Docket: 2016-2396(IT)I

BETWEEN:

MACEY-ANNE COOK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 29, 2017, at Edmonton, Alberta
Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Neil T. Mather
Counsel for the Respondent:	Adam Pasichnyk

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2013 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 26th day of September 2017.

"B. Russell"

Russell J.

Citation: 2017 TCC 188
Date: 20170926
Docket: 2016-2396(IT)I

BETWEEN:

MACEY-ANNE COOK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Introduction:

[1] The Appellant appeals the denial by the Respondent's Minister of National Revenue (Minister) of the Appellant's claim for dependent and child tax credits *per* paragraphs 118(1)(b) and (b.1) of the *Income Tax Act* (Canada) (Act), both in respect of a child of the Appellant, in computing the Appellant's tax payable for the 2013 taxation year.

[2] As a preliminary matter, the Appellant applied to have her identification in this appeal amended to reflect her new gender-affirming legal name, Macey-Anne Cook. The application was granted, on consent. Accordingly the name of the Appellant is amended to be, "Macey-Anne Cook".

II. Facts:

[3] The Appellant testified. No other witnesses were called for the Appellant and the Respondent called no witnesses. The pertinent facts are that the Appellant fathered a son, M.C., born in August, 2006 to the Appellant's then wife. In 2009 the parents' marital relationship broke down. In 2010 the parents formally separated and subsequently divorced. At all material times they lived separately in Edmonton, with the Appellant maintaining the marital home and sharing custody

of the child with the child's mother. On December 2, 2010 the Alberta Court of Queen's Bench issued a Divorce Judgment and Corollary Relief Order, granting the two parents joint custody of the child, with the child's primary residence to be with the ex-wife in Edmonton. The Order provided also that the Appellant pay $331 monthly to the ex-wife to support the child. The Order did not require the ex-wife to pay any support amounts.

[4] In or about June 2013 the ex-wife moved from Edmonton to Drayton Valley - approximately 150 kilometres distant from the child's friends and school in Edmonton. The Appellant and ex-wife then agreed between themselves that the child's primary residence would change to be with the Appellant at the Appellant's Edmonton home and that with this change of primary residence the support amounts being paid by the Appellant to the ex-wife would cease.

[5] Somewhat more than a year later, on August 1, 2014 the Alberta Court of Queen's Bench issued an Interim Without Prejudice Consent Order that basically reflected this 2013 agreement between the two parents. It provided that neither parent was required to make support payments for the child, in view of the change in primary parenting. The Consent Order stated that the Appellant's residence had been the child's primary residence since September 2013. The Consent Order also provided that neither party owed any arrears of support to the other and any existing arrears in child support *per* the December 2, 2010 Order were vacated forthwith, and also that all expenses of the child would be borne by the Appellant, subject to proposed sharing between the parents of anticipated expenses of $1,000 or more. Lastly the Consent Order provided that the Appellant, "… shall be entitled to claim the child from 2014 onward for tax purposes until there is a change in primary residential parenting."

[6] The Appellant testified that she had a "verbal agreement" prior to 2013 with the ex-wife that instead of making monthly support payments to the ex-wife, the Appellant would pay all expenses for the child, and also that the Appellant would reimburse the ex-wife for any expenses she incurred for the child. The Appellant testified also that despite what was stated in the December 2, 2010 Order, the child's primary residence prior to commencement of 2013 had been with the Appellant and not the child's mother.

[7] On December 29, 2014 the Minister reassessed to deny the claimed child and dependent amounts. A notice of objection was filed. The Minister on March 10, 2017 confirmed the reassessment on the basis of subsection 118(5) of the Act and the view that the December 2, 2010 Order had, throughout the 2013,

taxation year, required the Appellant to pay support to the ex-wife in 2013 in respect of the child. Retroactive forgiveness *per* the 2014 Consent Order of any 2013 support arrears did affect the result.

III. Issue:

[8] The issue is whether the Minister erred in denying the Appellant's 2013 taxation year claim for section 118 tax credits *per* paragraphs 118(1)(b) and (b.1) of the Act, for respectively a child under 17 and an eligible dependent.

IV. Parties' Positions:

[9] The Appellant submits that she was eligible for "dependent" and "child" tax credits in the Appellant's 2013 year as the child had lived with the Appellant since prior to 2013, and likewise prior to 2013 the two parents had agreed to cessation of the support payments provided by the December 2, 2010 Order. Further, the August 1, 2014 Consent Order vacated any arrears of support payments *per* the December 2, 2010 Order. The Appellant submits that as retroactively there was not liability to make support payments in 2013, and the Appellant did not make support payments in 2013 anyway, so the subsection 118(5) exception does not apply and the Appellant should be allowed the sought section 118 tax credits. The Appellant cites *Barthels v. The Queen*, 2002 CarswellNat 1088 [TCC Inf] for the proposition that subsequent forgiveness of support payment arrears would qualify the Appellant for the denied tax credits.

[10] The Respondent's position is that in accordance with the December 2, 2010 Order the Appellant was required to make support payments in the 2013 taxation year. Accordingly, *per* subsection 118(5) the Minister was correct in denying the Appellant's claim for the child support related tax credits. The fact that in the following year of 2014 an Order forgave arrears including arrrears from 2013 is irrelevant in light of the pertinent statutory wording. Also the Respondent does not accept that no support payments were made for any of the early months of 2013, and this further confirms the applicability of subsection 118(5).

V. Analysis:

[11] In this matter the Appellant has claimed dependent and child deductions for the 2013 taxation year *per* subsections 118(1)(b) and (b.1) of the Act. The issue is whether the exception in subsection 118(5) prohibits such deductions. Subsection 118(5) states:

> **(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
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> **(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.

[12] It is clear that the December 2, 2010 Order required the Appellant to make monthly support payments to the ex-wife in respect of the child. That Order remained in effect from December 2, 2010 throughout all of 2011, 2012 and 2013 and until issuance August 1, 2014 of the Consent Order which forgave any arrears in respect of the support payments provided by the December 2, 2010 Order. However in 2013, within the April to September period, the ex-wife decided to move to Drayton Valley and subsequently did so. The child either already had been primarily living with his father, the Appellant, with the Appellant picking up all child expenses *in lieu* of paying the monthly support amounts, or the child commenced to do so in 2013 with his mother's impending or actual move to Drayton Valley.

[13] Also in connection with subsection 118(5) there seems no issue between the parties that the support payments required by the December 2, 2010 Order would each constitute a subsection 56.1(4) defined "support amount". That definition reads:

> ***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.

[14] The support payments specified in the December 2, 2010 Order readily seem to come within the ambit of this definition, noting particularly clause (b) thereof.

[15] There are in general two lines of authority respecting application of subsection 118(5) in circumstances akin to herein where, while a court order existed during the applicable taxation year requiring periodic payment of support amounts, non-payment of such amounts was retroactively excused by a subsequent Order.

[16] One line reflects a purely textual approach, not affected by any retroactive change of circumstances applying to the pertinent taxation year. That is the interpretative basis herein espoused by the Respondent. This line of authority includes the Tax Court decision of *Lavoie*, 2001-564(IT)I, wherein the taxpayer had ceased compliance with a court order for support payments to be made by him to his ex-wife for two infant children given into the ex-wife's custody pursuant to that court order; when subsequently one of the children went to live with her father, the taxpayer. Nevertheless, as the court order specifying the support payments remained in effect until altered by a further order in the ensuing taxation year (note that the reasons for judgment do not state that the subsequent order also specified cancellation of support arrears), Lamarre, J. as she then was concluded in favour of the Minister that the subsection 118(5) exception still applied.

[17] Also, in *Dubis*, 2010 TCC 121, Sheridan, J. considered a substantively similar situation - save with the added dimension that the subsequent court order did cancel all support arrears. The Court nevertheless upheld the respondent Minister's application of the subsection 118(5) exception, thus disallowing the taxpayer's appeal. The same conclusion was reached by Sarchuk, J. in *Young*, TCC 2002-1673(IT)I.

[18] The other line of authority in these cases recognizes as relevant a subsequent order cancelling support arrears arising in the context of a *de facto* shift of a child's primary residence to that of the taxpayer parent who had been ordered to make support payments. In *Barthels*, *supra*, Hershfield TCJ considered that subsequent cancellation of support arrears where a custodial child had moved to the claimant parent's residence did neutralize the original requirement to pay support amounts. His primary consideration was fairness - allowing the subsection 118(1) deductions where there had been *de facto* change of ordered primary residency of the child, with accompanying parental agreement to cease ordered support payments, pending a confirmatory order vacating support arrears. *Barthels* has been followed in *Antalya*, 2005 TCC 31; *Giroux*, 2012 TCC 284 and *Abiola*, 2013 TCC 115.

[19] My preference as to these two lines of authority is that represented by *Barthels*. However there remains a further hurdle for the Appellant here. Can the subsection 118(1) deductions be prorated in view of any support payments made by the Appellant for the first several months of the pertinent taxation year? This raises a factual issue. Here, did the Appellant pay support to the ex-wife for any of the early months of the Appellant's 2013 taxation year?

[20] The Appellant testified to not having paid support amounts at all in 2013. However that appears to be contradicted by the Appellant's notice of appeal which at paragraphs 14 and 15 read:

> 14. The Child moved in with the Appellant on a permanent basis in April 2013, at the time that the Appellant's Ex-Wife moved to Drayton Valley.
>
> 15. Upon an oral agreement made between and the Appellant and the Appellant's Ex-Wife (the "Interim Agreement"), the Support Payments were discontinued as the Child now resided with the Appellant.

[21] Further the August 1, 2014 Consent Order states (page 1, paragraph 2)

> The Applicant Father has had the primary residence of the child, by an interim agreement between the parties, since September 2013…

[22] As well, Ex. A-1 being the Appellant's notice of objection showing Appeals Division received stamp date of July 15, 2015, includes the statement,

> …[the ex-wife] moved from Edmonton Alberta to Drayton Valley Alberta in June of 2013. Previous to this date the child … was living primerely [sic] with equal time with both parents one week on and one week off and all expenses related to the upbringing of [the child] were payed [sic] for by [the Appellant]. When [the

> ex-wife] moved 150 kms away from Edmonton, [the child] remained fulltime with [the Appellant]. There no [sic] child support paid to [the ex-wife] and no child support was received from [the ex-wife].

[23] This extract implies that support had been paid by the Appellant until the child began to live with the Appellant fulltime after the ex-wife had moved to Drayton Valley.

[24] In support of his position at the hearing, the Appellant filed on consent certain school and day-care statements suggestive that in the 2013 and 2014 years the Appellant was paying all the child's monthly day-care and school charges. However, that is not particularly indicative as to whether or not the Appellant was making support payments. Also, a letter from one Kevin C. Kozmech (Exhibit A-5) dated August 12, 2014 addressed to Canada Revenue Agency filed on consent, states that Mr. Kozmech's client, the Appellant, has had the child "living solely and fulltime" with the Appellant since September 2012. However, there is no statement as to payment or non-payment of the monthly support amount *per* the December 2, 2010 Order. And of course the weight to be attached to this letter is slight at best, given that the author did not appear at the hearing to testify.

[25] On the basis of all the foregoing I am inclined to the view that monthly payment of support amounts as provided by the December 2, 2010 Order did continue to be paid for some period of months in 2013, approximately until the ex-wife moved to Drayton Valley in that year, sometime between April and September.

[26] Having reached this factual conclusion, the question is whether there can be proration of the tax credits, where arguably subsection 118(5) applies for an entire taxation year even if only one or a few monthly support payments were made in that year. In this regard I concur with the decision of this Court in *Young*, *supra*, *per* Sarchuk, J., that no statutory language used in or in connection with subsection 118(1) indicates that the deductions may be prorated for a taxation year, noting in contrast with other provisions in the Act by which Parliament has explicitly provided for proration.

[27] A similar conclusion was reached in *Giroux*, *supra*. The Court there found that the subsection 118(1) deductions could not be shared for the same 2008 taxation year, and since the appellant was required to pay support for part of that year, only the former spouse could claim the credit for that year. At paragraphs 27 and 28 in *Giroux*:

> [27] As for 2008, the situation is not the same. The former spouse was entitled to claim the credits set out in paragraphs 118(1)(*b*) and (*b.1*), since she was the custodial parent and supported the child G until November 1, 2008. The father took over that role starting on that date.
>
> [28] Given that, under paragraph 118(4)(*b*), only one parent can claim the credits described in paragraphs 118(1)(*b*) and (*b.1*) in a taxation year, subsection 118(5) of the ITA prevents the parent who is required to pay support from claiming the credit. This was also ruled on in *Sherrer v. Canada*, [1998] T.C.J. No. 62 (QL), which confirmed that these credits could not be shared between two parents for the same taxation year, and that the parent who had to pay support during the year was the one who could not claim the credits under paragraphs 118(1)(*b*) and (*b.1*).

[28] Therefore, in respect of the 2013 taxation year, which is the only year at issue in this matter, I will uphold the Minister's appealed reassessment. The appeal is accordingly dismissed, albeit without costs.

Signed at Ottawa, Canada, this 26th day of September 2017.

"B. Russell"

Russell J.

CITATION:	2017 TCC 188
COURT FILE NO.:	2016-2396(IT)I
STYLE OF CAUSE:	MACEY-ANNE COOK AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 20, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
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APPEARANCES:

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