Docket: 2010-73(IT)I

BETWEEN:

KHELIFA LACHABI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 8, 2010, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant:	Paul N. Tardif
Counsel for the Respondent:	Darren Prevost

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2002, 2003, 2006 and 2007 taxation years are quashed;

The appeals from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years are dismissed.

Signed at Ottawa, Canada, this 27th day of October 2010.

"V.A. Miller"

V.A. Miller, J.

Citation: 2010TCC529
Date: 20101027
Docket: 2010-73(IT)I

BETWEEN:

KHELIFA LACHABI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The Appellant has appealed the reassessment of his 2002, 2003, 2004 and 2005 taxation years and the assessment of his 2006 and 2007 taxation years. The issues raised in this appeal are whether the Appellant had business losses of $6,066 and $4,282 in 2004 and 2005 respectively and whether the Appellant can deduct support payments in each of the years under appeal.

[2] As a preliminary matter, counsel for the Respondent made a motion to have the appeals quashed for the 2002, 2003, 2006 and 2007 taxation years on the basis that the Appellant had not served a Notice of Objection in respect to these years. In support of its motion, counsel filed the affidavit of Emil Varden, an officer of the Toronto Litigation Office of the Canada Revenue Agency (the "CRA"). That affidavit disclosed that the result of the reassessment of the 2002 taxation year was that there were no federal taxes owing. The affiant also stated that the Appellant's 2003 taxation year was reassessed on October 18, 2005; his 2006 taxation year was assessed on April 7, 2008; and his 2007 taxation year was assessed on July 30, 2009. The Appellant did not serve a Notice of Objection to these assessments nor did he make an application to extend the time to serve an objection.

[3] As a precondition to appealing to this court, a taxpayer must serve a notice of objection to an assessment on the Minister of National Revenue (the "Minister"). Section 169 of the *Income Tax Act* (the "Act") reads as follows:

> **169. (1) Appeal** -- Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either
>
> (a) the Minister has confirmed the assessment or reassessed, or
>
> (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,
>
> but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed

[4] In respect of the 2002 taxation year, there is no appeal from a notification that there is no tax owing[1].

[5] The Respondent's motion is granted and the appeals for the 2002, 2003, 2006 and 2007 taxation years are quashed.

[6] The Appellant was the only witness at the hearing. He was represented by Paul Tardif, an agent.

Support Payments

[7] The Appellant is seeking to deduct the amounts of $15,674 and $12,000 in 2004 and 2005 respectively which he stated he paid as support payments to his former spouse.

[8] The Appellant's testimony was as follows. He came to Canada from Jakarta, Indonesia in 1997. In 1998, he enrolled in the business administration program at Laval University in Quebec City. He graduated in 2001 with his Bachelor's degree.

[9] In 1998, the Appellant married Huda Brik, a non-resident of Canada. At the time of their marriage, Ms. Brik was living in Indonesia. The Appellant applied in 1998 to Citizenship and Immigration Canada to have his wife join him in Canada and this application was refused in 2001. A daughter, Nadine, was born to the Appellant and his wife on April 30, 1999. In February 2002, his wife applied for a divorce which was granted on September 9, 2002.

[10] The Decision for the divorce was written in the Indonesian language as it was from the West Jakarta Religious Court (the "Court"). The Appellant stated that he

had translated the Decision for this court's consideration because there was no one else in Toronto who could translate from Indonesian to English.

[11] According to the Decision, the Appellant's former spouse sought 210,000,000 rupiah to pay for living expenses which she had incurred during the marriage. She asked that this amount be paid immediately and in a lump sum. She also sought maintenance and education support for their daughter, Nadine, in the amount of 3,000,000 rupiah. The West Jakarta Religious Court considered the requests and denied the child support on the basis that it did not know the Appellant's income or his whereabouts. The Court wrote that the Appellant "should pay the Petitioner living expenses mentioned above and pay legal fee, which until now calculated at Rp. 194,000".

[12] The Appellant stated that he was unable to make a lump sum payment to his former spouse and they agreed, during a telephone conversation, that he could pay her the amount in installments. He tendered a document (exhibit A-1, document #5) which purports to be signed by his former spouse. The document has the heading "DECLARATION LETTER" and it, as well, was translated by the Appellant. In this letter, it is written that the former spouse received the following amounts from the Appellant:

YEAR	AMOUNT
2002	$389
2003	12,000
2004	15,674
2005	6,000
2006	11,750
2007	12,200
2008	8,000
2009	8,000
TOTAL	$74,013

[13] When I review the evidence, the pleadings and the representations made on behalf of the Appellant, I question whether the amounts listed in the Declaration Letter were ever made. First, the deductions for support payments claimed by the Appellant in his income tax returns do not match the amounts he now says he paid. According to the assumptions in the Reply to Notice of Appeal, the Appellant claimed the following deductions for support payments in his income tax returns:

a) In 2003, he deducted $883 as "other deductions";

b) In 2004, he deducted $15,674 as support payments;

c) In 2005, he deducted $12,000 as a business investment loss;

d) In 2006 and 2007, he deducted $11,750 and $12,200 as support payments

[14] Second, in his written representations, Mr. Tardif wrote that the Court award of 210,000,000 rupiah plus the legal expenses of 194,000 rupiah converted to $40,400 Canadian dollars. I have used the conversion rate that he quoted and I find that the award in Canadian dollars is $39,936.86. Regardless, I find it implausible that the Appellant would pay his former spouse the amount of $74,013 which was more than the amount awarded. It is also questionable whether the Appellant had the ability to pay the amount of money which he now says he paid. According to the agent's representations, the Appellant earned "no more than $24,000" in 2003 and 2004.

[15] Finally, the Appellant did not have any independent evidence to support his assertions. The two documents submitted to this court were translated by the Appellant. He did not produce any cancelled cheques or any documents to show that he had actually paid the amounts in issue.

[16] Assuming that the amounts were paid, they are deductible only if they are support amounts. The term "support amount" is defined in the *Act* as follows:

> **56.1 (4) Definitions** -- The definitions in this subsection apply in this section and section 56.
>
> **"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
>
> (b) the payer is a legal parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[17] According to the Decision given by the West Jakarta Religious Court, it did not order the Appellant to pay a support amount to his former spouse. The amount ordered was not payable as an allowance on a periodic basis for the maintenance of the former spouse. The amount was to be paid as a lump sum and it was for living

expenses and legal expenses already incurred by the former spouse and not for her maintenance in the future.

[18] The agreement between the Appellant and his former spouse did not alter the character of the Court award from a lump sum award to periodic payments. The payments listed in paragraph 12, herein, were not made on a periodic basis. The Appellant stated that he and his former spouse had agreed that the payments would be made when he could afford them over the period from 2002 to 2009. The payments, if they were made, were made for a fixed term. The payments were capital in nature[2] and they are not deductible by the Appellant.

Business Losses

[19] In 2004 and 2005, the Appellant provided translation services to different organizations at their place of business. The Appellant reported the following income and expenses:

	2004	2005
Professional fees	$ 2,972	$ 1,179
Expenses		
Association fees & donation	120	
Liability insurance	85	92
Bank interest & charges	168	188
Maintenance & repairs	380	513
Administration	2,039	2,625
Promotional gifts (50%)	1,500	750
Office expenses	189	95
Accounting & legal	135	107
Rental space	1,980	
Transportation & travel	3,190	798
Equipment & supplies	1,801	901
Total expenses	11,587	6,069
Home business expense adjustment	2,549	608
Deductible expenses	$ 9,038	$5,461
Net business income (loss) deducted from income	(6,066)	(4,282)

[20] There was some confusion in the Appellant's testimony. In direct examination, he stated that he had a home business and he submitted all receipts to the CRA. He did not tender any receipts at the hearing of his appeal. In cross examination he said that he had moved in 2005 and that he had lost all of his receipts.

[21] The Appellant described each of the expenses that he claimed. The professional fees were a donation to UNICEF as he did translation work for them and he thought it was good business to give them a donation. The liability insurance was for his home office. The Administration expenses were the cost of an electronic dictionary and newspapers. The expenses for Promotional gifts were actually the costs of meals he consumed during lunch time. The Office expenses were a portion of his costs for the telephone, fax and internet in his apartment. In 2004, he paid $750 monthly for a bachelor apartment and he claimed $300 monthly as a business rental expense. The Equipment and Supplies expenses were for a laptop computer in 2004 and an upgrade to his software in 2005.

[22] As a translator, the Appellant could earn $24/hr if he was hired by the Immigration and Refugee Board; $32/hr if he was hired by a court and $26/hr if he was hired by Citizenship and Immigration Canada. However, he could only earn a maximum of $24,000 annually and then he would not receive any further contracts with the government for that year. The Appellant stated that he sometimes had two hearings a day and that he traveled at least 15 times to Ottawa for work. I doubt that the Appellant received the number of contracts that he alleged. He reported that he earned only $2,972 and $1,179 in 2004 and 2005 from his work as a translator.

[23] The onus was on the Appellant to show that the assessments were incorrect. This he has not done. As stated by the Federal Court of Appeal in Njenga v. Canada, [1996] F.C.J. No. 1218 at paragraph 3:

> **3** The Income tax system is based on self monitoring. As a public policy matter the burden of proof of deductions and claims properly rests with the taxpayer. The Tax Court Judge held that persons such as the Appellant must maintain and have available detailed information and documentation in support of the claims they make. We agree with that finding. Ms. Njenga as the Taxpayer is responsible for documenting her own personal affairs in a reasonable manner. Self written receipts and assertion without proof are not sufficient.

[24] For all of these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 27th day of October 2010.

"V.A. Miller"

V.A. Miller, J.

[1] *Groulx v. R.*, 2009 FCA 10
[2] *McKimmon v. Minister of National Revenue*, [1990] 1 F.C. 600 (FCA)

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STYLE OF CAUSE:	KHELIFA LACHABI AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 8, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	October 27, 2010

APPEARANCES:

Agent for the Appellant:	Paul N. Tardif
Counsel for the Respondent:	Darren Prevost

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan,
Deputy Attorney General of Canada
Ottawa, Canada