Docket: 2012-3807(IT)I

BETWEEN:

DAN BERTY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 9, 2013, at Ottawa, Canada

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Susan Tataryn
Counsel for the Respondent:	Christopher Kitchen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2010 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of June 2013.

"Paul Bédard"

Bédard J.

Citation: 2013 TCC 202
Date: 20130625
Docket: 2012-3807(IT)I

BETWEEN:

DAN BERTY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] In issue in this case is the deductibility of spousal support payments in the amount of $11,739 with respect to the 2010 taxation year.

Facts

[2] The appellant separated from his wife Kerry Leclerc (the "Former Spouse") in August 2008. They were married in 1990. The appellant and the Former Spouse have two children, namely, SNNB born in 1996 and SBPB born in 1992.

[3] The appellant was employed by SunLife Financial ("SunLife") between the years 1982 and 2011 as an assistant vice-president of cost competitiveness.

[4] The appellant's gross annual income for the 2010 taxation year was $236,188.

[5] On July 17, 2009, the appellant and the Former Spouse entered into a separation agreement (Exhibit A-5) (the "Agreement").

[6] The appellant was to pay periodic monthly support based on his base income. The appellant's base income is the usual biweekly income from employment, but does not include income such as bonus income, proceeds from exercising stock options, investment income, capital gains and dividend income.

[7] The appellant was to make child support payments of $1,876 per month with respect to the two children, commencing on August 1, 2009 and payable on the 1st day of each month thereafter (Exhibit A-5, clause 5.2(a)). The appellant and the Former Spouse agreed to adjust the amount of child support payable based on each party's base income (Exhibit A-5, clause 5.3).

[8] The appellant was to pay his Former Spouse spousal support of $1,942 per month, commencing on July 15, 2009 and payable on the 15th day of each month thereafter (Exhibit A-5, clause 6.1).

[9] The Agreement also required the appellant to pay 50 per cent of his bonus to his Former Spouse for "child and spousal support". The stipulation of the Agreement pertaining to "child and spousal support" reads as follows:

> Lump Sum Child and Spousal Support Payments
>
> 7.1 Fifty percent (50%), net of income tax, of any bonus income received by the husband shall be paid to the wife as lump sum child and spousal support (called "bonus payment"). Bonus income may include, but is not limited to, incentive pay and the exercise or redemption of stock options after the Separation Date. These payments will continue for as long as the husband is required to pay child and/or spousal support. The bonus payment based shall be made within seven (7) days of the husband receiving a payment of bonus income. Interest shall run on any outstanding payments, in accordance with the Courts of Justice Act.

[10] The appellant sought to deduct spousal support payments that were made on a monthly basis as well as a part of his annual bonus (in the amount of $11,739), the latter of which was declined by the Minister of National Revenue. The respondent submits that the support payment of $11,739 made in relation to the appellant's bonus (i.e. pursuant to par. 7.1 of the Agreement filed as Exhibit A-5) was not a deductible amount pursuant to subsections 56.1(4) and 60(*b*) of the *Income Tax Act* (the "Act") because such payment made according to section 7.1 of the Agreement was neither:

a) an amount payable or receivable as allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and the children since there is no guarantee that a bonus will be paid each year;

b) identified as being solely for the support of the Former Spouse.

[11] The appellant also testified that:

1) he has received a bonus every year since SunLife commenced that practice in the mid 1990's, on the basis of both the employee's and SunLife's performance (Transcript, p. 10);

2) there was no written contract defining the features of the bonus. That practice, according to the appellant, was standard in the insurance industry (Transcript, p. 11). He added that the bonus was normally paid at the end of February or early March;

3) since there was some risk "that it wouldn't have been paid", the bonus was a "variable amount" that was not included in the monthly amounts, so as not to cause financial difficulty before it became available.

Issues

[12] The issue herein is whether the support payment of $11,739 made in relation to the appellant's bonus was:

i) 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 the children of the recipient;

ii) solely for the support of the Former Spouse.

Discussion and Conclusion

[13] "Child support" means any support that the court order, or the written agreement, does not identify as being solely for the support of the taxpayer's spouse

or former spouse (subsection 56.1(4) of the Act). For example, even where an agreement provides for a global support amount for the spouse and children, the entire amount is child support and, therefore, not deductible and not taxable.

[14] Where a payer must make spousal and child support payments, the presumption is that the payments are first deemed to be child support, and then spousal support (by virtue of the formula in paragraph 60(b) of the Act. See also Interpretation Bulletin IT-530). Thus, in the event that the payer defaults, the recipient receives the payment first on a non-taxable basis. The payer cannot deduct any portion on account of spousal support until the child support obligations are fully satisfied.

[15] Pursuant to section 56.1(4) of the Act, an amount payable or receivable will qualify as "support amount" if (see also Interpretation Bulletin IT-530):

- The recipient has discretion as to the use of the amount;
- The recipient is a spouse/CL partner and the recipient and payer are living separate because of the breakdown of their marriage;
- The amount is receivable under an order of a competent tribunal or under written agreement;
- The payer is a natural parent of the child of the recipient.

[16] Furthermore, to qualify as support amount, the amount must be payable as an allowance on a periodic basis.

[17] In *Gagnon v. Canada*, [1986] 1 C.T.C 410, the Supreme Court defined the word "allowance" as follows: "a limited predetermined sum of money paid to enable the recipient to provide for certain kinds of expense […] determined in advance and once paid […] at the complete disposition of the recipient who is not required to account for it."

[18] In *Queen v. McKimmon*, [1990] 1 C.T.C. 109, the Federal Court of Appeal enumerated criteria to be considered in distinguishing between periodic payments made as an allowance, and made for lump or capital sum:

> 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.

2. The amount of the payments in relation to the income and living standards of both payer and recipient. […] 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.

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.

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. […].

5. Whether the payments allow a significant degree of capital accumulation by the recipient. […] An allowance for maintenance should not allow the accumulation, over a short period, of a significant pool of capital.

6. Whether the payments are stipulated to continue for an indefinite period or whether they are for a fixed term. […].

7. Whether the agreed payments can be assigned and whether the obligation to pay survives the lifetime of either the payer or the recipient. […].

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.

Appellant's position regarding the First Issue

[19] The appellant submits that he pays support to the Former Spouse on a received basis; no other mode of payment would make sense, as cash flow problems could result. He added that, as such, the Agreement was drafted such that there was an annual "adjustment" to take into account the bonus amount.

[20] The appellant also submits that, in view of the *McKimmon* factors, the payments in issue herein should be qualified as periodic. The appellant's relevant submissions are as follows:

> So if we take those criteria in *McKimmon* and apply them, we can see that this supports the appellant's position that the payments are periodic in nature. The bonus is to be paid within seven days of the receipt by the appellant, that's set out in 7.1 of

> the agreement. The obligations continues as long as the appellant is required to pay child and/or spousal support. In fact, a read of the agreement shows that even if a child ages out of the agreement or marries pursuant to 5.7, the amount continues to be paid. It doesn't stop. There's no provision in the agreement that 7.1 bonus payments stop.
>
> The amount of the bonus payment is directly related to and is a significant part of the appellant's income. As testified by the appellant, the target bonus is 25 percent of the annual compensation, and that bonus payment relates to an amount that was and remains a significant factor in relation to both the living standards of both parties. The payment is practically speaking to made, to be made immediately. It's to be made within 7 days of receipt and interest is payable on the overdue amounts. There's no accelerated payment contemplated in the agreement, it's ongoing to the extent that support obligations exist, so that's 7.1 payment continues indefinitely.
>
> The bonus payment is determined by reference to a contingent aspect of the appellant's remuneration package. It's a division of an income amount that the appellant receives on an annual basis. Moreover, the amount of the bonus payment is not unusual when compared to the base monthly support payments. The bonus support payment continues as long as basic support is -- basic spousal support is payable and the agreement does not expressly address the survival of the support obligation beyond the life of the wife. However, the terms of the agreement indicate that the ongoing spousal support is a personal contractual right, and bonus payment is referred to as spousal support, and it's not a release of further support payments. Accordingly, it's submitted that the bonus payment spousal support obligation is an ongoing obligation payable by the appellant when the bonus payment is realized. The appellant's remuneration package with his employer contemplates this payment on an annual basis, notwithstanding the reference to the words lump sum in payment in the agreement, it's submitted that the better view is that the bonus payment should be characterized as a periodic payment of spousal support under the *Income Tax Act* and the jurisprudence that relates to periodic payment.

[21] Since the evidence reveals that there is no guarantee that the bonus will be paid in any given year (although, as per the appellant's submissions, the risk seems fairly remote), I am of the opinion that the support payment of $11,739 made in relation to the appellant's bonus does not meet the definition of "periodic" based on the *McKimmon* factors, as "periodic" means "at a regular interval". In other words, the payments to be made under 7.1 of the Agreement cannot be qualified as periodic since there is a possibility that the appellant will not be paid a bonus every year. I also want to point out that the decision in *McKimmon* refers to the fact that payments made at intervals of more than one year could not be conceived as an allowance for maintenance.

Second issue

[22] Regarding the second issue, I will also reproduce the appellant's submissions (Transcript, pp. 41 to 43):

> With respect to the separation agreement, it's our submission that the separation so going to the second issue, Your Honour, of whether the amount is a spousal support amount payable, the separation agreement pursuant to 6.1 specifically sets out spousal support of 1,942 as basic spousal support. The amounts calculated by reference to the support advisory guidelines, there's annual indexing provided in 6.3 of the agreement, and in addition, 7.1 provides an additional amount equal to 50 percent of any bonus received as a lump sum is the word used in the agreement, payment to top up the child support and the spousal support amount.
>
> The existence of the bonus payment element in the agreement is not surprising. All of the appellant's income is taken into account in determining spousal support. This is consistent with the independent net disposable income concept in the federal support guidelines. The payment is simply a pay as and when received and it's reasonable as it avoids an arbitrary estimate of what those future payments would be and would necessitate some kind of reconciliation of what that is on an annualized basis.
>
> In the hands of the appellant, the base income and the bonus income are simply income, they're the same, albeit, they're received at different times. As spousal support, the payment is a re direction of income of the appellant and it should be treated in a consistent and like manner with the base amount that is set out in, I believe, at 6.1. The agreement provides for the allocation of support payments as between spousal support and child support in 5.2 and 6.1. It's clear that the approach is an allocation of 50 percent to 50 percent. It's very close, 47 point something to 53 point something.
>
> The appellant must direct 50 percent of the bonus income to support given that the agreement is to be read as a whole. There's no reason to deviate from the rule that an agreement should be read and interpreted as a whole without a contrary intention so stated in the agreement. Therefore, the apportionment of the bonus income being income nonetheless is subject to the same rules of apportionment. There's no reason to really restate the obvious in the agreement, there's no reason to resort to arbitrary determinations as to how the amount should be apportioned because it's clear in the agreement what is being done.
>
> If any deviations from the 50/50 allocation were intended, it would have been state in the agreement. As such, Your Honour, there is an allocation, and if we look at what Justice Bowie commented in *Elcich* and I have provided you with a copy, *Steven Elcich v. Her Majesty the Queen* decided by Mr. Justice Bowie on

> February 14th, 2006. Justice Bowie speaks to an agreement where there is no allocation as between child support and spousal support, and he suggests that where there's no allocation there's a problem, but in this case, there is an allocation and a clear allocation is what the intentions of the parties were, and that's the approximate 50/50 or 47/53 percent which the appellant claimed on his tax return.
>
> I did want to address, Your Honour, had questioned the appellant with respect to, if he had losses which went out the income.

[23] I am of the opinion that there is no ambiguity in section 7.1 of the Agreement. In section 7.1 of the Agreement, there is no allocation in relation to support. In the absence of allocation of amounts between child support and spousal support, the entire amount is treated as child support in accordance with the definition of "child support" in the Act. In the case at hand, I also am of the opinion that even after reading the Agreement as a whole, I cannot come to the conclusion that there is an implicit apportionment of the support between Former Spouse and the Children. Since section 7.1 is free from ambiguity, I am of the opinion that it is improper to resort to extrinsic evidence to determine the meaning of that stipulation. My role is not to determine the intention of the parties. Assuming arguendo that I had had to do so, the appellant has the burden of proof. In that kind of situation, for example, draft documents can be brought in evidence. The other party to the agreement can be called as a witness to testify as the intention of the parties. In the case at hand, the fact that no draft documents have been offered in evidence and that the Former Spouse has not been called to testify is telling. Furthermore, the Agreement provides that the parties have received independent legal advice, and yet, there is no statement of purpose in the Agreement.

[24] Consequently, I am of the opinion that the support payments of $11,739 made in relation to the appellant's bonus (i.e. pursuant to section 7.1 of the Agreement) are not a deductible amount pursuant to subsections 56.1(4) and 60(*b*) of the Act.

[25] For those reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 25th day of June 2013.

"Paul Bédard"

Bédard J.

CITATION:	2013 TCC 202
COURT FILE NO.:	2012-3807(IT)I
STYLE OF CAUSE:	DAN BERTY v. HER MAJESTY THE QUEEN
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APPEARANCES:

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Counsel for the Respondent:	Christopher Kitchen

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