Docket: 2011-2093(IT)I

BETWEEN:

STÉPHANE GIROUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on July 19, 2012, at Montréal, Quebec.
Before: The Honourable Justice Lucie Lamarre

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Valérie Messore

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* (**ITA**) for the 2008 taxation year is dismissed.

The appeal from the original assessment under the ITA for the 2009 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 the wholly dependent person credit and the credit related to the child amount under paragraphs 118(1)(*b*) and (*b.1*) of the ITA.

Each party shall bear its own costs.

Signed at Ottawa, Canada, this 27th day of July 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 19th day of September 2012
Margarita Gorbounova, Translator

Citation: 2012 TCC 284
Date: 20120727
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Appellant,

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Respondent.

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REASONS FOR JUDGMENT

Lamarre, J.

[1] The appellant is appealing from two assessments made by the Minister of National Revenue (**Minister**) under the *Income Tax Act* (**ITA**) for the 2008 and 2009 taxation years. The Minister disallowed the appellant the wholly dependent person credit and the credit related to the child amount, which he had claimed for one of his children under paragraphs 118(1)(*b*) and (*b.1*) of the ITA. In disallowing the appellant these credits, the Minister relied on the following assumptions of fact found at paragraph 8 of the Reply to the Notice of Appeal:

> [TRANSLATION]
> 8. In making and confirming the reassessment, the Minister relied on the following findings and assumptions of fact:
>
> (a) The appellant and Michelle Émond (hereinafter the former spouse) stopped living together in November 1998 and have been divorced since 2003.
>
> (b) The parties are the parents of two children: G, born in 1992, and M, born in 1993.

(c) According to the interim consent signed by the parties on February 13, 2009, the appellant requested custody of the child G and cancellation of the support he paid to his former spouse for G.

(d) In filing his income tax returns for the years at issue, the appellant claimed the wholly dependent person credit and the credit related to the child amount for the child G.

(e) For the period from January 1, 2008, to February 15, 2009, the appellant was required to pay support for the child G to his former spouse.

[2] The respondent is referring specifically to subsection 118(5) and the definition of "support" in subsection 56.1(4) of the ITA. I will reproduce these provisions as well as paragraphs 118(1)(*b*) and (*b.1*) and 118(4)(*b*) below:

> **118**. (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by the formula
>
> . . .
>
> (*b*) in the case of an individual who does not claim a deduction for the year because of paragraph 118(1)(*a*) and who, at any time in the year,
>
> (i) is
>
> (A) a person who is unmarried and who does not live in a common-law partnership, or
>
> (B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common law-partner and who is not supported by that spouse or common-law partner, and
>
> (ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is
>
> (A) except in the case of a child of the individual, resident in Canada,
>
> (B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,
>
> (C) related to the individual, and

(D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,

an amount equal to the total of

(iii) $10,320, and

(iv) the amount determined by the formula

$10,320 – D

Where

D is the dependent person's income for the year,

(*b.1*) where

(i) a child of the individual ordinarily resides throughout the taxation year with the individual together with another parent of the child, $2,000 for each such child who is under the age of 18 years at the end of the taxation year,

(ii) except where subparagraph (i) applies, the individual may deduct an amount under paragraph (*b*) in respect of the individual's child who is under the age of 18 years at the end of the taxation year, or could deduct such an amount in respect of that child if paragraph 118(4)(*a*) did not apply to the individual for the taxation year and if the child had no income for the year, $2,000 for each such child,

. . .

(4) For the purposes of subsection 118(1), the following rules apply:

. . .

(*b*) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (*b*) or (*b.1*) of the description of B in that subsection for a taxation year in respect of the same person or the same domestic establishment and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

. . .

(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(*a*) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or

(*b*) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

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.

[3] The respondent argues that, since during the 2008 and 2009 taxation years the appellant was required to pay support to his former spouse for the child G, he is ineligible, under subsection 118(5) of the ITA, for the credits claimed under paragraphs 118(1)(*b*) and (*b.1*) of the ITA.

[4] In his testimony and documents filed in evidence, the appellant explained how his family situation evolved.

[5] A judgment of divorce was first handed down on January 6, 2003. According to this judgement, the appellant and his former spouse had shared custody of their two minor children. According to this judgment, the appellant had to pay child support to his former spouse because his income was higher than hers (Exhibit I-1, tab 5).

[6] On October 27, 2005, the appellant's former spouse filed an amended application to vary corollary relief with the Superior Court of Québec (Exhibit I-1, tab 6). In this application, she requested sole custody of both children and, as a result, child support.

[7] On May 30, 2006, the Superior Court of Québec rendered a judgment regarding this application, granting the former spouse sole custody and ordering the appellant to pay her child support, which was indexed.

