

Docket: 2014-1393(IT)I

BETWEEN:

OHAD KONDOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 6, 2014, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant:                      The Appellant Himself  
Counsel for the Respondent:        Darren Prevost

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**JUDGMENT**

The Appeal of the reassessment of the Appellant's 2011 taxation year is dismissed without costs.

Signed at Ottawa, Canada, this 15<sup>th</sup> day of October 2014.

“David E. Graham”

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Graham J.

Citation: 2014 TCC 303

Date: 20141015

Docket: 2014-1393(IT)I

BETWEEN:

OHAD KONDOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Graham J.

[1] Ohad Kondor separated from his wife in 2010. In 2011, Mr. Kondor spent \$12,171 in legal fees relating to the division of property between himself and his wife. Mr. Kondor deducted those legal fees from his income when he filed his 2011 tax return. The Minister of National Revenue denied that deduction. Mr. Kondor has appealed the denial.

[2] Mr. Kondor owns 50% of the shares of DPX Capital Inc. Mr. Kondor takes the position that the legal fees were incurred to earn income from DPX's business. The Respondent takes the position that the legal fees were personal living expenses. Alternatively, the Respondent takes the position that if the legal fees were incurred to earn income, they were incurred to earn income from the DPX shares, not DPX's business and they were incurred on capital account.

[3] Therefore, the issues on this Appeal are:

- (a) whether Mr. Kondor incurred the legal fees to earn income from DPX's business;
- (b) if not, whether Mr. Kondor incurred the legal fees to earn income from the DPX shares; and
- (c) if so, whether the expenditure was on income account.

**Were the legal fees incurred to earn income from DPX's business?**

[4] Mr. Kondor's assertion that the legal fees were incurred to earn income from DPX's business is without merit. The legal fees cannot have been incurred by Mr. Kondor in order to earn income from DPX's business as Mr. Kondor does not carry on DPX's business and thus did not earn any income from it. Mr. Kondor's interest in DPX was as a shareholder. Thus, to the extent that the legal fees were incurred to earn income, they were incurred to earn income from the DPX shares.

**Were the legal fees incurred to earn income from the DPX shares?**

[5] Following Mr. Kondor's separation, his wife informed him that, in addition to some other assets, she expected to receive \$2,100,000 in cash from him as part of the division of property from the marriage. Mr. Kondor's only significant asset at the time was his shares in DPX. There was no market to sell those shares and his wife was not prepared to accept shares in lieu of cash. Therefore, Mr. Kondor's only means of obtaining the necessary cash was through DPX.

[6] DPX borrows money from third parties (generally the friends and family of Mr. Kondor and of the other 50% shareholder of the company) and invests that money in various complex securities. DPX takes steps to hedge its risk in those investments. The investments are highly leveraged. While DPX believes that there is minimal risk involved in its investments, its brokerage does not share that view. Thus, the brokerage regularly reviews DPX's account to ensure that it is maintaining sufficient margin and, when it believes it is not, requires DPX to either unwind some of its investments or inject additional capital. Just as DPX's brokerage believes that DPX's investments are risky, so too do conventional lenders. Thus DPX is not in a position to borrow funds from traditional lenders.

[7] Mr. Kondor explained that, because of its highly leveraged positions, withdrawing that amount of money from DPX in the short term would have been disastrous for DPX. Similarly, it would have had a disastrous impact on the value of Mr. Kondor's shares in DPX. He testified that he was in a position to extract the necessary funds from DPX but that he needed a significant amount of time if he wanted to do so without impacting the value of the company.

[8] Mr. Kondor's strategy to deal with this problem was to stretch out negotiations with his wife over the division of assets as long as possible. He succeeded in obtaining a delay of approximately three and a half years. Mr. Kondor testified that the legal fees that he incurred were incurred for the

purpose of obtaining that delay. Mr. Kondor argues that the fees should therefore be deductible as they were laid out for the purpose of earning income from his shares in DPX.

[9] In keeping with his duty as an officer of the court, counsel for the Respondent drew my attention to a decision of former Chief Justice Bowman that supported Mr. Kondor's position. The appellant in *Muggli v. The Queen*<sup>1</sup> was a farmer who was separating from his wife. The appellant's wife claimed that she was entitled to 50% of the value of the farm. The appellant spent money having the farm valued and incurred legal fees resolving the division of property. The appellant argued that those funds had been expended to protect his interest in the farm and thus to allow him to continue to earn income from his farming business. The Minister argued that the funds had been expended for personal or living expenses. Former Chief Justice Bowman held that there was a "sufficient nexus between the preservation of the farm, his principal means of livelihood, and the legal expenses claimed that I would not be justified in rejecting his claim on the basis of paragraph 18(1)(a) alone"<sup>2</sup>. He went on to conclude that although there was also a personal element to the expenditure, that element did not detract from the commercial element. He stated that where an expenditure had both a commercial and a personal purpose it was up to the Court to determine which one was the predominant purpose. I agree with the reasoning in *Muggli*.

[10] The Respondent submits that the legal fees related to Mr. Kondor's separation from his wife and were thus personal in nature. The Respondent argues that the fees were a cost that Mr. Kondor would have had to pay regardless of his ownership of the DPX shares. While I agree that Mr. Kondor would have had to pay at least some legal fees in order to deal with his separation, the evidence that I have before me is that the fees in question were paid to obtain the delay, not to obtain the separation. The Respondent did not cross-examine Mr. Kondor on this point, preferring instead to take the position that all of the fees were personal in nature. In fact, the Minister made an assumption of fact that the legal fees were "incurred and paid to contest immediate payment to [Mr. Kondor's wife] of the amount that [Mr. Kondor] owed from his shareholdings in DPX"<sup>3</sup>.

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<sup>1</sup> 1994 CarswellNat 929 (informal procedure).

<sup>2</sup> *Muggli* at paragraph 8.

<sup>3</sup> Reply, paragraph 11(u).

[11] Based on the foregoing, I find that the predominant purpose for which Mr. Kondor incurred the legal fees was to protect the value of his shares in DPX. Accordingly, I find that those fees were incurred for the purpose of gaining or producing income from property.

**Were the legal fees incurred on income account or capital account?**

[12] Having found that the legal fees were incurred for the purpose of gaining or producing income from the DPX shares, I must now determine whether they were incurred on income account or capital account.

[13] In *Muggli*, having found that the appellant had expended funds for the purpose of gaining or producing income, former Chief Justice Bowman had easily concluded that the funds had been expended on capital account since they had been expended to preserve the ownership of a capital asset. That reasoning is equally applicable to Mr. Kondor's case. Mr. Kondor expended the legal fees in order to preserve the value of his DPX shares.

[14] Mr. Kondor argued that he had effectively borrowed money from his wife for three and a half years, that the cost of doing so was the legal fees that he expended and thus that those fees should be deductible on income account. I agree that that is the economic reality of what occurred but taxation is based on the actual transactions that occurred, not on the economic reality of the situation (*Shell Canada Limited v. The Queen*<sup>4</sup>). Mr. Kondor did not settle the division of property and then borrow funds back from his wife. He paid legal fees to delay the division of property and thus maintain the value of his DPX shares. Therefore, his expenditure was not laid out to borrow money but rather to preserve a capital asset. Accordingly it was incurred on capital account.

**Conclusion**

[15] Based on all of the foregoing, I find that the legal fees were incurred to earn income from the DPX shares but that they were incurred on capital account. The Appeal is therefore dismissed without costs.

Signed at Ottawa, Canada, this 15<sup>th</sup> day of October 2014.

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<sup>4</sup> [1999] 3 SCR 622.

“David E. Graham”

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Graham J.

CITATION: 2014 TCC 303  
COURT FILE NO.: 2014-1393(IT)I  
STYLE OF CAUSE: OHAD KONDOR AND HER MAJESTY  
THE QUEEN  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: October 6, 2014  
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham  
DATE OF JUDGMENT: October 15, 2014

APPEARANCES:

For the Appellant: The Appellant Himself  
Counsel for the Respondent: Darren Prevost

COUNSEL OF RECORD:

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