Docket: 2003-2907(IT)G

BETWEEN:

FAZAL MAHMOOD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 3, 4, 5, 6 and 7, 2008, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	W. Ross MacDougall
Counsel for the Respondent:	Steven D. Leckie

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 1999, 2000 and 2001 taxation years is allowed, with costs, and the assessments are hereby vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of February 2009.

"Robert J. Hogan"

Hogan J.

Citation: 2009 TCC 89
Date: 20090206
Docket: 2003-2907(IT)G

BETWEEN:

FAZAL MAHMOOD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] This is an appeal from assessments issued by the Minister of National Revenue (the "Minister") for the 1999, 2000 and 2001 taxation years for unreported income in the amounts of $312,896, $174,248 and $315,041 respectively.

I. Factual Background

[2] In assessing the Appellant for the taxation years under review, the Minister relied, *inter alia,* on the following assumptions:

(a) that the Appellant is not a resident of Guyana;

(b) that neither the Appellant nor his proprietorship are registered with Guyana Telephone and Telegraph Co.;

(c) that the Appellant had no legitimate business operations in Guyana during the taxation years in issue;

(d) that the Appellant was not employed in Guyana during 1999, 2000 or 2001;

(e) that the Appellant spends an equivalent amount of time in Canada and Guyana;

(f) that the Appellant has sojourned in Canada for the following periods of time:

1997	102 days
1998	204 days
1999	156 days
2000	236 days
2001	181 days

(g) that the Appellant's mother (Ms. Nazboon Sarfraz) and sister (Ms. Sally Aziz) reside in Canada;

(h) that the Appellant, when in Canada, lives in a condominium registered in his name (98% interest in the condominium) and in the name Aslim Ahamad (2% interest in the condominium);

(i) that the condominium does not carry a mortgage;

(j) that the condominium is the Appellant's mother's (Ms. Nazboon Sarfraz) permanent dwelling;

(k) that the condominium is located at 3455 Morningstar Drive, Unit 225, Mississauga, Ontario, Canada;

(l) that the Appellant applied for and was issued with a Canadian social insurance number in May 1976;

(m) that the Appellant has the following Canadian credit cards:

Hudson's Bay/Zeller[s]
CIBC VISA
Royal Bank VISA
Sears Canada
Canadian Tire MasterCard

(n) that, during the application process for the Canadian Tire and Hudson's Bay/Zeller[s] credit cards, the Appellant had signed documents that acknowledged that he had been a resident of Canada for at least one year and that he was not making false claims on the application;

(o) that the Appellant maintains three bank accounts in Canada with the Royal Bank one of which (account number 5101985) is in the joint names of the Appellant and Mr. Sheik Ghazali Mahmood and the other two (account numbers 4508255 and 5047782) are in the Appellant's own name;

(p) that the majority of the Appellant's banking transactions were conducted in Ontario and were of a continuous nature;

(q) that the banking system in Guyana was adequately suited to accommodate foreign currency transactions;

(r) that the Canadian component of the financial transactions was critical to the transferring of the funds.

[3] At the outset of the trial counsel for the Respondent and the Appellant produced four volumes of a Joint Book of Documents (the "Joint Book") that contained documents that both parties agreed were authentic.

[4] The assessments were issued against the Appellant following a seizure of approximately £35,000 sterling, $107,805 Canadian and $18,400 US in cash upon his arrival at Lester Pearson airport in Toronto on November 11, 2001. The Appellant was arrested at the same time and subsequently released. The Appellant was questioned on a number of occasions by Canada Customs officials on the purpose of his multiple visits to Canada. In a previous year, cash in his luggage had been seized by the Royal Canadian Mounted Police ("RCMP"). These funds were subsequently returned to the Appellant. This time, the Appellant was not as lucky. The cash seized at Lester Pearson airport by the RCMP has not been returned to the Appellant as, prior to the expiration of the RCMP seizure, the Canada Revenue Agency (the "CRA") seized the funds pursuant to a jeopardy order applied for to protect the payment of the taxes at issue, in the event that the assessments are upheld.

[5] The documentary evidence contained in the Joint Book, particularly the affidavits sworn by Sergeant Gene Hann of the RCMP for the purpose of obtaining the initial seizure order, suggests that the Appellant was engaged in the laundering of proceeds from the trafficking of cocaine in Canada, the UK and the US by a criminal organization headquartered in Guyana. I note that the Appellant has not been charged for these alleged activities. Sergeant Hann testified that the RCMP did not plan to press charges with respect to the Appellant's alleged activities as money laundering is a hard crime to prove. Sergeant Hann testified that he is satisfied with the outcome to date, namely that the Appellant has been denied access to Canada and the alleged proceeds of crime are in the custody of the CRA.

[6] The Appellant disputes the contents of Sergeant Hann's affidavits. He claims that he was carrying on legitimate banking transactions in Canada in the years under review. He submits that he started buying and selling foreign currency in Guyana in

1985 and has continued to do so to this day. He buys foreign currency, often US and Canadian dollars, from tourists or currency traders that operate throughout Guyana. The Appellant alleges that Guyanese banks do not hold large foreign currency reserves and do not offer their customers competitive foreign exchange rates. He claims that most tourists and former Guyanese residents returning from the US or Canada on vacation or to visit with family members prefer to deal with local street vendors when exchanging foreign currency for Guyanese dollars.

[7] Beginning in 1990, the Appellant alleges, he started importing food products into his native country with his business partner, Fazal Khan, also a Guyanese citizen and resident. At the beginning they imported powdered milk from Ireland. Afterwards they expanded their business to include cooking oils imported from Holland, yeast from Mexico, tapioca from Thailand, plastic bags from China, tomato paste from an Italian-based supplier, orange juice from Miami and Wrigley chewing gum from Chicago. The Appellant testified that he and his partner would sell these food products to wholesalers and/or retailers in Guyana. The Appellant referred me to numerous letters and Christmas cards signed by suppliers, bills of lading, insurance policies and invoices addressed to the Appellant at his home in Guyana as proof of his legitimate business activities in Guyana.

[8] Starting in 1995 the Appellant leased a bonded warehouse located in Paramaribo, Suriname. Guyanese retailers and wholesalers would travel to Suriname by boat to the bonded warehouse to purchase goods. The merchants were responsible for clearing the goods through customs in Guyana.

[9] The Appellant alleges that the funds that were brought to Canada were purchased with Guyanese dollars generated from his import business and also belonged to other Guyanese merchants, who had contracted with the Appellant for his services for the purpose of having him pay third party suppliers on their behalf. He claims that he purchased Canadian and US dollars because his suppliers would not accept payment in local currency. Approximately $6,250,000 in total was brought into Canada during the taxation years under review. Each time he left Guyana, the Appellant would fill out customs currency forms for the currency that he was carrying on his trip to Canada. Currency declaration forms must be completed by travellers on their departure from Guyana.

[10] The Appellant testified that he used four separate bank accounts opened with the Royal Bank of Canada ("RBC") in Ontario to deposit the currency that he brought into Canada on a regular basis. For each of these accounts, the Appellant explained, he granted signing authority to a family member so that banking transactions could

be carried out in the event of his incapacitation or death. The bank account for which his son also had signing authority was used principally to pay the maintenance fees and other expenses associated with a condominium the Appellant owned in Ontario. The Appellant's son was living with his mother in Canada when this account was opened. The Appellant claims that his mother and sister were responsible for the condo fees and expenses and would deposit the funds in this account so that the payments could be made on time. His mother would also deposit, from time to time, funds that she had received from former Guyanese residents living in Canada. In these cases, the Appellant had agreed to make payments of Guyanese dollars to the family members of his mother's friends and acquaintances on his return to Guyana.

[11] The account opened jointly by the Appellant and his wife was a US dollar account. This account was opened while the Appellant's wife was visiting with him in Canada. The Appellant testified that he closed the account opened with his sister because she had withdrawn funds to pay personal expenses and had caused the account to be overdrawn.

[12] The Appellant opened a bank account under the trade name of F.M. Trading Enterprises ("F.M. Trading") following a request from RBC, which advised the Appellant that it would not accept large cash deposits in personal bank accounts. RBC was willing to do so only for an account opened in a business's name.

[13] The Appellant alleges that F.M. Trading is a business name that he chose to designate the joint enterprise that he carries on with his partner, Mr. Khan. The registration filed with Ontario Corporate Affairs shows the Appellant's address in Guyana as the enterprise's head office. Under the heading "Business Name and Mailing Address", however, the Appellant indicated his sister's home address in Ontario, and her home phone and fax numbers were given.

[14] The documentary evidence establishes that the Appellant dealt with Friedberg & Co Inc. and Calforex, two large currency traders based in the Metropolitan Toronto area, to complete the wire payments to his own suppliers and those of Guyanese merchants that he had agreed to act for as payment agent.

[15] The Appellant was shown a deed of transfer produced in the Appellant's Book of Documents (the "Appellant's Book"). The Appellant testified that this deed of transfer was with regard to the purchase of land referred to as "Lot numbered 142 . . . section A . . . in the Town of Corriverton, situate on the Corentyne Coast in the county of Berbice, Republic of Guyana . . .". The land had been rented by the

Appellant's family since 1976 and a house had been built on it while rented (the "family home").

[16] The Appellant testified that he is a devout Muslim and that he regularly attends mosque in Guyana and in Canada when visiting. He explained that he was an active member of the Guyana Islamic Trust during the taxation years under review. He alleges that this institution is a charitable organization that donates money to, and helps, poor families in Guyana.

[17] The Appellant owns a Honda 125 cc motorbike which he uses in Guyana and which is registered in his name. He referred me to a copy of his insurance policy[1] as proof that the motorbike is registered in his name in Guyana. The Appellant claims that he does not hold a Canadian driver's licence although he admitted that he had purchased a used car in Canada, which was registered in the name of a friend living in Canada. This car was available for his use and was generally parked at the condominium on the outskirts of Toronto where his mother lived.

[18] The Appellant entered Canada under a multiple-entry visa issued by the Canadian government, which expired shortly after his arrest. He has applied for a new visa, but his request has been denied.

[19] The Appellant alleges that he never sought employment in Canada and did not apply for landed immigrant status. He claims that he did not apply for a Canadian social insurance number ("SIN"). In this regard, the Appellant was referred by his counsel to a letter signed by C. Lemay of Citizenship and Immigration on June 7, 2002 and addressed to Mr. Angelo Villella, Investigations, Special Enforcement Program ("SEP"), of the CRA. In this letter Mr. Lemay indicated that Human Resources Development Canada ("HRDC") had informed him that a social insurance card had been issued to the Appellant in 1976.

[20] The Appellant suggested that a social insurance card could be obtained easily before 1976 by completing an application and mailing it to the competent authorities. The Appellant's parents separated when he was a young child and his father moved to Winnipeg, Canada, some time around 1975. He speculates that his father must have applied for the social insurance card without his knowledge and approval.

[21] The Appellant bought a condominium located on the outskirts of Toronto to allow his mother to live out the rest of her years in Canada in comfort. The Appellant

---

[1] See Tab 10 of the Appellant's Book.

alleges that a mortgage broker informed him that he could not obtain a mortgage as a non-resident of Canada. Apparently he needed a Canadian resident as a part owner of the condominium to qualify for a mortgage. This caused the Appellant to register a 2% joint interest in the property in the name of Aslim Ahamad, a close friend living in Canada. The remaining interest was registered in the Appellant's name.

[22] The Appellant admitted that he would stay with his mother at the condominium on his travels to Canada. He testified that his mother and/or his sister purchased the furniture for the condominium, with the exception of a television which he acquired as a gift for his mother.

[23] The Appellant received many credit card application forms following the opening of bank accounts with RBC. He eventually applied for and obtained five credit cards. Counsel referred the Appellant to transaction summaries for each of his credit cards. I note that the vast majority of the purchases recorded on the statements were for airline tickets issued by BWIA and for items consistent with the Appellant's testimony that he was acquiring goods in Canada for use in Guyana.

[24] The Appellant provided tax assessments, payment notices and instalment reminders issued by the Inland Revenue Service of Guyana for the taxation years under review. The Appellant filed his tax returns on the basis that he was a resident of Guyana. The Appellant provided a profit and loss statement for his joint enterprise for the fiscal period ending December 31, 1999. This statement showed that the total net income of the enterprise for 1999 was approximately $5,580 Canadian dollars. This statement was prepared by the Appellant's tax consultant.

[25] The Appellant's daughter Wallima Hadiya Shamsudeen testified that she lives in Ontario and is married to a Canadian resident. Ms. Shamsudeen also alleged that she lived with her parents and two of her three brothers at the family home in Guyana during the years at issue. She was attending high school at the time.

[26] The witness corroborated the Appellant's statement that her oldest brother, Sheik Mahmood, moved to Canada in 2001 and stayed for a few years but has since returned home.

[27] The Appellant's mother testified that she was born in Guyana and was married to the Appellant's father in 1951. The couple was divorced when her son was a small child. The witness explained that all of her five children were raised in Guyana. She corroborated her son's testimony that he purchased the land on which the family home is built.

[28] The witness moved to Canada approximately 21 years ago. At the time of her immigration to Canada, her son was married and was living with his wife and two children in Guyana. She testified that her son and his family have always lived in the family home.

[29] The witness corroborated her son's testimony that she would deposit small amounts of cash in the Appellant's accounts with RBC at the request of various members of the Guyanese community living in Canada. She and her daughter would also deposit funds to pay the maintenance fees for the condominium.

[30] Stuart Wuebbolt, an investigator with the CRA, testified that the file was first assigned to him in 2002. He worked on the Appellant's file with Tracy Mccellan, an auditor assigned to the Integrated Proceeds of Crime division, a joint CRA and RCMP initiative.

[31] The witness explained that he requested the Appellant's credit card and bank accounts statements. He also sought details concerning the Appellant's air travel from BWIA, the airline with which the Appellant travelled to Canada.

[32] The witness reviewed the criteria adopted by the CRA in Interpretation Bulletin IT-221R3 (Determination of an Individual's Residence Status). In the instant case, he looked at the regularity of the Appellant's travel to Canada, the amount of time he spent in Canada with members of his immediate family (including his sister, mother and son), the ownership of a condominium in Ontario and the business transactions conducted by the Appellant in Canada in determining that he was a resident of Canada for the purposes of the *Income Tax Act* (Canada) (the "*Act*"). He reviewed the Appellant's BWIA travel records and his bank records to determine how many days he spent in Canada.

[33] Mr. Wuebbolt testified that the BWIA information was not completely reliable as it contained information indicating that some of the travel may have been done by family members using the Appellant's travel reward points. The witness could not determine whether the Appellant himself had travelled on each of the occasions indicated on the airline's records. He therefore relied on the banking and credit card summaries and assumed that the Appellant was in Canada on each date that a banking or credit card transaction was completed in Canada.

[34] The witness also took into account the fact that the Appellant had a Canadian SIN number. He assumed that the Appellant had applied for a social insurance card as he had no information to the contrary in his file.

[35] The witness was asked if he had considered whether the Appellant may have been carrying on business in Canada in the taxation years in question. He testified that the assessments were issued solely on the basis that the Appellant was a resident of Canada.

[36] Mr. Wuebbolt testified that he made an arbitrary assessment of the Appellant's worldwide income for the purposes the *Act*. In the absence of reliable information he assumed that all deposits made in the Appellant's bank accounts, excluding the F.M. Trading account, constituted the Appellant's worldwide income. The F.M. Trading bank deposits were excluded because the witness believed that the CRA would have little chance of collecting the tax due on the additional income that would be assessed if the deposits in this account were included in income.

[37] Mr. Wuebbolt was subjected to a lengthy cross-examination by the Appellant's counsel, Mr. MacDougall. The witness was asked whether he took into account all or part of Sergeant Hann's affidavit in drawing up his report and responded in the negative. Mr. MacDougall pointed out that Sergeant Hann indicated in his affidavit that the Appellant was allegedly engaged in illegal money-laundering activities in Guyana. Mr. Wuebbolt was asked why he did not consider the Appellant's alleged illegal conduct in Guyana noted by Sergeant Hann in making his determination.

[38] Mr. MacDougall pointed out to Mr. Wuebbolt that his residence determination report contained a number of shortcomings. The final report failed to account for the fact that the Appellant had a driver's licence, identification card and passport issued by the Government of Guyana and that the Appellant had filed tax returns on the basis that he was a Guyanese resident.

II. Positions of the Parties

[39] Mr. MacDougall argues that the evidence shows that the Appellant was not ordinarily resident in Canada in the taxation years under review. He suggests that the facts of the present case are different from the facts considered by Mr. Justice Rand in the Supreme Court case of *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209. Counsel argues that the Appellant cannot be found to be a deemed resident of Canada for the 2000 taxation year because the examination of his passport

shows that he was present in Canada for less than 183 days in that year. I do not have to consider this issue for the 1999 and 2001 taxations years as the Respondent admits that the Appellant was present for less than 183 days in each of those years.

[40] Finally, Mr. MacDougall argues that his client's centre of vital interests is more closely tied to Guyana, his country of birth, making the Appellant a resident of Guyana for the purposes of the *Act* under paragraph 4(2)(*a*) of the Canada-Guyana Income Tax Convention (the "Convention").

[41] Mr. MacDougall made it clear at the outset of the proceedings that he would not lead evidence to contest the amount of income on which his client would be subject to tax as a result of the assessments. He accepts that the case can be disposed of solely on the basis of whether his client was a resident of Canada or not for the taxation years at issue.

[42] Not surprisingly, Mr. Leckie, counsel for the Respondent, argues that the evidence should lead me to conclude as follows:

a) The Appellant was residing or ordinarily resident in Canada during the 1999, 2000 and 2001 taxation years.
b) Alternatively, the Appellant is deemed to have been a resident of Canada for the 2000 taxation year because he sojourned in Canada for more than 183 days.
c) In the event of a finding by me that the Appellant was a resident of both countries, the tiebreaker rule in paragraph 4(2)(*a*) of the Convention makes the Appellant a resident of Canada for the purposes of the *Act*.

III. Analysis

[43] The question before me is largely one of fact. This being the case, the Supreme Court of Canada's decision in *Thomson v. Minister of National Revenue* and the decision of former Chief Justice Bowman of this Court in *Fisher v. The Queen*, 95 DTC 840, merit a brief review.

[44] In the *Thomson* case, the Appellant was found to be "residing" or "ordinarily resident" in Canada in the taxation years in question. Mr. Thomson who was a Canadian citizen had homes available to him at East Riverside, New Brunswick and Pinehurst, North Carolina. Each year, the taxpayer would move from North Carolina to New Brunswick with his family and domestic staff. He would routinely stay in New Brunswick for a continuous period of 150 days from May to October. He would

leave New Brunswick with the approach of winter in late October and return to Pinehurst with his family and domestic staff. This was the pattern of life adopted by the taxpayer for his family and himself. Mr. Justice Rand interprets the words "residing" or "ordinarily resident" as follows:

> The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.
>
> The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.
>
> For the purposes of income tax legislation, it must be assumed that every person has at all times a residence. It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.
>
> 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. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".[2]

---

[2] *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, at pp. 224-25.

[45] The Supreme Court concludes that the taxpayer is a dual resident because ". . . his living in Canada is substantially as deep rooted and settled as in the United States. . . . "[3]

[46] I mentioned the *Fisher* case because the essence of that case is captured by former Chief Justice Bowman's quotation of the following lines from Robert Frost's poem, "The Death of the Hired Man": "Home is the place where, when you have to go there, [t]hey have to take you in."[4]

[47] Counsel for both parties submitted a Joint Brief of Authorities (the "Joint Brief of Authorities") containing eight other cases that analyze the question of residence, dual residence and the application of treaty tiebreaker rules.[5] Each of these cases turns on its own particular facts. Of special interest is the fact that in each of the cases the taxpayer had the right to live in Canada because the taxpayer was either a Canadian citizen or held landed immigrant status. The taxpayers in those cases argued that they had severed their former residential ties to Canada. In the present case, the Appellant did not have the right to live permanently in Canada. Each time he came to Canada he entered under a multiple-entry visa, stayed for a while to conduct business and left to return a short time later with another carry-on bag of cash to be deposited and transferred outside of Canada for the purpose of paying for goods ordered by the Appellant or his clients. In fact, the Appellant has now been denied access to Canada altogether except for the right to attend his trial.

[48] The facts of this case are very different from those considered in the *Thomson* case, in which Mr. Thomson came to Canada each year during the summer months with his whole household in tow. In the present case, the Appellant almost always travelled to Canada alone and left immediately after his business in Canada was conducted.

[49] This having now been stated, the question remains whether the Appellant's conduct in Canada, his continuous entry and return, the presence here of family members and the ownership of the condominium are factors which are sufficient for a finding that the Appellant was residing or ordinarily resident in Canada in the years under review. If I so find, does the application of the tiebreaker rules make the Appellant a resident of Canada or of Guyana?

---

3 *Ibid*, p. 228.

4 *Fisher*, above, at p. 845.

