Citation: 2004TCC201
Docket: 2002-4932(IT)I

BETWEEN:

KEITH ANSTEAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(delivered orally from the Bench at
Regina, Saskatchewan on February 27, 2004)

Margeson, J.

[1] The matter before the Court at this time is the decision and the reasons for judgment in the matter of Keith Anstead and Her Majesty the Queen, 2002-4932(IT)I.

[2] In computing income for the 2000 taxation year the Appellant deducted $45,000 as support payments. In assessing the Appellant for that year the Minister of National Revenue ("Minister") allowed a deduction for support payments of only $28,800. The Appellant filed an objection, but the assessment was confirmed by Notification of Confirmation dated September 19, 2002. From this confirmation of assessment the Appellant filed a Notice of Appeal to this Court.

Evidence

[3] Keith Anstead testified that he and Sylvia Clara Anstead were divorced and a judgment was granted on the 30th day of April, 1997. This judgment required him to pay $800 per month for each child and $1,350 per month for the support and maintenance of his former spouse. The payments for his former spouse were to be for a period of 24 months only or until his spouse should remarry or live in a common-law relationship, whichever event first occurred.

[4] The order further provided that the maintenance paid for the wife and children should be included in the income of Sylvia Clara Anstead and deducted by the Appellant. The first of these payments was to be made on May 1, 1997, in the amount of $675 and a further identical payment on the 15th day of May and thereafter on the 1st and 15th days of each month.

[5] The Appellant's former spouse requested that these payments for her support continue after the period provided for in the judgment and up to the end of the year 2000. This was agreed upon and the lawyer for the former spouse agreed to the provision previously in effect, that the payments be included in the income of the former spouse and deductible by the Appellant.

[6] To that end an order was obtained, although be it later, dated June 18, 2002, which amended the original order granted on April 30, 1997, and provided for an extension of 15 months only as it related to the spousal support. These amounts were to be deductible by the Appellant and claimable by the former spouse for income tax purposes. The order provided that the first payment was to be made on the 1st day of May, 1999, and the 15th day of May, 1999, and on the 1st and 15th days of each month thereafter for a period of 15 months.

[7] The Appellant's former spouse was reassessed for income tax for the 2000 taxation year and the spousal support payments that were made, or paid, were added on, as seen in Exhibit A-4, in the amount of $37,500, as additional support payments. It was noted that this was an adjustment to her prebankruptcy return. The Appellant indicated that he had actually paid his former spouse more than that amount that he was claiming as a deduction.

[8] The Appellant filed his 2000 income tax return and claimed a deduction of $45,000, and on September 24, 2001, he was advised by letter that his return was under review and he was asked to forward further documentation to support his claimed deduction of $45,000, including an amended court order amending the order of April 30, 1997. He was given 30 days to provide the documentation, after which time the return would be assessed based upon the information in the Minister's file.

[9] The Appellant replied on November 6, 2001, and included copies of all cheques -- that would be cancelled cheques -- supporting his alleged payments of $45,000 (and an amount in excess of that amount).

[10] On November 21, 2001, the Appellant received a letter indicating that he was only entitled to claim the child support payments of $28,800 as he was no longer required to pay support payments for his former spouse, but it was indicated to him that if they received the subsequent court order his position would be reconsidered.

[11] A Notice of Assessment was mailed to him under separate cover dated December 3 and was introduced into evidence as Exhibit A-9. He said that he could not understand it and asked for an explanation of it, which was received by him. The breakdown was dated January 25, 2002. According to him it merely gave the figure of $28,000 as the amount which he was entitled to claim. They told him that they had denied any deduction for support payments over $28,800.

[12] He then filed an objection to the assessment. In the objection he indicated that his former spouse had included in her income the amount of $16,200, the disputed amount.

[13] By way of letter to the Appellant dated May 13, 2002, the appeals officer asked for a copy of the amended order again and he set a deadline of June 15, 2002, to receive that and any other documentation that the Appellant deemed necessary.

[14] A notice of confirmation was issued on September 19, 2002, in which the deduction sought was denied and indicating the reason therefore.

[15] In cross-examination the Appellant admitted that he did not get an order extending the provisions of the April 30, 1997 order until June 18, 2002.

[16] In redirect he said that his former spouse was agreeable to having the June 18, 2002 order issued. He received a copy of her 2000 taxation return two days before the commencement of this trial.

[17] In answer to the Court's question, he said that he was advised of his former spouse's prebankruptcy filing and was satisfied that she had claimed as income the amount that he was seeking to deduct here.

[18] Doug Spencer was the chief of appeals. Counsel for the Appellant was allowed to cross-examine him. He said that he was not aware of the Appellant's former spouse's return.

Argument on Behalf of the Appellant

[19] In argument on behalf of the Appellant counsel said that one of the principles of the *Income Tax Act* ("*Act*") is that there should be no double taxation. He referred to subsection 248(28) and said that the evidence in this case indicated that the Appellant's former spouse had already been reassessed and the amount sought to be deducted by the Appellant was added to her income in the year in question. Therefore the assessment should be denied, that is the assessment of him.

[20] He argued that Revenue Canada has waived its right to rely upon the provisions of the *Act*, specifically, 60.1(3), 60(*b*) and 56.13. These provisions limit the taxpayer's right to going back only one year from the date of the order to claim the deduction. His client did not receive enough notice in 2001 in order for him to obtain the necessary order for the year 2000. That was the reason he gave for the Court to deny the Minister the right to disallow him the deduction.

[21] He said that his former spouse was not willing to sign the court order until 2002. The Minister did not assess the Appellant in accordance with subsection 152(1) of the *Act* and therefore the Appellant did not have enough time to go back and get the necessary order for the taxation year 2000. This is not fair according to him. He pointed out that the Appellant has acted honourably throughout, has paid his taxes, and was treated unfairly.

[22] In essence he agreed that apart from the fairness argument which he put forward and the effects of his interpretation of subsection 248(28) the Appellant is prohibited from claiming the deductions because of the provisions of 60.1(3) and 60(*b*) and the Minister is correct that he can only claim deductions for a period of one year back from the date of the order. Further, he argued that section 60 does not override subsection 248(28). The appeal should be allowed.

Argument on Behalf of the Respondent

[23] According to counsel for the Respondent, the evidence does not support the position that the Minister did anything improper. He did not fail to act with due diligence in accordance with the Act. It was not his fault that the Appellant failed to act in time and did not receive the order in time, if he had chosen to do so. The

Minister went beyond what he was required to do. He was not required to advise the Appellant to get a new order, he was simply advising him that the old order did not cover these payments.

[24] With respect to the argument under subsection 248(28), there is in fact no double taxation. If double taxation did result, then there is an avenue open to the Appellant's spouse to have that issue addressed.

[25] There is no double taxation here. Subsection 248(28) includes the amount in the hands of one person and excludes it in the hands of the other. That is the effect of subsection 248(28). The Minister has not erred in applying the law to the Appellant. If he did in respect to the Appellant's spouse, that is for her to establish in another action.

[26] The Minister has properly applied the provisions of subsection 60.1(3), and sections 60.1 and 60(*b*) with respect to the Appellant. The appeal should be dismissed.

Rebuttal by Counsel for the Appellant

[27] In rebuttal, counsel for the Appellant argued that the Minister never advised the Appellant that he had to obtain the order before the end of 2001. In the letter written by the Minister to the Appellant dated May 13, 2002, Exhibit A-12, the Minister was suggesting, according to him, that he had until June 15, 2002, to obtain the order. He suggested that the Minister must advise the Appellant if there is a limitation period based upon fairness, especially in light of this letter and the interpretation that the Appellant might reasonably take from it. The principles of fundamental justice would apply against the actions of the Minister here to prevent him from denying the deduction since he misled the Appellant. He referred to section 7 of the *Charter of Rights and Freedoms* ("*Charter*") and suggested that the Appellant has been denied fundamental justice.

Analysis and Decision

[28] In essence, there is no disagreement about the facts in this case. It is obvious from a consideration of subsection 60.1(3) that in order for the Appellant to be able to claim the deductions that he seeks, the amount must have been paid "in the year or in the preceding taxation year". The taxation year in question is 2000 and the order that was obtained was not until June 18, 2002.

[29] The evidence was clear that the Appellant did not seek and was not granted an order before the end of the taxation year 2001. Indeed, in argument counsel for the Appellant indicated that the Appellant's former spouse would not agree to such an order before June 18, 2002.

[30] The Court is satisfied that the Minister was correct in concluding that the amounts in question allegedly paid in pursuance of the order of June 18, 2002, in the year 2000 are not considered to have been paid and received thereunder and therefore are not deductible under paragraph 60(*b*) of the *Act*.

[31] With respect to the argument based upon fairness or section 7 of the *Charter*, the Court cannot see where the Appellant was denied fundamental justice or was dealt with unfairly by the Minister.

[32] The Court is satisfied that the Minister acted with due diligence and due dispatch in assessing the taxpayer and in advising him that his claim for deducting the support payments in question was being reconsidered. This advice was given on September 24. The Appellant had only filed his return on June 12, 2001. It was not until November 6, 2001, that the Appellant responded to this request for more information and a copy of the amended Order. He did not enclose it as he did not have it at that time.

[33] Whatever delay that was caused thereafter was the result, not of the actions of the Minister, but of the Appellant himself, who was obviously attempting to obtain the necessary order. The fault for being unsuccessful in obtaining this order on time as not that of the Minister but of the Appellant, possibly of his legal and accounting advisors, and obviously done due to the fact that his former spouse was not prepared to consent to the order until later.

[34] As counsel for the Respondent pointed out, the Minister's letter of May 13, 2002, was not something which the Appellant could have reasonably assumed was an undertaking by the Minister that if the Appellant obtained the order by June 15, 2002, his claim would be successful. It was nothing more than an undertaking by the Minister to do nothing further in consideration of the objection until June 15, 2002. Indeed, at this time, it was already too late.

[35] The Minister had no duty to advise the Appellant other than as he did prior to the end of the year 2001 that his 2000 return was being reconsidered and that they required a new order. In spite of the misgivings that the Appellant had regarding the interpretation of the reassessment, it is necessary to point out that this did not come about until the year 2002 and by that time it was too late to obtain the requisite order. The argument of the Appellant with respect to fairness and the *Charter* is therefore rejected.

[36] With respect to the argument of double taxation under section 248(28) of the *Act*, the Court is satisfied that this section and subsection 60.1(3) are stand-alone sections. Subsection 248(28) states that there shall not be double taxation, but it does not operate to override the provisions of subsection 60.1(3) which prevents the claiming of the deduction because the Appellant has not brought himself within its provisions.

[37] Subsection 248(28) cannot make a taxpayer eligible for a deduction that is prohibited by another provision of the *Act*. It is at best a remedial section which has the effect of allowing one party, in this case the former spouse of the Appellant, who is not otherwise prohibited from doing so to say, you taxed my former spouse for this because you did not allow him the deduction for the same income, so I do not have to claim it in my income, and she is entitled to have it removed from inclusion in her income. Therefore, the relief is available to her and there is no double taxation. It is not a deduction, it is a non-inclusive amount in her income.

[38] This provision was never intended to allow the taxpayer the right to elect who was to have the remedy, as that would defeat the purpose of the *Act*.

[39] In the case at bar, it would mean that in spite of the *Act* providing that the Appellant could not claim the deduction, he would get it anyway.

[40] There is no evidence before this Court as to whether the Appellant's spouse has asked for relief on the basis of subsection 248(28), but presumably it is

available to her on application to the Minister under the *Act* or under the fairness package.

[41] The appeal is dismissed and the Minister's assessment is confirmed.

Signed at Ottawa, Canada, this 2nd day of April, 2004.

"T. E. Margeson"

Margeson, J.

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APPEARANCES:

For the Appellant:	No one appeared
For the Respondent:	No one appeared

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