Docket: 2006-1682(IT)I

BETWEEN:

SHERRY LEE CRONE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 13, 2008, at Ottawa, Ontario

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The appellant herself
Counsel for the Respondent:	Sara Chaudhary

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* in respect of the 2000 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 16th day of October 2008.

"Réal Favreau"

Favreau J.

Citation: 2008 TCC 567
Date: 20081016
Docket: 2006-1682(IT)I

BETWEEN:

SHERRY LEE CRONE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Favreau, J.

[1] The only question raised in this appeal is whether the Minister of National Revenue (the "Minister") correctly included in the appellant's income for the 2000 taxation year, payments totalling $3,997 that she received from her ex-spouse, Mr. David Crone, in respect of extraordinary child-related expenses pursuant to a separation agreement dated May 27, 1993 (the "Agreement").

[2] In her income tax return for the 2000 taxation year, the appellant included in her income, support payments totalling $32,740.94 but did not include the extraordinary child-related expenses totalling $3,997. The appellant's 2000 taxation year, initially assessed by a notice of assessment dated August 17, 2001, was reassessed by virtue of a notice of reassessment dated August 16, 2004. In so reassessing, the Minister included in the appellant's income additional support payments totalling $3,997.

[3] In reassessing tax for the 2000 taxation year of the appellant and in confirming that reassessment, the Minister assumed the following facts described in paragraph 8 of the reply to the notice of appeal:

> a) the Appellant and her ex-spouse, David Crone, have two (2) children of the marriage, Robert, born December 18, 1983 and Jordan, born June 10, 1986; **[admitted]**

b) the Appellant and David Crone, commenced living separate and apart due to their marriage breakdown on July 26, 1992, and the children's primary residence was with the Appellant; **[admitted]**

c) pursuant to the Agreement, David Crone was required to pay to the Appellant periodic child support payments, in the amount of $1,200 per month/per child (with indexing), throughout the 2000 taxation year, and they were to be deductible by David Crone and they were to be included in the income of the Appellant; **[admitted]**

d) also pursuant to the Agreement, the Appellant and David Crone were to share extraordinary child-related expenses, and David Crone was required to pay an amount of $333 per month, in respect of both of the children, for such expenses, and such payments were to be considered periodic payments within the meaning of the *Income Tax Act*; **[admitted]**

e) the Agreement does not state that subsections 56.1(2) and 60.1(2) of the *Income Tax Act* R.S.C. 1985 (5th supp.) c.1 (the "*Act*") are to apply in respect of the extraordinary child-related expenses; **[ignored]**

f) the Appellant had discretion as to the use of the amounts, totalling $3,997, noted in subparagraph 8(d) above, even though she had to present the Appellant [*sic*] with a proposed budget for each coming year, and she had to submit, at the end of each year, the receipts and bills proving the reasons for the expenditures; and **[denied as written because the appellant did not have discretion as to the use of the amounts and admitted for the rest of the paragraph]**

g) David Crone paid amounts totalling $36,737 to the Appellant, in the 2000 taxation year, in respect of the child support payments noted in subparagraph 8(c) above and $3,997 for the extraordinary child-related expenses, and all of these said amounts are required to be included in the income of the Appellant. **[denied as to the inclusion in income of $3,997]**

[4] The pertinent portion of the Agreement dealing with the extraordinary expenses is in paragraph 9 which reads as follows:

> (1) The parties will share extraordinary child-related expenses such as private school tuition, summer camp, extra-curricular activities, school trips, piano lessons and other incidental expenses taking into account their respective financial positions and the children's trust.
>
> (2) The husband will pay on the first (1st) day of May 1993 and on the first (1st) day of each month hereafter the sum of $333.00 per month for both children such payments to be considered periodic payments within the meaning of the Income Tax Act. The parties will meet annually to review a budget to be prepared by the wife proposing how the monies due pursuant to this subparagraph are to be spent. The wife shall account for expenditures annually and to the extent monies due pursuant to this subparagraph are not used in a year will be credited to payments due by the husband in the following year.

[5] The above-mentioned paragraph 9 contains no indication that the payments referred to therein would be deductible by the husband in computing his income and would be required to be included in the income of the appellant except for the reference to the fact that the payments for the children shall be considered periodic payments within the meaning of the *Income Tax Act*, R.S.C. 1985, c.1 (5th suppl.) as amended (the "*Act*").

[6] Support payments are required to be included in the income of the recipient by virtue of paragraph 56(1)(*b*) of the *Act* which reads as follows:

> **Support** — 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;

[7] The definitions of "child support amount" and of "support amount" for the purpose of section 56 of the *Act* are found in subsection 56.1(4) of the *Act* and read as follows:

> "**child support amount**" — means any support amount that is not identified in the agreement or order under which it is receivable as being solely for the support of a recipient who is a spouse or former spouse of the payer or who is a parent of a child of whom the payer is a legal parent.
>
> "**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, <u>if the recipient has discretion as to the use of the amount</u>, and

> (*a*) the recipient is the spouse or former spouse of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage 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.
>
> [Emphasis added].

[8] The appellant's position in respect of the extraordinary expenses is that she did not have to include them in her income because she did not have discretion as to how the money should be spent. In her notice of objection dated February 8, 2005, the appellant described the restrictions she had as to the spending of money in the following terms:

> However, prior to his accountant sending those cheques I had to submit a proposed budget of how I planned to spend that money. Only after that was approved did I receive those payments. Also I was required to annually submit a written account, with receipts of where each cent was paid before any payments were made for the next year. A budget again accompanied these receipts to propose the next year's expenses. I did not have discretion of the fund. David had to approve it. David's accountant is in receipt of each and every year's report, receipt and budget. I had to send it to obtain the support payments.

[9] The appellant testified at the hearing and the only document that she filed was a handwritten document titled an "Extra Curricular Expenses for Robbin & Jordan Crone 2000 – 2001" to which was attached handwritten notes showing the amounts of expenses made during the 1999/2000 period, the dates on which these expenses were made and a general description of the expenses. No budget was presented but the appellant testified that the annual budget submitted had only general headings such as school activities, after school activities, birthday parties and incidentals. She further stated that there was no prior approval of the budgets by her ex-husband as she was referred to his accountant. She mentioned that the only discussion she had with her ex-husband concerning the budgets was in the first year after the Agreement was signed. The appellant also confirmed that there was no conciliation of the expenses incurred in a given year with the budget submitted for that year. She also admitted that she had the choice of the type of expenses to be made for the benefit of the children.

[10] The Respondent's position is that the income inclusion of the extraordinary child-related expenses is required pursuant to paragraph 56(1)(*b*) of the *Act* as the appellant had discretion as to the use of the allowances received on a periodic basis for the maintenance of the children and thus fall within the definitions of "support amount" and "child support amount" pursuant to subsection 56.1(4) of the *Act*. Counsel for the respondent relied on the following cases:

- *Canada v. Pascoe*, [1976] 1 F.C. 372 (Court of Appeal);
- *Jean-Paul Gagnon v. The Queen*, 86 DTC 6179 (Supreme Court);
- *Danielle Serra and Denyse Hamer v. Her Majesty the Queen*, 98 DTC 6602 (Federal Court of Appeal), *Hamer v. Canada*, 97 D.T.C. 1273 (Tax Court of Canada); and
- *Assaf v. Canada*, [1992] T.C.J. No. 46

[11] The *Serra and Hamer* decision is particularly relevant because the appellants challenged the inclusion in their income of support payments made exclusively for the benefit or maintenance of their children. Justice Dussault did not accept the appellants' position and he made the following comments in paragraph 21 of his judgment:

> Only the appellants could control the use of the money they received, decide how it was allocated for maintenance of the children, set priorities and decide on how much would be spent on each type of expense. As the appellants had this power of controlling the use of the money received and in fact exercised this power, the Court can only conclude that they could use the money received in their discretion, and hence that what they received was allowances within the meaning of s. 56(12) for the purposes of applying s. 56(1)(*b*), (*c*) or (*c*.1) of the Act. As such, these allowances must be included in their respective incomes. What is more, the control over the money received and their power to dispose of it in my opinion gives it the nature of income in their hands under the rules laid down in Sura and Poynton, if indeed this requirement needs to be added to the clear wording of s. 56(1), which stipulates specifically and unambiguously that income from alimony and other allowances received in the circumstances described in paras. (*b*), (*c*) and (*c*.1) of that provision should be included. Furthermore, the mere possibility that an account would have to be rendered or that there might be control a posteriori does not in any way alter the situation.

[12] In this case, the appellant had custody of the two children and she alone decided how the money received was to be spent. Her ex-husband had no input on the expenses and was not consulted in any way. The only condition imposed on the appellant was that the money had to be spent for the benefit of the children and the reporting procedure to the accountant was simply to ensure that result.

[13] Based on the foregoing, the appeal is dismissed.

Signed at Ottawa, Canada, this 16th day of October 2008.

"Réal Favreau"

Favreau J.

CITATION:	2008 TCC 567
COURT FILE NO.:	2006-1682(IT)I
STYLE OF CAUSE:	Sherry Lee Crone and Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 13, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	October 16, 2008

APPEARANCES:

For the Appellant:	The appellant herself
Counsel for the Respondent:	Sara Chaudhary

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada