Docket: 2007-3798(IT)G

BETWEEN:

EDWARD PALONEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 10 and 11, 2010 and October 18, 2010,
at Hamilton, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	John Grant Brent E. Cuddy

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001 taxation years are dismissed in accordance with the attached Reasons for Judgment.

The parties shall have 45 days from the date of the within Reasons to provide written submissions respecting the issue of costs.

Signed at Ottawa, Canada, this 1st day of December 2010.

"Diane Campbell"

Campbell J.

Citation: 2010 TCC 615
Date: December 1, 2010
Docket: 2007-3798(IT)G

BETWEEN:

EDWARD PALONEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] These appeals relate to a number of taxation years, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001, in which the Appellant claimed the following support amounts:

Year	Amount Claimed as Support Payment
1993	$ 18,670
1994	$ 22,179
1995	$ 23,190
1996	$ 70,769
1997	$126,053
1998	$116,810
1999	$ 85,454
2000	$100,536
2001	$ 88,485

The Minister of National Revenue (the "Minister") disallowed all of the amounts claimed by the Appellant.

[2] The Appellant and his wife, Angela Palonek, separated on November 1, 1992. They entered into a separation agreement on September 30, 1993 (the "Agreement") in which the Appellant was to pay $2,500 monthly, being spousal support of $500 per month for a ten year period and $1,000 per month for each of the two children. The Appellant also alleges that he made *ex gratia* payments for the children pursuant to the Agreement.

[3] On or about June 20, 2002 (Amended Notice of Appeal, paragraph C(8)), the Appellant entered into a voluntary disclosure with the Canada Revenue Agency (the "CRA") and, on August 12, 2002, he filed his income tax returns for the 1993 to 2001 taxation years. In filing these returns, he deducted the support and *ex gratia* payments, pursuant to the terms of the Agreement.

[4] The Appellant alleges that, pursuant to the Agreement, he paid the support and *ex gratia* payments to his ex spouse with 20 to 30 per cent of those payments being paid personally and 70 to 80 per cent being paid through several corporate entities and a family trust on the Appellant's behalf. He argued that these payments were periodic and did not change character when he directed that they be paid through the third parties. He further submits that the payments made through third parties were accounted for in his personal tax returns for these taxation years as income. The Appellant also alleges that his ex spouse, in her previous tax returns, included these support amounts which he paid in her income. Consequently, he argued that he should be permitted these deductions. The Appellant initially advanced a *Canadian Charter of Rights and Freedoms* argument in his Amended Notice of Appeal but abandoned this argument at the hearing.

[5] The Respondent's position is that the Appellant has never made any support payments to his former spouse and that, if he did make any payments to Angela Palonek, they were not support amounts as defined by subsection 56.4(1) of the *Income Tax Act* (the "*Act*"). In addition, any payments received by Angela Palonek from the third party corporate entities were not received by her as support amounts pursuant to the terms of the Agreement. The Appellant did not make *ex gratia* payments for which he claimed a deduction during these taxation years and, if he did make them, they are not support amounts that can be deducted because he was under no legal obligation to make any of these payments.

[6] The issue is whether the Appellant can deduct these support and *ex gratia* payments. In deciding this issue, four sub issues must be addressed:

1. Did the Appellant actually make these payments either directly and/or through third parties?

2. If the Appellant made the support payments, are those payments made through third parties deductible?

3. If the Appellant made the *ex gratia* payments, are they deductible as support payments?

4. Is the Minister being inconsistent in assessing the Appellant and his ex spouse?

[7] The Appellant's Agreement, dated in 1993, predates the legislative amendments in May 1997 made necessary by the Supreme Court of Canada decision in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. With these amendments, the payor could no longer claim a deduction for such payments and the payee did not have to claim the payments as taxable amounts. Prior to those amendments, the *Act* permitted the deduction of support amounts paid by the payor, pursuant to a court order or written agreement, while the recipient payee was required to include those same payments in income as taxable amounts. This is sometimes referred to as the pre-1997 inclusion/exclusion regime. Provided there are no intervening court orders or agreements, this tax treatment will continue to apply to payments made after the 1997 amendments.

[8] "Support amount" is defined in subsection 56.1(4) of the *Act* as follows:

> **56.1 […] (4) Definitions**
>
> …
>
> **"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 natural 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.

[9] If an amount is a support amount, subsection 60(b) of the *Act* permits the deductibility of that amount. Although this provision was revised twice during the years under appeal, those revisions do not otherwise affect the deductibility of the amounts at issue in this appeal. Subsection 60(b) states:

60. Other deductions

…

(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;

[10] Subsection 60.1(1), together with its parallel provision, 56.1(1), provides that support payments made to a third party, for the benefit of a spouse, children, or both, for which support payments are payable, are otherwise deemed to be deductible under subsection 60(b).

[11] There are several provisions contained in the 1993 Agreement (Exhibit R-1, Tab 5) which are particularly relevant to these appeals. The relevant portions of paragraphs 9 and 10 of the Agreement state:

9. SPOUSAL SUPPORT:

(a) For a ten (10) year period commencing on the 23rd day of September, 1993, and on the 23rd day of each subsequent month, the husband will pay to the wife for her support and maintenance $500.00, as monthly payments within the meaning of The Income Tax Act (Canada) until one or more of the following occurs: …

…

10. CHILD SUPPORT:

(a) Commencing on the 23rd day of September, 1993, and on the 23rd day of each subsequent month, the husband will pay to the wife for the support and maintenance of the children the sum of $1,000.00 for each child, in advance, (making a total of $2,000.00 each month) until one of the following occurs:

(i) The child ceases to reside fulltime with the Wife, and “reside fulltime” includes the child living away from home to attend an educational institution, pursuing summer employment or enjoying a vacation but otherwise maintaining a residence with the wife;

(ii) The child becomes 18 years of age and ceases to be in fulltime attendance at an educational institution;

(iii) The child becomes 21 years or [*sic*] age;

(iv) The child marries;

(v) The Wife dies;

(vi) The child dies.

(b) Forthwith upon the execution of this Agreement, the husband shall provide to the wife a series of twelve (12) post-dated cheques, each dated for the 23rd of the month from the 23rd day of September, 1993, to the 23rd day of August, 1994, inclusive, for the amounts payable to the wife pursuant to this Agreement, and thereafter in each year on or before the 23rd day of September of each year, the husband shall provide to the wife a further series of twelve (12) post-dated cheques for the next ensuing twelve (12) month period and so on form [*sic*] time to time so long as he is obliged to make payments to the wife.

(c) Each of the husband and the wife will be responsible for the payment of all day to day expenses including food, clothing, shelter, entertainment and vacations for the children while the children are [in] that parent’s care.

(d) The wife will receive the Family Allowance payments for the children free from any claim by the husband.

(e) The cost of any of the children's other expenses, including, but not limited to, daycare, extra-curricular activities, lessons, recreational fees and equipment, shall be paid for by each parent in proportion to their respective incomes. All such expenses for the child will be discussed and agreed to in advance.

(f) The wife hereby acknowledges and agrees that any and all payments made by the husband to the wife and/or on behalf of the wife and/or children, as of June 23, 1993, pursuant to a Confirmation Agreement dated September 24, 1993, attached hereto and marked as Schedule "A" to this Agreement, including but not limited to the benefits as outlined in paragraphs 9 through 11 inclusively, be a deductible expense by the husband of the wife, as defined under the Income Tax Act.

[12] The two paragraph body of the Confirmation Agreement, referenced in paragraph 10(f) above, states:

> That any and all payments (i.e. fixed of $2,500.00 and any ex gratia) since and including June 23, 1993 are being deducted by Edward Palonek as against his total taxable income.
>
> It is further agreed and understood that Angie Palonek will declare as taxable income the above payments(s), monies or benefits, received since June 23, 1993, from Edward Palonek and that from this point forth, any and all future payments, monies or benefits, shall be declared and considered as taxable income in the hands of Angie Palonek. Edward Palonek will agree to pay Angie Palonek, on or about April 30, 1994, a further sum of up to $1,000.00 to be applied towards Angie Palonek's Income Tax payable, for the calendar year 1993.

[13] In addition to the Appellant's testimony, I heard evidence from Angela Palonek, the Appellant's former spouse, and Stephen Griffiths, the CRA auditor who dealt with the Appellant's T-1 adjustments for the years under appeal. Both of these witnesses appeared at the hearing at the Appellant's request. Mr. Griffiths added little respecting clarification of the issues before this Court, as he dealt with and focussed upon the business aspects of the filed returns and not on the support amounts. He testified he saw references to those amounts in the returns but that the payments were disallowed through the Ottawa department and not by Mr. Griffiths, himself.

[14] Angela Palonek stated that she did not want to be at the hearing and did not know why Mr. Palonek had subpoenaed her to be there. Like the Appellant, she was vague at times, exasperated and evasive. In addition, her evidence contained

inconsistencies. I am hesitant, therefore, to place much reliance on what she told me. If the Appellant called his former spouse as a witness for the purpose of confirming that she received those amounts as support, he clearly did not succeed. Ms. Palonek remained reluctant to confirm that she received any support amounts during these taxation years and, surprisingly, testified that she and the Appellant had, in fact, reconciled in 1994 after the Agreement was executed and that the Appellant directed her on how to complete her tax returns for some of these taxation years where she claimed support amounts while they were cohabiting.

[15] She testified that the Appellant's tax returns were inaccurate and, at pages 186 to 188 of the transcript, the following exchange occurred between the Appellant and Ms. Palonek:

> Q. Well, if I can bring you back to your earlier testimony, you said that you didn't feel my returns were forthright.
>
> A. I knew they weren't forthright.
>
> Q. You knew they weren't forthright. And can you tell me why there weren't forthright?
>
> A. Do you really want me to answer that?
>
> Q. With respect to the deductions that I claimed, child and spousal?
>
> A. Can I answer the question Your Honour?
>
> JUSTICE CAMPBELL: Go ahead.
>
> THE WITNESS: I knew that your income tax numbers were incorrect because I knew you were taking money out of the country and hiding money.
>
> MR. PALONEK: Madam Justice, can you stop her?
>
> THE WITNESS: You asked me why I knew that and that's why I knew that.
>
> JUSTICE CAMPBELL: Try and relate it to whether or not it affected the support amounts because that's all that's before me Mrs. Palonek.
>
> THE WITNESS: I understand that Your Honour, but we were cohabitating. I worked with my husband. I help build a business with my husband. I gave my husband stupidly credit cards to help him because of his bankruptcy. I had knowledge of this. The fact that he is bringing me before you today, I think he is

hanging himself because I don't want to be here doing this and that is how I knew that they were incorrect was because I knew the numbers of the tax returns were incorrect. I saw the dollars that came into our house. I knew the numbers were incorrect but be right or be happy. I chose to be happy and to make sure that my children came first. That's it.

(Transcript, June 10, 2010, page 186, line 23 to page 188, line 13)

[16] Initially, Ms. Palonek admitted that she may have received some support payments as reflected in some of her returns in these taxation years. However, later in her testimony she recanted that admission and, at one point, claimed that she did not know where the amounts came from or what they were for. Further, she later admitted she misrepresented those claimed amounts. When questioned by the Appellant about the support amount of $30,000 claimed in her 1996 tax return, the following exchange occurred:

Q. Could you tell the Court where that support payment came from?

A. It would have come from you.

Q. Why do you believe you were entitled to that support payment?

A. I didn't believe I was entitled to that support payment in that year.

Q. So did you misrepresent the facts to CRA, to the Canada Revenue Agency?

A. I believe the number should have been zero for support payments but you and I agreed at the time that I would claim an extra year because you were in fear of your bankruptcy.

(Transcript, June 11, 2010, page 256, lines 9 to 21)

[17] In responding to questions concerning cheques and wire transfers from some of the third parties, she testified that during some of the years in question, she worked for one of the third party corporate entities and that the cheques may have been in respect to the business-related activities conducted by her and the Appellant after 1993 and, therefore, not support amounts. She also noted that most of the cheques, that the Appellant directed her to in giving her evidence, were payable not to herself but to cash and, in addition, the Appellant had omitted to submit the backs of the cheques in his documents, which were required to show who had endorsed them.

[18] Ms. Palonek also testified that she rarely received cheques from the Appellant and that the amounts, from unknown sources that were alleged to be support amounts, just showed up in her account. At pages 268 to 269 of the transcript, she responded to questions concerning amounts deposited to her account as follows:

> Q. So you don't know whether it was Mr. Palonek or whether it was a corporation who paid these funds into your account?
>
> A. No, I do not. I don't know where the money I came from [*sic*] and many times, you know, Edward would come home and say okay, I put money in your account to pay the bills, the rent or whatever but I didn't see a physical cheque. I never got a physical cheque. The majority of the time I never saw anything.
>
> (Transcript, June 11, 2010, page 268, line 18 to page 269, line 2)

[19] The Appellant's attempts at questioning Ms. Palonek, concerning support payments he claimed he made on her behalf against her credit card balances also failed, as she stated these cards were obtained in her name when he declared bankruptcy in 1993 and that she provided supplementary cards to him. She claimed they were used for a variety of reasons including personal debts, payments on behalf of the Appellant's disabled sister, family vacations and business-related expenses and that any payments on these cards related to those specific items.

[20] The Appellant, although given ample opportunity to do so by the Respondent and the Court, never provided the specifics or mechanics of the "how, when, where and why" alleged support payments were paid either by himself directly or, at his direction, through the third party corporate entities. He testified in vague generalities and left me with the impression that it should be sufficient for him to get a deduction simply because the Agreement contained the support payment provisions obligating him to pay those amounts. His responses in cross-examination were confrontational and intentionally evasive.

[21] The Appellant's testimony was sprinkled with his efforts to avoid addressing specific questions:

> Q. Are there any monies directly paid from you? Any bank account that you directly own or hold yourself? Is there any proof of that anywhere in any of these documents?
>
> A. There may well be, but it might take an hour to find it, if you are asking me to do that right now. …

(Transcript, October 18, 2010, page 51, lines 16 to 22)

Q. … I'm simply looking for any documents that you have that we have in evidence for the Court that you can say, "Here is a reflection of me paying 20 or 30 percent," of what you have characterized at times of over $640,000. So I'm not just looking for a $2,000 cheque from a family trust. I'm looking for proof from you.

A. Like I say, there is a telephone book in this particular volume. I guess it is A-6.

JUSTICE CAMPBELL: We will go through them. We will give you a moment. He is asking you if there is anything in the exhibits to point that out. It is your claim, the 20 percent, so he is asking you to substantiate that.

THE WITNESS: I understand that, and I'm not sure that you are going to find that here. That material is not here to substantiate 20 percent. It is not here, I don't think. Maybe it is.

(Transcript, October 18, 2010, page 52, line 8 to page 53, line 2)

Q. … which entities here owed you money for consulting, as I understand your explanation earlier today, during the period in question?

A. I think all of them. It was only in the beginning years. The Rothwell Corporation, I think, was defunct earlier.

Q. You claimed all the money you were owed as a consultant?

A. Are you asking me or telling me?

Q. I'm asking you.

A. I said I'm not sure whether it was consulting income or employment income. That is reflected in the returns.

(Transcript, October 18, 2010, page 59, line 17 to page 60, line 6)

Q. Therefore, all four of those entities owed you consulting fees, and then you caused all four of those entities to pay amounts that, in your mind, you believe are support amounts. Is that what I understand?

A. Yes. As I said, we haven't established whether I was an employee or consultant of the one company, but they paid me fees whether it was one sort or another. You just said that.

Q. I don't want you to change your answers, sir, and if you are going to change your answers, I want to understand them. If you weren't a consultant with all of these individual companies as you just hinted at, then I have problems with your earlier testimony today and your testimony right now that each of these entities you consulted with and you caused them to pay your wife amounts that you thought were support amounts. Which is it?

A. I also said – to answer your question, and I'm being completely consistent – that I may have been an employee of Found Money Inc. at some point in time, so it is either consulting income or employment income. Which one? I don't know.

(Transcript, October 18, 2010, page 61, line 3 to page 62, line 2)

[22] I have more questions at the end of the day than when we commenced the hearing. The Appellant, although self-represented, needed only to present relevant evidence, which would confirm, or not, the specifics of the payments of $2,500 monthly paid pursuant to paragraph 9 of the Agreement. The type of supporting evidence could have been cancelled cheques, receipts from the recipient, bank statements identifying amounts transferred to the ex spouse, corporate documentation supporting his arrangement with those third parties to pay Angela Palonek, or an officer from one of those third party entities to corroborate the Appellant's testimony. If I had been given some of this essential information, I may have been in a position to give the Appellant some portion of the amounts claimed as deductions. However, in the words of the Appellant in cross-examination, "There is nothing here." (Transcript, October 18, 2010, page 120, lines 6 to 7).

[23] It is surely an easy task to provide such evidence. With respect to the corporate entities involved, there must have been some documentation that would support his position that he had the ability to direct amounts from these entities to Angela Palonek and that somehow he was owed those amounts. I have no evidence respecting why these entities paid those amounts. Was the Appellant in receipt of shareholder benefits? Was he owed wages/salary? Was he owed consulting fees? How were these amounts taxed in the hands of these entities? How was he able to compel those entities to pay the amounts? I cannot answer any of those essential questions because the Appellant could not or refused to provide the necessary evidence from which I could draw conclusions.

[24] I remained unable at the end of three days of evidence to draw any specific conclusions respecting something as basic as the exact nature of the Appellant's relationship with these corporate entities. One of his responses in cross-examination illustrates this:

> A. I didn't say they were independent third party companies. I said I was doing some work with them, so I don't know if that means they are independent or not. Obviously, I had some relationship, but everything you need is right here. …
>
> (Transcript, October 18, 2010, page 71, lines 20 to 25)

[25] In addition, the Appellant's only evidence that the amounts he allegedly directed to Angela Palonek from the third party corporate entities were reflected in the income tax returns he filed in 2002, was his statement that those amounts were included.

[26] The Appellant submitted that he had put forth a great deal of "supporting material" to suggest that those entities did pay amounts to his ex spouse. However, that information alone is insufficient to enable the Appellant to claim those amounts as deductions for support. In *Gagnon v. The Queen*, [1986] 1 S.C.R. 264, 86 D.T.C. 6179, the Supreme Court of Canada stated that the deductibility of support amounts under subsection 60(b), (now part of the definition of "support amount" in subsection 56.1(4)), was subject to four conditions:

1. Payments must be periodic;
2. Payments must be for maintenance of the former spouse and/or children;
3. The spouses must be living separate and apart due to a breakdown of the marriage; and
4. The obligation to pay must arise from a court order or written agreement.

[27] The Appellant has the onus to establish that the payments he has referenced are part of or made in conjunction with the support arrangements. The Respondent relied on the decision in *Hodson v. M.N.R.*, 88 D.T.C. 6001, where the Federal Court of Appeal, in considering the scope of subsection 60(b), stated, at page 6003, that a strict application of 60(b) [as well as 60.1(1)] prevents a "loose and indefinite structure" that could

> … open the door to colourable and fraudulent arrangements and schemes for tax avoidance …

Essentially, if one is to reap the benefit of the deductibility of support amounts, the circumstances permitting taxpayers to do so must be clearly proved so that abuse under these provisions can be avoided.

[28] Without the production of any of the specifics I have referred to and in light of the contradictory evidence of the ex spouse respecting their very cohabitation status during these years, I must conclude that the Appellant has failed to establish that he made the payments as he claims for support pursuant to the terms of the Agreement. Consequently, he has not overcome the basic assumptions of fact upon which the Respondent relied. I do not dispute his claim that payments were made, but I have no basis upon which I could conclude that they were, in fact, support amounts in accordance with the relevant provisions of the *Act* and with the terms of the Agreement.

[29] Although the appeals fail on this basis alone, there are several issues I wish to address briefly, simply because of the significant amounts of payments involved where the Appellant is self-represented and devoted time to these issues. First, is the deductibility of the *ex gratia* payments addressed in paragraph 27 of the Appellant's separation agreement? Paragraph 27 of the Agreement states:

> 27. EX GRATIA PAYMENTS:
>
> Either spouse or his or her personal representative may make any payment or payments to the other spouse not provided for herein on an *ex gratia* basis. Neither the fact, nor the offering of such payment or payments shall be considered so as to oblige the spouse or his or her personal representative to continue same, nor will the fact of the offer thereof be pleaded, tendered or given in evidence, or raised by way of estoppel in any legal proceedings between the parties.

According to the Agreement, the basic monthly spousal and child support amounts totalled $2,500 or $30,000 yearly. Consequently, a large part of the amounts that the Appellant wishes to deduct in some of these taxation years is comprised of *ex gratia* amounts he claims to have made pursuant to paragraph 27 of the Agreement.

