

Docket: 2011-1191(IT)I

BETWEEN:

PIERRE BERGERON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 16, 2012, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Nancy Azzi, Student-at-Law

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of April 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 18th day of October 2012

François Brunet, Revisor

Citation: 2012 TCC 143
Date: 20120430
Docket: 2011-1191(IT)I

BETWEEN:

PIERRE BERGERON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] In this case, the issue is whether, in computing his income, the appellant may deduct the amount of \$19,200 (reported as a support amount) that he paid to his spouse in 2009.

[2] The appellant and Linda Dufour have been living separate and apart since December 1, 2008, and are now divorced.

[3] In the consent to judgment on accessory measures filed with the Superior Court of Québec and signed by the appellant and Ms. Dufour on September 25, 2009, and October 2, 2009 (see Exhibit I-1), the following terms were agreed on, *inter alia*:

- The appellant will pay his former spouse the amount of \$19,200 as a lump sum, which she acknowledged she had already received;
- The appellant will pay his former spouse half of the fees that she will have to assume, up to \$1,500;
- The appellant undertakes to transfer to his former spouse, in the thirty days following the handing down of the judgment to be rendered, the amount of

\$64,879.52, representing half of the RRSP amount accumulated by the appellant and his former spouse;

- The former spouse acknowledges having received the amount of \$87,500, that is, half of the value of the parties' family residence.
- The consent provides that the complete execution of the transfer of the \$64,879.52 constitutes full and final release from any rights or action claiming, among other things, any compensatory allowance, lump sum, division of property, partition of family patrimony and spousal support.

[4] The appellant paid the amount of \$19,200 in three instalments, which amounted to \$5,000, \$10,000 and \$4,200, which were deposited by the former spouse between July 13 and August 6, 2009.

[5] In this case, for the appellant to deduct the amount of \$19,200, it must constitute a support amount as defined in subsection 56.1(4) of the *Income Tax Act* (the Act). These words are defined 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 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.

[6] The respondent argues that the appellant cannot deduct the three payments totalling \$19,200, because they do not meet the definition of "support amount" in of the Act, as the payments for which the deduction is claimed were not payable as an allowance on a periodic basis. The respondent argues, invoking the following criteria developed by the Federal Court of Appeal in *McKimmon v. The Minister of National*

Revenue, [1990] 1 F.C. 600, that the three lump-sum payments were rather paid as capital.

[10] The following are, as it seems to me, some of the considerations which may properly be taken into account in making such a determination. The list is not, of course, intended to be exhaustive.

[11] 1. The length of the periods at which the payments are made. Amounts which are paid weekly or monthly are fairly easily characterized as allowances for maintenance. Where the payments are at longer intervals, the matter becomes less clear. While it is not impossible, it would appear to me to be difficult to envisage payments made at intervals of greater than one year as being allowances for maintenance.

[12] 2. The amount of the payments in relation to the income and living standards of both payer and recipient. Where a payment represents a very substantial portion of a taxpayer's income or even exceeds it, it is difficult to view it as being an allowance for maintenance. On the other hand, where the payment is no greater than might be expected to be required to maintain the recipient's standard of living, it is more likely to qualify as such an allowance.

[13] 3. Whether the payments are to bear interest prior to their due date. It is more common to associate an obligation to pay interest with a lump sum payable by instalments than it is with a true allowance for maintenance.

[14] 4. Whether the amounts envisaged can be paid by anticipation at the option of the payer or can be accelerated as a penalty at the option of the recipient in the event of default. Prepayment and acceleration provisions are commonly associated with obligations to pay capital sums and would not normally be associated with an allowance for maintenance.

[15] 5. Whether the payments allow a significant degree of capital accumulation by the recipient. Clearly not every capital payment is excluded from an allowance for maintenance: common experience indicates that such things as life insurance premiums and blended monthly mortgage payments, while they allow an accumulation of capital over time, are a normal expense of living which are paid from income and can properly form part of an allowance for maintenance. On the other hand, an allowance for maintenance should not allow the accumulation, over a short period, of a significant pool of capital.

[16] 6. Whether the payments are stipulated to continue for an indefinite period or whether they are for a fixed term. An allowance for maintenance will more commonly provide for its continuance [page606] either for an indefinite period or to some event (such as the coming of age of a child) which will cause a material change in the needs of the recipient. Sums payable over a fixed term, on the other hand, may be more readily seen as being of a capital nature.

[17] 7. Whether the agreed payments can be assigned and whether the obligation to pay survives the lifetime of either the payer or the recipient. An allowance for maintenance is normally personal to the recipient and is therefore unassignable and terminates at death. A lump or capital sum, on the other hand, will normally form part of the estate of the recipient, is assignable and will survive him.

[18] 8. Whether the payments purport to release the payer from any future obligations to pay maintenance. Where there is such a release, it is easier to view the payments as being the commutation or purchase of the capital price of an allowance for maintenance.

[7] The appellant essentially submits that the amount of \$19,200 represents the support amount of \$800 per month spread over a 24-month period.

[8] In this case, the amount of \$19,200 was paid in three instalments of \$5,000, \$10,000 and \$4,200, deposited by the former spouse between July 13 and August 6, 2009. Once he paid the \$19,200, the appellant was released from any future claims for spousal support. Accordingly, I conclude that the amount of \$19,200 does not constitute an "allowance on a periodic basis" within the meaning of subsection 56.1(4) of the Act. It was not a support amount, but rather an amount paid as capital, which cannot be deducted by the appellant. A lump sum paid during a taxation year is admissible as an allowance on a periodic basis when it can be shown that the lump sum payment represents amounts payable periodically, which are payable only after the date of the order or written agreement and which are outstanding. In this case, the appellant did not satisfactorily prove that the amount of \$19,200 represented amounts payable periodically, which were payable only after the date of the order or written agreement and which were outstanding.

[9] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 30th day of April 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 18th day of October 2012

François Brunet, Revisor

CITATION: 2012 TCC 143

COURT FILE NO.: 2011-1191(IT)I

STYLE OF CAUSE: PIERRE BERGERON AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: April 16, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: April 30, 2012

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Nancy Azzi, Student-at-Law

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent:

Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada