

TAX APPEAL BOARD OF THE STATE OF DELAWARE

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APR 10 1987

GARY LEE & CHRISTINE L. EBERT  
Petitioners,

TAX APPEAL BOARD

Docket No. 848

v.

DIRECTOR OF REVENUE  
Respondent.

Gary Lee Ebert, as Petitioner  
Mark Froelich, Esquire, Deputy Attorney General for Respondent

DECISION AND ORDER

David C. Eppes, C.P.A., Member. The parties to this case have stipulated the facts of the case ("Exhibit A").

The issue before the Board is whether the Petitioners' tax home has shifted to Canada during the stipulated period. If the tax home has shifted, the Board must find for the Petitioner; if not, the Board must find for the Respondent.

The determination of a taxpayer's tax home has often been litigated since it is usually a matter of facts and circumstances. In order to clarify the matter, the Internal Revenue Service issued Rev. Rul. 83-82, which provides a three-pronged test for determining whether presumptive findings are appropriate or whether the facts and circumstances must be weighed in reaching a determination.

The three tests are summarized as follows:

- 1) Did the taxpayer use his previous abode for lodging immediately before leaving the area and has he maintained work contacts in the area of his original employment?
- 2) Has the taxpayer incurred duplicative living expenses?
- 3) Do members of the taxpayers family continue to live in the previous abode, or does the taxpayer frequently use it for purposes of lodging?


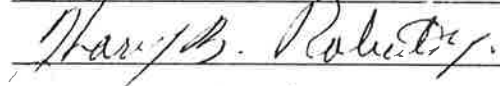
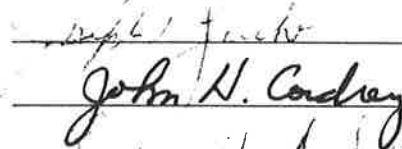

Of the three tests, Petitioner and Respondent seem to agree that the answer to test one is "yes" and the answer to test three is "no", and we concur.

Rev. Rul. 83-82 contains a presumption that the tax home is shifted if the answer to two or more of the questions is "no". Thus the issue remains as to whether the taxpayer incurred

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duplicative living expenses. In oral argument, the Respondent argued that because the taxpayers did not sell their Delaware residence, they incurred duplicative living expenses. The Petitioners argued that they rented the residence at fair market value during the period in question. We agree with the Petitioner that, because the house was rented at fair market value, duplicative living expenses were avoided. Clearly, once a residence is rented at fair market value, it ceases to be a personal residence and becomes an investment property. Expenses incurred to carry or maintain the property during the rental period are not living expenses but rather expenses for the production of income.

Reliance on a mechanical test such as the test in Rev. Rul. 83-82 can lead to a conclusion which may seem to diverge from the facts and circumstances. Respondent argues in the instant case that the facts and circumstances clearly indicate that the taxpayers intended to maintain their tax home in Delaware. While the Respondent's arguments are persuasive, they ignore the purpose of Rev. Rul. 83-82, which is to presumptively resolve this issue where possible and avoid litigation. The mechanical test was devised by a taxing authority. When the taxpayer passes a mechanical test devised by the taxing authority, we must accept the presumption reached.

For the foregoing reasons, we find that the Petitioner's tax home did shift to Canada for the period in question. The Director's decision is reversed.

  
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Charles C. [unclear]  
  
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Thomas B. Robertson  
  
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John H. Conroy  
  
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[unclear]

Dated: ~~April 10, 1987~~ April 10, 1987

BEFORE THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

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Docket No. 848

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 Petitioners, )  
 )  
 v. )  
 )  
 DIRECTOR OF REVENUE, )  
 )  
 Respondent. )

STIPULATION OF FACTS

NOW COME the parties in the above-captioned cause of action, by their respective attorneys, and hereby stipulate and agree as follows:

1. Professor Gary L. Ebert, his wife Christine, and daughters Alissa and Katie resided in Canada from August 1, 1983, until August 6, 1984.
2. During this time Prof. Ebert was employed by the University of Western Ontario to teach one course (3 hours per week) per semester and also received grant monies from the National Science and Engineering Research Council of Canada to do research in the area of finite geometries.
3. Prof. Ebert also received one-half salary from the University of Delaware for the period September 1, 1983, to September 1, 1984, in conjunction with the sabbatical program at the University of Delaware.
4. Sabbaticals at the University of Delaware are not automatically granted every seven years, but rather each faculty member must apply through the Dean's Office of his or her college.

5. Prof. Ebert's sabbatical was granted by Dr. Helen Gouldner, Dean of Arts and Science, for the purpose of further developing his research expertise in finite geometry.

6. A sabbatical report was filed by Prof. Ebert with the Dean's Office and the Office of the Provost on February 11, 1985, indicating his research accomplishments while on leave.

7. Although faculty taking sabbatical leaves normally return to the home institution at the end of their sabbatical leave, many exceptions exist. Most recently, in the Mathematical Sciences Department of the University of Delaware alone, Prof. Zuhair Nashed decided to stay in Saudi Arabia for an additional year after his sabbatical expired in September, 1984, and Prof. David Mason has not yet returned although his sabbatical also expired in September of 1984.

8. Prof. Ebert choose Canada as the country of residence for his sabbatical because Canada (along with Belgium and Italy) has by far the greatest concentration of mathematicians working in the area of finite geometries. There is only a handful of people in the United States carrying out this kind of research, one of whom is Prof. Ebert.

9. While in Canada, Prof. Ebert conducted the research for three papers which have appeared or are about to appear in the international journals. During this time, Prof. Ebert was invited to give research talks at the annual meeting of the Canadian Mathematical Society in Montreal (December, 1983), at the Geometry Seminar at the University of Toronto (January, 1984), and at the

Conference on Finite Geometry held in Winnipeg (July, 1984).

10. Prof. Ebert inquired about permanent positions at various Canadian universities, but was informed that current Canadian law prohibits non-Canadians from being considered unless no qualified Canadians are available for such positions. In the area of finite geometries, there is no shortage of qualified Canadian researchers.

11. While in Canada, Prof. Ebert and his family were allowed to participate in the Ontario Health Insurance Program (part of Canada's socialized medicine program). All members of the family used the services throughout the year. In particular, when Prof. Ebert was hospitalized with pneumonia in Beaver Dam, Wisconsin, while visiting his mother for Christmas in 1983, he submitted the entire bill to OHIP rather than Blue Cross. OHIP paid the bill in full.

12. While in Canada, Mrs. Ebert received family allowances for the care of the Ebert children from Health and Welfare Canada.

13. While in Canada, Mrs. Ebert received a child care tax credit from Revenue Canada.

14. While in Canada, Alissa Ebert was allowed to attend a Saturday morning German School which was subsidized by the local government of London, Ontario.

15. Prof. Ebert's Canadian wages were subject to Canadian withholding by Revenue Canada.

16. While in Canada, Prof. Ebert rented his house in Newark, Delaware, to a non-relative for \$450 per month, a fair market value for the development at that time. All utilities, etc. were the sole