Docket: 2011-1105(IT)I

BETWEEN:

SAMIR SAROPHIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 5, 2012, at Vancouver, British Columbia.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jonathan Wittig

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the 2009 taxation year is dismissed, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 21st day of March 2012.

"Lucie Lamarre"

Lamarre J.

Citation: 2012 TCC 92
Date: 20120321
Docket: 2011-1105(IT)I

BETWEEN:

SAMIR SAROPHIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from a reassessment made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**ITA**) for the appellant's 2009 taxation year. The minister disallowed legal fees in the amount of $15,875 that were claimed by the appellant in the computation of his income for that year. The legal fees were disallowed pursuant to paragraph 18(1)(*a*) of the ITA on the basis that they were incurred for the purpose of renegotiating or contesting the support payments that were required to be made under a Consent Order of the Supreme Court of British Columbia dated August 24, 2006, and therefore were not incurred to produce income (paragraphs 8 and 13 of the Reply to the Notice of Appeal).

[2] The appellant opposes the reassessment on the basis 1) that the legal fees were incurred by him to establish an income for himself (and therefore to produce income) by protecting the amount to be paid to his ex-spouse, which he refers to as income retention as opposed to income generation (Issue and reason for Appeal, page 4), and 2) that the practice of denying the deduction of legal fees to a person defending himself against an action by his ex-spouse for support payments while the claimant

ex-spouse's legal fees are deductible is unfair and discriminatory. In his Notice of Constitutional Question, the appellant claims that this practice is discrimination based on sex, as most payers of support tend to be males, and that it is therefore unconstitutional by virtue of section 15 of the *Canadian Charter of Rights and Freedoms* (**Charter**).

Statutory Provisions

Income Tax Act

Deductions

SECTION 18:

18(1)

(1) General limitations. In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

18(1)(*a*)

(*a*) General limitation — an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

18(1)(*b*)

(*b*) Capital outlay or loss — an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;

Canadian Charter of Rights and Freedoms

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Facts

[3] By Consent Order dated August 24, 2006 (Exhibit A-2), the appellant was ordered to pay to his ex-spouse child support and spousal support. The spousal support amount was reviewable on or after September 30, 2008 (Exhibit A-2, paragraph 19).

[4] On May, 26, 2009, the appellant's former spouse filed before the Supreme Court of British Columbia a Review Application, which was amended on September 8, 2009. This was an application seeking, *inter alia*, to have varied retroactively the amount of spousal support payable in accordance with the Consent Order dated August 24, 2006, and to obtain further contribution from the appellant to the payment of tuition costs for the two children, to which the appellant was opposed (Reasons for Judgment attached to the Order dated March 8, 2011, Exhibit A-3, paragraphs 1, 2, 3, 14 and 20).

[5] The March 8, 2011 Order signed by Savage J. provided for higher spousal support for part of 2009 and thereafter. The amount could be revised when the younger child ceased to be a child of the marriage, that is, as of September 24, 2010. The spousal support payment to be made by the appellant to his ex-spouse was based on the annual income of the appellant, which was significantly higher than his former spouse's. The order also provided for the payment of the appellant's proportionate share of the children's tuition costs.

[6] On November 12, 2010, another Review Application was filed before the Supreme Court of British Columbia, this time to fix spousal support payable by the husband. The major issue in that application was whether all aspects of the husband's income should be considered for spousal support purposes and whether there should be imputation of income in regard to the wife (Reasons for Judgment of Groves J. attached to the Order dated May 18, 2011, Exhibit A-4, paragraph 18). The Court did impute a modest amount of additional income to the wife while establishing a significantly higher income amount for the husband for spousal support purposes, resulting in an increase in the spousal support payable by the appellant (paragraphs 25, 29, 39, 48 and 50 of the Reasons for Judgment).

[7] The appellant and the respondent in the present case filed as Exhibits A-1 and R-1 the billings by the appellant's lawyers for 2009. Included with Exhibit R-1 were similar letters from two law firms (one from Farris, Vaughan, Wills & Murphy LLP dated March 16, 2010, and the other from Pepper Longe de Guzman LLP dated April 28, 2010), stating that 70% of the firm's total invoices (70% representing

$9,128.11 in the first letter and $6,747.75 in the second letter) would have been in respect of a child support order with ongoing income-related disclosure requirements. While I see that the total of those amounts is $15,875, which is the amount at issue, no explanations were really given as to how the same percentage of 70% had been established by the two different law firms.

Analysis

[8] It is now settled law that legal fees incurred by the payer of support (either to prevent it from being established or increased, or to decrease or terminate it) cannot be considered to have been incurred for the purpose of earning income, and the courts have never recognized any right to the deduction of these expenditures (*Nadeau v. M.N.R.*, 2003 FCA 400, [2004] 1 F.C.R. 587, at paragraph 18). The Canada Revenue Agency (**CRA**) has enunciated this position in Interpretation Bulletin IT-99R5 (dated December 11, 1998 and revised December 5, 2007), in paragraph 21, stating that from the payer's standpoint, legal costs incurred in negotiating or contesting an application for support payments are not deductible since these costs are personal or living expenses. This statement was approved by Bowman C.J. as being a correct statement of the law in *Loewig v. Canada*, 2006 TCC 476, at paragraph 10.

[9] In the present case, it appears that the appellant is in exactly such a situation. Except with regard to the adjustment for the children's tuition costs, which are clearly personal expenses, the legal fees incurred in 2009 were in relation to an application by his ex-spouse for an increase in the spousal support amount previously determined in the Consent Order. It is also obvious that, considering the gap between the appellant's income and that of his ex-spouse, it was the appellant who would be called upon to pay support and that the appellant could have no reasonable expectation of being awarded any support. In this context, the appellant could not argue, and he did not argue, that at the time the legal fees were incurred he had a reasonable expectation of earning income from property with regard to his contestation of the application (*Mercier v. Canada*, 2011 TCC 427, at paragraph 18).

[10] The appellant's argument that the legal fees were incurred by him to establish an income for himself (and therefore to produce income) by protecting the amount to be paid to his ex-spouse, which he refers to as income retention as opposed to income generation, cannot stand in the circumstances. Protecting income, by the appellant's reasoning, means not paying support or paying less support so that there would be more money left in his pocket. This is not the same as deriving income from a source.

A source of income is an activity undertaken in pursuit of profit or in a sufficiently commercial manner (*Stewart v. Canada*, [2002] 2 S.C.R. 645, par. 51, 52 and 60). For an expenditure to be deductible pursuant to paragraph 18(1)(*a*) of the ITA, the expenditure must be attributed to a particular business or property source (*Stewart*, par. 56). Legal fees incurred to fight against the payment of support cannot therefore be classified as expenses incurred to earn income flowing from a source.

[11] With respect to the Charter argument, as suggested by the Federal Court of Appeal in *Nadeau*, *supra*, at paragraphs 37 and 39, referring to the decision of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paragraph 57, the appellant must demonstrate that the impugned legislation (in the present case, paragraph 18(1)(*a*) of the ITA) creates a differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. In the absence of a proper factual record on which to base such a determination, it would be inappropriate for the Court to attempt to adjudicate on this issue.

[12] As was the case in *Nadeau*, *supra*, the appellant's submissions are limited to saying that the legal expenses of each former spouse should be subject to the same treatment. The appellant further asserts that the fact that they are not is discrimination based on sex, as most payers of support tend to be males, and that the current practice is therefore unconstitutional by virtue of section 15 of the Charter. However, "[a]s the Supreme Court said in *Symes v. Canada*, [1993] 4 S.C.R. 695 (at page 764), it obviously must not be assumed that a statutory provision has the effect of sex-based discrimination in the absence of any evidence supporting such a contention" (see *Nadeau*, *supra*, at paragraph 39). In the present case, apart from making a broad assertion, the appellant did not provide any evidence of discrimination based on sex.

[13] In addition, in *Calogeracos v. The Queen*, 2008 TCC 389, referred to by counsel for the respondent, Webb J. of this Court stated at paragraphs 21 and 22, in speaking of the child tax credit that, pursuant to subsection 118(5) of the ITA, was denied to the father paying child support:

> 21 However it is subsection 118(5) of the *Act* that is to be analyzed to determine whether this subsection of the *Act* draws a distinction between males and females. It does not. Both men and women who pay child support are, as a result of the provisions of subsection 118(5) of the *Act*, denied the claim for a credit under paragraph 118(1)(*b*) of the *Act*. As noted above, Justice Iacobucci in *Law* stated that:
>
> > First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or

> (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> 22 In this case the provision in question neither makes a formal distinction between males and females nor does it fail to take into account the Appellant's already disadvantaged position within Canadian society. It draws a distinction based on whether the individual is paying child support, which is based on the income levels of the parents since the obligation to pay child support is based on the relative income of the parents. The fact that in most joint or shared custody arrangements it is the male who is making child support payments cannot be grounds for a claim for discrimination by the Appellant as males who make more money than females are not in a disadvantaged position in Canadian society.

[14] I agree with counsel for the respondent that the same reasoning applies with respect to the deductions disallowed pursuant to paragraph 18(1)(*a*) of the ITA in the present case. Hence the constitutional attack cannot succeed.

[15] The appeal is dismissed

Signed at Ottawa, Canada, this 21st day of March 2012.

"Lucie Lamarre"

Lamarre J.

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REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	March 21, 2012

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jonathan Wittig

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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