

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140205**

**Dockets: A-191-13  
A-193-13  
A-194-13**

**Citation: 2014 FCA 34**

**CORAM: BLAIS C.J.  
SHARLOW J.A.  
GAUTHIER J.A.**

**Docket: A-191-13**

**BETWEEN:**

**DR. MIKE ORTH INC.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**BETWEEN:**

**Docket: A-193-13**

**371501 B.C. LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-194-13**

**BETWEEN:**

**440214 B.C. LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Calgary, Alberta, on February 5, 2014.

Judgment delivered from the Bench at Calgary, Alberta, on February 5, 2014.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Calgary, Alberta, on February 5, 2014).**

**SHARLOW J.A.**

[1] These three appeals were heard together in this Court and in the Tax Court of Canada (Chief Justice Rip) because they deal with the same issues and similar facts. The appeals were commenced by 371501 B.C. Ltd. and 440214 B.C. Ltd. (2013 TCC 124), and Dr. Mike Orth Inc. (2013 TCC 123), from 2003 and 2004 reassessments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.). They were heard under the informal procedure rules of the Tax Court.

[2] In the reassessments under appeal, the Minister disallowed the claims of the appellant taxpayers for deductions for certain legal expenses. The taxpayers appealed on the basis that all of the claimed amounts were deductible. Chief Justice Rip allowed the appeal in relation to some of the expenses, but otherwise dismissed the appeal. The taxpayers now appeal to this Court. They argue that their claims for deductions should have been allowed in full.

[3] In each case, the only issue is the deductibility of certain legal fees. The Minister accepts that the legal fees were incurred by the corporations who claimed the deductions. The statutory test that applies in this case – referred to in these reasons as the “statutory purpose test” – is whether the legal expenses were incurred for the purpose of earning income from a business or property, and were not outlays on account of capital or personal expenses. Whether the statutory purpose test is met in a particular case is a question of mixed fact and law, for which the standard of review is palpable and overriding error unless there is an extricable question of law, which is reviewed on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[4] In the Tax Court, the taxpayers presented oral and documentary evidence. The evidence was reviewed comprehensively by Chief Justice Rip. His reasons explain clearly and in detail why he was satisfied that some but not all of the legal expenses met the statutory purpose test. His conclusions must stand absent an error of law or a palpable and overriding factual error. We have been able to discern no such error, and therefore the appeals will be dismissed.

[5] The taxpayers argue that they are entitled to succeed because Chief Justice Rip held that the Minister's factual assumptions were demolished. That argument is based on a misapprehension of the legal effect of demolishing a factual assumption of the Minister. In an income tax appeal, such a factual assumption is demolished by evidence that establishes, on a *prima facie* basis, that the assumption is not true. A factual assumption that is demolished cannot be relied upon to justify the assessment under appeal.

[6] In each of these cases, two factual assumptions were held to be demolished. One of those assumptions was that the amount of legal expenses claimed was unreasonable (a reference to section 67 of the *Income Tax Act*). Once that assumption was held to be demolished, then in the absence of evidence that the expenses were unreasonable (and there is none), Chief Justice Rip could not and did not conclude that the legal expenses were unreasonable in amount.

[7] The other demolished assumption in each case was that the purpose of certain corporate reorganizations was estate or tax planning. Again, once that assumption was held to be demolished, Chief Justice Rip could not and did not conclude that the purpose of the corporate reorganizations was estate or tax planning.

[8] The Minister made no other factual assumptions as to the purpose of the legal expenses. However, each of the taxpayers alleged, in the statement of facts in its notice of appeal, that the expenses in issue were incurred “in respect of the [taxpayer’s] business and investments”. That is an ambiguous expression that could include an income earning purpose or a capital purpose. The Minister denied the allegation.

[9] The pleadings leave no room for doubt that the purpose of the legal expenses was contested. It is apparent from the Minister’s pleading under the heading “Statutory Provisions, Grounds Relied on and Relief Sought” that the Minister took the position from the outset that the documentary evidence the taxpayers had provided to the Minister was not sufficient to establish the purpose for which the legal expenses were incurred. Thus, the Crown plainly raised the critical issue, which was whether the statutory purpose test was met.

[10] Chief Justice Rip was required to determine the relevant facts on the basis of all of the evidence presented, in light of the legal arguments of the taxpayer and the Crown as set out in their pleadings. If he had concluded that the evidence proved, on a balance of probabilities, that the legal expenses were incurred to earn income from a business or property, the taxpayers would have been entitled to succeed. But he did not do so. Rather, he concluded that the evidence proved that some of the legal expenses, but not all, met the statutory test. Therefore the taxpayers succeeded only in part.

[11] But because Chief Justice Rip's conclusion did not rely in any way on section 67 or on a finding that the taxpayers' corporation reorganizations were undertaken for estate or tax planning, there is no basis upon which we can conclude that he misapplied the principles relating to Ministerial assumptions and the onus of proof.

[12] The taxpayers also argue that they could not disclose more particulars of their legal expenses without waiving solicitor and client privilege, which they were not willing to do. They argue that Chief Justice Rip erred in law in requiring them to waive their privilege to succeed in their appeals. We do not accept this argument.

[13] We note that the taxpayers' claims of solicitor and client privilege were not challenged in the Tax Court. We assume for the purpose of these appeals that they are valid claims. However, neither the Minister nor the Court is obliged to determine a factual dispute in the taxpayer's favour merely because the taxpayer asserts and refuses to waive a claim of solicitor and client privilege with respect to evidence that could resolve the dispute.

[14] Several arguments were raised to challenge minor factual findings. We found no palpable and overriding error with respect to those findings.

[15] The Crown has informed the Court that, in the case of 440214 B.C. Ltd., the parties have agreed that further deductions of \$4,631.67 for 2003 and \$1,450 for 2004, should be allowed. That agreement will be reflected in the order disposing of that appeal.

[16] The appeals of Dr. Mike Orth Inc. and 371501 B.C. Ltd. will be dismissed and the appeal of 440214 B.C. Ltd. will be allowed in part, only to reflect the agreement of the parties as described in the preceding paragraph. The Crown will be granted one set of costs for the three appeals. A copy of these reasons will be placed in A-191-13, A-193-13 and A-194-13.

"K. Sharlow"

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-191-13

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED APRIL 24, 2013, DOCKET 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:** FEBRUARY 5, 2014

**REASONS FOR JUDGMENT OF THE COURT BY:** BLAIS C.J.  
SHARLOW J.A.  
GAUTHIER J.A.

**DELIVERED FROM THE BENCH BY:** BLAIS C.J.

**APPEARANCES:**

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-193-13

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED APRIL 24, 2013, DOCKET NO. 2009-715(IT)I**

**STYLE OF CAUSE:** 371501 B.C. LTD. v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** FEBRUARY 5, 2014

**REASONS FOR JUDGMENT OF THE COURT BY:** BLAIS C.J.  
SHARLOW J.A.  
GAUTHIER J.A.

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-194-13

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED APRIL 24, 2013, DOCKET NO. 2009-789(IT)I**

**STYLE OF CAUSE:** 440214 B.C. LTD. v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** FEBRUARY 5, 2014

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