

Docket: 2011-1818(IT)I

BETWEEN:

SHERRY ANN WILLIS (ARBEAU),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard and Judgment rendered orally on January 11, 2012 at
Fredericton, New Brunswick

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Jan Jensen

JUDGMENT

The appeal from the determination made under the *Income Tax Act* with respect to the period September, 2009 to June, 2010 is allowed, without costs, but only to the extent of recognizing that the Appellant's notification to the Minister occurred in April, 2010, therefore negating the Appellant's responsibility for the overpayment for May and June, 2010. The determination is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of January 2012.

“Diane Campbell”

Campbell J.

Citation: 2012 TCC 23
Date: January 18, 2012
Docket: 2011-1818(IT)I

BETWEEN:

SHERRY ANN WILLIS (ARBEAU),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant and her husband, Ronald Arbeau, separated in August, 2009. There is one son of the marriage, born in August, 1996. The Appellant admitted that the child continued to reside with the husband after the separation and it was Mr. Arbeau who was responsible for the son's primary care and supervision. Therefore, there is no issue concerning which parent was the eligible individual with respect to the child tax credit or the national child benefit supplement. By her own admission, the Appellant stated that she was no longer the eligible individual after August, 2009 when she separated, nor was she the parent that primarily fulfilled the responsibility for her son's care and upbringing pursuant to section 122.6 of the *Income Tax Act* (the "Act").

[2] The problem arises in this appeal because the Appellant failed or neglected to notify the Minister of National Revenue (the "Minister") as required by subsection 122.62(4) that she was no longer the eligible individual in respect to her son.

[3] Without notice that the separation had occurred, the Minister continued to forward the cheques subsequent to August, 2009, payable to the Appellant, to the

address that belonged to the marital residence of the Appellant and her husband prior to the separation. This was, in fact, the address where the cheques had been forwarded to the Appellant for a number of years prior to the separation.

[4] The Appellant testified that, when she filed her 2009 return in February, 2010, she notified the Minister of a change in her address to 100 Myrtle Street and that subsequent to this she received the first cheque following the August, 2009 separation in March, 2010 and then one in April, 2010. She assumed that the March cheque was somehow related to the marriage and not the child tax benefit and supplement and she cashed it. She cashed the April cheque but testified that she called the Canada Revenue Agency (the "CRA") after she received that cheque to inquire about the reason for receipt of it. She was informed that it related to the child tax benefit and supplement. When she received subsequent cheques for May and June, 2010, she did not cash them and returned them to the CRA. She received no cheques after that.

[5] The issue is whether the Appellant is responsible to repay to the Minister the amounts of the child tax benefits and the national child benefit supplement paid during the period September, 2009 to June, 2010.

[6] The Minister is relying on subsection 122.62(4) of the *Act* which states the following:

122.62.(4) Person ceasing to be an eligible individual. Where during a particular month a person ceases to be an eligible individual in respect of a particular qualified dependant (otherwise than because of the qualified dependant attaining the age of 18 years), the person shall notify the Minister of that fact before the end of the first month following the particular month.

[7] The Minister's position is that the Appellant did not notify the Minister that she was separated from her spouse, that she had left the marital home to take up residence elsewhere and that the son was continuing to reside with his father who was the primary caregiver and, consequently, the eligible individual entitled to receive the benefits.

[8] This is not a simple case of the Appellant continuing to receive all of these cheques and cashing them for the period September, 2009 to June, 2010. Her evidence is that the first cheque she received was in March, 2010 because she filed her 2009 tax return which had advised the Minister of her new address on Myrtle Street. Consequently, the Minister started to forward the cheques to her instead of the marital home address as had occurred in the past. Her evidence, and I believe her, is

that she received no cheques for September through to and including February, 2010 as they continued to go to the residence where her spouse was residing and which was the address on record for the Appellant. According to the Appellant's evidence, the only two cheques that she cashed were March and April and I believe she mistakenly did so thinking they were somehow connected to the marital breakdown. The documentary evidence, being the cancelled cheques, does, in fact, support that the cheques for September, 2009 through to February, 2010 were payable to the Appellant and forwarded to the marital residence but signed on the back by only her spouse.

[9] The cheques for March and April were payable again to the Appellant but contain her new Myrtle Street address and contain only her signature as the individual cashing those two cheques, as per her evidence. Prior to the separation, the Appellant testified that they had a joint account but that the account number on the back of the cheques for September, 2009 to February, 2010 contain a different account number than the joint account she shared with her husband. She further stated that she had no account at the Royal Bank where these cheques were deposited. Exhibit A-1, a letter from the Royal Bank, confirms that the Appellant has no personal dealings or accounts at RBC. The March and April cheques that the Appellant admits to cashing contain a Bank of Montreal account number.

[10] I have no doubt that what the Appellant alleges, in fact, occurred and that it was in all likelihood the husband that cashed the September to February cheques and then refused to cooperate with the Appellant when she asked him to do so in straightening this matter out with the CRA. The husband, according to the documentary evidence, has received a double benefit because he received a cheque from the government for \$2,238.69 in July, 2010 as a reimbursement for some of this amount.

[11] All of this leaves the Appellant with the problem of owing money to the Minister, viewed by the Minister as being an overpayment of monies she was not otherwise entitled to because she is not the eligible individual under the *Act*. The wording in subsection 122.62(4) is mandatory, that is, the parent that ceases or is no longer the eligible individual in relation to the child of the marriage must notify the Minister of that fact before the end of the first month following the separation. In this particular appeal, that means that the responsibility falls on the Appellant to notify the CRA in September, 2009, the month following the separation in August, 2009, of that separation and that she was no longer the primary caregiver for the child. The subsection contains the wording "shall notify". I therefore have no discretion to "right" what I perceive to be a "blatant wrong" on the part of the husband. It is clear

from both the Appellant's oral testimony and the documentary evidence that the husband has refused to 'step up to the plate' and rectify this situation and, in fact, has quietly accepted funds by way of the cheque in July, 2010 in the amount of \$2,238.69 to which he was not entitled as he, and not the Appellant, clearly received and cashed the September, 2009 to February, 2010 cheques for these benefits.

[12] While the subsection may seem to produce harsh results in this appeal, it is premised on the underlying principle of self-assessment in which it is presumed that every taxpayer best knows their own unique circumstances and the Minister cannot be expected to enquire of each taxpayer changes to those circumstances. It was upon the Appellant's shoulders to notify the Minister even though she assumed all was well for the September to February period because she was not in receipt of the monthly cheques.

[13] Because of the legislation, it is irrelevant that the majority of these cheques were cashed and deposited by her former spouse because it was the Appellant who had the duty to inform the Minister under subsection 122.62(4).

[14] According to Respondent Counsel, the first notification to the Minister occurred in July, 2010 when the Appellant wrote to the CRA explaining what occurred. However, according to the Appellant's oral testimony, she advised me that she called the CRA at the end of April, 2010 to enquire about those two cheques and was told at that time that they related to the child tax benefit. I am accepting the Appellant's evidence that she notified the CRA in April, 2010 and that the subsequent July correspondence was a follow up explanation after she received yet two more cheques for May and June.

[15] I am, therefore, allowing the appeal but only to the extent of recognizing that the notification to the Minister occurred in April, 2010, therefore negating the Appellant's responsibility for the overpayment for May and June of this period. For the other months, I must unfortunately, and with regret, order the Appellant to repay the amounts for the balance of the period in issue. Although these Reasons are being delivered orally, I am going to provide them in writing to the Appellant in due course in the hope that they may be of assistance to her in her divorce proceedings. Her recourse is against her husband or the bank or possibly both and I trust that for this appeal, Justice will prevail and the "correct and just ending" to this saga can be resolved in another court.

Signed at Ottawa, Canada, this 18th day of January 2012.

“Diane Campbell”

Campbell J.

CITATION: 2012 TCC 23

COURT FILE NO.: 2011-1818(IT)I

STYLE OF CAUSE: SHERRY ANN WILLIS (ARBEAU) and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: January 11, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF JUDGMENT: January 18, 2012

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Jan Jensen

COUNSEL OF RECORD:

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