

**TAX COURT OF CANADA**

**IN RE: the Income Tax Act**

**BETWEEN:**

**ALLISON CLEMENT**

**Appellant**

**- and -**

**HER MAJESTY THE QUEEN**

**Respondent**

**- and -**

**ALESSANDRO D'OVIDIO**

**Third Party**

**REASONS FOR JUDGMENT DELIVERED  
ORALLY FROM THE BENCH BY JUSTICE JOE E. HERSHFIELD  
in the Courts Administration Service,  
180 Queen Street West,  
Toronto, Ontario  
on Thursday, April 19, 2007 at 1:45 p.m.**

**APPEARANCES:**

Mr. Theodore Cowdrey  
Mr. Laurent Bartleman

Agent for the Appellant  
Counsel for the Respondent

**Also Present:**

Mr. Alessandro D'Ovidio

**A.S.A.P. Reporting Services Inc. 8 2007**

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Toronto, Ontario

**REASONS FOR JUDGMENT**

(Edited from the transcript of Reasons delivered orally from the Bench at Toronto, Ontario on April 19, 2007)

JUSTICE HERSHFIELD: The Appellant appeals a reassessment in respect of her 2003 taxation year which included in her income child support payments made by her former spouse in the amount of \$9,600. Pursuant to an order made under Subsection 174(3) of the Income Tax Act by Justice Bowie on January 4, 2007, the Appellant's former spouse, Alessandro D'Ovidio, was joined as a party to the appeal.

The Appellant and her former husband lived separate and apart since April 1996 because of the breakdown of their marriage. A divorce judgment was issued in November 2002 by the Ontario Superior Court of Justice. The Appellant and her former husband are the parents of three children over which they have joint custody, with the primary residence of the children being at the home of the Appellant.

A separation agreement was executed in 1996 pursuant to which the Appellant was required to pay for the support of the children

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1 the amount of \$1,000 per month, \$333 per child,  
2 with indexing. Further contributions towards  
3 certain child-care costs were required as well.

4 The issue in this hearing is  
5 whether a commencement day was created after the  
6 1996 agreement was entered into. It is not in  
7 dispute that by oral agreement the fixed monthly  
8 payments reduced, in about June of 1998, to \$800  
9 per month or \$266 per child per month.

10 There was an unsigned written  
11 amending agreement presented at the hearing. This  
12 unsigned agreement reflects the change to the child  
13 support amount from \$1,000 to \$800. The  
14 Appellant's testimony was that it reflected the  
15 amount of support being unilaterally imposed on her  
16 and was prepared on her husband's behalf.

17 Her ex-husband testified that he  
18 had never seen the document. He did acknowledge  
19 however that the support amount paid on a regular  
20 monthly basis or fixed monthly basis was reduced to  
21 \$800 per month as per an oral agreement between  
22 them at that time, although he testified as well  
23 that he continued to pay other expenses for the  
24 children in various amounts which might have  
25 brought the total to some \$1,000, or perhaps even  
26 in excess of \$1,000 per month in some years.

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1 ex-spouse unilaterally imposed the agreement on him  
2 to ensure a tax advantage to her. The Appellant's  
3 testimony was that it was his idea in the first  
4 place and that he knew it was a change in the  
5 support obligations and even filed his post-1998  
6 tax returns claiming a reduced payment.

7 The Respondent's counsel pointed  
8 out inconsistencies in the Appellant's notice of  
9 objection relative to her testimony, and had the  
10 Appellant admit that she was now suing for arrears  
11 even though she testified that her ex had paid the  
12 \$800 per month agreed upon.

13 I have listened to the witnesses.  
14 I don't find either of them reliable. The  
15 hostility between them is still palpable and each  
16 spins testimony in a light believed at that moment  
17 to be favourable to their cause. In these  
18 situations, the documents will speak for  
19 themselves. Accordingly, I find that the November  
20 2002 affidavit is a written agreement reducing  
21 child support from \$1,000 to \$800 per month and as  
22 such creates a commencement date as at November  
23 18th, 2002, the date that the affidavit was sworn  
24 before the commissioner.

25 I note here that it is Subsection  
26 54.1(4) that defines when a commencement day is

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1 created. It provides that such day, being the date  
2 the child support amounts commence being  
3 nondeductible and nontaxable, is created when the  
4 child support amount is varied. Child support  
5 amount is also defined in that subsection as  
6 effectively being the amount received in the  
7 respect of the children under a written agreement.

8 The amount actually paid prior to  
9 December '02 and since the time of the oral  
10 agreement was arguably upward of \$1,000 or more per  
11 month although the claim was only for \$800 per  
12 month since the time of the oral agreement in about  
13 June of 1998. This claim reflects the change in  
14 fixed monthly payments, whether or not it had to,  
15 based on the 1996 agreement. Whether or not it was  
16 so limited, would depend on whether the other  
17 expenses paid for the children, such as  
18 recreational expenses, could fall under the  
19 definition of child support even though they were  
20 not paid on a fixed periodic basis.

21 Regardless, what he is allowed or  
22 might have been allowed prior to November or  
23 December of 2002 is not an issue before me. I am  
24 concerned only with 2003 which will impact  
25 subsequent years as well as 2003. If a  
26 commencement day is created, all payments in

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1 respect of the children are nondeductible and  
2 nontaxable at and from the commencement day.

3 Expanding the child support amount  
4 to include other expenses or limiting it to \$800  
5 makes no difference. The question is whether the  
6 affidavit, the written agreement, changes the child  
7 support amount. As stated, if it does, a  
8 commencement day is created and, as I've already  
9 stated, the affidavit does, in my view, meet the  
10 requirement for the creation of a commencement day.  
11 A Written agreement need not take any particular  
12 form. The affidavit needed to include the written  
13 agreement as to support in order to get the  
14 divorce. The divorce judgment itself says that the  
15 Judge grants the joint petition for divorce having  
16 read the affidavit of the petitioners. An argument  
17 might even be made that it forms part of the order.

18 In any event, the Court needed the written  
19 undertaking that the parties were agreed as to the  
20 support, and the Court relied on it in giving or  
21 granting the petition of divorce.

22 There is no clearer case of where  
23 the statutory requirements have been met. I also  
24 note before concluding that there are no mistakes  
25 here except perhaps in the mind of the Appellant's  
26 ex-husband. He says he didn't understand that

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1 signing the affidavit would have an adverse tax  
2 consequence. This may or may not be true but that  
3 is not relevant. He understood and intended the  
4 commercial result. He understood and intended the  
5 family law result. He knew that the new written  
6 understanding reflected the verbal agreement that  
7 he had honoured for four years. That he did not  
8 understand the tax results or intend the tax result  
9 is not relevant. The motives of the parties are  
10 not relevant.

11 At the end of the day, the oral  
12 agreement did reduce the fixed amount that the  
13 Appellant's ex-spouse had to pay. It reduced it to  
14 the amount that both parties, reluctantly or not,  
15 had agreed to accept as child support. They were  
16 bound in respect of this agreement, happily or  
17 unhappily, for four years.

18 However, for tax purposes,  
19 respecting the oral agreement at \$800 per month did  
20 nothing to change the tax regime until it was  
21 rendered in writing. For tax purposes, the regime  
22 changed when the agreement was reduced to writing  
23 and that happened in November 2002.

24 There is no doctrine of mistake or  
25 contract that can assist the Appellant's husband in  
26 these circumstances where there is a clash between

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1           the parties. Accordingly, the appeal and the joint  
2           application under Section 174 shall be disposed of  
3           on the basis that a commencement day was created on  
4           November 18th 2002, in effect, the Appellant has  
5           won her appeal.           That's my judgment and  
6           reasons, thank you.  
7           --- Upon concluding the Reasons for Judgment at  
8           2:00 p.m.

CITATION: 2007TCC296

COURT FILE NO.: 2005-4348(IT)I

STYLE OF CAUSE: Allison Clement -and-  
Her Majesty the Queen  
-and- Alessandro D'Ovidio

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING  
AND ORAL JUDGMENT: April 19, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice  
J.E. Hershfield

DATE OF WRITTEN REASONS  
FOR JUDGMENT: May 23, 2007

APPEARANCES:

Agent for the Appellant: Theodore Cowdrey, CA

Counsel for the Respondent: Laurent Bartleman

For the Third Party: Alessandro D'Ovidio

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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