

Docket: 2017-4665(IT)I

BETWEEN:

JOHN A. BARRETT

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 21, 2019 at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Acinkoj Magok

JUDGMENT

WHEREAS the Court has on this date issued Reasons for Judgment in this appeal;

NOW THEREFORE the appeal from reassessment made under the *Income Tax Act* in respect of the 2015 taxation year is dismissed, without costs.

Signed at Ottawa, Ontario, this 21st day of October, 2019.

“R.S. Boccock”

Boccock, J.

Citation: 2019TCC228
Date: 20191021
Dockets: 2017-4665(IT)I

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Appellant,

and

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REASONS FOR JUDGMENT

Bocock, J.

I. Introduction

[1] The sole issue to be decided in this appeal is whether the Appellant, Mr. Barrett, is entitled to deduct legal fees in the amount of \$27,333 from his income in the 2015 taxation year.

[2] Mr. Barrett was involved in three separate legal actions: a matrimonial dispute against his former spouse, a wrongful dismissal suit against PSI Peripheral Solutions (“PSI”), and an oppression remedy action instituted by his former spouse against Mr. Barrett, PSI and 791755 Ontario Corporation (“791755”) (the “proceedings”). To prosecute or defend the three proceedings, Mr. Barrett retained the legal services of Kevin Robinson of Robinson Heeney LLP.

[3] At the hearing, Mr. Barrett testified that both he and his former spouse were majority shareholders of 791755. This holding company owned an unspecified interest in PSI. Although a founder of PSI, Mr. Barrett was ultimately dismissed from PSI as an employee. Therefore, he brought the wrongful dismissal action.

[4] Mr. Barrett believes that his former spouse was partly responsible for PSI’s decision to terminate his employment. Further, the former spouse initiated an oppression remedy action as a security holder whose interests allegedly had been

prejudiced or unfairly disregarded. According to Mr. Barrett, she brought her action in order to secure a greater share of his business assets, namely PSI and 791755.

[5] Mr. Barrett provided the Court with 4 documents:

- i) Minutes of Settlement from the civil lawsuit of *Barrett v Barrett*: Superior Court of Ontario File No. 32160/09, dated June 15, 2015;
- ii) Statement of Account from Robinson Heeney LLP, dated October 20, 2015 in the amount of \$ 316.40 and a Trust Ledger Statement reflecting, *inter alia*, a transfer of trust funds in the amount of \$12,923.08 to fund unspecified future invoices on an “other matter”;
- iii) Statement of Account from Robinson Heeney LLP, dated March 18, 2015 in the amount of \$4,432.43; and,
- iv) Email correspondence from Mr. Barrett to the Department of Justice, dated May 14 to 18, 2019.

[6] Mr. Barrett asserts that the claimed legal fees of \$27,333 were incurred and paid by him in respect of the wrongful dismissal suit, matrimonial dispute and the oppression remedy action. In addition to the claimed legal fees, Mr. Barrett asked to deduct further amounts, specifically the settlement amount of \$40,000 and costs of \$12,923.08, both paid to his former spouse as part of the settlement of the matrimonial dispute.

[7] Mr. Barrett admitted that he had neither any invoices or documents concerning the legal fees nor the actual amounts that were incurred and paid by him concerning the wrongful dismissal litigation beyond those identified above.

[8] In litigating the oppression remedy action, Mr. Barrett testified that he incurred and paid legal fees in the amount of \$12,923.08. Mr. Barrett entered into evidence a copy of the invoice in the amount of \$4,432.43 from Robinson Heeney LLP, as proof of the services rendered and paid.

[9] Mr. Barrett asserted during the hearing that he had additional invoices which would assist in proving his right to deduct the legal fees. Based on that representation, the Court allowed further submissions after conclusion of hearing

all other evidence. To affect this, an order issued. Mr. Barrett was permitted to serve and file copies of any additional invoices concerning legal fees rendered by Robinson Heeney LLP and paid by Mr. Barrett concerning litigation involving the oppression remedy action relating to 791755 Ontario Corporation (known as “Barrett Holdings”). Mr. Barrett did not follow the order he sought. No further documents or submissions were received from him. Only submissions from Respondent’s counsel were filed and served. Therefore, the Court has made certain assumptions concerning Mr. Barrett’s likely arguments and submissions.

II. The Law

[10] The relevant excerpted provisions of the *Income Tax Act*, RSC 1985, c.1, as amended (the “Act”) provide as follows:

Section 8(1)(b)

Deductions

Deductions allowed

8(1) In computing a taxpayer’s income for a taxation year from an office or employment, there may be deducted [...]

(a) [Repealed, 2001, c.17, s.3(1)]

Legal expenses of employee

(b) amounts paid by the taxpayer in the year as or on account of legal expenses incurred by the taxpayer to collect, or to establish a right to, an amount owed to the taxpayer that, if received by the taxpayer, would be required by this Subdivision to be included in computing the taxpayer’s income.

Subsection 60(0.1)

Idem

(o.1) the amount, if any, by which the lesser of

(i) the total of all legal expenses (other than those relating to a division or settlement of property arising out of, or on a breakdown of, a marriage or common-law partnership) paid by the taxpayer in the year or in any of the 7 preceding taxation years to collect or establish a right to an amount of

(A) a benefit under a pension fund or plan (other than a benefit under the *Canada Pension Plan* or a provincial pension plan as defined in section 3 of that Act) in respect of the employment of the taxpayer or a

deceased individual of whom the taxpayer was a dependant, relation or legal representative, or

(B) a retiring allowance of the taxpayer or a deceased individual of whom the taxpayer was a dependant, relation or legal representative, and

(ii) the amount, if any, by which the total of all amounts each of which I

(A) an amount described in clause 60(o.1)(I)(A) or 60(o.1)(I)(B)

(I) that is received after 1985,

(II) in respect of which legal expenses described in subparagraph 60(o.1)(I) were paid, and

(III) that is included in computing the income of the taxpayer for the year or a preceding taxation year, or

(B) an amount included in computing the income of the taxpayer under paragraph 56(1)(1.1) for the year or a preceding taxation year,

exceeds the total of all amounts each of which is an amount deducted under paragraph 60(j), 60(j.01), 60(j.1) or 60(j.2) in computing the income of the taxpayer for the year or a preceding taxation year, to the extent that the amount may reasonably be considered to have been deductible as a consequence of the receipt of an amount referred to in clause 60(o.1)(ii)(A),

exceeds

(iii) the portion of the total described in subparagraph 60(o.1)(I) in respect of the taxpayer that may reasonably be considered to have been deductible under this paragraph in computing the income of the taxpayer for a preceding taxation year;

[11] Paragraph 8(1)(b) of the *Act* provides that a taxpayer, in computing income from an office or from employment, may deduct legal expenses paid by a taxpayer in order to collect or to establish a right to an amount owed to the taxpayer that, if received by the taxpayer, would be required to be included in computing the taxpayer's income.

[12] Similarly, subsection 60(o.1) of the *Act* allows for the deduction, in computing a taxpayer's income, of legal expenses paid by a taxpayer to collect a retiring allowance or a pension benefit to which they were entitled, up to the amount received. A retiring allowance is defined in subsection 248(1) of the *Act* to

include an amount received on account of damages received in connection with the loss of employment.

III. Position of the Parties

[13] The Respondent's position is that Mr. Barrett is not entitled to deduct legal fees of \$27,333 pursuant to paragraph 8(1)(b) and/or subsection 60(o.1) of the *Act* because the claimed legal fees were not incurred and paid by Mr. Barrett to collect or establish a right to an amount owed to Mr. Barrett as an employee. Further, such legal expenses were not incurred to collect or establish a right to an amount of a benefit under a pension fund or plan in respect of the employment of Mr. Barrett or a retiring allowance of Mr. Barrett.

IV. Analysis

Wrongful Dismissal Action

[14] The wording of 8(1)(b) is directed towards legal proceedings undertaken to procure income owed or assert the right to claim or retain it. The jurisprudence is clear that a taxpayer must produce documentary evidence in support of her or his assertion that legal fees were incurred and paid by the taxpayer or at the very least offer a cogent reason as to why the evidence was not available but on balance exists: *Naraine v The Queen*, 2016 FCA 6 at paragraph 3.

[15] Mr. Barrett successfully litigated a wrongful dismissal suit against PSI. However, Mr. Barrett admitted that he neither had any invoices nor did he bring or subsequently submit any other evidence before the Court to establish that he incurred and paid legal fees concerning the wrongful dismissal suit.

Matrimonial Dispute

[16] The Respondent submits that the language of paragraph 8(1)(b) and subsection 60(o.1) of the *Act* is unambiguous. It does not permit a taxpayer to deduct from income legal fees incurred and paid concerning litigation, nor any awards received at the disposition, of a matrimonial proceeding.

[17] The amounts paid in respect of the matrimonial litigation were not incurred and paid by Mr. Barrett for the purpose of recovering a taxable income or right to income from an employer nor a pension benefit. Rather, the matrimonial dispute

involved the dissolution of Mr. Barrett's marriage and the subsequent distribution of the matrimonial assets.

[18] Accordingly, Mr. Barrett is not permitted to deduct any amounts paid in respect of that matrimonial dispute, including the ordered settlement amount and the awarded costs on the basis that those amounts are not proper legal expenses within the meaning of paragraph 8(1)(b) and/or subsection 60(o.1) of the *Act*.

Oppression Remedy Action

[19] Mr. Barrett submitted to the Court that he is entitled to deduct legal expenses of \$12,923.08, which he had incurred in order to protect his business interests in PSI and 791755. As mentioned, no submissions were received from Mr. Barrett. He possibly relied on the proposition that a taxpayer is entitled to deduct legal fees incurred and paid in accordance with sound accounting and commercial practices during the course of the taxpayer's income earning operations: *Rolland Paper Co. v Minister of National Revenue : 1960 CarswellNat 260*, (Exchequer Court of Canada). However in that case, the Exchequer Court was concerned with the interpretation of the then subsection 120(1)(a) of *Income Tax Act*, (the predecessor of section 18(1)(a) of the *Act*), which related to the deductibility of legal expenses in the computation of income from business or property.

[20] Nothing heard by the Court brings this appeal within that factual scenario. Mr. Barrett did not make such assertions in his notice of appeal. No evidence was adduced that he carried on a business or that the claimed legal expenses were incurred for the purpose of gaining or producing income within the meaning of paragraph 18(1)(a) of the *Act*. He sought to deduct the legal fees from employment income.

[21] Paragraph 8(1)(b) of the *Act* contemplates two types of litigation: whether the litigation arose as a result of the failure of the employer to pay the salary and wages due to an employee; and second, whether the employee was actually entitled to the salary and wages.: *Loo v. HMQ* 2004 FCA 370 at paragraphs 7 and 8. The Federal Court of Appeal in *Fenwick v HMQ* 2008 FCA 370 expressly stated that the scope of paragraph 8(1)(b) of the *Act* is relatively narrow and is limited to litigation where the essential element of the claim must have arisen from a disagreement over the terms of employment.

[22] Similarly, the language of subsection 60(o.1) of the *Act* is clear and unambiguous; it only allows the deduction of legal fees paid by a taxpayer to

collect a retiring allowance or a pension benefit to which a taxpayer was entitled. It parallels for pensions the required nexus which paragraph 8(1)(b) requires for salary, wages and benefits from employment.

[23] There is no evidence that the oppression remedy action involved a dispute over whether Mr. Barrett was entitled to collect taxable income from employment or office, a pension benefit or a retiring allowance from his employer. From his own evidence, Mr. Barrett admitted that the oppression remedy action involved the protection of the business interests of PSI and 791755. More importantly, Mr. Barrett's involvement in the oppression remedy action was not in his capacity as an employee.

[24] In *Fenwick, supra* at paragraphs 9 and 10, the Court rejected attempts to deduct legal expenses paid by a taxpayer in defending a derivative action on the basis that the derivative actions are brought against a taxpayer *qua* director not employee. Even on the scant evidence before it, the Court concludes that the oppression remedy action was instituted against Mr. Barrett not as an employee but rather in his capacity as an allegedly offending officer, director or shareholder of 791755 and PSA.

[25] Assuming the Court accepts Mr. Barrett's evidence that the oppression remedy action was a subterfuge by which Mr. Barrett's former spouse indirectly attacked Mr. Barrett's employment relationship with PSI, Mr. Barrett has still not demolished the Minister's assumptions. Paragraph (8)(1)(b) of the *Act* cannot assist Mr. Barrett because it is only directed at the collection of or the entitlement to taxable income owed: *Hollinger v. HMQ* 2013 TCC 252 at paragraph 31. The Minutes of Settlement set out the terms of disposition of the oppression remedy action by its terms. There was no discussion with respect to the employment status of Mr. Barrett; the Minutes of Settlement dealt with the redistribution of the shares in both PSI and 791755 between Mr. Barrett and his former spouse as well as the restructuring of the corporate structure and other corporate business. Similarly, even a new corporate structure at PSI and 791755, which ultimately allowed Mr. Barrett to restore his employment relationship, is not enough. Paragraph 8(1)(b) of the *Act* does not allow for the deductibility of legal fees incurred to secure future employment or the reversion or restoration of a right to a position (aside from salary or benefits or the right to same) once held, but lost.

V. Summary and Costs

[26] For the above reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 21st day of October, 2019.

“R.S. Boccock”

Boccock, J.

CITATION: 2019TCC228
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DATE OF JUDGMENT: October 21, 2019

APPEARANCES:

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COUNSEL OF RECORD:

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