Docket: 2008-1762(IT)I

BETWEEN:

SADRUDIN KARA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 28, 2009, at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sonia Singh

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* (“*Act*”) for the Appellant’s 2006 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to a transfer of his spouse’s unused disability tax credit pursuant to section 118.8 of the *Act*.

The Respondent shall also pay costs to the Appellant, which are fixed in the amount of $600.

The filing fee of $100 is to be refunded to the Appellant.

Signed at Ottawa, Ontario, this 3rd day of February 2009.

“Wyman W. Webb”

Webb J.

Citation: 2009TCC82
Date: 20090203
Docket: 2008-1762(IT)I

BETWEEN:

SADRUDIN KARA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the Appellant is entitled to claim his spouse's unused disability tax credit, pursuant to section 118.8 of the *Income Tax Act* ("*Act*") in 2006. The position of the Appellant is that he had already been reassessed in relation to this issue with respect to his 2005 taxation year. By a Judgment of this Court dated November 9, 2007 his appeal for 2005 was allowed and it was confirmed that he was entitled to claim, on his tax return, his spouse's unused disability tax credit in 2005.

[2] Counsel for the Respondent indicated that the Respondent was not questioning or attempting to appeal the earlier decision of this Court, but was only bringing this matter forward to determine if the facts had changed from 2005 to 2006. The Appellant confirmed that the facts have not changed, but even after hearing that the facts had not changed (and not leading any evidence to suggest that the facts had changed) counsel for the Respondent indicated that the Respondent still wanted to pursue this appeal.

[3] There is no dispute in this case that the Appellant's spouse was disabled in 2006 and that she had been disabled since 1985. The Appellant stated that his wife's residence was located at one location and his residence was located at another. This is related to the history between the Appellant and his spouse. In 1991, as a result of a misunderstanding between the Appellant and his spouse, the Appellant's spouse told the Appellant to move out. They entered into a separation agreement and commenced to live separate and apart.

[4] Over time it would appear that the Appellant was spending more and more time with his spouse. In 2006, he would spend five days per week with his spouse. Each of these days would commence at 7:00 a.m. and he would stay with her until approximately 8:00 p.m. unless he slept at her place. Throughout the year he would regularly sleep at his spouse's place, sometimes three nights in one week. When he was not staying with his spouse he would be at his place.

[5] The Appellant's spouse had several medical conditions. She was diabetic, her heart was very weak and she had lower back pain. Her bladder was also very active. She also had swelling in her legs. The Appellant would cook meals for his wife, feed her, clothe her, do housekeeping work for her, give her medication, bathe her, buy her groceries, take her to the doctor, and take her church. He would help her as much as he could. The Appellant also stated that he was physically and emotionally with his spouse in 2006. It seems to me that the Appellant was looking after his spouse as her husband and not just as a caregiver.

[6] Section 118.8 of the *Act* provides in part as follows:

> 118.8 For the purpose of computing the tax payable under this Part for a taxation year by an individual who, at any time in the year, is a married person or a person who is in a common-law partnership **(other than an individual who, by reason of a breakdown of their marriage or common-law partnership, is living separate and apart from the individual's spouse or common-law partner at the end of the year and for a period of 90 days commencing in the year)**, there may be deducted an amount determined by the formula…
>
> (emphasis added)

[7] In this case, the issue is whether the Appellant, by reason of a breakdown of his marriage, was living separate and apart from his spouse at the end of 2006 and for a period of 90 days commencing in 2006.

[8] In *Roby* v. *The Queen* [2001] T.C.J. No. 801, Associate Chief Justice Bowman (as he then was) stated as follows:

> 7 In *Kelner* v. *R.* (1995), [1996] 1 C.T.C. 2687 (T.C.C.), I reviewed the case law in this area and concluded that it was possible for spouses to live "separate and apart" even where they were living under the same roof. This is an unassailable proposition as a matter of law, but as a matter of fact in any given case the evidence should be convincing. Campbell J. in *Rangwala* v. *R.*, [2000] 4 C.T.C. 2430 (T.C.C. [Informal Procedure]), and *Raghavan* v. *R.*, [2001] 3 C.T.C. 2218 (T.C.C. [Informal Procedure]), reached the same conclusion.
>
> 8 As good a starting point as any is the decision of Holland J. in *Cooper* v. *Cooper* (1972), 10 R.F.L. 184 (Ont. H.C.) where he said at p. 187:
>
>> Can it be said that the parties in this case are living separate and apart? Certainly spouses living under the same roof may well in fact be living separate and apart from each other. The problem has often been considered in actions brought under s. 4(1)(e)(i) of the Divorce Act and, generally speaking, a finding that the parties were living separate and apart from each other has been made where the following circumstances were present:
>>
>> (i) Spouses occupying separate bedrooms.
>>
>> (ii) Absence of sexual relations.
>>
>> (iii) Little, if any, communication between spouses.
>>
>> (iv) Wife performing no domestic services for husband.
>>
>> (v) Eating meals separately.
>>
>> (vi) No social activities together.
>>
>> See *Rushton* v. *Rushton* (1968), 1 R.F.L. 215, 66 W.W.R. 764, 2 D.L.R. (3d) 25 (B.C.); *Smith* v. *Smith* (1970), 2 R.F.L. 214, 74 W.W.R. 462 (B.C.); *Mayberry* v. *Mayberry*, [1971] 2 O.R. 378, 2 R.F.L. 395, 18 D.L.R. (3d) 45 (C.A.).
>
> 9 Both Campbell J. and I took those criteria as useful guidelines, although they are by no means exhaustive and no single criterion is determinative. I tend to agree with what was said by Wilson J. in *Macmillan — Dekker* v. *Dekker*, [(2000), 10 R.F.L. (5th) 352 (Ont. S.C.J.)] August 4, 2000, docket 99-FA-8392, quoted by Campbell J. in *Rangwala* at pp. 2435-2436:
>
>> Based on a synthesis of prior case law, the court established a list of seven factors to be used to determine whether or not a conjugal relationship exists or

