Docket: 2009-2348(IT)I

BETWEEN:

MICHAEL BENINGER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 25, 2010, at Vancouver, British Columbia

Before: The Honourable Justice Pierre Archambault

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Max Matas

JUDGMENT

The appeals with respect to the 2006 and 2007 taxations years are allowed with cost and the assessment will be referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Beninger is entitled to deduct the following additional three amounts:

a) a $9,000 spousal support amount for the 2006 taxation year;
b) a $10,000 spousal support amount for the 2007 taxation year; and
c) $4,943.50 for the 2007 taxation year.

Signed at Ottawa, Canada, this 30th day of June 2010.

« Pierre Archambault »

Archambault J.

Citation: 2010 TCC 301
Date:20100630
Docket: 2009-2348(IT)I

BETWEEN:

MICHAEL BENINGER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on June 16, 2010, in City of Québec, Québec and modified for clarity and accuracy but without substantive changes.)

Archambault J.

[1] Mr. Michael Beninger is appealing income tax reassessments made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**Act***)* with respect to the 2006 and 2007 taxation years. The issue to be decided is whether Mr. Beninger is entitled to deduct in respect of spousal support payments he made in 2006 and 2007 amounts in excess of those allowed by the Minister and more specifically, whether an amount paid on account of arrears of spousal support, which arrears had been previously reduced by a court order, is nonetheless deductible in computing Mr. Beninger's income. The amounts in issue are $9,000 for 2006 and $10,000 for 2007. It should be stated that the Minister's representative admitted at the outset of the hearing that Mr. Beninger's appeal should be allowed for the 2007 taxation year so that an amount of $4,943.50 would be deductible in computing his income for that year.

[2] Before giving my reasons, I would like to point out that the Act allows the losing party (here the Respondent) to appeal my decision to the Federal Court of Appeal. In this event, this party may ask for a transcript of my reasons. The practice of this Court is generally to wait for one of the parties to ask for such transcript, whereupon a request for the transcript is made forthwith by the court to the official

Court stenographer. The transcript is given to the judge who heard the appeal for review. The judge may direct the personnel of the Court to forward it to the parties as is or he may decide to make minor modifications. In this latter case, the judge signs his reasons, which are then to be given to the parties, and the transcript is kept by the Court. As held by the Federal Court of Appeal in *Breslaw v. Canada (Attorney General)*, 2005 FCA 355, at paragraph 24, such modifications cannot be substantive. In this case, I intend to issue signed reasons. If after reading them a party is of the view that substantive modifications have been made to my oral reasons, that party may ask me to have the Court provide the transcript of my oral reasons as prepared by the stenographer so that it may be filed with the Federal Court of Appeal in order to enable it to exercise efficiently its appellate jurisdiction.

[3] For the record, and contrary to what was written by the Federal Court of Appeal in *Fortin v. Canada,* 2008 FCA 248, I neither in *Fortin* nor in *Brunet v. Canada,* 2007 FCA 196 (a case referred to in *Fortin*) did I refuse to provide the transcript of my reasons as prepared by the stenographer. In *Brunet*, it was the personnel of the Court who refused to provide the transcript, without consulting me before hand. The letter of refusal of the Tax Court's Registrar, reproduced in the Federal Court of Appeal's reasons in *Brunet* and again in *Fortin*, had been sent to Ms. Brunet after consulting with the then Chief Justice.

[4] Also for the record, the appellants in Fortin asked for the transcript of my oral reasons on the very day that they filed their appeal with the Federal Court of Appeal. Therefore, contrary to what is stated by the Federal Court of Appeal in paragraph 4 of its reasons, it was not "[o]wing to the belated filing of the reasons'' of Justice Archambault that the appellants, in their notices of appeal, reserved the right to amend those notices. Furthermore, contrary to the belief expressed by the Federal Court of Appeal in *Fortin* at paragraph 11, the transcript of my oral reasons existed at the time, as was also the case in *Brunet*, and those transcripts were never deleted.

[5] The rectifications in the preceding paragraphs have not been made before today because certain prior steps had to be completed.

Factual background

[6] There is no real dispute between the parties as to what took place. Indeed Mr. Beninger admitted all of the facts assumed by the Minister in issuing his assessment and outlined in paragraph 13 of the Reply to the Notice of Appeal, except for the last one, which is actually a conclusion of law as to the maximum deduction

available, namely an amount corresponding to the regular (paid on time) spousal support amount.

