Docket: 2009-35(IT)I

BETWEEN:

DR. MIKE ORTH INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on March 15 and 16, 2010
and on December 1 and 2, 2010,at Calgary, Alberta.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Virginia A. Engel Patrick Robinson
Counsel for the Respondent:	Marla Teeling

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessments on the basis that the appellant is entitled to deduct the following amounts for legal fees:

a) For 2003, the sum of $6,465.29;

b) For 2004, the sum of $13,637.

Each party shall have 30 days from the date of these reasons to provide the Court with written submissions as to costs with respect to the application to reopen the appeals and the withdrawal of the said application.

Signed at Ottawa, Canada, this 24th day of April, 2013.

"Gerald J. Rip"

Rip C.J.

Citation: 2013 TCC 123
Date: 20130424
Docket: 2009-35(IT)I

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REASONS FOR JUDGMENT

Rip C.J.

Introduction

[1] In these appeals (Informal Procedure) from its 2003 and 2004 income tax reassessments Dr. Mike Orth Inc. ("Orth Inc."), the appellant, declares that the Minister of National Revenue ("Minister") denied its "deduction for legal fees", and the reassessments "are based on erroneous assumptions of fact and law" and that it is entitled to amortize or deduct the legal fees from its 2003 and 2004 incomes. The appellant relies, *inter alia*, on sections 9, 14, 20(1) and 60(*o*) of *Income Tax Act* ("*Act*").

[2] The appellant states that the legal fees were accrued during its 2003 and 2004 fiscal year and it provided the Minister with copies of invoices for the legal fees. However, the appellant states, the Minister has "insisted on receiving a detailed description of the specific legal services provided to the corporation in incurring the legal fees. The detailed description of the specific legal services and specific legal advice provided to the [appellant] associated with the legal fees are subject to solicitor-client privilege which the appellant did not waive." The appellant declares that it did provide the Minister with a "general description of the nature of the legal services" as an "alternative method of substantiating the nature of the legal fees."

[3] On the other hand, the respondent complains that the invoices do not satisfy the requirement of subsection 230(1) of the *Act* that every person carrying a business and is required to pay or collect taxes shall keep records and books of account in such form and containing such information as will enable taxes payable under the *Act* to be determined. The respondent states that the Minister cannot determine from the information on the invoices alone if the fees were deductible in computing income. Counsel for the respondent states that the Minister requires a description of the legal services performed for the fees in issue and has refused to accept the "general description" of the nature of the legal services provided to the appellant.

[4] The respondent does not refute the appellant's position that the information it seeks is subject to the solicitor-client privilege raised by the appellant.

[5] The invoices in issue were issued by Olson Lemons LLP ("Olson Lemons"), a law firm, and Olson Tax Consultants Inc. ("Olson Inc."), a corporation carrying on the business of preparing tax returns and which is owned by the law firm. A typical invoice read as follows (subject to changes of amounts):

Account for Legal Services Rendered

Fee for services	5,000.00
Total GST	350.00
Total	5,350.00
Less Payment from Client	5,350.00
Balance Due	0.00

[6] Some accounts would include charges for disbursements and refer to payment out of the law firm's trust account.

[7] Orth Inc. carries on a medical practice. The principal shareholder of Orth Inc. is Dr. Michael Orth. The fiscal year-end is June 30.

[8] These appeals were the first by three related taxpayers that were scheduled to be heard on March 15, 2010 for two and half days. The issues in the appeals of the other two appellants, 371501 B.C. Ltd. ("371 Ltd.") and 4402143 B.C. Ltd. ("440 Ltd.")[1], are similar to that of the appeals at bar. After several hours of evidence on the first day of the Orth Inc. appeals, counsel for the parties agreed that the appeals were "settleable" and undertook to settle the appeals.

[1] Judgments in these appeals were signed on same day as that in appeals at bar.

[9] The appeals were not settled and the hearing of the Orth Inc. appeal resumed on December 1, 2010. (The appeals of 371 Ltd. were heard the next day, the parties agreed that the appeals of 440 Ltd would be settled on the basis of my reasons in 371 Ltd., subject to issues previously agreed to.)

Privilege

[10] The appellant has refused to divulge certain information with respect to invoices in issue claiming solicitor-client privilege. In these appeals, appellant's counsel advises that one of the privilege issues is that the auditor of the Canada Revenue Agency ("CRA") wanted access to the contents of the files of the appellant's solicitor. The Crown says the CRA auditor simply wanted more detail than was on the invoices.

[11] Again, the Minister has not questioned the appellant's right to claim of solicitor-client privilege and neither do I. The fisc cannot cast its eyes on documents in a solicitor's files. However, respondent's counsel has questioned whether the appellant has waived solicitor-client privilege since, she says, it has selectively revealed some information that may be privileged and hid evidence that may prejudice its appeals. At the end of the day counsel for respondent did not pursue the argument.

[12] The Minister, when making an assessment, proceeds on assumptions of fact[2] that leads him or her to assess in a particular manner. The initial onus is on the taxpayer to "demolish" the assumptions made by the Minister in assessing[3]. The appellant's initial burden is only to "demolish" the exact assumptions made by the Minister but no more[4].

