

Docket: 2011-948(IT)I

BETWEEN:

DAVID LAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 9, 2012, at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Laurent Bartleman Mindy Caterina (Student-At-Law)

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2007 and 2008 taxation years are dismissed.

Signed at Ottawa, Canada, this 15th day of February 2012.

“G. A. Sheridan”

Sheridan J.

Citation: 2012 TCC 54
Date: 20120215
Docket: 2011-948(IT)I

BETWEEN:

DAVID LAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, David Lam, is appealing the reassessments of the Minister of National Revenue under the *Income Tax Act* of his 2007 and 2008 taxation years. The issue in these appeals is whether the Appellant is entitled to deduct amounts paid in those years to his former common law partner under a written separation agreement.

[2] In 2006, the Appellant and his former partner separated after having cohabited as husband and wife for approximately two years. They executed a separation agreement dated January 3, 2007 (“Separation Agreement”), the relevant provisions of which read:

7. RELEASE OF SUPPORT AND MAINTENANCE:

(1) Each of the parties hereby releases and discharges the other from all rights and claims for support and maintenance that he or she has or may have under the law of any jurisdiction and in particular all rights to and claims for support and maintenance that he or she has or may have under the Family Law Act and any other applicable legislation.

(2) Each party acknowledges that in waiving and releasing all rights to receive and to claim support from the other and in consideration of same LAM agrees to pay to CHAN the sum of one thousand five hundred (\$1,500.00) dollars commencing on December 1, 2006 for a period of 26 months with a final payment of one thousand

(\$1,000.00) dollars on the 27th month for a total amount of forty-thousand (\$40,000.00) dollars. In the event that the New Territories property is sold within the 27th month period, then LAM will pay to CHAN a sum of ten thousand (\$10,000.00) dollars as prepayment of the monthly payments owing. LAM further agrees to maintain medical and dental coverage for the son of CHAN, Ben CHAN, and the parties acknowledge that LAM has not acted in LOCO PARENTIS to BEN CHAN.

(a) each has considered his or her prospects now and for the future and his or her future financial security, whatever circumstances, catastrophic or otherwise, may arise in the future, including possible career reversals, the lack of employment opportunities, the contingencies of life including illness and disability, adverse economic circumstances such as rising costs and inflation, and the mismanagement of funds by themselves or others; and,

[. . .]

9. MATRIMONIAL HOME:

The husband and the wife currently reside at 3139 Bartholomew Crescent, Mississauga, which home is in the name of CHAN and was always considered her home. They acknowledge that LAM paid \$15,000.00 to renovate the kitchen and put in a new bathroom. LAM paid to CHAN \$2,000.00 monthly for a two year period as his contribution to household expenses including food, utilities and mortgage payments. CHAN acknowledges that the down payment for the New Territories property was funded from the proceeds of the sale of LAM's Terraghar property. LAM releases any claim he may have for an interest in 3139 Bartholomew Crescent. As consideration for same, CHAN agrees to sign over her alleged interest in Flat F. 22nd Floor, Tower 5, Monterey Cove, No.2 Kin Tung Road, Caribbean Coast, Tung Chung, Lantau Island, New Territories by executing any and all documents required to transfer sole ownership in the same to LAM.

[. . .]

28. PERSONAL REPRESENTATIVES BOUND:

Unless otherwise expressly provided herein, this Agreement and every covenant, provision and term herein contained shall ensure to the benefit of and be binding upon the husband and the wife and each of them and their respective heirs, executors and administrators.¹

[3] In 2007 and 2008, the Appellant deducted \$16,500 and \$18,000, respectively, for amounts paid under subparagraph 7(2) of the Separation Agreement. The Appellant testified that it was the parties' intention that these amounts would be deductible. Further, it was his understanding that because the Separation Agreement provided for monthly payments to his former common law partner of amounts to be

¹ Exhibit A-1.

used at her discretion, they fell within the definition of “support amount” under subsection 56.1(4) of the *Act*:

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

(a) the recipient is the ... 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 ... a written agreement; or

[...]

[4] While conceding that the amounts were “periodic payments” and that the Appellant’s former common law partner had discretionary use of them, the Minister contended they did not constitute a “support amount” because they were not “for the maintenance” of the former common law partner as required by subsection 56.1(4). Rather, pursuant to subparagraphs 7(1) and (2) of the Separation Agreement, the monthly payments were paid by the Appellant to secure his release from any obligation to pay support or maintenance to her. As such, the payments were periodic payments made as installments of the capital sum of \$40,000 which the Appellant had agreed to pay under subparagraph 7(2) of the Separation Agreement.

[5] In distinguishing between periodic payments made as a maintenance allowance and as a capital sum, the Minister relied on the considerations set out in the Federal Court of Appeal decision, *McKimmon v. Minister of National Revenue*, [1990] 1 C.T.C. 109 at paragraphs 11-18. Ms. Caterina, the student-at-law who argued the Respondent’s case, made a thorough review of the criteria and their application to the Appellant’s case. I am persuaded by her argument that on the evidence in the present matter, factors 4, 7 and 8 of the *McKimmon* test lead to the conclusion that the payments made under the Separation Agreement were installments on a capital amount rather than an allowance for maintenance. In these circumstances, the amounts claimed in 2007 and 2008 are not deductible.

[6] I regret this conclusion because I have no reason to doubt the Appellant’s testimony that he always intended the amounts to be deductible. Unfortunately for the Appellant, it is not his intention but his ability to satisfy the requirements of the *Act* which must determine the deductibility of the payments. Blocking his ability to do so is the clear wording of the Separation Agreement.

[7] Subparagraphs 7(1) and (2) are unambiguous in their description of the \$40,000 as an amount, payable in monthly installments, to release the Appellant from any future obligations to pay maintenance (factor 8, *McKimmon*).

[8] Under subparagraph 7(2), the Appellant's obligation to pay could be accelerated in the event he sold a certain property prior to the expiry of the 27-month payment period (factor 4, *McKimmon*). I do not agree with the Appellant's submission that paragraph 9 of the Separation Agreement can be read as diminishing the effect of these provisions.

[9] Finally, paragraph 28 of the Separation Agreement provided that the Appellant's obligation to make the payments was to survive the death of his former common law partner (factor 7, *McKimmon*). The Appellant indicated that he was not even aware of this provision and further, that he suspected the Separation Agreement was simply a standard-form template used by the real estate lawyer who prepared it. He also said that notwithstanding his lawyer's certificate of disclosure attached to the Separation Agreement, at the time of its execution, he did not appreciate the tax consequences it might have. Unfortunately, the Separation Agreement is a valid agreement and as such, must be taken as representing the intentions of the parties.

[10] In my view, the factors considered above outweigh the others in the *McKimmon* criteria which favour the Appellant's argument that the monthly payments constituted a support amount. In these circumstances, the appeals of the 2007 and 2008 taxation years must be dismissed.

Signed at Ottawa, Canada, this 15th day of February 2012.

“G. A. Sheridan”

Sheridan J.

CITATION: 2012 TCC 54

COURT FILE NO.: 2011-948(IT)I

STYLE OF CAUSE: DAVID LAM AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 9, 2012

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

DATE OF JUDGMENT: February 15, 2012

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Laurent Bartleman Mindy Caterina (Student-At-Law)

COUNSEL OF RECORD:

For the Appellant:	
Name:	n/a
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada