

Docket: 2010-2334(IT)I

BETWEEN:

BEVERLEY J. KELLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on February 16, 2011, at Toronto, Ontario,

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Judith Holzman

Counsel for the Respondent: Thang Trieu and Christian Cheong

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**JUDGMENT**

The appeals from reassessments made under the *Income Tax Act* for the 2005 and 2006 taxation years are dismissed.

Signed at Ottawa, Canada, this 3rd day of May 2011.

“E.A. Bowie”

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Bowie J.

Citation: 2011 TCC 242  
Date: 20110503  
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BEVERLEY J. KELLY,

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### **REASONS FOR JUDGMENT**

#### **Bowie J.**

[1] Ms. Kelly appeals from reassessments for income tax for the 2005 and 2006 taxation years. By those reassessments the Minister of National Revenue added to the income she had declared the amounts of \$5,593.00 for 2005 and \$5,786.00 for 2006. It is not in dispute that these amounts were paid to her during the year by her former spouse pursuant to an order made by Mr. Justice Beaulieu of the Ontario Court (General Division), now the Ontario Superior Court of Justice. The only matter in dispute is whether these payments have the character of spousal support payments falling within the terms of paragraph 56(1)(b) of the *Income Tax Act*<sup>1</sup>. In that event the payments are subject to tax and these appeals must be dismissed.

[2] Ms. Kelly was married to Gordon Lewis Kelly for some 38 years. In 1993 she began proceedings for divorce and ancillary relief. In December 1995 they signed

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<sup>1</sup> R.S. 1985 c.1 (5th supp.), as amended.

Minutes of Settlement within that action. The relevant parts of that document read thus:

- (1) The husband to assign or give to the wife, the equivalent of his old age security payment each and every month, regardless of clawbacks or entitlement. The husband shall pay these moneys even if he does not qualify for an old age pension.
- (2) The husband shall pay to the wife the costs of her medication up to the sum of \$350.00 per month. [irrelevant]
- (3) The aforesaid payments encompass the totality of the husband's payments to the wife, and conditional on the husband's adhesion and compliance with paragraphs 1 and 2 the wife waives any and all rights to periodic or lump sum maintenance regardless of any change of circumstances in the future.
- (4) The husband undertakes to make the wife beneficiary of \$75,000 from his Estate. This bequest is irrevocable and binding upon his Estate, heirs and Assigns, and in lieu of the payments under paragraphs 1 & 2 after his death.

Dated Dec 7, 1995, Toronto

This wording became the terms of a consent order made by Justice Beaulieu, with the addition of the following paragraph:

THIS COURT FURTHER ORDERS that unless the support order is withdrawn from the Director of the Family Support Plan, it shall be enforced by the Director and amounts owing under the support order shall be paid to the Director, who shall pay them to the person to whom they are owed.

[3] In her evidence the appellant explained that this agreement was framed in this way because her former spouse had vehemently opposed making any support payments to her. For that reason the agreement avoided the use of the word support. I note, however, that Beaulieu J. calls it a "support order" and contemplates its enforcements in the manner of a support order.

[4] The appellant makes two arguments in defence of her position that the payments to her are not subject to tax. The first is that the payments are not support payments, and so do not fall within paragraph 56(1)(b) of the *Act*. This argument is predicated entirely on the fact that her former spouse would not make support payments, and on the fact that the agreement does not describe the payments as support payments. Absent the word support in the agreement the payments must be something else, presumably a windfall that escapes the Minister's net.

[5] This argument suffers from a number of frailties. I have reproduced paragraph 56(1)(b) and the definition of “support amount” that is found in subsection 56.1(4) of the *Act* as an appendix to these reasons. For present purposes it is sufficient to say that, in broad terms, paragraph 56(1)(b) has the effect of including support amounts that are not child support in the income of the recipient, and that an amount paid as an allowance on a periodic basis by one spouse or former spouse to the other is a support amount if the recipient has discretion as to the use of the money, if it is paid pursuant to either a court order or a written agreement, and if the payor and the payee are separated or divorced. The absence of the word "support" from the agreement does not mean that these payments, which meet the requirements of the definition, are not support payments. As Mogan J. said, in a somewhat different context, in *Sanford v. The Queen*:<sup>2</sup>

An old cliché comes to mind. If a two-legged creature with feathers waddles like a duck, quacks like a duck, and looks like a duck, it must be a duck.

[6] The proceeding between the appellant and her former spouse was brought under the *Divorce Act*<sup>3</sup> and under the *Family Law Act*<sup>4</sup> of Ontario. I know of no provision that would give the Court jurisdiction to make an order for the payment of an amount such as this on a periodic basis unless it were either a payment for support or an equalization payment on division of property. It is clearly not the latter. The appellant’s evidence was that in addition to the payments in issue here she received half the proceeds of the matrimonial home, and that her former spouse’s other assets were not subject to division under the *Family Law Act*. There also would be no reason for the order to provide for its enforcement by the Director of the Family Support Plan if the payments were not in fact support payments.

[7] The appellant’s other argument derives from the fact that in assessing her for the taxation year 1997 the Minister included these payments in her income, but later reversed that position in response to her notice of objection. She testified that but for the fact that her objection was allowed she would have applied to the Ontario Court for an increase in the amount of the payments to take into account the effect of taxation on them. The Minister, she now argues, is estopped from taking the position

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<sup>2</sup> [2001] 1C.T.C. 2273.

<sup>3</sup> R.S.C. 1985, c. 3 (2nd Supp.).

<sup>4</sup> R.S.O. 1990, c. F.3.

that the payments are taxable, as she has acted to her detriment in reliance on his 1997 decision.

[8] This argument is quite without merit. Even accepting for the sake of argument that the appellant relied to her detriment on the 1997 decision, which is a doubtful proposition at best, no estoppel could arise. The question in issue is one of law, and no estoppel can overcome the provisions of the *Act*: see *M.N.R. v. Inland Industries*<sup>5</sup>. As the Federal Court of Appeal has made clear on a number of occasions, the fact that the Minister has erred in assessing a taxpayer does not mean that he is required to repeat that error in perpetuity<sup>6</sup>.

[9] I have great sympathy for the appellant in this case. Her former spouse has certainly treated her shabbily, and the family law system has apparently done little to redress that. However, that does not permit me to ignore the provisions of the *Act*. I have no alternative but to dismiss the appeals.

Signed at Ottawa, Canada, this 3rd day of May, 2011.

“E.A. Bowie”

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Bowie J.

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<sup>5</sup> [1974] S.C.R. 514.

<sup>6</sup> *Ludmer. v. Canada*, [1995] 2 F.C. 3; *Sinclair v. The Queen*, [2004] 1 C.T.C.89.

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## APPENDIX

56(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

- (a) ...
- (b) the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

- A is the total of all amounts each of which is a support amount received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,
- B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and
- C is the total of all amounts each of which is a support amount received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;

56.1(4) The definitions in this subsection apply in this section and section 56.

"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.

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STYLE OF CAUSE: BEVERLEY J. KELLY and  
HER MAJESTY THE QUEEN

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APPEARANCES:

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Counsel for the Respondent: Thang Trieu and Christian Cheong

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