

Docket: 2019-1391(IT)I

BETWEEN:

PHILIPPE CLÉMENT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 5, 2020, at Montreal, Quebec and on
February 17, 2020, by conference call at Ottawa, Canada

Before: The Honourable Justice Dominique Lafleur

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Justine Allaire-Rondeau (February 5, 2020)
Christina Ham (February 17, 2020)

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2015 taxation year is dismissed, without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 20th day of February 2020.

“Dominique Lafleur”

Lafleur J.

Citation: 2020 TCC 33
Date: 20200220
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REASONS FOR JUDGMENT

Lafleur J.

A. INTRODUCTION

(1) Philippe Clément is appealing from a reassessment made by the Minister of National Revenue (the Minister) pursuant to the *Income Tax Act* (the Act) for the 2015 taxation year. By this new assessment, notice of which is dated November 7, 2016, the Minister disallowed the deduction of legal expenses totalling \$132,145 claimed by Mr. Clément because, according to the Minister, Mr. Clément had not incurred these expenses to collect, or to establish a right to, an amount owed to the taxpayer that, if received by the taxpayer, would be required by Part I, Division B, Subdivision a (sections 5 to 8) of the Act (Subdivision a) to be included in computing the taxpayer's income from an office or employment.

(2) After the Notice of Appeal was filed, the Minister made a reassessment, notice of which is dated May 6, 2019, allowing the carryback of a capital loss for the 2018 taxation year while upholding the refusal to allow the deduction of legal expenses claimed by Mr. Clément. That reassessment is the subject of this appeal.

(3) Unless otherwise indicated, any statutory provision referred to in these reasons is a provision of the Act.

B. FACTS

(4) The facts are not disputed by the parties, nor is the credibility of Mr. Clément's testimony.

(5) In 1984, Mr. Clément was appointed a part-time judge at the Cour municipale de Pierrefonds. In subsequent years, he also sat as a municipal court judge in various cities.

(6) From 2002 to 2005, Mr. Clément acted as a temporary judge at the Municipal Court of Montreal. From 2005 to 2012, Mr. Clément was a full-time judge at the Municipal Court of Montreal.

(7) Mr. Clément retired in 2012 after having reached the mandatory retirement age of 70. Pursuant to section 39 of the *Act respecting municipal courts* (CQLR chapter C-72.01), the mandatory retirement age for municipal judges is 70:

39. A municipal judge shall cease to hold office when he reaches 70 years of age or where the municipal court to which he is appointed is abolished.

(8) At the time of his mandatory retirement, Mr. Clément was not entitled to the full pension because he had not sat as a full-time judge at the Municipal Court of Montreal for the minimum number of years required to obtain such a right. He needed to work another 23 months to be eligible for a full pension.

(9) As a result, Mr. Clément hired a law firm to file a motion for a declaratory judgment (which was submitted in May 2012 and amended in August 2012) seeking the following relief:

...

DECLARE that section 39 of the *Act respecting municipal courts* is *ultra vires* and/or inoperative in general or inapplicable to the applicant;

...

DECLARE that the applicant is entitled to continue to work as a judge after his 70th birthday and accrue the credits needed to obtain the employee benefits to which he would otherwise have been entitled, including a full pension (without deductions);

ALTERNATIVELY, if the first two remedies are not allowed:

DECLARE that the years that he worked as a “temporary” judge at the Municipal Court of Montreal be taken into account in computing the pension and that, in any case, the applicant is entitled to the full pension;

...

(10) In a judgment dated May 22, 2015, the Superior Court dismissed Mr. Clément’s motion for a declaratory judgment. Mr. Clément agreed not to appeal this judgment.

(11) At the hearing before our Court, Mr. Clément acknowledged that the legal expenses paid during the 2015 taxation year with respect to his motion for a declaratory judgment in fact amounted to \$12,113.30.

C. ISSUE

(12) Pursuant to paragraph 8(1)(b), in computing his income for the 2015 taxation year, can Mr. Clément deduct the legal expenses totalling \$12,113.30 paid in 2015?

D. THE ACT

(13) Paragraph 8(1)(b) reads as follows:

8 (1) In computing a taxpayer’s income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto :

(a) . . .

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

8 (1) Sont déductibles 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 se rapportent entièrement à cette source de revenus, ou la partie des éléments suivants qu’il est raisonnable de considérer comme s’y rapportant :

a) [...]

Frais judiciaires d’un employé

b) les sommes payées par le contribuable au cours de l’année au titre des frais judiciaires ou extrajudiciaires

received by the taxpayer, would be required by this subdivision to be included in computing the taxpayer's income;

qu'il a engagés pour recouvrer un montant qui lui est dû et qui, s'il le recevait, serait à inclure en vertu de la présente sous-section dans le calcul de son revenu, ou pour établir un droit à un tel montant;

E. POSITIONS OF THE PARTIES

(14) According to Mr. Clément, the motion for a declaratory judgment had been filed to enable him to collect a full pension and to establish a right to the amount of this pension, as well as to collect the salary to which he was entitled and allow him to continue to occupy his position. More specifically, the motion was filed to enable him to perform his duties as a judge after the mandatory retirement age of 70 so that he could accrue the credits he required to qualify for a full pension. Alternatively, the motion asked that the three years during which Mr. Clément worked as a temporary judge at the Municipal Court of Montreal be taken into account in computing his pension entitlement.

(15) In his submissions, Mr. Clément indicated that because the right to a pension was part of his remuneration, this right was an amount covered by Subdivision a. Also, according to Mr. Clément, he tried to collect an amount that would have been taxable. This was the salary that should have been paid to him if he had continued to hold office as a judge after age 70, i.e. the higher pension amount that he would have received if the 3 years during which he was a temporary judge had been taken into account in computing his pension.

(16) According to the respondent, the legal expenses were incurred to obtain a judgment declaring that Mr. Clément was entitled to continue to perform his duties as a judge at the Municipal Court of Montreal after age 70 and accrue credits to obtain a full pension, or, alternatively, requiring that the 3 years during which Mr. Clément acted as a temporary judge at the Municipal Court of Montreal be taken into account in computing his pension credits. As a result, the requirements set out in paragraph 8(1)(b) were not met because these expenses were not incurred to collect an amount that was owed to Mr. Clément or to establish a right to such an amount, because the proceedings instituted by Mr. Clément sought to have an uncertain future right recognized or sought to have the 3 years during which he acted as a temporary judge at the Municipal Court of Montreal credited to his pension.

F. ANALYSIS

(17) For the reasons set out below, I conclude that in computing his income, Mr. Clément cannot deduct any amount for legal expenses pursuant to paragraph 8(1)(b).

(18) The purpose of paragraph 8(1)(b) is clear: to allow the taxpayer to deduct the legal expenses that he incurred to collect, or to establish a right to, an amount owed to him that, if received by the taxpayer, would be required by Subdivision a (sections 5 to 8) to be included in income from an office or employment (*Geick v. The Queen*, 2017 TCC 120 (*Geick*)).

(19) The old version of paragraph 8(1)(b) referred to legal expenses incurred by the taxpayer to collect or establish a right to the “salary or wages” owed to the taxpayer by the employer or former employer of the taxpayer, rather than amounts which would be required by Subdivision a to be included in income from an office or employment.

(20) In *Catlos v. The Queen*, 2018 TCC 177, Mr. Justice Russell made the following comments, with which I concur. He held that the changes to paragraph 8(1)(b) had some effect (at paragraph 18). The expression “amount that . . . would be required by this subdivision to be included” includes the gratuities and other remuneration referred to in section 5, the employee benefits and other benefits referred to in section 6 and stock option benefits, while the old version of paragraph 8(1)(b) dealt only with “salary or wages”.

(21) These changes must therefore be kept in mind when referring to the case law. In my opinion, the scope of paragraph 8(1)(b) has been expanded with respect to the type of amount that the taxpayer may attempt to collect (or to which he may attempt to establish a right), which may therefore entitle the taxpayer to a deduction pursuant to this paragraph. The new version of paragraph 8(1)(b) is applicable for the 2015 taxation year.

(22) According to the Federal Court of Appeal in *Loo v. Canada*, 2004 FCA 249 (*Loo*), paragraph 8(1)(b) has two branches. The first branch permits a deduction for legal expenses incurred in an action to collect salary or wages owed. The second branch of paragraph 8(1)(b) contemplates a situation in which the matter in controversy is the legal entitlement to the salary claimed (at paragraphs 7 and 8).

(23) According to the Federal Court of Appeal, the use of the word “owed” in paragraph 8(1)(b) is essential because, in its ordinary sense, the word “owed” means to have an obligation to pay something in return for something received. Thus, “salary or wages are “owed” to the employee when the services have been performed” (*Loo*, at paragraph 6). In this case, because I must decide according to the new version of paragraph 8(1)(b), we could paraphrase by saying that the “amount that . . . would be required by this subdivision to be included in computing the taxpayer’s income” is owed if the services to be delivered in return for income from the office or employment have been provided.

(24) In *Blagdon v. Canada (Attorney General)*, 2003 FCA 269, the Federal Court of Appeal affirmed that in order to deduct legal expenses under paragraph 8(1)(b), the taxpayer must be owed salary or wages. According to the new version of paragraph 8(1)(b), legal expenses may be deducted by the taxpayer if an amount is owed to the taxpayer, that, if received by the taxpayer, would be required by subdivision a to be included in computing the taxpayer’s income.

(25) As Mr. Justice Rip pointed out in *Hollinger (Succession) v. The Queen*, 2013 TCC 252 (*Hollinger*), Parliament used the word “owed” to describe “amount” in paragraph 8(1)(b). Therefore, the amount owed was for services provided in the past. More specifically, Rip J. found that paragraph 8(1)(b) did not permit the deduction of legal fees paid for the right to obtain income in the future from an office or employment or to acquire a right to a position he had at one time but lost (at paragraph 31). This finding is consistent with several decisions of our Court which held that legal expenses incurred to establish a future right to salary or wages or to protect a source of future income were not deductible pursuant to paragraph 8(1)(b), because only legal expenses incurred to collect past wages were deductible (*L’Écuyer v. The Queen*, 95 DTC 175, *Geick*, *Esposito v. The Queen*, 2004 TCC 102).

(26) In order to answer the question at hand, we must determine the purpose for which Mr. Clément incurred the legal expenses. The fact that Mr. Clément was unsuccessful is not relevant in considering this question (*Loo*, at paragraph 5).

(27) By filing a motion for a declaratory judgment, Mr. Clément first sought to obtain a judgment declaring that he could continue to perform his duties as a judge at the Municipal Court of Montreal – a position which he automatically lost at age 70 pursuant to section 39 of the *Act respecting municipal courts* –, which would have allowed him to accrue additional credits and obtain a full pension.

(28) With respect to this first remedy sought by the motion, I find that it does not seek to collect any amount which would have been owed to Mr. Clément for performing his duties as a judge at the Municipal Court of Montreal until age 70, because what Mr. Clément was asking for was the right to perform his duties after age 70 and to be reinstated as a judge so that he could accrue pension credits. Because Mr. Clément is not owed any amount for performing his duties as a judge at the Municipal Court of Montreal, he is not eligible for any deduction for legal expenses in this regard. This is consistent with the various decisions mentioned above, including *Loo* and *Hollinger*, which required that services must have been provided in order for the taxpayer to claim such a deduction. Mr. Clément did not perform any judicial duties after age 70. Therefore, he cannot claim that an amount was owed to him in this regard. Also, the case law is consistent on this issue. Legal expenses incurred in relation to a claim to obtain a future right, protect a source of future income or to have the Court recognize his right to be reinstated cannot give rise to a deduction pursuant to paragraph 8(1)(b). In this case, Mr. Clément was asking to be reinstated and sought to protect a future source of income, which cannot give rise to the application of paragraph 8(1)(b).

(29) Alternatively, Mr. Clément's motion sought to have the three years during which he worked as a temporary judge at the Municipal Court of Montreal (from 2002 to 2005) recognized in computing his pension credits, which would allow him to get a full pension. For the same reasons set out above regarding the first remedy sought by the motion, these purposes cannot give rise to the application of paragraph 8(1)(b). Furthermore, the other requirement set out in paragraph 8(1)(b), that the amount, if received, would be required by Subdivision a to be included in computing the taxpayer's income, is not met. If Mr. Clément had received such an additional amount as a pension, this amount would not have been included in his income under Subdivision a (sections 5 to 8). It would have been included pursuant to section 56, in Subdivision d entitled "Other sources of income", in Section B of Part I of the Act.

(30) In his submissions, Mr. Clément indicated that paragraph 8(1)(b) should now be given a broader interpretation and referred the Court to *Chagnon v. The Queen*, 2011 TCC 268 (*Chagnon*). In this decision, the Court appeared to concur with the view that the word "owed" could be interpreted as meaning "earned" and allowed the deduction of legal expenses incurred by Mr. Chagnon to defend himself against an action to collect salary brought by Groupe Vidéotron Ltée. This decision does not support Mr. Clément's interpretation in this case. In *Chagnon*, it is clear that the salary had already been earned and the legal expenses had been incurred to protect the right to that salary. In the case at hand, Mr. Clément did not

earn any salary or other benefits after he reached the mandatory retirement age. Therefore, he cannot rely on this decision to support his position.

G. CONCLUSION

(31) For these reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 20th day of February 2020.

“Dominique Lafleur”

Lafleur J.

CITATION: 2020 TCC 33

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STYLE OF CAUSE: PHILIPPE CLÉMENT v. HER MAJESTY
THE QUEEN

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DATE OF JUDGMENT: February 20, 2020

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Justine Allaire-Rondeau (02/05/20)
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