Docket: 2009-2519(IT)G

BETWEEN:

KHEDIDJA MESSAR-SPLINTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 15, 2012, at Ottawa, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant:	Charles Gibson Ian Houle
Counsel for the respondent:	Sara Chaudhary

JUDGMENT

The appeal from the reassessment made pursuant to the *Income Tax Act* by the Minister of National Revenue on May 8, 2008, regarding the 2006 taxation year is allowed with costs and the reassessment is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of March 2012.

"Réal Favreau"

Favreau J.

Translation certified true
on this 24th day of July 2012.

François Brunet, Revisor

Citation: 2012 TCC 72
Date: 20120308
Docket: 2009-2519(IT)G

BETWEEN:

KHEDIDJA MESSAR-SPLINTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from the reassessment made pursuant to the *Income Tax Act,* R.S.C. (1985) c.1 (5th suppl.), as amended (the Act), by the Minister of National Revenue (the Minister), dated May 8, 2008, regarding the appellant's 2006 taxation year. Under this reassessment, the Minister assessed the appellant to include income earned abroad as a resident of Canada in the calculation of her income.

[2] The issue is whether, during 2006, the appellant was deemed resident in Canada pursuant to subparagraph 250(1)(*c*)(i) of the Act.

[3] To set the tax payable by the appellant for 2006, the Minister invoked the following presumptions of fact, listed at paragraph 7 of the Reply to the Notice of Appeal:

> [TRANSLATION]
> (a) residents of Canada at the time, the appellant and her husband, Peter Splinter, left Canada for Geneva, Switzerland in August 1994;
> (b) Peter Splinter was assigned to the Permanent Mission of Canada to the Office of the United Nations in Geneva, Switzerland (the Mission) by his employer, the Government of Canada;

(c) Mr. Splinter began his duties for the Mission in August 1994 as a Canadian public servant;
(d) Mr. Splinter left his position with the Mission on or around August 17, 1998, and thereby ceased being a Government of Canada employee as a public servant at that time;
(e) in the meantime, in 1997, the appellant was offered a position with the Government of Canada as a public servant at the Mission as a member of the administrative and technical team, which she accepted;
(f) the appellant began to serve the Mission in January 1997 and was employed there until at least the end of the 2006 taxation year;
(g) the appellant's employment income paid by the Government of Canada during the 2006 taxation year was exempt from taxes in Switzerland;
(h) at all relevant times, the appellant and Peter Splinter were spouses; and
(i) the appellant did not sever her residential ties to Canada.

[4] Ms. Splinter testified at the hearing. She stated she was born in Tunisia and held Algerian and Tunisian passports. She has been married to Peter Splinter since 1987 and they have two children from this marriage. She immigrated to Canada in 1988 where she lived until August 1994, when she left Canada with her husband to go live in Geneva, Switzerland.

[5] When they left Canada, the appellant and her husband did not sever their residential ties to Canada because they kept their drivers licences and Canadian passports and their residence was leased to a third party after their departure.

[6] The appellant and her husband left Canada in August 1994 because her husband's employer, the Department of External Affairs, assigned him to the Mission. Mr. Splinter began to serve the Mission in August 1994 as consul and first secretary for a four-year period.

[7] On January 17, 1997, the appellant was offered a position with the Mission in an emergency hiring, as a locally-hired employee. It was a non-permanent indeterminate position. The appellant accepted the offer and employment conditions and began her employment on January 17, 1997.

[8] On November 3, 1997, the Mission offered the appellant a permanent position as program assistant. This employment offer stated that, as the spouse of a federal public servant, the appellant was subject to tax deductions at the source, the Canada Pension Plan and unemployment insurance. The appellant accepted the offer and conditions of employment, and she began her employment in November 1997.

[9] For the 1997 and 1998 taxation years, the appellant filed her tax returns as an individual deemed resident in Canada pursuant to paragraph 250(1)(*e*) of the Act, as the spouse of a person covered under paragraph 250(1)(*c*) of the Act, a federal public servant.

[10] On or around August 17, 1998, Mr. Splinter's assignment with the Mission ended, and he ceased being an employee of the Government of Canada.

[11] In 2000, the appellant and her spouse separated; he left Geneva to return to Canada to live in the couple's residence that had been leased to a third party.

[12] As of January 1, 2004, the appellant and her husband were living together again, and had purchased an apartment in Geneva. From 2000 to 2004, the appellant had remained in Geneva with her two children and she has kept her position with the Mission to today. At the hearing, the appellant stated that, pursuant to Swiss laws, she could have asked for a divorce after one year of separation but she did not.

[13] According to the appellant's testimony, she became eligible for Swiss citizenship in 2006. She stated she applied in 2009 and became a Swiss citizen on October 17, 2011.

[14] The appellant filed her tax return for the 2006 taxation year as a non-resident and on September 20, 2007, she received a tax refund of $28,605.90 with $464.51 in interest. In that tax return, the appellant claimed an exemption from income tax on the salary she earned that year from her employment with the Mission on the ground that the salary was not taxable in Canada pursuant to article 19 of the Convention between the Government of Canada and the Swiss Federal Council for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital.

[15] The appellant and her husband also filed a joint tax return with the Swiss tax authorities for 2006.

[16] For the 1999 to 2005 taxation years, the appellant filed income tax returns as an individual deemed resident in Canada in view of opinions issued by the Canada Revenue Agency (the CRA).

[17] Indeed, the appellant attempted many times to get a determination on her residency from the CRA for Canadian income tax purposes. The appellant's efforts in this regard, and the CRA's responses are described as follows at paragraphs 6, 7 8, 10, 11, 12 and 13 of the Notice of Appeal:

[TRANSLATION]

6. On March 5, 1999, the appellant wrote to the International Tax Services Office of the Canada Revenue Agency to obtain a determination of her residency for Canadian income tax purposes as of August 17, 1998.

7. In response to the appellant's March 5, 1999, letter, the International Tax Services Office of the Canada Agency (*sic*) issued an opinion by letter dated August 27, 1999, stating that the appellant did not continue to maintain significant residential ties with Canada, but considering the purpose of her stay in Switzerland, she was a deemed resident of Canada.

8. The international tax program of the Ottawa Tax Services Office of the Canada Revenue Agency sent a letter to the appellant dated November 18, 1999, in which the international tax program confirmed the opinion issued by the International Tax Services Office, and stated that the appellant was deemed resident in Canada pursuant to sub-paragraph 250(1)(*c*)(*i*) of the *Income Tax Act*.

10. On January 2, 2006, the appellant again wrote to the International Tax Services Office of the Canada Revenue Agency to ask for a re-determination of her residency status for Canadian tax purposes.

11. On March 6, 2007, the appellant again wrote to the International Tax Services Office to ask to be relieved of the obligation to pay taxes in Canada because of the provisions of the Convention between the Government of Canada and the Swiss Federal Council for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital.

12. On May 3, 2007, the International Tax Services Office advised the appellant in writing that she was a non-resident of Canada as of August 16, 1994, because she had not continued to maintain significant residential ties with Canada.

13. On November 1, 2007, the International Tax Services Office sent a letter to the appellant advising her that she was deemed resident in Canada for Canadian tax purposes, from her arrival in Switzerland until the decisive factors of her current situation change.

[18] At the hearing, the appellant submitted an expert report by counsel Pietro Sansonetti, dated October 3, 2011, called [TRANSLATION] "Legal opinion regarding your tax exemption in Switzerland". The content of the expert report was admitted in evidence by counsel for the respondent.

[19] Counsel for the appellant described the findings of the expert report as follows, at paragraphs 24 and 25 of the Notice of Appeal:

[TRANSLATION]

24. The appellant is eligible for an exemption on the income tax that is payable in Switzerland, in regard to wages she receives for her employment with the Mission, pursuant to the Swiss *Federal Direct Tax Law*, the Canton of Geneva's *Law on the Taxation of Natural Persons,* the Federal Council on permanent missions and their staff members decisions of March 31, 1941, and May 20, 1958, that apply the Vienna Convention of 18 April 1961 on diplomatic relations, by analogy, to permanent missions and their staff members, and pursuant to the decisions of the Federal Council on Swiss foreign policies and the practice of authorities who set up the system of privileges and immunities.

25. The decisions of the Federal Council on permanent missions and their staff members and the Federal Council on Swiss foreign policies are not agreements or conventions entered into by one or more foreign countries and do not have the force of law in Canada.

Respondent's position

[20] The respondent submits that the appellant, during the 2006 taxation year, was deemed resident in Canada pursuant to subparagraph 250(1)(*c*)(i) of the Act because she resided in Canada immediately prior to her employment with the Mission in January 1997, in accordance with the applicable version of paragraph 250(1)(*e*) of the Act.

Appellant's position

[21] Since the appellant cut all her personal, economic and residential ties with Canada when she left Canada in August 1994, she did not reside in Canada immediately prior to starting serving the Mission in January 1997. As a result, paragraph 250(1)(*c*) of the Act does not apply and the appellant cannot be deemed to have been resident in Canada during the 2006 taxation year.

Analysis

[22] Subsection 250(1) of the Act, in the version that applied during the 2006 taxation year, stated:

Person deemed resident

250(1) For the purposes of this Act, a person shall, subject to subsection 250(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;
(*b*) was, at any time in the year, a member of the Canadian Forces;
(*c*) was, at any time in the year,
(i) an ambassador, minister, high commissioner, officer or servant of Canada, or,
(ii) an agent-general, officer or servant of a province,
and was resident in Canada immediately prior to appointment or employment by Canada or the province or received representation allowances in respect of the year;
(*d*) performed services, at any time in the year, in a country other than Canada under a prescribed international development assistance program of the Government of Canada and was resident in Canada at any time in the 3 month period preceding the day on which those services commenced;
(*d.1*) was, at any time in the year, a member of the overseas Canadian Forces school staff who filed his or her return for the year on the basis that the person was resident in Canada throughout the period during which the person was such a member;
(*e*) [Repealed, 1999, c. 22, s. 82(1)]
(*f*) was at any time in the year a child of, and dependent for support on, an individual to whom paragraph (*b*), (*c*), (*d*) or (*d.1*) applies and the person's income for the year did not exceed the amount used under paragraph (*c*) of the description of B in subsection 118(1) for the year;
(*g*) was at any time in the year, under an agreement or a convention with one or more other countries that has the force of law in Canada, entitled to an exemption from an income tax otherwise payable in any of those countries in respect of income from any source (unless all or substantially all of the person's income from all sources was not so exempt), because at that time the person was related to or a member of the family of an individual (other than a trust) who was resident in Canada.

[23] Paragraph 250(1)(*e*) of the Act stated, in its previous version to February 24, 1998, the date the paragraph was repealed :

(*f*) was resident in Canada in any previous year and was, at any time in the year, the spouse of a person described in paragraph (*b*), (*c*), (*d*) or (d.1) living with that person; or;

[24] Subsections 82(1), (3), (5) and (7) of the Statutes of Canada 1999, c. 22, the "*Income Tax Amendments Act, 1998*" provided as follows:

> 82(1) Paragraph 250(1)(*e*) of the Act is repealed.
>
> 82(3) Subsection 250(1) of the Act is amended by striking out the word "or" at the end of paragraph (e), by adding the word "or" at the end of paragraph (*f*) and by adding the following after paragraph (*f*):
>
> > *(g)* was at any time in the year, under an agreement or a convention with one or more other countries that has the force of law in Canada, entitled to an exemption from an income tax otherwise payable in any of those countries in respect of income from any source (unless all or substantially all of the person's income from all sources was not so exempt), because at that time the person was related to or a member of the family of an individual (other than a trust) who was resident in Canada.
>
> 82(5) Subsection (1) applies after February 23, 2998, except that, where:
>
> > (*a*) any person would, except for paragraph 250(1)(*e*) of the Act,
> >
> > > (i) would have been non-resident at any time before February 24, 1998, and
> > > (ii) not have become resident in Canada after that time and before February 24, 2998, and
> >
> > (*b*) the person does not elect in writing filed with the Minister of National Revenue with the person's return of income under Part I of the Act for the 1998 taxation year to have subsection (1) apply after February 23, 1998,
> >
> > subsection (1) does not apply in respect of the person before the first time after February 23, 1998 that the person would, but for paragraph 250(1)(*e*) of the Act, cease to be resident in Canada.
>
> 82(7) Subsection (3) applies after February 23, 1998.

