Docket: 2020-777(IT)G

BETWEEN:

TRISKELION PROJECTS INTERNATIONAL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 2, 2022, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant:	Mark Feigenbaum
Counsel for the Respondent:	Michael Ding

JUDGMENT

The appeal from an assessment made under the *Income Tax Act* for the Appellant's 2016 taxation year is dismissed with costs in accordance with the Tariff.

Signed at Ottawa, Canada, this 13th day of June 2022.

"David E. Spiro"

Spiro J.

Citation: 2022 TCC 63
Date: 20220616
Docket: 2020-777(IT)G

BETWEEN:

TRISKELION PROJECTS INTERNATIONAL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Spiro J.

[1] The issue raised in this appeal is whether the Appellant had a "permanent establishment" in Canada for its 2016 taxation year. If so, the Minister of National Revenue (the "Minister") was entitled to assess as she did. If not, she was not entitled to so assess. The parties went to trial on the basis of a Statement of Agreed Facts and a Joint Book of Documents. No supplementary evidence was called by either party.

[2] The Appellant is a corporation resident in the United States whose taxation year is the calendar year. It is in the business of providing project management services to the construction industry ("consulting services"). The Appellant provided consulting services in Canada under a contract to a client on a project from March 2015 to March 2016. It provided 198 days of consulting services in Canada in 2015 and 54 days of consulting services in Canada in 2016 in respect of that project.

[3] The Appellant earned $621,481 for the consulting services it provided in Canada from March to December, 2015 and $181,740 for the consulting services it provided in Canada from January to March, 2016.

[4] The Appellant was assessed tax of $27,261 under Part I of the *Income Tax Act* (the "Act") and tax of $7,530 under Part XIV of the Act in respect of the income it earned from providing consulting services in Canada in its 2016 taxation year. This is the appeal of that assessment.

I. The Law

[5] The country in which a taxpayer is resident is entitled to impose tax on that taxpayer's income. For the Appellant, as a resident of the United States, the United States is the state entitled to tax its income. However, a bilateral tax treaty may also allow the state in which income is earned (the "source state") to tax that income as well.

[6] Tax treaties generally include a provision allowing the source state to tax income earned by a resident of the other state to the extent that the resident of the other state has earned that income from carrying on business in the source state by way of a "permanent establishment" ("PE"). The most common type of PE provided for in tax treaties is a "fixed base". That type of PE is not relevant to this appeal.

[7] The other type of PE provided for in certain tax treaties is a "deemed services PE". Where such a provision is included in a treaty, the source state may tax income earned by a resident of the other state from providing services in the source state if the resident of the other state provided 183 days or more of those services in the source state in "any twelve-month period".

[8] The *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* (the "Canada-U.S. Tax Treaty") includes such a provision in Article V.[1] After a number of paragraphs dealing with "fixed base", paragraph 9 of Article V describes a "deemed services PE":

> 9. Subject to paragraph 3,[2] where an enterprise of a Contracting State provides services in the other Contracting State, if that enterprise is found not to have a permanent establishment in that other State by virtue of the preceding paragraphs

[1] Paragraph 9 of Article V of the Canada-U.S. Tax Treaty became law by *An Act to amend the Canada-United States Tax Convention Act, 1984*, S.C. 2007, c. 32.

[2] Paragraph 3 of Article V provides: "A building site or construction or installation project constitutes a permanent establishment if, but only if, it lasts more than 12 months."

> of this Article, that enterprise shall be deemed to provide those services through a permanent establishment in that other State if and only if:
>
> (a) . . .
>
> (b) the services are provided in that other State for an aggregate of 183 days or more in any twelve-month period with respect to the same or connected project for customers who are either residents of that other State or who maintain a permanent establishment in that other State and the services are provided in respect of that permanent establishment.
>
> [Emphasis added]

II. The Issue

[9] The only issue is whether, under the Canada-U.S. Tax Treaty, the Appellant had a "deemed services PE" in Canada for its 2016 taxation year on the basis that it provided services in Canada for "183 days or more in any twelve-month period". No other issue is raised on the pleadings.[3]

III. The Respondent's Argument

[10] The Appellant's 2016 taxation year commenced on January 1, 2016 and ended on December 31, 2016. During that taxation year, the Appellant provided 54 days of consulting services in Canada. It earned $181,740 for providing those services. All of that income is subject to tax in Canada under paragraph 9 of Article V of the Canada-U.S. Tax Treaty.