[13] Justice L'Heureux-Dubé explained in *Hickman Motors*, at paragraph 93, that:

> … this initial onus of "demolishing" the Minister's assumptions is met where the appellant makes out at least a *prima facie* case."

[2] *Bayridge Estates Ltd. v. M.N.R.*, 59 DTC 1098 (Ex.Ct.) approved in *Hickman Motors Ltd v. Canada*, [1997] 2 S.C.R. 336 at para. 92.

[3] *Johnson v. M.N.R.*, [1948] S.C.R. 486, cited in Hickman Motors, *op it*, at para. 92.

[4] *First Fund Genesis Corp. v. The Queen*, 90 DTC 6337 (F.C.T.D.) at p. 1340, cited with approval in *Hickman Motors*, *op. cit.*, para. 92.

[14] Once the Minister's assumptions have been "demolished" by the appellant, it is the Minister who has the onus to rebut the *prima facie* case presented by the appellant and prove his or her assumptions[5].

[15] On the evidence before me I must determine if the evidence presented by the appellant is sufficient to demolish all or any of the Minister's assumptions. Is the evidence lead by the appellant of a degree that the appellant made out a *prima facie* case? What is a *prima facie* case in an income tax appeal?

[16] In *Amiante Spec. Inc. v. The Queen*,[6] at paragraph 23, Trudel J.A. quoted Cain J. in *Stewart v. Canada*:[7]

> A *prima facie* case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence".

[17] Trudel J.A. added, at paragraph: 24:

> Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (*Orly Automobiles Inc. v. Canada*, 2005 FCA 425 (CanLII), 2005 FCA 425, paragraph 20). This Court stated that the taxpayer "knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister does not. He [or she] has information within his [or her] reach and under his [or her] control" (*ibid*).

[18] Recently Huddart J.A. of the British Columbia Court of Appeal considered the nature of the burden of proof incumbent upon a taxpayer in *Northern Properties Corp. v. British Columbia*[8]. He described, at paragraph 33, what is needed to establish a *prima facie* case, and how the appellant's evidence which would otherwise establish a *prima facie* case can be effectively challenged by the respondent to prevent the burden from shifting:

> In response to the taxpayer's submissions, the Crown may adduce its own evidence to prove either that the assumptions are correct or to show that, even

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5 *Kamin v. M.N.R.*, 93 DTC 62 (T.C.C.), cited with approval in *Hickman Motors*, *op. cit.*, at para. 93.

6 2009 FCA 139, [2009] G.S.T.C. 71, at para. 23.

7 [2000] T.C.J. No. 53 (QL), 2000 CanLII 426.

8 [2010] 10 W.W.R. 264.

> without relying on the assumptions, the assessment is nevertheless valid: *Pillsbury* at 5188; *Pollock* at 6053. The Crown may also challenge the taxpayer's evidence, either on cross-examination, or by raising serious issues of credibility. A court may draw a negative inference "from the taxpayer's failure to adduce material evidence in the taxpayer's possession or control" and conclude the taxpayer has not met its initial burden of disproving one or more of the assumptions: *Trac*[9] at para. 31. Once all the evidence is in, the judge must weigh it and first determine whether the taxpayer has met the initial legal burden with respect to the assumptions. If the taxpayer has failed to meet its burden, then the Crown need not go on to discharge its conditional legal burden because the precondition has not been met.
>
> [Emphasis added.]

[19] Earlier, in *The Queen v. Peter K.S. Wu*,[10] Strayer J.A. illustrated an instance where the taxpayer's evidence, to which the taxpayer did not lead rebuttal evidence, nevertheless failed to establish a *prima facie* case. In overturning a decision of the Court that a witness' testimony despite the witness being evasive, forgetful and unimpressive, must be accepted as it was the only evidence before the Court, Justice Strayer made the following comments, at p. 6006:

> The learned judge appears not to have taken into account the onus placed on the taxpayer by the Minister's assumption that this was one of the purposes of the payment of the stock dividends to the taxpayer. In other words, the onus here was on the taxpayer to prove that this was not one of the purposes of the payment. Yet, after treating the taxpayer's evidence as unsatisfactory, … he held that as this was the only evidence he had to accept it. He should instead have considered whether the evidence met the standard of objective reasonability which was required to overcome the onus on the taxpayer …
>
> (Emphasis added.)

[20] A taxpayer wishing to establish a *prima facie* case to demolish all or any of the Minister's assumptions must not only present evidence of a high degree of probability that must be accepted by the Court but must allow for a fair and open cross-examination of the evidence by Minister's counsel. Counsel is entitled to vigorously challenge the evidence of the taxpayer by cross-examination. A taxpayer claiming privilege in cross-examination on matters he or she leads in examination-in-chief, thus limiting the cross-examination, must consider possible

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9 *Trac v. British Columbia* (2007), 61 B.C.L.R. (4th) 359, citing William Innes & Hemamalini Moorthy, "*Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals*" (1998) 46:6 Can. Tax J. 1187, at 1188.

10 98 DTC 6004.

consequences. A taxpayer claiming privilege who wishes to shift the onus must still make a case that will survive cross-examination.

[21] One of the tasks before me in these appeals, then, is to determine whether the appellant while maintaining his right to solicitor-client privilege has presented evidence reversing the onus placed on the appellant by the Minister's assumptions.

Application to reopen

[22] In order to promote a settlement of the appeals, I issued an order on April 18, 2011 that Orth Inc., 371 Ltd. and 440 Ltd. and their lawyers meet to reconsider what information they may be willing to provide under a limited and partial waiver of solicitor-client privilege and meet with counsel for the respondent at the office of Olson Lemons in Calgary to review their position. The appellants in all appeals and respondent were to report back to the Court in writing by August 31, 2011 (extended to September 30, 2011). In issuing the order, I adopted the interim reasons of Campbell J. in *Richard A. Kanan Corporation v. The Queen*[11]. The parties could not come to any agreement as to any such information. On October 3, 2011, the appellants requested that their appeals be reopened for additional evidence and on November 15, 2011 the appellants filed written submissions in support of their request, including an affidavit of Mr. Olson. For various reasons the parties could not agree to an earlier date than December 11, 2012 for the hearing of the motion. On December 10, 2012, the day before the scheduled hearing and over a year after filing its application to reopen the appeals, the appellants withdrew their application to reopen their appeals. The respondent has requested that counsel be permitted to make submissions in respect of costs on the aborted application.

Facts

[23] Mr. Olson explained that at the beginning of each fiscal year of the appellant he would review the work the firm had done earlier for the appellant and, based on the "expertise it takes to do certain things", determine the anticipated services to the appellant for the year and fix a fee. The fee would cover all the work or projects to be performed for the year. The fee would be reviewed with the client and an engagement letter would follow. If Mr. Olson underestimated the fee "we eat the difference, if we overstate, we keep the difference".

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[11] 2011 TCC 211, 2011 D.T.C. 1168.

[24] For the 2003 fiscal year. for example, Mr. Olson fixed a fee of "approximately" $36,500 to the appellant. For this fee, Olson Lemons engaged to work on 16 different tasks or projects for the appellant during the year. According to Mr. Olson six of the projects actually dealt with corporate distributions, three projects concerned the appellant's capitalization with respect to share subscriptions, two projects examined the appellant's risk of being associated for tax purposes with corporations controlled by siblings of Dr. Orth, one task analyzed the appellant's balance sheet, one project reviewed compensation to be paid by the appellant and three items, which he referred to as "tangential projects", "dealt more with one of the shareholders of the corporation and the relationship between the [appellant] and one of its corporate shareholders", 594962 British Columbia Ltd. ("594 Ltd."). The shareholders "were sort of partly involved and partly not". Mr. Olson said he had discussions with the client — I assume the principal of the appellant — and allocated invoices to the appellant aggregating $25,000 to reflect actual work. "Later, we thought that it probably should have been more to the [appellant]." Other accounts were also rendered to the shareholders, he stated.

[25] Mr. Olson acknowledged that he did not have a precise method of allocating fees as to hours or percentage of work. "We look at issues … and make [an] allocation … [as] best we could". Hourly billing records are maintained but, Mr. Olson said, the appellant is not billed on an hourly basis. Mr. Olson had a sense of how long a project will take but "in a really crude sense". One could say that 13 of the 16 projects related to the appellant, he surmised. He guessed that the fee to the appellant would "probably [be] close to 13/16 [of the total fees billed] rather than a laboured analysis of each distribution".

[26] The "fixed fee" also includes the right of the appellant from time to time to ask the firm's lawyers "run of the mill questions", usually of general business issues, said Mr. Olson.

[27] All the projects are maintained in one file, for 2003, for example, called "Projects 2003". "All the things we are going to do are put there … we set a fee for the entire work."

[28] Mr. Olson was "not at liberty to disclose issues discussed with the client". Thus, Mr. Olson did not answer questions in cross-examination relating to the analysis of corporate distributions and shareholder conflicts he mentioned in examination-in-chief. He did say that there were different shareholders involved and a "corporation has an obligation to be sensitive to differences among shareholders". He referred to "important issues that had to be dealt with … fiduciary issues about

changing shareholders, particularly when there were family members involved." As far as any redemption of shares is concerned, he refused to give reasons for any redemption, referring respondent's counsel (and me) to the "results" recorded in the minute book of the appellant.

[29] Counsel for the respondent asked Mr. Olson if, in respect of dividends, the amount invoiced as part of legal fees pertain to legal advice as to whom the dividends should be paid or to the "actual work" done to pay those dividends and the actual payment of the dividends. He replied that the fees were for "the legal and tax analysis related to paying dividends." For example, Mr. Olson explained that share provisions must be examined; some shares contain provisions entitling the owner to a dividend to the disadvantage of owners of a different class of shares. The retained earnings must be examined, potential conflicts between shareholders must be considered, records must be kept, reports must be compiled, resolutions must be drafted, forms must be filed with governments, a report to the tax preparer how to prepare the tax return as a result of the dividends is drafted. If a dividend is to be paid on capital dividend account, then elections must be filed. All this was part of the work performed for the six distribution projects. The tax work was done by the tax lawyers at Olson Lemons, corporate matters were assigned to its corporate lawyers. Mr. Olson could not answer any question relating to corporate matters since, he said, he is not a corporate lawyer. In preparation for trial, he did not consult with any corporate lawyer in the firm who may have had knowledge of the issues.

