Docket: 2012-1182(IT)I

BETWEEN:

FOLASADE ABIOLA,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Appeal heard on February 27, 2013, at Calgary, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Paige Atkinson

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year is allowed, and the matter 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 27th day of May 2013.

"Robert J. Hogan"

Hogan J.

Citation: 2013 TCC 115
Date: 20130527
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BETWEEN:

FOLASADE ABIOLA,

appellant,

and

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respondent.

REASONS FOR JUDGMENT

Hogan J.

I. INTRODUCTION

[1] The appellant, Folasade Abiola, has appealed the denial of her claims for a wholly dependent person tax credit and a child tax credit in respect of her daughter, who is identified as OA in the respondent's reply to the appellant's notice of appeal for her 2009 taxation year. The credits were disallowed by the Minister of National Revenue (the "Minister") on the grounds that the *Income Tax Act* of Canada (the "*ITA*") bars a taxpayer from claiming wholly dependent person and child tax credits in respect of a child for whom the taxpayer is required to pay child support to a former spouse or common-law partner.

[2] For the most part, the facts are not in dispute. The appellant was married to Philip Abiola. There are three children of the marriage, a daughter, OA, born in 1996, and two sons, S, born in 1994, and T, born in 1993. The appellant and Philip Abiola divorced on January 12, 2009.

[3] At the time of the divorce, the three children were in the care of Philip Abiola.

[4] On April 2, 2009, the appellant was ordered to pay an amount of $843 per month to Philip Abiola, commencing on February 5, 2009. This order was in respect of all three children of the marriage.

[5] The situation changed shortly after that order was issued. The appellant's daughter, OA, moved in with the appellant in April 2009. The appellant's employment came to an end on May 8, 2009, and she collected employment insurance from May until September 2009. The appellant then obtained employment as an administrative assistant commencing September 2, 2009, earning approximately $42,000 per annum.

[6] On November 17, 2009, a new order was issued, stating that the appellant was $1,658 in arrears for the months of February through August 2009. The order did not provide a breakdown of the arrears amount.

[7] The appellant claimed OA as an eligible dependant in her 2009 tax return. By a signed statement dated February 7, 2013, Philip Abiola agreed that the appellant could claim OA as a dependant for the 2009 taxation year.

[8] On June 25, 2010, the CRA initially assessed the appellant, at which point the wholly dependant person and child credits were allowed as claimed.

[9] On December 20, 2010, the Minister reassessed the appellant and denied her claims for the tax credits in respect of OA because the appellant was allegedly required to make support payments for OA during the 2009 taxation year.

[10] On April 1, 2011, the appellant filed a notice of objection to the reassessment for the 2009 taxation year. On November 17, 2011, the Minister confirmed the reassessment on the basis that the appellant was required by a court order dated September 23, 2009 to make support payments in respect of OA and is thus precluded from claiming the tax credits at issue in this appeal.

II. ISSUES

[11] Was the appellant required to make support payments in 2009 with respect to her daughter? If not, was the appellant entitled to the wholly dependent person and child tax credits under paragraphs 118(1)(*b*) and (*b*.1) of the *ITA* in respect of OA for her 2009 taxation year?

III. APPELLANT'S POSITION

[12] At the hearing, the appellant argued that the second order required her to pay child support only in respect of her two sons, and not her daughter, who chose to live with her in 2009.

IV. RESPONDENT'S POSITION

[13] The respondent submits that no claim can be made as there was a court order under which the appellant was to make support payments to her spouse, as referred to in by subsection 56.1(4) of the *ITA*. According to the respondent, subsection 118(5) of the *ITA* prohibits the appellant from claiming non-refundable tax credits in respect of OA.

V. ANALYSIS

[14] For the appellant to succeed, she needs to show on a balance of probabilities that (1) there was no order to make support payments with respect to her daughter, OA, in 2009 and that (2) there was an agreement with her former spouse that the appellant could claim their daughter for tax purposes. Such an agreement was produced at the hearing, thus satisfying the second condition.

[15] The appellant was required to pay child support in respect of her three children by a court order, as can be seen in the respondent's evidence (Exhibit R-1, court order, of April 2, 2009, "First Order"). However, there was a new order issued as a result of a change in the situation of the appellant (Exhibit R-1, court order, of November 17, 2009, "Second Order"). The Second Order states that the appellant was $1,658.00 in arrears, but it does not break down the amount.

[16] Although the Second Order is vague, the manner in which the payments were calculated demonstrates that the appellant was required to pay child support only in respect of her two sons in 2009.

[17] In my opinion, the overall result of the Second Order was to confirm that the appellant was not required to pay any support amount in respect of her daughter for the 2009 taxation year. While the appellant admitted that she was in arrears and that the arrears amount included support for her daughter for the period of February and March 2009, the Second Order modified the support requirement so as to reflect the changes in the appellant's living situation. This was the result of a change in the appellant's income and the fact that her daughter moved in with her shortly after the

First Order was issued. The Second Order eliminated any requirement to pay support amounts with respect to the appellant's daughter for the 2009 taxation year.

[18] I see no reason to depart from Judge Hershfield's analysis in *Barthels v. Canada*:[1]

> 10 . . . Consistency with the new child support guidelines would not be advanced by denying the equivalent-to-spouse credit to the supporting custodial parent. Clearly in the case at bar, Diane is not an individual entitled to the credit in respect of Stephanie. Diane has not supported Stephanie at any time in 1999 in a home maintained by her (Diane). The scheme of these provisions cannot be taken to intend that the supporting custodial parent be denied the equivalent-to-spouse credit.
>
> 11 Secondly, I note that subsection 118(5) has a potential ambiguity in that one might ask the relevance of it not expressly stating when the requirement to pay a support amount needs to be in place. It is somewhat unusual that that subsection denies the credit "for a taxation year" where there is "a requirement to pay a support amount" but makes no mention of when that requirement must have come into existence or have been extinguished. More typically, exhaustive drafting styles evidenced in the Act might have said the credit is denied where there is "in the year" or "at anytime in the year" or "in respect of the year or any part of the year" a requirement to pay a support amount. While I hesitate to suggest that these cumbersome provisions be made more cumbersome by adding further language, <u>I am inclined in this case to suggest that by not adding a time reference as to when the requirement to pay must be in existence, an extinguishment, at any time, of the requirement to pay any support amount "in respect of the year" might well be sufficient to escape the limitation imposed by that subsection. Certainly in this case I see no mischief in such a statutory construction approach.</u>
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> 12 Thirdly, I find that the First Order payment requirement was inherently conditional on the custody situation set out in that order. That situation changed in the year preceding the subject year and remained changed throughout the subject year. The First Order was not meant to apply to such case. The Second and Third Orders setting aside the arrears were, in my view, perfunctory and must be given the same effect as setting aside the order that gave rise to the arrears. The Second and Third Orders acknowledged the state of affairs, the legal arrangement, as agreed to when the First Order was made. They acknowledged the inherently conditional nature of the First Order and clarified that the requirement to pay child support for Stephanie was not to have effect when the premises on which that requirement was imposed ceased to exist. These Orders, while not expressly retroactive in vitiating that requirement, have that effect nonetheless, in my view.

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[1] [2002] T.C.J. No. 256 (QL).

[Emphasis added.]

[19] Justice Lamarre relied on those same passages in *Giroux v. The Queen*:[2]

> 22 In 2009, the appellant, not the former spouse, should normally have been entitled to the credits set out in paragraphs 118(1)(*b*) and (*b.1*). I agree with Justice Hershfield's statement that consistency with the provisions at issue would not be advanced by denying the wholly dependent person credit to the supporting custodial parent. I also agree with his finding that an order payment requirement is inherently conditional on the custody situation set out in that order. As soon as the child left the mother's house to move in with his father, the situation that existed at the time when the Quebec Court of Appeal ruled on the appellant's payment of child support was no longer the same and could not entitle the former spouse to require the appellant to pay said support. . . .

[20] In the case at bar, the First Order was conditional on all three children living with Philip Abiola. That situation changed shortly after the First Order was issued, when OA moved in with the appellant in April 2009. The Second Order extinguished the requirement that the appellant pay support in respect of OA. The Second Order, while not expressly retroactively vitiating that requirement, has that effect nonetheless.

VI. CONCLUSION

[21] For these reasons I conclude that the appellant was not required to pay any support amount in respect of her daughter, OA, in the 2009 taxation year. As a result, the appellant is entitled to claim the wholly dependent person and child tax credits under paragraphs 118(1)(*b*) and (*b*.1) of the *ITA* in respect of OA for her 2009 taxation year.

Signed at Ottawa, Canada, this 27th day of May 2013.

"Robert J. Hogan"

Hogan J.

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[2] 2012 TCC 284.

CITATION:	2013 TCC 115
COURT FILE NO.:	2012-1182(IT)I
STYLE OF CAUSE:	FOLASADE ABIOLA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 27, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	May 27, 2013

APPEARANCES:

For the appellant:	The appellant herself
Counsel for the respondent:	Paige Atkinson

COUNSEL OF RECORD:

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