

Docket: 2006-3221(IT)I

BETWEEN:

CLAUDE ASSELIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 2, 2007, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:

The Appellant himself

Agent for the Respondent:

Nadia Golmier (student-at-law)

JUDGMENT

The appeal from the notice of reassessment dated April 13, 2006, by which the Minister of National Revenue revised the deduction claimed by the Appellant for the 2001 taxation year, as support amount or other allowance paid periodically, to a sum of \$13,967, is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of September 2007.

“Réal Favreau”

Favreau J.

Translation certified true
on this 9th day of October 2007.
Monica F. Chamberlain, Translator

Citation: 2007TCC549
Date: 20070914
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BETWEEN:

CLAUDE ASSELIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a notice of reassessment dated April 13, 2006, concerning the deduction, as support amount or other allowance paid periodically, claimed by the Appellant for the 2001 taxation year.

[2] The only matter to be decided is the deductibility, for tax purposes, of certain payments made by the taxpayer to his ex-wife in 2001, in accordance with the provisions of a divorce judgment delivered September 21, 2000, by a judge of the Superior Court sitting in the district of Saint-Hyacinthe. The relevant passages of this judgment are as follows:

[TRANSLATION]

...

[54] The wife claims support in the amount of \$964.25 per month and a lump sum of \$40,000 to provide for her retirement.

...

[57] Currently, the needs of the wife who lives alone in an apartment can reasonably be estimated at between \$1200 and \$1400 per month. She has no income. ...

[60] The wife must make a concerted effort to find a job as soon as possible. With this goal in mind, the Court grants her a lump sum to provide the financial stability necessary for her immediate job search and, subsequently, to provide for her retirement, all in relation to the means of the husband of course.

[61] Furthermore, there is reason to establish a periodical support amount.

...

[68] On the whole, the Court concludes that to meet the needs of the wife, the husband can afford to pay her a lump sum of \$10,000. To ensure her economic stability within a reasonable period of time during which she will search for paid employment, the Court deems it just to ascertain that the sum of \$10,000 will be made in payments of \$500 per month for six months and at the end of this six-month period, the balance of \$7000 will be due and could, in part, provide for a retirement fund.

[69] Finally, the Court, after having considered the foregoing and, more importantly, the fact that the lump sum will be partly paid in \$500 increments for six months establishes the support amount at \$800 per month. To establish this amount, the Court, in addition to the consideration of the foregoing, also took into account the tax effect.

...

[74] **ORDERS** the defendant to pay the plaintiff a lump sum in the amount of \$10,000 payable as follows: six monthly payments of \$500 each starting October 1 and ending March 1, 2001, and a final payment of \$7000 on April 1, 2001;

...

[3] The relevant legislative provision is paragraph 60(b) of the *Income Tax Act*, R.S.C. 1985, (5th Supp.) c. 1, as amended (the Act) which allows a taxpayer to deduct the total support amount paid throughout the year when calculating their income for a given taxation year:

(b) **Support**—the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

A is the total of all amounts each of which is a support amount paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,

B is the total of all amounts each of which is a child support amount that became payable by the taxpayer to the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and

C is the total of all amounts each of which is a support amount paid by the taxpayer to the particular person after 1996 and deductible in computing the taxpayer's income for a preceding taxation year;

[4] The definition of "support amount" is found in subsection 56.1(4) of the Act:

"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.

[5] The issue is whether the sum of \$10,000 paid by the Appellant to his ex-wife represents periodic payments as an allowance for maintenance which are deductible for tax purposes or periodic payments made under a lump sum or capital payment, which are not deductible.

[6] Mr. Justice Hugessen of the Federal Court of Appeal in *Her Majesty the Queen v. Stanley John McKimmon*, [1990] 1 C.T.C. 109, concluded that this type of problem cannot be easily resolved by rigid rules. He stated that the Court should, on the contrary, examine all the circumstances surrounding the payments and determine, in light of these circumstances, the appropriate manner to qualify these payments. In his decision, Hugessen J.A. set out eight (8) criteria to be taken into account in

making such a determination, while clarifying that the list was not intended to be exhaustive. The criteria are:

1. the length of the periods at which the payments are made;
2. the amount of payments in relation to the income and living standards of both payer and recipient;
3. whether the payments are to bear interest prior to their due date;
4. whether the amounts envisaged can be paid by anticipation at the option of the payer or can be accelerated as a penalty at the option of the recipient in the event of default;
5. whether the payments allow a significant degree of capital accumulation by the recipient;
6. whether the payments are stipulated to continue for an indefinite period or whether they are for a fixed term;
7. whether the agreed payments can be assigned and whether the obligation to pay survives the lifetime of either the payer or recipient;
8. whether the payments purport to release the payer from any future obligations to pay maintenance.

[7] Considering the reasons for which the lump sum of \$10,000 was paid and considering the aforementioned criteria, it seems clear to me that the payments in question were made under a lump-sum settlement and not as allowance for the maintenance of the ex-wife.

[8] The Court granted the ex-wife of the Appellant a lump sum of \$10,000 to ensure the financial stability necessary for an immediate job search (i.e. monthly payments of \$500) and subsequently, to provide for her retirement (i.e. the lump sum of \$7000). In addition, the Court granted a support amount of \$800 per month for the maintenance of the ex-wife.

[9] According to criteria 5 and 6 set out by Hugessen J.A. in the above-noted decision, a maintenance allowance should not be allowed to accumulate, over a brief period, a significant degree of capital and the amounts paid during a fixed term can more easily be considered as capital than as allowance.

[10] In the present case, the lump sum of \$10,000 was paid during a fixed term and allowed the accumulation of capital to provide a retirement fund.

[11] I conclude that the Appellant did not pay the lump sum of \$10,000 as allowance for the maintenance of his ex-wife; the maintenance was otherwise satisfied by the support amount.

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

Signed at Ottawa, Canada, this 14th day of September 2007.

“Réal Favreau”

Favreau J.

Translation certified true
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Monica F. Chamberlain, Translator

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APPEARANCES:

For the Appellant: The Appellant himself
Agent for the Respondent: Nadia Golmier (student-at-law)

COUNSEL OF RECORD:

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Firm:

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