Docket: 2008-1493(IT)I

BETWEEN:

MARCIA CLARKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Respondent's Preliminary Motions and
Appeals heard on October 24, 2011, at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Roxanne Wong

JUDGMENT

Preliminary Motions

In accordance with the attached Reasons for Judgment, the Court hereby grants the Respondent's motion to quash the Appellant's appeals in respect of her entitlement to the Ontario Child Care Supplement for Working Families, the Canada Child Tax Benefit in the 2006 and 2007 base taxation years and the Goods and Services Tax Credit in the 2006 taxation year.

Appeals

In accordance with the attached Reasons for Judgment, the appeals of reassessments of the 2001, 2002, 2003, 2004 and 2005 taxation years are allowed and:

1. in respect of the 2001 and 2002 taxation years, the reassessments, including penalties, are vacated;

2. in respect of the 2003, 2004 and 2005 taxation years, the penalties are vacated;

3. in respect of the 2003 and 2004 taxation years, the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to childcare expense deductions as claimed, subject to the $7,000 limit imposed under section 63 of the *Income Tax Act*; and

4. in respect of the 2005 taxation year, the reassessment is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to a charitable donation deduction of $25 in 2005.

IT IS FURTHER ORDERED that the filing fee of $100 be refunded to the Appellant.

Signed at Ottawa, Canada, this 7th day of December 2011.

"G. A. Sheridan"

Sheridan J.

Citation: 2011TCC548
Date: 20111207
Docket: 2008-1493(IT)I

BETWEEN:

MARCIA CLARKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Marcia Clarke, is appealing various aspects of reassessments made by the Minister of National Revenue in respect of her 2001, 2002, 2003, 2004 and 2005 taxation years.

Respondent's Preliminary Motions

[2] At the commencement of the hearing, the Respondent moved firstly, that the Appellant's appeals in respect of her entitlement to the Ontario Child Care Supplement for Working Families be quashed. Counsel for the Respondent submitted that it was a provincial tax matter and therefore the Tax Court of Canada was without jurisdiction to entertain that aspect of the appeal. That being a correct statement of the law, the Respondent's motion was granted.

[3] Counsel for the Respondent further submitted that the Appellant's appeals of her entitlement to a Canada Child Tax Benefit ("CCTB") for the 2006 and 2007 base taxation years (July 2007 to June 2008 and July 2008 to June 2009, respectively) and to a Goods and Services Tax Credit ("GSTC") in the 2006 taxation year (July 2007 to April 2008) be quashed. Filed in support of the Respondent's motion was the Affidavit of Tracey Cooper which I am satisfied shows that the Appellant had not

properly objected to the Minister's determination regarding the CCTB and in respect of the GSTC, the Minister had not yet issued a determination. While it is not clear to me on the face of the Appellant's Notice of Appeal that she intended to appeal these matters, in the event that she did, the appeals are quashed on the basis set out above.

Respondent's Concessions

[4] At the hearing, counsel for the Respondent advised that the Minister was prepared to concede certain issues and submitted that the appeals ought to be allowed and:

1. in respect of the 2001 and 2002 taxation years, the reassessments, including penalties, be vacated as they were statute-barred;

2. in respect of the 2003, 2004 and 2005 taxation years, the penalties assessed be vacated as the Minister was not justified in imposing them;

3. in respect of the 2003 and 2004 taxation years, the reassessments referred back to the Minister for reconsideration and reassessment on the basis that the Appellant was entitled to childcare expense deductions as claimed, subject to the $7,000 limit imposed under section 63 of the *Income Tax Act*; and

4. in respect of the 2005 taxation year, the reassessment referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to a charitable donation deduction of $25 in 2005.

Issues Under Appeal

[5] The issues remaining have to do with the Appellant's entitlement, in various taxation years, to CCTB and GSTC payments as well as deductions for rental losses, childcare expenses and a charitable donation.

[6] Before disposing of these matters, a word must be said about the credibility of the Appellant and the reliability of the documents presented in support of her claims. I regret to say I found her testimony generally unconvincing. She often claimed to know nothing about or not to recall the details of events or transactions, especially where they might be to her detriment. For example, when asked about her marital status for the purpose of determining her entitlement to CCTB payments, the Appellant professed not to have known where her husband resided following their

separation, a position she maintained even when later confronted with evidence to show he was using her father's address as his residential address in his tax returns. She claimed she did not to remember her parents' address and further, that she had never discussed her separation from her husband with them. This, after her own testimony that during that period she had been in regular contact with her father who helped her financially by buying groceries and baby supplies and assisted her rental business by making repairs to the family home. The Appellant claimed not to know that her husband owned another property which he apparently rented to others and/or lived in himself at some point during their alleged estrangement but then reluctantly admitted she had heard something about this from unnamed "friends" sometime after the fact.

[7] Further, while claiming to be ignorant of tax matters, the Appellant's practices demonstrated a certain shrewdness in her financial transactions. For example, the Appellant dealt only in cash and kept records only where it was likely to be to her advantage. Her conduct is more consistent with a deliberate attempt to avoid detection by the tax authorities than a lack of knowledge of fiscal matters. What few documents she did produce tended to be self-serving and/or lacking in essential details i.e., receipts without the payer's full name or such basic information as to the purpose of the amounts receipted.

[8] The Respondent called Litigation Officer Tracey Cooper and the Appellant's husband, Wesley Clarke. Ms. Cooper was thorough and careful in the presentation of the information gleaned from reviewing the tax records of the Appellant and her husband. I have no reason to doubt her evidence. Mr. Clarke's testimony was as unpersuasive as the Appellant's.

1. CCTB and GSTC Payments

[9] The issue is whether the Appellant and her husband, Wesley Clarke, were living "separate and apart" so as to entitle the Appellant to receive CCTB payments during the base taxation years 2003, 2004 and 2005 and the GSTC for 2006. The Appellant had the onus of disproving the Minister's assumption that during the relevant period, the Appellant and her husband were living together in a conjugal relationship with their two children.

[10] The Appellant essentially asked the Court to take her at her word that as a result of his misconduct, the Appellant asked her husband to leave the family home in late 1999 or early 2000 and that he did not return until they reconciled their differences sometime in 2006. She provided no corroborating testimony or

documentation that would support her position that they were leading independent lives during that period.

[11] The Appellant's case did not become any stronger during cross-examination. She claimed never to have spoken to her father or other family members about the separation because it was a private matter. She admitted that after her husband's alleged departure, she took no legal action to protect her or her children's rights for support. She did nothing to stop the delivery of some of her husband's mail (including T-4's and other important employment documentation) to the family home address. She said her reason for not seeking sole ownership of their jointly owned family home was that she needed her husband's name on the deed to maintain the mortgage but provided no evidence as to why that would be. Though she claimed to have made all the mortgage payments herself, it was later revealed that Mr. Clarke's tax refund cheques were deposited in a joint account used for mortgage payments. While the Appellant initially said she had to rent the basement of the family home to help support herself, she later stated that "we" (meaning she and her husband) had "always rented our basement".

[12] All in all, the Appellant has failed to convince me that from 1999 to 2006 she and her husband were living "separate and apart" for the purposes of the *Act*. In these circumstances, there is no justification to interfere with the Minister's reassessment for the taxation years in question.

2. Business Losses from Property Rental

[13] The issue is whether in 2003, 2004 and 2005 the Appellant was in the business of renting out the basement of the family home and if so, whether she incurred the expenses claimed in her returns to generate the rental income reported.

[14] The Appellant testified that she rented the basement to students or families from time to time on a month-to-month basis at whatever the going rate for apartments might be. She provided no details of the nature of the rental accommodation. Her practice was not to have written agreements with any of her alleged tenants and only to accept rental payments in cash. The Appellant produced only a few sample receipts (Exhibit A-1). These receipts were not issued to the individuals whose names appear in them at the time the rent was paid; rather, the Appellant prepared the receipts annually (apparently at the request of her tenants) and only for the purpose of allowing them to claim provincial tax credits for rent. Most of the receipts are incomplete and/or contain inaccuracies: two are made out simply to "Vida"; receipt #3440 indicates that the amount was paid by "money order" but the

Appellant said this was wrong as it would have been in cash. Some bear the signature “Marcia Clarke”, others “Marcia Ferguson”, one is unsigned and in another the signature is illegible. The amounts receipted do not correspond with the rental income reported in the Appellant’s return for that year. Had the Appellant been a more credible witness, it might have been less important for her to have produced books and records in support of her position. As it was, the documentary evidence she relied on was no more convincing than the Appellant’s testimony.

[15] The Minister’s position is that the Appellant was not in the business of renting her basement and accordingly, no losses can be claimed in respect of it. As the Appellant has failed to rebut this assumption, there is no need to consider whether the expenses claimed in respect of the business were incurred. However, out of an abundance of caution, I would add the following: the Appellant had no documentary evidence in support of her claims other than a business card which she said was from someone who had done some repairs at some point. She also claimed that her father was a carpenter and that he had done some work on the house but she provided no proof of what work was done or that she had paid any amounts for it in any of the taxation years. The Appellant did not have any utility or tax invoices or receipts for her property. In these circumstances, I am not at all persuaded any of the expenses claimed were actually incurred.

3. Childcare Expense Deductions 2005

[16] The issue is whether in 2005 the Appellant incurred childcare expenses of $4,000, an amount she said she paid in cash to her childcare provider, “Lisa”. In support of her claim, the Appellant put in evidence a receipt purportedly received from Lisa (Exhibit A-4). The first problem with the receipt is that it was prepared by the Appellant herself because, as she blithely explained, Lisa was not reporting her babysitting income and therefore refused to provide her with the sort of details which might otherwise have given it some legitimacy i.e., Lisa’s surname, address or social insurance number.

[17] Leaving the unreliability of the receipt aside, I find it difficult to believe the Appellant would leave her son with a childcare provider about whom she knew so little. The one point upon which the Appellant was credible was in her explanation of the care she took in finding quality childcare for her little boy in 2003 and 2004. She had receipts from the Montessori school for those years which were ultimately accepted by the Minister. It simply makes no sense to me that this same woman would the following year leave her child with a virtual stranger, pay $4,000 in cash and not obtain any proof of payment. As a result, I am left with a serious suspicion

that no such payment was ever made. For that reason, there is no reason to interfere with the Minister's reassessment in respect of her childcare expense claim for that year.

4. Charitable Donation Issue

[18] In 2005, the Appellant reported total charitable donations of $5,125. As mentioned above, the Minister conceded that $25 of the amount reported was a valid charitable donation.

[19] The Appellant contended that the remaining $5,100 had been donated to a registered charity known as the "Africa Support and Sustenance Organization". This amount comprised cash payments totaling $2,000 and in-kind donations valued at $3,100. In support of her claim, she put in evidence a copy of a document entitled "Official Charitable Tax Receipt" (Exhibit A-7).

[20] She said that she had given the $2,000 cash payment to her tax preparer to donate on her behalf but that he had not given her a receipt for that amount. The in-kind donation she said was her late mother's bedroom set which the tax preparer arranged to have picked up from her garage.

[21] On cross-examination the Appellant said it was after having heard about the Africa Support and Sustenance Organization from a friend or colleague that she had decided to make her donation. Though she knew little about the charity, it was enough to know it had something to do with Africa.

[22] The Appellant admitted that after all deductions were made, she was left with barely enough to cover her living costs for herself and two children and that she received no support from her husband. The source of the funds used to donate to the Africa Support and Sustenance Organization was a cash bequest received from her late mother in 2001. The Appellant said she had also used this money to help support herself yet oddly, could not recall how much she had received. Furthermore, she had no testamentary documents to corroborate her story.

[23] The Respondent put in evidence an Affidavit sworn by Michael Scott[1], a director of the Africa Support and Sustenance Organization responsible for the preparation and filing of its financial statements from 2004 to 2007. The Appellant

[1] Exhibit R-4.

offered no response to his sworn statement at paragraph 5 "that the Africa Support and Sustenance Organization has never received any donations nor has the Organization ever issued any donation receipts" other than to say she had a valid receipt from the organization which, at the time she gave the cash and goods to her tax preparer in 2005, was shown as a registered charity on the Canada Revenue Agency website.

[24] The short answer to the Appellant's claim is that she is not entitled to the deduction claimed in respect of the donation allegedly made to the Africa Support and Sustenance Organization because the receipt entered as Exhibit A-7 does not meet the requirements of subsection 118.1(2) of the *Income Tax Act* and section 3500 and 3501(1) of the *Income Tax Regulations*. Exhibit A-7 does not set out "the place or locality where the receipt was issued" as required by paragraph 3501(1)(*d*) or "a brief description of the property" comprising the donation in-kind as required by subparagraph 3501(1)(*e.1*)(ii).

[25] Even if these requirements were met, however, I simply do not believe that the Appellant made a "gift" of $5,100 to the Africa Support and Sustenance Organization. The word "gift" is not defined in the legislation but in *The Queen v. Friedberg*, 92 DTC 6031 at page 6032, Linden J.A. defined "gift" as:

> … [A] gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor …

[26] The Appellant described herself as a woman with a modest income, abandoned by her husband with two children to support, forced to rent out her basement and relying on her father to make ends meet. Yet, in the same breath, she would have me believe that she was suddenly moved to make a sizeable donation to a charity about which she knew virtually nothing. She identified no credible source for the funds she alleged to have given to the Africa Support and Sustenance Organization; nor did she provide any evidence to corroborate her valuation of a used bedroom set (stored in her garage for four years) at $3,100. Bad enough to have cheated on her taxes; even worse for the Appellant to have passed herself off as a charitable donor in the process.

[27] In these circumstances, there is no justification for allowing more than the $25 amount conceded by the Respondent in respect of the 2005 taxation year.

Conclusion

[28] The appeals of the reassessments of the 2001, 2002, 2003, 2004 and 2005 taxation years are allowed only to give effect to the Respondent's concessions:

1. in respect of the 2001 and 2002 taxation years, the reassessments, including penalties, are vacated;

2. in respect of the 2003, 2004 and 2005 taxation years, the penalties are vacated;

3. in respect of the 2003 and 2004 taxation years, the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to childcare expense deductions as claimed, subject to the $7,000 limit imposed under section 63 of the *Income Tax Act*; and

4. in respect of the 2005 taxation year, the reassessment is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to a charitable donation deduction of $25 in 2005.

Signed at Ottawa, Canada, this 7th day of December 2011.

"G. A. Sheridan"

Sheridan J.

CITATION:	2011TCC548
COURT FILE NO.:	2008-1493(IT)I
STYLE OF CAUSE:	MARCIA CLARKE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 24, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	December 7, 2011

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Roxanne Wong

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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