> existed. These organising questions permit a trial judge to view the relationship as a whole in order to determine whether the parties lived together as spouses. Reference to these seven factors will prevent an inappropriate emphasis on one factor to the exclusion of others and ensure that all relevant factors are considered.

. . . . .

> I conclude that there is no single, static model of a conjugal relationship, or of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique objective facts.

[9] It seems clear to me that there was no period of 90 days in 2006 when the Appellant was living separate and apart from his spouse by reason of a breakdown of their marriage. During the times when the Appellant was with his spouse both day and night he was living with her. Given her condition, it seems to me that little emphasis, if any, should be placed on the first two circumstances listed above. He was cooking meals for her, feeding her, dressing her, bathing her, giving her medication, doing housekeeping work and sleeping in the same premises. He was also taking her to church. He was generally looking after and taking care of her, as noted above, as her husband. Associate Chief Justice Bowman (as he then was) in the *Roby* case also added financial considerations. In this case the Appellant was financially supporting his spouse. He was paying approximately $645 per month for meals and other expenses.

[10] The Appellant was not living separately from his spouse in her premises but with her in those premises. Since this continued throughout 2006, there was no period of 90 days commencing in 2006 when he was living separate and apart from her.

[11] He indicated that he would return to his premises when his wife, because of her condition, would indicate that she wanted him to leave her alone. These short periods of time could not be considered to be times when he was living separate and apart from his spouse because of a breakdown of the marriage. As well none of these periods lasted 90 days or more. While in total there may have been more than 90 days when he was at his own premises, the *Act* does not refer to a total of 90 days but a period of 90 days commencing in the year. This would require that the 90 days be part of a consecutive period of 90 days.

[12] Counsel for Respondent indicated that the facts in this case were the same as the facts in *Corroll v. The Queen*, 2002 FCA 388, [2003] 1 C.T.C. 179. In that case Justice Rothstein (as he then was) described the facts as follows:

> 2 As Rip J. pointed out, this is a sympathetic case. The applicant's wife has suffered from schizophrenia for over thirty years. The applicant attends at his wife's residence two or three times per week to do maintenance, cleaning, bringing food and looking after the property.
>
> 3 However, the applicant testified before Rip J. that his wife was living by herself or on her own in the relevant years. Rip J. found that even though the applicant was giving help to his wife, he was living with another woman and that there had been a breakdown of the marriage. This finding was based on an assumption to this effect by the Minister of National Revenue in his reply to the applicant's Notice of Appeal in the Tax Court and which was not refuted by the applicant.

[13] In my opinion the facts in this case are easily distinguishable from the facts in the *Corroll* case. In the *Corroll* case, the taxpayer attended at his wife's residence for significantly less time each week than the Appellant attended at his spouse's place. The taxpayer in the *Corroll* case, attended "at his wife's residence two or three times per week to do maintenance, cleaning, bringing food and looking after the property". There was no indication of the number of hours each day that he would spend at her place. However, it seems unlikely (since he was living with another woman) that he would be spending 13 hours per day with his spouse.

[14] In this case the Appellant was at his spouse's place five days per week from 7 a.m. to 8 p.m. unless he slept there, in which case it would be longer. Another very important distinguishing fact is that in the *Corroll* case, the taxpayer was living with another woman. This would seem to be a clear indication that there was a breakdown of the marriage in the *Corroll* case. In this case the Appellant clearly stated that he was emotionally and physically with his wife. There was no evidence (and no assumption in the Reply) that the Appellant was living with another woman in this case.

[15] As a result, I find that the Appellant was not living separate apart from his spouse for any period of 90 days commencing in 2006 as a result of a breakdown of the marriage.

[16] The appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to a transfer of his spouse's unused disability tax credit pursuant to section

118.8 of the *Act* for 2006. The Respondent shall also pay costs to the Appellant, which are fixed in the amount of $600.

Signed at Ottawa, Ontario, this 3rd day of February 2009.

'Wyman W. Webb"

Webb J.

CITATION:	2009TCC82
COURT FILE NO.:	2008-1762(IT)I
STYLE OF CAUSE:	SADRUDIN KARA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	February 3, 2009

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sonia Singh

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

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