Docket: 2010-3570(IT)I

BETWEEN:

ROLF STUDER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 13, 2011, at Prince George, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kristian DeJong

JUDGMENT

The appeals from the reassessments of the Appellant's 2008 and 2009 taxation years made under the *Income Tax Act* are dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of July 2011.

"G. A. Sheridan"

Sheridan J.

Citation: 2011TCC322
Date: 20110704
Docket: 2010-3570(IT)I

BETWEEN:

ROLF STUDER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Rolf Studer, is appealing the reassessments of the Minister of National Revenue disallowing his claim for a deduction for child support payments paid in 2008 and 2009 to his former spouse who is a resident of Switzerland.

[2] Neither the facts underpinning the appeal nor the amounts claimed by the Appellant are in dispute. He and his former spouse were divorced in Switzerland in 2005. In May 2008, the Appellant immigrated to Canada. By order of a court in Switzerland made in November 2008 and effective August 2008, the Appellant was required to pay and duly paid to his former spouse in Switzerland 750 Swiss francs per month as child support for their son.

[3] While acknowledging that if he and his former spouse were resident in Canada, these amounts would not be deductible under paragraph 60(*b*) of the *Income Tax Act* because the Swiss child support order was made after April 30, 1997, the Appellant contended that the child support amounts ought to be deductible under Article 18(2)(d) of the *Canada-Switzerland Tax Convention*. The basis for his conclusion was a hypothetical fact situation set out in a Canada Revenue Agency guide entitled *Support Payments* illustrating the tax consequences for a recipient of spousal support from a non-resident:

> Carol and Doug divorced on December 23, 2009. Doug resides in Australia. Carol is a Canadian resident. Under a court order, Doug paid Carol $500 a month in spousal support beginning January 1, 2010.
>
> Under the terms of the Canada-Australia Income Tax Treaty, alimony and other maintenance payments are only taxable in the source country. The payment is taxable **only** in Australia.
>
> Carol must report $6,000 on line 128 of her tax return and she should also enter this amount on line 156 of her tax return. Carol may also claim $6,000 as a deduction on line 256 of her tax return because of the provisions of the Canada-Australia Income Tax Treaty.[1]

[4] Article 18.3 of the *Canada-Australia Income Tax Convention* provides that "[a]ny alimony or other maintenance payment arising in a Contracting State and paid to a resident of the other Contracting State, shall be taxable only in the first mentioned State".

[5] Article 18(2)(d) of the *Canada-Switzerland Tax Convention* reads as follows:

> 18.2 Notwithstanding anything in this Convention
>
> …
>
> (d) alimony and other similar payments arising in a Contracting State and paid to a resident of the other Contracting State who is subject to tax therein in respect thereof, shall be taxable only in that other State.

[6] The purpose of these provisions is to avoid "juridical double taxation", referring to circumstances in which a taxpayer is liable for tax on the same amount in more than one jurisdiction. To take advantage of the tax relief provided in the treaty provision a taxpayer must be able to show that he has had to pay tax on the same amount in the two jurisdictions subject to the treaty.

[7] In the present case, the Appellant made the following analogy between his situation and the scenario used in the Canada Revenue Agency guide:

> Rolf [the Appellant] and Daniela [his former spouse] were divorced on November 30, 2005. Daniela resides in Switzerland. Rolf is a Canadian resident. Under a court order, Rolf pays Daniela CHF750 a month in child support beginning August, 2008. Under the terms of the Convention between Canada and Switzerland

---

[1] See page 15 of Canada Revenue Agency Guide, *Support Payments*, attached to Appellant's Brief of Law.

> for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, alimony and other similar payments arising in a Contracting State and paid to a resident of the other Contracting State who is subject to tax therein in respect thereof, shall be taxable only in that other State.
> The payment is taxable only in Switzerland.
>
> Rolf may claim this amount as a deduction on line 256 of his tax return because of the provisions of the Convention between Canada and Switzerland.

[8] With respect, except to the extent they were both Canadian residents, the Appellant's situation does not correspond exactly with Carol's. The first distinction is that while they are both "support amounts", spousal support and child support payments trigger different tax consequences under the *Income Tax Act.* Another important difference is that Carol was the *recipient* of spousal support payments from a non-resident which, under Canadian law, were taxable in her hands. The Appellant, on the other hand, was the *payer* of child support payments to a non-resident. As such, he was neither liable for tax in Canada on the child support payments nor entitled to a deduction for them.

[9] As a result of these differences, the conclusion drawn by the Appellant in the second paragraph of his analogy does not follow. Carol was relieved from including the spousal support payments she would otherwise have had to include in her income under Canadian law and was allowed to deduct that amount only because the *Canada-Australia Income Tax Convention* provided that "alimony payments" (in her case, spousal support) are taxable only in the "source" country i.e., Australia. Unlike Carol, the Appellant, as the payer of child support, was not liable in Canada for any tax on such amounts. As counsel for the Respondent noted, subsection 212(1)(*f*) of the *Income Tax Act* which, prior to April 1997 had required payers of child support to withhold tax on amounts paid to non-resident persons, was repealed concurrent with the amendments to the provisions governing the inclusion/deduction of child support payments after that time. Reference to this aspect of the law also appears at page 15 of the Canada Revenue Agency publication relied on by the Appellant in respect of payers of support payments to non-residents:

> **Payer**
> If you are a resident of Canada who makes support payments to a non-resident, you do not have to withhold tax on the payments. You can deduct the payments if the conditions outlined on pages 5 and 6 [not applicable to child support amounts] are met.

[10] In the present circumstances, the Appellant's situation does not fall within the ambit of Article 18(2)(*d*) of the *Canada-Switzerland Tax Convention* because he had

no tax liability in respect of the child support payments paid in 2008 and 2009. Further, Article 18(2)(*d*) cannot be relied upon to create a deduction not otherwise available to the Appellant under Canadian law for those amounts simply because they were paid to a non-resident who paid tax on them in Switzerland.[2]

[11] Accordingly, the appeals of the reassessments of the Appellant's 2008 and 2009 taxation years under the *Income Tax Act* are dismissed. Under the Informal Procedure, each party is responsible for his own costs.

Signed at Ottawa, Canada, this 4th day of July 2011.

"G. A. Sheridan"

Sheridan J.

---

[2] *Anstead v. Canada*, 2005 FCA 315 at paragraph 9. (FCA).

CITATION:	2011TCC322
COURT FILE NO.:	2010-3570(IT)I
STYLE OF CAUSE:	ROLF STUDER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Prince George, British Columbia
DATE OF HEARING:	May 13, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	July 4, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kristian DeJong

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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