

Docket: 2015-1835(IT)I

BETWEEN:

KEN BLUE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 21, 2015, at Saskatoon, Saskatchewan.

Before: The Honourable Justice Johanne D' Auray

Appearances:

For the Appellant:

The Appellant himself

For the Respondent:

Mike Colon, Student-at-Law

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* is allowed, without costs, on the basis that the appellant is entitled to deduct an amount of \$12,000 as a spousal support payment for his 2013 taxation year.

Signed at Montreal, Quebec, this 3rd day of December 2015.

“Johanne D' Auray”

D' Auray J.

Citation: 2015 TCC 304

Date: 20151203

Docket: 2015-1835(IT)I

BETWEEN:

KEN BLUE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D' Auray J.

[1] The question that I need to determine in this appeal is whether the appellant is entitled to deduct a lump sum payment for spousal support in the amount of \$12,000 for his 2013 taxation year.

Facts

[2] The facts are straightforward. The appellant and his spouse started living together in 1994 and married on August 1, 1998.

[3] In November 2012, the appellant and his spouse separated and have since been living apart.

[4] A Petition for Divorce was filed on February 6, 2013, before the Court of Queen's Bench of Saskatchewan (the "Saskatchewan Court").

[5] On March 7, 2013, the Saskatchewan Court ordered interim support payments, whereby the appellant had to pay to his spouse support payments of \$1,000 per month, commencing on April 1st, 2013 until September 1st, 2013.

[6] A divorce was granted by the Saskatchewan Court in December 2013. The appellant and his spouse entered into Minutes of Settlement, signed on December 18, 2013, whereby they agreed on spousal support payments and how

assets would be divided. These Minutes of Settlement formed an integral part of the divorce decree rendered by the Saskatchewan Court.

[7] Before the divorce was granted, the appellant's spouse had proposed spousal payments totalling \$85,200 over seven years. As seen below, this was ultimately revised to \$60,000 over five years. Paragraph 17 of the Minutes of Settlement set out the parameters of spousal support as follows:

SPOUSAL SUPPORT

17. The Respondent shall pay to the Petitioner a lump sum payment in the amount of \$60,000.00 as full and final satisfaction of the Petitioner's claim for spousal support. This payment shall be made in five (5) installments of \$12,000.00 per annum commencing December 18th, 2013 and on December 1st each year thereafter until the final payment is made on December 1, 2017.

Positions of the parties

[8] The appellant submitted that during the negotiations, the parties agreed the support payments would be paid on a monthly basis (\$1,000 per month). At the last minute, however, in order to minimize contact between the parties, the appellant suggested that he could make one payment of \$12,000 per year.

[9] The appellant submitted that I should take into account the intentions of the parties at the time of the negotiations. He stated that both parties understood that he would be entitled to deduct the support payments and that his former spouse would have to include such payments in her income for tax purposes.

[10] The appellant also relied on *Hanlin*¹ in support of the deductibility of the payments.

[11] The respondent submitted that the lump sum payments for spousal support are not deductible since the payments are capital in nature. The respondent relied on *McKimmon*² to support her position.

Analysis

¹ *Hanlin v Canada (Minister of National Revenue - MNR)*, [1985] 1 CTC 54, 85 DTC 5052.

² *The Queen v McKimmon*, [1990] 1 CTC 109, [1990] 1FC 600 [*McKimmon* cited to CTC].

[12] The relevant provisions of the *Income Tax Act* in this appeal are paragraph 60(b), which allows the deduction with respect to a “support amount”, subsection 56.1(4), which defines “support amount”, and subsection 60.1(4), which imports the definition of “support amount” into section 60. They read as follows:

60. There may be deducted in computing a taxpayer’s income for a taxation year such of the following amounts as are applicable: [...]

(b) 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 paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,

B

is the total of all amounts each of which is a child support amount that became payable by the taxpayer to 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 paid by the taxpayer to the particular person after 1996 and deductible in computing the taxpayer’s income for a preceding taxation year;

56.1(4) [...]

“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.

60.1(4) The definitions in subsection 56.1(4) apply in this section and section 60.

[Emphasis added.]

