Dockets: 2013-2108(IT)I

BETWEEN:

JOHN EDWARD KONECNY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 11, 2014, at Toronto, Ontario
Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Darren Prevost

JUDGMENT

In accordance with the Reasons for Judgment attached, the Appeal in respect to the 2011 taxation year is dismissed on the basis that the Appellant did not incur an eligible relocation within the meaning of that definition in subsection 248(1) of the *Income Tax Act*.

Signed at Ottawa, Ontario, this 11th day of April 2014.

"R.S. Bocock"

Bocock J.

Citation: 2014 TCC 114
Date: 20140411
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BETWEEN:

JOHN EDWARD KONECNY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. Introduction

[1] Under subsection 62(1) of the *Income Tax Act*, taxpayers, when calculating taxable income in the year of a move, may deduct certain moving expenses arising from an "eligible relocation". In turn, an "eligible relocation" is defined under subsection 248(1): moving from an old residence, where the Appellant ordinarily resides before the move, to a new residence where the Appellant will ordinarily reside after the move in order "to enable the taxpayer…to be employed in Canada" at the "new work location".

[2] In 2011, Mr. Konecny worked 10 months of the year for the Toronto District School Board ("TDSB") and resided in Whitby, Ontario. In the month of July 2011, he worked for the Ottawa District School Board ("ODSB") and stayed in the Ottawa suburb of Nepean, Ontario ("Ottawa"). Mr. Konecny appeals the Minister's re-assessment which disallowed the moving expenses of some $2,694.00 in relation to the costs of the move. That reassessment rests upon the Minister's assertion that Mr. Konecny temporarily moved to Ottawa during July, never ceased to be ordinarily resident in Whitby and did not incur an "eligible relocation". Only one issue is

before the court: did Mr. Konecny ordinarily reside in Ottawa during a portion of 2011?

II. Some Additional Facts

[3] During the Toronto months, Mr. Konecny lived with his wife and their three children in Whitby. Consistent with teacher employment, he worked from September to June in each teaching year with the TDSB which paid him for those 10 months, but that 10 months salary was averaged over 26 weeks. In July of each year (this was an annual occurrence according to the Appellant), and materially in July 2011, Mr. Konecny and two of his children stayed in Ottawa. There, during July, the Appellant worked a regular full teaching day for the ODSB. His wife remained at the Whitby home from where she continued to work.

[4] When staying at this former boyhood home in Ottawa in 2011 (still owned and occupied by his mother), Mr. Konecny and his two children took with them usual clothing, personal effects and works items. The family car remained with Mrs. Konecny.

[5] Prior to his departure for Ottawa and the ODSB, Mr. Konecny testified that he knew he had a job with TDSB upon his planned return in September. He did not sell his house in Whitby nor rent or buy accommodations in Ottawa. Unsurprisingly, he stayed with family in a home, community and region where he was comfortable, familiar and, as he testified, felt at home. To use Mr. Konecny words, "we were not tourists"; living in Ottawa allowed re-establishment of ties with community and family, but also brought the benefit of a full-time, one month employment opportunity.

[6] While Mr. Konecny did not change his bank account or driver's license, he was a member of the OSSTF in Ottawa and was qualified to be an elector for the Ontario College of Teachers from that region.

III. The Law

[7] There is no dispute that Mr. Konecny met the minimum distant requirements of an "eligible relocation". Similarly, there is also no issue taken by the Respondent

as to the quantum or reasonableness of the expenses which invariably relate to *in transit* transportation and meal costs. The legal issue is whether the move occurred within the confines of the definition in subsection 248(1) in order to constitute a relocation of Mr. Konecny's ordinary residence from the old residence to the new residence and back again in order to enable Mr. Konecny to be employed during July at the ODSB.

IV. Appellant's Submissions

[8] Mr. Konecny argues that:

i. Modern workforce reality causes frequent changes of ordinary residency and the holding of whatever number of segmented, part-time jobs are necessary;

ii. Unique to teaching, he could not structure his employment any other way; he had 2 full time teaching positions during different months, in different locations, both jobs requiring a change in ordinary residence;

iii. The nature of his move to Ottawa made him ordinarily resident there; and,

iv. The facts he did not sell his old residence or buy a new one, change his bank account or driver's license do not prevent him from being an uninterrupted ordinary resident for most months of the year in Whitby and an uninterrupted ordinary resident for one month in Ottawa, both of which ordinary residencies were part of a settled, normal and usual routine.

V. Respondent's Submissions

[9] Respondent's counsel submits that should the Court find that the ordinary residence changed from Whitby to Ottawa in July of 2011 then the appeal should be allowed. However, "ordinarily resident" is highly fact specific and must be viewed within the prism of "customary mode of life" in contrast to a special, occasional or casual residence: *Thomson v. R*, [1946] SCR 209 page 10 at paragraphs 3 and 4 and

page 14 at paragraph 2. Ordinary residence is singular and may not be contemporaneously split between two places: *Rennie v. R*, 90 DTC 1050(TCC) at page 3 and page 4 at paragraph 2.

[10] Counsel for the Respondent further submitted that in determining the "ordinary residence" there are factors to be considered: duration, accommodation, community, social and economic ties severed or maintained, transfer of correspondence/communications, driver's license, health cards and medical care, vehicle registration, family members also moving, and significant belongings moved: *Sears v. R*, 2009 TCC 344 at page 6 paragraph 1.

[11] Lastly, in determining the customary mode of life in relation to the ordinary residence one must examine the types of expenses (*Sampson v. R*, 2009 TCC 204 at paragraphs 16 and 17), and the emphasis and weight previously given in the authorities to the length of time of any purported new residence: *Cavalier v. R*, [2001] TCJ No. 719 (TCC) and *Persaud v. R*, 2007 DTC 1432.

[12] In summary, the Respondent argues that the very short duration of the stay, remaining spouse, vehicle and family home, no license or health card change of address routine type of expenses and the clear intention and preplanned actual return to Whitby after only one month of work all inform the conclusion that there was no change in ordinary residence.

VI Decision

[13] For the following reasons the appeal is dismissed. There is no question that Mr. Konecny could not have worked at the ODSB without leaving Whitby and staying in Ottawa. Factually, such employment could not have otherwise been accepted.

[14] However, in light of existing case law the following facts cannot afford a conclusion of a change in ordinary residence on June 30 and again before September 1, of 2011. Prior to leaving Whitby, Mr. Konecny knew he would return. Therefore, he did not sell or lease his house, take his car, relocate his spouse, change government issued documents or take up a permanent residence in a fashion readily identifiable as a customary made of life. The summer was spent with family and old friends, in a family house where he was

joined by his school aged children otherwise on summer vacation and able to accompany him. The permanence of the Whitby residence never changed. All of the incurred expenses related to travel, *per se* not determinative, but none related to the proactive relocation of ordinary residence. Simply, the necessities of a customary mode of life remained in Whitby: spouse, house, vehicles, furniture and his permanent 10 month annual job with the TDSB; all to which he would unquestionably return within 45 to 60 days.

[15] Mr. Konecny's ordinary residence did not change because Mr. Konecny expended little demonstrable effort to change it. His teaching job with the ODSB was planned in 2011 (as in previous years according to Mr. Konecny) well ahead to coincide with a reconnection with family, friends and boyhood community. The nature of the move was transitory and seasonal, not permanent. Lastly, however settled, normal and usual the trip to Ottawa became in 2011, or in other years for that matter, it was not clothed with factual indicia of an ordinary, permanent residence reflecting a customary mode of life.

[16] Empirically, one concludes that the trip to Ottawa eased acceptance of a job with the ODSB, rather than the job with the ODSB having necessitated a move or relocation to be ordinarily resident in Ottawa. The move was not to enable the job, but the job otherwise reduced the financial burden of the summer visit of Mr. Konecny to his family, friends and boyhood community. It is all of the above factual characteristics when combined with this plausible, alternative purpose of such a stay that do not constitute a change in ordinary residence.

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

Signed at Ottawa, Ontario, this 11th day of April 2014.

"R.S. Bocock"

Bocock J.

CITATION: 2014 TCC 114

COURT FILE NO.: 2013-2108(IT)I

STYLE OF CAUSE:	JOHN EDWARD KONECNY and HER MAJESTY THE QUEEN
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APPEARANCES:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Darren Prevost

COUNSEL OF RECORD:

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Firm:	

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