5 *Hertel v. M.N.R.*, 93 DTC 721; *Shih v. The Queen*, 2000 DTC 2072; *Harris-Eze v. Canada*, [2002] T.C.J. No. 40 (QL); *Allchin v. The Queen*, 2004 DTC 6468; *Gaudreau v.* Canada, [2004] T.C.J. No. 637 (QL); *Bujnowski v. Canada*, [2005] T.C.J. No. 46 (QL); *Hauser v. The Queen*, 2005 DTC 1151; *Yoon v. Canada*, [2005] T.C.J. No. 321 (QL.).

[50] I note that the Appellant was not completely truthful when he testified. Therefore, it would be imprudent for me to rely solely on the Appellant's testimony in deciding this issue. I asked the Appellant on more than one occasion to explain the large discrepancy between the small amount of income that he reported in Guyana and the million dollars of payments made to suppliers through the Canadian banking system. I suggested that the transaction level was inconsistent with the Appellant's reported income. I also drew the Appellant's attention to the fact that his share of the partnership capital was reported to be approximately $100,000 Canadian. Of this, $90,000 represented the purchase price of the condominium, leaving $10,000 for working capital. This amount of working capital was insufficient to finance the Appellant's transactions in Canada.

[51] I suggested to the Appellant that perhaps he was understating the amount of net income that he declared to the Guyanese tax authorities. The second possibility was that the contents of Sergeant Hann's affidavit were perhaps accurate in whole or in part. After much hesitation, the Appellant finally admitted, rather reluctantly, that perhaps he was understating the income that he reported to the Guyanese tax authorities.

[52] Bearing this background in mind, there is however, a number of sources which corroborate the Appellant's testimony and allow me to conclude that he was not residing or ordinarily resident in Canada. The documentary evidence corroborates the Appellant's testimony that his permanent residence is his family home in Guyana. The Appellant's mother and daughter confirmed this fact, with the Appellant's daughter admitting that she lived at the family home with two of her three brothers during the years in question.

[53] The Appellant's travel habits confirm that he must have been living in Guyana when he was not visiting Canada. An examination of his passport confirms that the Appellant departed from Guyana each time he travelled to Canada. The Guyanese currency declaration forms also point to this fact. Substantially all of the commercial documentation introduced as evidence was mailed or sent by courier to the Appellant at his family home address. The tax document received by the Appellant or filed with Guyanese Inland Revenue also establishes strong ties to Guyana.

[54] This leaves me to review other factors which I believe constitute residential ties attaching the Appellant to his country of birth. First, there is the presence in Guyana of his closest family members, namely his wife and three of his four

children. The three youngest children were all attending school in Guyana during the period under review.

[55] The existence of the Appellant's business operations in Guyana are disputed by the Respondent. The Respondent argues that the Appellant was engaged solely in the alleged illicit money-laundering activities conducted in Canada. The pleadings state that the Appellant had no legitimate business activities in Guyana. I disagree with the Respondent's interpretation of the evidence. There is a substantial amount of independent evidence which corroborates the Appellant's version of the facts and rebuts the Respondent's assertions. As noted earlier, most of the third-party commercial documents presented in evidence were addressed to the Appellant at his family home.

[56] If I am to accept the Respondent's allegation that the Appellant was engaged in money laundering in Canada, I must conclude that parts of his business must have been legitimate in order for him to succeed in the alleged activities. One cannot launder money simply by transferring money around shell corporations in a circle. So-called dirty money is cleansed when it is washed through a legitimate business. At the very least, the evidence points to the fact that some of the Appellant's economic activities were legitimate. If I conclude that the Appellant was engaged in money laundering as suggested by Sergeant Hann in his affidavit, then he must have had been doing so by using the proceeds of crime to purchase food and other household products for distribution to wholesalers and retailers in Guyana. The money would have been laundered when it was collected by the Appellant from the merchants when the goods were landed in Guyana. In the end, I conclude that nothing really turns on whether the Appellant's activities were legitimate or whether they were illicit as suggested by the Respondent. I am of the opinion that illegal activities, whether conducted in Guyana or Canada, must be considered in an even-handed residency determination, in much the same way that proceeds from national or international criminal activities are subject to tax in the hands of a Canadian resident.

[57] I note that the Respondent argues that the Appellant's business of importing goods into Guyana was conducted from Suriname where he and his partners allegedly rented space in a bonded warehouse. On this point, suffice it to say that the bills of lading and invoices and insurance documents were addressed to the Appellant at his family home address. I infer from these documents that the orders to acquire the goods were placed by the Appellant through facsimile transmissions or telephone conversations originating from Guyana. Sergeant Hann's affidavit and testimony also contradict the Respondent's version of the facts. In his affidavit, Sergeant Hann suggests that the Appellant was laundering the proceeds received by traffickers in

Guyana from the distribution of cocaine in Canada, the US and the UK. The Appellant flew from Guyana each time he visited Canada in the years under review, bringing the cash with him in a carry-on bag. If the Appellant was money laundering, the funds would have had to have been collected in Guyana, which means that the Appellant would have had business activities in Guyana.

[58] The CRA auditor claims that the Appellant spent more than half of the year in Canada in the 2000 taxation year. This conclusion was based on the assumption that the Appellant must have been in Canada when transactions were processed in his bank accounts or on his credit cards.

[59] Exhibit A-5 produced and prepared by the Appellant's counsel tabulates the Appellant's days in Canada based on information contained in his passport, particularly the stamps showing his entry into Canada and his return to Guyana. I find this evidence to be more reliable than the Respondent's source of information in light of the fact that the Appellant's mother was the person who made the small deposits in the Appellant's bank account, these being either money to pay the maintenance fees for the condominium or funds received from friends or acquaintances to be paid by the Appellant to their family members back home. In short, the evidence shows that the Appellant was not always in Canada when transactions were recorded in his bank accounts.

[60] The evidence does show that the Appellant had some ties to Canada in the years in question. His mother lived in a condominium which he owned. He stayed in the condominium when he came to Canada. One of his sons also lived there, along with his sister, who stayed there from time to time. The Appellant used the Canadian financial system to deposit funds, exchange currency and ultimately pay the foreign suppliers of his business. He attended the local mosque near the condo that he owned in Canada. He had a car available to him that was parked at the condo. He went on camping trips with friends and visited Niagara Falls at least seven times.

[61] In my view, these facts are not sufficient to make the Appellant a resident of Canada for the purposes of the *Act*. The condominium, while owned by the Appellant, was really his mother's home and not his own. His mother has lived there the entire time. The Appellant lives at the family home in Guyana with his wife and his three children.

[62] The Appellant's Canadian activities are similar to the activities of other non-residents carrying on business in Canada. One can be a non-resident of Canada and own real estate in Canada at the same time. Section 116 of the *Act* and Part XIII

deal with these cases. The former provision applies when a non-resident sells property and the latter when a non-resident collects, among other things, rental income.

[63] In the event that I am wrong and Canada is the Appellant's home in the same way Guyana is, I find that the tiebreaker rule in paragraph 4(2)(*a*) of the Convention makes him a resident of Guyana for the purposes of the *Act*. The Appellant's family and economic interests are more closely tied to Guyana than to Canada.

[64] I surmise that the Appellant's alleged criminal activities may have influenced the CRA in its pursuit of these proceedings. The *Act* was adopted to provide rules governing the imposition and collection of taxes. It was not meant to sanction criminal activity save for the case of tax evasion and similar cases. In the end, what matters is whether the Appellant's conduct in Canada makes him subject to Canadian tax. It is immaterial whether the Appellant's activities are legitimate or whether they are of a criminal nature.

[65] I suggested to the Respondent's counsel at the outset of argument that perhaps the assessments could have been based on the alternative ground that the Appellant was carrying on business in Canada. In my opinion, this would have been a stronger foundation for the assessments. This was not done, however. Therefore, for the reasons noted above, I allow the Appellant's appeal, with costs, and order the assessments for each of the taxation years under appeal to be vacated.

Signed at Ottawa, Canada, this 6th day of February 2009.

"Robert J. Hogan"

Hogan J.

CITATION:	2009 TCC 89
COURT FILE NO.:	2003-2907(IT)G
STYLE OF CAUSE:	FAZAL MAHMOOD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 3, 4, 5, 6 and 7, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	February 6, 2009

APPEARANCES:

Counsel for the Appellant:	W. Ross MacDougall
Counsel for the Respondent:	Steven D. Leckie

COUNSEL OF RECORD:

For the Appellant:

Name:	W. Ross MacDougall
Firm:	Fogler, Rubinoff LLP Toronto, Ontario

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada