Docket: 2004-2395(IT)I

BETWEEN:

PIERRETTE G. DESHARNAIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

LÉO PELLETIER,

Added Party.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on May 14, 2007, at Québec, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant:	Jean-Philippe Trudel
Counsel for the Respondent:	Stéphanie Côté
For the Added Party:	Léo Pelletier

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1998 to 2001 taxation years are allowed, without costs, to the extent set out in the attached Reasons for Judgment, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with these reasons.

Signed at Ottawa, Canada, this 18th day of June 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 17th day of September 2007.
Daniela Possamai, Translator

Citation: 2007TCC361
Date: 20070618
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Appellant,

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] The Appellant's assessments under appeal are for the 1998 to 2001 taxation years.

[2] By order of this Court, rendered on November 9, 2005, pursuant to section 174 of the *Income Tax Act* (the "Act"), Léo Pelletier is an added party to the assessments for the 1998 to 2001 taxation years and projected assessments for the 2002 and 2003 taxation years.

[3] The common issue is whether the amounts paid to Pierrette G. Desharnais by her former spouse, Léo Pelletier, during those years, are amounts in the nature of support.

[4] There is another issue in this case, but it only concerns the Appellant. It involves the imposition of penalties for the late filing of income tax returns.

[5] With respect to the primary issue, that is the inclusion of the support amount in computing the Appellant's income and the deduction of the payment of the support amount in computing the payer's income, counsel for the Appellant mentioned to the Court, at the beginning of the hearing, that the Appellant accepted the inclusion of 60% of the support amount. The other 40% should not have been included in computing the Appellant's income, as according to counsel, Ms. Desharnais did not have discretion over that amount. That amount was to be used to pay the mortgage on the family home.

[6] The interim agreement under which the payments were made was filed as Exhibit A-1. It is dated July 29, 1998.

[7] Articles 2, 3 and 7 are important. They read as follows:

[TRANSLATION]

> 2. The Respondent shall pay the Applicant, on an interim basis, a support amount of $1,290.00 per month until a final ruling is made on the Applicant's motion;
>
> 3. The Applicant shall continue to live in the parties' residence on the condition that she incur the household expenses (mortgage, taxes, telephone, heating, insurance) with the exception of extraordinary maintenance expenses;
>
> . . .
>
> 7. The support amount will be deposited into the accounts every two weeks in accordance with the following terms and conditions on the Respondent's paydays;
>
> - $225.00, every two weeks in the special savings account at the Caisse populaire de Québec bearing number 38380
>
> - $370.00, every two weeks at the Caisse populaire de Ste-Foy bearing number 815 20248 021294.

[8] It is on the basis of article 7 that the Appellant allocates the support amount in the proposed manner. She explains that the first account mentioned was the one from which the mortgage and property tax payments were made. It was a no

withdrawal account. The Appellant submitted in that respect a letter from the Caisse populaire Desjardins dated January 12, 2007, Exhibit A-4, which reads as follows:

[TRANSLATION]

> This is to confirm that the 38380-ES-l stable savings account which was used to pay future taxes and where necessary the mortgage payment was a **NO WITHDRAWAL ACCOUNT**, since December 1985. The holders could not access that money except to pay taxes.

[9] Johanne Carrier, an advisor at the Caisse populaire de Québec testified at the Respondent's request. She explained that the account was not used much and that it was, in fact, a no withdrawal account. However, either party could, on their own initiative and without the consent of the other, modify that condition.

[10] With respect to article 7 of the interim agreement, Mr. Pelletier stated that it was at the Appellant's request that this clause was added to the agreement.

[11] It is admitted that the ex-spouses co-owned the house.

[12] Shortly after the signing of the interim agreement, Ms. Desharnais requested that the Ministère du Revenu du Québec collect the support. A letter in that regard was sent to her on October 23, 1998, Exhibit A-5, informing her that, as of November 1, 1998, the $1,290 in support per month would be paid to her in two equal payments of $645, that is on the first and sixteenth of each month, pursuant to *An Act to facilitate the payment of support.*

[13] I quote a few paragraphs from that letter:

[TRANSLATION]

> We hereby wish to advise you that we have assessed your case under *An Act to facilitate the payment of support.*
>
> According to the order issued by the court, your support was set at $1,290.00 per month, to be indexed each year, with effect from January 1, 1999.
>
> . . .

> Following a review of your case, it was established that your situation authorizes us to make such advances. As a result, your support payments will be paid as follows:
>
> - Effective November 1, 1998, the support in the amount of $1,290.00 per month will be paid to you in two equal payments of $645.00, that is on the first and sixteenth of each month.
>
> . . .
>
> To conclude, please note that we have established the amount of your support arrears on the basis of the information contained in our files. As of October 31, 1998, the arrears amounted to $2,040.00. These sums will be paid to you as soon as they are collected.

[14] It is an admitted fact that said sums of money were deposited by Quebec into the Appellant's personal account.

[15] The Appellant did not file her income tax returns within the prescribed time limit for the 1998 to 2001 taxation years. The income tax returns were made by the Minister of National Revenue (the "Minister") for each of those years. The assessments are dated January 31, 2003. For the 1998, 1999 and 2001 taxation years, a late-filing penalty in the respective amounts of $10.19, $214.20 and $140.78 was imposed. For the 2000 taxation year, a penalty in the amount of $900.62 was imposed for failure to file a return of income (repeated failure to file). For the 2000 taxation year, the Minister sent the Appellant a demand for return.

[16] In that regard, the Appellant filed a certificate (Exhibit A-6) from a psychiatrist attesting that she had been under his care since December 19, 2000, and that [translation] " . . . *the depression and anxiety she has been suffering from for years, the traumatizing events she has endured all these years and the presence of a personality disorder which leads to procrastination, that is postponing things that need to be done, contributed to her not filing her income tax returns within the required time limit.*"

Arguments

[17] Counsel for the Appellant argues that the payer cannot do indirectly what he cannot do directly, that is, deduct mortgage payments in computing his income.

[18] Counsel for the Respondent argues that article 7 of the interim agreement is only a method of payment for the support and does not at all take away the Appellant's discretion to use the amount paid to her.

Analysis and conclusion

[19] Paragraph 56(1)(*b*) and the definition of "support amount" in subsection 56.1(4) of the Act read as follows:

> **(1) Amounts to be included in income for year** -- Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year:
>
> . . .
>
> (*b*) **Support [spouse or child]** -- 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 received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,
>
> B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from 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 received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;
>
> **"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 natural 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.

[20] For the following reasons, I am of the opinion that the evidence revealed that throughout the years in issue, the Appellant had discretion as to the use of the amounts paid to her by her former spouse. Those amounts were therefore amounts in the nature of support within the meaning of the above definition.

[21] In reading the interim agreement, the support provisions and the fact of ensuring that household expenses are paid set out distinct obligations. Article 2 provides for the payment of support by the former spouse to the applicant. Article 3 provides that the applicant may continue to live in the parties' residence, but that it is up to her to incur ordinary expenses. The amounts paid under article 2 are therefore at her full disposal.

[22] Does article 7 of the agreement between the parties modify that discretion? On the one hand, the evidence shows that the account in which part of the amount had to be deposited was a no withdrawal account. But on the other hand, the evidence is that each of the parties could remove that condition. Furthermore, the amounts collected by Quebec for the Appellant and paid to her were deposited into her personal bank account. Neither the former spouse, nor the Appellant were concerned with this variation from article 7 of the interim agreement. This shows that this article was never regarded by the parties as having the limiting and binding nature the Appellant now wishes to attribute to it.

[23] Counsel for the Appellant argued that a taxpayer cannot do indirectly what he or she cannot do directly and that allowing the former spouse to deduct the entire support amounts would allow him to benefit from a deduction for mortgage payments. First, it was not he who, according to the interim agreement, was responsible for the mortgage payments but the Appellant who lived on the common property. But in any event, there is a provision that provides for the

deduction of the payment of support amounts that are not child support amounts. If the former spouse paid such support amounts, he is entitled to deduct them under paragraph 60(*b*) of the Act. He does directly what the Act entitles him to do.

[24] Now let us consider the imposition of penalties for late filing.

[25] Subsections 162(1) and 162(2) of the Act read as follows:

> **(1) Failure to file return of income** -- Every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is liable to a penalty equal to the total of
>
> > (*a*) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and
> >
> > (*b*) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which the return was required to be filed to the date on which the return was filed.
>
> **(2) Repeated failure to file** -- Every person
>
> > (*a*) who fails to file a return of income for a taxation year as and when required by subsection 150(1),
> >
> > (*b*) on whom a demand for a return for the year has been served under subsection 150(2), and
> >
> > (*c*) by whom, before the time of failure, a penalty was payable under this subsection or subsection 162(1) in respect of a return of income for any of the 3 preceding taxation years
> >
> > is liable to a penalty equal to the total of
> >
> > (*d*) an amount equal to 10% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and
> >
> > (*e*) the product obtained when 2% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 20, from the date on which the return was required to be filed to the date on which the return was filed.

[26] Subsection 150(1), paragraph 150(1)(*d*) and subsections 150(1.1) and 150(2) of the Act read as follows:

> **150(1) Filing returns of income – general rule** -- Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,
> . . .
>
> (*d*) **Individuals** -- in the case of any other person, on or before
>
> (i) the following April 30 by that person or, if the person is unable for any reason to file the return, by the person's guardian, committee or other legal representative (in this paragraph referred to as the person's "guardian"),
>
> (ii) the following June 15 by that person or, if the person is unable for any reason to file the return, by the person's guardian where the person is
>
> (A) an individual who carried on a business in the year, unless the expenditures made in the course of carrying on the business were primarily the cost or capital cost of tax shelter investments (as defined in subsection 143.2(1)), or
>
> (B) at any time in the year a cohabiting spouse or common-law partner (within the meaning assigned by section 122.6) of an individual to whom clause 150(1)(d)(ii)(A) applies, or
>
> (iii) where at any time in the year the person is a cohabiting spouse or common-law partner (within the meaning assigned by section 122.6) of an individual to whom paragraph 150(1)(b) applies for the year, on or before the day that is the later of the day on or before which the person's return would otherwise be required to be filed and the day that is 6 months after the day of the individual's death;
>
> **150(1.1) Exception** -- Subsection (1) does not apply to a taxation year of a taxpayer if
>
> (*a*) the taxpayer is a corporation that was a registered charity throughout the year; or

(*b*) the taxpayer is an individual unless

(i) tax is payable under this Part by the individual for the year,

. . .

150(2) Demands for returns – Every person, whether or not the person is liable to pay tax under this Part for a taxation year and whether or not a return has been filed under subsection 150(1) or 150(3), shall, on demand from the Minister, served personally or by registered letter, file, within such reasonable time as may be stipulated in the demand, with the Minister in prescribed form and containing prescribed information a return of the income for the taxation year designated in the demand.

[27] According to subsection 150(1.1) of the Act, an individual is not obliged to file a return of income if no tax is payable by the individual for the year.

[28] However, subsection 150(2) of the Act provides for the possibility of demands for returns whether or not the person is liable to pay tax and whether or not a return has been filed. Such a demand was made to the Appellant for the 2000 taxation year.

[29] For the years in issue for which a late-filing penalty was imposed, the income added by the Minister consisted of little more than the support amount received from Léo Pelletier. The only year where another substantial amount was added is the 2000 taxation year, where the amount of $7,052 was cashed out of a registered retirement savings plan. Source deductions in the amount $353 were made on the amount cashed out.

[30] The Appellant challenged the inclusion of the support amount paid to her by her former spouse in computing her income. There was no evidence that had it not been for that amount, tax would have been payable by the Appellant. We are not dealing here with income that was knowingly unreported. I am therefore of the opinion that the Appellant is not liable to the imposition of the late-filing penalty as I am not certain that for the 1998, 1999 and 2001 taxation years, tax was payable by her. As for the lack of response to the demand for return, I accept the doctor’s certificate which states that the Appellant was in a state of depression or mental confusion and incapable of managing her affairs.

[31] Following the hearing, counsel for the Respondent, on her own initiative, sent a letter to the Court allowing the Appellant certain deductions:

[TRANSLATION]

> The Respondent concedes that the Appellant is entitled to the following deductions and credits:
>
> For the year 2000:
> - Medical expenses of $1368.
> - Tuition and education amounts of $457.
> - Eligible donations of $5.
>
> For the year 2001:
> - Tuition fees of $187.
> - Education amounts of $480.
> - Medical expenses of $470 .
> - Eligible donations of $5.

[32] To conclude, for each of the years in issue, the Appellant must include the total support amount paid by her former spouse and her former spouse may deduct the same amount in computing his income for each of those years. The imposition of penalties for late filing and repeated failure to file is cancelled. The appeal is allowed in that regard and also with respect to the deductions set out in the letter of counsel for the Respondent.

Signed at Ottawa, Canada, this 18th day of June 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 17th day of September 2007.
Daniela Possamai, Translator

CITATION:	2007TCC361
COURT FILE NO.:	2004-2395(IT)I
STYLE OF CAUSE:	PIERRETTE G. DESHARNAIS v. HER MAJESTY THE QUEEN and LÉO PELLETIER
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	May 14, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Louise Lamarre Proulx
DATE OF JUDGMENT:	June 18, 2007

APPEARANCES:

Counsel for the Appellant:	Jean-Philippe Trudel
Counsel for the Respondent:	Stéphanie Côté
For the Added Party	Léo Pelletier

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