



INCOME TAX

INCOME CALCULATION

Deductions

Appeals from Tax Court of Canada (T.C.C.) decision (2018 TCC 177) upholding Minister of National Revenue decision denying appellants' for legal expenses — Appellant Miriam Barkley acquiring control of Tatra Corporation in 2004 as result of her father gifting her shares of Tatra — Brothers of appellant commencing guardianship application in respect of their father, seeking to set aside transfer of shares to Miriam Barkley — Remedies sought in lawsuit included order for accounting, disgorging, equitable tracing of all wages, bonuses, dividends, other monies paid by Tatra to each of appellants — Appellants claiming legal expenses for 2013 taxation year incurred in defending claims made against them in lawsuit — Each appellant claiming full amount of these legal expenses as deduction in computing their income from office or employment — T.C.C. appearing to have accepted that *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 8(1)(b) could apply to situation where employer or former employer seeking return of income previously paid — Noting, however, that claim that appellants overpaid not made by Tatra but by appellants' brothers — Concluding that claimed legal expenses reaching beyond scope of s. 8(1)(b) — Appellants submitting that legal expenses wholly applicable to claim for overpaid remuneration — Underlying premise in appellants' argument being that Act, s. 8(1)(b) permitting taxpayer, in computing income from office or employment, to deduct amount for legal expenses incurred to defend claim that such taxpayer was overpaid — Whether legal expenses incurred by officer or employee to defend claim that such person was overpaid deductible — Act, s. 8(1)(b) not allowing employee to claim deduction for legal expenses incurred to defend claim related to amount that employee having already received — Thus, legal expenses incurred by appellants, even to extent that such legal expenses may reasonably be regarded as applicable to claim that they were overpaid, not deductible under s. 8(1)(b) — Appellants relying mainly on decision in *Chagnon v. The Queen*, 2011 TCC 268, [2011] D.T.C. 1205 wherein T.C.C. agreeing with *obiter* in *Fenwick v. The Queen*, 2008 TCC 243, [2008] D.T.C. 3523 that s. 8(1)(b) extending to legal expenses incurred by employee in order to retain salary already paid when that employee facing litigation seeking to reclaim such amount — T.C.C. in *Fenwick* interpreting word "owed" in s. 8(1)(b) as equivalent to "earned" — However, far from clear that Parliament intending such interpretation — *Chagnon*, *Fenwick* decided based on different wording of Act, s. 8(1)(b) than applicable here — Revised wording making it clear that only deduction permitted is for legal expenses incurred in relation to amounts not yet received by taxpayer — Addition of wording "if received by the taxpayer, would be required by this Subdivision to be included in computing the taxpayer's income" removing any doubt respecting whether it was only intended to apply to unpaid remuneration — Language clear that deduction only available for legal expenses incurred to collect or establish right to amounts that, if received, would be included in income — Nothing in context suggesting that Parliament intended broader deduction for legal expenses under s. 8(1)(b) than words suggesting — History of this provision relevant in ascertaining its purpose — Nothing in 1989 technical note suggesting that amended version of s. 8(1)(b) intended to expand deduction available to include legal expenses incurred to defend action to recover overpaid salary or wages — Appeals dismissed.

BARKLEY V. CANADA (A-295-18, A-296-18, A-297-18, 2021 FCA 5, Webb J.A., reasons for judgment dated January 19, 2021, 17 pp.)