[30] With respect to the project on compensation, Mr. Olson could not "recall" who, if anyone, was paid salary or bonus in 2003 or 2004 by the appellant. He did state that compensation is reviewed each year but he could not recall any specifics.

[31] The balance sheet analysis for 2003 involved a particular asset and, according to Mr. Olson, "as I recall, had to do with payables and receivables …". This was relevant for preparation of the tax return, he stated. The appellant's tax returns for either 2003 or 2004 were not produced at trial. The respondent produced financial statements of the appellant that it created to demonstrate that professional fees represented more than ten per cent of the appellant's gross income in each of the years under appeal.

[32] With respect to the appellant's share capital, Mr. Olson advised that Dr. Orth's spouse became a shareholder and Dr. Orth acquired preferred shares. He would not reveal his advice to Mrs. Orth to acquire the shares and to the appellant to redeem any shares.

[33] Olson Ltd., Mr. Olson advised, "is part of the firm". It is "strictly a tax return preparation" business. It is the lawyer in the firm who prepares a report on how to prepare the tax return and Olson Ltd. carries out the lawyer's instructions. Olson Ltd. sends out invoices to clients "for convenience of the client". Mr. Olson could not answer what time Olson Ltd. spent on the appellant's matters. In preparing for trial, he did not review the billing records of Olson Ltd. He could not recall if he earlier reviewed the appellant's tax returns prepared by Olson Ltd. for 2003 and 2004.

[34] During the course of the audit of the appellant, Mr. Brian Kearl, a lawyer then working at Olson Lemons, on January 29, 2008, sent copies of invoices from the firm to the appellant for 2003 and 2004 to the CRA auditor working on the file. The invoices were for fees for the appellant's medical practice and investments: services for corporate compliance and tax compliance for $3,226.37 and $12,648.15 for 2003 and 2004, respectively and legal services in respect of the appellant's business and investments for $33,416.02 and $18,218.71 for 2003 and 2004, respectively.

[35] About a month later, by letter dated February 20, 2008, Mr. William Quigley, also then a lawyer at Olson Lemons, wrote to the CRA and enclosed copies of invoices in dispute as well as an analysis of the fees charged. He advised that he had carriage of the appellant's file and "as these invoices are subject to solicitor-client privilege, I have reviewed the relevant time entries in an effort to summarize them for you such that their deductibility may be determined". He divided the invoices as follows:

i) Legal advice given to the appellant relative to annual distributions. (Invoice Nos. 302045, 303032 and 304043 for 2003 and Invoice Nos. 504061 and 606084 for 2004.);

ii) Annual corporate and tax compliance services provided to the appellant. (Invoice Nos. 304570 for 2003 and Invoice Nos. 406722 and 504597 for 2004.);

iii) Legal advice given to the appellant relative to annual corporate distributions and other business planning options. (Invoice Nos. 303031 and 304042 for 2003 and Invoice Nos. 410120, 504060 and 508044.); and

iv) Analyzing the appellant's current and future business, financial and tax situation. (Invoice Nos. 301076 for 2003 and Invoice Nos. 401031 and 501213 for 2004.).

[36] The copies of invoices sent to CRA by Mr. Kearl and Mr. Quigley were not identical. Mr. Kearl had included copies of invoices to other corporations related to the appellant, for example, 594 Ltd.[12] Three invoices originally charged to the appellant in 2004 were subsequently charged to shareholders of the appellant. Apparently the appellant's bookkeeper listed invoices to the appellant that should have been paid by others. These invoices aggregated $3,215.75.

[37] The analysis of professional fees charged to the appellant for each fiscal year referred to: (i) explanation per General Ledger; (ii) amount per General Ledger; (iii) the invoice date; and (iv) number and the invoice amount. There are reconciliations to amounts determined by the bookkeeper. For 2003, an amount (Invoice No. 304042) for $1,551.55 was deducted in 2004 when it ought to have been deducted in 2003, Mr. Olson noted.

[38] In the 2004 analysis the bookkeeper, according to Mr. Olson, had listed certain invoices "that we thought … had been assessed to and properly repayable by other related parties, and so we removed those from the list". The bookkeeper, he added, also accrued an amount of $20,750 for professional fees that were rendered after year-end and failed to deduct two other invoices that were paid by the appellant "at least to the tune of $6,000." Rather than Olson Lemons issuing a new invoice, the appellant reimbursed 594 Ltd. as it had actually made the payment to Olson Lemons. The aggregate invoiced amount for 2004 was thus increased from $20,296.18 to $27,950.57.

[39] The following invoices, included with Mr. Quigley's letter, are in issue:

A) <u>2003 Taxation Year</u>

(a) <u>Invoice No. 304570, dated April 15, 2003: from Olson Inc., fee for services: $2,925. (Total after including charges and disbursements: $3,015.29.)</u>[13]

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[12] The appellant also filed a bundle of copies of invoices as Exhibit A-5. This exhibit included copies of invoices attached to Mr. Quigley's letter but also included copies of invoices to 594 Ltd., Orth Holdings, Mike Orth and 573 Ltd. In the attachments to Mr. Quigley's letter, Invoice No. 606084 is addressed to the appellant for a total of $494.34, in Exhibit A-5 the same invoice number is addressed to 573 Ltd. for a total of $4,012.50.

[13] In addition to a fee for legal services, Olson Lemons charged the client for other charges, such as disbursements. The "total" includes the added amounts but does not include Goods and Services Tax.

Mr. Olson stated that this invoice related to tax compliance, the preparation of the appellant's 2002 income tax return and income tax slips. The fee was agreed to after the 2002 year-end. At certain times Mr. Olson was asked about additional billing for the same task and explained that "bills go out from time to time" and one cannot look at a specific invoice to determine the complete fee for the project. Sometimes the work is more expensive than the invoice amount", he said, referring to Invoice No. 304570, and would be "pushed up" in a subsequent account. Some accounts may be paid partly in one year and partly in another. "I can't tell you for sure."

(b) Invoice No. 301076, dated January 29, 2003: fee for services, $2,750. (Total: $2,764.24.)

This invoice relates to advice on various issues in the carrying on of the business of a medical practice. Mr. Olson referred to this work as "general advice" in connection with the business, including employment issues. If an employment lawyer was required, Mr. Olson would refer the appellant to an employment lawyer. He said this invoice also included "some general tax issues". He could not recall if it also related to "property issues".

(c) Invoice No. 302045, dated February 21, 2003: fee for services $10,000. (Total: $10,015.02.), Invoice No. 303032, dated March 24, 2003: fee for services $10,000. (Total: $10,000.62.) and Invoice No. 304043, dated April 25, 2003: fee for services $5,000.

The fees described in invoices numbered 302045, 303032 and 304043, Mr. Olson testified, related to one retainer and based on an allocation of services, were borne by shareholders. Two related invoices went to 594 Ltd. Of the 16 different assignments, 13 of the 16 related to the appellant, "we thought". Perhaps the three other items related to both the shareholders and the appellant. Mr. Olson said he believed one of the issues related to share redemptions for a numbered company and he thought that the "ultimate shareholder" of that corporation be billed

separately. The fixed fee was allocated amongst shareholders based on what he thought the services related to.

Mr. Olson produced copies of the two invoices, numbered 304044 and 305072 in the amounts of $2,675 ($2,500 for fees) and $5,885 ($5,500 for fees) respectively, sent to 594 Ltd. after the 2003 year-end. Copies of these invoices were included with Mr. Kearl's letter but not in Mr. Quigley's. Mr. Olson explained that these invoices related to "some work done with respect to some capitalization issues" of the appellant. Based on the fixed fee charges, "we had sort of designed this at this rate to be paid by 594". Mr. Olson said that later in discussions with the client "we suggested that 'it would be fine for the client to have some of that paid by [the appellant]'. The amounts was [sic] 'paid by 594 initially, and then subsequently … was reimbursed to the tune of approximately $6,000." Mr. Olson blamed the bookkeeper who "was confused about the reimbursement, thought it was … the compliance fees." The bookkeeper deducted the fee that was "properly allocated to 594 Ltd., but should have been shown as a reimbursement", Mr. Olson explained. This is the reason these invoices were removed from Mr. Quigley's enclosures[14].

(d) <u>Invoice No. 303031, dated March 24, 2003: fee for service $2,000 and Invoice No. 304042, dated August 25, 2003: fee for services $1,450. (Total: $1,450.05.)</u>

The fees in these invoices were for services relating to distributions and the tax consequences of the distributions "and the business planning options". The distributions were made in 2002 but the work was completed after year-end. Invoice No. 303031 also referred to analyzing if the appellant was associated with another corporation for tax purposes as well as compensation affecting the small business deduction.

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[14] The appellant had also invoiced 594 Ltd. for services for $1,925 (Invoice No. 406721) on June 17, 2004. (A copy of this invoice was included with Mr. Kearl's letter.) See paragraph 39B(a.1) of these Reasons.

The amount of the fee in Invoice No. 304042 was "inadvertently" deducted in computing income for 2004. It should have been deducted in computing income for 2003, according to Mr. Olson.

B. 2004 Taxation Year

(a.1) Invoice No. 406722, dated June 17, 2004 from Olson Tax Consultants Inc.: fee for services: $3,950. (Total: $4,056.90.) and Invoice No. 504597, dated April 19, 2005: fee for services: $5,000. (Total: $5,037.86.)

Invoice No. 406721, dated June 17, 2004, from Olson Inc.: sent to 594962 British Columbia Ltd. for fees for services: $1,925.

Copies of these invoices were included with Mr. Kearl's letter with respect to business and tax compliance for 2004.

These invoices represent fees for corporate and tax compliance, filing of tax returns for the appellant's 2004 taxation year, as well as advice in connection with the tax returns. The fees were agreed to, Mr. Olson said, after the work was done and was "deducted … when they paid us". According to Mr. Olson, Invoice No. 406722 was paid, No. 504597 was accrued in the appellant's working papers. Mr. Olson believed that some or all of the amount was accrued by the client. The items related to the 2004 fiscal year but billed after. Mr. Olson asserted these fees, billed by Olson Inc., also covered legal advice. The services in support of these invoices were performed by Olson Tax in respect of the law firm's retainer, said Mr. Olson. I assume the invoice addressed to 594 Ltd. was that which was paid by 594 Ltd. and reimbursed to it by the appellant for $1,925.

(b.1) Invoice No. 401031, dated January 12, 2004, fees for services: $2,975. (Total: $3,101.310.) and Invoice No. 501213, dated February 1, 2005, fees for services: $2,975. (Total: $3,017.60).

These Invoices are for issues relating to business planning "and so on", according to Mr. Olson.

The amount in Invoice No. 501213 had been included in the amount of $18,217.71 for legal services rendered in respect of the corporation's business and investments set out in Mr. Kearl's letter of January 28, 2007. This invoice was subject to reconciliation efforts by the appellant's advisors, according to Mr. Olson.

(c.1) Invoice No. 410120, dated November 19, 2004, fee for services: $2,000., Invoice No. 504060, dated April 13, 2005 to Dr. Mike Orth, fee for services $2,500. Invoice No. 508044, dated August 5, 2005, fee for services: $3,450.

Those fees, Mr. Olson declared, were for advice in connection with "some current and future distribution strategies" for the appellant. Some distributions were "post year-end" but advice was given during the year.

Mr. Olson testified that Invoice No. 504060 , should have been sent to the appellant, not to Dr. Orth personally. The error was due to similarity in names of the appellant and Dr. Orth.

d.1) Invoice No. 606084, dated June 16, 2006 sent to 573893 B.C. Ltd., for services $3,750. Also, an invoice bearing the same number and date was sent to the appellant for $450 (plus disbursements of $12.00.) A copy of the latter invoice was sent to CRA by Mr. Quigley, the former by Mr. Kearl.

Mr. Olson expanded on Mr. Quigley's letter that those invoices were for "legal advice given to the corporation relative to annual corporate distributions and other business planning options". According to Mr. Olson the fees were for advice "in connection with some current and future distribution strategies" for the appellant and included advice and preparation of documents in connection with the distributions. While some of the distributions were made during the 2004 taxation year, some were later. However, Mr. Olson stated the advice was given and documents

prepared pursuant to an agreement that had been discussed before year-end.

(f.1) <u>Invoice No. 504061, dated April 13, 2005, fee for services $2,500.</u>

This invoice (and the two numbered 606084 above) are for legal advice relating to annual corporate distributions, according to Mr. Quigley's letter. Mr. Olson agreed, stating that these invoices dealt with distributions subsequent to the 2004 year-end "but we had already commenced the … work on it". The fee was discussed with the client and was accrued in their books; invoices were rendered at a later date.

<u>Appellant's submissions</u>

[40] Appellant's counsel submits that his client has demolished the assumptions on which the Minister assessed the appellant for 2003 and 2004 taxation years[15]. She also added that the respondent did not make an assumption about whether the deduction should be in relation to income or capital.

[41] In counsel's view the "testimony of Mr. Olson was clear and uncontradicted that the expenses were incurred to derive income". "The fees", she explains, "were 'reasonable in the circumstances', in accord with Mr. Olson's testimony, and where Mr. Olson and the taxpayer are independent parties, the only conclusion is that the fees are reasonable, or the taxpayer would not have agreed to them." In this regard, she refers to *Gabco Ltd. v. M.N.R.*, 68 DTC 5210. approved by the Federal Court of Appeal in *Petro-Canada v. R.*, 2004 FCA 158, 2004 CarswellNat 1163, where Cattanach J. stated that it is not for the Minister or the Court to substitute its judgment for what is reasonable but to conclude that no reasonable businessman would have agreed to pay such an amount, having regard only to business considerations.

[42] Appellant's counsel asserts that Mr. Olson's testimony was "essentially unchallenged" and his "credibility was not questioned". During argument I indicated that Mr. Olson's testimony appeared credible. Counsel declared that the Minister's assumptions that the expenses claimed were not deductible as an expense and that the

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[15] Various cases concerning the Minister's assumptions are referred to in paragraphs 12 to 19 of these reasons.

expenses, in any event, were unreasonable pursuant to section 67 of the *Act* were demolished. In my view the fact that the fees were negotiated between parties at arm’s length is a very strong indication that they are reasonable.

[43] Counsel also submits that I "heard the uncontradicted evidence of Mr. Olson, a senior practitioner and member in good standing of the Law Society of Alberta" as to what the legal fees were in respect of. Therefore, I assume I am to accept the appellant's submission that the expenses were for reasons alleged by the appellant; that they were incurred for the purpose of earning income from a business within the meaning of subsection 18(1) of the *Act*.

[44] Quite frankly, upon review of the transcript, I was disappointed in Mr. Olson’s testimony. In many instances he appeared not prepared to answer questions that a lawyer would reasonably expect to be posed during a cross-examination. In other situations he gave weasel word replies. For example, he could not "recall" or "recollect" who received compensation by way of salary or bonus from the appellant in 2003 and 2004, although he did "believe" a bonus was paid in both years. At least one of the invoices was with respect to how or how much compensation should be paid. He was not aware if Mrs. Orth "took a salary", although she provided services to the appellant. She was one of "two people who made a difference in this company", said Mr. Olson.

[45] Mr. Olson referred to the appellant’s minute book on several occasions during his testimony. He stated that the recording of corporate transactions, declarations of dividends and share transfers are recorded in the minute book, yet he did not produce the minute book and any financial statements were produced by the respondent. He could not recall if the appellant redeemed shares owned by Dr. Orth. He did state that Dr. Orth "subscribed for a different class of shares, but I can’t be 100 percent sure. That’s what I thought he did … " I am not impressed by the fact Olson Lemons was sending out invoices having an identical number to two different clients in two different amounts. Any explanation to explain this escaped me. However, where Mr. Olson’s testimony was clear and unambiguous, I accepted it.

[46] When questioned about corporate advice as opposed to tax advice his firm gave affecting the appellant, Mr. Olson stated that he had no knowledge since corporate matters were dealt with by corporate lawyers in his firm. He did not meet with the corporate lawyers to brief himself for trial as one would reasonably expect of a lawyer.

[47] In the appellant's notice of appeal there is also a suggestion that on relying on section 14 of the *Act*, perhaps not all expenses claimed were current expenses but that some of the expenses claimed may be on account of capital. Mr. Olson's view is that if amounts are not deductible in computing income they are deductible according to the provisions in section 14 of the *Act*. Mr. Olson acknowledged that all fees billed to the appellant were deducted in computing its income for 2003 and 2004 notwithstanding that it may be that some of the fees ought to have been capitalized. So what I am offered is a smorgasbord of fees, some perhaps of a capital expense, all claimed as a current expense, and no evidence to distinguish one from the other. Mr. Olson does not inform me which legal expenses he believes may be of a capital nature and allow me to consider his view.

[48] Nowhere, not in the notice of appeal, not in Mr. Olson's evidence, does the appellant or the witness suggest, let alone declare, what invoices refer to services respecting a possible eligible capital expenditure within the meaning of Section 14. It appears that the appellant's attitude is that if I find any amount not a current expense, it is automatically an eligible capital expenditure. I cannot agree; tax litigation is not a forum where if a judge cannot accept one position then he or she must accept a party's alternative position.

[49] I appreciate the appellant's position that much of the information that may bear on these appeals is privileged and I respect its right to protect that information. However, most of Mr. Olson's testimony describing the various invoices in question which, while interesting, is not illuminating to the extent that I actually learned the purpose for which the legal fees were incurred and be able to come to a reasonable conclusion as to whether the fees were incurred for business or other reasons. Indeed, the invoices themselves may be privileged yet they were provided to the CRA.[16] By testifying Mr. Olson, it could be argued, may be deemed to have waived privilege. Respondent's counsel did raise the issue as to whether the appellant did waive solicitor-client privilege by producing evidence otherwise subject to the privilege but was beneficial to it. The matter was not pursued.

[50] These appeals were filed under the *Tax Court of Canada Rules* (*Informal Procedure*) ("*Rules*") and in accordance with subsection 18.15(3) of the *Tax Court of Canada Act:*

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[16] *Maranda c. Québec*, 2003 SCC 67, 2003 CarswellQue 2477, para. 33. However, the amount of fees paid to a lawyer is not necessarily privileged when severed from the details of the services rendered: para. 54 per Deschamps J.

> … the Court is not bound by any legal or technical rules of evidence in conducting a hearing and the appeal shall be dealt with by the Court as informally and expeditiously as the circumstances and consideration of fairness permit.

For this reason I preferred to consider the evidence before me, give the necessary weight and consideration the evidence deserved, and not open the hearing of the appeals to a formal process, more akin to an appeal under the General Procedure. My primary concern was to have the hearing of the appeals proceed in an Informal Procedure process reasonably and as "informally and expeditiously as the circumstances and consideration of fairness" permitted.

[51] Mr. Olson's evidence, for the most part, lacked precision. Mere generalities describing the purpose of the legal fees without additional explanation or corroboration are not helpful. I felt that I was given partial access to a story, a headline that may or may not be at all descriptive of the story under the heading. This makes it difficult for me to agree with appellant's counsel that I have to accept Mr. Olson's testimony because he is a lawyer and the person who he invoiced is a client at arm's length. While Mr. Olson's credibility is not in issue, the evidence he gave is not convincing. I note that the principal of the appellant did not testify. The appellant did not make out a *prima facie* case as described by Trudel J.A. in *Stewart*[17] and Huddart J.A. in *Northern Properties Corp.*[18] so as to rebut the Minister's assumptions on many of he expenses underlying the assessments.

[52] At the end of the day what I have to determine is what exactly were the services generally described on the invoices or what reasonably can I find to be the services so described on the invoices and the taxation year the services related to.

[53] Among the facts the Minister assumed in assessing the appellant was that during the years in appeal "a complicated reorganization of the companies owned by Dr. Michael Orth, his spouse, his brothers and their spouses, and his parents took place (the 'Share Reorganization')" and therefore the Minister concluded that the Share Reorganization was done for estate or tax planning purposes of Dr. Michael Orth, his spouse, his brothers, his sisters-in-law and his parents. Dr. Orth's three siblings each have a business unrelated to that of the appellant. He explained that the corporations had a "complex cross-ownership" as a result of their father, the original shareholder of the non medical business, arranging for each child to own shares in all corporations, although one child would run a particular corporation. The corporations did go through a reorganization in part, Mr. Olson

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[17] Supra.

[18] Supra.

stated, to simplify holdings, to avoid conflict in dividend distribution and business decisions. The testimony of Mr. Olson strongly suggests that the purpose of the "reorganization" was not as much for the business of any corporation as for separating the interests of the individual shareholders. He declared that the legal work for the reorganization was performed by Olson Lemons under a retainer separate from the general retainer the firm had with the appellant but he was reluctant to go into more detail. Nevertheless, his evidence on this issue was sufficient to demolish the Minister's assumption.

[54] As I have mentioned, the appellant's relevant tax returns were not produced, nor was the minute book. What was produced were copies of the invoices, correspondence between Olson Lemons and the CRA, copies of CRA material including some working papers, income statements and balance sheets of the appellant as of June 30, 2000 to 2004, created in 2005 by the CRA. From this material and the obvious fact that the appellant prepared and filed its tax returns for 2003 and 2004, it is clear that the appellant paid salaries, wages and dividends during these years. The proportion of dividends to net income over the years, except for 2004, was substantial, frequently exceeding net income. It is reasonable to conclude that notwithstanding my concern how evidence was presented at trial, Olson Lemons did provide services to the appellant during the years in appeal for income tax return preparation and advice on how to structure dividends and compensation, including tax compliance.

[55] As set out above, I do not have sufficient evidence before me to allow the amounts of fees to be deducted in respect of the following invoices:

<u>2003</u>

i) Invoice No. 301076:

"General advice" may include many items, both on income account and on capital account. Where the legal services are with respect to an employment matter, the fees are deductible but I cannot determine any allocation or even if these fees were deductible in computing income because there is no evidence before me, for example, as to how the fee can reasonably allocated to general advice, employment issues, "some general tax advice" or property matters.

ii) Invoices Nos. 302045, 303032 and 304043:

These invoices appear to pertain primarily to shareholder matters.

2004

(i) Invoices No. 401031 and 501213:

A cryptic description of service for business planning "and so on" does nothing to clarify what the billed services were for.

(ii) Invoices Nos. 410120, 504060 and 508044:

I am not satisfied that all three invoices were for "some current and future distribution strategies" or which of the three invoices were for such "strategies". I also have difficulty understanding what the services actually related to and whether the same matters may relate to services referred to in Invoice No. 606084.

(iii) Invoice No. 606084 for $3,750 was sent to 573893 B.C. Ltd. I am not satisfied with the explanation of why the appellant was to pay this invoice.

(iv) Invoice No. 304042 for $1,450. According to the appellant this invoice related to the appellant's 2003 taxation year.

[56] I am confident that on the balance of probability the fees for services “described” in the following invoices were properly deducted by the appellant and allow the appeals for 2003 and 2004 accordingly:

2003

i) Invoice No. 304570 for $3,015.29:

While it is not clear whether this invoice relates to the 2003 taxation year or the 2002 taxation year or parts of both, the amount was for tax related matters and is a deductible expense I will give the appellant the benefit of doubt that it relates to 2003.

ii) Invoice No. 303031 for $2,000 and Invoice No. 304042 for $1,450.

2004

a) Invoice No. 406722 for $3,750 and Invoice No. 504597 for $5,000, Invoice No. 406721 for $1,925.

b) Invoice No. 504061 for $2,500 and Invoice No. 606084 sent to the appellant for $462 .

The invoices in paragraphs 56 a) and b) are related to tax return preparation and distributions to shareholders.

[57] The appeals for 2003 and 2004 will be allowed and the reassessments are referred back to the Minister for reconsideration and reassessment to allow the appellant to deduct the amounts set out in paragraph 56 of these reasons.

[58] Because of the lateness of the appellant withdrawing its application to reopen the appeals, the respondent has asked for costs. Each party shall have 30 days from the date of these reasons to provide me with written submissions as to costs with respect to the application and its withdrawal, such submissions to be exchanged by the parties. I draw counsel's attention to subsection 10(2) of the *Rules*.

Signed at Ottawa, Canada, this 24th day of April 2013.

"Gerald J. Rip"

Rip C.J.

CITATION:	2013 TCC 123
COURT FILE NO.:	2009-35(IT)I
STYLE OF CAUSE:	DR. MIKE ORTH INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	March 15 and 16 and December 1 and 2, 2010
REASONS FOR JUDGMENT BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF JUDGMENT:	April 24, 2013.

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