

Docket: 2015-730(IT)I

BETWEEN:

RICK LUSCHTINETZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on September 3, 2015, at Vancouver, British Columbia.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Kristian DeJong

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**JUDGMENT**

The appeal from a reassessment dated October 24, 2013 concerning the 2012 taxation year and from an assessment dated July 10, 2014 concerning the 2013 taxation year, both made pursuant to the *Income Tax Act*, is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 10th day of December 2015.

“Réal Favreau”

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Favreau J.

Citation: 2015 TCC 320

Date: 20151210

Docket: 2015-730(IT)I

BETWEEN:

RICK LUSCHTINETZ,

Appellant,

and

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### **REASONS FOR JUDGMENT**

Favreau J.

[1] This is an appeal under the informal procedure from a reassessment dated October 24, 2013 concerning the 2012 taxation year and from an assessment dated July 10, 2014 concerning the 2013 taxation year, both made by the Minister of National Revenue (the “Minister”) pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) as amended (the “Act”).

[2] By way of the reassessment dated October 24, 2013, the Minister disallowed the following amounts claimed by the appellant in computing his non-refundable tax credits for the 2012 taxation year:

- \$10,822 for an eligible dependant (the “Eligible Dependant Amount 2012”);
- \$6,382 for children born in 1995 or later (the “Children Amount 2012”);
- \$11,948 for disability amount transferred from a dependant (the “Disability Amount 2012”).

[3] By way of the assessment dated July 10, 2014, the Minister disallowed the following amounts claimed by the appellant in computing his non-refundable tax credits for the 2013 taxation year:

- \$11,038 for an eligible dependant (the “Eligible Dependant Amount 2013”);
- \$2,234 for children born in 1996 or later (the “Children Amount 2013”);
- \$12,187 for disability amount transferred from a dependant (the “Disability Amount 2013”).

[4] In determining the appellant’s tax liability for the 2012 and 2013 taxation years, the Minister made the following assumptions of fact:

- a) the facts as stated and admitted above;
- b) Ms. Janet Lushtinetz was Appellant’s former spouse (the « Ex-Spouse »);
- c) The Appellant and the Ex-Spouse separated in 2011;
- d) the Appellant and the Ex-Spouse lived separately during the 2012 and 2013 taxation years;
- e) The Appellant and the Ex-Spouse have two children, J. L. born in 2002 and T. L. born in 2004 (the “Children”);
- f) T. L. was eligible for the Disability Tax Credit (DTC) since 2004;

Non-Refundable Tax Credits

- g) When Appellant submitted his 2012 T1 return, he claimed:
  - i) the Eligible Dependant Amount 2012 as a non-refundable tax credit for one of the Children;
  - ii) the Children Amount 2012 as a non-refundable tax credit for the Children in the total amount of \$6,382; and
  - iii) the Disability Amount 2012 transferred from a dependant as a non-refundable tax credit for T.L.;

- h) When Appellant submitted his 2013 T1 return, he claimed:
  - i) the Eligible Dependant Amount 2013 as a non-refundable tax credit for T.L.;
  - ii) the Children Amount 2013 as a non-refundable tax credit for the one of the Children; and
  - iii) the Disability Amount 2013 transferred from a dependant as a non-refundable tax credit for T.L.;

Court Order

- i) the Supreme Court of British Columbia issued an Order on June 7, 2012 (the "Order");
- j) the Order required the Appellant to pay the Ex-Spouse \$1,092 per month for child support for the Children commencing February 1, 2012;
- k) the Order required the Appellant to pay the Ex-Spouse \$900 for spousal support for the Ex-Spouse commencing February 1, 2012.

Support Paid

- l) during 2012 and 2013 taxation years, the Appellant paid the Ex-Spouse a minimum of \$1,092 per month for support for the Children;
- m) the Appellant claimed total support payment deductions of \$20,232 and \$24,822 for the 2012 and 2013 taxation years, respectively; and

Other Material Facts

- n) the Supreme Court of British Columbia issued an Order dated November 16, 2011 that the Appellant and the Ex-Spouse would have joint custody of the Children.

[5] The Appellant admitted all the assumptions of fact on which the Minister relied upon. The only issue is to determine whether the Minister properly disallowed the amounts claimed by the Appellant.

[6] The Minister disallowed the Eligible Dependant Amount 2012, the Eligible Dependant Amount 2013, the Children Amount 2012 and the Children Amount 2013, under subsection 118(5) of the *Act*, because the Appellant paid a child support amount on behalf of the Children during the 2012 and 2013 taxation years.

[7] The Minister disallowed the Disability Amount 2012 and the Disability Amount 2013, under subsection 118(5) of the *Act*, because the Appellant paid a child support amount on behalf of T. L. during the 2012 and 2013 taxation years.

[8] Paragraph 118(1)(b) of the *Act* permits an individual taxpayer, who does not claim the spouse or common-law partner amount under paragraph 18(1)(a), to claim a non-refundable eligible dependant credit for a dependant if certain conditions are met. This credit is also called the “Eligible Dependant Credit”.

[9] Paragraph 118(1)(b.1) of the *Act* permits an individual taxpayer to claim a non-refundable credit for each child under the age of 18. This credit is also called the “Child Tax Credit”. This credit can be claimed by either parent when the child lives with both parents throughout the year. If the child does not live with both parents, the credit may be claimed by the parent who is entitled to claim the Eligible Dependant Credit or who would be entitled to claim it if the child was the parent’s only child.

[10] Subsection 118.3(2) of the *Act* provides for the transfer to a taxpayer of a dependant’s disability tax credit. The disability tax credit may be transferred from a person for whom the taxpayer has claimed the Eligible Dependant Credit under paragraph 118(1)(b), the caregiver credit under paragraph 118(1)(c.1) or the infirm dependant credit under paragraph 118(1)(d).

[11] For the 1997 and subsequent taxation years, subsection 118(5) of the *Act* provides that a taxpayer may not claim a credit for a spouse, common-law partner or a child under subsection 118(1) if the taxpayer is required to pay a support amount, as defined in subsection 56.1(4), for the spouse, common-law partner or child and the taxpayer either:

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

(b) claims a deduction for the support payments.

[12] Subsection 118(5) reads as follows:

**Support** - 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.

[13] The meaning of "support amount" in subsection 56.1(4) is as follows:

*"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.

[14] This means that if a taxpayer lives apart from his or her spouse or common-law partner or former spouse or common-law partner and is required to make support payments for a dependant, the taxpayer is not entitled to claim a personal credit for the dependant under subsection 118(1) even if the taxpayer does not pay the support amounts or pays them but does not deduct them.

[15] Pursuant to the Order of the Supreme Court of British Columbia issued on June 7, 2012, the appellant was required to pay his former spouse:

- \$1,092 per month for child support for the children of the marriage commencing February 1, 2012; and
- \$900 per month for spousal support commencing February 1, 2012.

[16] The appellant was then required to pay support amounts, as contemplated by subsection 56.1(4) of the *Act*, and as a result of the application of

subsection 118(5), he was not entitled to the tax credits in respect of the Eligible Dependant Amount 2012, the Eligible Dependant Amount 2013, the Children Amount 2012 and the Children Amount 2013.

[17] The appellant was not entitled to the tax credits in respect of the Disability Amount 2012 and the Disability Amount 2013 transferred from T.L. because the appellant was not entitled to claim the Eligible Dependant Credit under paragraph 118(1)(b) in respect of T. L.

[18] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 10th day of December 2015.

“Réal Favreau”

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Favreau J.

CITATION: 2015 TCC 320

COURT FILE NO.: 2015-730(IT)I

STYLE OF CAUSE: Rick Luschtinetz and Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 3, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice R al Favreau

DATE OF JUDGMENT: December 10, 2015

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Kristian DeJong

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

William F. Pentney  
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