

Docket: 2017-4483(IT)I

BETWEEN:

JOHANNE L. TOURNIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 5, 2018, at Halifax, Nova Scotia and subject to
subsequent written submissions from both parties
Before: The Honourable Mr. Justice Randall S. Boccock

For the Appellant: The Appellant herself
Counsel for the Respondent: Meaghan Mahadeo

JUDGMENT

IN ACCORDANCE with the Reasons for Judgment attached, the appeal in respect of the 2015 taxation year is allowed and the Appellant is entitled to deduct expenses of \$1,200.00 on account of file storage costs related to her obligations to maintain certain client records attributable to her previous legal practice.

Signed at Ottawa, Canada, this 16th day of November 2018.

“R.S. Boccock”

Boccock J.

Citation: 2018 TCC 229

Date: 20181116

Docket: 2017-4483(IT)I

BETWEEN:

JOHANNE L. TOURNIER,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Bocock J.

[1] The Appellant, (“Ms. Tournier”) is a retired member of the Nova Scotia Barristers Society (the “Society”). She deducted professional dues of \$57.00 (“annual dues”) and certain file storage fees of \$1,200.00 (“filing storage fees”) as expenses during the 2015 taxation year. The Minister of National Revenue (the “Minister”) allowed the annual dues, but disallowed the file storage fees. The Minister asserts Ms. Tournier had no income from the provision of legal services and operated no business in the 2015 taxation year. Ms. Tournier appeals that decision.

[2] Originally the appeal was to be heard in Halifax on October 5, 2018. On that date however, Ms. Tournier did not appear. Instead, she signed an agreed statement of facts (“ASF”) and requested that the Court proceed to render its decision after hearing oral submissions from the Respondent. In addition, the Appellant had provided written submissions on that very day. Respondent’s counsel requested some additional time to prepare responding submissions. On that basis, the Court afforded an opportunity for written submissions from the Respondent and rebuttal submissions from the Appellant. That process is now complete and the Court shall render its decision.

[3] Some additional facts are helpful. Ms. Tournier acquired the files, giving rise to the file storage fees, through 27 years of practising law. She became a “retired” member of the Society in 2013 ceasing to provide active legal services in

that year. A year before, after giving up her traditional business office, Ms. Tournier moved the client files to the storage facility and briefly provided legal services from her home.

[4] The Society's members are insured against professional liability risk through the Lawyers Insurance Association of Nova Scotia ("LIANS"). LIANS recommends that client files be retained, depending on type, for 3 to 25 years. Moreover, there are elaborate and precise directives for files which may be scanned, may be destroyed and must be kept indefinitely. The characterization which may best summarize the obligation regarding file retention is as follows: the files should be readily available where necessary and needed to mitigate legal liability arising from premature destruction, mindful of relevant limitation periods. Ms. Tournier's file storage challenge is not one which will exist forever for the present legal profession; new files are now digitized as they are created and then easily and efficiently stored in electronic format.

[5] The issue before the Court is simple. Is Ms. Tournier, as a "retired" member of the Society with no current business income, entitled to deduct the file storage fees as an expense in relation to client files created during previous tax years when she had business income and pursued a profit from business?

[6] In denying the file storage fees as a deduction, the Minister has concluded the following from the facts, the legislation and the written submissions.

Legislation

Paragraph 18(1)(a) of the *Act* provides a general limitation on allowable deductions for businesses. Paragraph 18(1)(a) states:

18(1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property ...

Respondent's Summarized Submissions

[7] Given the wording, Respondent's counsel submits the following argument. Not all expenses are deductible, only those incurred for the purpose of gaining income: *Poulin v HMQ*, 96 DTC 6477 (FCA), reversing *Poulin v HMQ*, 94 DTC 1667 (TCC). There are examples of other cases supporting this proposition. A law practice discontinued in 1988, did not permit deduction claimed in the next ensuing 3 taxation years: *Pearlman v HMQ*, [1999] 1 CTC 96 (TCC), affirmed [1996] 2 CTC 2721 (FCA). However, a temporary hiatus from the practice of law with a future intention to profit from practice is sufficient evidence of no permanent business cessation: *Churchman v HMQ*, 2004 TCC 191. Reconciling these two competing contexts, the Tax Court had held that "being a lawyer is not, in and of itself, a business" and therefore expenses incurred by a lawyer not engaged in private practice, but rather as in-house corporate counsel, were not deductible business expenses: *Jamieson v HMQ*, 2013 TCC 52.

[8] Admittedly, the Respondent contends there have been some authorities which have permitted the deduction of expenses after active business operations have discontinued. From the trial and appeal decisions in *Poulin* above, the Federal Court of Appeal said, albeit as *obiter dicta*, that provided activities undertaken after cessation of business were identical to activities undertaken during operations, then the continued undertaking of such activities was evidence of partial continuation of business activities. Similarly, the completion of steps necessary to wind-up a business after cessation may be evidence of a sunset phase of the business notwithstanding no income is being sought, procured or earned.

Ms. Tournier's Submissions in Brief

[9] In rebuttal, Ms. Tournier submitted two arguments which may be summarized briefly. In considering the principles in *Poulin*, file maintenance or storage "is an inherent risk of the profession" and one necessary to the practice of law. Failure to do so would have resulted in progressive sanction ascending to possible disbarment. Secondly, the requirement to currently maintain the closed files is needed to comply with the guidelines and "standard and acceptable business practice" laid out by LIANS and the Society. Certain authorities have allowed deductible expenses where operations have ceased, but reasonable or unavoidable costs were incurred after business cessation because of timing constraints and operational impediments. One involved repair expenses to a rental property before owner re-occupancy: *Raegele v HMQ*, [2002] 2 CTC 2955. The second involved liquidation expenses for selling dairy equipment related to a terminated dairy business: *Langille v HMQ*, 2009 TCC 398.

Analysis and Decision

[10] The following facts grounded in the reality of the wind-up and discontinuance of a professional service practice are determinative to the outcome of this appeal. During the years of providing legal services to clients, Ms. Tournier was accruing annually “run off” responsibilities concerning file retention, accessibility and, ultimately, future storage obligations. Presently, current practitioners are deploying new methods of electronic storage, referenced to which was submitted in updated regulations concerning digital file retention. During Ms. Tournier 15 years of providing legal services, such efficient options were not available. As such, she incurred the requirement to expend future sums on storage to earn then current income.

[11] In addition, Ms. Tournier was incurring run off professional responsibilities and future risk as a sole practitioner, itself relevant to the nature, character and structure of her chosen business. Why is this? It is chiefly on account of her responsibility and liability as a professional. There is underlying tort liability for negligence, first arising from advice given as a legal service, but also arising from the obligation to store and access evidence of that advice to fend off future liability claims for sub-standard destruction of client records. Such standards or best practices for doing so are mandated by the Society. However, the risk protection connected is underwritten through the insurance (contract of indemnity) by LIANS. That coverage has run off provisions, requirements and standards. These include file storage and maintenance.

[12] Both the past accrual of future record keeping services, the file storage, and the need to protect presently her insurance coverage for past legal services all represent the enduring and current provision of legal services (“continuing services”) beyond the temporal period in which the income was received: the year in which it was otherwise earned and recorded. Put another way, the continuing services provided by Ms. Tournier in 2015 were referable and connected to the income earned in previous years. This is consistent with the notion of unavoidable expenses necessarily expended in future years referable to previous income contemplated in the cases of *Poulin*, *Raegele* and *Langille*.

[13] The Respondent did not raise the issue of reasonableness in her reply. The Court notes that such expenses are presently so, being only 3 years after cessation of providing “active” legal services. However, given the advances in technology, the reduction of Ms. Tournier’s annual storage costs is possible through digitization and planned destruction. An argument of unreasonableness may be

available should those best practices not be undertaken in future, but presently this is not the case.

[14] The appeal is allowed, without costs.

Signed at Ottawa, Canada, this 16th day of November 2018.

“R.S. Boccock”

Boccock J.

CITATION: 2018 TCC 229

COURT FILE NO.: 2017-4483(IT)I

STYLE OF CAUSE: JOHANNE L. TOURNIER AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: October 5, 2018

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.
Bocock

DATE OF JUDGMENT: November 16, 2018

APPEARANCES:

Counsel for the Appellant:
Counsel for the Respondent: Meaghan Mahadeo

COUNSEL OF RECORD:

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