

BETWEEN:

FRANKLIN J. McLAREN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on October 5, 2009 at London, Ontario

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Julian Malone

---

**JUDGMENT**

The appeal with respect to an assessment made under the *Income Tax Act* for the 2006 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to an additional deduction in respect of support payments in the amount of \$1,672.

Each party shall bear their own costs.

The Registry is directed to refund the Court's filing fee to the appellant.

Signed at Ottawa, Canada this 14<sup>th</sup> day of October 2009.

“J. M. Woods”

---

Woods J.

Citation: 2009 TCC 514  
Date: 20091014  
Docket: 2008-3138(IT)I

BETWEEN:

FRANKLIN J. McLAREN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Woods J.**

[1] This is an appeal by Franklin McLaren in respect of an assessment made under the *Income Tax Act* for the 2006 taxation year.

[2] There are two issues: (1) whether legal expenses in the amount of \$14,670 are deductible, and (2) whether support payments in the amount of \$1,672 are deductible.

#### **Factual background**

[3] Many of the relevant facts are not in dispute.

[4] In 2004, a judge of the Ontario Superior Court of Justice issued an order requiring Mr. McLaren to pay monthly amounts of \$1,200 to his spouse, Elaine McLaren, as interim spousal support (the “Interim Order”). In his reasons, the judge notes that Mr. McLaren had provided “shabby” financial information and an order was made for more complete information to be provided.

[5] A final order of divorce was issued on June 27, 2006 pursuant to a settlement between the parties (the “Final Order”). In addition to granting the divorce, the judge modified the support payments. The relevant parts of the order provide:

2. **AND THIS COURT ORDERS THAT** spousal support arrears shall be fixed in the amount of \$11,781.00 and all other spousal support arrears are rescinded in their entirety.

3. **AND THIS COURT FURTHER ORDERS THAT** the said spousal support arrears as set out in paragraph 1 [sic] above shall be paid by the Respondent to the Applicant at the rate of \$400.00 per month commencing October 1, 2006 and are payable on the 1<sup>st</sup> day of each month thereafter until payment is made in full.

8. **AND THIS COURT FURTHER ORDERS THAT** the Respondent's obligation to pay spousal support is hereby terminated.

[6] When the Final Order was issued, there were arrears outstanding under the Interim Order of approximately \$19,000 or \$20,000 (Ex. A-2). The Final Order changed the spousal support under the Interim Order in three ways: (1) it rescinded outstanding support payments in excess of \$11,781, (2) it modified the payment terms for the balance so that the monthly amounts were reduced to \$400 and they were to begin on October 1, 2006, and (3) it terminated spousal payments effective from the date of the Final Order.

[7] Mr. McLaren made several support payments from the date of the Final Order until the end of 2006. Payments that were made before October 1, 2006 were in odd amounts and payments made after were in the amount of \$400 in accordance with the Final Order.

[8] At the hearing, the parties agreed that the total amounts paid to Elaine McLaren in 2006 and after the Final Order were \$1,672. I was not able to reconcile this figure from the evidence, but the parties agreed to it and I will accept it.

[9] In relation to legal services in connection with the Final Order, Mr. McLaren paid his solicitor a total of \$14,670 in 2006.

#### Deductibility of legal fees

[10] Mr. McLaren seeks a deduction for the fees paid to his solicitor in 2006.

[11] Counsel for the Minister submits that the expense should be disallowed on the basis that it was not laid out to earn income and that it was a personal expense. The relevant provisions of the *Act* are paragraphs 18(1)(a) and (h).

[12] The Minister's position is consistent with prior judicial decisions and I agree with it.

[13] In order to deduct legal expenses of this nature, it must be established that they were incurred for the purpose of earning income. In this case, the legal expenses do not relate to Mr. McLaren's income, and accordingly the deduction must be disallowed.

[14] Mr. McLaren stated at the hearing that his accountant told him that the expense could be deducted.

[15] I can understand some confusion when it comes to the deductibility of legal expenses relating to support payments. Bowman C.J. commented on this problem in *Loewig v. The Queen*, 2006 TCC 476. He stated that there is unequal tax treatment between payors and receivers of support payments when it comes to legal expenses. Persons who receive support payments are able to deduct their legal expenses because they are laid out to earn property income, whereas persons who pay support amounts are not able to deduct the legal expenses because they do not relate to income earned. He further stated that this state of affairs seems to go against common sense and notions of fairness, but it is the law.

[16] For this reason, this part of the appeal will be dismissed.

#### Deductibility of support payments

[17] Mr. McLaren also seeks a deduction for the support payments made in 2006 and after the Final Order.

[18] Counsel for the Minister submits that these payments are not deductible because they are not receivable as an allowance. He suggests that the payments would only be deductible if the Final Order had provided that the existing arrears be paid in full. Since a portion of the arrears were rescinded, it is suggested that the payments are not paid as an allowance.

[19] Counsel referred me to a number of judicial decisions, but none specifically dealt with this particular issue: *MNR v. Armstrong*, 56 DTC 1044 (SCC), *The Queen v. McKimmon*, 90 DTC 6088 (FCA), *The Queen v. Sills*, 85 DTC 5096 (FCA), and *Soldera v. The Queen*, 91 DTC 987(TCC).

[20] The relevant legislative provision is the definition of “support amount” in s. 56.1(4) of the *Act*. It provides:

**"support amount"** means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

- (a) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or
- (b) the payer is a legal parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[21] In my view, the payments at issue were payments of a support amount as defined above and are deductible.

[22] The payments were initially payable under the Interim Order. These payments clearly qualified as support amounts.

[23] By the time of the Final Order there were substantial arrears. A payment of arrears, whether in a lump sum or over time, continues to be deductible: *Sills*. In this case, the payments were made over time, initially in odd amounts and then at the rate of \$400 per month.

[24] The result would have been different if the payments at issue were not simply a payment of arrears. A recent example of this is the decision of Campbell J. in *Gill v. The Queen*, 2008 TCC 473. In that case, the taxpayer agreed to make a payment of \$100,000 at a time when there were arrears of child support payments in the amount of \$370,000. Justice Campbell concluded that the lump sum amount was paid to obtain a release from the liability to pay the arrears and that the character and nature of the payment altered (para. 18).

[25] Whether a payment retains its character as a payment of arrears or something else is largely a factual question that depends on the particular circumstances.

[26] In issuing the assessment in this case, the Minister did not make any assumptions as to the nature of the payments and accordingly the Minister has the burden to establish that the payments changed their character once the Final Order was issued.

[27] This burden has not been satisfied. All of the evidence before me is consistent with the payments totaling \$1,672 retaining their character as a payment of arrears owing. This is how the Final Order is worded and it is also consistent with Mr. McLaren's explanation as to how the settlement was arrived at.

[28] I conclude that amount of \$1,672 is deductible. The appeal will be allowed to that extent.

[29] As for costs, each party shall bear their own.

Signed at Ottawa, Canada this 14<sup>th</sup> day of October 2009.

“J. M. Woods”

---

Woods J.

CITATION: 2009 TCC 514

COURT FILE NO.: 2008-3138(IT)I

STYLE OF CAUSE: FRANKLIN J. McLAREN and  
HER MAJESTY THE QUEEN

PLACE OF HEARING: London, Ontario

DATE OF HEARING: October 5, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: October 14, 2009

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Julian Malone

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

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