

Docket: 2016-1091(IT)I

BETWEEN:

GREGORY P BURTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 5, 2017, at Kelowna, British Columbia

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jamie Hansen

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**JUDGMENT**

IN ACCORDANCE WITH the Reasons for Judgment attached, the Appeal from reassessment made under the *Income Tax Act* for the Appellant's 2013 taxation year is dismissed, without costs.

Signed at Toronto, Canada, this 29<sup>th</sup> day of March, 2019.

“R.S. Boccock”

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Boccock J.

BETWEEN:

GREGORY P BURTON,

Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

Bocock, J.

#### Introduction

[1] This appeal concerns the deductibility of support payments paid by one separated or former spouse to the other. There is much litigation before this Court involving similar situations. The critical issue in this appeal is whether the terms of payments between the separated or ex-spouses comply with the very specific provisions within the legislation governing deductibility of such support payments.

[2] The relevant legislation, subsections 56.1(4) and 60.1(3) of the *Income Tax Act*, RSC 1985, c.1 (the “Act”), provides as follows (underlining added for emphasis):

#### **56.1(4)**

[ ... ]

***support amount*** means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient and and

the recipient is the common-law partner of the payer and the amount is receivable under an order of a competent tribunal or under a written agreement;

**60.1(3)** For the purposes of this section and section 60, where a written agreement or order provides that an amount paid before that time and in the year or the preceding taxation year is to be considered to have been paid and received thereunder,

(a) the amount is deemed to have been paid thereunder; and

[3] The appellant, Mr. Burton, made payments to his spouse during the 2013 taxation year. In that regard, and relevant to the appeal, he deducted support payments in the amount of \$23,281 and an allowable support deduction of \$5,120. Payments were also made in 2014 and 2015.

[4] The Minister allowed the deductions for the 2014 and 2015 taxation years, but not 2013. It is not disputed that a finalized separation agreement was ultimately executed on May 1, 2015. As such, the Minister asserts that taxation years 2015 and 2014, respectively, are “the year and previous year” within the language of subsection 60.1(2). By implication and assumption, the amounts paid in the 2013 year were before such a timeframe.

[5] Both Mr. Burton and his former spouse retained lawyers to assist with the negotiation of an agreement which would include spousal support. As noted, finalizing the arrangements took some time. That process generated correspondence. The initial bases for the ultimate agreement are two letters from the respective lawyers. The relevant content of each is summarized below:

(i) Mr. Burton’s counsel’s letter of December 6, 2013

We are counsel to Gregory Burton. Our client shares your client’s desire to resolve matters by agreement if possible and has instructed us to provide the following response to your proposal.

[...]

Spousal Support:

- Unless parties agree otherwise in the separation agreement, the payment of spousal support will commence after the sale of the family residence;
- Until August 21, 2018, Mr. Burton will pay spousal support of \$1,877 per month, representing the low end of the Spousal Support Advisory Guidelines (SSAG) range based on an income of \$151,710. (Enclosed please find our Divorcemate calculation.)
- Spousal support payments will be reviewed only in the following circumstances and only as to quantum:
  - if at any time before August 21, 2018, Mr. Burton loses his job or stops receiving a project premium;

- if at any time before August 21, 2018, Ms. Burton earns employment income exceeding \$40,000 annually; or
- if at any time before August 21, 2018, Ms. Burton marries or cohabitates with a new partner;
- Ms. Burton will have no entitlement to spousal support after August 21, 2018;
- The parties shall execute a prior support agreement, with the assistance of accountants if necessary, to characterize payments for tax purposes made by Mr. Burton on Ms. Burton's behalf since separation.

[...]

Note that the above proposal is provided solely for the purposes of facilitating a binding agreement between the parties. It is not an offer that can be accepted, and there shall be no binding agreement between the parties until the parties have executed a formal separation agreement.

Please let me know at your earliest convenience whether the above is acceptable to your client. I look forward to hearing from you soon.

(ii) The (ex) spouse's counsel's letter of January 7, 2014

Thank you for your letter dated December 6, 2013 which I have now had an opportunity to review with my client. My instructions are as follows:

- I am not clear at this point if anything turns on the date of separation. My client instructs me that they went to a relationship counselor in September with a view to continuing their marriage. In any event this may not be an issue if matters resolve;
- Thank you for the information on Mr. Burton's income. I would appreciate receiving tax returns once filed and a final 2013 paystub with year to date totals;

[...]

Guardianship and parenting arrangements

[...]

4. Agreed in principle but there may be some logistical problems that we should discuss first;
5. Mr. Burton's parenting time:
  - a. Agreed in principle depending on what rotation Mr. Burton works. We require clear details of his schedule before this clause is finalized. Also 48 hours' notice would be the minimal that would be acceptable;
  - b. Agreed however, based on how school schedules typically work for Christmas Break it is not guaranteed that one year will have Christmas and the next Boxing Day. We are prepared to agree that

it be halved on an alternating basis, but some years the half way mark may be after Boxing Day;

- c. Agreed;
- d. Given the schedule above I do not see how it is workable to divide other holidays on an alternating basis given your client's work schedule;

[...]

Child Support:

- 8. We require confirmation of your client's income. Please refer to our comments on the "interim agreement below"

[...]

- 12(d) I am not sure this is workable. Does this mean Mrs. Burton would need written approval before taking a child to the dentist? If so, we cannot agree;
- 13. Not agreed – the RESPs shall be joint;

Relocation:

- 14. 100 km is not workable. If my client was to move it would either be to Victoria BC (apx. 350 km) or to the lower mainland (apx. 200 km). In either event your client's parenting time would be easier because of each of those locations would have major airports (at least much larger than Powell River). In fact, I cannot think of many locations in BC that have a more extended commute to reach from the Interior than Powell River.

Spousal Support

- 15. Agreed;
- 16. This is again subject to confirmation of income. I am not certain what would justify the low end of the range, given that my client has young children, must retrain and has been a stay at home mom for the entire relationship. I would suggest the mid-range of support would be appropriate;
- 17. Review:
  - a. Agreed as long as those changes are not within Mr. Burton's control and that is his burden to prove;
  - b. Agreed
  - c. Marriage is agreed, cohabitate would need to state "lives in a marriage like relationship for a period of two years" which would trigger the review;
- 18. Five years is again the lowest possible range. I would suggest 7 years given the number of agreed to reviews that are in place;
- 19. Agreed – however more discussion on which payments and in what portion go to her benefit and the full amount of child support would come off the top because any of the balance would be deemed spousal

support; Clearly you and I would need some further discussions on this point, but again, we agree in principle;

[...]

Interim Agreement:

[...]

- 23. Not agreed
- 24. Not agreed;

[...]

I look forward to the requested disclosure so that we can continue to work towards a final resolution.

[6] Mr. Burton sought to argue during the hearing of evidence that one could deductively conclude that the two lawyer letters conjunctively and cumulatively formed a “written agreement” concluded as early as the calendar year 2014. This, in turn, is referable and applicable to the payments in the 2013 taxation year: the desired and necessary “previous year”.

[7] There was also a view expressed at the hearing that additional documentary evidence may exist to shed additional light and further support the view that a written agreement was concluded in 2014. If this were to be, then the 2013 taxation year would be the “previous” year. Respondent’s counsel agreed to delay submissions while such a search was conducted by Mr. Burton. One thing led to the next. The Court and the parties finally agreed the matter needed closure. Ultimately, Mr. Burton refrained from further submissions, although invited by the Court to do so. The Court now renders its judgment based upon the evidence and submissions at the hearing and the Respondent’s subsequent written submissions.

[8] Recently in a similar case, this Court reviewed the jurisprudence concerning the documentation or evidence necessary to conclude that a written agreement has indeed been achieved. In *Ryan v. HMQ*, 2018 TCC 257, this very Court stated the following concerning the lengths to which the Court will go to find a separation or support agreement has been concluded where subsequent part performance and continued affirmation of the terms exists. Specifically, the following was stated:

[8] In the context of an agreement, a mere confirmation of payment with a retrospective effective date is insufficient in the absence of a specific reference to prior payment and a characterization of the amounts as having been paid and received under the agreement: *Nagy v R*, 2003 TCC at paragraphs 6, 7 and 8.

[9] An agreement intended to be formed retroactively cannot reach back more than its current year or year immediately prior to its creation, and even then, must be clear as to the intention of both parties to allow the spousal amount deduction: *Witzke v Her Majesty the Queen*, 2008 TCC 596 at paragraphs 7 and 16.

[10] However, the existence of a written agreement need not be based upon formalistic structures; at the same time evidence of its existence must exceed merely cheques and receipts reflecting payment: *Connor v Her Majesty the Queen*, 2009 TCC 319 at paragraph 16, itself referencing *Fortune v Her Majesty the Queen*, 2007 TCC 20.

[9] Regrettably for Mr. Burton, the Court in this appeal cannot ford the gap. The lawyers' letters, when considered in their totality, leave considerable doubt in any reader's mind: where is there actual acceptance of the terms of spousal support resulting from the exchange?

[10] Express terms within the letters support the view that a binding, written agreement was not reached from the exchange. Firstly, within Mr. Burton's counsel's letter, the second last paragraph makes it clear that the proposal as a whole contained in the letter was not an offer which could be accepted and rendered binding "until the parties have executed a formal separation agreement." On this basis alone, unilateral acceptance by Mrs. Burton's lawyer could not have affected a binding, written agreement without a "formal separation agreement". The express "non-binding" term embedded as a final provision within his own lawyer's proposal letter precluded such from occurring.

[11] Secondly, such musing is hypothetical. There remained a least one-half dozen terms rejected outrightly by Mrs. Burton's lawyer. Further, other responses demanded further financial disclosure and information. Not only was this true within other headings in the response, but it was also manifestly present within at least 4 different provisions concerning "Spousal Support", namely, paragraphs 16, 17(a), 18 and 19.

[12] As stated, additional time has been afforded Mr. Burton to attempt to locate any additional evidence of the achievement of a binding, written agreement during the period after the exchange of lawyer letters and prior to December 31, 2014. This has not occurred. As such, the Court cannot conclude a written agreement creating an obligation to pay a support amount existed in the 2014 taxation year, in turn, referable back by virtue of subsection 60.1(2) to taxation year 2013, as the "previous year". Therefore, payments in 2013 were not support amounts within the

deeming provisions of subsection 56.1(4). For these reasons, the appeal is dismissed without costs.

Signed at Toronto, Canada, this 29<sup>th</sup> day of March, 2019.

“R.S. Boccock”

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Boccock J.



CITATION: 2019TCC67

COURT FILE NO.: 2016-1091(IT)I

STYLE OF CAUSE: GREGORY P BURTON AND HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: October 05, 2017

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.  
Bocock

DATE OF JUDGMENT: March 29, 2019

APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Jamie Hansen

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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