Citation: 2009 TCC 115
Date: 20090224
Docket: 2006-707(IT)G

BETWEEN:

JAMES M. SCOTT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Counsel for the Appellant: Patrick Spinks
Counsel for the Respondent: Karen A. Truscott

REASONS FOR JUDGMENT

(Delivered orally from the bench on November 20, 2008, in Kelowna, British Columbia)

McArthur J.

[1] This is an appeal from a reassessment of the Appellant's 2003 taxation year. The Minister of National Revenue disallowed the Appellant's claimed deduction of $60,000 for spousal support paid to his former spouse, Barbara McColl. The basis of the Minister's decision is that the amount was not paid on a periodic basis, pursuant to paragraph 60(*b*) and paragraph 56.1(4) of the *Income Tax Act*. The only testimony was given by the Appellant, Dr. Scott, and he also filed an affidavit on behalf of his former lawyer,[1] who because of serious illness, was unable to attend. I accept the oral evidence of Dr. Scott. I find no need to deal with the evidentiary concerns of the Respondent's counsel with respect to the affidavit evidence.

---

[1] Exhibit A-2.

[2] For the most part, the facts are not in dispute. The Appellant is a radiologist who now resides in Saskatoon. He and Ms. McColl ended a seven-year relationship in November 1999. On November 1, 2000, Master Groves of the British Columbia Supreme Court ordered the Appellant, *ex parte*, to pay child and spousal support. When the Appellant became aware of the Order, he retained counsel to apply to vary it. Upon the hearing of the variance application, Master Groves did vary his original Order to the effect that the Appellant pay $5,000 monthly for spousal support only.

[3] The Appellant appealed this second interim Order, and made no payments under it. Subsequently, Ms. McColl began living with a new partner and was self-sufficient. Prior to a hearing of the appeal of the interim order, the parties settled their dispute on terms set out in a Desk Consent, which became a final Order[2] approved by Justice Brooke of the Supreme Court of British Columbia. The relevant terms include the following;

> 1, The defendant's appeal of the order of Master Groves, granted July 27, 2001, is hereby dismissed.
>
> 2. The defendant's total arrears in relation to spousal support to the date hereof are hereby fixed in the amount of $60,000. Any and all obligation to the plaintiff by the defendant for spousal support after the date hereof, shall cease completely.
>
> 3. The spousal support arrears referred to in paragraph (b), shall be paid by the defendant paying to the plaintiff the sum of $30,000 and the sum of $5,000 per month payable in equal installments, commencing July 1st 2003, through to December 1st 2003, at which time all of the arrears shall be paid.
>
> 4. In the event that the defendant defaults in relation to the payment of the said spousal support arrears referred to in paragraph (c), this court order shall be considered null and void save and except in relation to the dismissal of the defendant's appeal of Master Groves granted July 27th 2001, and the full amount of spousal support arrears that have accrued since the making of Master Groves shall be reinstated and continued to accrue until further court order or agreement between the parties or their payment in full.

---

[2] Exhibit A-1, tab 4.

> 5. Upon the spousal support arrears referred to in paragraph (b), being paid in full the plaintiff and the defendant shall re-file their income tax returns for the years 2000 and 2001. The plaintiff shall claim for the year 2000 the sum of $10,000 as paid to her by the defendant as spousal support. The defendant shall claim for the year 2000, the sum of $10,000 as paid by him as spousal support to the plaintiff. The plaintiff shall claim as income for the 2001 year, the sum of $50,000 as spousal support, paid to her by the defendant for the period January 2001 to October 2001. And the defendant shall claim for the year 2001 the sum of $50,000 as paid by the defendant to the plaintiff as spousal support for the same period.

An additional term of the consent Order was that Dr. Scott would take responsibility for half of the debt owed by Ms. McColl.

[4] As stated, previous to the July 22, 2003 Order, the Appellant made no payments. He made all the payments required in the Desk Consent Order. No periodic payments were ever made. It is difficult to conclude that the fixed lump sum of $60,000 was a catch-up payment of periodic spousal support contained in the interim order.

[5] While the Appellant's position is the intention of the parties, and probably the common-sense approach, I cannot change the facts in the law. In paragraph 4 of the final Order, the parties agreed to re-file their income tax returns to permit the Appellant to deduct the $60,000 and Ms. McColl to include it in her income, $10,000 in the year 2000, and $50,000 in 2001. We do not know if Ms. McColl included these amounts in her income. There is no disagreement between counsel that the relevant tax legislation, the law, cannot be changed by court order or the parties' intention. I must interpret the law as written.

[6] The deductibility of the $60,000 must be decided by the provisions of the *Income Tax Act*, and not as was attempted in paragraph 4 of the final order. Had the interim order been enforced, the arrears would have been in excess of $100,000. The question as to whether a lump sum payment is periodic has been litigated many times over the years. Can the Appellant deduct the $60,000 lump sum paid to his former spouse? The case most often cited is *The Queen v. McKinnon*,[3] where the Federal Court of Appeal set out guidelines that are helpful in this appeal. The most relevant guideline is "whether the payment releases the payer from future obligations to pay maintenance".

---

[3] 90 DTC 6088.

[7] With the payment of $60,000, Dr. Scott was in fact released from future obligation to pay maintenance. Again, if a release of obligation is being paid for, then most of the cases find that the payment is capital and not deductible. Although a finding of purpose is unnecessary, I have no doubt that the Appellant had the intention of making a one-time lump sum payment to finally buy peace and be released of any obligation. The payment truly was more in the nature of capital as opposed to income. He resisted making periodic payments for several years.

[8] The Respondent submitted 22 cases in her book of authorities, although mercifully referred specifically to only three or four, to establish her mantra – and I say that in a positive sense – that if the payment was made for a release of liability and terminates all obligations to a former spouse, then it is capital and not periodic payments.

[9] I did review at least the headnotes of all 22 cases, and in *Glazier v. The Queen*,[4] with facts similar to this case, Sarchuk J. found that the lump sum, which was less than the total of arrears was consideration for release of the taxpayer from future obligations, and brought the payment outside the requirement of paragraph 60(*b*) of the *Act*. Earlier in his reasons, he acknowledged that the character of payments does not change merely because they are not paid on time, citing, as did counsel for the Appellant, *The Queen v. Sills*,[5] and *Soldera v. the M.N.R.*[6]

[10] Turning to the Appellant's submissions, in *Sills*, the taxpayer being in arrears of spousal support, made a lump sum catch-up payment. The Federal Court of Appeal concluded the lump sum did not change the character of the payment within the meaning of paragraph 56.1(*b*). The Appellant also referred to *Sills* as a leading case in support of his position. It can be distinguished from the present case in that *Sills* did not obtain a final release from future obligations. The same exists in other cases cited by the Appellant, including *Bayliss v. The Queen*,[7] which had another twist. If my recollection is accurate, in *Bayliss*, the

---

4 2003 TCC 2.

5 85 DTC 5096.

6 [1991] T.C.J. No. 142.

7 2007 TCC 387.

lump sum did not truly include arrears of spousal support.

[11] The Appellant also relied on *Soldera* wherein the payment made by the Appellant represented a portion of the arrears of maintenance payments that were an allowance payable on a periodic basis under a 1983 order and which Justice Geroff found, therefore, deductible in full in computing the Appellant's income for the 1986 taxation year. Again, there was no final release from future payments.

[12] Presently, the $60,000, in my opinion, was not periodic. It was a once in a lifetime payment. In *Ostrowski v. the Queen*,[8] at tab 4 of the Appellant's authorities, a one-time payment by the taxpayer released him from future payments up to the total lump sum of what was owing at the time of the payment. The taxpayer did not receive an absolute release.

[13] In *Saltzmann v. The Queen*,[9] tab 5 of the Appellant's book of authorities, the taxpayer's lump sum of $90,000 was exactly equivalent to his arrears, unlike the present case, and was held to be payment of arrears and a deduction was allowed up to the date of payment. However, the taxpayer remained liable for future payments. These facts are distinguishable from the present.

[14] The same can be said of *Stephenson v. The Queen*,[10] at tab 8 of the Appellant's authorities. Reference is made in *Stephenson* with respect to the intent of the parties. As stated earlier, intent of the parties has no effect in changing the legislation, specifically paragraph 60(*b*) and subsection 56.1(4). While I have some sympathy for the Appellant, and perhaps the right solution would be to adhere to the clear intention of the parties, I would be stretching the facts and the law too far to conclude that the Appellant made periodic payments.

[15] As a general comment, one could wriggle the facts and analysis to come within the umbrella of *Sills*, *Soldera*, *Saltzmann* and *Stephenson*, and perhaps the others, but presently, the amount does not represent a specific amount of periodic payments. The settlement order does not refer to reducing arrears from over $100,000 to $60,000.

---

8 2002 TCC 299.

9 2008 TCC 327.

10 2007 TCC 559.

[16] The Appellant had denied before Master Groves that a spousal relationship existed. The parties had retained separate residences for all but six months of their relationship. The Appellant perceived no obligation to make support payments. His payment was to buy permanent peace from lawyers and courtrooms. In my opinion, it was certainly in the nature of capital.

[17] Despite the able argument of the Appellant's counsel, the appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 24th day of February, 2009.

"C.H. McArthur"

McArthur J.

CITATION:	2009 TCC 115
COURT FILE NO.:	2006-707(IT)G
STYLE OF CAUSE:	JAMES M. SCOTT and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kelowna, British Columbia
DATE OF HEARING:	November 20, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
DATE OF JUDGMENT:	November 28, 2008

APPEARANCES:

Counsel for the Appellant:	Patrick Spinks
Counsel for the Respondent:	Karen A. Truscott

COUNSEL OF RECORD:

For the Appellant:

Name:	Patrick Spinks
Firm:	Rush Ihas LLP

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