Docket: 2009-2773(IT)I

BETWEEN:

ROBERT A. DUBIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 4, 2010, at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Khashayar Haghgouyan

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2007 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of March, 2010.

"G. A. Sheridan"

Sheridan J.

Citation: 2010TCC121
Date: 20100302
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BETWEEN:

ROBERT A. DUBIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The issue in this appeal is whether the Appellant, Robert Dubis, was entitled to an "amount for an eligible dependent" credit in respect of his daughter for the 2007 taxation year.

[2] In 2007, the Appellant and his former spouse were separated and not residing together. Their two daughters, N. and E. were residing with the former spouse. Pursuant to a court order dated December 19, 2006[1] ("Temporary Support Order"), it was ordered that:

> 1. The [Appellant] shall pay the [former spouse] child support of $1,330.00 per month for the [two] children of the marriage … on a temporary temporary basis commencing January 1, 2007, payable directly between the parties.
>
> 2. Unless the support order is withdrawn from the Office of the Director of the Family Responsibility Office, it shall be enforced by the Director and amounts owing under the support order shall be paid to the Director, who shall pay them to the person to whom they are owed.
>
> 3. This order bears interest at the rate of 6 per cent per annum on any payment or payments in respect of which there is a default from the date of default.

[1] Exhibit A-2.

[3] Pursuant to a subsequent order dated January 18, 2007[2] ("Continuing Child Support Order"), the Appellant's child support obligations in the Temporary Support Order were continued.

[4] Some nine months later, in September 2007, their daughter N. decided to live with the Appellant. This was not a contentious matter; the only question was how to adjust the payment of child support to reflect the new custodial arrangements. As of October 2007, the Appellant stopped paying child support in respect of N. who, by that time, was residing with him. Because he was now her *de facto* custodial parent, the Appellant claimed an "amount for an eligible dependent" credit for N. under paragraph 118(1)(*b*) of the *Income Tax Act*.

[5] The Minister of National Revenue disallowed the credit on the basis that the Temporary Support Order required the Appellant to pay a "support amount" for N. during the 2007 taxation year; accordingly, he did not meet the requirements of subsection 118(5) of the *Act*:

> **(5) Support** – No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual
>
> (a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or
>
> b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner. [Emphasis added.]

[6] Furthermore, because his former spouse was not required, at any time during 2007, to pay a support amount in respect of N., either by written agreement or order of a competent tribunal, the Appellant could not rely on subsection 118(5.1) to avoid the prohibition imposed under subsection 118(5):

> **(5.1) Where subsection (5) does not apply.** Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (*b*) or (*b.1*) of the description of

[2] Exhibit A-3.

> B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

[7] By way of background, the *Technical Notes* to subsection 118(5.1) show that this provision was added to the *Act* to correct the unintended consequences[3] of the application of subsection 118(5):

> **Oct. 2007 TN (budget/technical):** Presently, subsection 118(5) precludes a person from claiming a credit in respect of a child under paragraph (b) or (b.1) of the description of B in subsection 118(1) if that person also pays child support in respect of the child. Where, in the same taxation year, two persons pay child support in respect of a child, neither person is eligible for the credit.
>
> New subsection 118(5.1) corrects this unintended result by providing that, in such a case, the Act is to be read without reference to subsection 118(5). This ensures that one of the persons may claim the credit.

[8] The Appellant represented himself at the hearing of this appeal and was the only witness to testify. He explained that after N. moved in with him in September 2007, he and his former spouse continued negotiations[4] to sort out their respective child support obligations. By June 2008, they had agreed to the terms of draft Minutes of Settlement[5] which were ultimately incorporated into a court order dated June 9, 2008 ("Final Support Order"). Pursuant to the Final Support Order, the Appellant and his former spouse had joint custody of their daughters; E. resided with his former spouse and N., with the Appellant.

[9] Paragraphs 4, 7 and 11 of the Final Support Order touch on the issue raised in the present appeal; the relevant portions of these terms are set out below:

> 4. Commencing June 1, 2008, and on the 1st day of each month thereafter, the [Appellant] shall pay to [his former spouse] for Child Support, the sum of $475.00 per month. This sum represents the set-off of the $867.00 per month that the [Appellant] would pay for the support of [the daughter living with his former spouse] … and the amount of $392.00 per month that the [former spouse] would pay for the support of [N.] …

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[3] See *Leclerc v. Her Majesty the Queen*, 2005TCC689, [2007] 2 C.T.C. 2448, regarding the impact of subsection 118(5) prior to the 2007 amendment.

[4] See Exhibits A-7, A-8, A-9 and A-10.

[5] Exhibit A-4.

> 7. The [former spouse] may claim the Canada Child Tax Benefit including the National Child Benefit Supplement and the eligible dependent credit (formerly, equivalent-to-spouse credit) for [the child residing with her] and the [Appellant] may claim the Canada Child Tax Benefit including the National Child Benefit Supplement and the eligible dependent credit (formerly, equivalent-to-spouse credit) for [N.]. These benefits will not affect the Child Support.
>
> …
>
> 11. All Child Support is deemed to be paid to date and no Child Support arrears exist. The [Appellant] is not entitled to any refund or adjustment of Child Support paid to [his former spouse] from September 2007 to the date of this agreement.

[10] The Appellant also insisted that paragraph 13 of the Final Support Order was relevant to his appeal; in my view, it sheds little light on his entitlement to an "amount for an eligible dependent" credit, since it deals primarily with the Appellant's obligations in respect of the payment of spousal, rather than child, support:

> 13. All Spousal Support shall be deemed as having been paid to date and no arrears are owing, specifically, the [Appellant's former spouse] is deemed to have received Spousal Support for the year 2007 in the amount of $650.00 per month for a total of $7,800.00. The [Appellant's former spouse] shall include this Spousal Support as income and the [Appellant] may claim the Spousal Support as a deduction from his income. The [Appellant] will provide the [Appellant's former spouse] 12 post-dated cheques of $885.00 each, dated for the 1st and the 15th day of each month from July to December 2008 and so on, thereafter, for Child and Spousal Support payments.

[11] Briefly stated, the Appellant's position is that because he stopped paying child support in October 2007 and paragraphs 11 and 13 of the Final Support Order of June 2008 retroactively released him from any liability for spousal or child support arrears that might have accrued in 2007, it cannot be said that he was "required to pay a support amount (within the meaning assigned by subsection 56.1(4))" as contemplated by subsection 118(5); accordingly, he ought to be entitled to an "amount for an eligible dependent" credit under that provision.

[12] Given the reality of his situation in the last three months of 2007, I can understand the Appellant's unhappiness with the Minister's disallowance of his claim. The weakness of his argument, however, is that it fails to address the legislative criteria governing his eligibility for an "eligible dependent" credit; in

particular, the definition of “support amount” in subsection 56.1(4), and the clear and unambiguous language used in subsections 118(5) and 118(5.1).

[13] Notwithstanding the negotiations which occurred between the Appellant and his former spouse or the fact that N. resided with the Appellant after September 2007, the fact remains that throughout that year, the Temporary Support Order was in full force and effect. From this it follows that in the 2007 taxation year, the Appellant was required by the order of a competent tribunal to pay an amount as an allowance on a periodic basis for the maintenance of N., the discretion for the use of which lay with his former spouse. As a result, the Appellant was clearly “required to pay a support amount” in respect of N. and accordingly, is unable to meet the criteria in subsection 118(5) of the *Act*. Further, as nothing in either the Temporary Support Order (or, for that matter, the Continuing Child Support Order or the Final Support Order) imposed on the Appellant’s former spouse a requirement to pay child support in respect of N. in 2007, the relief provided under subsection 118(5.1) is equally unavailable to him. Accordingly, the appeal must be dismissed.

Signed at Ottawa, Canada, this 2nd day of March, 2010.

“G. A. Sheridan”

Sheridan J.

CITATION:	2010TCC121
COURT FILE NO.:	2009-2773(IT)I
STYLE OF CAUSE:	ROBERT A. DUBIS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	March 2, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Khashayar Haghgouyan

COUNSEL OF RECORD:

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