

Docket: 2003-1405(IT)I

BETWEEN:

JEAN FALARDEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 18, 2003, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:

The Appellant himself

For the Respondent:

Agathe Cavanagh (articling student)

JUDGMENT

The appeal from the assessment made pursuant to the *Income Tax Act* for the 2001 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of December 2003.

“Paul Bédard”

Bédard J.

Translation certified true
on this 31st day of March 2009.
Bella Lewkowitz, Translator

Citation: 2003TCC689
Date: 20031202
Docket: 2003-1405(IT)I

BETWEEN:

JEAN FALARDEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] This is appeal under the Informal Procedure from a reassessment made by the Minister of National Revenue (the Minister) pursuant to the *Income Tax Act* (the Act) for the 2001 taxation year. In computing his income for the 2001 taxation year, the Appellant deducted an amount of \$7,000 as a support payment.

[2] The Minister granted the Appellant for 2001 a deduction in the amount of \$3,800 as a support payment and disallowed a deduction of \$3,200 for that same year.

[3] In making and confirming the reassessment, the Minister relied on the following facts outlined in paragraph 5 of the Reply to the Notice of Appeal:

[TRANSLATION]

- a) The Appellant and Ms. Chantal Legris (former spouse) separated in 2001;
- b) Their union produced Valérie, born November 26, 1991;

- c) On April 6, 2002, a motion for interim relief was heard at the Superior Court of Quebec;
- d) The interim judgment ordered the Appellant to make weekly support payments of \$200: \$100 for the child and \$100 for the former spouse; he was to assume all the costs related to the family home, medical and dental expenses for the child and former spouse, the psychologist fees for the former spouse, the cost of gas and vehicle maintenance, the child's tuition fees and all other expenses to do with the child; he was to pay, for the former spouse, the Master Card expenses up to a monthly average of \$400, said expenses including gas for the vehicle, and to be paid within 30 days of this judgment, an allowance for fees up to \$2,000;
- e) There is no other written agreement between the parties;
- f) In or around December 2002, the Appellant requested an adjustment to his income tax return for the 2001 taxation year;
- g) In his request, the Appellant claimed an amount of \$7,000 as support payments; of this, \$3,800 represented the weekly payments of \$100 to the former spouse and \$3,200 represented the monthly amount of \$400 towards the Master Card credit card;
- h) The Minister allowed the Appellant, based on the supporting documents submitted, a deduction of \$3,700 representing the weekly support payments for the former spouse; however, he disallowed the amount of \$3,200 for the credit card payment because first, it was not an allowance and second, the recipient did not have discretion as to the use of this amount.

[4] Only the Appellant testified at the hearing. He admitted to all the facts outlined in paragraph 5 of the Reply to the Notice of Appeal except subparagraph h).

[5] The Appellant submitted into evidence, as Exhibit A-1, the interim judgment of the Superior Court of Quebec. This judgment stipulated the following, among other things:

[TRANSLATION]

Judgment

The Court:

...

On an interim basis, the Court:

- Orders the petitioner to assume:
 - 1) all the expenses related to the family home, including, but not limited to, electricity, telephone, cable, etc....;
 - 2) medical and dental expenses for the mother and the child, and the psychologist fees for the mother and other similar expenses;
- Grants the mother exclusive use of the 1986 Cavalier;

Orders the petitioner to cover the cost of gas and vehicle maintenance; the gas will be paid for using the Master Card credit card;
- Orders the petitioner to pay support of \$200 per week: \$100 for the child and \$100 for the mother;
- Orders the petitioner to cover all of Valérie's tuition fees;
- Orders the petitioner to directly assume all the expenses for the child's needs including, but not limited to, her clothes, entertainment, vacation camps, etc....;
- Orders the petitioner to pay, on behalf of the respondent, her Master Card credit card expenses up to a monthly average of \$400; said expenses including gas for her vehicle;

[6] In his Notice of Appeal, the Appellant presents the following argument:

[TRANSLATION]

...

The argument is that payments made to a third party are not deductible if the recipient may decide how to use them. Here are all

the payments that I have made on the Master Card account of my former spouse from May to December 2001:

7-May-01	MASTERCARD	\$888.94
6-Jun-01	MASTERCARD	\$958.27
3-Jul-01	MASTERCARD	\$1,251.93
1-Aug-01	MASTERCARD	\$1,034.69
5-Sep-01	MASTERCARD	\$1,892.24
5-Oct-01	MASTERCARD	\$1,598.75
6-Nov-01	MASTERCARD	\$439.40
7-Dec-01	MASTERCARD	\$597.41
19-Dec-01	MASTERCARD	\$364.41
	Total	\$9,026.04

These payments include the amounts paid for our daughter and the amounts to pay for the maintenance of my former spouse's vehicle and medical expenses. **Thus I claim, as allowable support payments, only the monthly payments of \$400 for which my former spouse had complete liberty in deciding how to use.**

I agree that this type of payment is not common but the Master Card account is, in this case, simply used as a means of transferring money just like a bank account. With respect to the weekly support payment of \$100 that you recognized as an eligible support payment, the money was deducted from my salary by the Direction des pensions alimentaires and deposited into my former spouse's bank account. She could then spend the money as she saw fit with her debit card or by withdrawing cash. With respect to Master Card, I myself transferred the funds from my bank account to her Master Card account directly and she could use the money however she chose with the credit card or by withdrawing cash from the account. **So there is no difference. Master Card, like the bank account, is not a third party, as it belongs to my former spouse and she had the freedom to spend \$400 per month in any way she saw fit.**

I therefore ask you to please review my file and to readjust the amount allowable as a support payment to my former spouse from \$3,700 to **\$6,900** as she had **complete liberty** in terms of spending the monthly amounts of \$400. It is a simple question of "common sense".

...

[7] During his testimony, the Appellant essentially repeated the same argument.

Analysis

[8] Paragraph 60(b) of the Act enables the taxpayer to deduct amounts paid as support in computing income. This paragraph reads as follows:

Support

- 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;

[9] Subsection 56.1(4) of the Act defines the expression "support amount" used in paragraph 60(b) of the Act:

"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.

[10] Subsections 60.1(1) and 60.1(2) of the Act allow the taxpayer to deduct amounts paid to third parties as support in computing income. These subsections read as follows:

SECTION 60.1: Support

(1) For the purposes of paragraph 60(b) and subsection 118(5), where an order or agreement, or any variation thereof, provides for the payment of an amount by a taxpayer to a person or for the benefit of the person, children in the person's custody or both the person and those children, the amount or any part thereof

- (a) when payable, is deemed to be payable to and receivable by that person; and
- (b) when paid, is deemed to have been paid to and received by that person.

(2) **Agreement.** For the purposes of section 60, this section and subsection 118(5), the amount determined by the formula

$$A - B$$

where

A is the total of all amounts each of which is an amount (other than an amount that is otherwise a support amount) that became payable by a taxpayer in a taxation year, under an order of a competent tribunal or under a written agreement, in respect of an expense (other than an expenditure in respect of a self-contained domestic establishment in which the taxpayer resides or an expenditure for the acquisition of tangible property that is not an expenditure on account of a medical or education expense or in respect of the acquisition, improvement or maintenance of a self-contained domestic establishment in which the person

described in paragraph (a) or (b) resides) incurred in the year or the preceding taxation year for the maintenance of a person, children in the person's custody or both the person and those children, where the person is

- (a) the taxpayer's spouse or common-law partner or former spouse or common-law partner, or
- (b) where the amount became payable under an order made by a competent tribunal in accordance with the laws of a province, an individual who is a parent of a child of whom the taxpayer is a legal parent,

B is the amount, if any, by which

- (a) the total of all amounts each of which is an amount included in the total determined for A in respect of the acquisition or improvement of a self-contained domestic establishment in which that person resides, including any payment of principal or interest in respect of a loan made or indebtedness incurred to finance, in any manner whatever, such acquisition or improvement

exceeds

- (b) the total of all amounts each of which is an amount equal to 1/5 of the original principal amount of a loan or indebtedness described in paragraph (a),

is, where the order or written agreement, as the case may be, provides that this subsection and subsection 56.1(2) shall apply to any amount paid or payable thereunder, deemed to be an amount payable by the taxpayer to that person and receivable by that person as an allowance on a periodic basis, and that person is deemed to have discretion as to the use of that amount.

[11] It is possible, pursuant to subsection 60.1(1) of the Act, for payments to a third party to be in the nature of support, if this nature is clearly expressed in the order and that the recipient has some discretion as to the use of the payments.

[12] In this case, there is nothing to indicate this is a support payment. In the interim judgment, the judge ordered the Appellant to pay \$200 in support per week: \$100 for his daughter and \$100 for the mother (first order). She also ordered him to pay for the benefit of his spouse [TRANSLATION] “her Master Card credit card expenses, up to a monthly average of \$400...; said expenses including gas for her vehicle” (second order). In my opinion, in reading the second order, it would seem that these payments are not in the nature of support payments, as this is not clearly expressed as such as it was in the first order.

[13] It must now be determined if the second order gave the Appellant’s spouse some discretion as to the use of the amounts in question. The amount received is considered an allowance only if the recipient can use it at her discretion. The amount that is discretionary is the amount received. We must therefore consider the time the amount is received and not the time the obligation to pay it was created in order to determine if the recipient may use it at her discretion. Here, at the time when the Appellant paid the Master Card bill, the recipient could not say: “give me the money and I will pay Master Card”. The recipient could not insist the payment be made directly to herself rather than to Master Card. What the recipient could do with the Master Card seems irrelevant to me. For these reasons, I find that the Appellant’s spouse did not have discretion as to the use of the amounts in question.

[14] Finally, the Appellant cannot, in my opinion, rely on the provisions of subsection 60.1(2) of the Act to deduct the amount of \$3,200. Subsection 60.1(2) must be interpreted in such a way as to give it its effect, which is to provide adequate protection from tax for the beneficiaries of payments to third parties where those beneficiaries did not assume the tax burden in full knowledge of the facts. In this case, there is no mention in the order that the recipient consented to being taxed on the \$400 payment.

[15] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 2nd day of December 2003.

“Paul Bédard”

Bédard J.

Translation certified true
on this 31st day of March 2009.
Bella Lewkowicz, Translator

CITATION: 2003TCC689

COURT FILE NO.: 2003-1405(IT)I

STYLE OF CAUSE: Jean Falardeau and Her Majesty the Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 18, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: December 2, 2003

APPEARANCES:

For the Appellant: The Appellant himself

For the Respondent: Agathe Cavanagh (articling student)

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg
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Ottawa, Canada