Docket: 2012-536(IT)I

BETWEEN:

FIONA J. EDWARDS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 16, 2012, at Edmonton, Alberta

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant:	Ronald J Agar
Counsel for the Respondent:	Robert Neilson
	Rowan Kunitz – Articled Student

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2005, 2006 and 2007 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of December 2012.

"V.A. Miller"

V.A. Miller J.

Citation : 2012TCC430
Date: 20121204
Docket: 2012-536(IT)I

BETWEEN:

FIONA J. EDWARDS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The Appellant has been assessed a penalty of $2500 for each of her 2005, 2006 and 2007 taxation years for failure to file form T1135 within the time prescribed by the *Income Tax Act* (the "*Act*"). Form T1135 is the foreign income verification statement.

[2] The Appellant filed her income tax returns and form T1135 for 2005, 2006 and 2007 on September 22, 2009. Her filing due dates for her returns and form T1135 were April 30, 2006 for 2005, April 30, 2007 for 2006 and April 30, 2008 for 2007. As the T1135 forms were filed more than 100 days late, a maximum penalty of $2,500 was assessed for each year pursuant to subsection 162(7) of the *Act*.

[3] The Appellant indicated in the T1135 forms that she owned real property outside Canada which cost more than $100,000 but less than $300,000. She also reported rental income from this property.

[4] At the hearing, the Appellant was represented by R.J. Agar, an accountant. He argued first, that the Appellant was not a resident of Canada in 2005, 2006 and 2007;

and in the alternative, if she was a resident, then she exercised due diligence during the relevant period in failing to file form T1135 within the prescribed time period.

Residence

(a) Facts

[5] The Respondent filed the affidavit of Brent Aylesworth, Litigation Officer in the Appeals Division of the Edmonton Tax Services Office of the Canada Revenue Agency ("CRA"). The exhibits attached to the affidavit included a Determination of Residence Status form (the "DRS form") dated February 24, 2009 which had been completed and signed by the Appellant and a letter dated July 10, 2009 from the CRA which notified the Appellant that she was considered to be a resident of Canada as of March 3, 2003.

[6] At the hearing, her agent stated that the Appellant's statements in the DRS form pertained to the facts as they existed in 2003 and not as they existed in 2005, 2006 and 2007. The Appellant explained that she was not sure how to complete the DRS form and she asked an officer at the CRA for assistance. It was her evidence that she was advised to complete the form with the facts as they existed in 2003.

[7] The Appellant related the following events that led up to her request for a determination of her residence status.

[8] She has been a flight attendant with United Airlines since 1992 and she has always worked out of the UK.

[9] In May 2000 the Appellant married a Canadian citizen. After the birth of their daughter in 2002, the Appellant and her spouse decided to move to Canada. In March 2003, she moved from the UK to Edmonton, Alberta. She became a permanent resident of Canada on March 15, 2005.

[10] The Appellant was on leave from the United Airlines from 2002 until August 2005 when she was recalled to work. She separated from her spouse in November 2005 and filed for divorce in January 2006.

[11] Initially, on occasion, the Appellant was allowed to take her daughter with her when she travelled to the UK. However, due to a custody assessment, it was decided that her daughter would stay in Edmonton. The Appellant then "tried to spend as much time in Edmonton" as possible to have access to her daughter. According to her evidence, she spent 50 percent of her time in Canada and 50 percent of her time in the UK.

[12] When she was in Canada, the Appellant lived in the matrimonial home with her former spouse until 2007. She then rented an apartment and later purchased a home in Edmonton. Her divorce was granted in October 2008.

[13] The Appellant stated that at the divorce proceeding she wanted the judge to focus on the custody issue. In satisfaction of the matrimonial property issue, she accepted a lump sum payment from her former spouse.

[14] According to her evidence, her former spouse instructed his lawyer to withhold 25 percent of the lump sum because it was his opinion that the Appellant was not a resident of Canada.

[15] The Appellant testified that it was only because of her former spouse's actions that she sought to have her Canadian residency determined.

(b) Analysis

[16] The question of residency is a factual finding. The seminal decision on residence of an individual is the decision of the Supreme Court of Canada in *Thomson v. Minister of National Revenue* (1945), [1946] CTC 51 (SCC) and the most quoted portions of that decision are the following observations of Rand J.:

> 47 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.
>
> 48 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.
>
> 49 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.

> 50 But in the different situation 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.

[17] In *R. v. Reeder*, [1975] CTC 256 (FCTD) Mahoney J. listed some of the factors which are material in determining the question of residence as follows:

> 13 While the defendant here is far removed from the jet set, including any possible imputation of a preconceived effort to avoid taxation, the factors which have been found in those cases to be material in determining the pure question of fact of fiscal residence are as valid in his case as in theirs. While the list does not purport to be exhaustive, material factors include:
>
> (a) past and present habits of life;
>
> (b) regularity and length of visits in the jurisdiction asserting residence;
>
> (c) ties within that jurisdiction;
>
> (d) ties elsewhere;
>
> (e) permanence or otherwise of purposes of stay abroad.
>
> The matter of ties within the jurisdiction asserting residence and elsewhere runs the gamut of an individual's connections and commitments: property and investment, employment, family, business, cultural and social are examples, again not purporting to be exhaustive. Not all factors will necessarily be material to every case. They must be considered in the light of the basic premises that everyone must have a fiscal residence somewhere and that it is quite possible for an individual to be simultaneously resident in more than one place for tax purposes.

[18] I understand the Appellant's confusion in completing the DRS form because many of the declarations are phrased in the future tense. As an example, the Appellant declared that she will own furniture or appliances in Canada; she will have an automobile and a driver's licence from a province; she will have a bank account in Canada.

[19] However, in the DRS form, the Appellant wrote that she became a permanent resident of Canada on March 15, 2005 and has maintained her permanent residency since that date. She also wrote that she has a personal bank account and a mortgage at Scotiabank.

[20] During the relevant period, the Appellant always had a home available to her in Canada. She stated that when she was in Canada she resided with her former spouse until 2007. She then rented an apartment and later bought a house. She did not give an exact date for the rental of the apartment and the purchase of a house. In the UK, although she owned a two bedroom condominium, it was always rented out through an agency so she stayed with her parents while there.

[21] The Appellant may have completed parts of the DRS form from a 2003 perspective; but, she did not state that those same facts did not exist during 2005, 2006 and 2007.

[22] During the period, the Appellant's ties with Canada were substantial. Her infant daughter lived in Canada and the Appellant spent as much time with her child as she could. By her own evidence she spent at least 50 percent of her time in Canada.

[23] It is my view that the Appellant was a resident of Canada in 2005, 2006 and 2007. Her settled routine was that she worked in the UK and she returned to Canada where she resided with her daughter.

[24] It is also my view that the Appellant knew she was a resident of Canada in 2005, 2006 and 2007. She filed her Canadian income tax returns for 2003 and 2004 on November 22, 2005. In these returns, she applied for the Goods and Services Tax Credit ("GSTC"). In 2005, she also applied for retroactive payment of the Canada Child Tax Benefit ("CCTB"). She was advised that she was not entitled to the GSTC for the 2003 taxation year as her spouse had applied for it on her behalf but she was entitled to it for 2004. By letter dated December 23, 2005 she was advised that she was eligible for the CCTB retroactive to March 2003 as requested.

Due Diligence

[25] During the relevant period, the Appellant filed income tax returns in the UK. After it was determined in 2009 that she had been a resident of Canada since March 9, 2003, the Appellant was asked to file her Canadian income tax returns for 2005, 2006 and 2007. In each of the returns the Appellant claimed a federal foreign tax credit and reported there was no federal taxes payable in Canada in 2006 and 2007. The Appellant was required to pay additional federal taxes in Canada in 2005 but there was no evidence as to the amount.

[26] Mr. Agar argued that the Appellant had exercised due diligence in late filing form T1135 and he relied on the decision in *Douglas v. R.*, 2012 TCC 73.

[27] In *Douglas* the taxpayer late filed his 2008 income tax return and the T1135 form. For the 2008 taxation year, he reported no tax payable. Woods J. found that the evidence revealed that Mr. Douglas had exercised due diligence in the circumstances and she vacated the penalty.

[28] Unlike *Douglas*, in the present appeal, the Appellant has not provided any evidence to show that she exercised due diligence.

[29] The Appellant knew that she had to file an income tax return in Canada because she had filed returns for 2003 and 2004. These returns were filed on November 22, 2005. The Appellant was assessed as a resident of Canada for part of the 2003 taxation year and as a resident of Canada for all of 2004.

[30] She did not seek professional tax advice in 2005, 2006 or 2007. She took no steps to report her income in Canada in 2005, 2006 and 2007. It is my view that a reasonable person in such circumstances and with the Appellant's knowledge that she had filed her 2003 and 2004 Canadian income tax returns in November 2005 would, at the very least, have consulted a tax advisor with respect to her income tax return for 2005. The Appellant has not established that she exercised due diligence.

[31] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 4th day of December 2012.

"V.A. Miller"

V.A. Miller J.

CITATION:	2012TCC430
COURT FILE NO.:	2012-536(IT)I
STYLE OF CAUSE:	FIONA J. EDWARDS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
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REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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APPEARANCES:

Agent for the Appellant:	Ronald J Agar
Counsel for the Respondent:	Robert Neilson Rowan Kunitz – Articled Student

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