Docket: 2013-2231(IT)I

BETWEEN:

EUGENE JUDICKAS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 25, 2016, at London, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alexander Nguyen

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2009 and 2010 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to claim the Child Tax Credits with respect to his child Mar, born in 1993, for the 2009 and 2010 taxation years.

The appellant is not entitled to any further relief.

Without costs.

Signed at Ottawa, Canada, this 12th day of October 2016.

"Johanne D'Auray"

D'Auray J.

Citation: 2016 TCC 225
Date: 20161012
Docket: 2013-2231(IT)I

BETWEEN:

EUGENE JUDICKAS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

I. OVERVIEW

[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") pursuant to paragraphs 118(1)(*b*) and (*b*.1) of the *Income Tax Act* (the "*Act*") for his 2009 and 2010 taxation years.

[2] The respondent's position is that the appellant is not entitled to the Tax Credits since during the years under litigation the appellant was paying child support payments to his former spouse.

II. FACTS

[3] The appellant and his former spouse, Ms. Stuifbergen, were separated in 1998 and divorced in 2006.

[4] The appellant and Ms. Stuifbergen had six children, Ma born in 1989, M and K born in 1991, Mar born in 1993, J born in 1995 and M born in 1998.

[5] Pursuant to an Order of the Ontario Superior Court of Justice, Family Court, pronounced on April 7, 2003 (the "April Order"), the appellant had legal custody of the three oldest children and Ms. Stuifbergen had legal custody of the three

youngest children. Specifically, the three oldest children had to reside with the appellant and were under his care and control at all times, and the three youngest children had to reside with Ms. Stuifbergen and were under her care and control at all times.

[6] In the April Order, the Court ordered that commencing June 1, 2003, the appellant had to pay child support for the three youngest children in accordance with the Federal Child Support Guidelines (the "Guidelines"). The support payments were for the three children only and the calculation was based on the appellant's income alone, since at that point, Ms. Stuifbergen was not earning any income.

[7] There was also a clause in the April Order that provided that if Ms. Stuifbergen were to obtain employment, the quantum for the child support would be adjusted by taking the difference between the amounts that each party would otherwise pay if a child support order were sought against each of the parties. The April Order also stipulated that any child upon attaining age 12 or older had the right to change their residence at their own direction.

[8] The April Order was amended by a written agreement dated September 15, 2005 (the "September Agreement"). The September Agreement took into account that Ms. Stuifbergen was now employed and that one of the oldest children who was previously residing with the appellant was now residing with Ms. Stuifbergen.[1]

[9] Under the September Agreement, the appellant was required to pay to Ms. Stuifbergen the amount of $894 per month for four children of the marriage, and Ms. Stuifbergen was required to pay to the appellant the amount of $415 per month for two children of the marriage. The difference was paid by the appellant to Ms. Stuifbergen.

III. LAW AND ANALYSIS

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

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[1] During the trial, the appellant stated that later in 2015, one of the children who was previously living with his former spouse decided to reside with him.

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 (a) and who, at any time in the year,

(i) is

(A) 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

(A) 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) where

(i) a child of the individual ordinarily resides throughout the taxation year with the individual together with another parent of the child, $2,000 for each such child who is under the age of 18 years at the end of the taxation year, 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 118(4)(a) did not apply to the individual for the taxation year and if the child had no income for the year, $2,000 for each such child,
>
> . . .

(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) or (b.1) 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;
>
> . . .

(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

> (a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of a 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.

(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (b) or (b.1) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

[Emphasis added.]

[11] 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.

[12] Subsection 118(5) of the *Act* precludes a taxpayer from claiming the Tax Credits if she or he paid child support payments as contemplated by subsection 56.1(4) of the *Act*.

[13] Subsection 118(5.1) of the *Act*, however, provides that if no individual is entitled to deduct the Tax Credits because of the application of subsection 118(5) of the *Act*, subsection 118(5) may be ignored.

[14] The respondent submitted that the appellant was not entitled to claim the Tax Credits because the appellant was paying child support to his former spouse in accordance to subsection 118(5) of the *Act*. To support her position, the respondent quoted the decision in *Verones v R.*[2]

[15] In *Verones*, Mr. Verones and his former spouse had two children. The children resided 50% of the time with each parent in a joint custody agreement. The child support payments were based on the income of both parties. The person having the higher income, Mr. Verones, had to pay the difference (a "set-off" amount) to his former spouse for the children of the marriage. Mr. Verones stated that since he and his former spouse were both paying support, he should have been entitled to the Tax Credits. Justice Trudel of the Federal Court of Appeal in *Verones* explained that the set off concept did not apply since the income of both spouses is always taken into account to establish the child support payments. She stated at paragraph 8 the following:

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[2] 2012 TCC 291, 2013 FCA 69.

> [8] 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] The appellant argued that he and his former spouse were both obligated to pay child support. Therefore, the appellant argues that he should be granted the Tax Credits.

[17] In my view, the appellant's position is correct, this appeal can be distinguished from the decision in *Verones*. In this appeal, both parents have the legal obligation pursuant to the September Agreement to pay child support, which was not the case in *Verones*.

[18] In *Verones*, the child support was based on the Guidelines taking into account the two children. The child support was determined on a pro rata basis in accordance with the parents' respective income. Only Mr. Verones had the obligation to pay child support.

[19] In this appeal, both parents have an obligation to pay child support under the September Agreement. The appellant has to pay for the four children under the legal custody of Ms. Stuifbergen and she has to pay for the two children under the legal custody of the appellant.

[20] This appeal falls within the first example provided by Justice Miller of this Court in *Letoria v Canada*,[3] who stated:

> 9 I dealt with a somewhat similar situation in the case of *Ochitwa* where I stated:
>
> > 8. While I cannot disagree with the Respondent's conclusions, I am perturbed by the implications that in the same circumstances of a shared custody arrangement, that simply due to the crafting of an order or agreement a parent will or will not get the eligible dependant amount. For example, where there is a shared custody arrangement with two children it strikes me there are three possible ways to craft the child support, where each parent earns some income:

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[3] 2015 TCC 221, [2015] TCJ No 180, at para 9.

> 1. Each parent agrees to or is ordered to pay support for one child ($400 for one for example and $300 for the other -- net $100.00): both could claim the eligible dependant amount. . . .
>
> [Emphasis added.]

[21] This type of agreement triggers the application of subsection 118(5.1) of the *Act*. If subsection 118(5.1) of the *Act* did not exist, both the appellant and his former spouse would have not been entitled to claim the child amounts for the children Ma and Mar, since both Ma and Mar did not ordinarily reside throughout the taxation years with Ms. Stuifbergen, and the appellant was paying child support.

[22] Therefore, the appellant is entitled to claim the Tax Credits for the 2009 and 2010 taxation years as he falls within the ambit of subsection 118(5.1) of the *Act*. However, as Ma was over the age of 18 at the end of 2009, the appellant may only claim the Tax Credits in respect of Mar for both taxation years. The appeal is therefore allowed on that basis.

Signed at Ottawa, Canada, this 12th day of October 2016.

"Johanne D'Auray"

D'Auray J.

CITATION:	2016 TCC 225
COURT FILE NO.:	2013-2231(IT)I
STYLE OF CAUSE:	EUGENE JUDICKAS v HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	August 25, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	October 12, 2016

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Alexander Nguyen

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada