

Docket: 2007-3782(IT)I

BETWEEN:

LOUISE BOISVERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

MAURICE DÉSILETS,

Third Party.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 7, 2008, at Québec, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	André Lareau
Counsel for the Respondent:	Vlad Zolia
For the Third Party:	The Third Party himself

JUDGMENT

The appeal from the assessments of Louise Boisvert made under the *Income Tax Act* for the 2002 and 2003 taxation years is allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The appeal from the assessments of Louise Boisvert made under the *Income Tax Act* for the 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

The assessments of Maurice Désilets made under the *Income Tax Act* for the 2002 to 2005 taxation years are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of June 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 2nd day of September 2008.
Susan Deichert, Reviser

Citation: 2008 TCC 323
Date: 20080611
Docket: 2007-3782(IT)I

BETWEEN:

LOUISE BOISVERT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

MAURICE DESILETS,

Third Party.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] Louise Boisvert appealed from the notices of reassessment dated June 4, 2007, in which the Minister of National Revenue ("the Minister") added, in computing the Appellant's income for the 2002, 2003, 2004 and 2005 taxation years, the respective amounts of \$10,192, \$11,819, \$11,612 and \$3,668 as unreported income for support or other allowance paid on a periodic basis by her former spouse, Maurice Désilets.

[2] The initial notices of assessment with respect to the Appellant's 2002 and 2003 taxation years are dated April 3, 2003, and April 22, 2004, respectively. The Minister determined that the Appellant, in filing her income tax returns for the 2002 and 2003 taxation years, made misrepresentations that were attributable to neglect, carelessness or wilful default, considering the importance of the additional income added.

[3] On June 8, 2007, the Appellant served the Minister with a notice of objection for the 2002, 2003, 2004 and 2005 taxation years with respect to the notices of reassessment dated June 4, 2007.

[4] On July 10, 2007, the Minister confirmed the notices of reassessment dated June 4, 2007.

[5] Counsel for the Respondent served the parties with a reference under section 174 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended ("the Act"), dated March 20, 2008, in order to join Maurice Désilets to Louise Boisvert's appeal. With the parties' consent to the reference, when the hearing began the Court ordered Maurice Désilets to be joined to Louise Boisvert's hearing in order to determine the following issues:

- (a) in computing her income for the 2002 to 2005 taxation years, is Louise Boisvert required to include the amounts of support received from Maurice Désilets in these years?
- (b) similarly, in computing his income for the 2002 to 2005 taxation years, can Maurice Désilets deduct the amounts of support paid to Louise Boisvert?

[6] Louise Boisvert and Maurice Désilets were married on August 24, 1974, and were the parents of two daughters, Patricia, born on March 22, 1978, and Constance, born on April 27, 1982.

[7] Ms. Boisvert and Mr. Désilets ceased to live together on September 13, 1993, and a divorce judgment of the Quebec Superior Court dated July 24, 1995, was handed down by the Honourable Justice Édouard Martin ("the divorce judgment").

[8] The divorce judgment confirms and makes enforceable an [TRANSLATION] "agreement for corollary relief relating to the divorce and for the division of the family patrimony" dated December 4, 1994 ("the agreement for corollary relief").

[9] Paragraph 4 of the agreement for corollary relief provides the following:

[TRANSLATION]

The male applicant will pay monthly support of \$750.00 for the children, to be paid into a trust account in their names to be administered by the female applicant until

each of them reaches the age of majority; the male applicant will also pay for their clothing and their tuition.

[10] Paragraph 6 of the agreement for corollary relief provides the following:

[TRANSLATION]

The children Patricia and Constance must include these amounts in their income tax returns and the male applicant will deduct the amounts paid as support from his income.

[11] Paragraph 7 of the agreement for corollary relief provides the following:

[TRANSLATION]

The parties declare that they are financially independent and mutually waive all remedies for support.

[12] During the years in dispute, Ms. Boisvert received support payments from Mr. Désilets under the *Act to facilitate the payment of support*, and the agreement for corollary relief was not fully complied with by the former spouses.

[13] Ms. Boisvert testified and pointed out that the agreement for corollary relief had been prepared by Raynald D'auteuil. She also indicated that on November 3, 1997, she applied to the clerk of the court responsible for the application of the *Act to facilitate the payment of support* because her former husband had not been making the support payments. At the time of her application to the clerk of the court, the capital balance of the arrears was \$8,395.

[14] Ms. Boisvert also explained that she had never opened a trust bank account for her daughters. The support cheques were payable to her and she deposited them in her own bank account. She stated that each of her daughters has had a credit card since the month of March 1998. A single monthly statement was obtained for the three outstanding credit cards, including Ms. Boisvert's. The allocation of the expenses on the monthly statement to each holder was done monthly.

[15] Ms. Boisvert also confirmed that she had never included the support payments from her former husband in the computation of her income.

[16] Mr. Désilets testified and explained that he had continued to pay support even after his daughters had reached the age of majority, namely, on March 22, 1996, for Patricia and April 27, 2000, for Constance, because he believed he was required to do so. In addition, he wanted to act responsibly since his daughters were still at school.

[17] Mr. Désilets also confirmed that he had never deducted, in computing his income, the support payments to his former wife. He decided to claim this deduction for the 2002 to 2005 taxation years after an assessment he received in 2005 or 2006 which required him to pay income tax. Mr. Désilets believes that he is entitled to claim the deduction for support payments retroactively up to 10 years.

Analysis

[18] The first issue that must be addressed relates to the tax status of the support payments by Mr. Désilets to Ms. Boisvert. The obligation to pay the support arises from the agreement for corollary relief and the divorce judgment dated December 4, 1994, and July 24, 1995, respectively, or before the addition of the definition of "child support amount" to the Act by the 1996 Budget Statement.

[19] The terms and conditions for the support payments, as described in the agreement for corollary relief and the divorce judgment, were not complied with to the letter (for example, no trust account was opened), but they have not been changed and the amount of the support payments to meet the children's needs has not been varied.

[20] As there is no "commencement day" within the meaning of subsection 56.1(4) of the Act that was after April 1997, the support payments made by Mr. Désilets remain subject to the former taxation rules, that is, they are deductible by the payer and taxable in the hands of the recipient. The definition of the expression "commencement day" found in subsection 56.1(4) of the Act reads as follows:

Définitions. The definitions in this subsection apply in this section and section 56.

"commencement day" at any time of an agreement or order means

- (a) where the agreement or order is made after April 1997, the day it is made; and
- (b) where the agreement or order is made before May 1997, the day, if any, that is after April 1997 and is the earliest of
 - (i) the day specified as the commencement day of the agreement or order by the payer and recipient under the agreement or order in a joint election filed with the Minister in prescribed form and manner,
 - (ii) where the agreement or order is varied after April 1997 to change the child support amounts payable to the recipient, the day on which the first payment of the varied amount is required to be made,
 - (iii) where a subsequent agreement or order is made after April 1997, the effect of which is to change the total child support payments payable to the recipient by the payer, the commencement day of the first such subsequent agreement or order, and
 - (iv) the day specified in the agreement or order, or any variation thereof, as the commencement day of the agreement or order for the purposes of this Act.

[21] In order to be deductible in the computation of income, the payments by Mr. Désilets must satisfy the requirements of the definition of "support amount" in subsection 56.1(4) of the Act, which reads as follows:

"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 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.

[22] The support payments made by Mr. Désilets satisfy the requirements of the definition of "support amount" in subsection 56.1(4) of the Act because they were payable to the recipient (the cheques were payable to Ms. Boisvert) as an allowance on a periodic basis for the maintenance of the children of Ms. Boisvert and because Ms. Boisvert had discretion as to the use of the said payments (the support cheques were payable to her and were deposited into her personal bank account and not into a trust bank account in the children's names). The conditions set out in paragraphs (a) and (b) of the definition of "support amount" are also satisfied in this case, since Ms. Boisvert is the former spouse of Mr. Désilets and they are living separate and apart from each other because of the breakdown of their marriage, since the support amount is payable under an order of a competent tribunal or under a written agreement, and since Ms. Boisvert is the mother of the children whose natural father is Mr. Désilets, and the support amount is payable under an order made by a competent tribunal in accordance with the laws of a province or territory.

[23] During the 2002 to 2005 taxation years, Ms. Boisvert administered the support payments received from Mr. Désilets. As each child reached the age of majority, Ms. Boisvert lost the administration of the trust bank account. In fact, she never lost the administration of the support payments because the trust bank account had never been opened. For purposes of the Act, no trust had been created. In her testimony, Ms. Boisvert admitted that she was unfamiliar with the concept of a trust and that she had not considered it advisable to deposit the support payments in a separate and distinct bank account from her own because she did not think it was necessary and it was needlessly complicated.

[24] The divorce judgment and the agreement for corollary relief do not contain any specific provisions applicable to the time after the children reached the age of majority, except for the loss of the administration of the trust bank account by Ms. Boisvert. On the other hand, no reduction of the support payments nor any date for their cessation is provided for. The obligation to pay support therefore remained after the children reached the age of majority.

[25] During the 2002 to 2005 taxation years, Ms. Boisvert's children had already reached the age of majority, namely, on March 22, 1996, for Patricia and April 27, 2000, for Constance. During this period, Ms. Boisvert no longer had legal custody of her two daughters. Legal custody of a child ceases when he or she reaches the age of majority but the obligation to support a child does not necessarily cease at that time (see article 599 of the *Civil Code of Québec*). One of the most common reasons given to justify continuation of the payment of support to a child who has reached the age of majority is that the child is pursuing studies, even undergraduate and sometimes

more advanced university studies. Another example is the pursuit of competitive sporting activities, as was the case for Constance who was a competitive snowboarder.

[26] Subsections 56.1(1), 60.1(1) and 60.1(2) of the Act refer to the concept of "children in the recipient's custody" in terms of payments made to third parties to ensure that these payments are taxable in the hands of a recipient and deductible by the payer. These provisions do not apply in the present case because all the support payments were paid directly to Ms. Boisvert (the recipient).

[27] For the reasons mentioned above, I am of the opinion that

- (a) in computing his income for the 2002 to 2005 taxation years, under paragraph 60(b) of the Act, Maurice Désilets is entitled to deduct the support amounts paid to Louise Boisvert;
- (b) in computing her income for the 2004 and 2005 taxation years, under paragraph 56(1)(b) of the Act, Louise Boisvert must include the amounts received from Mr. Désilets for support or any other allowance payable on a periodic basis as a result of the divorce judgment and the agreement for corollary relief;
- (c) in computing her income for the 2002 and 2003 taxation years, under paragraph 56(1)(b) of the Act, Louise Boisvert does not have to include the amounts received from Maurice Désilets for support or any other allowance payable on a periodic basis as a result of the divorce judgment and the agreement for corollary relief because the Minister has not established the validity of the notices of reassessment dated June 4, 2007, for the 2002 and 2003 taxation years.

[28] Contrary to what is asserted by counsel for the Respondent, Louise Boisvert has not, pursuant to subsection 152(4) of the Act, made a misrepresentation that was attributable to neglect, carelessness or wilful default in filing her income tax returns for the 2002 and 2003 taxation years because the tax status of the support payments made to Louise Boisvert by Maurice Désilets had not been established with certainty, and hence the need for the present appeal, and because Maurice Désilets had not originally claimed a deduction relating to the support payments made in 2002 and 2003 and for previous years.

[29] The fact that Maurice Désilets has been joined to Louise Boisvert's appeal as a result of a reference under section 174 of the Act cannot cause Louise Boisvert to lose the benefits of the limitation period with respect to the years 2002 and 2003, and conversely, cannot cause Maurice Désilets to lose the benefit of these deductions for the support payments he paid to Louise Boisvert in 2002 and 2003.

[30] Louise Boisvert's appeal is allowed with respect to the 2002 and 2003 taxation years and dismissed with respect to the 2004 and 2005 taxation years.

[31] The assessments of Maurice Désilets under the Act for the 2002 to 2005 taxation years must be reassessed to allow for the deduction of support payments made to Louise Boisvert.

Signed at Ottawa, Canada, this 11th day of June 2008.

"Réal Favreau"

Favreau J.

Translation certified true
on this 2nd day of September 2008.
Susan Deichert, Reviser

CITATION: 2008 TCC 323

COURT FILE NO.: 2007-3782(IT)I

STYLE OF CAUSE : Louise Boisvert and Her Majesty the Queen
and Maurice Désilets

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: April 7, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: June 11, 2008

APPEARANCES :

 Counsel for the Appellant : André Lareau

 Counsel for the Respondent: Vlad Zolia

 For the Third Party: The Third Party himself

COUNSEL OF RECORD:

 For the Appellant:

 Name: André Lareau

 Firm:

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