Docket: 2016-1645(IT)I

BETWEEN:

JENNIFER LYN RYAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 2, 2018, at Yarmouth, Nova Scotia

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Rhonda Lemphers

JUDGMENT

IN ACCORDANCE with the Reasons for Judgment attached, the Appeal with respect to the Notice of Confirmation dated February 18, 2016 for the Appellant's 2013 taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the sum of $4,310.58 as a spousal support amount deduction.

Signed at Ottawa, Canada, this 18th day of December 2018.

"R. S. Bocock"

Bocock J.

Citation: 2018TCC257
Date: 20181218
Docket: 2016-1645(IT)I

BETWEEN:

JENNIFER LYN RYAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

[1] The Minister disallowed the Appellant's ("Ms. Ryan's") claimed deduction for spousal support payments in the taxation year 2013. In each of October, November and December of that year Ms. Ryan paid the sum of $1,436.86 for a total of $4,310.58 to her ex-spouse, one Mr. B. There is no dispute as to the amounts, the status of the payor or payee or any other statutory or legal deficiency, but for one. The Minister asserts that the amounts claimed as a spousal support deduction were not made in the taxation year or in the preceding taxation year under a directive court order.

[2] The Minister's specific assumptions within the reply were as follows.

6. In order to establish and maintain the assessment, the Minister relied on the following facts:

    a) The Appellant and S.B., her common-law partner separated in October 2013 and have been living apart since;

    b) during the 2013 taxation year, the Appellant paid to her ex common-law partner a monthly amount of $1,436.86 for the

months of October, November and December 2013, for a total amount of $4,310.58 (the 2013 "support amounts");

c) on March 5, 2015, the Supreme Court of Nova Scotia issued an Order to enforce a settlement agreed by the parties on November 7, 2014;

[3] The facts are generally uncontested. From the direct testimony and cross-examination of Ms. Ryan and the documents produced, the Court summarizes the facts as follows.

[4] Ms. Ryan's ex-common-law partner was recalcitrant as to completing the terms of separation, attending at Court, instructing his lawyer and even picking-up his payments. These stalling techniques may have been related to his disagreement or contestation of the process, but also possibly relate to his dilatory character. The delay had consequences. The relationship broke down in 2013. Ms. Ryan dutifully, and in accordance with her lawyer's instructions, paid the support amounts in 2013 and 2014 in advance of a completed agreement. She did that so such payments would qualify as spousal support when a court order or agreement was completed the following year, 2014.

[5] Things did not go as planned. As the proceedings dragged on, the ex-partner even failed to attend in person a mandatory settlement conference on November 7, 2014. Ultimately, his own lawyer brought him on the telephone line, read the terms of the settlement audible to all parties and the judge and secured the ex-spouse's recorded agreement. On the basis of that agreement, Ms. Ryan proceeded to obtain funds for the additional payments provided for by the agreement, execute various deeds of land and establish a closing time on December 15, 2014. Her ex-spouse again failed to show.

[6] Ultimately, recourse to the family law courts was necessary, in the Minister's words, to "enforce a settlement agreed by the parties on November 7, 2014." That enforcement order was dated March 5, 2015 (the "March 2015 Order"). As such, the Minister assumes the March 2015 Order and its date are operative and effective documents for the purposes of interpreting subsections 56.1(4) and 60.1(3). The Minister made no assumption concerning the existence or otherwise concerning any agreement aside from 6(c) above. Ms. Ryan was unable to produce a written version of the "settlement agreed" emanating from the

recording of the agreed terms, in turn, arising and agreed to at the November 7, 2014 settlement meeting.

[7] The relevant legislation provides as follows by virtue of 56.1(4) of the *Income Tax Act*, RSC 1985, c1 ("Act"):

> **56.1(4)**
>
> […]
>
> ***support amount*** means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient and
>
> the recipient is the common-law partner of the payer and the amount is receivable under an order of a competent tribunal or under a written agreement;
>
> **60.1(3)** For the purposes of this section and section 60, where a written agreement or order provides that an amount paid before that time and in the year or the preceding taxation year is to be considered to have been paid and received thereunder,
>
> (a) the amount is deemed to have been paid thereunder; and
>
> **Definitions**
> **(4)** The definitions in subsection 56.1(4) apply in this section and section 60.

