

Docket: 2015-987(IT)I

BETWEEN:

SYLVAIN LARIVIÈRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 20, 2015, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the appellant: The appellant himself

Counsel for the respondent: Marissa Figlarz (student at law)
Antonia Paraherakis

JUDGMENT

The appeal against the assessments made under the *Income Tax Act*, dated July 18 and 22, 2013, for the appellant's 2010, 2011 and 2012 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Montréal, Canada, this 19th day of November 2015.

"Réal Favreau"

Favreau J.

Translation certified true
on this 4th day of January 2016
Michael Palles, Translator

Citation: 2015 TCC 287
Date: 20151119
Docket: 2015-987(IT)I

BETWEEN:

SYLVAIN LARIVIÈRE,

Appellant,

and

HER MAJESTY QUEEN,

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal, under the informal procedure, against assessment made under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), as amended (the Act), by the Minister of National Revenue (the Minister) dated July 18 and 22, 2013, for the appellant's 2010, 2011 and 2012 taxation years.

[2] Pursuant to the assessment dated July 18, 2013, the Minister disallowed the appellant's deduction in the amount of \$14,522 for spousal support and a child tax credit of \$2,191 for the 2012 taxation year.

[3] Pursuant to the assessment dated July 22, 2013, the Minister disallowed the deductions of \$13,172 and \$13,830 claimed by the appellant for support for the 2010 and 2011 taxation years, respectively, and imposed late-filing penalties on the appellant under subsections 162(1) and 162(2) of the Act.

[4] In computing the tax payable, the Minister relied on the following facts:

- (a) the appellant and Marie-Claude Tessier lived in a common-law partnership for 14 years;
- (b) two children were born of their common-law partnership, in 1995 and 1997;
- (c) the appellant and Ms. Tessier have lived apart since February 2007;
- (d) on July 4, 2007, the Quebec Superior Court rendered a judgment ordering the appellant to pay Ms. Tessier \$16,945 a year as basic child support for their two children, plus a sum of \$4,820 representing 90% of their day-care and day-camp fees;

- (e) by that judgment, to maintain the children's standard of living, the appellant also had to pay Ms. Tessier \$1,000 a month for housing expenses, representing \$800 for mortgage payments and \$200 for taxes, amounting to \$13,172, \$13,830 and \$14,522 for the 2010, 2011 and 2012 taxation years, respectively.

Repeat late filing penalty

- (f) for the 2008 taxation year, the appellant paid a late filing penalty;
- (g) for the 2010 taxation year, the appellant was supposed to file his income tax return no later than April 30, 2011, and he filed it on February 22, 2013.

Late filing penalty

- (h) for the 2011 taxation year, the appellant was supposed to file tax return n later than April 30, 2012, and he filed it on February 22, 2013.

[5] The Minister disallowed the deduction of the payments of \$13,172, \$13,830 and \$14,522 that the appellant paid to his ex-spouse in the 2010, 2011 and 2012 taxation years, respectively, because these were not deductible support amounts within the meaning of subsection 56.1(4) of the Act.

[6] The appellant does not dispute the late filing penalties. However, he submits that the recipient of the payments whose deduction is in dispute had discretion as to their use. The payments were made by bank transfers to the bank account designated by the recipient, and there were no controls in place to ensure that the money was specifically spent as stipulated in the judgment. As specified in paragraph 30 of the judgment, the payments were made for the purpose of maintaining the children's standard of living by covering their housing expenses.

[7] The appellant explained that he claimed, for the 2012 taxation year, a child tax credit because his daughter moved in with him in January 2012 for the entire year. For the 2011–2012 school year, the appellant's daughter was registered at Collège Sainte-Anne in Lachine, while in the 2010–2011 school year, she was registered at Polyvalente Deux-Montagnes. The appellant continued to pay full support for his daughter despite the fact that she was now living with her father. The appellant's daughter had the option of going back to live with her mother at any time.

Analysis

[8] The amounts at issue in this case were paid by the appellant to his ex-spouse pursuant to a judgment of the Quebec Superior Court dated July 4, 2007, which homologated an agreement between the parties dated May 22, 2007. As the judgment was rendered after April 1997, the date of the judgment is considered to be the commencement date of the judgment, in accordance with the definition of the phrase "commencement date" in subsection 56.1(4) of the Act:

56.1(4) Definitions – The definitions in this subsection apply in this section and section 56.

"commencement date" at any time of an agreement or order means

(a) where the agreement or order is made after April 1997, the day it is made;

...

[9] The judgment's commencement date is important for determining the tax regime that applies to child support amounts. Child support amounts pursuant to an order whose commencement date is after April 1997 is generally non-taxable for the recipient and non-deductible for the payer, while other amounts paid to support the recipient are generally taxable for the recipient and deductible for the person required to make the payment.

[10] The phrase "child support amount" is defined in subsection 56.1(4) in the following terms:

"child support amount" means any support amount that is not identified in the agreement or order under which it is receivable as being solely for the support of a recipient who is a spouse or common-law partner or former spouse or common-law partner of the payer or who is a parent of a child of whom the payer is a legal parent.

[11] The phrase "support amount" is also defined in subsection 56.1(4) of the Act, as follows:

"support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

(a) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and

apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or

(b) the payer is a legal parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[12] The payments made by the appellant to his ex-spouse pursuant to paragraph 30 of the Quebec Superior Court judgment dated July 4, 2007, qualifies as a "support amount" because they were made for the maintenance of the recipient and her children and the recipient had discretion as to the use of the amounts. The Canada Revenue Agency initially concluded, in confirming the assessments, that the recipient had no discretion as to the use of these amounts as they were intended to cover housing expenses representing \$800 for the mortgage and \$200 for taxes. At the hearing of this case, the respondent withdrew this line of argument further to the application to strike paragraph 11 from the Amended Reply to the Notice of Appeal.

[13] However, the payments in question also qualify as a "child support amount" because they are not solely for the support of the appellant's ex-spouse; these payments were also intended to maintain the standard of living of the children in the ex-spouse's custody.

[14] In my opinion, the judgment under which the payments were made is unambiguous, and there was no apportionment of the support amounts between the ex-spouse and the children. Accordingly, all the payments constitute child support amounts within the meaning of the Act.

[15] For the 2012 taxation year, the Minister disallowed the child tax credit that the appellant claimed for one of his children on the basis that the appellant was required to pay his ex-spouse support amounts within the meaning of subsection 56.1(4) of the Act.

[16] Paragraph 118(1)(b) of the Act establishes a personal tax credit for a taxpayer who supports a dependent, and paragraph 118(1)(b.1) of the Act establishes a personal tax credit for a tax payer who tends to the needs of a child. However, subsection 118(5) of the Act states that no amount may be deducted under subsection 118(1) where the taxpayer is required to pay a support amount, within the meaning of subsection 56.1(4) of the Act, to his or her ex-spouse in respect of the person in question.

[17] Subsection 118(5) of the Act reads as follows:

(5) Support - No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or

(b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

[18] The definition of "support amount" is reproduced in paragraph 11 above.

[19] A parent who is required to pay a child support amount, as in this case, is not entitled to the personal tax credit under subsection 118(1) of Act, even if the amount cannot be deducted in computing the payer's income, and even if the child resides with the payer in the taxation year in question and there could no longer be a requirement to pay a support.

[20] Subsection 118(5) of the Act is very clear on this issue, and the exception under subsection 118(5.1) of the Act does not apply in this case.

[21] For these reasons, the appeal is dismissed.

Signed at Montréal, Canada, this 19th day of November 2015.

"Réal Favreau"

Favreau J.

Translation certified true
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Michael Palles, Translator

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APPEARANCES:

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