

Docket: 2008-3053(IT)I

BETWEEN:

CHRIS A. CONNOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on June 8, 2009 at Hamilton, Ontario

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Ian Theil

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**JUDGMENT**

The appeal with respect to assessments made under the *Income Tax Act* for the 2005 and 2006 taxation years is dismissed.

Signed at Toronto, Ontario this 11<sup>th</sup> day of June 2009.

“J. M. Woods”

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Woods J.

Citation: 2009 TCC 319  
Date: 20090611  
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Appellant,

and

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### **REASONS FOR JUDGMENT**

#### **Woods J.**

[1] The appellant, Chris Connor, was reassessed under the *Income Tax Act* for the 2005 and 2006 taxation years to disallow a portion of the deductions claimed in respect of amounts paid to Mr. Connor's former spouse. The disallowed amounts are \$3,100 for the 2005 taxation year and \$450 for the 2006 taxation year.

#### **Facts**

[2] Following a marriage breakdown in September 2004, Mr. Connor made child and spousal support payments. The child support payments are not at issue here.

[3] Under a court order dated March 2, 2005, Mr. Connor was required to pay spousal support in the amount of \$500 per month commencing March 1, 2005.

[4] In a subsequent court order dated February 20, 2006, the level of spousal support was increased from \$500 to \$725 per month commencing March 1, 2006.

[5] Aside from the court orders, Mr. Connor made additional payments (the "Additional Amounts") to his former spouse in 2004, 2005 and 2006. These amounts, which in aggregate are \$3,550, are the subject of this appeal.

[6] Mr. Connor was jointly advised on this matter by the lawyers who acted on the divorce for him and his former spouse. The lawyers both advised that it would be more cost effective for Mr. Connor to pay the Additional Amounts on an informal basis so that the issues at trial could be narrowed.

[7] No written agreements were entered into at the time of these payments, but such agreements were subsequently entered into in order to comply with the requirements for deductibility under the *Act*.

[8] In a written agreement dated January 6, 2008, Mr. Connor agreed to pay to his former spouse (1) \$3,100 for daycare expenses incurred from September 2004 to March 2, 2005, and (2) \$450 to increase spousal support from \$500 to \$725 for a two month period commencing January 1, 2006.

[9] By a subsequent written agreement dated May 1, 2008, the above agreement was rewritten. In the new agreement, the \$3,100 payment is stated to be for spousal support instead of daycare expenses.

[10] The amount of \$3,100 referred to above was paid partly in 2004 and the balance was paid in 2005. The amount of \$450 was paid in 2006.

### Legislative provisions

[11] The relevant legislative provisions of the *Act* are paragraph 60(b), the definition of “support amount” in subsection 56.1(4), and subsections 60.1(3) and 60.1(4). The relevant parts of the provisions are reproduced below.

**60. Other deductions** -- There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:

...

(b) **[spousal or child] 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 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,

[...]

**56.1(4) Definitions** -- The definitions in this subsection apply in this section and section 56.

**"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

[...]

**60.1(3) Prior payments** -- For the purposes of this section and section 60, where a written agreement or order of a competent tribunal made at any time in a taxation year provides that an amount paid before that time and in the year or the preceding taxation year is to be considered to have been paid and received thereunder,

- (a) the amount is deemed to have been paid thereunder; and
- (b) the agreement or order is deemed, except for the purpose of this subsection, to have been made on the day on which the first such amount was paid, [...]

**(4) Definitions** -- The definitions in subsection 56.1(4) apply in this section and section 60.

[Emphasis added.]

### Analysis

[12] The conclusion that I have reached in this appeal is that the deduction of the Additional Amounts are not permitted under the *Act*. Although I have sympathy for Mr. Connor in this result, the relevant legislative provisions and several previous court decisions do not allow me to find in his favour.

[13] The problem is that the Additional Amounts do not satisfy the requirements for deductibility in paragraph 60(b) because they were not, at the time they were paid, receivable under a court order or written agreement.

[14] This interpretation has been adopted in many decisions of this Court, as well as a decision of the Federal Court of Appeal: *Martin v. The Queen*, 2005 FCA 297, 2006 DTC 6523. It is also consistent with the appellate court's decision in *Anstead v. The Queen*, 2005 FCA 315, 2005 DTC 5616.

[15] Although it is possible to rectify this problem by entering into a written agreement after the payments are made, there is a time limit for making a subsequent agreement: subsection 60.1(3). Unfortunately, the written agreements in this case were made outside this time limit.

[16] I would also comment that, in decisions of this Court, a broad view has generally been taken of what constitutes a written agreement for purposes of these provisions. Although a written agreement does not need to be in the form of a formal agreement, the provision of cancelled cheques and receipts has been held not to be sufficient: *Fortune v. The Queen*, 2007 TCC 20.

[17] Based on the evidence led at the hearing, there does not appear to have been any other form of written documentation evidencing the Additional Amounts until the written agreements were entered into in 2008.

[18] I now turn to an argument based on fairness. Mr. Connor submits that relief should be granted in his case because of a mishandling of the matter by the Canada Revenue Agency during the audit. Mr. Connor testified that no one from the CRA informed him on a timely basis during the audit of the requirement to have a court order or written agreement supporting these payments. He submits that if someone from the CRA had looked carefully at his file at the beginning of the audit, he could have been informed of the requirement in time for a written agreement to be made on a timely basis.

[19] As sympathetic as these circumstances appear to be, they do not permit me to find that the Additional Amounts are deductible.

[20] Mr. Connor is seeking relief for what in effect is an alleged misrepresentation of the law by the CRA. Unfortunately, this is not grounds to provide the deduction that he seeks.

[21] The applicable law in situations such as this is called the doctrine of estoppel and it was considered by Bowman A.C.J. (as he then was) in *Moulton v. The Queen*, 2002 DTC 3848 (TCC). At para. 11, the former Chief Justice stated the applicable principle as follows:

The essential factors giving rise to an estoppel are I think:

- (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
- (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
- (3) Detriment to such person as a consequence of the act or omission.

[...]

It is sometimes said that estoppel does not lie against the Crown. The statement is not accurate and seems to stem from a misapplication of the term estoppel. The principle of estoppel binds the Crown, as do other principles of law. Estoppel *in pais*, as it applies to the Crown, involves representations of fact made by officials of the Crown and relied and acted on by the subject to his or her detriment. The doctrine has no application where a particular interpretation of a statute has been communicated to a subject by an official of the government, relied upon by that subject to his or her detriment and then withdrawn or changed by the government. In such a case a taxpayer sometimes seeks to invoke the doctrine of estoppel. It is inappropriate to do so not because such representations give rise to an estoppel that does not bind the Crown, but rather, because no estoppel can arise where such representations are not in accordance with the law. Although estoppel is now a principle of substantive law it had its origins in the law of evidence and as such relates to representations of fact. It has no role to play where questions of interpretation of the law are involved, because estoppels cannot override the law.

[Emphasis added.]

[22] The result in this case may be harsh to Mr. Connor, but the relief that he seeks cannot be provided. The appeal will be dismissed.

Signed at Toronto, Ontario this 11<sup>th</sup> day of June 2009.

“J. M. Woods”

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Woods J.



CITATION: 2009 TCC 319

COURT FILE NO.: 2008-3053(IT)I

STYLE OF CAUSE: CHRIS A. CONNOR AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: June 8, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: June 11, 2009

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Ian Theil

COUNSEL OF RECORD:

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Name:

Firm:

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