Citation: 2007TCC217
Date: 20070509
Docket: 2003-2467(IT)G

BETWEEN:

PETER G. MILLER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Counsel for the Appellant: Franklyn Cappell
Counsel for the Respondent: Andrea Jackett

REASONS FOR JUDGMENT

(Delivered orally from the bench on
November 23, 2006, in Toronto, Ontario.)

McArthur J.

[1] This is an appeal from an assessment wherein the Minister of National Revenue disallowed a deduction by the Appellant in the 2000 taxation year for support amounts of $59,500 pursuant to subsection 56.1(4) and paragraph 60(*b*) of the *Income Tax Act*. The Appellant and his former wife Karen had been married almost 30 years, when they separated in May 1999. The negotiations leading to a separation agreement and subsequent financial arrangements have been unusually cordial.

[2] The Appellant has been a successful businessman primarily through owning and operating McDonald's Restaurant franchises, and dealing in real estate. The parties signed a separation agreement in April 2001, when their children were 23 and 25. In addition to the payment in question, the Appellant had agreed to pay Karen support of $27,000 annually, subject to conditions that are of no concern in this

judgment. The parties agreed that the net family assets totalled $5,642,000, and they each were entitled to equalize their respective net worths at $2,821,000.

[3] The major assets were the McDonald's Restaurant franchises, land acreages in Aurora, Ontario, valued at $1.6 million, and their principal place of residence valued at 1.2 million. The following paragraph of the Separation Agreement is relevant, but in particular paragraph 16, which provide:

> Equalization:
>
> 15(A) The parties recognize and acknowledge that they are each entitled to equalize their respective net worths at $2,821,000.
>
> (B) The provisions of this Agreement are intended to ensure that the equalization takes place in no more than ten (10) years and the payments by the Husband to the Wife under the provisions of this Agreement and the assets owned by the Wife and the payments already made by the Husband to the Wife as set forth in this Agreement are intended to provide the Wife with the equalization of the said $2,821,000 in no more than 10 years.
>
> …
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> Additional Support
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> 16. The Husband will pay to the Wife as support 6% per annum of the outstanding balance owed to the Wife for the equalization payment set forth under the immediately preceding paragraph to a maximum of **ONE HUNDRED and NINETEEN THOUSAND ONE HUNDRED DOLLARS** ($119,100) per year. This support payment is not subject to termination until the equalization payment is paid in full. The said payments are to be paid monthly and the outstanding balance shall be determined annually on the 1st day of July.

The following paragraphs are also relevant:

> Tax Deductibility
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> 18. The Husband and Wife acknowledge and agree that all support payments under paragraphs 6 and 16 hereof shall be deductible from the Husband's taxable income and shall be included in the Wife's taxable income.
>
> Equalization Payment Schedule

> 20(B) The Husband and Wife acknowledge that the approximate balance payable by the Husband to the Wife for the equalization payments required under this Agreement at June 30th, 2005 should be $800,000. On December 31st, 2005, the Husband shall pay to the Wife a principal payment equal to 50% of the said outstanding balance. Thereafter, the Husband shall pay to the Wife interest only on a monthly basis on the balance of the principal outstanding and the principal outstanding shall be fully paid on or before June 30th, 2010, or on the closing of the sale of the business of P.G. Miller Enterprises Limited if the said sale closes before June 30th, 2010.

In effect, the Appellant retained the three major assets, and undertook to ensure that Karen received her $2.8 million, over a period of 10 years.

[4] As stated in paragraph 16, he agreed to pay her as support, 6% per annum of the outstanding balance of the equalization amount, up to a maximum of $119,100 per year. It is the interpretation of paragraph 16 that is in issue, along with the amount $59,500, being one-half of the $119,100 to have been paid annually, for the period July 1 to December 30, 2000. This amount was calculated as 6% of the outstanding equalization amount owing by the Appellant to Karen, after crediting her with payments and assets of approximately $800,000.

[5] The amount of $119,100 and $27,000 was agreed to, because Karen had calculated that she needed $150,000 in support, before taxes, to maintain her standard of living. Counsel for the Appellant described the situation as follows:

> They were wealthy. Peter was a McDonald's franchisee. He had multiple locations up and down Yonge Street for the most part north of Toronto. He had the investment land and they had a big house on an estate lot in Richmond Hill. They lived very well and they travelled, they had an airplane and they entertained and so on. They had lived in that scale for many years.

