

Docket: 2015-787(IT)I

BETWEEN:

JEFF LEINWEBER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 29, 2016, at Winnipeg, Manitoba

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Neil Goodridge

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2012 taxation year is dismissed.

Signed at Ottawa, Canada, this 7th day of November 2016.

“V.A. Miller”

V.A. Miller J.

Citation: 2016TCC253

Date: 20161107

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Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether Mr. Leinweber is entitled to claim the tax credits for a wholly dependent person and the child amount in respect of his daughter “S” in his 2012 taxation year.

[2] Mr. Leinweber was the only witness at the hearing.

Facts

[3] Mr. Leinweber and his former spouse were married in 2003 and they had two children during their marriage. They commenced living separate and apart on December 11, 2011; and, on December 14, 2012, they entered into a Separation Agreement.

[4] According to the Separation Agreement, Mr. Leinweber was to pay child support to his spouse in the amount of \$472 monthly. Paragraph 7.01 in the Separation Agreement read:

7.01 Commencing July 1, 2012, the Husband shall pay child support to the Wife, pursuant to the Manitoba Table of the Child Support Guidelines Regulation in the sum of \$472.00 per month, payable in equal installments of \$236.00 the first and fifteenth day of each month thereafter, the foregoing representing offset child support based on the parties’ estimated 2012 incomes

based on their gross employment earnings as at the 15th pay period of 26 pay periods in 2012.

[5] The parties agreed that the Separation Agreement would survive the dissolution of the marriage and that the terms of the Separation Agreement would “continue in full force notwithstanding the issuance of a Divorce Judgment”.

[6] In 2012, Mr. Leinweber paid his former spouse \$472 each month as required by the Separation Agreement.

[7] Mr. Leinweber and his former spouse were divorced on March 11, 2013 and a Final Order was issued on that date by the Manitoba Court of Queen’s Bench (Family Division). The Final Order reiterated that Mr. Leinweber was to pay support of \$472 monthly to his former spouse. The relevant paragraph in the Final Order read:

7.0.13 JEFFREY PAUL LEINWEBER pay JENNIFER IVY HOLLAND LEINWEBER having shared custody of S born 2006, and M born 2008, JEFFREY PAUL LEINWEBER pay support to JENNIFER IVY HOLLAND LEINWEBER in the sum of \$472.00 per month in installments of \$236.00 on the first and fifteenth day of each month commencing December 15, 2012, until further Order of the Court;

[8] In his income tax return for the 2012 taxation year, Mr. Leinweber claimed a dependant amount of \$10,822 and a child amount of \$2,191 (the “Tax Credits”) in respect of one of his children.

[9] By notice dated March 6, 2014, the Minister of National Revenue (the “Minister”) reassessed Mr. Leinweber’s 2012 income tax liability to disallow the Tax Credits. The reason given for the reassessment was that Mr. Leinweber was required to pay support to his former spouse.

[10] In an attempt to be eligible to claim the Tax Credits, Mr. Leinweber and his former spouse, prepared an Addendum to Separation Agreement (the “Addendum”) on March 17, 2014. In the Addendum, Mr. Leinweber and his former spouse agreed to extinguish paragraph 7.01 of the Separation Agreement. In its place, they agreed to the following terms with respect to child support:

3.02 The parties have considered all aspects of the shared custody provisions of the Child Support Guidelines, including standards of living and that in order to accord with the provisions of *The Income Tax Act* to permit each party to claim a child as an equivalent to spouse in accordance with paragraph 7.14 of the parties’

Agreement, JEFFREY shall pay JENNIFER a sum each month, based on the set off principles, which for the purposes of same shall be defined as JEFFREY paying JENNIFER child support of \$1,284.00 per month for both children and JENNIFER paying JEFFREY \$812.00 per month for both children, for a net payment due and owing to JENNIFER of \$472.00 per month, payable in equal monthly installments of \$236.00 each, on the 1st and 15th days of the month, commencing July 1, 2012, until further agreement of the parties or court order.

[11] The Minister confirmed the reassessment for the 2012 taxation year and made the following assumptions of fact:

- a) Mr. Leinweber's former spouse is Jennifer Ivy Holland Leinweber (previously defined as the Former Spouse);
- b) Mr. Leinweber and the Former Spouse are parents of the Children;
- c) the Children are "S" born in 2006 and "M" born in 2008;
- d) in his 2012 personal income tax return, Mr. Leinweber claimed the Amounts in respect of "S";
- e) by agreement entered into on December 14, 2012 (the "Agreement"), Mr. Leinweber was required to pay the Former Spouse child support in the amount of \$472 per month with respect to the Children, commencing July 1, 2012;
- f) the Former Spouse was not required to pay Mr. Leinweber support for the Children under the Agreement;
- g) by addendum to the Agreement entered into on March 17, 2014 (the "Addendum"), no change was made to Mr. Leinweber's requirement to pay the Former Spouse child support in the amount of \$472 per month with respect to the Children, commencing July 1, 2012; and
- h) the Former Spouse was not required to pay Mr. Leinweber support for the Children under the Addendum.

[12] On September 8, 2016, Mr. Leinweber and his former spouse brought a Motion to Vary the Final Order which had been pronounced on March 11, 2013. The Variation Order was granted on September 15, 2016 so that paragraph 7.0.13 of the Final Order was deleted and replaced with the following:

7.0.13 JEFFREY PAUL LEINWEBER pay to JENNIFER IVY HOLLAND LEINWEBER the sum of \$1284.00 per month for S, born 2006 and M, born 2008 and JENNIFER IVY HOLLAND LEINWEBER pay to JEFFREY PAUL LEINWEBER the sum of \$812.00 per month for S, born 2006 and M, born 2008,

for a net payment to JENNIFER IVY HOLLAND LEINWEBER of \$472.00 per month payable in equal monthly instalments of \$236.00 each, on the 1st and 15th days of each month commencing July 1, 2012 until further Order of the Court.

Law

[13] For the purposes of the Tax Credits, a wholly dependent person and a child amount are defined in subsection 118(1) of the *Income Tax Act* (“ITA”) as follows:

118. (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year,

Wholly dependent person

(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

Child amount

(b.1) if

(i) a child, who is under the age of 18 years at the end of the taxation year, of the individual ordinarily resides throughout the taxation year with the individual together with another parent of the child, the total of

- (A) \$2,131 for each such child, and
- (B) \$2,000 for each such child 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, or

(ii) except where subparagraph (i) applies, the individual may deduct an amount under paragraph (b) in respect of the individual's child who is under the age of 18 years at the end of the taxation year, or could deduct such an amount in respect of that child if 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 if the child had no income for the year, the total of

(4) For the purposes of subsection 118(1), the following rules apply:

b) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (b) of the description of B in that subsection for a taxation year in respect of the same person or the same domestic establishment and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

(b.1) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (b.1) of the description of B in that subsection for a taxation year in respect of the same child and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

(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. (**emphasis added**)

Where subsection (5) does not apply

(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.

[14] A support amount is defined in subsection 56.1(4) as follows:

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. (pension alimentaire)

Analysis

[15] Mr. Leinweber and his former spouse have attempted to avoid the application of subsection 118(5) of the *Act* so that subsection 118(5.1) would apply to their circumstances. They altered their Separation Agreement by including the Addendum and when that proved not to be effective to avoid the application of subsection 118(5), they had the Final Order varied.

[16] It is my view that Mr. Leinweber did not succeed in avoiding the application of subsection 118(5). Neither the Addendum nor the Variation Order required the former spouse to pay a “support amount” within the meaning of subsection 56.1(4).

[17] The Addendum clearly stated that Mr. Leinweber “shall pay” his former spouse an amount based on the set-off principle. The parties defined “the set off principles” as “Jeffrey paying Jennifer” and “Jennifer paying Jeffrey”. That is not sufficient to meet the definition of support amount in subsection 56.1(4).

[18] The recipient of a support amount must have the discretion to use the amount as he pleases. According to the terms of the Addendum, only

Mr. Leinweber actually paid an amount. Therefore, only Jennifer received a support amount because only she had discretion as to the use of the amount in accordance with subsection 56.1(4).

[19] Although the Variation Order required each of Mr. Leinweber and his former spouse to pay an amount, it required that Mr. Leinweber make a “net payment” to his former spouse. Again only Mr. Leinweber is required to pay a support amount. Only his former spouse has discretion as to the use of the amount she received in accordance with subsection 56.1(4).

[20] In addition, the Variation Order does not have retroactive effect. It is effective from the date of the Variation Order which was September 15, 2016. There is nothing in the Variation Order which states that the Order itself is retroactive to and effective on July 1, 2012.

[21] As in *Verones v The Queen*, 2013 FCA 69, the real issue in this appeal is not the principle of set-off. It is whether Mr. Leinweber was the only parent making a “child support payment” by virtue of “an order of a competent tribunal or an agreement”. It is clear that the answer to that question is yes. Both parents may have an obligation to support their children but according to the wording of the Addendum and the Variation Order, that obligation translated into only Mr. Leinweber making a payment to his former spouse. He made the net payment of their two obligations.

[22] Subsection 118(5.1) is not applicable because both parents did not agree or were not ordered to pay a support amount.

[23] Unfortunately, I must dismiss Mr. Leinweber’s appeal.

[24] The appeal is dismissed.

Signed at Ottawa, Canada, this 7th day of November 2016.

“V.A. Miller”

V.A. Miller J.

CITATION: 2016TCC253
COURT FILE NO.: 2015-787(IT)I
STYLE OF CAUSE: JEFF LEINWEBER AND HER MAJESTY
THE QUEEN
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DATE OF HEARING: September 29, 2016
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller
DATE OF JUDGMENT: November 7, 2016

APPEARANCES:

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