[25] To make it easier to understand the concepts that apply in the present case, it is useful to reproduce the explanatory notes from the 1998 budget regarding the repeal of paragraph 250(1)(*e*) of the Act.

> **27 October 1998, NE**: Subsection 250(1) of the Act deems certain persons to be resident in Canada.

Paragraph 250(1)(*e*) of the Act applies to the spouse of a person who is deemed to be resident in Canada by any of certain other of the rules in the subsection. In such a case, the spouse is also deemed to be resident in Canada if the spouse lived with the person at any time in the year and was a resident in Canada in any previous year.

Paragraph 250(1)(*e*) is repealed, with effect to persons who cease to be resident in Canada after February 23, 1998. Persons who, but for the application of paragraph 250(1)(*e*), would have ceased to be resident in Canada before February 24, 1998 and would not have re-established residence in Canada before that date may elect that the repeal apply to them with effect after February 23, 1998.

Budget, February 1998, AMVM: *Deemed Residence*

That paragraph 250(1)(*e*) of the Act, which deems spouses of government employees and certain others to be residents of Canada, be repealed for spouses who, but for that paragraph, would cease to be residents of Canada after February 23, 1998 and for spouses who, but for that paragraph, would have ceased to be residents of Canada before February 24, 1998 and elect not to be subject to that paragraph after February 23, 1998.

Budget, February 1998, RS: *Deemed Residence*

The distinction between residence and non-residence for tax purposes is an important one. Residents of Canada pay Canadian tax on their worldwide income; non-residents pay Canadian tax only on their Canadian-source income.

In most situations, whether or not an individual is resident in Canada is a question of fact: the answer depends on the nature of the individual's ties to Canada and the individual's intentions. In some cases, however, the *Income Tax Act* deems an individual to be resident in Canada whether or not those factual tests are met.

One of the deeming rules treats members of the Canadian Forces, certain development workers, Canadian Forces school staff, and officers and employees of the Government of Canada or a province (including ambassadors, ministers, high commissioners and others) as residents of Canada irrespective of where they are posted. In its current form, the rule also deems the spouses and dependent children of these persons to be Canadian residents.

The budget proposes to eliminate the special rule for spouses. In its place, a new rule is proposed which will deem as residents those individuals who, by virtue of their relationship to a Canadian resident, are exempt from tax in another country under a tax treaty or international agreement.

These changes will apply to individuals who would, but for the current deeming rule, cease to be residents of Canada after February 23, 1998. Individuals who,

> but for the current rule, would have ceased to be resident prior to February 24, 1998 will be permitted to elect that these changes also apply to them after February 23, 1998. If they make this election, they will be treated as having ceased to be resident in Canada on February 24, 1998.

[26] When the appellant began serving the Mission on January 17, 1997, she did not reside in Canada immediately preceding her appointment or employment by Canada, even if the appellant maintained certain ties with Canada after August 1994. The same situation existed when the appellant was offered a permanent position with the Mission in November 1997; she resided in Switzerland. As a result, the appellant cannot be deemed to have resided in Canada under paragraph 250(1)(*c*) of the Act.

[27] However, the conditions of application of paragraph 250(1)(*e*) of the Act were met because the appellant resided in Canada during a prior taxation year and, at one point during the year, was the spouse of a person covered by paragraph 250(1)(*c*), with whom she lived. As a result, the appellant is deemed to have resided in Canada for the entire 1997 taxation year. The same is true for the 1998 taxation year because at some point during the year, the appellant was the spouse of a person covered by paragraph 250(1)(*c*) with whom she lived.

[28] Paragraph 250(1)(*e*) was repealed as of February 24, 1998, and this amendment applies to all persons who ceased to reside in Canada after February 23, 1998, which is certainly not the appellant's case because she ceased to reside in Canada in 1994.

[29] However, as the appellant is a person who, if not for paragraph 250(1)(*e*) would have ceased being a resident of Canada before February 24, 1998, and who did not return to reside in Canada before February 24, 1998, she could have elected to have the repeal apply to her after February 23, 1998.

[30] According to the evidence of record, the appellant did not make this election in her income tax return pursuant to Part I of the Act for her 1998 taxation year. If she had made this election, the appellant would have ceased being deemed resident in Canada on February 24, 1998, with the ensuing tax consequences.

[31] Under the provision that gave effect to the repeal of paragraph 250(1)(*e*), subsection 82(5), Statutes of Canada 1999, c.22, the repeal of paragraph 250(1)(*e*) does not apply to the appellant before the first time after February 23, 1998, she would cease, but for paragraph 250(1)(*e*) of the Act, to be resident in Canada. As a

result, paragraph 250(1)(*e*) continued to apply to the appellant after February 23, 1998. The question is: until when?

[32] The appellant's husband ceased being a Canadian public servant on or around August 17, 1998. Since the appellant was not, at any time during the 1999 taxation year, the spouse of a person covered by paragraph 250(1)(*c*), paragraph 250(1)(*e*) ceased to apply to the appellant during that taxation year. As a result, the appellant became a non-resident of Canada during the 1999 taxation year, unless she is deemed to be resident in Canada pursuant to another provision of subsection 250(1) of the Act.

[33] The determination of the appellant's tax status for the 1999 to 2005 taxation years is not at issue in this case. Only the appellant's 2006 taxation year is in issue in this appeal.

[34] Counsel for the respondent argued that paragraph 250(1)(*c*) applied to the appellant for her 2006 taxation year because she was, pursuant to paragraph 250(1)(*e*), deemed resident in Canada immediately prior to her employment with the Mission. According to this interpretation, the appellant is deemed to be resident in Canada as long as she keeps her job with the Mission, because immediately following her appointment, she was deemed to be resident in Canada.

[35] Despite the able arguments of counsel for the respondent regarding the effects of a legal presumption, I do not agree with her interpretation of paragraph 250(1)(*c*) because paragraph 250(1)(*c*) never applied to the appellant.

[36] There is no doubt that the appellant did not reside in Canada immediately prior to her appointment to the Mission and therefore, paragraph 250(1)(*c*) did not apply to the appellant. She was deemed to be resident in Canada from 1994 to 1998 under paragraph 250(1)(*e*). Moreover, it was specified in her offer of employment in November 1997, that the appellant would be subject to source deductions for Canadian tax purposes as the spouse of a Canadian public servant.

[37] Paragraph 250(1)(*e*) was repealed as of February 24, 1998, but continued to apply to the appellant until the 1999 taxation year.

[38] For the appellant's 2006 taxation year, counsel for the respondent applied retroactively to the 1997 taxation year the presumption of paragraph 250(1)(*e*) to paragraph 250(1)(*c*), which cannot apply to the appellant for the 1997 taxation year

even if paragraph 250(1)(*e*) was repealed in 2006 and no longer applied to the appellant as of 1999.

[39] It seems clear to me that Parliament's intent was to refer to the commonly used criteria for the concept of "residence" when, at the end of paragraph 250(1)(*c*), it used the phrase, "and was resident in Canada immediately prior to appointment or employment by Canada". The fact Parliament clarified that the determination of residence in Canada was at the time "immediately prior to appointment or employment" confirms, in my opinion, its intention to refer to the commonly used criteria for "residence" and not a presumption of residence.

[40] It seems illogical to me to apply a double presumption to the 2006 taxation year, those at paragraphs 250(1)(*c*) and (*e*) when, for the 1997 taxation year, only the presumption at paragraph 250(1)(*e*) was needed to establish the appellant's residence in Canada.

[41] For these reasons, the appeal is allowed with costs and the reassessment is vacated.

Signed at Ottawa, Canada, this 8th day of March 2012.

"Réal Favreau"

Favreau J.

Translation certified true
on this 24th day of July 2012.

François Brunet, Revisor

CITATION:	2012 TCC 72
COURT FILE NO.:	2009-2519(IT)G
STYLE OF CAUSE:	Khedidja Messar-Splinter and Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 15, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	March 8, 2012
APPEARANCES:	
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