[7] Various court orders were filed as exhibits and they gave additional background to the situation of the former spouses. However, for the purpose of these reasons, I believe it is necessary to refer to the actual wording of only the order granting the spousal support, the order reducing the arrears of spousal support and the court's reasons for the latter order. Justice Cole issued the following order dated July 6, 2004 (**July 2004 order**) reducing the arrears from $69,416[1] to $20,000:

> The Defendant's arrears for support of the Plaintiff are reduced to $20,000, and the balance is cancelled, which reduced amount shall be paid in monthly payments of $500 commencing December 1, 2005.

[8] In his reasons, at paragraph 1, Justice Cole stated as follow: "The defendant, Michael John Beninger, applies to retroactively vary spousal [. . .] support payments as ordered by Mr. Justice Curtis on February 11, 2003.[2] What the defendant is, in fact, attempting to do is to cancel the arrears of spousal […] support and to vary the order in respect to […] spousal maintenance." Justice Cole reviewed some of the legal requirements for cancelling or reducing arrears. He referred at paragraph 31 of his reasons to the following statement made in *Earle v. Earle*, [1999] B.C.J. No. 383 (QL) (B.C.S.C.):

> Before a judge can change a maintenance order that has already been made, there has to be a material change of circumstances since the original order was made. That is, the change must be of the kind that, if known by the judge when the last order was made, would have resulted in a different order. The change must be significant and long lasting. Otherwise, there will be uncertainty, which is not in the best interests of children.
>
> [Emphasis added.]

[9] In setting out the facts, Justice Cole stated, at paragraph 5, that Mr. Beninger's income had been determined by Justice Curtis to be $312,000. Although he acknowledged that Mr Beninger had had health problems that affected his ability to earn income, that he had declared bankruptcy, that he had lost his employment on December 31, 2002 and that, therefore, his future employment was uncertain, Justice Curtis had stated that Mr. Beninger would "probably be employed successfully as a lawyer". He then fixed the spousal support payments at $6,500 per month (Exhibit A-12, par. 4).

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[1] See par. 6 of Exhibit A-7 and par. 21 of Exhibit A-12.

[2] I shall refer to this order as the "**February 2003 order**".

[10] However, the hopes of Justice Curtis were not fulfilled. Mr. Beninger was unable to find work as a lawyer for several reasons. In fact, he had to borrow money for living expenses and, not surprisingly, was not able to keep up with his spousal support payments. His arrears were calculated by Justice Cole to be $69,416, as of June 2004.

[11] Justice Cole justified his decision to reduce the arrears $20,000 and to cancel the balance in the following terms at paragraph 42 of his reasons:

> With respect to the arrears of spousal support, I have taken into account the amount of arrears of child support, the amount of payments that have been made from the date of the original order, the fact the defendant applied in July 2003 to have his spousal and child support varied. I have also considered the fact that the plaintiff has had to go into debt and sold assets in order to maintain herself and her daughter.

Position of the Minister

[12] Although this is not stated in the reply, the respondent takes the view that the reduction of the arrears to $20,000 had the effect of changing the nature of the payment owing by Mr. Beninger. The amount of $20,000 basically does not, according to the respondent, represent support payable on a periodic basis to Mr. Beninger's former wife but represents an amount paid for a release with respect to payment of the arrears. In support of this position, counsel for the respondent cited the decision of my colleague Justice Campbell in *Gill v. The Queen* 2008 TCC 473, 2008 DTC 4769 and [2009] 1 C.T.C. 2286. The key portions[3] of Justice Campbell's reasoning are at paragraphs 14, 15, 17, 19 and 23:

> [14] The Respondent also relied on the Federal Court of Appeal decision in *The Queen v. Sills*, 85 DTC 5096, which was decided prior to the legislative amendments in 1997. I believe *Sills* is decided correctly but it is inapplicable to the facts before me. The decision in *Sills* held that if a taxpayer pays a series of lump sum payments, although in irregular amounts, which catches him up on the arrears then the amount paid will be deductible because its nature and character have not changed. However, I believe that if the taxpayer pays an amount, that is less than the amount of the arrears owed but that will settle his liability for those arrears then it is not deductible as the nature of the payment has changed. In the present appeal, the Appellant paid $100,000 U.S. in lieu of the $370,000 he owed. It was a modification of the original arrears amount and according to the 2005 Agreement, and the evidence presented, it was paid to settle the entire outstanding arrears and release the Appellant from further liability in respect to

[3] These portions are also of interest because they refer to several cases in which a contrary position has been taken.

these past due arrears. I agree with J. Mogan's assessment of *Sills* in *Widmer v. Canada*, [1995] T.C.J. No. 1115 where he distinguished the facts of *Sills* from those before him. At paragraph 17 he stated:

> As I read the Sills decision, neither one of those thousand dollar payments was a lump-sum payment but was more in the nature of a catch-up payment. Also, as counsel for the Respondent indicated in argument, there was no second order of the Court in the Sills case as there was in this case.

