Docket: 2015-3552(IT)I

BETWEEN:

DALE COMMET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 15, 2016, at Edmonton, Alberta

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Peter Basta

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2013 taxation year is dismissed.

Signed at Ottawa, Canada, this 22nd day of February 2016.

"V.A. Miller"

V.A. Miller J.

Citation: 2016TCC48
Date: 20160222
Docket: 2015-3552(IT)I

BETWEEN:

DALE COMMET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant is entitled to claim the tax credits for a wholly dependent person and child amount (the "Tax Credits") in respect of his daughter in his 2013 taxation year.

[2] The Appellant was the only witness at the hearing. There was no real disagreement about the facts in this case.

Facts

[3] The Appellant and his former spouse divorced in 2010 and they have been living separate and apart since at least 2010. They have joint custody of their two minor children – a son and a daughter. After the marriage breakdown, the children resided with each of the Appellant and his former spouse on a week on/week off basis until May 2013 when the daughter moved in with the Appellant on a permanent basis. The son continued to reside with both parents. In his income tax return, the Appellant claimed the Tax Credits for his daughter for the 2013 taxation year.

[4] Four court orders from the Court of Queen's Bench of Alberta (the "Court") were submitted as exhibits at the hearing. The first order was a Consent Order which was made on January 24, 2013. In it the Court ordered that the Appellant had to pay his former spouse $860 monthly commencing the 1st day of January,

2013. This order also stipulated that there was no retroactive credit/child support credit given by one party to the other as at December 31, 2012.

[5] The second order was an 'Interim "Without Prejudice" Consent Order' (the "Interim Order") made on December 18, 2013. The Court ordered that the daughter's primary residence was with the Appellant until there was a further agreement between the parties. It also ordered that there was to be a net payment from the Appellant to his former spouse of $306 monthly commencing December 1, 2013. The order also contained the following paragraph:

> The balance of the issues as outlined in the Defendant Father's application including retroactive child support credit owing by the Plaintiff Mother to the Defendant Father, shall be adjourned to Special Family Law Chambers on March 19, 2014.

[6] The third order was made on March 19, 2014. The Court ordered that the Appellant was to pay his former spouse the sum of $391 per month commencing April 1, 2014; that the Appellant could earn up to an additional $13,000 over and above his salary of $108,000 before the child support payable by him would be recalculated; and there was no retroactive child support/arrears payable by one party to the other as at March 19, 2014. In this order, the Court stated that starting the 2013 tax year, the Appellant could claim the "Child Tax Benefit, G.S.T., equivalent to spouse deduction and such other tax benefits as may be available" with respect to the daughter and his former spouse could claim the tax credits with respect to the son.

[7] The fourth order, pronounced on March 3, 2015, amended the third order to give specifics with respect to the calculation of the child support.

[8] It was the Appellant's position that he should be eligible to claim the Tax Credits because his daughter lived with him for most of the year in 2013. As well, the second court order reduced the amount he had to pay to his former spouse from $868 to $306 because his former spouse had to pay him $562. In support of his argument, he submitted the "Summary of Child Support Guideline Calculations" which showed that the amount of child support payable by the Appellant was $868 and the amount payable by his former spouse was $562.

Law

[9] For the purposes of the Tax Credits, a wholly dependent person and a child amount are defined in subsection 118(1) of the *Income Tax Act* ("*ITA*") as follows:

> 118. (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year,
>
> Wholly dependent person
>
> (*b*) in the case of an individual who does not claim a deduction for the year because of paragraph 118(1)(*a*) and who, at any time in the year,
>
> (i) is
>
> - a person who is unmarried and who does not live in a common-law partnership, or
> - (B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common law-partner and who is not supported by that spouse or common-law partner, and
>
> (ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is
>
> - except in the case of a child of the individual, resident in Canada,
> - (B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,
> - (C) related to the individual, and
> - (D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,
>
> an amount equal to the total of

Child amount

(b.1) if

(i) a child, who is under the age of 18 years at the end of the taxation year, of the individual ordinarily resides throughout the taxation year with the individual together with another parent of the child, the total of