[6] The Respondent’s position is that the $119,100 was interest on the $1.9 million equalization balance, at a rate of 6%, and if it is interest, it cannot be deducted by the Appellant. The Appellant, together with witnesses, Tracy Warne, Karen’s solicitor, and accountant Perry Foster, all testified that the amount was a support payment which would be deductible by the Appellant. No one testified to the contrary.

[7] The Appellant and his former wife had retained their long-time accountant, Mr. Foster, to assist in arriving at the equalization amount and the manner it would be paid. Together they sought the services of solicitor, Mr. Warne, to structure the

separation agreement, in accordance with the terms they mutually agreed upon. They both testified that the amount was a support payment reducing over the years with the reducing equalization balance.

[8] Mr. Foster testified that Peter and Karen had met with him on several occasions during the negotiations. Karen set her annual support requirements at approximately $150,000, and it was this amount that the 6% of the debt intended to achieve. The Appellant's gross annual income was approximately $600,000, and Karen's income was insignificant, although she did commence a business, I believe, after the separation, arranging social functions. She is an able person and I have no doubt she would be successful.

[9] Mr. Warne testified that he acted for both Peter and Karen because there was none of the usual acrimony between them, and they had worked out the basics for a separation agreement without him. He had each party obtain independent legal advice, each with a separate highly-regarded matrimonial lawyer. I draw an inference from this that these two lawyers, Mr. Dasilva and Mr. Straightman, both concluded that the payment was a support amount to be included in Karen's taxable income, and deductible by Peter.

[10] The Appellant's solicitor referred to *Simpson (Inspector of Taxes) v. The Executors of Bonner Maurice et al*,[1] an English decision. Briefly, the facts are that a German bank held money through World War I and for several years after for an English citizen. It paid his estate the amount, plus what it described as interest. The High Court of Justice found the additional amount was not interest, but compensation or damages. Counsel for the Appellant:

> We have much the same thing here except, of course, that in our case the support payments are not called interest. They're called support payments. Just because they are computed by a percentage amount referring to a larger sum, that doesn't turn it into interest. Obviously, it's exactly what it was called, support, nothing else.
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> …
>
> The position which my learned friend will submit to you is bizarre. It is bizarre to think that Peter Miller did not pay any support to Karen Miller, not only is it bizarre, not only is it unexpected, not only is it absurd, not only is it counter-productive to both of them, not only is it contrary to the three lawyers and the two accountants who looked at it, but it makes no sense.

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[1] 14 T.C. 580, High Court of Justice, King’s Bench.

[11] Counsel the Respondent agrees that the sole issue is the interpretation of paragraph 16, and states that tax treatment is determined by the *Act* and not by a separation agreement. She added that there is no need for extrinsic evidence to interpret paragraph 16 because it is clear the payment was 6% interest charged on the outstanding principal amount or equalization amount. In *P. Syrier v. M.N.R.*[2] Bonner J. quoted from *Huston et al. v. Minister*[3] where at page 420, Thurlow J. said:

> The name attached by the parties to payments, the way the amounts are calculated, and what they represent may often be of great importance in resolving such an issue. But the issue is one of substance and depends not on these features alone but on the other features of the case as well. For just as a sum which is in truth interest, though called by some other name, will fall within the meaning of the section, so a sum which in truth is not interest, in my opinion, will not be 'received as interest' within the meaning of the section, even though it may have the name and some of the other attributes of interest.

Analysis

[12] The support amount in section 56.1(4) of the *Act* is defined in part:

> "Support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, … if the recipient has discretion as to the use of the amount, and
>
> *(a)* the recipient is the spouse …

[13] I find that the present facts meet the five criteria in that short definition. There was an amount payable being a total of $147,000 as an allowance. The definition of allowance according to the *Canadian Oxford Dictionary* is an amount given to a person regularly for a stated purpose, and that is the situation here. It was to be paid monthly pursuant to paragraph 16, and it was no doubt for Karen's maintenance. She had the discretion as to its use, and she was the former spouse of the Appellant.

