Citation: 2018 TCC 210
Date: 20181102
Docket: 2017-1737(IT)I

BETWEEN:

RONALD STEWART,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Lebel, D.J.

[1] The Appellant testified on his own behalf during the trial and tendered a separation agreement dated April 4, 2000 filed as Exhibit A-1.

[2] The Respondent did not tender any evidence at trial. The Minister's assumptions of fact are found at paragraph 15 of the reply to the notice of appeal dated June 26, 2017.

[3] The Respondent conceded that the appellant's credibility was not in issue in this matter. In fact, I found the Appellant to be credible and reliable. His evidence was not contradicted in any way and my findings of fact are based on his evidence which I accept in its entirety.

[4] The sole issue to be decided is whether all or part of spousal support claimed in excess of the amount allowed may be deducted in computing the Appellant's income for the 2015 taxation year.

[5] The Appellant and his former spouse Judith Louise Stewart entered into a separation agreement on April 4, 2000.

[6] Paragraph 15 of the separation agreement provided for medical and dental benefits as follows:

"15. **MEDICAL AND DENTAL BENEFITS:**

(1) Ron will maintain in force for the benefit of Judy his existing health and dental coverage with Great West Life Assurance Company, for so long as the benefit is available to him through his insurer, and after divorce if the policy permits.

(2) Ron hereby agrees that he shall not represent any one else as his spouse under the policy before the parties are divorced.

(3) Where Judy is obliged to pay for any services covered by such insurance, Ron will immediately endorse over to Judy any cheque he receives in reimbursement of amounts paid by Judy.

(4) If coverage is not available to Judy under Ron's policy after divorce, Ron hereby agrees that:

(a) Ron shall be responsible for payment in full of the premiums for the health care benefits available to Judy through Ontario Blue Cross (presently referred to as "First Choice Coverage"), or equivalent health care provided, provided that the premiums payable under the equivalent health care plan do not exceed the premiums payable for the "First Choice Coverage" by more than ten (10) percent, for the duration of Judy's lifetime. Ron agrees that his responsibility for payment of these premiums shall only be terminated on death of either of the parties.

(b) Ron will increase the total amount payable to Judy each month as periodic spousal support by the full amount of the monthly premium payable to Judy each month for the Ontario Blue Cross (or equivalent) health care coverage. Prior to the execution of this Agreement, Judy shall notify Ron of the quantum of the monthly premiums payable under the Plan, and thereafter Ron will pay any increases in the premium rate as are advised by Judy from time to time so as to ensure that Judy is fully covered under the said (or equivalent) medical plan at all time.

[Emphasis added.]

(c) Ron recognizes that there is a six-month implementation period for dental and vision coverage and agrees that he shall provide Judy with no less than six (6) months' notice of his intention to petition for divorce, so that Judy may arrange for Ontario Blue Cross (or equivalent) health care coverage at least six (6) months prior to the termination of her benefits available under Ron's policy.

[7] In his tax return for the 2015 taxation year, Mr. Stewart deducted the sum of $2,056.06 as spousal support for medical coverage. This former spouse claimed this amount as income in her income tax return. At paragraph 6 of the reply to the notice of appeal, the Attorney General of Canada states "With respect to paragraph 13, he states that the income tax filings of the Appellant's former spouse are irrelevant to his liabilities under the *Income Tax Act* and in any event are confidential under the *Act.*" With the greatest of respect, I reject this proposition. In my view, by claiming a set amount as income corroborates the intent of the parties that the medical payment was intended to be construed as periodic spousal support to Mrs. Stewart.

[8] Mr. Stewart acknowledged that the separation agreement did not specifically state that the amount paid for health coverage is deductible under sections 60.1[2] and 56.2 of the *Income Tax Act.*

[9] Mr. Stewart testified that the agreement that was actually made was that the spousal support would be increased by monthly payments for medical coverage. I find as a fact that she directed him to make the payments directly to Blue Cross on an annual basis to save some money and to convenience her. In other words, she directed him to make the payment on her behalf thereby exercising control as to how the money should be spent. Mr. Stewart testified that this payment constituted maintenance for the benefit of his former spouse. He further testified that she had discretion as to how she wanted the additional payment paid and I agree.

[10] Mr. Stewart emphasized that he could have easily paid his former spouse the amount prescribed in the separation agreement by increasing his monthly check to her and she could have deposited the check and written it to anyone she wanted for healthcare. Instead, she asked him to simply simplify her life and make the payment directly to Blue Cross on an annual basis

THE LAW

[11] Support payments to a third party are governed by section 60.1 of the *Income Tax Act:*

> **60.1(1) Support [payment made to third party]**
>
> For the purposes of paragraph 60(b) and subsection 118(5), where an order or agreement, or any variation thereof, provides for the payment of an amount by a taxpayer to a person or for the benefit of the person, children in the person's custody or both the person and those children, the amount or any part thereof

(a) when payable, is deemed to be payable to and receivable by that person; and

(b) when paid, is deemed to have been paid to and received by that person.

60.1(2) Agreement [to make third-party support payments]
For the purposes of section 60, this section and subsection 118(5), the amount determined by the formula

A – B

Where

A is the total of all amounts each of which is an amount (other than an amount that is otherwise a support amount) that became payable by a taxpayer in a taxation year, under an order of a competent tribunal or under a written agreement, in respect of an expense (other than an expenditure in respect of a self-contained domestic establishment in which the tax payer resides or an expenditure for the acquisition of tangible property, or for civil law corporeal property, that is not an expenditure on account of a medical or education expense or in respect of the acquisition, improvement or maintenance of a self-contained domestic establishment in which the person described in paragraph (a) or (b) resides) incurred in the year or the preceding taxation year for the maintenance of a person, children in the person's custody or both the person and those children, if the person is

(a) the taxpayer's spouse or common-law partner or former spouse or common-law partner, or

(b) where the amount became payable under an order made by a competent tribunal in accordance with the laws of a province, an individual who is a parent of a child of whom the taxpayer is a legal parent,

and

B is the amount, if any, by which

(a) the total of all amounts each of which is an amount included in the total determined for A in respect of the acquisition or improvement of a self-contained domestic establishment in which that person resides, including any payment of principal or interest in respect of a loan made or indebtedness incurred to finance, in any manner whatever, such acquisition or improvement

exceeds

(b) the total of all amounts each of which is an amount equal to 1/5 of the original principal amount of a loan or indebtedness described in paragraph (a),

> is, where the order or written agreement, as the case may be, provides that this subsection and subsection 56.1(2) shall apply to any amount paid or payable thereunder, deemed to be an amount payable by the taxpayer to that person and receivable by that person as an allowance on a periodic basis, and that person is deemed to have discretion as to the use of that amount.

[12] This section was dealt with by the Federal Court of Appeal in *Gaston Veilleux* and *Her Majesty the Queen*, 2002 FCA 201 per Létourneau J.A. :

> "[24] I prefer the approach taken by Judge Archambault of the Tax Court of Canada in *Pelchat, supra*, and *Ferron* v. *Her Majesty the Queen*, 2001 DTC 230, which is more representative of Parliament's intention, consistent with the wording itself of the statutory provision, and humane: an express reference to the numbers of subsections 56.1(2) and 60.1(2) is not required in the written agreement; it need only be apparent from the written agreement that the parties have understood the tax consequences of that agreement. A mere reference to the numbers of the subsections in the agreement is no better guarantee that the parties to the agreement understood their duties and their rights. On that point, stating and describing those duties and rights in the written agreement seems, in my view, to achieve Parliament's objective just as well as, if not better than, a mere magical reference to numbers of sections to substance of which I not stated in the agreement.
>
> [Emphasis added.]
>
> [25] Moreover, having regard to Parliament's objective in enacting sections 56 and 60, the parties' intention when they draft and sign the written agreement that will govern their financial relations after the divorce must be taken into account in interpreting subsections 56.1(2) and 60.1(2), which are tools for implementing the principle in sections 56 and 60. In *Gagné* v. *Her Majesty the Queen*, 2001 DTC 5639, at paragraph 10 (F.C.A.), which also involved the interpretation in a divorce situation, of an interim relief agreement that was ratified by a court. Décary J.A. writing for this Court, correctly summarized the principles that apply in such a case:
>
> > It is settled law, in Quebec civil law, that if the common intention of the parties in an agreement is doubtful, the judge [TRANSLATION] "must try to find what the parties truly intended by their agreement" Jean-Louis Baudouin, *Les Obligations*, 4th Ed., 1993, Les Éditions Yvon Blais, p. 255). The judge must [TRANSLATION] **"**place greater weight on the real intention of the contracting parties **than** on the apparent intention, objectively manifested by the formal expression (p. 255), and he must ascertain the effect that the parties intended the contract to have (p. 256). To do so, the judge must have a overall picture of the parties' intention, which calls for an analysis of all the clauses in the contract in relation to one another (p. 258). If

> there is any remaining doubt as to the parties' real intention, the judge may [TRANSLATION] "examine the manner in which the parties conducted themselves in relation to the contract, in their negotiations, and most importantly their attitude after entering into the contract, that is, the manner in which the parties have interpreted it in the past**..."**(pp. 258-259).
>
> [Emphasis added.]

> In determining that intention, and consequently the parties 'knowledge and understanding of their duties and rights, the written agreement, if it is clear, pays a crucial role. However, if the agreement is ambiguous or silent, the circumstances in which it was drafted and entered into and the parties' conduct after it was signed become relevant in determining that intention and knowledge. **It** will be recalled that the combined purposes of sections 56 and 60 and subsections 56.1(2) and 60.1(2) are to give divorced couples the option of reducing their tax burdens and to ensure that they are aware and informed of the consequences for both of them of doing so.
>
> [Emphasis added.]

APPLICATION OF THESE PRINCIPLES TO THE WRITTEN AGREEMENT IN THIS CASE

[13] The Appellant claimed spousal support payments in the amount of $17,089.12 in his 2015 tax return, consisting of two components: $15,033.06 paid in cash directly to his former spouse and $2,056.06 paid directly to Blue Cross to cover the cost of health care coverage for his former spouse. Canada Revenue Agency (the "CRA") denied the deduction for the amount paid to Blue Cross in the sum of $2,056.06.

[14] Paragraph 15(4)(b) of the separation agreement specifically states that Mr. Stewart "will increase the total amount payable to Judy each month as periodic spousal support by the full amount of the monthly premium payable to Judy each month for her Ontario Blue Cross health care coverage". The former spouse included in her 2015, income the amounts paid to her directly as well as the amounts paid to Blue Cross.

[15] In fact, it was the former spouse who directed the Appellant to pay the amounts directly to Blue Cross to save her time and to convenience her.

[16] The Appellant obliged and paid the annual amount premium to Blue Cross directly by way of a lump sum payment as opposed to monthly payments to his former spouse while negotiating the terms of the separation agreement. Mr. Stewart testified that it was always the intent of the parties to include payments as a spousal support.

[17] In my view, their subsequent conduct **regarding** this issue clearly reflect their intention. In the words of Létourneau J. at page 11 "if the agreement is ambiguous or silent, the circumstances in which it was drafted and entered into and the parties' conduct after it was signed become relevant in determining that intention and knowledge".

[Emphasis added.]

[18] The appeal is allowed.

Signed at Ottawa, Canada, this 2nddday of November 2018.

"J.G. Lebel"

Lebel, D.J.

CITATION:	2018 TCC 210
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sophie De Viller

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada