Docket: 2015-1407(IT)I

BETWEEN:

STEPHEN C LETORIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 18, 2015, at Prince George, British Columbia

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant:	Kevin Christieson
Counsel for the Respondent:	Jeff Watson

JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* with respect to the 2013 taxation year is dismissed.

Signed at Ottawa, Canada, this 11th day of September 2015.

"Campbell J. Miller"

C. Miller J.

Citation: 2015 TCC 221
Date: 20150911
Docket: 2015-1407(IT)I

BETWEEN:

STEPHEN C LETORIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] The difficult provisions of subsections 118(1), (5) and (5.1) of the *Income Tax Act* (the "*Act*") are once again before me. I expressed concerns in my Reasons in the case of *Ochitwa v The Queen*[1] vis-à-vis the application of these provisions and how the wording of an order or agreement can so significantly impact the entitlement to the subsection 118(1) of the *Act* credit. This case makes that point in spades. Mr. Letoria claims $11,038 for the eligible dependent amount pursuant to subparagraph 118(1)(*b*) of the *Act* and $2,234 for the child amount pursuant to subparagraph 118(1)(*b.1*) of the *Act*, both of which the Minister of National Revenue (the "Minister") has denied.

[2] The facts are straightforward.

[3] The Appellant and his former spouse were separated throughout 2013 due to the breakdown of their marriage. They had two children, both minors at the time. They shared custody of the children.

[4] Mr. Letoria claimed the eligible dependent amount and the child amount on his 2013 tax return in respect of one of the children. The Supreme Court of British Columbia issued an order (the "1st Order") on November 12, 2012. It required the

---

[1] 2014 TCC 263.

Appellant to pay his former spouse monthly child support of $962 commencing September 1, 2011 until further order. The Supreme Court of British Columbia issued a further order (the "2nd Order") on October 22, 2013. This order required the Appellant to pay his former spouse monthly child support of $746 commencing August 1, 2013.

[5] The wording of the orders that pertains to the 2013 taxation year is critical. The 1st Order filed in January 2013 reads in part as follows:

> 5.a. The Respondent will pay to the Claimant the sum of $962 per month for the support of the Children of the marriage, payable on the first day of each and every month, commencing on the first day of September, 2011, and continuing to the 1st day of each month thereafter until further order.
>
> b. On or before May 31, 2013 and on May 31 in each and every year thereafter, for so long as the children are "children of the marriage", the Claimant and the Respondent will provide to each other a copy of all documents required to be produced by them pursuant to Section 21(1) of the Federal Child Support Guidelines. The Respondent's basic child support payments will be adjusted annually to comply with the Federal Child Support Guidelines commencing on August 1, 2013 and the adjusted amount will be based on the previous year's income.

[6] The 2nd Order reads in part as follows:

> 2. By consent the Claimant's 2012 income for the purposes of the Federal Child Support Guidelines is $34,006, and the Respondent's 2012 income for the purposes of the Federal Child Support Guidelines $84,472.
>
> 3. By consent and based on the Federal Child Support Guidelines the Respondent would pay to the Claimant $1,271 a month for the children and the Claimant would pay to the Respondent $525 a month for the children.
>
> 4. By consent the Respondent will pay to the Claimant the offset amount of $746 a month for the children commencing August 1, 2013, based on the 2012 agreed annual incomes. This is decrease from the original Order amount of $962 a month registered January 4, 2013.

[7] The pertinent provisions of the *Act* are as follows:

> 118(1)(b) in the case of an individual who does not claim a deduction for the year because of paragraph 118(1)(a) and who, at any time in the year,

(i) is

(A) a person who is unmarried and who does not live in a common-law partnership, or

(B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common law-partner and who is not supported by that spouse or common-law partner, and

(ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is

(A) except in the case of a child of the individual, resident in Canada,

(B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,

(C) related to the individual, and

(D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,

an amount equal to the total of

(iii) $10,527, and

…

(b.1) $2,000 for each child, who is under the age of 18 years at the end of the taxation year, of the individual and who, by reason of mental or physical infirmity, is likely to be, for a long and continuous period of indefinite duration, dependent on others for significantly more assistance in attending to the child's personal needs and care, when compared to children of the same age if

(i) the child ordinarily resides throughout the taxation year with the individual together with another parent of the child, or

(ii) except if subparagraph (i) applies, the individual

(A) may deduct an amount under paragraph (b) in respect of the child, or

(B) could deduct an amount under paragraph (b) in respect of the child if

(I) paragraph (4)(a) and the reference in paragraph (4)(b) to "or the same domestic establishment" did not apply to the individual for the taxation year, and

(II) the child had no income for the year,

…

(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or

(b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (b) or (b.1) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

[8] The effect of these provisions is that if both parents are required to pay a support amount, then subsection 118(5) of the *Act* is inoperative and amounts under subsection 118(1) of the *Act* are deductible. The question is therefore - was Mr. Letoria's former spouse required to pay a support amount?