[8] The appellant appealed the decision to the Quebec Court of Appeal, which rendered a judgment on February 26, 2007. According to the judgment, the former spouse would keep sole custody of both children, but the support amount for the children would be reduced.

[9] The elder of the two children, G, started living full time with his father on October 29, 2008 (Exhibit I-1, tab 2). The appellant explained that, since that time, he had tried to have his employer stop automatically paying support for that child to his former spouse from his salary. The former spouse refused to comply and the appellant's employer informed him that he needed to have a court judgment authorizing him to reduce the automatic payments for the child.

[10] Therefore, on January 28, 2009, the appellant filed with the Superior Court of Québec an application to vary corollary relief (Exhibit I-1, tab 7), in which he requested custody of the child G, and as a result, the cancellation of support payable to his former spouse for that child. In the application, he asked for a safeguard order suspending, as of February 1, 2009, the payment of support, which he had continued to pay via automatic payments from his salary.

[11] On February 13, 2009, the parties agreed through an interim consent that the appellant alone would pay all the costs related to the child G starting on February 15, 2009. That agreement indicates that, starting on that date, he no longer had to pay support to his former spouse for that child (Exhibit I-1, tab 8).

[12] On May 29, 2009, the appellant's former spouse made a settlement offer regarding the amounts owed between the spouses (Exhibit A-1).

[13] This letter indicates that the former spouse thought the appellant owed her sums of money under the Court of Appeal judgement mentioned above. She then calculated the amounts owed by both parties and agreed to make the support retroactive to November 1, 2008, the date on which she considered that custody for the child G changed. She therefore acknowledged that she owed the appellant money in overpaid child support arrears. She therefore proposed to offset the amounts that she owed the appellant so that the appellant would owe her only the difference between their debts.

[14] The appellant explained in court that he did not agree that he owed money to his former spouse, but, wanting to get everything over with, he proposed to his former spouse to give each other full and final release without having to pay each other regarding the child G.

[15] A consent to judgment was finally signed on September 17, 2009, confirming the interim consent dated February 13, 2009, with some amendments. By this consent to judgment, the parties waived all arrears owed by either party regarding both child support and specific costs (which were part of the settlement proposal) and gave each other full and final release from any claims in this regard (Exhibit I-1, tab 9).

[16] The respondent argues that, since according to the interim consent the appellant was required, until February 15, 2009, to pay his former spouse support for the child G, he cannot be entitled to the credits claimed under paragraphs 118(1)(*b*) and (*b.1*) of the ITA for G for the 2008 and 2009 taxation years, pursuant to subsection 118(5) of the ITA.

[17] In addition, the respondent maintains that the consent to judgment finally signed on September 17, 2009, does not specify that the parties offset their debts, but rather shows that both parties waived all arrears owed and gave each full and final release. In regard to this, the respondent argues that the appellant cannot say that he had been reimbursed the amount of child support that he had paid his former spouse for the child G from November 1, 2008, to February 15, 2009.

[18] The appellant maintains that he has had full custody of his child G since October 29, 2008, and that he is entitled to claim the credits he was disallowed for this child. He also argues that his former spouse reimbursed him the amount of

support paid for the child G for the period from November 1, 2008, to February 15, 2009.

[19] Subsection 118(5) of the ITA sets out that no amount may be deducted under subsection 118(1) (including the credits claimed by the appellant) in respect of a person (here the child G) in computing an individual's (the appellant's) tax for a taxation year when the individual is required to pay a support amount within the meaning of subsection 56.1(4) to his former spouse in respect of the person (the child G) and when (as it is the case here) the individual lives separate and apart from the former spouse throughout the year because of the breakdown of their marriage or common-law partnership.

[20] As pointed out by Justice Hershfield of our Court at paragraph 11 of *Barthels v. Canada*, [2002] T.C.J. No. 256 (QL), subsection 118(5) has a potential ambiguity in that one might ask the relevance of it not expressly stating when the requirement to pay a support amount needs to be in place. He wrote the following at the end of paragraph 10 and the following paragraphs:

> **10** . . . Consistency with the new child support guidelines would not be advanced by denying the equivalent-to-spouse credit to the supporting custodial parent. Clearly in the case at bar, Diane is not an individual entitled to the credit in respect of Stephanie. Diane has not supported Stephanie at any time in 1999 in a home maintained by her (Diane). The scheme of these provisions cannot be taken to intend that the supporting custodial parent be denied the equivalent-to-spouse credit.
>
> **11** Secondly, I note that subsection 118(5) has a potential ambiguity in that one might ask the relevance of it not expressly stating when the requirement to pay a support amount needs to be in place. It is somewhat unusual that that subsection denies the credit "for a taxation year" where there is "a requirement to pay a support amount" but makes no mention of when that requirement must have come into existence or have been extinguished. More typically, exhaustive drafting styles evidenced in the Act might have said the credit is denied where there is "in the year" or "at anytime in the year" or "in respect of the year or any part of the year" a requirement to pay a support amount. While I hesitate to suggest that these cumbersome provisions be made more cumbersome by adding further language, I am inclined in this case to suggest that by not adding a time reference as to when the requirement to pay must be in existence, an extinguishment, at any time, of the requirement to pay any support amount "in respect of the year" might well be sufficient to escape the limitation imposed by that subsection. Certainly in this case I see no mischief in such a statutory construction approach.
>
> .

> **12** Thirdly, I find that the First Order payment requirement was inherently conditional on the custody situation set out in that order. That situation changed in the year preceding the subject year and remained changed throughout the subject year. The First Order was not meant to apply to such case. The Second and Third Orders setting aside the arrears was, in my view, perfunctory and must be given the same effect as setting aside the order that gave rise to the arrears. The Second and Third Orders acknowledged the state of affairs, the legal arrangement, as agreed to when the First Order was made. They acknowledged the inherently conditional nature of the First Order and clarified that the requirement to pay child support for Stephanie was not to have effect when the premises on which that requirement was imposed ceased to exit. These Orders, while not expressly retroactive in vitiating that requirement, have that effect nonetheless, in my view.

[21] In this case, it is clear that the appellant had custody of the child G and supported him throughout 2009.

[22] In 2009, the appellant, not the former spouse, should normally have been entitled to the credits set out in paragraphs 118(1)(*b*) and (*b.1*). I agree with Justice Hershfield's statement that consistency with the provisions at issue would not be advanced by denying the wholly dependent person credit to the supporting custodial parent. I also agree with his finding that an order payment requirement is inherently conditional on the custody situation set out in that order. As soon as the child left the mother's house to move in with his father, the situation that existed at the time when the Quebec Court of Appeal ruled on the appellant's payment of child support was no longer the same and could not entitle the former spouse to require the appellant to pay said support. Furthermore, she acknowledged it herself in her settlement offer.

[23] I would add that the definition of "support amount" in subsection 56.1(4) of the ITA gives weight to that interpretation. Indeed, a support amount is defined as an amount payable or receivable as an allowance on a periodic basis <u>for the maintenance of the recipient or children of the recipient</u>. If the child for whom the former spouse (the recipient) was receiving the support amount no longer lived with her, the amount that she continued to receive from the appellant in order to support that child would no longer have a reason to exist once the child started living full time with his father. These amounts would no longer be support amounts within the meaning of the ITA.

[24] The appellant stopped paying his former spouse any amounts for the child G. on February 15, 2009, but I acknowledge with him that he and his former spouse set up a form of compensation by waiving any arrears owed and/or claimed by either

party both for support and for specific costs. The settlement offer filed as Exhibit A-1, in combination with the final consent to judgment, confirms this.

[25] As in *Barthels*, I am of the view that, although the consent to judgment certified by the Superior Court did not expressly state that it retroactively ended the obligation to pay support, it did have such a retroactive effect.

[26] Thus, I am of the opinion that subsection 118(5) of the ITA does not apply to 2009 since the appellant was not required to pay support for the child G during that year.

[27] As for 2008, the situation is not the same. The former spouse was entitled to claim the credits set out in paragraphs 118(1)(*b*) and (*b.1*), since she was the custodial parent and supported the child G until November 1, 2008. The father took over that role starting on that date.

[28] Given that, under paragraph 118(4)(*b*), only one parent can claim the credits described in paragraphs 118(1)(*b*) and (*b.1*) in a taxation year, subsection 118(5) of the ITA prevents the parent who is required to pay support from claiming the credit. This was also ruled on in *Sherrer v. Canada*, [1998] T.C.J. No. 62 (QL), which confirmed that these credits could not be shared between two parents for the same taxation year, and that the parent who had to pay support during the year was the one who could not claim the credits under paragraphs 118(1)(*b*) and (*b.1*).

[29] As I mentioned earlier, I consider that this case law does not apply to 2009 because I find that the appellant was not required to pay support to his former spouse for the child G during the 2009 taxation year.

[30] For these reasons, I allow the appeal of the assessment for the 2009 taxation year and refer the assessment back to the Minister for reassessment on the basis that the appellant is entitled to the wholly dependent person credit and to the credit relative to the child amount within the meaning of paragraphs 118(1)(*b*) and (*b.1*) of the ITA.

[31] The appeal from the assessment for the 2008 taxation year is dismissed.

[32] Each party shall bear its own costs.

Signed at Ottawa, Canada, this 27th day of July 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 19th day of September 2012
Margarita Gorbounova, Translator

CITATION:	2012 TCC 284
COURT FILE No.:	2011-2093(IT)I
STYLE OF CAUSE:	STÉPHANE GIROUX v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	July 27, 2012

APPEARANCES:

For the appellant:	The appellant himself
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COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

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