a resident of both Contracting States.
>
> 10. To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State. …
> (Emphasis added.)

This Commentary is equally applicable to the tie-breaker rules in Article IV(2) of the *Treaty*. It follows logically that if an individual stays in one State consistently and repeatedly one day every year, although in one sense those stays are in the nature of a habit or of a customary nature, those stays would not reflect such an attachment to that State that it would be natural for the right to tax to devolve upon that particular State, where the tests for permanent home and centre of vital interests were inconclusive. This approach would align closely with the objects and purposes of the provisions in the *Treaty* which in part are meant to resolve cases of potential double taxation.

[29] Article 31(1) of the Vienna Convention on the Law of Treaties provides the following approach to be used when interpreting a treaty:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [Emphasis added.]

This accords with the decision of the Supreme Court of Canada in *Crown Forest* [*Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802] which emphasized the necessity of looking at the language used in the provision together with the parties' intention in drafting those provisions.

[30] It follows that the proper approach to determining whether the Appellant had an habitual abode in the United States is to enquire whether he resided there habitually, in the sense that he regularly, customarily or usually lived in the United States. Paragraphs 27 to 32 of the Agreed Statement of Facts and Issue contain pertinent statements which assist in the determination of whether the

> Appellant "normally lived" in the United States. It was agreed between the parties that the Appellant "consistently and repeatedly returned to his home in Canada for the majority of the days in this period." In the settled routine of his life "he regularly, normally and customarily lived in Canada." He "did not have any other contracts clients or business in the USA." In addition, he spent only 69 days out of 623 days in the relevant period at his home in the United States. It is interesting that these agreed statements explicitly state that the Appellant "normally … lived in Canada" – which answers the definition that the Avery Jones article suggested for the expression "habitual". The Appellant's stays at the Ransom House were in the nature of periodic visits with his "normal" place of residence being in Canada throughout the period. He did not have an habitual abode in the United States for the purposes of the *Treaty* because he did not regularly, customarily or normally live in the United States. Considering all the facts before me, his connections with the United States were weak when compared to his settled routine in Canada. Accordingly, the Appellant was a resident in Canada during this period and as such he is taxable on his business income earned as a consultant.

[30] As Campbell J. concluded, the Federal Court of Appeal subsequently approving, the proper approach to determining whether the appellant had an habitual abode in the US is to enquire whether he resided there habitually in the sense that he regularly, customarily or usually lived in there during the period at issue. Here, the appellant spent a lot more time in Canada, did not work elsewhere during that period, and, in the settled routine of his life, regularly and customarily lived in Canada while periodically returning to the US. As stated by the Federal Court of Appeal, "[t]he concept of "habitual abode" . . . refers to a stay of some substance in the jurisdiction as a matter of habit, so that the conclusion can be drawn that this is where the taxpayer normally lives" (paragraph 6). I find that, even though the appellant returned periodically—once a month and for holidays—to the US, his settled routine was, during the years at issue, in Canada and not in the US. As was found with regard to the taxpayer in *Lingle*, *supra*, the appellant in the present case likewise did not have an habitual abode in the US for the purposes of the Convention.

[31] Accordingly, the appellant was a resident of Canada within the meaning of Article IV of the Convention during the years 2000, 2001, 2002 and 2003 and as such he was taxable in Canada on his contractual income earned as a consultant in Canada.

[32] The appeals are therefore dismissed with costs.

Signed at Ottawa, Canada, this 21st day of March 2012.

“Lucie Lamarre”

Lamarre J.

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| COURT FILE NO.: | 2008-331(IT)G |
| STYLE OF CAUSE: | GEORGE TRIESTE v. HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | January 26, 2012 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Lucie Lamarre |
| DATE OF JUDGMENT: | March 21, 2012 |

APPEARANCES:

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| Counsel for the Respondent: | Brent Cuddy |

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| Name: | John David Buote |
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