

Docket: 2006-3248(IT)I

BETWEEN:

JOSE FIOGBE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 28, 2007 at Edmonton, Alberta

Before: The Honourable Justice T. O'Connor

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Julian Malone

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2002, 2003 and 2004 base years for the Canada Child Tax Benefit is dismissed for the reasons set forth in the attached Reasons for Judgment.

Signed at Ottawa, Canada this 3rd day of August, 2007.

"T. O'Connor"

O'Connor, J.

Citation: 2007TCC454
Date: 20070803
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BETWEEN:

JOSE FIOGBE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

[1] The issues and facts in this appeal are best conveyed by quoting from the Appellant's Notice of Appeal and from the Reply as follows:

Notice of Appeal:

...

Reason for the Appeal

Canada Revenue Agency refused to pay the Child tax benefit to my children for the year 2004. I sent the kids to Senegal, in Africa, because one of them was very sick. I paid [sic] for the health care, the housing and a baby sitter. Because I had to work far away in Australia, It [sic] was impossible for me to commute daily from Australia to Africa. I came back every month to Senegal to stay for a week with my kids, at the hospital. The children were very sick of sickle cell disease. Senegal has very good doctors who took care of my kids.

I believe I was the person primary responsible for the care and upbringing of my children and I was residing with them, having

brought them to my house after the treatment. The kids were not residing in Senegal but was there temporarily for medical reasons. Their residence was in Australia, with their father. Their mother, who is not a canadian [sic] citizen nor a permanent resident of Canada, was leaving [sic] in the USA at the time and could not claim the benefit.

I strongly disagree with Canada Revue [sic] Agency.

Reply to the Notice of Appeal

In reply to the Notice of Appeal for the 2002, 2003 and 2004 base years for the Canada Child Tax Benefit, forwarded to the Respondent on November 14, 2006, the Deputy Attorney General of Canada states:

A. STATEMENT OF FACTS

1. From the Notice of Appeal, he admits that the children of the Appellant where [sic] in Senegal from January 2004 to January 2005 and that the Appellant himself was in Australia during the same period and denies all other allegations of facts explicitly or implicitly contained in the Notice of Appeal.
2. By way of Notices of Determination for the CCTB for the base years 2002 and the [sic] 2003 issued November 18, 2005 and for the base year 2004 issued January 20, 2006, the Minister of National Revenue (hereafter “the Minister”) informed the Appellant that:
 - a) For the base year 2002, the Appellant had been overpaid by \$8,178 for the entitlement to the CCTB for the period July 2003 to June 2004;
 - b) For the base year 2003, the Appellant had been overpaid by \$7,729 for the entitlement to the CCTB for the period of July 2004 to June 2005; and,
 - c) For the base year 2004, the Appellant had been underpaid for December 2005 \$701.25 and was being paid for January 2006 \$701.26, and that of the total \$1,402.41 so being paid \$1,051.83 was being applied to reduce amounts owing by the Appellant.

3. By way of Notice of Objection, received by the Minister on March 26, 2006, the Appellant objected to the Notices of Determination for the base years 2002 and 2003 issued November 18, 2005 and for the base year 2004 issued January 20, 2006.
4. By way of letter issued August 22, 2006, the Minister notified the Appellant on the decision on the Notice of Objection by informing the Appellant that the Notices of Determination for the base years 2002, 2003 and 2004 were to be varied and that new Notices of Determination would be issued under separate cover.
5. On September 20, 2006 the Minister issued new Notices of Determination for the base years 2002, 2003 and 2004 informing the Appellant that:
 - a) For the base year 2002, the Appellant was being credited in the amount of \$4,089 for the entitlement period of July 2003 to December 2003;
 - b) For the base year 2003, the Appellant was being credited in the amount of \$2,755.29 for the period of March 2005 to June 2005;
 - c) For the base year 2004, the Appellant was being credited in the amount \$3,505.84 for the period of July 2005 to November 2005.
6. In order to establish the Notices of Determination for the 2002, 2003 and 2004 base years, the Minister relied on the following assumptions of fact:
 - a) The Appellant and Catherine Camara are the parents of three children:
 - i) Vanessa, born January 13, 2001;
 - ii) Naomi, born February 13, 2002; and
 - iii) Brandon, born February 14, 2003;
 - b) The Appellant is a single parent being responsible for the care of the children;

- c) The Appellant, during the period of January 2004 to October 2005 was pursuing full time post graduate studies at the Australian National University, Canberra, Australia;
- d) The Appellant resided during this period at 22/85 Derrima, Queanbeyan, Australia;
- e) While the Appellant was in Australia the three children were placed in the care of a babysitter (relative) in Senegal, Africa for the period of January 2004 to January 2005;
- f) The Appellant visited on a basis of once per month with the children in Senegal;
- g) The three children, Vanessa, Naomi, and Brandon are qualified dependants of the Appellant;
- h) For the base year 2004, the Appellant was entitled to receive the CCTB entitlements as eligible individual for the qualified dependants for the months of July 2005 to June 2006.

B. ISSUES TO BE DECIDED

- 7. Has the Minister has [*sic*] correctly determined that the Appellant is not an eligible individual for the CCTB for the qualified dependants, Vanessa, Naomi, and Brandon, for the period January 2004 to January 2005 and that hence the Appellant has been overpaid the [*sic*] CCTB for this period?
- 8. Is there any issue in litigation for the base year 2004?

C. STATUTORY PROVISIONS, GROUND RELIED ON AND RELIEF SOUGHT

- 9. He relies on sections 122.6, 122.61 and 171 of the *Income Tax Act* R.S.C. 1985, c.1 (5th Supp.) as amended (the “Act”).
- 10. He submits that the Tax Court of Canada has to dismiss the appeal for the base year 2004 as The Tax Court of Canada has no jurisdiction to hear this appeal, the reason being that in regards to the 2004 base year the Appellant has received the maximum CCTB benefits available to him as an eligible individual for the period of July 2005 to June 2006.

11. He submits that the Minister has correctly determined that for the base years 2002 and 2003 the Appellant was not an eligible individual for the period of January 2004 to June 2004 for the base year 2002 and from July 2004 to January 2005 for the 2003 base year for the qualified dependants, Vanessa, Naomi, and Brandon, as the Appellant did not reside with the qualified dependants for the period January 2004 to January 2005, in accordance with section 122.6 of the Act.
12. He further submits that since the Appellant was not residing with qualified dependants for the period January 2004 to June 2004 for the base year 2002, and from July 2004 to January 2005 for the base year 2003 the Minister correctly determined that the Appellant was not the eligible individual entitled to receive the CCTB for this period for the qualified dependants, and accordingly had been overpaid for this period in accordance with section 122.61 of the Act, \$4,089 for the base year 2002 and \$4,970.74 for the base year 2003.

For these grounds, he requests that the appeal be dismissed.

[2] The Appellant gave evidence at the hearing and presented various documents but that evidence and the documents do not negate or destroy the assumptions of the Minister contained in the Reply to the Notice of Appeal.

[3] The requirements to entitle a parent to the Child Tax Benefit are that the parent be the primary caregiver of a qualified dependant and that the qualified dependant reside with that parent.

[4] It appears clear that the Appellant was indeed the primary caregiver of his two daughters and that they were qualified dependants; however, due to the unusual circumstances related to the two daughters and their health he was unable to fulfill the residence condition. The third child, Brandon, is not of concern in this appeal.

[5] What constitutes residence for purposes of the Child Tax Benefit has been discussed in many cases. The analysis most cited is that of Bonner T.C.J. in *R. (S.) v. R.* [2004] 1 C.T.C. 2386. That citation reads as follows:

12 The word "reside" with as used in the section 122.6 definition of the term "eligible individual" must be construed in a manner which reflects the purpose of the legislation. That legislation was intended to implement the child tax benefit. That benefit was introduced in 1993 with a view to providing a single nontaxable monthly payment to the custodial parent of a child. That payment was intended to benefit the child by providing funds to the parent who primarily fulfilled the responsibility for the care and upbringing of the child. The threshold test is whether the child resides with the parent. Physical presence of the child as a visitor in the residence of a parent does not satisfy the statutory requirement. The word "resident" as used in s. 122.6 connotes a settled and usual abode. The arrangement made between the Appellant and her former spouse with regard to S.F. recognized a need to separate S.F.'s settled and usual abode from that of T.

[6] The Appellant failed to establish a residence with the children concerned during the relevant periods and the assumptions contained in the Reply have not been refuted or destroyed. It is not sufficient to simply be the principal caregiver. Residence is essential. Because the Appellant resided in Australia and the children in question resided in Senegal, either under hospital care or with babysitters, the children did not reside with the Appellant. Visits from time to time do not satisfy the condition. As stated by Bonner, T.C.J. in the above decision there must be a settled and usual abode. Necessary hospital stays of a qualified dependant, even for a required extended period of time, who had been residing with the eligible individual, should not, in my opinion, necessarily lead to a conclusion that the concept of residence is lost, but the facts of this appeal do not establish that that was the case. Those facts are set out in the assumptions in the Reply. As mentioned, they have not been refuted or destroyed and are therefore assumed to be correct.

[7] For all of these reasons the appeal is dismissed.

Signed at Ottawa, Canada this 3rd day of August, 2007.

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"T. O'Connor"

O'Connor, J.

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COURT FILE NO.: 2006-3248(IT)I
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DATE OF HEARING: June 28, 2007
REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor
DATE OF JUDGMENT: August 3, 2007

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Julian Malone

COUNSEL OF RECORD:

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