[8] The authorities have considered this section on many occasions. In the context of an agreement, a mere confirmation of payment with a retrospective effective date is insufficient in the absence of a specific reference to prior payment and a characterization of the amounts as having been paid and received under the agreement: *Nagy v R*, 2003 TCC at paragraphs 6, 7 and 8.

[9] An agreement intended to be formed retroactively cannot reach back more than its current year or year immediately prior to its creation, and even then, must be clear as to the intention of both parties to allow the spousal amount deduction: *Witzke v Her Majesty the Queen*, 2008 TCC 596 at paragraphs 7 and 16.

[10] However, the existence of a written agreement need not be based upon formalistic structures; at the same time evidence of its existence must exceed merely cheques and receipts reflecting payment: *Connor v Her Majesty the Queen*,

2009 TCC 319 at paragraph 16, itself referencing *Fortune v Her Majesty the Queen*, 2007 TCC 20.

a) the effect of the March 2015 Order

[11] Quite apart from the "settlement agreed", which shall be discussed below, the March 2015 Order cannot on its own render the 2013 spousal support amounts deductible as support amounts in 2013. Such a temporal limitation is clear and unambiguous: *Witzke*, *supra*. The Minister's assumption concerning the March 2015 Order has not been demolished. Of note, no assumption was made concerning any agreement.

b) the November 7, 2014 "settlement agreed": sufficient or not ?

[12] What factually distinguishes this appeal is the settlement agreed on the record by both the ex-spouse and Ms. Ryan to the specific terms relating to the 2013 support amounts. This is reflected in the following paragraphs of the March 2015 Order referencing such "Agreement".

> **AND UPON** the parties entering into an Agreement settling all rights and interests the parties may have against each other, now, and in the future, on November 7th 2014 before the Honourable Justice Stewart of this Court, after a Settlement Conference on said day;
>
> **AND UPON** this Court finding that such Agreement is binding upon the parties;
>
> 5. **THAT** Ms. Ryan shall be given credit for spousal support for the months of October, November, and December 2013 at the rate of $1,436.86 per month.
>
> 6. **THAT** Ms. Ryan shall be given credit for spousal support for the months of January until October, for the calendar year of 2014 at the rate of $1,436.86 per month.
>
> 7. **THAT** Ms. Ryan shall be given credit for spousal support of $980.50 for December 2014.

[13] In submissions to the family law court prior to the issuance of the March 2015 Order, Ms. Ryan's lawyer made the following written representations to Justice Suzanne Hood:

> On November 5[sic], 2014, the matter proceeded by way of a Settlement Conference. …. [H]is counsel, … was present and was in constant communication with Mr. B. throughout the day while the settlement conference progressed. The settlement conference took most of the day and settlement was reached at the end of the day. Justice Stewart requested that Mr. B. attend the reading of the settlement conference on the record, via phone, so that he could confirm his agreement with the settlement reached. Mr. B. did confirm, on the record, that he was in agreement with all points of the settlement reached.

[14] All the terms of the settlement were reflected in the record of a Superior Court so agreed to by the ex-spouse and upheld as reflective of a binding agreement so recorded by the judge. This is buttressed by the judge who ultimately issued the March 2015 Order enforcing the agreement. Formalism is not required. Deductively, there needed to be an agreed settlement reflected in written form in the transcript or minutes of the proceedings in 2014. If there were not, the judge (a different judge from the settlement conference judge) would not have enforced it, because she would not have known the terms or have been comfortable with both ex-spouses' agreement with same. The March 2015 Order enforced the known terms of the settlement agreed to in November of 2014. Enforcement is distinct from and was subsequent to the memorialization of, and agreement with, the terms.

[15] These unique facts satisfy the provisions of subsection 56.1(4) mandating "an amount payable … on a periodic basis for maintenance…under a written agreement". Since that agreement was concluded in 2014, it satisfies subsection 60.1(3) and thereby reaches back to 2013, affording deductibility of the spousal support amounts agreed to and paid in that taxation year.

[16] The Appeal is allowed, without costs.

Signed at Ottawa, Canada, this 18th day of December 2018.

"R.S. Bocock"

Bocock J.

CITATION:	2018TCC257
COURT FILE NO.:	2016-1645(IT)I
STYLE OF CAUSE:	JENNIFER LYN RYAN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Yarmouth , Nova Scotia
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REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF JUDGMENT:	December 18, 2018

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Rhonda Lemphers

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada