Docket: 2008-2525(IT)I

BETWEEN:

CHERYL LABORET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 22, 2009 at Calgary, Alberta

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Valerie Meier

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of June, 2009.

"G. A. Sheridan"

Sheridan J.

Citation: 2009TCC283
Date: 20090611
Docket: 2008-2525(IT)I

BETWEEN:

CHERYL LABORET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Cheryl Laboret, is appealing the reassessment of her 2004 and 2005 taxation years. In each of those years, the Minister of National Revenue included, as spousal support under paragraph 56(1)(*b*) of the *Income Tax Act*, payments of $32,400 made to the Appellant by her former spouse (the "Former Spouse").

[2] The only issue in dispute is whether each payment of $32,400 was a "support amount" under paragraph 56.1(4)(*a*), the relevant portions of which are as follows:

> "support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient … , if the recipient has discretion as to the use of the amount, and
>
> > (a) the recipient is the … former spouse … of the payor, the recipient and the 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
>
> …

[3] The Appellant's position is that the $32,400 amounts were lump sum payments and as such, are not caught by the definition of "support amount". She

argued as well that she had not understood or agreed that the amounts she received in those years would be taxable.

[4] The Respondent's position is that the $32,400 payments were received by the Appellant pursuant to a series of orders of the Court of Queen's Bench of Alberta as an allowance payable on a periodic basis and accordingly, each is a "support amount" as contemplated by the legislation and must be included in the Appellant's income for 2004 and 2005. For the reasons set out below, I am persuaded that the Respondent's argument is the correct one.

[5] The Appellant represented herself at the hearing and was the only witness to testify. It was clear from her evidence that she and the Former Spouse did not have an amicable parting of the ways and that the past few years have been difficult ones for her. While I am sympathetic to the situation in which she has found herself, I must nonetheless decide these appeals in accordance with the evidence presented, the applicable legislative provisions and the case law.

[6] In January 1999, Justice Fraser of the Court of Queen's Bench of Alberta presided over divorce proceedings commenced by the Appellant and an action for the distribution of matrimonial property brought by the Former Spouse.

[7] In respect of the divorce proceeding, Fraser, J. issued the "Amended Divorce Judgment and Corollary Relief Order"[1] (the "Fraser Support Order") under which the Former Spouse was ordered to pay child support of $500 per month to the Appellant for their son. He was also ordered to pay spousal support of $2,400 per month from April 1999 to June 2001, with the issue of whether any spousal support should be paid after June 1, 2001 to be determined at the continuation of the trial upon the request of either party.

[8] As for the matrimonial property distribution, the Court ordered (the "Matrimonial Property Order"[2]) that a new home purchased by the Former Spouse after their separation (the "New House") was to vest solely in him. The former matrimonial home (the "Lake Mead House") was to vest in the Appellant. The Appellant was to pay an equalization payment to her Former Spouse of $40,411.97[3]

[1] Exhibit A-3.

[2] Exhibit A-1.

[3] Exhibit A-1, paragraph 23.

on February 1, 1999 with interest until paid in full, such amount to be secured by a lien against the Lake Mead House in favour of the Former Spouse.

[9] As it turned out, the Fraser, J.'s orders were more honoured in the breach than the observance. The Former Spouse made not one of the monthly payments due in the period April 1999 to June 2001 which totalled $64,800 comprised of $2,400 per month for the 27-month period April 1, 1999 to June 1, 2001. Rather than paying child support of $500 per month to the Appellant as directed under the Fraser Support Order, he unilaterally elected to apply the child support amounts to the mortgage on the Lake Mead House (notwithstanding that under the Matrimonial Property Order he no longer had an interest in it and the payments were to be the sole responsibility of the Appellant), paying the mortgage amount directly to the bank and depositing any remaining balance in the Appellant's account. The Appellant did not transfer title to the Lake Mead House from their joint names to her name only; nor, apparently, did the Former Spouse register a charge against the Lake Mead House to secure the equalization payment which remained outstanding. At some point and for reasons not known to the Court, the Appellant registered a certificate of *Lis Pendens* against the Former Spouse's New Home. Neither party had requested a continuation of the trial for a ruling on whether further spousal support should be paid.

[10] In May 2002, there was an exchange of correspondence[4] between the Appellant's lawyer and the Former Spouse regarding a request for his updated financial information but, ultimately, nothing came of it. The Former Spouse remained in default under the Fraser Support Order.

[11] In December 2004, discussions somehow recommenced between the Appellant and the Former Spouse through their respective counsel. In a letter dated December 6, 2004, counsel for the Appellant wrote the following to the Former Spouse's lawyer, with a copy to her:

> …
>
> **Laboret v. Hennings**
>
> Pursuant to the above, and our conversation of December 6, 2004 this confirms that the within matter has been adjourned to December 8, 2004. As I indicated to you my client will accept a "wash" of the monies owed to either party. You indicated your client would accept this. I will prepare the Consent Order and the Withdrawal of Lis

[4] Exhibit A-5.

Pendens and the Transfer of Land transferring the property from Joint names to my client's name alone. You can prepare the acknowledgment you wish my client to sign with regards to receiving the monies with the understanding that once the monies are here we will execute an acknowledgment of receiving the monies and send you the cheque back with my client's signature endorsed on the back so that your client can cash the cheque. [5]

[12] By letter[6] of the same date, counsel for the Former Spouse replied as follows:

…

RE: Laboret v. Hennings

Enclosed is Dr. Hennings's cheque in the amount of $32,400.00 representing spousal support paid for taxation year 2004. The spousal support is paid pursuant to the order of Justice Fraser and consent order executed as between us through counsel. This amount if [emphasis added] fully taxable in your hands for the purposes of income tax and tax deductable [*sic*] in my hands for the purposes of income tax during taxation year 2004.

Please acknowledge receipt of this cheque and acceptance of these conditions by endorsing your acknowledgement and agreement on the return copy of this letter and endorsement of the cheque.

Yours truly,

BLAINE G. SCHUMACHER
BGS/mgo

cc: Murray Hennings

Acknowledged and Agreed

[Signature of] Cheryl Ann Laboret

Date December 6, 2004[7]

[13] The Appellant admitted that she had signed the two letters and endorsed the enclosed cheques, as requested, which were then returned to the Former Spouse.

---

[5] Exhibit A-4.

[6] And by letter dated January 6, 2005 in respect of the 2005 payment of $32,400.

[7] Exhibit A-4.

Included in the bundle of documents in Exhibit A-4 is a photocopy of the cheques from the Former Spouse made payable to the Appellant and duly endorsed by her. She insisted, however, that it had not been her understanding that the amounts agreed to would be taxable.

[14] On December 8, 2004, Justice Hillier granted the Appellant's application, upon consent of counsel for the Former Spouse, and issued the following order (the "Hillier Consent Order"):

> …
>
> IT IS HEREBY ORDERED AS FOLLOWS:
>
> 1. THAT the Respondent MURRAY NORMAN HENNINGS shall pay spousal support to the Petitioner in the amount of $64,800.00 as follows:
>
>   a) $32,400 shall be paid in the month of December 2004, on or before December 15, 2004.
>   b) $32,400 shall be paid in the month of January 2005.
>
>   Which amount shall be taxable in the hands of the Petitioner and tax deductible in the hands of the Respondent.
>
> 2. THAT the equalization payment owed by the Petitioner CHERYL ANN LABORET to the Respondent MURRAY NORMAN HENNINGS shall be paid as follows:
>
>   a) $32,400 in the month of December 2004.
>   b) $32,400 in the month of January 2005.
>
>   In full and final satisfaction of the Respondent's equalization claim.
>
> 3. THAT the Respondent shall sign a Transfer of Land on or before December 15, 2004 transferring the property municipally described as 220 Lake Mead Crescent S.E., Calgary, Alberta, transferring the property from joint names to the name of CHERYL ANN LABORET. The Petitioner shall be responsible for all outstanding liabilities regarding 220 Lake Mead Crescent S.E., Calgary, Alberta including but not limited to mortgage payments, taxes, insurance, utilities, etc.
>
> 4. THAT the Respondent shall have no further interest in the property municipally described as 220 Lake Mead Crescent S.E., Calgary, Alberta.
>
> 5. THAT the Petitioner, CHERYL ANN LABORET shall withdraw her Certificate of Lis Pendens from the property municipally described as 144 Lake Bonavista Drive S.E., Calgary, Alberta. The Respondent shall be

> responsible for all outstanding liabilities regarding 144 Lake Bonavista Drive S.E., Calgary, Alberta, including but not limited to mortgage payments, taxes, insurance, utilities, etc.
>
> 6. THAT the Petitioner shall have no further interest in the property municipally described as 144 Lake Bonavista Drive S.E., Calgary, Alberta.
>
> 7. THAT the within Order shall be filed notwithstanding counsel for the Respondent's signature is by way of facsimile.[8]
>
> …

[15] The Former Spouse claimed a deduction for spousal support in 2004 and 2005[9].

[16] The Appellant, however, did not include these amounts in her income for these taxation years. In November 2005, the Minister reassessed her 2004 taxation year to include the $32,400 in her income. She objected and by Notice of Reassessment dated May 23, 2006, the Minister reversed his decision and deleted that amount from her income.

[17] By that time, she had filed her income tax return for 2005 and it was assessed, as filed, on June 1, 2006.

[18] On October 3, 2007, the Former Spouse made an application to the Court of Queen's Bench of Alberta for an order to amend the spousal support provisions of the Hillier Consent Order. The following order was issued by Justice Kenny (the "Kenny Amending Order"):

> IT IS HEREBY ORDERED AS FOLLOWS:
>
> 1. The first paragraph of the Order of Justice Hillier of Wednesday 8 December 2004, shall be deleted in its entirety and replaced with the following:
>
> > "That arrears of spousal support payable on a periodic basis for the maintenance of the Petitioner Cheryl Ann Laboret, in the amount of $2,400.00 per month, commencing 1 April 1999, and continuing for

---

[8] Exhibit A-6.

[9] Assumed fact in paragraph 12(i) of the Reply to the Notice of Appeal.

> the next 27 months up to 1 January 2001[10], are now due and owing, and shall be paid as follows:
>
> i) $32,400.00 shall be paid in the month of December 2004 on or before 15 December 2004; and
> (ii) $32,400.00 shall be paid in the month of January 2005.
>
> Both these amounts, representing monthly spousal support payments payable on a periodic basis pursuant to the *Income Tax Act* for the Maintenance of the Petitioner, Cheryl Ann Laboret, owing but so far unpaid, shall be tax deductible by the payor spouse, Murray Norman Hennings, and shall be taxable in the hands of the recipient spouse, Cheryl Ann Laboret.
>
> 2. Paragraphs 2, 3, 4, 5, 6, and 7, of the subject Order of Justice Hillier shall remain in full force and effect.
>
> 3. The amounts owing under this Order shall be paid to the Director of Maintenance Enforcement ("MEP") at 7th floor North, 10365 97 Street, Edmonton, Alberta T5J 3W7, (telephone (780) 422-5555), (website www.albertamep.gov.ab.ca) and shall be enforced by MEP upon the creditor, recipient of support or debtor (payor of the support) registering with MEP. Such enforcement shall continue until the party who registered gives MEP a notice in writing withdrawing the registration pursuant to Section 9 of the Maintenance Enforcement Act.[11]
>
> …

[19] On December 17, 2007 the Minister again reassessed the Appellant's 2004 and 2005 taxation years to include the $32,400 payments in her income for each of those years. The Appellant objected, the Minister confirmed and the upshot is the matter at bar.

Analysis

[20] The Appellant submitted that notwithstanding her signature indicating her agreement to the terms upon which the Former Spouse was to pay the $64,800 and her endorsement of the cheques received from him, she had never agreed to pay tax nor had she understood that tax would be payable on that amount. In support of her

---

[10] The reference to "January" would appear to be a slip; the Fraser Support Order specified that the payments were to be made from April 1999 to "June" 2001, a period of 27 months.

[11] Exhibit A-7.

contention, she pointed to the use of the word "if" in the December 2004 and January 2005 letters in the sentence commencing "This amount *if* fully taxable in your hands for the purposes of income tax … "[12] [italics added]. The Appellant explained that she had made the same argument, without success, to oppose the amendment of the Hillier Consent Order. She expressed bewilderment as to how the Kenny Amending Order could simply rewrite the spousal support portion of the Hillier Consent Order.

[21] First of all, I have no difficulty accepting the Appellant's evidence that in December 2004, she was at the end of her emotional and financial tether and relied on her lawyer "to do the right thing". However, that does not alter the fact of her agreement to the terms set out in the letters between her counsel and that of the Former Spouse. As for the Kenny Amending Order, I have no jurisdiction to review its correctness but for the reasons set out below, it is not inconsistent with the terms of the Fraser Support Order, the agreement reached between the parties or even, the Appellant's own testimony.

[22] The documents in Exhibit A-4 reveal the intention of the Appellant and the Former Spouse to complete the steps still outstanding under the Matrimonial Property Order and the Fraser Support Order, including the payment of spousal support in arrears of $64,800. Indeed, it was the Appellant's counsel who sought the Hillier Consent Order; who invited counsel for the Former Spouse to prepare the "acknowledgment and agreement" letters following their discussions of December 6, 2004; and who drafted the terms of the consent order ultimately presented to Hillier, J.[13]. In his letters of response, counsel for the Former Spouse refers specifically to spousal support of two payments of $32,400 "paid pursuant to the order of Justice Fraser". Although no express reference is made to the Fraser Support Order in the Hillier Consent Order, the spousal support amount of $64,800 corresponds directly to the payments of $2,400 per month for the period April 1, 1999 to June 1, 2001 ordered by Fraser, J. In my view, even if the amendments effected by the Kenny Amending Order were disregarded, the result would be the same. Finally, the Appellant's testimony regarding the Former Spouse's shamefully recalcitrant behaviour in respect of his obligation to pay spousal support convinces me that but for the court orders, he would never have paid her a penny. Thus, when he finally did pay the amounts owing, he did so "under an order of a competent tribunal" (as the *Act* now reads) rather than "by reason of a legal obligation imposed or undertaken", the test established by the Supreme Court of Canada in *Minister of National Revenue*

---

[12] Exhibit A-4, letter from counsel for the Former Spouse to the Appellant dated December 6, 2004.

[13] Exhibit A-6 at paragraph 7.

v. J. J. Armstrong[14] to distinguish between a periodic payment and a lump sum amount. It is clear from in the orders, the agreement and the course of conduct of the Appellant and the Former Spouse that the $32,400 payments made in 2004 and 2005 pertained to the Former Spouse's pre-existing obligation[15] to pay spousal support totalling $64,800 for the period April 1, 1999 to June 1, 2001.

[23] Although much of the Appellant's argument revolved around her not having "agreed" to the $64,800 being taxable, it is not because of her agreement (or even, their description as "taxable" in the court orders) that they must be included in the Appellant's income: that determination depends on whether the circumstances of their payment fall within the governing provisions of the *Act*[16].

[24] For these reasons, I am persuaded by the Respondent's submission that the two payments of $32,400 were properly included in the Appellant's income. In so concluding, I do not condone for one moment the Former Spouse's failure to pay the spousal support when due. That factor, however, is not determinative of whether the Appellant was required to include the amount of $32,400 in her income for each of the 2004 and 2005 taxation years; in *The Queen v. Sills*[17], the Federal Court of Appeal held that "… [s]o long as the agreement provides that the monies are payable on a periodic basis, the requirement of the subsection is met. The payments do not change in character merely because they are not made on time."[18] Accordingly, the appeals must be dismissed.

---

[14] [1956] C.T.C. 93 at page 94.

[15] *Peterson v. Canada (appeal by Tossell),* [2005] F.C.J. No. 1062 at paragraph 36. (F.C.A.).

[16] Above, at paragraph 48.

[17] [1985] 1 C.T.C. 49 (F.C.A.) and *Peterson v. Canada (appeal by Tossell)*, above.

[18] *Sills,* above, at page 52.

Signed at Ottawa, Canada, this 11th day of June, 2009.

"G. A. Sheridan"

Sheridan J.

CITATION:	2009TCC283
COURT FILE NO.:	2008-2525(IT)I
STYLE OF CAUSE:	CHERYL LABORET AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	January 22, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	June 11, 2009

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Valerie Meier

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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