The facts in *Widmer* were similar to those in this appeal. At paragraph 15 J. Mogan states:

> When the amount actually received ($15,000) is so different from and so much smaller than the amount owed ($50,590), I cannot regard the amount received as having the same character as the amount owed. In other words, I cannot regard the $15,000 amount received by the Appellant as having been received for the maintenance of the three children. In my opinion, this small amount was paid by David in one lump sum firstly, to obtain a release from his very real liability to pay the remaining $35,590, and secondly, to obtain a reduction in the aggregate amount of his monthly maintenance payments from $795 per month to $600 per month. In summary, the $15,000 amount was paid to obtain a release from existing obligations and a reduction in future obligations, and not for the maintenance of the three children.

[15] In *Soldera v. M.N.R.*, 91 DTC 987, also decided prior to the 1997 amendments, J. Garon determined that the lump sum payment made pursuant to a 1986 Order reduced the amounts owing under a 1983 Order. It reduced the Appellant's liability as of May 31, 1986 in respect to the arrears of maintenance, but did not alter the Appellant's liability respecting the existing or future maintenance obligations. At page 990, it states:

> First of all, in the 1986 Order there is no provision whereby the Appellant is released in express terms from any existing or future liability in respect of the maintenance of his children.

Soldera relies on the principles expressed in the decisions in *Armstrong* and *Sills* (page 989 of *Soldera*). The Respondent counsel distinguished *Soldera* from the present appeal because in *Soldera* there was no provision in the documentation that released the taxpayer from any existing or future liability respecting maintenance payments for the children. The Appellant in the present appeal was released from any liability concerning the past due arrears of $370,000 once the $100,000 U.S. was paid.

. . .

> [17] Many of the decisions decided by this Court in respect to this issue could be distinguished on the basis that the facts involved both arrears and future support payments (see also *Bégin v. Canada*, 2005 DTC 949; *MacBurnie v. Canada*, 95 DTC 686). What is common to all of the decisions is that they have been decided under the Informal Procedure and I am not obliged to follow any of them. I do not have to decide whether there is any difference between the liability for past due arrears and the liability for future payments of maintenance as this appeal deals only with past due arrears. I believe however that the same principles should apply whether the lump sum payment being made is in respect to the amount owed in the past or in respect to an amount that will be owed in the future.
>
> . . .
>
> [19] Even if I had determined that the $100,000 U.S. payment was a "support amount", in accordance with the definition in subsection 56.1(4), with the result that it would also have been a "child support amount", the 2005 Agreement clearly varied the 1993 Order, triggering a "commencement day"[4], with the $100,000 U.S. amount payable on or after that date. Therefore even if the facts in this appeal could support a finding that the amount was a "child support amount" in accordance with the definitions, it would not be deductible from the Appellant's income pursuant to subsection 60(b).
>
> . . .
>
> [23] The Appellant relied on the recent decision of J. Hershfield in *Stephenson v. Canada*, 2007 DTC 1608. In that case the taxpayer had accumulated arrears of spousal support in the amount of $25,000 pursuant to an Order in 1998. By a consent order, the taxpayer's obligation to pay spousal support was reduced to $7,500, to be paid in two tax-deductible amounts in 2003. J. Hershfield found that the $7,500 amount was a deductible support amount. Whether this decision is rightly or wrongly decided, there are several important distinguishing factors between the *Stephenson* decision and the present appeal. *Stephenson* involves spousal support and not child support amounts. There is no commencement day which is critical in this appeal. Because it is decided under the Informal Procedure, I am not required to follow it in any event.
>
> [My emphasis.]

Analysis

[13] The starting point for resolving the issues raised by these appeals is the wording of the Act itself. The provision allowing the deduction of the support amounts payable by Mr. Beninger is to be found in paragraph 60*(b)* of the Act, which reads as follows:

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[4] On the basis of this finding, Mr. Beninger argued that the reasons of Justice Campbell respecting the change in nature of the support payment constituted an *obiter dictum*.

> **60**. There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:
> [. . .]
> *(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 paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,
>
> [My emphasis.]
>
> [. . .]

[14] By virtue of subsection 60.1(4), the definition of "support amount" for the purpose of the above provision is to be found in subsection 56.1(4):

> **56.1(4)**
>
> "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
>
> [My emphasis.]
>
> [. . .]

[15] So the issue to be decided here is whether the $9,000 paid in 2006 and the $10,000 paid in 2007 on account of arrears of the spousal support payments first determined in the February 2003 order issued by Justice Curtis still constituted "an amount payable . . . as an allowance on a periodic basis for the maintenance of the . . . former spouse" after it was reduced by the July 2004 order of Justice Cole.

[16] There is no dispute that had the amounts in question been paid when due they would have qualified as support amounts and the Minister would not have disallowed their deduction. The Minister contends that the amounts paid as a result of the of July 2004 order, which reduced the arrears from $69,416 to $20,000, do not represent amounts paid for the maintenance of the former spouse but were, rather, amounts paid to obtain a release from an existing obligation. He bases this contention on the

following dictum of Campbell J. in *Gill* at paragraph 14: "if the taxpayer pays an amount, that is less than the amount of the arrears owed but that will settle his liability for those arrears then it is not deductible as the nature of the payment has changed".

[17] Given that the Minister did not make any assumption as to the nature of the payments made by Mr. Beninger, I believe that the conclusion arrived at by Justice Woods in *McLaren v. the Queen*, 2009 TCC 514, is fully applicable here:

> [5] In issuing the assessment in this case, the Minister did not make any assumptions as to the nature of the payments and accordingly the Minister has the burden to establish that the payments changed their character once the Final Order was issued.
>
> [6] This burden has not been satisfied. All of the evidence before me is consistent with the payments totaling $1,672 retaining their character as a payment of arrears owing. This is how the Final Order is worded and it is also consistent with Mr. McLaren's explanation as to how the settlement was arrived at.
>
> [7] I conclude that amount of $1,672 is deductible. The appeal will be allowed to that extent.
>
> [My emphasis.]

[18] The facts in *McLaren* are similar to the facts of this appeal. An interim order for the payment of spousal support of $1,200 per month had been issued in 2004. When the final order of divorce was issued in 2006, the judge modified the support payment requirement. Justice Woods described the situation in the following terms:

> [8] A final order of divorce was issued on June 27, 2006 pursuant to a settlement between the parties (the "Final Order"). In addition to granting the divorce, the judge modified the support payments. The relevant parts of the order provide:
>
> > 2. **AND THIS COURT ORDERS THAT** spousal support arrears shall be fixed in the amount of $11,781.00 and all other spousal support arrears are rescinded in their entirety.
> >
> > 3. **AND THIS COURT FURTHER ORDERS THAT** the said spousal support arrears as set out in paragraph 1 [sic] above shall be paid by the Respondent to the Applicant at the rate of $400.00 per month commencing October 1, 2006 and are payable on the 1st day of each month thereafter until payment is made in full.
> >
> > 8. **AND THIS COURT FURTHER ORDERS THAT** the Respondent's obligation to pay spousal support is hereby terminated.

> [9] When the Final Order was issued, there were arrears outstanding under the Interim Order of approximately $19,000 or $20,000 (Ex. A-2). The Final Order changed the spousal support under the Interim Order in three ways: (1) it rescinded outstanding support payments in excess of $11,781, (2) it modified the payment terms for the balance so that the monthly amounts were reduced to $400 and they were to begin on October 1, 2006, and (3) it terminated spousal payments effective from the date of the Final Order.
>
> [My emphasis.]

[19] Here, the February 2003 order of Justice Curtis was issued on the assumption that Mr. Beninger would be employed successfully as a lawyer. However, that assumption proved to be incorrect and Justice Cole took into account what actually happened. He decided that the arrears should be reduced to $20,000 and that the balance should be cancelled. Therefore there is no evidence of any change in the nature of the payments. On the contrary, what Mr. Beninger was ordered to pay was the support originally ordered in February 2003 but reduced as result of significant changes in the circumstances of the parties.

