

Docket: 2011-1147(IT)I

BETWEEN:

KEN HURST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 30, 2011, at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: David Heti, Student-at-Law

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment by the Minister of National Revenue of the 2008 taxation year dated June 4, 2009 is quashed; the appeal from the assessment of the 2009 taxation year dated May 6, 2010 is dismissed.

Signed at Ottawa, Canada, this 6th day of December 2011.

“G. A. Sheridan”

Sheridan J.

Citation: 2011TCC549
Date: 20111206
Docket: 2011-1147(IT)I

BETWEEN:

KEN HURST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] This matter concerns the deductibility of certain amounts the Appellant, Ken Hurst, paid to his spouse in 2008 and 2009 following their separation in July 2008.

The 2008 Appeal

[2] Upon the Respondent's motion, the appeal from the 2008 assessment dated June 4, 2009 was quashed at the hearing as Mr. Hurst had not filed a Notice of Objection in respect of it and a subsequent reassessment was issued on August 31, 2011 (Affidavit of Warren O'Dwyer sworn November 28, 2011).

The 2009 Appeal

[3] The facts underlying the appeal of the 2009 assessment are not in dispute. Mr. Hurst left the Matrimonial Home in July 2008. About a year later, on June 10, 2009, a Consent Order¹ ("June 2009 Order") was issued requiring Mr. Hurst to pay his spouse the following amounts:

¹ Exhibit R-1, Tab 3.

1. ... \$15,000 in full and final satisfaction of the underpayment of spousal support up to and including June 30, 2009, payable on or before July 13, 2009;
2. ... interim spousal support of \$2,650 per month on the first day of each and every month, commencing on July 1, 2009 [Emphasis added.]

[4] From the time of his departure from the Matrimonial Home in July 2008 to the June 2009 Order, there was no court order or written agreement requiring Mr. Hurst to pay support to his wife. Nevertheless, during that period, he paid property tax and hydro bills for the Matrimonial Home directly to the appropriate agency and paid various amounts to his wife for her use from time to time. The total paid prior to the June 2009 Order was \$16,065.22² (“Miscellaneous Payments”).

[5] Once the June 2009 Order had been issued setting spousal support at \$2,650 per month, the parties determined that from July 2008 to July 2009, Mr. Hurst should have paid to his spouse a total of \$34,450³. This was later reduced by \$2,650 to reflect the payment of interim spousal support due on July 1, 2009; the parties agreed that the balance outstanding was \$15,734.78⁴. Further negotiations ensued and this amount was rounded down to the \$15,000 amount referred to in paragraph 1 of the June 2009 Order (“Lump Sum Payment”).

Issue

[6] In his 2009 income tax return, Mr. Hurst claimed a deduction for spousal support in respect of the amounts paid from July 2008 to June 2009: the Miscellaneous Payments of \$16,065.22 and the Lump Sum Payment of \$15,000.

[7] The Minister rejected his claim on the basis that these amounts did not fall within the definition of “support amount” as defined in subsection 56.1(4) of the *Income Tax Act*, the relevant portions of which read:

² Exhibit R-1, Tab 1.

³ Exhibit R-1, Tab 1.

⁴ Exhibit R-1, Tab 4.

“support amount” means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, ... if the recipient has discretion as to the use of the amount, and

- (a) the recipient is the spouse ... of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage ... and the amount is receivable under an order of a competent tribunal or under a written agreement; or

...

[Emphasis added.]

[8] Mr. Hurst’s position was that until a monthly spousal support amount had been established by the family law court, he could not know how much he ought to be paying to his wife. Pending that determination, he tried to do the “right thing” by continuing to look after certain Matrimonial Home costs and helping his wife financially. He argued that it could be inferred from the June 2009 Order and correspondence between the parties that the Miscellaneous Payments and the Lump Sum Payment were intended as spousal support during the pre-June 2009 Order period and accordingly, the full amount ought to be deductible.

Analysis

[9] From a practical perspective, Mr. Hurst’s argument has a certain appeal. However, his entitlement to a spousal support deduction hinges not on common sense but rather on his being able to satisfy the technical criteria under the legislation. I regret to say this he has been unable to do.

[10] I agree with the submissions of Mr. Heti, Student-at-Law, that the nature of the Miscellaneous Payments and the Lump Sum Payment prevents them from falling within the definition of “support amount” under the *Act*.

[11] Turning first to the Miscellaneous Payments, Mr. Hurst freely admitted that these were made on a voluntary basis rather than pursuant to a Court order or written agreement as required under subsection 56.1(4). A further weakness is that the taxes and hydro payments were paid not to Mr. Hurst’s wife but directly to the agency in question, thus depriving such amounts of the “discretionary” quality contemplated by the statutory definition.

[12] As for the Lump Sum Payment, while in certain circumstances a lump sum payment may be characterized as a “support amount”, it is not possible to do so in the

present case. The Lump Sum Payment falls outside the definition of that term because it was neither made on a “periodic” basis⁵ nor linked to any pre-existing obligation⁶ to pay spousal support on a periodic basis. Underscoring this difficulty is the fact that the \$15,000 Lump Sum Payment does not correspond directly to the amount actually owing of \$15,734.78; to Mr. Hurst’s intense regret, it represents a settlement of arrears as negotiated between the parties. If it is any comfort to him, even had the amount not been rounded off, it would not have changed the legal character of the Lump Sum Payment. In these circumstances, the reference in the June 2009 Order to “the underpayment of spousal support” is not sufficient to convert the Lump Sum Payment into a “spousal amount” as contemplated by the *Act*.

[13] For the reasons set out above, the appeal from the assessment of the 2008 taxation year is quashed and the appeal from the assessment of the 2009 taxation year is dismissed.

Signed at Ottawa, Canada, this 6th day of December 2011.

“G. A. Sheridan”

Sheridan J.

⁵ *Tossell v. Her Majesty the Queen and Peterson*, 2005 DTC 5365 at paragraph 31. (FCA).

⁶ Above, at paragraph 36.

CITATION: 2011TCC549

COURT FILE NO.: 2011-1147(IT)I

STYLE OF CAUSE: KEN HURST AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 30, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: December 6, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David Heti, Student-at-Law

COUNSEL OF RECORD:

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Firm:

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