[11] Had the Canada-U.S. Tax Treaty required the relevant "twelve-month period" to commence on January 1, 2016 and end on December 31, 2016, Canada could not have taxed the income earned by the Appellant from the 54 days of consulting services it provided here from January to March, 2016.

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[3] See paragraph 12 of the Notice of Appeal. During oral argument, Appellant's counsel tried to raise issues regarding: (a) the correctness of the amount of tax assessed in light of Article VII of the Canada-U.S. Tax Treaty, and (b) whether the Appellant provided consulting services in respect of the "same or connected project" within the meaning of subparagraph 9(b) of Article V of the Canada-U.S. Tax Treaty. As neither issue was raised by the Appellant in its Notice of Appeal, the Court declined to hear the Appellant's argument on either of those two new issues.

[12] However, the Canada-U.S. Tax Treaty allows the Minister to use "any twelve-month period" to determine whether a resident of the United States was carrying on business in Canada by way of a "deemed services PE" for a particular taxation year.

[13] Could the Minister use the twelve-month period commencing in March 2015 and ending in March 2016 as "any twelve-month period" for purposes of assessing the Appellant for its 2016 taxation year? Of course she could. It is an uncontroverted fact that the Appellant provided more than 183 days of consulting services in Canada during that twelve-month period. Indeed, that was the central fact that the Minister assumed in assessing tax to the Appellant for its 2016 taxation year:

> (i) the Appellant provided the Consulting Services in Canada for at least 183 days between March 19, 2015 and March 18, 2016;[4]

[14] At the hearing, the Appellant conceded that fact.[5] That should be determinative of this appeal.

IV. The Appellant's Argument

[15] The Appellant argued that in assessing tax for 2016, the Minister was not entitled to count the days that she had already counted in assessing tax for 2015.

[16] The Appellant contended that in assessing tax for 2015, the Minister counted 183 of the 198 days during which the Appellant provided consulting services in Canada in 2015. The Appellant argued that the Minister was entitled to carry over only 15 days from her 2015 computation in determining whether the Appellant had a "deemed services PE" in Canada for its 2016 taxation year.

[17] Adding the 15 days carried over from 2015 to the 54 days of services provided in Canada in 2016, the Minister had only 69 days in total. That falls short of the minimum of 183 days in "any twelve-month period" as required by subparagraph 9(b) of Article V of the Canada-U.S. Tax Treaty.

[18] During oral argument, counsel for the Appellant, Mr. Feigenbaum, expressed this submission in a number of ways:

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[4] Paragraph 9(i) of the Reply.
[5] Transcript, page 13, lines 4-17.

It's my interpretation of the word "any", Your Honour. Does "any" include days already counted in the previous countings –- [6]

***

. . . we've already used the 183 days once in 2015, . . . -- [7]

***

They've used the same days twice, . . . [8]

***

I don't want to use the word "burned", but they've already used the days in assessing the 2015, . . . [9]

***

JUSTICE SPIRO: But maybe that's your argument, that, assume that there was a 2015 assessment and that those days had been used for the 2015 assessment, and therefore they cannot be reused or recycled for the 2016 assessment. That's your argument, is it?

MR. FEIGENBAUM: 100 per cent [my] argument, Your Honour.[10]

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JUSTICE SPIRO: So let's assume for the sake of argument there was a 2015 assessment for the 2015 profits earned in Canada, based on 183 days. You're saying the Minister can only use whatever remainder of the days remain from 2015 and carry those over for purposes of the calculation, so to speak, into 2016, and if that were done, that still wouldn't add up to 183. If you took the remaining 2015 days and put them into 2016, that still wouldn't give you 183 days, and that's why the 2016 assessment is incorrect.

MR. FEIGENBAUM: That is my entire –

JUSTICE SPIRO: That's your argument. Okay.

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[6] Transcript, page 30, lines 13-15.
[7] Transcript, page 32, line 28 to page 33, line 1.
[8] Transcript, page 34, line 26.
[9] Transcript, page 42, lines 17-19.
[10] Transcript, page 54, lines 4-10.

> MR. FEIGENBAUM: Right. . . . [11]

[19] In its Supplementary Written Argument, the Appellant repeated the same submission:

> The determination of whether the Appellant, Triskelion Projects International Inc. had a Permanent Establishment in Canada for the 2016 tax year hinges on the interpretation of the Treaty and specifically Article V, Paragraph 9 and whether 183 days or more in any twelve-month period may include days that have previously been counted towards the 183 [day] calculation for Permanent Establishment.[12]
>
> ***
>
> . . . the days that were counted in 2015 should be separated from those counted in 2016. Accordingly, the Appellant would not be found to have a permanent establishment in 2016.[13]
>
> [Emphasis added]

V. Analysis

[20] Unfortunately for the Appellant, the Court cannot find that the Minister made any assessment of tax for the Appellant's 2015 taxation year.

[21] The pleadings do not allege that the Minister made any such assessment. No such assessment is referenced in the Statement of Agreed Facts. No copy of any such assessment appears in the Joint Book of Documents. At the commencement of the hearing, the Court gave the Appellant the opportunity to present additional evidence to supplement the record. It chose not to do so.

[22] Had there been an assessment of tax for the Appellant's 2015 taxation year, one would have expected the Appellant to allege in its Notice of Appeal that the Minister assessed tax for the Appellant's 2015 taxation year and, in so assessing, counted certain days. In the same Notice of Appeal, one would have expected the Appellant to outline its theory of its case, namely, that the Minister is not entitled to count the same days again in assessing tax for the Appellant's 2016 taxation year.

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[11] Transcript, page 56, lines 10-21.
[12] Appellant's Supplementary Written Argument, paragraph 2.
[13] Appellant's Supplementary Written Argument, paragraph 19.

[23] The only inference open to the Court is that the Minister did not assess tax for the Appellant's 2015 taxation year. For that reason, the Court is unable to entertain the Appellant's argument and makes no comment on whether such an argument might prevail on a different evidentiary record.[14]

VI. Conclusion

[24] The Appellant conceded the fact that it provided consulting services in Canada for at least 183 days between March 19, 2015 and March 18, 2016. In light of paragraph 9 of Article V of the Canada-U.S. Tax Treaty, that is determinative of the appeal.

[25] The Appellant lacked any factual foundation for the argument on which it rested its case — a non-existent assessment for the Appellant's 2015 taxation year. The appeal will, therefore, be dismissed with costs in accordance with the Tariff.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated June 13, 2022.

Signed at Ottawa, Canada, this 16th day of June 2022.

"David E. Spiro"

Spiro J.

[14] By way of contrast, see *AB LLC and another v Commissioner of the South African Revenue Services*, (2015) 17 International Tax Law Reports 911 at 949-951, where the resident of the other state had appealed its assessment for the previous year and was, therefore, able to present essentially the same argument to the Tax Court of Johannesburg.

CITATION:	2022 TCC 63
COURT FILE NO.:	2020-777(IT)G
STYLE OF CAUSE:	TRISKELION PROJECTS INTERNATIONAL INC. AND HER MAJESTY THE QUEEN
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DATE OF HEARING:	May 2, 2022
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DATE OF AMENDED REASONS FOR JUDGMENT:	June 16, 2022

APPEARANCES:

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Counsel for the Respondent:	Michael Ding

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