[20] The situation here is different from that in *Widmer*, the decision of Justice Mogan cited by Campbell J. in *Gill*. The reduced amount in *Widmer* was negotiated by the former spouses and so it could be argued that the amount was paid to obtain a release from an existing obligation and a reduction of a future obligation. Here, Mr. Beninger did not agree to pay any such amount. He wanted the full extinction of his past obligations. It was Cole J. who decided that Mr. Beninger's obligation should be the payment of a lower amount. He was not ordered to pay an amount in exchange for the reduction of his past liability.

[21] My conclusion that the arrears in the present case constitute a deductible spousal support amount is consistent with the decision of the Federal Court of Appeal in *Sills v. MNR, 1984 CarswellNat 514* [1985] 1 C.T.C. 49, [1985] 2 F.C. 200, 85 DTC 5096, in which Justice Heald stated at paragraph 9 (CarswellNat): "So long as the agreement provides that the moneys are payable on a periodic basis, the requirement of the subsection is met. The payments do not change in character merely because they are not made on time."(My emphasis.) Furthermore, given that no amount was paid in full settlement of all payments due or to become due under a particular order, the principle enunciated by the Supreme Court of Canada in *MNR v. Armstrong* ,1956 CarswellNat 212, [1956] C.T.C. 93, [1956] S.C.R. 446, 56 DTC 1044, does not apply. Moreover, when one reads the facts as described in the decisions of the lower courts in *Armstrong*, it is evident that the amount of $4,000 was paid for a release from future obligations and not for arrears. See for instance the decision of Porter J. in *MNR v. Armstrong*, 54 DTC 1104, at page 1104, where it is stated that payments were made under the decree *nisi* until or before June 30, 1950, and that the release agreement was also dated June 30, 1950.

[22] With the greatest respect for the contrary opinion, I do not believe that whenever a taxpayer pays an amount less than the amount of arrears of spousal support (or of any other deductible or taxable amount for that matter) one must automatically conclude that the amount so paid is not deductible or taxable because the nature of the payment has changed. For example, if an employee sues his employer for unpaid salary, the fact that he later accepts a lesser amount in satisfaction of the original claim does not mean that what he receives from, or what is paid by, his employer is not salary. The same logic would apply equally with respect to a creditor who sues his debtor for unpaid interest and who, for whatever reason, accepts in full satisfaction of the interest arrears a lesser amount.

[23] In my view, the situation is different where a person agrees to pay for being released from future obligations, such as the payment of a pension, an annuity or any other kind of future income. In such a case, a "capitalization" occurs. In the words of J. P. Hannan and A. Farnsworth, the authors of *The Principles of Income Taxation Deduced from the Cases*, (London: Stevens & Sons Limited, 1952) at page 287, "[c]apitalisation is simply the act of converting what would be income into what is capital". It is also enlightening to cite their observations on how the capitalization process works. At page 288, they state:

> Capitalisation looks to the future—that is, it operates on a right to *future income*. It cannot operate on arrears of what would have been income if it had been received. There is not any capitalisation if mortgagee receives payment of interest accrued

> over (say) ten years, or if he accepts in full settlement less than the amount actually owing. All that happens in either event is that a debt is paid; and that payment is, of course, a derivation of income by the mortgagee.
>
> [My emphasis.]

[24] Kellock J., at paragraph 7 (CarswellNat) of the Supreme Court decision in *Armstrong*, cited above, adopted this capitalization approach: "Such an outlay made in commutation of the periodic sums payable under the decree is in the nature of a capital payment to which the statute does not extend".[5]

[25] For all these reasons, the appeals of Mr. Beninger will be allowed and the assessments with respect to the 2006 and 2007 taxation years referred back to the Minister for reconsideration and reassessment on the basis that Mr. Beninger is entitled to deduct the following additional three amounts:

a) a $9,000 spousal support amount for the 2006 taxation year;
b) a $10,000 spousal support amount for the 2007 taxation year; and
c) $4,943.50 for the 2007 taxation year.

Mr. Beninger shall have his cost.

Signed at Ottawa, Canada, this 30th day of June 2010.

« Pierre Archambault »

Archambault J.

[5] As stated above, there were no arrears in that particular case.

CITATION:	2010 TCC 301
COURT FILE NO.:	2009-2348(IT)I
STYLE OF CAUSE:	MICHAEL BENINGER V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 25, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	June 30th, 2010

APPEARANCES:

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Counsel for the Respondent:	Max Matas

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