[9] I dealt with a somewhat similar situation in the case of *Ochitwa* where I stated:

> 8. While I cannot disagree with the Respondent's conclusions, I am perturbed by the implications that in the same circumstances of a shared custody arrangement, that simply due to the crafting of an order or agreement a parent will or will not get the eligible dependant amount. For example, where there is a shared custody arrangement with two children it strikes me there are three possible ways to craft the child support, where each parent earns some income:
>
> 1. Each parent agrees to or is ordered to pay support for one child ($400 for one for example and $300 for the other – net $100.00): both could claim the eligible dependant amount.
>
> 2. As in example 2 above, both parents agree or are ordered to pay support for both children (one pays $300 for example and one pays $400 – net $100.00: both can rely on subsection 118(5.1) of the Act kicking out the effect of subsection 118(5) of the Act).
>
> 3. As Mr. Ochitwa did, the higher earning parent is obligated to pay support for both children (net $100.00: no eligible dependant amount would be allowed).
>
> 9. So, same shared custody arrangement, same fiscal effect, but different result. This is unfortunate. Why should each parent (where both parents earn income), in a two or more child shared custody arrangement of at least two children, not be able to claim the eligible dependant amount – one child each? I suggest these provisions could be clarified to more clearly ensure the policy objectives are being met, presumably for the benefit of the children.
>
> 10. Ms. Softley, Respondent's counsel, suggested the case of Marc Verones v Her Majesty the Queen,[1] recently issued by the Federal Court of Appeal, is a complete answer to this case. It too involved a shared custody arrangement and an order representing a setoff of the amount the appellant in that case was required to contribute to the childrens' needs versus the amount the former spouse was required to contribute in accordance with the Federal Child Support Guidelines. The court found that:
>
> The whole discussion about the concept of setoff is a mere distraction from the real issue, ie. whether or not the appellant is the only parent making the "child support payment" in virtue of "an order of a competent tribunal or an agreement", as defined under the Act.

> …
>
> … the setoff concept does not translate the parents' respective obligation to contribute to child rearing into a "support payment" as defined in the Act.
>
> 11. I agree that the offset is just a means of determining who is required to make the payment: it is not an obligation of two support payments going both ways, but as I illustrated earlier, it could readily have been drafted to be otherwise.

[10] The 1st Order makes no mention of any possible obligation on Mr. Letoria's former spouse to make any support payment. Only Mr. Letoria is so obliged. As such, he is clearly caught by the provisions of subsection 118(5) of the *Act* which precludes him from getting the credit where he is "required to pay a support amount". He can be relieved of this prohibition, however, under subsection 118(5.1) of the *Act* if both he and his former spouse were required to pay support amounts. In such a case, the legislation recognizes an unfairness would result in that neither parent could claim a credit and, therefore, the legislation, in such a situation, renders subsection 118(5) of the *Act* inoperative. That is not, however, the situation under the 1st Order. Mr. Letoria's former spouse was not required to pay support amounts.

[11] With respect to the 2nd Order, the wording has changed to indicate that, based on the Federal Child Support Guidelines, Mr. Letoria's former spouse "would pay to the respondent" and yet in paragraph 4, it is made clear that Mr. Letoria "will pay to the Claimant the offset amount".

[12] Is paragraph 3 of the 2nd Order, a requirement that both spouses pay or is it simply an explanation of how the parties get to the offset amount of $746 which the 2nd Order explicitly states in paragraph 4 that "the Respondent will pay"? Mr. Letoria's agent argued the intent is clear that both parties are required to pay and, only out of convenience, especially in the Letorias' case where the matrimonial dispute was bitter, was there just the one payment. The agent went on, however, to suggest the agreements were drafted in error in not being more explicit. I agree. I do not read the 2nd Order as requiring Ms. Letoria to pay; only Mr. Letoria "will pay". That is clear. The rest of the order simply addresses the offset arrangement.

[13] The Federal Court of Appeal in the case of *Verones v The Queen*[2] said the following about offset:

> 6. The whole discussion about the concept of set-off is a mere distraction from the real issue, i.e. whether or not the appellant is the only parent making a "child support payment" in virtue of "an order of a competent tribunal or an agreement", as defined under the Act.
>
> …
>
> 8. Once each parent's obligation vis-à-vis the children is determined, the higher income parent may be obligated to make child support payments to the lower income parent as part of his or her performance of said obligation. However, in the end, the set-off concept does not translate the parents' respective obligation to contribute to child rearing into a "support payment" as defined in the Act.

[14] It follows that for subsection 118(5.1) of the *Act* to benefit Mr. Letoria by rendering subsection 118(5) of the *Act* inoperative, his former spouse must be required to pay child support under the order. She is not. The order is clear that the obligation rests solely with the higher income earner – Mr. Letoria.

[15] It is regrettable that those involved in counselling couples on breakup and drafting their agreements or orders are not intimately familiar with these tax provisions to ensure their clients get the credits they deserve.

[16] This order could have been drafted so as to impose an obligation on the former spouse. It was not. I cannot pretend that it was. Mr. Letoria is precluded by the operation of subsection 118(5) of the *Act* from claiming this credit and he is not saved by subsection 118(5.1) of the *Act*, as his former spouse had no legal obligation imposed by the order to make support payments.

[17] The Appeal is dismissed.

Signed at Ottawa, Canada, this 11th day of September 2015.

"Campbell J. Miller"

C. Miller J.

---

[2] 2013 FCA 69.

CITATION:	2015 TCC 221
COURT FILE NO.:	2015-1407(IT)I
STYLE OF CAUSE:	STEPHEN C LETORIA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Prince George, British Columbia
DATE OF HEARING:	August 18, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	September 11, 2015

APPEARANCES:

Agent for the Appellant:	Kevin Christieson
Counsel for the Respondent:	Jeff Watson

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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