

Docket: 2011-3330(IT)I

BETWEEN:

VICKI ANNE WELCH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 28, 2012, at Hamilton, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant: The Appellant Herself
Counsel for the Respondent: Christopher M. Bartlett

JUDGMENT

The Appellant's appeal is allowed, without costs, to reflect that the total amount that she received in 2009 as a support amount was \$11,200 and not \$12,000 and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the total amount that the Appellant received as a support amount in 2009 was \$11,200.

Signed at Ottawa, Canada, this 5th day of October, 2012.

“Wyman W. Webb”

Webb J.

Citation: 2012TCC350
Date: 20121005
Docket: 2011-3330(IT)I

BETWEEN:

VICKI ANNE WELCH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the Appellant was required to include in her income as determined for the purposes of the *Income Tax Act* (the “*Act*”) for 2009 amounts that she received as spousal support even if her former spouse did not claim a deduction for such payments and the Appellant and her former spouse had agreed that they would request an Order of the Ontario Superior Court of Justice confirming that the Appellant was not obligated to include such payments in her income for the purposes of the *Act*. The Appellant was reassessed to include in her income the amount of \$12,000 as the spousal support amount that she had received in 2009. The Appellant testified that she had reviewed her bank records and the total amount that she had received in 2009 was \$11,200. Counsel for the Respondent agreed that the correct amount for spousal support for 2009 should be \$11,200 and not \$12,000.

[2] When the Appellant and her former spouse separated the spousal support amount was based on his earnings at that time. Unfortunately he lost his job and then fell into arrears. The Appellant and her former spouse agreed that he would not deduct the amount that he paid as spousal support in 2009 and that she would not include this amount in her income for 2009 for the purposes of the *Act*. This agreement was to have been reflected in an Order of the Ontario Superior Court of Justice by the end of March 2010. However, the lawyer who was working on this matter did not submit the Order for signature until sometime later. It seems to me that

the timing of the signing of the Order is immaterial. An Order of the Ontario Superior Court of Justice cannot change the requirements of the *Act* regardless of whether the Order would have been signed in March 2010 or sometime later. Nor can the parties themselves agree to change what is otherwise required to be included in the Appellant's income under the *Act*.

[3] Paragraph 56(1)(b) of the *Act* provides as follows:

(b) 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 received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,
- B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from 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 received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;

[4] "Support amount" is defined in subsection 56.1(4) of the *Act* 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.

[5] Clearly the Appellant was receiving an allowance payable on a periodic basis for her maintenance and the Appellant had discretion as to the use of such an amount. The definition of “support amount” and the requirements to include the support amount received in income do not provide an option for individuals to choose whether such amounts will be included in income or not. If an amount that the Appellant has received is a support amount (and not a child support amount) as defined in subsection 56.1(4) of the *Act*, the Appellant is required to include that amount in her income. Individuals cannot agree to exclude such amounts from income any more than they can agree to exclude other amounts that would be required to be included in income under the *Act*. The requirement to include support amounts in income can only be changed by Parliament – it cannot be changed by an agreement between the Appellant and her former spouse or by an Order of the Ontario Superior Court of Justice (regardless of when such Order was signed).

[6] As a result the Appellant’s appeal is allowed, without costs, to reflect that the total amount that she received in 2009 as a support amount was \$11,200 and not \$12,000 and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the total amount that the Appellant received as a support amount in 2009 was \$11,200.

Signed at Ottawa, Canada, this 5th day of October, 2012.

“Wyman W. Webb”

Webb J.

CITATION: 2012TCC350

COURT FILE NO.: 2011-3330(IT)I

STYLE OF CAUSE: VICKI ANNE WELCH AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: September 28, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: October 5, 2012

APPEARANCES:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Christopher M. Bartlett

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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