Citation: 2007TCC674
Date: 20071**15**
Docket: 2007-892(IT)I

BETWEEN:

JOHN B. LANE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Webb J.

[1] The Appellant's 2005 taxation year was reassessed to deny the Appellant the deduction that he had claimed for $13,801.93. The Appellant had claimed this amount as a deduction for support amounts paid by him to his spouse from whom he was living separate and apart. The alternate issue in this case is whether this amount should have been excluded from his income based on the decision of the Federal Court of Appeal in *Walker v. The Queen*, [2000] 1 C.T.C. 271, 2000 DTC 6025.

[2] The Appellant and his spouse were married in 1964. They separated in 2005 and executed a Separation Agreement dated June 15, 2005. This Agreement included the following paragraph:

> 3. **MAINTENANCE/SUPPORT**
>
> The Wife and the Husband are both retired, the Husband acknowledges that if he was not retired and was working he would have to pay maintenance/support to the Wife. Therefore, if for any reason the pension division under clause 12 is changed or the Husband recommences work the maintenance/support issue for the Wife will be revisited.

[3] The payment of the pension amounts (which are the subject of this appeal) is dealt with in paragraph 12 of the Agreement which provides as follows:

> 12. **PENSION PLANS**
>
> (a) The Husband and the Wife acknowledge and agree that they are each aware of the amendments to the Canada Pension Plan Act whereby pension credits earned by one or both spouses during their years of marriage may be divided equally upon marriage dissolution, or upon a permanent separation. Further, such Act precludes spouses from releasing their rights to the Canada Pension Plan benefits of the other, unless there is a specific statutory provision in the province in which the spouses reside at the date of separation, enabling such a release. The parties acknowledge and agree that no such statutory provision exists in the Province of Newfoundland and Labrador and that, therefore, their pension credit, up to the date of separation are subject to equal division between them (herein called the "Canada Pension"). Further the Husband is now receiving his Canada Pension, the Canada Pension payment shall be divided equally between the Husband and Wife.
>
> (b) The Husband is receiving a pension in relation to his employment with the Business Development Bank (herein called the "BDC Pension"), this pension shall be divided equally between the Husband and Wife;
>
> (c) The Husband is receiving a pension from the Government of Newfoundland and Labrador (herein called the "NL Pension"), this pension shall be divided equally between the Husband and Wife;
>
> (d) The Husband shall execute the required documentation to allow the division of the Canada Pension, the BDC Pension and NL Pension at the source so that the Wife receives 50% of each payment.

[4] The total gross amount of the pensions that the Appellant was receiving was approximately $60,000. The pension from the Government of the Province of Newfoundland and Labrador represented approximately two-thirds of the total pension income of the Appellant. The Appellant attempted to have the pension payable from the Government of the Province of Newfoundland and Labrador divided at source but was informed by letters dated July 6, 2005 and September 12, 2005 that this division could not be made at source. There were two years of service that the Appellant had provided to the Government of the Province of Newfoundland and Labrador that were prior to the marriage and therefore ought not to have been included in the amounts to be divided. The Appellant had forgotten about these two years when he signed the Separation Agreement. By an Amending Agreement dated February 7, 2007 the original Separation Agreement

was amended to reflect that the pension benefits that related to the two years prior to the marriage were not to be divided between the Appellant and his spouse and to provide that the BDC pension and the NL pension benefits were to be paid by the Husband making direct deposits to his spouse's bank account. Paragraph 1(d) of the Amending Agreement provides that these payments "are to be treated as spousal support payments from the Husband to the Wife".

[5] The amount at issue in this case, $13,801.93, was determined by the Appellant based on the gross amount of the total pensions that he received, excluding the benefits related to the two years of service that were prior to the marriage. The amount was calculated as 50% of the total gross amount per month times 5 ½ months (the period of separation in 2005). The amount was paid by the Appellant to his spouse monthly. Since the pension payable by the Government of the Province of Newfoundland and Labrador was approximately two-thirds of the total pensions, the Appellant adopted the same method of dividing the other two pensions as he had to adopt for the pension payable by the Government of the Province of Newfoundland and Labrador.

[6] In *Andrews v. The Queen*, 2005 TCC 246, [2006] 1 C.T.C. 2012, 2005 DTC 1546, Bowman C.J. dealt with a very similar situation. That case also dealt with the division of pension plans following a breakdown of a marriage that was effected by one spouse making a payment to the other of an amount that was equal to the gross amount of the pension.

[7] In dealing with the issue of whether the amounts paid in relation to the division of the pension are support amounts, Bowman C.J. made the following comments:

> [18] … The result is that an amount paid monthly by a husband to his ex-spouse as a division of a matrimonial asset, the husband's pension, is neither a support amount nor a pension benefit in the hands of the recipient spouse nor is it deductible by the payor as a support amount.

[8] In the original Separation Agreement in this case the division of the pension plan was not contemplated as a support amount. This reference to the treatment of the payment of the pension amounts as a support amount appears in the Amending Agreement dated February 7, 2007. Although the Addendum to [the] Amendment to Separation Agreement indicates that the effective date of the amendment is to be June 15, 2005, because the Agreement was not executed until 2007 this purported effective date of July 15, 2005 cannot change or alter the tax consequences of the

2005 taxation year. Since the Amending Agreement was made in 2007, it could only affect prior support amounts paid in 2006 or in 2007 as a result of the provisions of subsection 60.1(3) of the *Act*. Whether the amounts paid under the Separation Agreement as amended by the Amending Agreement will qualify as "support amounts" is not the issue in this case. The tax treatment of the amounts paid in 2005 under the Separation Agreement before it was amended by the Amending Agreement is the issue in this case.

[9] As a result of the finding of Bowman, C.J. in the *Andrews* case, as noted above, the amounts that were paid by the Appellant to his spouse in 2005 were not support amounts for the purposes of the *Act* and hence were not deductible under paragraph 60(b) of the *Act.* These amounts were paid as a division of the Appellant's pensions.

[10] However, as noted by Bowman C. J. in the *Andrews* case, this does not end the matter. The next issue to be decided is whether or not the amount that was paid by the Appellant to his spouse, which was equal to 50% of the gross amount of his pension for the months for which they were separated, should be excluded in determining his income. As noted by Bowman C. J., this is based on the *Walker* decision referred to above. In paragraph 27 of the *Andrews* case Bowman C. J. made the following comments in relation to the *Walker* decision:

> [27] ... The ratio of the Federal Court of Appeal's judgment seems to be contained in paragraph 5 of the reasons which reads:
>
> > [5] We believe it was the intention of the parties at the time the separation agreement was executed that each would pay income tax on the gross amount received with the result that each would be left with their share of the pension (the property in this case) after taxes.

[11] Mogan J. in his decision in *Walker v. The Queen*, [1995] 1 C.T.C. 2408, 95 DTC 753 stated as follows in relation to this issue:

> 17 To me, the above words are a clear indication that the husband and wife (i.e., the third party and the appellant) intended that the military pension be allocated at the source so that the administrator of the pension would issue two cheques each month: one to the husband for $418.42 and one to the wife for $418.42. How else can I interpret words like: 'and until such time as the payments resulting from the assignment are processed and reach the wife, the husband shall pay to the wife ... '? Also, the last sentence of section 14 supports my

> interpretation: 'The husband warrants that he will proceed with due diligence to process such assignment'. If the assignment had been processed immediately causing the administrator to issue two cheques each month, the appellant and the third party would have each reported annual income of $5,021 with respect to the military pension.

[12] In the present case the language is clearer that it was the intention of the parties that the pensions would be divided at source as this was contemplated by paragraph 12(d) of the original Separation Agreement. This case is indistinguishable from *Walker* and from *Andrews* and hence I find that, based on the Federal Court of Appeal decision in *Walker* and on the decision of Bowman, C.J. in *Andrews*, the amount of $13,801.93 (which was the portion of the gross amount of the pensions that was paid by the Appellant to his spouse for the period of time that they were separated in 2005) should not have been included in the income of the Appellant in 2005.

[13] This is not an unjust result. The position of the Respondent was that the Appellant should be taxed on all of the pension income that he received in 2005 without any deduction for the amount paid to his spouse, regardless of the fact that $13,801.93 of this amount was paid by the Appellant to his spouse. This would have resulted in the Appellant paying taxes on amounts that, as a result of a Separation Agreement, he had agreed would be split with his spouse. Presumably (although this was not in issue in this case) the position of the Respondent would be that the Appellant's spouse would not be required to include this amount in her income. As a result the Appellant's spouse would have received more than what would have been the intention of the parties under the Agreement as it would not have been their intention that she receive this amount without paying the income taxes related thereto. Since the Agreement contemplated that the amounts would be divided at source, the Agreement had contemplated that each party would bear the tax consequences of receiving one-half of the gross amount of the pensions.

[14] The Appellant is entitled to his costs, if any, as determined in accordance with the *Rules*.

This Amended Reasons for Judgment is issued in substitution for the Reasons for Judgment dated November 7, 2007.

Signed at Ottawa, Ontario, this **15th** day of November 2007.

"Wyman W. Webb"

Webb J.

CITATION:	2007TCC674
COURT FILE NO.:	2007-892(IT)I
STYLE OF CAUSE:	JOHN B. LANE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
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APPEARANCES:

Agent for the Appellant:	John E. Lane
Counsel for the Respondent:	Devon Peavoy

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada