Docket: 2011-1480(IT)I

BETWEEN:

ANDRÉE LARIVIÈRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

ROBIN DUPUIS,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 30, 2013, at Montréal, Quebec.
Before: The Honourable Justice Réal Favreau

Appearances:

Agent for the appellant:	Cédric Gaulin
Agents for the respondent:	Sara Jahanbakhsh Julien Wohlhuter (student-at-law)
For the intervener:	The intervener himself

AMENDED JUDGMENT

The appeal from the reassessment made on June 10, 2010, under the *Income Tax Act* for the appellant's 2009 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of March 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 9th day of May 2013
Daniela Guglietta, Translator

Citation: 2013 TCC 88
Date: 20130327
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REASONS FOR JUDGMENT

Favreau J.

[1] The appellant is appealing from a reassessment issued on June 10, 2010, under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) as amended (the Act), in which the Minister of National Revenue (the Minister) added to the appellant's income the amount of $21,871 that she received in the 2009 taxation year as support from the intervener.

[2] By Order dated June 13, 2012, the Court joined Robin Dupuis as a party to the appellant's appeal from the assessment made for the 2009 taxation year, in accordance with paragraph 174(3)(*b*) of the Act.

[3] In his 2009 federal income tax return, the intervener claimed a deduction of $20,103.69 in support amounts paid to the appellant.

[4] The Minister relied on the following findings and assumptions of fact to make and confirm the assessment:

[TRANSLATION]

(a) The appellant and Robin Dupuis married on May 4, 1985;

(b) The parties stopped living together on August 1, 2008, and were granted a divorce on February [*sic*] 28, 2009;

(c) According to the draft agreement signed by the parties on December 15, 2008, which was approved by the Superior Court of Quebec on January 28, 2009, the parties agreed as follows:

- The former spouse shall pay the appellant spousal support in the amount of $420 per week commencing November 10, 2008;
- The parties shall reduce the support amount when the family residence is sold as the wife's housing expenses will be lower than $1,700;

The spouse shall use the family residence until it is sold and shall pay all expenses related to the residence, namely municipal taxes ($166 per month), hypothec payments ($1,200 per month), insurance ($39.45 per month), Vidéotron ($130 per month) and Hydro-Québec ($166 per month), as she receives spousal support in which these expenses are accounted for.

(d) The payments were made to the appellant as an allowance on a periodic basis for her maintenance;

(e) The appellant had discretion as to the use of the amounts received.

[5] The appellant and the intervener testified at the hearing and a number of documents were filed. They included the following: the divorce judgment, the draft agreement signed by the parties, the intervener's federal income tax return for the 2009 taxation year with applicable schedules and various statements, a bank statement for the month of March for the joint account used to make hypothec payments and the consent signed by the parties to adjust the support amount following the sale of the family residence on January 20,2010, which was homologated and given legal effect by the Superior Court of Quebec on January 20, 2010.

[6] The testimony and documentary research revealed the following:

(a) The appellant and the intervener were married under the legislative regime of partnership of acquests, which was modified for the separation of property regime through a notarial deed on October 2, 1985;

(b) The draft agreement concluded on December 15, 2008, provides as follows:

(i) The intervener shall pay to the appellant spousal support in the amount of $420 per week (that is, $1,806 per month) commencing November 10, 2008;

(ii) The spousal support shall be reduced when the family residence located at 55 Lise Street in Saint-Jean-sur-Richelieu is sold as the appellant's housing expenses will be less than $1,700 per month;

(iii) Upon the sale of the family residence, the parties shall share equally in the net proceeds of sale, and the municipal and school tax adjustments shall be remitted to the intervener;

(iv) Until the family residence is sold, the appellant shall be solely responsible for all costs related to the residence totalling $1,701.45 per month, including the following:

-municipal and school taxes ($166 per month);
-hypothec payments ($1,200 per month);
-insurance ($39.45 per month);
-Vidéotron's cable and telephone services ($130 per month);
- Hydro-Québec electricity bills ($166 per month)

(c) The family residence was sold in January 2010, and on January 20, 2010, the parties entered into an agreement in which the intervener agreed to pay the appellant support of $750 per month for seventeen (17) months starting from the signing of the agreement until June 20, 2011.

Analysis

[7] The Minister relies on paragraph 56(1)(*b*), subsection 56.1(1) and the definition of the expression "support amount" in subsection 56.1(4) of the Act to justify adding to the appellant's income the amount of $21,871 that she received as support. The provisions read as follows:

> 56(1) (*b*) **Support** — 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 received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,
>
> B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and
>
> C is the total of all amounts each of which is a support amount received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;
>
> 56.1(1) For the purposes of paragraph 56(1)(*b*) and subsection 118(5), where an order or agreement, or any variation thereof, provides for the payment of an amount to a taxpayer or for the benefit of the taxpayer, children in the taxpayer's custody or both the taxpayer and those children, the amount or any part thereof
>
> (*a*) when payable, is deemed to be payable to and receivable by the taxpayer; and
>
> (*b*) when paid, is deemed to have been paid to and received by the taxpayer.
>
> 56.1 (4) The definitions in this subsection apply in this section and section 56.

. . .

> **"support amount"** — "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.

[8] The purpose of these statutory provisions is to define the support amount received by the taxpayer over the course of a year, which must be included in computing the taxpayer's income for the year.

[9] Prior to 1997, all amounts received as support payments had to be included in the taxpayer's income. Since 1997, child support amounts have been non taxable. Therefore, only amounts received that are not attributable to child support must be included in the recipient's income. It should be noted that, under subsection 56.1(4) of the Act, support is considered a child support amount if it is not identified as being solely for the support of a recipient who is a former spouse. In the case at bar, the support amount received by the appellant was paid solely for her maintenance, that is, it was used almost entirely to allow her to live in the family residence until it was sold.

[10] For an amount receivable to be considered a support amount, it is necessary, according to the definition of subsection 56.1(4) of the Act, that the amount be 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 if the conditions of paragraph (*a*) or paragraph (*b*) of the definition are met. The conditions of said paragraphs (*a*) and (*b*) have been met in the appellant and intervener's situation in this case.

[11] Indeed, the sole issue here is to determine whether the appellant had discretion as to the use of the support amount she received from the intervener.

[12] At the hearing, the appellant submitted that she had no discretion as to the use of the support amount she received from her former spouse. She had an obligation to comply with the divorce judgment, which confirmed the draft agreement signed by the parties on December 15, 2008, and which was attached to the divorce judgment as an integral part. Failure to pay the amounts provided for in section 9 of the draft agreement could have resulted in the appellant being charged with contempt of court.

[13] The appellant also argued that the hypothec payments of $1,200 per month (principal and interest) would become deductible in computing the intervener's income if the payments were considered as support amounts in respect of which the appellant could exercise discretion. In Canada, it is well-established that mortgage payments representing the repayment of the mortgage principal cannot be deducted in computing the payer's income. Interest payments cannot be deducted if they are incurred for the purpose of earning income.

[14] Finally, the appellant noted that the invoices from Vidéotron and Hydro-Québec were in the intervener's name and that she could not change them to her name. Since the family residence belonged to both former spouses, the appellant could not make any changes to the hypothec on it.

[15] Counsel for the respondent referred to the following decisions to argue that the appellant had discretion as to the use of the support amount:

-*Canada v. Pascoe* [1975] F.C.J. No. 139
-*Fontaine v. Canada* [1993] T.C.J. No. 587
-*Fry v. Canada* [1995] T.C.J. No. 223
-*Robert J. Byers v. The Minister of National Revenue* 85 DTC 129
-*Arsenault v. Canada* [1995] T.C.J. No. 241 and [1996] T.C.J. No. 202
-*Hak v. Canada* [1998] T.C.J. No. 921
-*McNeely v. The Queen*, 2008 TCC 450 (CanLII)

[16] In *Pascoe, supra*, the Federal Court of Appeal set out the following principle at paragraph 7:

> . . . An allowance is, in our view, a limited predetermined sum of money paid to enable the recipient to provide for certain kinds of expense; its amount is determined in advance and, once paid, it is at the complete disposition of the recipient who is not required to account for it. A payment in satisfaction of an obligation to indemnify or reimburse someone or to defray his or her actual expenses is not an allowance; it is

> not a sum allowed to the recipient to be applied in his or her discretion to certain kinds of expense.

[17] The term "allowance" was defined in subsection 56(12) of the Act by the introduction of subsection 34(6) of chapter 55 of the *Statutes of Canada, 1988*. Subsection 34(6) read as follows:

> 34(6) Section 56 of the said Act is further amended by adding thereto, immediately after subsection (11) thereof, the following subsection:
>
> > 56(12) Subject to subsections 56.1(2) and 60.1(2), for the purposes of paragraphs (1)(*b*), (*c*) and (*c*.1) (hereinafter in this subsection referred to as the "former paragraphs") and 60(*b*), (*c*) and (*c*.1) (hereinafter in this subsection referred to as the "latter paragraphs"), "allowance" does not include any amount that is received by a person, referred to in the former paragraphs as "the taxpayer" and in the latter paragraphs as "the recipient", unless that person has discretion as to the use of the amount."

[18] Subsection 56(12) of the Act re-established the concept of allowance, as defined by the Federal Court of Appeal in *Pascoe, supra*.

[19] The definition of the term "allowance" stopped being used in the Act following the repeal of subsection 56(12) by subsection 8(3) of chapter 25 of the *Statutes of Canada, 1997,* but the requirement that the recipient can exercise his or her discretion as to the use of the support amount was included in the definition itself of the expression "support amount" in subsection 56.1(4) of the Act.

[20] This means that the case law decided under the former *Pascoe* regime, *supra*, while subsection 56(12) of the Act was in existence continue to be applicable in determining whether a payment received by a recipient qualifies as a "support amount" within the meaning of subsection 56.1(4) of the Act.

[21] The facts described in *Fontaine v. Canada, supra,* and the arguments that were made therein are very similar to the facts of the present case and to the arguments made by the appellant. In *Fontaine*, clauses 2 and 5 of a judgment approving certain clauses of a consent signed by the parties read as follows:

> 2. The respondent agrees to pay for the plaintiff and her two children alimony of $255 a week payable in advance on the fifteenth of each month at the plaintiff's home, the said alimony to be indexed each year on the anniversary date of the judgment, the whole pursuant to section 638 of the Civil Code;

> 5. The plaintiff will pay the mortgage, tax and heating costs and all expenses relating to her home as long as she shall live in the matrimonial home.

[22] The appellant in *Fontaine* claimed, as does the appellant here, that the expenses related to the matrimonial home were not, according to her, fully at her disposal and should not therefore have been considered as a taxable allowance.

[23] In *Fontaine*, the Tax Court Judge did not accept the appellant's argument and dismissed her appeal.

[24] In *Arsenault v. Canada*, *supra*, the Federal Court of Appeal held that Mr. Arsenault's former spouse retained the discretion to decide how the sum of money was paid pursuant to the separation agreement and judgment and, as such, had discretion as to its use, even though the amount paid to her was in the form of cheques made payable to a third party that could not be used for any other purpose.

[25] A close reading of clauses 2, 3 and 9 of the draft agreement of December 15, 2008, reveals that the spousal support of $420 per week was determined by taking into account expenses related to the principal residence but that the obligation to pay the spousal support was not subject to any condition. Accordingly, the appellant had discretion as to its use.

[26] The obligation to pay the expenses related to the family residence was exclusively linked to the use of the residence until it was sold. It is, of course, understood that if the appellant had not paid the expenses related to the residence, the intervener would have had the right to take legal action against the appellant to receive indemnification for the damages and losses he may have suffered.

[27] The fact that the appellant was unable to make changes to either the ownership of the family residence or the hypothec on it, or the accounts with Hydro-Québec and Vidéotron Ltd., did not prevent the appellant from exercising her discretion as to the use of the support amount she received from the intervener.

[28] The appellant's tax policy argument that the deduction granted to the intervener for the support amount that he paid to her would amount to allowing a deduction for hypothec payments, principal and interest, is not relevant to this case.

[29] For these reasons, the appellant's appeal in respect of the 2009 taxation year is dismissed.

Signed at Ottawa, Canada, this 27th day of March 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 9th day of May 2013
Daniela Guglietta, Translator

CITATION:	2013 TCC 88
COURT FILE NO.:	2011-1480(IT)I
STYLE OF CAUSE:	ANDRÉE LARIVIÈRE AND HER MAJESTY THE QUEEN AND ROBIN DUPUIS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 30, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	March 27, 2013

APPEARANCES:

Agent for the appellant:	Cédric Gaulin
Agents for the respondent:	Sara Jahanbakhsh Julien Wohlhuter (student-at-law)
For the intervener	The intervener himself

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada