2012 SCC 14 (CanLII)

SUPREME COURT OF CANADA

CITATION: Fundy Settlement *v.* Canada, 2012 SCC 14

DATE: 20120412
DOCKET: 34056, 34057

BETWEEN:

St. Michael Trust Corp., as Trustee of the Fundy Settlement
Appellant
and
Her Majesty The Queen
Respondent

AND BETWEEN:

St. Michael Trust Corp., as Trustee of the Summersby Settlement
Appellant
and
Her Majesty The Queen
Respondent

CORAM: LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 19)

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2012 SCC 14 (CanLII)

St. Michael Trust Corp., as Trustee of the Fundy Settlement *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

St. Michael Trust Corp., as Trustee of the Summersby Settlement *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: Fundy Settlement *v.* Canada

2012 SCC 14

File Nos.: 34056, 34057.

2012: March 13; 2012: April 12.

Present: LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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Taxation — Income tax — Trusts — Residence — Trusts held by corporation resident in Barbados — Beneficiaries of trusts resident in Canada — Central management and control of trusts carried out by main trust beneficiaries in Canada — Trustee seeking return of amounts withheld on account of Canadian tax from capital gains realized by trusts on sale of shares in Canada — Whether trusts are resident in Canada for taxation purposes.

Held: The appeals should be dismissed

The principal basis for imposing income tax in Canada is residency. As with corporations, the residence of a trust should be determined by the principle that a trust resides for the purposes of the *Income Tax Act* where its real business is carried on, which is where the central management and control of the trust actually takes place. The residence of the trust is not always that of the trustee. It will be so where the trustee carries out the central management and control of the trust where the trustee is resident. Here, however, the trusts are resident in Canada, since the central management and control of the trusts was exercised by the main beneficiaries in Canada and the trustee's limited role was to provide administrative services and it had little or no responsibility beyond that.

Cases Cited

Referred to: *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455; *The King v. British Columbia Electric Railway Co.*, [1945] C.T.C. 162; *Crossley Carpets (Canada) Ltd. v. M.N.R.* (1968), 67 D.T.C. 522; *Unit Construction Co. v. Bullock*, [1960] A.C. 351.

Statutes and Regulations Cited

Canada—Barbados Income Tax Agreement Act, 1980, S.C. 1980-81-82,83, c. 44, s. 25.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 2(1), 94, 104(1), (2), 245.

Treaties and Other International Instruments

Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Can. T.S. 1980 No. 29.

Authors Cited

Krishna, Vern. *The Fundamentals of Income Tax Law*. Toronto: Carswell, 2009.

APPEALS from a judgment of the Federal Court of Appeal (Nadon, Sharlow and Stratas JJ.A.), 2010 FCA 309, 411 N.R. 125, [2011] 2 C.T.C. 7, 2010 D.T.C. 5189, 61 E.T.R. (3d) 168, [2010] F.C.J. No. 1457 (QL), 2010 CarswellNat

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4259 (*sub nom. St. Michael Trust Corp. v. Minister of National Revenue*; *Garon Family Trust v. The Queen*), affirming a decision of Woods J., 2009 TCC 450, [2010] 2 C.T.C. 2346; 2009 D.T.C. 1287; 50 E.T.R. (3d) 241, [2009] T.C.J. No. 345 (QL), 2009 CarswellNat 2600 (*sub nom. Garon Family Trust v. The Queen*). Appeals dismissed.

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Douglas H. Mathew, *Matthew G. Williams* and *Mark A. Barbour*, for the appellants.

Anne M. Turley and *Daniel Bourgeois*, for the respondent.

The following is the judgment delivered by

THE COURT —

[1] St. Michael Trust Corp. ("St. Michael") is the trustee of two trusts, the Fundy Settlement and the Summersby Settlement. The trusts were settled by an individual resident in St. Vincent in the Caribbean. The beneficiaries are residents of Canada. St. Michael is a corporation resident in Barbados.

[2] When the trusts disposed of shares they owned in two Ontario corporations, the purchaser remitted some $152 million to the Minister of National

Revenue as withholding tax on account of Canadian tax from capital gains realized by the trusts on the sale of the shares.

[3] St. Michael sought return of the withheld amount based on an exemption from Canadian capital gains tax under the *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 1980 No. 29 (incorporated into Canadian law by the *Canada-Barbados Income Tax Agreement Act, 1980*, S.C. 1980-81-82-83, c. 44, s. 25). Under the treaty, tax would only be payable in the country in which the seller was resident. St. Michael claimed that because it was resident in Barbados, the trusts were resident in Barbados. As a result, there would be no basis for withholding tax in Canada.

[4] The Minister of National Revenue was of the opinion that the trusts were resident in Canada and that the withheld tax was properly payable.

[5] St. Michael's appeal from the Minister's reassessment to the Tax Court of Canada was unsuccessful (2009 TCC 450, [2010] 2 C.T.C. 2346), as was its further appeal to the Federal Court of Appeal (2010 FCA 309, 411 N.R. 125). It was granted leave to appeal to this Court.

[6] The issue in this case is the residence of the Fundy and Summersby trusts. St. Michael says the residence of the trusts is the residence of the trustee, which is Barbados. The Minister says the trusts are resident in Canada because the

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central management and control of the trusts was carried out by the main beneficiaries, who were resident in Canada. On the facts as determined by Woods J., the Tax Court judge, St. Michael is resident in Barbados while the central management and control of the trusts was carried out in Canada by the main beneficiaries of the trusts.