[30] Referring again to the requirements for deductibility of support amounts pursuant to subsection 56.1(4) of the *Act*, as set out in *Gagnon v. The Queen*, 86 D.T.C. 6179, these clearly are *ex gratia* payments for which there can be no deductibility. Even if I had concluded that the Appellant had made them, which I

have not, there is no evidence that they could be considered support amounts because they were not periodic payments. In addition, the caselaw requires that the payor must be compelled or obligated to make such payments pursuant to a court order or written agreement for them to be deductible. Paragraph 27 of the Agreement employs the word "may" in referencing the making of such payments. The wording in this paragraph unequivocally states that such payments, if made, "shall" not be considered obligatory in the sense of compelling those payments in the future. The entire wording of paragraph 27 is permissive rather than mandatory in respect to the requirement to make such payments.

[31] The fact that the Confirmation Agreement, attached as Schedule "A" to the Agreement, states that all payments of the fixed amounts of $2,500 monthly as well as the *ex gratia* payments are being deducted by the Appellant against his taxable income, cannot bind the Minister or this Court to accept those payments as deductible. It is only where such payments are in compliance with the pertinent provisions of the *Act* that those payments will be deductible.

[32] The second issue is the deductibility of amounts that the Appellant claims were made to Angela Palonek by third party corporate entities on his behalf. This issue requires consideration of whether support amounts paid directly to a recipient spouse, by a third party corporation or trust, against amounts owing by these entities to the payor are still deductible under the *Act*. The Appellant claims that he was owed amounts from these third party entities and that he directed those entities to pay amounts to Angela Palonek to satisfy his support obligations. He also claims that such amounts were included in his income in the relevant years.

[33] Although there is an abundance of caselaw that addresses the issue of support payments made by a payor spouse to third party entities or government entities on behalf of a recipient spouse, (for example, where amounts are paid against a mortgage), there does not appear to be any caselaw dealing specifically with a payor spouse who is owed money by a third party entity and instructs those amounts to be re-directed to a recipient spouse to satisfy his obligations pursuant to a court order or agreement. It is clear from the caselaw that, where payments are made through a government agency acting as an intermediary, the character of the "support amount" is not changed and the amount may still be deductible (see *Pepper v. The Queen*, [1997] 1 C.T.C. 2716, and *Gervais v. The Queen*, [1997] T.C.J. No. 816).

[34] I conclude that third party entities and trusts at the direction of the payor may similarly act as intermediaries and, provided those re-directed payments meet the requirements set out in the *Act* and can be shown to have been included in the payor's

income, such payments may be deducted. However, for such support payments to be deductible, a payor must be able to provide proof that the payments are for support purposes and are not simply to achieve some type of income splitting in the guise of a support payment vehicle. The payor must also provide evidence sufficient to the Court to support his claim that he was owed these amounts by the third party entity together with the direction that the third party entity relied upon in order to re-direct such funds.

[35] There is no magic in third party payments unless other conditions are met. In the present appeals, the Appellant bears the onus of establishing that the payments in question complied with all of the relevant provisions of the *Act*, that he was entitled to receipt of the funds from the third party entities, that the third party entities were instructed to re-direct those funds otherwise payable to him to Angela Palonek and that those payments were received as support by his former spouse. Unfortunately, the Appellant failed to adduce evidence to satisfy this onus. He failed to produce any documentation that would support his allegation that he had the ability to direct and influence any of the four entities in the payment of any amounts to his former spouse. The Appellant provided only vague, general responses respecting these third party amounts. I have no clear and concise evidence respecting why these entities owed this money to the Appellant or if, in fact, they actually did owe it. Further, there is no evidence of how they reached an arrangement to pay these amounts to the former spouse, whether accounting records of such payments were retained, how these amounts translated into income on the Appellant's returns or how these entities treated these amounts in their books and records. The Appellant's evidence was basically that he had a "loose and indefinite" arrangement with these entities but, in such circumstances, it becomes even more incumbent upon him to adduce the specifics of these arrangements that I have referenced.

[36] It bears repeating that the Federal Court of Appeal in *Hodson* stated that a strict application of the requirements of subsection 60(b) prevents a "loose and indefinite structure [that] might well open the door to colourable and fraudulent arrangements and schemes for tax avoidance." The benefit of deductibility of support amounts is to be given in specific circumstances and an appellant has the onus of proving those, so that the Court can be assured that there is no abuse of the benefit to be given.

[37] Although the Appellant continuously referred to the great volume of his "supporting materials", I have no concrete evidence to support a conclusion that the payments, that these entities did make to Angela Palonek, were for support. I know he was able to direct these payments, but I do not know why or how. He stated that

such payments were made via these entities because he was absent from the country, but the evidence suggests that these payments were also made when he was in the country.

[38] Angela Palonek's evidence in no way provided any corroboration to what the Appellant was alleging. She claimed that the amounts she received from the Family Trust entity were to pay for expenses for family holidays and for respite care for the Appellant's sister. Ms. Palonek also testified that some of the payments on the American Express card paid by these third party entities may have been for the care of the Appellant's sister, but I have no evidence from anyone what percentage that may have been. I have no evidence that would allow me to ascertain which amounts of those that were paid were actually for support. Of course, all of this is coloured by the evidence of Angela Palonek that, for some of the years under appeal, she and the Appellant were actually co-habiting.

[39] The Appellant further argued that subsection 56(2) of the *Act* supported his claim and cited the decision in *Lambert v. The Queen*, 2005 D.T.C. 5499. If I understand the Appellant's argument correctly, he is claiming that the application of subsection 56(2) would attribute back to his income those payments he directed these third party entities to make on his behalf. Thus, those payments would be deductible against his income because he claims that they are support amounts. However, subsection 56(2) does not, as the Appellant suggests, automatically deem any amounts paid by these third party entities on his behalf to be support payments. For that, the Appellant must establish that the payments were for support and qualify pursuant to the relevant provisions of the *Act*. At most, the Appellant, in relying on the decision in *Lambert*, has simply established that he should be taxed on those amounts that he alleges were transferred to Angela Palonek.

[40] Third is the Appellant's argument that there are inconsistencies and unequal tax treatments respecting the assessments of himself and his ex spouse. Although the Appellant relied on the decision in *Fink et al v. The Queen*, 99 D.T.C. 582, to advance his position, that case does not assist him. Although Justice Rip (as he was then) clearly stated that the courts never condone inconsistent assessments, he also noted that there may legitimately be inconsistent assessments between taxpayers in similarly situated circumstances, provided they are consistent with the provisions of the *Act*. This means that any challenge to an assessment must be done on the basis that it is inconsistent with the taxing statute and not simply with the assessment of another taxpayer.

[41] In the circumstances of these appeals, the Appellant and Angela Palonek are not similarly situated taxpayers. The Appellant is the alleged payor of support amounts and Ms. Palonek is the recipient of those amounts. The decision in *Fink* makes it clear that, where the Minister may have reasons for inconsistent assessments between taxpayers which are relevant on appeal, the taxpayer may request particulars in order to know the case he has to meet. However, in these appeals, the Minister did not withhold the reasons for denying the deductions, but has clearly set forth those reasons for such denial, that is, the Appellant's failure to provide proof that he made support payments as he claims.

Conclusion

[42] The burden of proof is upon the Appellant, to show that he made the support payments that he is claiming as deductions in all of these taxation years. He has failed to do so, as he has not adduced any evidence to substantiate that the amounts which were paid were for support for his ex spouse and children. He did not substantiate payment of the amounts he claims he made directly to his ex spouse (20 to 30 per cent), nor did he substantiate how he became entitled to the payments made by the third parties that he had authority for directing that those payments be made to his ex spouse or how those payments were characterized on the corporate records and books and accounted for in the corporate returns.

[43] I see no reason why support payments, made by third parties at the direction of a payor to a recipient, should not be deductible, provided the evidence substantiates that those payments were for support and otherwise comply with the relevant provisions of the *Act*. In these appeals, the Appellant did not provide evidence that would establish that those payments were made for support purposes. The *ex gratia* payments, even if there had been evidence adduced that they were made, cannot be deductible because they are not compellable payments pursuant to the wording of the Agreement.

[44] The appeals must therefore be dismissed.

[45] The parties shall have 45 days from the date of the within Reasons to provide written submissions respecting the issue of costs.

Signed at Ottawa, Canada, this 1st day of December 2010.

"Diane Campbell"

Campbell J.

CITATION:	2010 TCC 615
COURT FILE NO.:	2007-3798(IT)G
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PLACE OF HEARING:	Hamilton, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	December 1, 2010

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