Docket: 2005-3342(IT)I

BETWEEN:

GARTH STEPHENSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 12, 2007 at Winnipeg, Manitoba

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	Bernard J. Rodrigue
Counsel for the Respondent:	Ainslie Schroeder

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant be allowed the amount of $7,500 as a deductible support amount paid by him in that year.

Signed at Ottawa, Canada this 24th day of September, 2007.

"J.E. Hershfield"

Hershfield J.

Citation: 2007TCC559
Date: 20070924
Docket: 2005-3342(IT)I

BETWEEN:

GARTH STEPHENSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] Having conceded that other deductions claimed and denied in respect of the Appellant's 2003 taxation year are no longer at issue, the Appellant appeals the denial of a $7,500 deduction claimed in that year in respect of support payments made in that year to his former spouse.

[2] The facts and issue in this appeal are straightforward. The Appellant and his former spouse separated in 1998. Pursuant to an Interim Order of the Court of Queen's Bench of Manitoba made in that year, the Appellant was required to pay monthly spousal support in the amount of $2,000. The Appellant fell behind in payments and after losing his job in late 2001, a further Interim Order was sought and obtained in February 2002. This second Interim Order limited collectible support payments to $750 per month.

[3] In February 2003, a Final Order (consented to by counsel for each of the Appellant and his former spouse), was issued. At this time, it appears that arrears in spousal support payments were some $25,000.

[4] Section 4 of the Final Order set out support payment obligations as follows:

> 4.0 THIS COURT ORDERS pursuant to the *Divorce Act* that:
>
> 4.1 The obligation of John William Garth Stephenson to pay support for Joan Louise Stephenson is terminated effective February 25, 2003;
>
> 4.2 The total arrears of spousal support pursuant to the Order pronounced October 26, 1998 by Mr. Justice Mykle to February 25, 2003 are set at $7,500.00.
>
> 4.3 The arrears set out in the previous paragraph of this Order shall be paid to Joan Louise Stephenson as follows:
>
> 4.3.1 by two periodic payments *(tax-deductible to John William Garth Stephenson and taxable to Joan Louise Stephenson)*
>
> 4.3.2 by payment of $3,469.62 on May 22, 2003, and
>
> 4.3.3 by payment of $4,030.38 forthwith upon pronouncement of this Order.
>
> [Emphasis Added]

[5] At all times, the Appellant and his former spouse were represented by legal counsel and to that extent I am satisfied not only of the intent of the Judge - that the $7,500 payment of arrears be tax deductible - but, to the extent that it is relevant, I am satisfied, as well, that that was the well informed intent of the parties.

[6] Appellant's counsel argued that the payments made by his client to his former spouse pursuant to the terms of the Final Order, namely $7,500 in 2003, are payments of arrears and deductible as set down in *The Queen v. Barbara D. Sills (formerly Barbara D. LaBrash)*, [1985] 2 F.C. 200 (F.C.A.). As well, the Appellant relied on the case of *Norman C. Soldera v. The Minister of National Revenue*, [1991] T.C.J. No. 142 (T.C.C.) which held that a lump sum payment of arrears did not lose its character as a periodic payment for the purposes of paragraph 60(b) of the *Income Tax Act*. The late Chief Justice Garon of this Court found that the lump sum payment of arrears was deductible because it merely crystallized the amounts due periodically under a prior Order.

[7] Respondent's counsel argued that the payments in question settle all arrears and were thereby a capital payment pursuant to the Supreme Court of Canada decision in *The Minister of National Revenue v. John James Armstrong*, [1956] S.C.J. No. 22 (S.C.C.). Further, Respondent's counsel relies on two other cases, namely *Elizabeth E. Bates v. Her Majesty the Queen*, [1998] T.C.J. No. 660 (T.C.C.) for authority that the character of a payment, as taxable or not taxable, is not determinable simply by virtue of a characterization set out in an Order of a Court and on the case of *Susan Widmer v. Her Majesty the Queen*, [1995] T.C.J. No. 1115 (T.C.C.) wherein Justice Mogan found that a small payment of arrears made to settle a significant quantum of arrears was, in that case, a capital payment and had lost its character as arrears.

[8] While I agree that Judges of Family Courts have no jurisdiction to prescribe tax consequences in their Orders or Judgments, it is surely imperative to give effect to the expressly articulated intentions of an Order made by a Superior Court Judge where a reasonable construction of the terms of that Order allows it. Indeed, in this case, I find that the only reasonable construction of the Final Order is that it ordered the $7,500 be paid as arrears. It cannot reasonably be found to be an Order for the payment of the capital sum of $7,500 in consideration for the release of all arrears. Paragraph 4.3 of the Final Order expressly says it is "arrears" that are being paid. This overrides any suggestion in paragraph 4.2 or elsewhere that the $7,500 is a capital payment.

[9] Indeed, in general terms, it strikes me as somewhat contrary to the principles set down in *Sills* as followed in *Soldera*, to suggest that a payment of a portion of arrears should necessarily be seen as a capital payment just because the same Order terminates further obligations set under a previous Order. The character of payments as arrears cannot be so readily changed, particularly where all the parties have knowingly agreed that that was not the intention of the Order, as evidenced by the express reference in the Order to the payment being tax deductible. A Superior Court can without question order part payment of arrears due and with the same stroke of a pen terminate the balance of the arrears without necessarily tying the two events together as if the partial payment of arrears was consideration for the termination of the balance. A Court does not need consideration for the termination of a balance of arrears even in the case of an Order made with the consent of the parties.

[10] As well, I note (although a further finding of fact in support of allowing the Appeal is unnecessary) that the Interim Order of February 2002 appears in effect to have set new support payments and the Final Order in effect required that it was these arrears that had to be paid. In effect then, it was the arrears under the 1998

Interim Order that were terminated. Arguably, this further separates the $7,500 payment (being the arrears under the 2002 Interim Order) from the termination of the other arrears (being arrears under the 1998 Interim Order).

[11] In any event, I have no problem distinguishing the case at bar from the case in *Widmer*. In *Widmer*, Justice Mogan distinguishes *Soldera* on the basis of his accepting the fact that the Order in *Widmer* made the payment "appear to be something that it was not". This only confirms that Justice Mogan accepted that the intention of the Order, i.e. the intention of the Court, would not be given effect to find that the payment in that case was other than a capital payment. That is, the circumstances in that case encouraged a finding that the substance and intent of the Order was to treat the payment as consideration for the release of past due support obligations. That is far from the situation in the case at bar.

[12] As well, and importantly in my view, I suggest that the decision in *Widmer* is one that stands alone and is not a precedent of general application in circumstances such as those present in the case at bar where the Court making the Order has, acting within its jurisdiction and without misapplication of any principle of law, for all purposes characterized the nature of the payments. As I said in *Dale F. Hinkelman v. Her Majesty the Queen*, [2001] 3 D.T.C. 732 at paragraph 22:

> It should go without saying that giving full force and effect to an order of a Superior Court should be facilitated where possible. To do otherwise can do little else but undermine respect for and confidence in our judicial system.

[13] For these reasons the deduction in the amount of $7,500 is allowed as a deductible support payment made by the Appellant in his 2003 taxation year.

Signed at Ottawa, Canada this 24th day of September, 2007.

"J.E. Hershfield"

Hershfield J.

CITATION:	2007TCC559
COURT FILE NO.:	2005-3342(IT)I
STYLE OF CAUSE:	Garth Stephenson and

	Her Majesty the Queen
PLACE OF HEARING:	Winnipeg, Manitoba
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APPEARANCES:

Counsel for the Appellant:	Bernard J. Rodrigue
Counsel for the Respondent:	Ainslie Schroeder

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