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[7] As Sharlow J.A. in the Federal Court of Appeal explained, the principal basis for imposing income tax in Canada is residency (para. 52). Professor V. Krishna in *The Fundamentals of Income Tax Law* (2009), noted, at p. 85, that the policy reason for this is to ensure that a person who enjoys the legal, political and economic benefits of associating with Canada will pay their appropriate share for the costs of this association. For an individual, factors such as nationality, physical presence, location of family home and social connections, among others, will be considered in determining residence. While the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), contains certain deeming rules with respect to residency, generally residence is a question of fact.

[8] While there is a dearth of judicial authority on the question of the residency of a trust, the residency of a corporation has been determined to be where its central management and control actually abides. In *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455 (H.L.), Lord Loreburn stated, at p. 458:

> In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We

> ought, therefore, to see where it really keeps house and does business. ... [A] company resides for purposes of income tax where its real business is carried on. ... I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

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The central management and control test for residency of a corporation has been adopted in Canada in a number of cases and is well established (see *The King v. British Columbia Electric Railway Co.*, [1945] C.T.C. 162 (Ex. Ct.); *Crossley Carpets (Canada) Ltd. v. M.N.R.* (1968), 67 D.T.C. 522 (Ex. Ct.)).

[9] In general, the central management and control of a corporation will be exercised where its board of directors exercises its responsibilities. However, as Sharlow J.A. pointed out (at para. 56), where the facts are that the central management and control is exercised by a shareholder who is resident and making decisions in another country, the corporation will be found to be resident where the shareholder resides. (See *Unit Construction Co. v. Bullock*, [1960] A.C. 351 (H.L.).)

[10] St. Michael says that the residence of the trust must be the residence of the trustee based on two fundamental propositions. First, the trust is not a person like a corporation, so the central management and control test is inapplicable to trusts. Sharlow J.A. disposed of St. Michael's first argument summarily, as do we. While a trust is not a person at common law, it is deemed to be an individual under the Act. Section 104(2) provides:

> A trust shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for that person's own

> income tax, be deemed to be in respect of the trust property an individual …

We agree with the Minister that the fact that at common law a trust does not have an independent legal existence is irrelevant for the purposes of the Act.

[11] St. Michael's second argument is that the Act links a trust to the trustee and therefore the residence of the trust must be the residence of the trustee. It bases this argument on s. 104(1), which provides:

> In this Act, a reference to a trust or estate ... shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property ... .

The Federal Court of Appeal found that the linkage in s. 104(1) was for the purposes of solving "the practical problems of tax administration that would necessarily arise when it was determined that trusts were to be taxed despite the absence of legal personality" (para. 64). However, this did not mean that in all cases, the residence of the trust must be the residence of the trustee.

[12] St. Michael argues that s. 104(1) links the trustee to the trust for all attributes of a trust, including residency. However, although the subsection provides that a reference to a trust in the Act shall be read to include a reference to a trustee, St. Michael points to no provision that would link the trust and the trustee for purposes of determining the residency of the trust. The link that St. Michael asserts is

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not a principle of general application to trusts for all purposes, and there is nothing in the context of s. 104(1) that would suggest that there be a legal rule requiring that the residence of a trust must be the residence of the trustee.

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[13] On the contrary, s. 2(1) is the basic charging provision of the Act, and its reference to a "person" must be read as a reference to the taxpayer whose taxable income is being subjected to income tax. This is the trust, *not* the trustee. This follows from s. 104(2), which separates the trust from the trustee in respect of trust property.

[14] On the other hand, there are many similarities between a trust and corporation that would, in our view, justify application of the central management and control test in determining the residence of a trust, just as it is used in determining the residence of a corporation. Some of these similarities include:

1) Both hold assets that are required to be managed;
2) Both involve the acquisition and disposition of assets;
3) Both may require the management of a business;
4) Both require banking and financial arrangements;
5) Both may require the instruction or advice of lawyers, accountants and other advisors; and
6) Both may distribute income, corporations by way of dividends and trusts by distributions.

As Woods J. noted: "The function of each is, at a basic level, the management of property" (para. 159).

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[15] As with corporations, residence of a trust should be determined by the principle that a trust resides for the purposes of the Act where "its real business is carried on" (*De Beers*, at p. 458), which is where the central management and control of the trust actually takes place. As indicated, the Tax Court judge found as a fact that the main beneficiaries exercised the central management and control of the trusts in Canada. She found that St. Michael had only a limited role — to provide administrative services — and little or no responsibility beyond that (paras. 189-90). Therefore, on this test, the trusts must be found to be resident in Canada. This is not to say that the residence of a trust can never be the residence of the trustee. The residence of the trustee will also be the residence of the trust where the trustee carries out the central management and control of the trust, and these duties are performed where the trustee is resident. These, however, were not the facts in this case.

[16] We agree with Woods J. that adopting a similar test for trusts and corporations promotes "the important principles of consistency, predictability and fairness in the application of tax law" (para. 160). As she noted, if there were to be a totally different test for trusts than for corporations, there should be good reasons for it. No such reasons were offered here.

[17] For these reasons, we would dismiss the appeals with costs.

[18] In the alternative, the Minister argued that the trusts are deemed residents of Canada under s. 94, which provides a scheme for taxing non-resident trusts. Even if the trusts were found not to be resident in Canada under common law principles, the Minister submitted that their assessments were justified under s. 94 because the trusts were deemed to be Canadian residents for the purposes of the Act, and therefore Canadian residents for the purposes of the treaty exemption. In the case that this alternative argument failed, the Minister further argued that the tax benefit should be denied according to the general anti-avoidance rule under s. 245 of the Act because it would frustrate the purpose of relevant parts of the treaty.

[19] Given our conclusion that the trusts are resident in Canada under common law principles, it is not necessary to consider the arguments made about s. 94 or s. 245 of the Act. We should not be understood as endorsing the reasons of the Federal Court of Appeal on those matters.

Appeals dismissed with costs.

Solicitors for the appellants: Thorsteinssons, Toronto.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

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