

Court File No. 2006-820 (IT)I

TAX COURT OF CANADA

IN RE: the Income Tax Act

BETWEEN:

TIM PARR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

**JUDGMENT FROM THE BENCH
BY MR. JUSTICE EUGENE ROSSITER
in the Courts Administration Service, Courtroom No. 6B ,
Federal Judicial Centre, 180 Queen Street West, 6th Floor,
Toronto, Ontario
on Thursday, February 8, 2007 at 4:15 p.m.**

APPEARANCES:

Mr. Mark Greenstein

for the Appellant

Ms Sonia Akibo-Betts

for the Respondent

Also Present:

Mr. Colin F. Nethercut

Court Registrar

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--- Upon commencing on Thursday, February 8, 2007
at 4:15 p.m.

THE REGISTRAR: The hearing is
resumed.

JUDGMENT FROM THE BENCH:

JUSTICE ROSSITER: This matter
comes before me due to a reassessment of January
16, 2006 to the appellant. The facts are not
really in dispute. The appellant was married in
August 16, 1980. There was one child from the
marriage, Tanya, born July 28, 1983.

A divorce took place between the
appellant and the spouse in September 3, 1987, as
shown by Exhibit A-1. Paragraph 5 of Exhibit A-1
states as follows:

"This Court orders and
adjudges that the respondent
husband, Timothy James Parr,
shall pay to the petitioner,
Valerie Ellen Parr, the sum
of \$250 per month on the
first day of each month for
the support of the child of
the marriage, Tanya Valerie
Parr."

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1 The appellant met all his
2 obligations per the order until his spouse left the
3 jurisdiction with the child and, according to him,
4 upon one week's notice. No forwarding address was
5 given, according to the appellant.

6 The appellant stopped his payments
7 and contact was eventually made by the family
8 support services office or whatever their name is,
9 and eventually they closed their file or went into
10 abeyance mode.

11 Eventually the spouse reappears
12 and asserts her entitlement to maintenance in the
13 arrears and on an ongoing basis. The appellant
14 immediately responds and makes arrangements to
15 continue with payments and also to make payment on
16 the arrears. The appellant also makes an
17 application for what I presume to be a variation or
18 wiping out of the arrears outstanding.

19 A settlement was reached with the
20 assistance of the Court, resulting in Exhibit A-4.

21 By the time of this Exhibit A-4 order of July 19,
22 2004, arrears were allegedly, according to Exhibit
23 R-1, \$49,288.02.

24 Exhibit A-4, the order of July 19,
25 2004, does a couple of things. First of all, it
26 makes no reference whatsoever to Exhibit A-1, the

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1 divorce order of September 3, 1987.

2 No. 2, it fixed the child arrears
3 of support to \$10,500 as of July 31, 2004, which
4 was to be paid within 45 days of the order.

5 No. 3 provides for ongoing support
6 for the child of the marriage, Tanya, of \$300 per
7 month commencing August 1, 2004, with certain
8 provisos for its termination.

9 The issues here are really twofold
10 or threefold. The first issue is whether the
11 \$10,500 payment meets the requirements of the
12 definition of spousal amount as defined in
13 subsection 56.1(4) of the act. The second issue is
14 whether the commencement day for the \$10,500
15 payment is the date of the divorce judgment or of
16 the order of 2004 that is Exhibit A-4. Those are
17 the issues. If it is a spousal amount then is it
18 not also a child support amount and, if it is, the
19 applicable commencement day.

20 Now the appellant's position is
21 one of common sense. The payment was a maintenance
22 payment under the original order. Whether the
23 payment is made on time or not is really neither
24 here nor there. If there was a periodic payment
25 ordered and it was made by lump sum it is really
26 neither here nor there according to certain case

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1 law which I won't necessarily refer to because I
2 don't have to in the case at bar.

3 Finally, there was an agreement
4 ordered and confirmed by a court order to make the
5 deduction on his income tax and include the amount
6 as income in the spouse's tax return.

7 One would think that common sense
8 would prevail. One would think that fairness would
9 prevail, especially given the fact that it was a
10 court order.

11 The respondent's position is, no.
12 1, the Income Tax Act determines the amount that is
13 to be deductible, not the court, or not a judge
14 under any particular order. No. 2, a new
15 commencement date has been triggered and therefore
16 the new deductibility regime comes into effect
17 under section 60(b) of the Income Tax Act. The
18 amount is a child support. Under the new regime,
19 the formula kicks in and there is no deduction.

20 Now what is the law? Section
21 56.1(4) defines spousal amount. To qualify under
22 that, there are a bunch of criteria. No. 1, it
23 must be an allowance. No. 2, it must be payable
24 and receivable on a periodic basis. No. 3, it must
25 be paid for maintenance of the recipient, child of
26 the recipient or both. No. 4, the recipient must

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1 have direction as to the use of the amount. No. 5,
2 the payer and the recipient must be living separate
3 and apart as a result of the breakdown of the
4 marriage and, no. 6, the amount must be paid
5 pursuant to either written agreement or a court
6 order.

7 I have canvassed a variety of case
8 law with respect to whether or not this is a
9 periodic payment or a lump sum payment or whatever.

10 There are three cases, Groleau v. R., which was a
11 decision of Mr. Justice Rip as he then was of the
12 Tax Court, now Associate Chief Justice of the Tax
13 Court of Canada, 2002 DTC 1725.

14 We had the Lebreton case referred
15 to by both counsel. I think it is in tab 3 of the
16 respondent's authorities, a decision of Madam
17 Justice Lamarre of the Tax Court of Canada on
18 September 11, 2002. There is another case called
19 Benham, 2006 Tax Court of Canada 410.

20 All of those would find this
21 amount not to be a spousal amount, per se, and
22 therefore not deductible.

23 However, there is another case
24 which is very close to being on point. That is a
25 case called Soldera v. The Minister of National
26 Revenue, [1991] TCJ No. 142, a decision of Mr.

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1 Justice Garon of the Tax Court of Canada. That
2 particular case can be described as follows: In
3 Soldera, the taxpayer was initially ordered to pay
4 \$200 per month in child support. The order was
5 subsequently varied after the payments fell into
6 arrears to provide for \$100 per month plus \$7,500
7 in arrears.

8 After the taxpayer made the
9 payment in arrears, the Minister disallowed the
10 \$7,500 deduction on the basis that it was not a
11 periodic payment for the purpose of section 60(b)
12 of the act.

13 Judge Garon as he then was
14 determined that the lump sum payment was deductible
15 because it merely crystallized the amounts due
16 periodically under the first order and really
17 represented a portion of the arrears of maintenance
18 payments that were an allowable allowance payable
19 on a periodic basis under paragraph 60(b).

20 It was also noted that the
21 taxpayer had not been released from any existing or
22 further liability in respect of maintenance of the
23 children.

24 That case is almost square on with
25 Mr. Parr's situation.

26 I have authorities on one side and

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1 I have authorities on the other side. Which side
2 do I go on? It really is neither here or there as
3 to which side I go on because unfortunately, and I
4 say unfortunately because that is the way I feel,
5 unfortunately the matter is resolved by the issue
6 of the commencement date, but is not resolved in
7 the favour of Mr. Parr.

8 The commencement date can be a
9 very complicated issue or it can be very simple. I
10 will try to take the simplest approach by quoting
11 Mr. Associate Chief Justice Bowman, now Chief
12 Justice, in Kovarik v. R., [2001] TCJ No. 181,
13 informal procedure, Tax Court of Canada. I can
14 give these citations later to counsel, if they
15 require it.

16 Paragraphs 8 and 9 state as
17 follows:

18 "Under what I may describe as
19 the old regime (pre-May of
20 1997) spouses making payments
21 to separated or ex-spouses
22 for the support of children
23 could deduct those payments
24 and the recipient had to
25 include them in income.

26 Following the decision of the

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1 Supreme Court of Canada in
2 Thibaudeau v. Canada in 1995
3 2 SCR 627, the legislation
4 changed. So long as a pre-
5 May 1997 agreement remained
6 unchanged, the
7 deduction/inclusion system
8 under the old regime
9 prevailed.
10 "If a new agreement were
11 entered into or an old
12 agreement was changed in a
13 particular way the
14 deduction/inclusion regime
15 ceased and only payments made
16 up to the commencement day as
17 defined were deductible by
18 the payor and includable by
19 the payee."

20 In this particular case, the
21 matter is answered by that. Unfortunately, we can
22 only find that there has been a new agreement
23 entered into. The old agreement has been changed
24 in a particular way; the deduction regime has
25 therefore been changed.

26 The \$10,500 paid by Mr. Parr was

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1 under a new order which was different than the old
2 order. Since it is child support, it is not
3 deductible from the appellant pursuant to section
4 60(b) of the Income Tax Act.

5 I say unfortunate because I am
6 very concerned that if the Minister in this
7 particular case -- and we can't really go there, it
8 is really obiter -- if he allowed the spouse to
9 include this amount in her income and taxed her on
10 that income and did not allow an equivalent
11 deduction for the appellant, there is some
12 unfortunate sense of unfairness in that in my mind.

13 But the Income Tax Act is what it
14 is. I am sure there are many other instances where
15 the Income Tax Act will be found not necessarily to
16 be fair.

17 Again, I also want to point out
18 that there was a court order here. All that Mr.
19 Parr was doing was complying with a court order,
20 doing what he was basically ordered to do.
21 Notwithstanding what he was ordered to do, it turns
22 out the Income Tax Act does not allow him the
23 deduction.

24 Now the law is clear in this
25 particular point. In the Wilkinson case, as cited
26 by the respondent, Madam Justice Lamarre stated at

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1 paragraph 11:

2 "Unfortunately for the
3 appellant, the payment
4 received in 1998 had to be
5 included in her income for
6 that year in accordance with
7 paragraph 56(1)(b) and
8 subsection 56.1(4) of the
9 act. The fact that the
10 divorce judgment indicated
11 that the child support
12 payments were not taxable in
13 the hands of the recipient
14 cannot change the explicit
15 terms of the act. It is only
16 the special circumstance
17 referred to in 56.1 and 60.1
18 of the act that an agreement
19 or an order may stipulate
20 that such payments will be
21 deductible for the payer and
22 taxable for the recipient
23 under those two sections,
24 assuming that the payments
25 otherwise qualify for the
26 deduction and for inclusion

1 in income. Otherwise, it is
2 not open to a court to
3 determine that an order that
4 support payments shall not be
5 taxable for the recipient nor
6 deductible for the payer, if
7 the act expressly provides
8 that they are."

9 In the circumstances that we have
10 here, Wilkinson applies.

11 There is another case by Mr.
12 Justice Murray Mogan of this Court, *Betts v. The*
13 *Queen*, in which the same provision applies.
14 Notwithstanding what a judge of another court may
15 say, the deductibility still must be determined
16 within the four corners and confines of the Income
17 Tax Act.

18 This particular situation does not
19 allow this deduction in the circumstances that we
20 have had had, unfortunate as it may be.

21 I only hope that the Minister has
22 not taxed the recipient of these monies. But if
23 they did, there is nothing I can do about it.

24 The appeal is dismissed. Anything
25 further?

26 MR. GREENSTEIN: No. Thank you,

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1 very much, your honour, for hearing this matter.

2 MS AKIBO-BETTS: No, your honour,
3 thank you.

4 JUSTICE ROSSITER: Thank you.

5 THE REGISTRAR: This matter is
6 concluded. The Court is closed for this day, and
7 will resume tomorrow morning at 9:30.

8 --- Whereupon the hearing was concluded
9 at 4:32 p.m.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by Stenomask and transcribed therefrom, the
foregoing proceeding.

A handwritten signature in blue ink, appearing to read "Robert Lee", is written over a horizontal line.

Robert Lee, Certified Court Reporter

CITATION: 2007TCC134

COURT FILE NO.: 2006-820(IT)I

STYLE OF CAUSE: TIM PARR AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 8, 2007

REASONS FOR JUDGMENT: The Honourable Justice E. Rossiter

DATE OF REASONS FOR JUDGMENT: March 7, 2007

APPEARANCES:

Counsel for the Appellant: Mark Greenstein

Counsel for the Respondent: Sonia Akibo-Betts

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