- (A) $2,131 for each such child, and

- (B) $2,000 for each such child who, by reason of mental or physical infirmity, is likely to be, for a long and continuous period of indefinite duration, dependent on others for significantly more assistance in attending to the child's personal needs and care, when compared to children of the same age, or

(ii) except where subparagraph (i) applies, the individual may deduct an amount under paragraph (b) in respect of the individual's child who is under the age of 18 years at the end of the taxation year, or could deduct such an amount in respect of that child if paragraph (4)(a) and the reference in paragraph (4)(b) to "or the same domestic establishment" did not apply to the individual for the taxation year and if the child had no income for the year, the total of

(4) For the purposes of subsection 118(1), the following rules apply:

b) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (b) of the description of B in that subsection for a taxation year in respect of the same person or the same domestic establishment and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

(b.1) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (b.1) of the description of B in that subsection for a taxation year in respect of the same child and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

(5) 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 (**emphasis added**)

[10] A support amount is defined in subsection 56.1(4) as follows:

> 56.1 (4) 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. (pension alimentaire)

Analysis

[11] It is clear from subsection 118(5) that an individual who is required to pay a support amount is not eligible to claim a tax credit for a "wholly dependent person" or a "child amount". It is also readily apparent from the Consent Order made on January 24, 2013 and the Interim Order made on December 18, 2013 that only the Appellant was required to pay a support amount (child support) in 2013. In the Consent Order the relevant paragraph read:

> There shall be a payment of base child support from the Defendant Father to the Plaintiff Mother in the sum of $860 per month commencing the 1st day of January of 2013 with a like payment due and payable on the 1st day of each and every month thereafter.

The relevant paragraph in the Interim Order read:

> There shall be a net payment of s. 3 base child support from the Defendant Father to the Plaintiff Mother in the sum of $306.00 per month commencing the 1st day of December, 2013 with a like payment due and payable on the 1st day of each and every month thereafter until further agreement between the parties or Court Order.

The other Orders are not relevant with respect to who was required to pay child support in 2013.

[12] As a consequence of the Orders and subsection 118(5) of the *ITA*, the Appellant is not entitled to claim the Tax Credits in 2013.

[13] I agree with the Appellant that the support amount which he was required to pay in December 2013 was the net amount of the amount payable by him ($868) and the amount payable by his former spouse ($562). Nevertheless, the Interim Order did not require his former spouse to pay a support amount to him. It required the Appellant to pay the net of the two amounts to his former spouse.

[14] Both parents' income was considered in calculating the support amount because both parents have an obligation to support their children in accordance with their ability to contribute: *Contino v Leonelli-Contino*, 2005 SCC 63 at paragraph 32. However, in this case, only the Appellant, who had the higher income, was actually required to pay a support amount each month in 2013.

[15] The issue raised in the case of *Verones v The Queen*, 2013 FCA 69 was identical to that in the present appeal. In that case, Trudel J.A. stated:

> Once each parent's obligation vis-à-vis the children is determined, the higher income parent may be obligated to make child support payments to the lower income parent as part of his or her performance of said obligation. However, in the end, the set-off concept does not translate the parents' respective obligation to contribute to child rearing into a "support payment" as defined in the Act.

[16] I noted that in her Order made on March 3, 2015, Madame Justice Pentelechuk wrote that the Appellant was "at liberty" to claim the various tax credits. With respect, the Court of Queen's Bench of Alberta does not have jurisdiction with respect to the entitlement to tax credits. That jurisdiction lies with the Tax Court of Canada.

[17] The appeal is dismissed.

Signed at Ottawa, Canada, this 22nd day of February 2016.

"V.A. Miller"

V.A. Miller J.

CITATION:	2016TCC48
COURT FILE NO.:	2015-3552(IT)I
STYLE OF CAUSE:	DALE COMMET AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	February 15, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	February 23, 2016

APPEARANCES:

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Name:

Firm:

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