Citation: 2003TCC636
Date: 20031113
Docket: 2003-57(IT)I

BETWEEN:

DOUGLAS HARRY ARTHURS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on April 30, 2003,
in Vancouver, British Columbia, and revised for greater clarity
in Ottawa, Canada on November 13, 2003.)

Archambault, J.

[1] These are appeals by Mr. Douglas Harry Arthurs who is contesting the reassessments issued by the Minister of National Revenue (**Minister**) with respect to his 1998 and 1999 taxation years. Mr. Arthurs, an actor, claimed certain expenses, some of which the Minister disallowed on the basis that they were of a personal nature.

[2] In reassessing Mr. Arthurs, the Minister relied on a number of assumptions of fact, which are outlined in paragraph 7 of the reply to the notice of appeal. Mr. Arthurs admitted those assumptions set out in subparagraphs 7a), b), and c):

> In so assessing the Appellant, the Minister relied on the following assumptions of fact:
>
> a) at all material times, the Appellant was a self-employed professional actor;

b) in 1998 and 1999, the Appellant earned gross revenues of $46,602.00 and $37,560.47, respectively, in respect of acting;

c) the Appellant did not earn any income from employment for the 1998 and 1999 taxation years.

[3] The evidence introduced by Mr. Arthurs indicates that he is a TV and movie actor and that, in order to earn income from his business, he has hired the services of an agent who helps him in obtaining contracts.

[4] Before dealing with the specific expenses refused by the minister, I would like to state at the outset that these appeals were made under the Informal Procedure and accordingly, by law, these reasons for judgment do not have any precedential value.[1] Although I very rarely make this statement when I render judgments under the Informal Procedure, I do so here because I sense a move by the performing arts industry, at least in British Columbia, to contest the administrative practices of the Canada Customs and Revenue Agency (**CCRA**). Such a contestation raises difficult issues. Many of the expenses claimed by performing art artists such as Mr. Arthurs could be described as borderline because they have a significant personal component. If my perception as to the intention of the performing arts industry is right, I believe that the contestation of the CCRA's administrative practices should be done within the framework of an appeal under the General Procedure as a sort of test case, hopefully with the assistance of a well-qualified tax lawyer. This lawyer would have to introduce all the proper and relevant evidence as to what the expenses are and in what circumstances they were incurred. It is important that this Court not be left with generalities and vague statements as to how the trade is being carried on and as to the purpose for which the expenses were incurred.

[5] Unfortunately, in this case the evidence was not sufficient to convince me that all the expenses were actually incurred for business and not personal consumption purposes.

[6] Before I analyze the facts of this case, I should mention the three important statutory provisions that come into play in these appeals. First, there is section 9 of the *Income Tax Act* (***Act***) which provides that a taxpayer has to include in his income his income from a business. Business income is defined as being the profit derived from a business. Then there are two limitation provisions, the first being

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[1] Section 18.28 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

paragraph 18(1)(*a*) of the Act, which states that you cannot claim an expense unless it was incurred for the purpose of earning income; the second, and more critical here, is paragraph 18(1)(*h*) to the effect that no personal or living expense is allowable unless it is an expense incurred in the course of travelling away from home on business.

[7] With regard to the determination of what constitutes a personal or living expense, two useful cases were submitted to this Court by counsel for the Respondent. The first of these is *No. 360 v. M.N.R.*, 16 Tax A.B.C. 31 (English version) which involved facts very similar to those herein. In that particular case the taxpayer was, as described by the Chairman of the Tax Appeal Board, an "actress, commentator and dramatic artist . . . a star of the stage, radio and television — and occasionally of the screen". She was also a person earning income from a business: self-employed, as it is more commonly put. The Chairman acknowledged that her success was due both to "her great talent as an actress and to her charm and grooming".

[8] The actress in question claimed expenses with respect to her clothing and that is the description we find in the Chairman's reasons. The evidence was that she had to provide her own costumes for modern plays and, in most of her television engagements, she was required to furnish her own dresses, which had to be varied and always in the best taste. The appellant in that case also testified that because her viewers complained when she wore the same clothes more than once, she had to buy a large number of dresses and accessories if she wanted to retain her television contracts. The fact was, however, that the dresses could be worn not only for business purposes but also for personal purposes on other occasions. It was even argued that she had to maintain her reputation as a well-dressed woman both on and off the stage.

[9] Based on these facts, the Chairman rendered the following judgment:

> The question here has arisen in a great number of cases heard by this Board. In all such cases it was decided that such expenses were personal expenses and a deduction was not allowed. I find nothing in the present case which would warrant a decision different from the one reached by my colleagues and myself in similar cases, to wit, that these are "personal or living expenses" within the meaning of

> Section 12(1)(h) [at the time] of the Act and consequently are not deductible.[2]

[10] The other precedent submitted by counsel for the Respondent is the decision of the Supreme Court of Canada in *Symes v. Canada*, [1994] 1 C.T.C. 40. *Symes* is not a case dealing with the same kind of expenses as those claimed in these particular appeals: it deals rather with child care expenses. However, it does contain a review of the notion of "personal or living expenses" as found in paragraph 18(1)(*h*) of the *Act*. Writing on behalf of the majority of the Supreme Court, Mr. Justice Iacobucci made the following statements as to how one goes about determining if an expense is a personal or living expense. The three most relevant paragraphs of his reasons are the following, found on pages 60 and 61:

> Third, I note that there is no evidence to suggest that child care expenses are considered business expenses by accountants. There is, however, considerable reason to believe that many parents, and particularly many women, confront child care expenses in order to work. There is, first of all, the evidence of the expert witness, already discussed above. In addition, the record before this Court includes a report by Status of Women Canada, entitled the *Report of the Task Force on Child Care* (1985) [*sic*], which demonstrates that a very large number of working parents require non-parental care for their children (see, e.g., Table 4.2). As well, the intervener Canadian Bar Association presented this Court with survey information which specifically addresses the experience of lawyers in Ontario. That information suggests that for lawyers with children, a significant proportion of child care responsibility is borne by paid child care workers, and the mean proportion is over 250 per cent greater for women (25.56 hours per week) than for men (9.53 hours per week): Law Society of Upper Canada, *Transitions in the Ontario Legal Profession* (1991). This demographic picture may increase the likelihood that child care expenses are a form of business expense.
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> Finally, as a fourth point of analysis, I am uncomfortable with the suggestion that the appellant's decision to have children should be viewed solely as a consumption choice. I frankly admit that there is an element of public policy which feeds my discomfort. In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, Dickson, C.J. stated (at page 1243 (D.L.R. 339):

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[2] A review of the case law on this issue, as summarized in the CCH Tax Reporter and the Canada Tax Service, indicates that this is still the approach adopted by the courts. There was no significant departure from it that I could identify.

> That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant . . . it is unfair to impose all of the costs of pregnancy upon one half of the population.

. . .

> What is more, I note that it is not a necessary part of this conclusion that the appellant bears a legal obligation to care for her children, as might be suggested by the following oft-quoted analogy originating from the United States (M.J. McIntyre, "Evaluating the New Tax Credit for Child Care and Maid Service" (1977), 5 Tax Notes 7, at page 8):
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> > The child care deduction was somewhat different because of the legal obligation to care for children. No one would suggest that the costs of caring for a pet elephant are deductible, simply because it is impossible to go to work and leave the elephant alone. What made child care different was that a parent, after making the quintessential personal choice to have a child, could not undo that decision by giving the child to the local zoo. This difference, however, is not sufficient to convert child care into a business expense....

[11] At page 59, Mr. Justice Iacobucci refers to this statement written by Professor Brooks:

> If a person would have incurred a particular expense even if he or she had not been working, there is a strong inference that the expense has a personal purpose. For example, it is necessary in order to earn income from a business that a business person be fed, clothed and sheltered. However, since these are expenses that a person would incur even if not working, it can be assumed they are incurred for a personal purpose — to stay alive, covered, and out of the rain. These expenses do not increase significantly when one undertakes to earn income.

At pages 59-60, Justice Iacobucci writes:

> Since I have commented upon the underlying concept of the "business need" above, it may also be helpful to discuss the factors relevant to expense classification in need-based terms. In particular, it may be helpful to resort to a "but for" test applied not to the expense but to the need which the expense meets. Would the need exist apart from the business? If a need exists even in the absence of business activity, and irrespective of whether the need was or might have been satisfied by an expenditure to a third party or by the opportunity cost of personal labour, then an expense to meet the need would traditionally be viewed as a personal expense.

[12] The first group of expenses claimed by Mr. Arthurs was meal and entertainment expenses. Mr. Arthurs stated during his evidence that he would have meals with his friends, fellow actors who were in the same business as he, and it was useful for him to meet them in order to build his network and to help himself locate business opportunities. He also added that he would have meals with his agent and that he attended different wrap-up parties. He candidly acknowledged that it would be very rare to have meals with directors or casting directors given that performing artists are hired through talent agencies and not directly by directors or casting directors through individual contacts.

[13] It is my view that the meals taken with fellow actors are far too remote from the earning process to be deductible. However, lunches taken with one's agent to discuss one's career would fall into the business category. In between these two kinds of meal expenses are expenses incurred for so-called wrap-up parties. I would not have any difficulty granting deductions for costs relating to wrap-up parties held following a particular production in which one has participated. However, I would not be inclined to do so for the costs of attending wrap-up parties for productions in which one has not been involved.

[14] Here the evidence does not properly distinguish between the various activities referred to above and therefore it is difficult for me to determine an accurate amount to allow as a deduction. However, I am prepared in this particular case to allow an arbitrary amount of $1,000 for business lunches taken by Mr. Arthurs with his agent and for expenses for wrap-up parties connected with productions in which Mr. Arthurs was involved. But this amount is subject to the rule in section 67.1 of the Act, under which 50 percent thereof must be disallowed because that portion is considered as personal. Therefore, only $500 would be deductible for meals and entertainment for 1998 and 1999.

[15] With respect to the office expenses related to the apartment in which Mr. Arthurs resides, 50 percent of those expenses was initially claimed. Mr. Arthurs was prepared to reduce his claim to 20 percent. However, based on the evidence that I heard and, in particular, given that the place that he described as a rehearsal place is also his living room and that rehearsals are not conducted there on a continuous basis, I find that the ten percent allowed by the Minister is reasonable.

[16] With respect to the expenses for such things as dry cleaning, eyeglasses, casual clothing, personal hygiene, a jewellery box, a picture frame, a season ski pass and other supplies, they are all of a personal nature and Mr. Arthurs has failed to convince me that they were related to the earning process.

[17] The same conclusion applies to what were described as employment expenses, which is not the proper term, given that Mr. Arthurs was not an employee. Those expenses were for magazines, video rentals, movie tickets, theatre tickets and CDs. I am not satisfied that all those expenses were directly related to Mr. Arthurs' business. This applies equally to the so-called educational, promotional and clothing expenses claimed, such as for the cost of attending fitness classes and fitness club membership costs. The only expenses that should be allowed as deductible, are $44.49 for online services registration, $96.64 for a gift to his agent and an arbitrary amount of $100 for flowers.

[18] Mr. Arthurs indicated to me that he did not expect to be successful with his claim for the costs of a trip to Thailand. Indeed, that trip appears to have been more in the nature of a personal than a business expense. I am convinced that the trip would not have been taken just for the purpose of attending the puppeteering workshop. Finally, massage for his lower back pain was in any event a personal item.

[19] For these reasons, I will allow the appeals and the assessments will be referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to deduct in computing his business income for each of the years at issue 50 percent of $1,000 in expenses incurred for meals and, for the 1998 taxation year, an additional expense of $241.49.

[20] Given that these are appeals under the Informal Procedure, there are no costs that could be awarded to the Respondent.

Signed at Ottawa, Canada, this 13th day of November 2003.

« Pierre Archambault »

Archambault, J.

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APPEARANCES:

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