Docket: 2007-4544(IT)I

BETWEEN:

STEVEN P. ELCICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 8 - 9, 2009, at Hamilton, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant:	Janice Parker-Elcich
Counsel for the Respondent:	Diana Aird

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of October 2009.

"V.A. Miller"

V.A. Miller, J.

Citation: 2009TCC531
Date: 20091021
Docket: 2007-4544(IT)I

BETWEEN:

STEVEN P. ELCICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The issue in this appeal is whether the Appellant is allowed to deduct the amounts of $21,109 and $18,450 as spousal support in the 2004 and 2005 taxation years respectively.

[2] The Appellant had a similar appeal before this court for his 1998, 1999, 2000, 2001, 2002 and 2003 taxation years. That appeal was heard by Justice Bowie and it is from the Reasons for Judgment in that appeal that I have gleaned the history of this appeal.

[3] Justice Bowie dismissed the Appellant's appeal and as a result, in 2004 and 2005, the Appellant did not deduct those amounts which he now argues are spousal support payments and should be deductible.

[4] The Appellant and his former common-law spouse had a child in 1985. The spousal relationship broke down in 1997 and on April 2, 1997, The Honourable Madam Justice MacDonald of the Ontario Court (General Division) ordered, on an interim interim basis, that the Appellant pay support of $425 per week to his former common law spouse for her and the child.

[5] There were two further Orders that were referred to me by the Appellant. On June 26, 1998, The Honourable Mr. Justice Marshall of the Ontario Court made an Order; the portion of that Order which is relevant to this proceeding is the following:

> THIS COURT FURTHER ORDERS THAT Madam Justice MacDonald's unallocated support Order dated April 2, 1997 is varied and increased to $600.00 per week retroactive to January 12, 1998.

[6] On December 12, 2002, The Honourable Mr. Justice Forestell ordered that the Appellant shall pay child support in the amount of $600 per month and spousal support in the amount of $500 per month.

[7] At the conclusion of the trial, Justice Forestell asked the parties to submit material that would allow him to determine the amount of the arrears of child support. On April 25, 2003 he issued Reasons in which he determined that the total arrears of child support payments were $54,100.65 plus interest of $3,083.35 for total arrears of $57,184. There was a sum of $9,784.05 which had been held in trust and this was credited against the arrears so that the balance of arrears was $47,400. Justice Forestell made the following statement at the end of his deliberations:

> It should be noted that the support order paid here and the arrears are all child support pursuant to the terms of the Income Tax Act.

[8] Prior to May 1997, spouses who made payments to separated or ex-spouses for the support of children could deduct the payments while the recipient had to include the payments in income. This was the old regime of deduction and inclusion[1].

[9] Justice MacDonald's Order was made under the old regime and the entire support amount was required to be included in the common law spouse's income and was deductible by the Appellant.

[10] Pursuant to the amendments to the *Income Tax Act* (the "Act") which were effective the end of April 1997, spousal support still had to be included in income by the recipient and could be deducted by the payer. However, child support was neither deductible nor includable when the payments were made "on or after a commencement day". "Commencement day" is defined in the Act and one of those situations specified as a commencement day is the day on which a child support amount is varied by a subsequent Order. For the purposes of this appeal, there is a commencement day of January 12, 1998, which is the date when the first payment of

the varied amount provided for in the Order of Mr. Justice Marshal was to be made.[2] "Child support" is defined in the Act in subsection 56.1(4) 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 common-law partner or former spouse or common-law partner of the payer or who is a parent of a child of whom the payer is a legal parent.

[11] In his Order, Mr. Justice Marshall left the support amount unallocated. The result of not allocating an amount between child support and spousal support is that the entire amount is treated as child support in accordance with the definition of "child support" in the Act.

[12] It is the Appellant's position that a portion of the $600 per week support amount which was ordered by Mr. Justice Marshall was really spousal support.

[13] His agent argued that it was clear from Madam Justice MacDonald's Order that she intended the support to be both spousal and child support. In varying the Order, Mr. Justice Marshall must have had the intention to provide support for both the spouse and the child. The agent argued that Mr. Justice Marshall's Order was ambiguous and I can look at extrinsic evidence to discern his true intention. However, the agent did not refer me to any documents that allegedly showed his true intention. She did state that there were no transcripts of the proceeding before Justice Marshall.

[14] It is my opinion that there is no ambiguity in Mr. Justice Marshall's Order. He did not allocate the support amount between spousal and child support and the entire amount is child support in accordance with the Act.

[15] Essentially this same decision was made by Justice Bowie in the Appellant's prior appeal. At paragraph 19 Justice Bowie stated:

> [19] I am not unsympathetic to the Appellant's position in this case. There is no doubt that the failure of Mr. Justice Marshall to allocate the support payments between spousal and child support when he varied Justice MacDonald's Order has operated to the considerable detriment of the Appellant from a financial point of view. **Exactly what took place in the action under the *Family Law Act* of Ontario was a matter of some evidence, but not strictly speaking, a matter into which this Court has any right to inquire. Certain Orders were made, and I have to take those Orders at face value. If they were wrongly made, and I do not purport to make any finding one way or the other as to whether any of them were, the only place that a remedy for that lies is in the Ontario Court of**

> **Appeal. Mr. Justice Marshall's Order was appealed to the Court of Appeal.** (emphasis added) That appeal was abandoned, the Appellant says without his consent, by his lawyer acting without instructions. I have no right to make any inquiry into that. It is far beyond my jurisdiction to do so, and I do not pretend to make any finding with respect to it. I would say only that there were remedies available that, had they been pursued to their ultimate conclusion, might very well have left the Appellant in a much more satisfactory position than he finds himself in today.

[16] It is my opinion that by describing the support amount as unallocated, Justice Marshall intended it to be a child support amount.

[17] For these reasons the appeal is dismissed.

Signed at Ottawa, Canada, this 21st day of October 2009.

"V.A. Miller"

V.A. Miller, J.

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[1] *Kovanik v. Canada*, [2001] T.C.J. No.181 at paragraph 8
[2] *Elcich v. Canada*, [2006] TCC 179 at paragraph 8

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PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	October 8, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	October 21, 2009

APPEARANCES:

Agent for the Appellant:	Janice Parker-Elcich
Counsel for the Respondent:	Diana Aird

COUNSEL OF RECORD:

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