Date: 20081209

Dockets: A-160-08
A-162-08

Citation: 2008 FCA 390

CORAM: **SEXTON J.A.**
EVANS J.A.
RYER J.A.

Docket: A-160-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

BRIAN BARTLEY

Respondent

Docket: A-162-08

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JOHN DIMARIA

Respondent

Heard at Toronto, Ontario, on December 9, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on December 9, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: SEXTON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on December 9, 2008)

SEXTON J.A.

[1] The Crown appeals from two decisions of Justice Rossiter (as he then was) of the Tax Court, holding that scholarship monies given by the respondent taxpayers' employer to their children do not constitute employment benefits in the hands of the respondents pursuant to paragraph 6(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th supp.). These reasons apply to both appeals and a copy of these reasons will be placed in each of the files.

[2] The respondents, Mr. Bartley and Mr. DiMaria, are both employed by Dow Chemical Canada Inc. ("Dow"). Mr. DiMaria's son and three of Mr. Bartley's daughters received payments from Dow pursuant to its "Higher Education Award Program" ("HEAP").

[3] Justice Rossiter found that HEAP was established for the purpose of recognizing the academic achievement of the children of eligible Dow employees, and to provide financial assistance as a way of encouraging them to pursue post-secondary education. "Eligible employees", for the purposes of the program, includes current as well as retired, deceased, and disabled Dow employees.

[4] In order to qualify for an award, the student applicant must be the dependant child of an eligible employee and must be enrolled at a recognized post-secondary institution. He or she must have achieved a minimum 70% average in his or her last year of high school in order to qualify. Where the number of qualified applicants exceeds the maximum number of awards available, currently 100, awards are allocated on the basis of highest averages.

[5] HEAP is intended to reimburse tuition costs, up to a maximum of $3000 per year. Provided that the recipient maintains good academic standing, the award may be renewed annually, a maximum of three times. However, Dow is not obligated by contract or otherwise to maintain HEAP. It may modify or discontinue the program at any time, without notice.

[6] Dow paid the awards directly to the student recipients by cheque after their tuition for the year had been paid, regardless of whether it was the student or his or her parent(s) who paid the tuition. Nothing in the record has been shown to us which would give to the parents the right to recover the funds paid to their children. There was no evidence that any of the money received by the students was turned over to their parents.

[7] The sole issue in this case was whether the HEAP awards were benefits received or enjoyed by the respondents, and therefore taxable as employment income pursuant to paragraph 6(1)(*a*) of the Act, which reads:

Amounts to be included as income from office or employment	Éléments à inclure à titre de revenu tiré d'une charge ou d'un emploi
6. (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable	**6.** (1) Sont à inclure dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi, ceux des éléments suivants qui sont applicables :
Value of benefits	Valeur des avantages
(*a*) the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of	*a*) la valeur de la pension, du logement et autres avantages quelconques qu'il a reçus ou dont il a joui au cours de l'année au titre, dans l'occupation ou en vertu d'une charge ou d'un emploi, à

an office or employment, except	l'exception des avantages suivants :
…	…

[8] The Tax Court judge determined that, on the facts before him, the respondents had not received or enjoyed a benefit within the meaning of paragraph 6(1)(*a*) of the *Income Tax Act.*

[9] This question is one of mixed fact and law, so that in order to interfere with the decision of the Tax Court judge, it would be necessary to find that he made a palpable and overriding error. We are unable to conclude that he did make such an error. In asking whether the respondents had received an economic advantage measurable in monetary terms, the Tax Court Judge applied the correct legal test for determining whether the respondents had received or enjoyed "other benefits of any kind whatever" for the purpose of paragraph 6(1)(*a*).

[10] We note that there was no evidence that the respondents reduced the amount which they would otherwise have paid to support their children at university as a result of the award of scholarships to the children.

[11] The Crown also raises an argument that the respondents were under a binding legal obligation to support their children's post-secondary education, and that this burden was relieved by the HEAP awards. The provisions of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 relied upon by the appellant create an obligation to support a child who is a full-time student and who has not "withdrawn from parental control". Since this argument was not raised in the court below or in the

Crown's reply, the taxpayers did not have an opportunity to adduce evidence that their children had withdrawn from their control at the material time. For this reason, we will not entertain this argument on appeal.

[12] Finally, the appellant argues that Justice Rossiter erred in his treatment of paragraph 56(1)(*n*) of the Act, which concerns scholarship income. We would not give effect to this ground of appeal. In his reasons, the trial judge made it clear that he had reached a final conclusion that the HEAP awards were not a benefit enjoyed by the respondents before going on to consider paragraph 56(1)(*n*). His comments on that section were clearly not necessary to the disposition of the case, and it is therefore not necessary for us to discuss them.

[13] For the foregoing reasons, these appeals are dismissed. Pursuant to section 18.25 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, the respondents are entitled to their costs on a solicitor-client scale.

"J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-160-08 A-162-08
(APPEAL FROM A JUDGMENT OF THE TAX COURT DATED 7-MAR-08, DOCKET NOS. 2006-3303(IT)I and 2006-1400(IT)G)	
STYLE OF CAUSE:	A-160-08 *HER MAJESTY THE QUEEN* v. *BRIAN BARTLEY* A-162-08 *HER MAJESTY THE QUEEN* v. *JOHN DIMARIA*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2008
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, EVANS, RYER JJ.A.)
DELIVERED FROM THE BENCH BY:	SEXTON J.A.

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