[13] Accordingly, an amount will be deductible as a “support amount” if:

- An allowance is paid on a periodic basis for the maintenance of the recipient.
- The recipient has the discretion to use the amount as he or she wishes.
- The recipient and the payer are living separate and apart.
- The amount is receivable under an order of a competent tribunal.

[14] In this appeal, only the first requirement listed above is in dispute.

[15] Support payments that are capital in nature are not deductible because payments must be made for the maintenance of the recipient.

[16] As argued by the respondent, the leading case on whether an amount paid by a taxpayer is a non-deductible capital payment or a deductible allowance for maintenance is the decision rendered by Justice Hugessen of the Federal Court of Appeal in *McKimmon*. Justice Hugessen stated that “the Court is required to look at all the circumstances surrounding the payment and to determine what, in light of those circumstances, is its proper characterisation”.³ He listed eight non-exhaustive factors that a court must take into account in determining whether support payments are paid as an allowance for maintenance or as capital payments.

[17] I will therefore apply the eight factors enumerated by Justice Hugessen in light of the circumstances surrounding the appellant’s payment to his former spouse.

[18] The first factor is the length of the periods at which the payments are made. Payments made at intervals of greater than one year would not normally be for maintenance. In this appeal, since the period is not greater than one year, this factor is in favour of the taxpayer.

[19] The second factor is the amount of the payments in relation to the income and living standards of the parties. As stated in *McKimmon*, where a payment

³ *McKimmon* at 112.

represents a very substantial portion of a taxpayer's income or even exceeds it, it is difficult to view it as being an allowance for maintenance. On the other hand, where the payment is no greater than might be required to maintain the recipient's standard of living, it is more likely to qualify as an allowance for maintenance.

[20] This factor favours the appellant. Contrary to the McKimmon's appeal, where the support payments represented a significant portion of Mr. McKimmon's income, the support payments in the case at bar do not represent a significant proportion of the appellant's income. The payment in issue represents 12.2% of the appellant's total income for his 2013 taxation year.⁴

[21] Furthermore, the payments are made by the appellant to maintain the recipient's standard of living. This follows from the observations that, firstly, the spouse's original proposal (\$85,200 over seven years) was based on the *Spousal Support Advisory Guidelines* and the payments in issue (\$60,000 over five years), though less in aggregate value, are sufficiently similar to the original proposal. Moreover, the amount of the payments is the same as the interim support payments made pursuant to the interim order dated March 7, 2013, (which were themselves deductible as support payments).

[22] The third factor is whether the payments bear interest prior to the due date. It is more common to pay interest on a capital payment than a payment for maintenance. This factor also favours the appellant since there is no interest on the spousal support payments.

[23] The fourth factor is whether the amounts can be prepaid or accelerated. Rights of prepayment or acceleration are associated with capital amounts rather than an allowance for maintenance. There are no such rights on the appellant's payments and thus, this factor favors the appellant.

[24] The fifth factor is whether the payments allow a significant degree of capital accumulation by the recipient. As I mentioned earlier, the appellant's payments correlate with the spouse's living standards. They do not allow her to accumulate a significant amount of capital. Accordingly, this factor plays in favour of the appellant.

[25] The sixth factor is whether the payments last for an indefinite period or for a fixed term. Since support amounts must be made for the maintenance of the former

⁴ The appellant's total income for his 2013 taxation year was \$97,794.

spouse, it makes sense that the payments last for an indefinite period. However, as stated in *McKimmon*, some allowances for maintenance may have fixed terms that end on some event (such as the coming of age of a child, at the time a pension kicks in, or after the completion of a degree). In this appeal, the appellant's former spouse would turn 63 years old when the support payments cease.

[26] I am of the view that the emphasis should be put on the purpose behind the payments. In this regard, the length of the period is not, *per se*, helpful. The period must be examined in light of the circumstances of each case to determine how far the period goes to suggest that the payments were either made for maintenance or for some reason other than maintenance. This factor, in my view, does not favour the appellant because the fixed term of five years does not do anything to support the notion that the payments were made for maintenance. Nor do I believe that this factor is against the appellant. In the circumstances, a five-year fixed term is not significant enough to somehow change the purpose of the support payments as discerned from the other *McKimmon* factors. Support payments do not have to last throughout the lifetime of the recipient to be deductible by the payer. I am therefore of the view that this factor is neutral.

[27] The seventh factor is whether the payments can be assigned and whether the obligation to pay survives the lifetime of either of the parties. If the payments can be assigned or are to survive either of the parties, the payments are likely capital in nature, since they are not made for maintenance purposes. For example, in *Trottier*,⁵ the payments in issue were made pursuant to a mortgage given by the taxpayer to the spouse. At the lower court level, the Exchequer Court noted that the agreement explicitly stated that the rights of the spouse were assignable and would pass to her heirs, executors, administrators or successors, as the case may be. In *Lam*,⁶ the separation agreement included a clause that read "Personal Representatives Bound: Unless otherwise expressly provided herein, this Agreement and every covenant, provision and term herein contained shall ensure to the benefit of and be binding upon the husband and the wife and each of them and their respective heirs, executors and administrators." This Court held that this meant the support payments would survive the death of the recipient.

[28] In contrast, the Minutes of Settlement in this appeal are silent on whether the payments can be assigned or survive the lifetime of the parties. It has long been held that an obligation to make support payments does not survive the death of the

⁵ *Trottier v Minister of National Revenue*, [1967] 2 Ex CR 268, [1967] CTC 28.

⁶ *Lam v Canada*, 2012 TCC 54, 2012 DTC 1091 (Informal Procedure).

payer unless explicitly provided for in the support order.⁷ Accordingly, I conclude that the appellant's obligation to pay does not survive his lifetime. This factor favours the appellant.

[29] The eighth factor is whether the payments release the payer from future obligations to pay maintenance. At paragraph 18 of *McKimmon*, Justice Hugessen describes this factor as follows:

Whether the payments purport to release the payer from any future obligations to pay maintenance. Where there is such a release, it is easier to view the payments as being the commutation or purchase of the capital price of an allowance for maintenance.

[30] Pursuant to the Minutes of Settlement, the amounts are made by the appellant "as full and final satisfaction of the Petitioner's claim for spousal support". This factor is not in favour of the appellant. As stated in *McKimmon*, this type of clause "suggests it is easier to view the payments as capital payments".

[31] Except for the eighth factor that is not in favour of the appellant and the sixth factor that is neutral, all the other factors established by the Federal Court of Appeal in *McKimmon* indicate that the support payments were for the maintenance of the appellant.

[32] I find that the release does not in this appeal prevent the deduction of the appellant's payment to his former spouse. *McKimmon* states that such a release is only one consideration among eight (and potentially more, since the list of factors is non-exhaustive) that the payment is a capital in nature. *McKimmon* does not state that any payments made pursuant to an agreement in which there is a release will be non-deductible capital payments.

[33] At the end of the day, the definition of "support amount" asks whether the payments were made for the maintenance of the recipient. The factors in *McKimmon* aid the Court in examining the true nature of the payments to determine whether they were so made. Applying the factors in *McKimmon* to the facts of the case, I conclude that the payment was made for the maintenance of the appellant's former spouse. The requirements found in the definition of "support amount" are met. The payments are an allowance for maintenance, paid on a periodic basis. The recipients are living separate and apart. The order was made by

⁷ See, for example, *Katz v Katz*, 2014 ONCA 606 at para 72, 377 DLR (4th) 264.

a competent tribunal. The recipient had complete discretion over the payments she received from the appellant.

[34] The payment made by the appellant, with respect to his 2013 taxation year, to his former spouse is therefore deductible.

[35] The appeal is allowed, without costs.

Signed at Montreal, Quebec, this 3rd day of December 2015.

“Johanne D’Auray”

D’Auray J.

CITATION: 2015 TCC 304
COURT FILE NO.: 2015-1835(IT)I
STYLE OF CAUSE: KEN BLUE v HER MAJESTY THE QUEEN
PLACE OF HEARING: Saskatoon, Saskatchewan
DATE OF HEARING: October 21, 2015
REASONS FOR JUDGMENT BY: The Honourable Justice Johanne D' Auray
DATE OF JUDGMENT: December 3, 2015

APPEARANCES:

For the Appellant: The Appellant himself
For the Respondent: Mike Colon, Student-at-Law

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada