

Date: 20090115

**Dockets: A-203-08
A-204-08**

Citation: 2009 FCA 9

**CORAM: NADON J.A.
SHARLOW J.A.
PELLETIER J.A.**

Docket: A-203-08

BETWEEN:

DAVID SHERMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-204-08

BETWEEN:

SIMONE SHERMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 15, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on January 15, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

PELLETIER J.A.

Date: 20090115

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BETWEEN:

Docket: A-204-08

SIMONE SHERMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 15, 2009)

PELLETIER J.A.

[1] These reasons apply to the appeals in files no A-203-08 and A-204-08 (Simone Sherman). A copy will be placed on each file.

[2] We are of the view that the appeals should be dismissed.

[3] The determinative issue in these appeals is whether the appellants acquired the software in issue for the purpose of gaining or producing income, as provided in paragraph 1102(1)(c) of the *Income Tax Regulations*, C.R.C., c. 945.

[4] The trial judge held that they did not acquire the software for that purpose. This is a question of fact and of inferences of fact to be drawn from the evidence, in respect of which the standard of review is that of palpable and overriding error (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, para. 25).

[5] The trial judge set out her reasons for coming to the conclusion she did. There was evidence to support that conclusion and the reasons upon which it is founded. The fact that there is other evidence in the record which would support another conclusion does not lead inevitably to the conclusion that the trial judge committed a palpable and overriding error.

[6] It would be an unusual trial in which the record did not contain evidence for and against each of the parties' position in the case.

[7] The trial judge's conclusions of fact were grounded in the evidence and based on her assessment of the whole of the evidence.

[8] In this connection, paragraph 25 of *Housen v. Nikolaisen*, *supra*, is instructive:

Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. ...

[9] This issue is sufficient to dispose of the appeals. Therefore, it is not necessary to deal with the other issues raised on appeal.

[10] These appeals will be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-203-08
A-204-08

(APPEAL FROM A JUDGMENT OF JUSTICE WOODS OF THE TAX COURT OF CANADA, DATED APRIL 3, 2008, IN TAX COURT FILES 2005-1605(IT) G AND 2005-1604 (IT) G.

STYLE OF CAUSE: DAVID SHERMAN and
HER MAJESTY THE QUEEN
and
SIMONE SHERMAN and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 15, 2009

REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A.
PELLETIER J.A.
SHARLOW J.A.

DELIVERED FROM THE BENCH BY: NADON J.A.

APPEARANCES:

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Ernest Wheeler FOR THE RESPONDENT

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