

Docket: 2010-803(IT)I

BETWEEN:

NAVINDRA B. PERSAUD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 12, 2011, at London, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Hong Ky (Eric) Luu

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 16th day of March 2011.

“G. A. Sheridan”

Sheridan J.

Citation: 2011TCC163
Date: 20110316
Docket: 2010-803(IT)I

BETWEEN:

NAVINDRA B. PERSAUD,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Navindra Persaud, is appealing the assessment by the Minister of National Revenue of his 2008 taxation year. There are two separate but related issues in this appeal: whether the Appellant is entitled to deduct amounts under subsection 118(1) of the *Income Tax Act* in respect of his two-year-old daughter; and whether he may deduct \$40,000 in legal expenses which he claimed were to enforce his daughter's pre-existing right to child support.

[2] The Appellant had the onus of proving wrong the assumptions of fact upon which the Minister based his assessment. The relevant portions of paragraph 8 of the Reply to the Notice of Appeal are set out under the headings below.

1. Eligible Dependant and Support

8. ELIGIBLE DEPENDANT AND SUPPORT:

- a. the Appellant and Angela Sarah Garcia-Persaud (the "Former Spouse") have one child, namely S.J.S.P. born in 2006 (the "Child");
- b. at all material times during the 2008 taxation year, the Appellant and the Former Spouse were living separate and apart because of a breakdown of their relationship;

- c. the Appellant paid the Former Spouse child support during the first 10 months of the 2008 taxation year;
- d. the Appellant and the Former Spouse did not have a court order in place prior to August 30, 2006.

[3] The Appellant did not dispute that in 2008 he and his former spouse were living separate and apart and that he was required to pay child support to her in respect of his daughter of whom he and his former spouse had joint custody. In such circumstances, subsection 118(5) of the *Act* applies to disallow the Appellant's claims for a deduction in respect of his daughter under paragraphs 118(1)(b) and (b.1) of the *Act*.

2. Legal Fees

[4] The Minister made the following assumptions of fact in respect of the disallowance of the legal fees:

8. LEGAL FEES

- e) the Appellant paid legal fees in 2008 in the amount of \$80,984,00;
- f) the legal fees were not incurred to collect late support payments;
- g) the legal fees were not incurred to establish an amount of support payments from his former spouse; and
- h) the legal fees were not incurred to make child support non-taxable.

[5] The Minister disallowed the deduction of legal fees on the basis that they were incurred to get a separation or divorce, to establish, negotiate or contest the amount of support payments; and/or to establish custody or visitation rights to a child¹.

[6] The Appellant's position is that such costs were incurred to enforce his daughter's right to child support and are therefore deductible under the jurisprudence.

Facts

[7] Following a trial in December 2007 the Appellant and his former spouse were divorced pursuant to the Order of Justice Thompson dated December 7, 2007²

¹ Exhibit R-3.

(“Original Order 2007”). The effective date of the divorce was January 7, 2008. The Court made further orders in respect of their daughter; among other things, the parents were awarded joint custody of the child, her primary residence being with the parent in whose care she was at any given moment. Orders were made for regular access and holiday periods.

[8] Of particular relevance to this appeal were the following additional orders: Under paragraph 4, the Appellant’s former spouse was ordered to relocate their daughter (who according to the Appellant had been living outside of the province prior to the hearing) to within a two-hour driving radius of the Appellant’s Ontario residence on or before March 1, 2008. Prior to the relocation, the Appellant was to pay child support of \$500 per month³; after relocation, he was to pay \$790 per month⁴. Pursuant to paragraph 14, “the parties” were ordered to exchange income tax returns annually and “if necessary, [to] readjust child support”. Under paragraph 31, any further issues “as to the best interest of [their daughter]” were to be determined by Justice Thompson.

[9] The Appellant’s testimony was that his former spouse failed to disclose her financial information as required under paragraph 14. As a result, in 2008 the Appellant brought a motion for, among other things, the enforcement of the financial disclosure provisions in paragraph 14 of the Original Order 2007. The motion was originally returnable September 22, 2008 but was adjourned by the Court to October 23, 2008 (“2008 Motion”).

[10] By Order dated October 23, 2008⁵ (“Order to Vary 2008”), Justice Thompson varied the Original Order 2007: while the parties retained joint custody of their daughter, her primary residence was changed to be with the Appellant who was also given the right to make the final decision regarding “major decisions concerning” her. The Court deleted paragraph 11 requiring the Appellant to pay child support of \$790 per month upon the child’s relocation; no further order for child support was made against either party. As for the financial disclosure provisions under paragraph

² Exhibit R-1.

³ Paragraph 36.

⁴ Paragraph 11.

⁵ Exhibit A-1.

14, the Court ordered that “Paragraph 14 of the [Original Order 2007] is varied to delete any reference to the adjustment of child support”⁶.

[11] Although the Appellant had originally claimed legal expenses of \$80,000, he reduced that amount to \$40,000 in accordance with a letter⁷ from the family law lawyer who had represented him during the proceeding in 2008. The text of that letter reads as follows:

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I confirm that you have paid legal fees inclusive of GST to these offices in calendar 2008 in an amount of \$80,984.

The issues in your litigation with Ms. Garcia in the Superior Court of Justice at Walkerton involved the obtaining of custody of your daughter and also the obtaining of child support payments which were ordered by the Honourable Mr. Justice Thompson.

As such I am of the view that 50% of your legal fees paid in 2008 are income tax deductible to you in an amount of \$40,492 pursuant to the provisions of the *Income Tax Act*.

I trust this is the information that you require.

[12] Also in evidence were five invoices⁸ from the Appellant’s lawyer for services rendered between March 28 and November 4, 2008 totaling \$19,082.30. These were only some of the invoices received in 2008; they were furnished to the Canada Revenue Agency by the Appellant at the objection stage. When asked on cross-examination to identify the items in the invoices pertaining to the enforcement of his daughter’s right to child support, the Appellant stated that he was unable to do so because of the brevity of the descriptions in the invoices. For that reason, he was relying on his lawyer’s statement in the letter that he was entitled to a deduction of 50% of the total billed in 2008.

⁶ At paragraph 1(i).

⁷ Exhibit A-2.

⁸ Exhibit R-4.

[13] None of the materials in respect of the 2008 Motion were before the Court except the affidavit filed by the Appellant's former spouse dated October 17, 2008⁹. On cross-examination, the Appellant explained he had not brought any other documents, for example, the notice of motion, because he did not think they would be necessary. He also said he had been busy with the appeal of the family law matters.

Analysis

[14] The Appellant is correct in principle that expenses incurred to enforce a pre-existing right to child support are considered to be current expenses incurred to earn income from property, thereby qualifying for a deduction under paragraph 18(1)(a) of the *Act*; *Nadeau v. R.*, 2003 FCA 400 at paragraphs 16 and 17. The question is, however, whether the 2008 legal fees were incurred for that purpose.

[15] The Appellant contended that the legal fees incurred were to compel his former spouse to furnish the financial information necessary for the Court to determine her liability, if any, to pay child support under the *Guidelines*. From this it followed that they were incurred to enforce his daughter's right to child support and were, therefore deductible. The Appellant argued that his situation was on all fours with *McColl v. R.*, [2000] T.C.J. No. 335.

[16] Starting with the *McColl* decision, it is distinguishable from the present matter in that the Court was persuaded by the taxpayer's evidence that her legal costs had been incurred to enforce her children's right to child support. The same cannot be said here. I agree with the submission of counsel for the Respondent that the Appellant has failed to establish an evidentiary basis for his claims. Without at least the Notice of Motion from the 2008 Motion, it is impossible to tell what the precise grounds for it may have been. The materials that were before the Court, the Order to Vary 2008 and the Appellant's former spouse's affidavit, are not sufficient in themselves to provide a basis for the Appellant's position. The Order to Vary 2008 made no order for child support against either party and eliminated any directions for the adjustment of child support. As for the affidavit of the former spouse, it was in response to the one he had made in support of the 2008 Motion. That document, however, was not before the Court, leaving half of the story untold. What the former spouse's affidavit does show is that by the time of the 2008 Motion, there were numerous bones of contention between the parties. Beyond that, even read in light of the Order to Vary 2008, the former spouse's affidavit in itself does not support the

⁹ Exhibit R-2.

Appellant's position that the 2008 Motion had to do with the enforcement of his daughter's pre-existing right to child support. It seems as likely that it had to do with the reduction of the amounts originally ordered to be paid by the Appellant.

[17] Equally unhelpful to the Appellant's position are the letter from his family law lawyer and the invoices for some of the services rendered in 2008. Beginning with the letter, it contains only his lawyer's opinion as to what percentage of the 2008 fees should be deductible. It would have been more useful had he identified which services, if any, were directed to compelling the former spouse to furnish her financial information or even generally, to determining her child support obligations. Even under the more relaxed rules of the Informal Procedure, I am unable to give weight to what amounts to hearsay opinion evidence. Furthermore, when the Appellant was given the opportunity on cross-examination to cure this flaw by reviewing the invoices to explain what the enumerated services pertained to, he was unable to do so. In any case, the invoices in evidence total less than half of the \$40,000 in legal expenses claimed by the Appellant.

[18] The upshot is that the Appellant has not met his onus of establishing his entitlement to a deduction for legal fees in 2008. There being insufficient evidence before me to justify interfering with the reassessment of the Minister of National Revenue, the appeal of the 2008 taxation year must be dismissed.

Signed at Ottawa, Canada, this 16th day of March 2011.

"G. A. Sheridan"

Sheridan J.

CITATION: 2011TCC163

COURT FILE NO.: 2010-803(IT)I

STYLE OF CAUSE: NAVINDRA B. PERSAUD AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: London, Ontario

DATE OF HEARING: January 12, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: March 16, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Hong Ky (Eric) Luu

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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