[14] The payment by the Appellant, in addition to meeting the definition of support amount in the *Act,* had attributes of interest, but for the reasons that follow, I find the evidence is overwhelming in favour of it being support. First, the parties entered into a contract for the Appellant to pay Karen support. Second, it was the intention of the

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2 [1989] 1 C.T.C. 2405 (T.C.C.).

3 [1962] Ex. C.R. 69, [1961] C.T.C. 414.

contracting parties, Peter and Karen, to pay and receive support. Third, the evidence of all four witnesses, without doubt, indicate the payment was support. And fourth, Karen did not have independent income and required support until such time as she received sufficient capital equalization payment to invest and support herself.

[15] The Appellant had moral if not legal obligations, to pay support to Karen. Mr. Warne, an experienced family lawyer, acting for both parties carried out their instructions by providing for support as he felt obligated to do. Two experienced family law lawyers who gave independent legal advice were satisfied upon receiving the agreement that the Appellant was paying a support amount to Karen who required it. This I conclude through inference, not having heard evidence from those two lawyers.

[16] The Respondent referred to paragraph 20(b) of the separation agreement as evidence that the payment pursuant to paragraph 16 was interest. I have to agree with the Appellant that paragraph 20(b) strengthens his interpretation of paragraph 16. After most of the equalization payment was paid by year end 2005, Karen would no longer need support and it ceased, and thereafter, the Appellant was to pay interest on the remaining balance which in January 2006 would be, I believe, about $400,000.

[17] Having said this, I do find paragraph 16 somewhat ambiguous in that it refers to support and then 6% per annum on the outstanding balance owed to the wife. This is interest-type talk. Yet, I interpret this, although somewhat confusing, to be a manner of calculating the amount of support, and not the equivalent of interest on a loan. Looking to extrinsic evidence to interpret paragraph 16, I have no difficulty concluding that the payment was support.

[18] Looking at the other side of the coin at what evidence favours a conclusion that the payment was interest and not deducible, I find, in effect, the Appellant owed his former wife Karen an equalization amount of $1.9 million. He contracted to pay this amount over 10 years with interest at 6% on the reducing principal balance until paragraph 20(b) commenced January 2006, when clearly interest on the outstanding balance begins. Obviously, the Appellant cannot deduct the interest after December 31, 2005. Also, in favour of interest, the payments terminate once the equalization amount is paid. Paragraph 16 provides for a payment of 6% on the outstanding balance. Again, this is interest terminology.

[19] In the recent case of *The Royal Winnipeg Ballet v. M.N.R.*,[4] Justice Sharlow found that the parties' intention was important in determining the nature of a contract. Presently, the parties clearly intended that the Appellant husband pay support to Karen. If it can be argued that the payment fits the definition of both interest and support, the deciding factor is the intention of the parties and what in fact they did. The Appellant attempted to deduct the amount paid and Karen paid income tax on the payment. They both intended that the Appellant pay support to his wife of almost 30 years.

[20] The law provides that she had a right to support given her circumstances. By calculating the amount of support as 6% per annum of the outstanding balance, does not detract from the reality of the contract. While the payment does have some indicia of interest, the strong conclusion is that it was support, and deductible by the Appellant.

[21] In *Syrier*, a first agreement clearly provided for interest on an outstanding sum owed by the husband to his former wife. When he was unsuccessful in trying to deduct his interest payment, he simply had the words of the agreement changed to read "support" rather than "interest", and Bonner J. found the payment was interest, though called by another name. This differs from this situation where the Appellant acknowledges responsibility to Karen to pay support which she had set at $150,000 per year, and they negotiated an amount payable of $147,000, and this was done with the assistance of an accountant and three lawyers. The Appellant had no obligation to pay interest on the balance of the equalization payment. He did have an obligation, I find, to pay support.

[22] In conclusion, I find that the $59,550 paid by the Appellant to Karen Miller in the 2000 taxation year is a support payment, as defined in subsection 56.1(4) of the *Act*, and the Appellant is entitled to deduct this amount under paragraph 60(*b*) of the *Act* in computing his income for the 2000 taxation year. The appeal is allowed, with costs.

Signed at Ottawa, Canada, this 9th day of May, 2007.

"C.H. McArthur"

McArthur J.

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[4] 2006 FCA 87 (F.C.A.)

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STYLE OF CAUSE:	PETER G. MILLER and HER MAJESTY THE QUEEN
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APPEARANCES:

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