Docket: 2005-3611(IT)I

BETWEEN:

RAYMOND F. FORTUNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 19, 2006 at Toronto, Ontario

Before: The Honourable Justice G. Sheridan

Appearances:

Agent for the Appellant:	Qamar Sadiq
Counsel for the Respondent:	Laurent Bartleman

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of January, 2007.

"G. Sheridan"

Sheridan, J.

Citation: 2007TCC20
Date: 20070118
Docket: 2005-3611(IT)I

BETWEEN:

RAYMOND F. FORTUNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Raymond Fortune, is appealing the reassessment of the Minister of National Revenue of his 2003 taxation year. The Minister disallowed the deduction claimed by the Appellant in respect of child support payments. While conceding that such payments were made, the Minister decided they were not deductible because they were not made pursuant to a "written agreement" as required under the *Income Tax Act*.

[2] In assessing the Appellant's 2003 taxation year, the Minister made the following assumptions[1]:

(a) throughout the 2003 taxation year, the Appellant and his spouse, Catherine Fortune, were living separate and apart because of a breakdown in their marriage;

(b) the Appellant and Catherine Fortune are the parents of (2) two children, Erin, born January 1987 and Kayla, born June 1989;

[1] Reply to the Notice of Appeal, Paragraph 7.

(c) as it was never established that the Appellant paid the amounts at issue to Catherine Fortune, the Minister proceeded on the basis that such amounts had not been paid;[2] and

(d) the Appellant was not required to pay the claimed amounts pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement.

[3] Paragraph 60(*b*) of the *Act* permits the deduction of a child support payment if it is a "support amount" as defined in paragraph 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 natural parent of the 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.

[4] The Appellant has the onus of proving wrong the assumptions. With respect to paragraph 7(d), he admits that the child support payments were not made pursuant to a court order or a formal written agreement between him and his spouse. He argues, however, that certain other documents, when considered in light of his having actually made the payments claimed, constitute a "written agreement" within the meaning of the *Act.*

[5] According to the Appellant, there had been no need for a court order because when they separated, he and his spouse had been able to agree to the terms of the payment of child support. Similarly, having thus worked things out between themselves without legal advice, no formal written agreement setting out the terms of their agreement was ever prepared. At some point in 1993 however, he had received a written request from his spouse for payment of child support. Although he no longer had that document in his possession, the Appellant testified that it was in

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[2] The Respondent conceded at the hearing that the Appellant paid the child support amounts to his spouse in 2003.

accordance with its terms that he began making monthly payments. In 1995, the amount was changed to $150, the amount he had been paying since that time. He put in evidence copies of the cancelled cheques[3] for 2003. He also furnished a copy of a receipt from his spouse for the 2003 payments[4] along with the originals of receipts for 2000[5] and 2001[6].

[6] Counsel for the Respondent argues that the Appellant's admission that there was no written agreement is sufficient to put an end to the matter and further, that the Court ought to draw a negative inference from the failure of the Appellant to call his spouse to testify as to their agreement.

[7] On this latter point, the appeal was heard under the Informal Procedure; the Appellant was represented by his financial advisor who had no legal training. Against this backdrop and mindful of the Appellant's evidence that the marriage breakdown had left relations with his spouse somewhat strained, I am not persuaded that any negative inference ought to be drawn.

[8] As for counsel's argument that the *Act* requires that there be a written agreement, however, I am inclined to agree. What constitutes a "written agreement" within the meaning of paragraph 60(*b)* has been given much judicial consideration. While I am sympathetic to the situation in which the Appellant finds himself, the case law does not support his position.

[9] In *Knapp v. M.N.R.*[7], the facts were similar to those of the present case; indeed, the appellant in *Knapp* was in a stronger position than the Appellant in that he was at least able to put in evidence a copy of a separation agreement which, though unsigned, contained the terms of the agreement between the spouses. Even so, Christie, A.C.J. dismissed the appeal summarizing Mr. Knapp's position as follows:

> The essence of the appellant's position in this regard is stated in these extracts from his Notice of Appeal which was reiterated here this morning. After listing the receipts previously mentioned, the Notice goes on:

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[3] Exhibit A-4.

[4] Exhibit A-1.

[5] Exhibit A-2.

[6] Exhibit A-3.

[7] 85 DTC 424.

> As these receipts show I paid to my ex-wife the above amounts in the months indicated in the year 1981.
>
> During the course of the year 1981 several differences arose during our negotiations for a separation agreement. Although there were these differences an agreement was reached for the amount of money to be paid by me each month to her.
>
> These receipts were provided to me to prove that she had agreed to the amounts indicated and also proof that she had received the money.
>
> ...
>
> It is hoped that the [Court] will consider that the cheques written by me, are on my part, a written agreement to pay the amount indicated.
>
> And that the receipts given to me by my ex-wife for the money received is a written agreement on her part.
>
> I also refer to Exhibit A-1, which is a detailed separation agreement dated August 11, 1981, prepared by the solicitor for the appellant's then wife. It was signed by Mrs. Knapp, but not by the appellant who disagreed with some of the terms.[8]

[10] Christie A.C.J. then concluded that:

> In my opinion, no matter how hard one strains to find in favour of the plaintiff, those facts cannot be held to be an agreement in writing or a written separation agreement (or both). They do not, as I see it, meet the requirements of 11(1)(*1*)*. [FOOTNOTE * : Paragraph 11(1)(*1*) is now paragraph 60(b).]

[11] This decision was considered by Bowman, A.C.J. (as he then was) in *Foley v. Canada*[9], another case with facts quite similar to those of the present matter:

> 26 The *Kapel* decision was quoted with approval by Christie, A.C.J. (as he then was) in *Knapp v. Minister of National Revenue* (1985), 85 D.T.C. 424 (T.C.C.). In that case, there was nothing that could be called a written agreement signed by either party. The appellant argued that the cheques signed by the husband and the receipts signed by the wife were a written agreement. Such an argument was obviously doomed. The word "agreement" denotes at least a binding obligation.

[12] The rationale for the requirement of a "written agreement" was explained by the Federal Court of Appeal in *Hodson v. Canada*[10]:

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[8] *Supra*, at page 425.

[9] [2000] 4 C.T.C. 2016.

> … spouses who live together are not allowed to split their income thereby reducing the total tax bill of the family. Paragraph 60(*b*) provides an exception to that general rule and confers upon separated spouses who come within its terms and conditions certain tax advantages. Parliament has spoken in clear and unmistakable terms. Had Parliament wished to extend the benefit conferred by paragraph 60(*b*) on separated spouses who, as in this case, do not have either a Court order or a written agreement, it would have said so. The rationale for not including separated spouses involved in payments made and received pursuant to a verbal understanding is readily apparent. Such a loose and indefinite structure might well open the door to colourable and fraudulent arrangements and schemes for tax avoidance. I hasten to add that there is no suggestion in the case at bar of any such fraudulent or colourable arrangement. The Minister agrees that, in the case at bar, the appellant has made the alimony payments to his spouse in good faith[11]. Nevertheless, such a possible scenario in other cases commends itself to me as the rationale for the carefully worded restrictions set out in the paragraph. If the words used by Parliament create hardships, as suggested by the appellant, it is Parliament, and not the Court, that has the power to redress those hardships. [Footnote 11 added.]

[13] It must be noted that the above decision pre-dated the changes to the deductibility of child support payments. As counsel for the Respondent quite rightly pointed out in his argument, another object of the requirement for a written agreement is to provide a means of determining whether the agreement was in place prior to the May 1997 legislative changes which, except in certain limited circumstances, rendered child support payments no longer deductible. Further, the existence of a written agreement provides a means for determining whether there have been changes to a pre-1997 agreement; certain changes will trigger a "commencement day" thus depriving the payments of their previously held deductibility.

[14] In the present matter, even assuming the existence of his spouse's written request, that and the cancelled cheques and receipts are not sufficient to satisfy the *Act's* precondition of deductibility of a "written agreement" pursuant to which the Appellant made the child support payments; accordingly, the appeal must be dismissed.

Signed at Ottawa, Canada, this 18th day of January, 2007.

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[10] 88 DTC 6001 at page 6003.

[11] As Mr. Fortune did in the present case.

"G. Sheridan"

Sheridan, J.

CITATION:	2007TCC20
COURT FILE NO.:	2005-3611(IT)I
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 19, 2006
REASONS FOR JUDGMENT:	The Honourable Justice G. Sheridan
DATE OF JUDGMENT:	January 18, 2007
APPEARANCES:	
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Counsel for the Respondent:	Larent Bartleman

COUNSEL OF RECORD:

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