Docket: 2012-2809(IT)I

BETWEEN:

CHRISTIANE LEMIEUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Before: The Honourable Justice Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the appellant:	Marc-André Paquin
Counsel for the respondent:	Marie-France Camiré

AMENDMENT TO REASONS FOR JUDGMENT

Whereas this Court rendered a judgment dated October 3, 2013;

And whereas an error not affecting the substance of the judgment was made at paragraph [39] thereof;

This Court amends that paragraph as follows:

- Insurance (**$39.45** per month);

These Amended Reasons for Judgment are issued in replacement of the Reasons for Judgment dated October 3, 2013.

Signed at Montréal, Quebec, this 20th day of November 2013.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 6th day of December 2013
Margarita Gorbounova, Translator

Citation: 2013 TCC 304
Date: 20131121
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AMENDED REASONS FOR JUDGMENT

Masse D.J.

[1] In the case at bar, the appellant is appealing from a notice of reassessment issued on June 16, 2010, by the Canada Revenue Agency (CRA) in respect of the 2010 taxation year, in which the CRA included $21,000 received as a support amount in computing the appellant's income. On September 6, 2011, the appellant served on the CRA a Notice of Objection to the reassessment. On April 13, 2012, the CRA confirmed the reassessment; hence, this appeal.

Factual background

[2] The appellant and Dr. Étienne Cardinal (the husband) were once married. They lived together for 23 years and are the parents of four children. Throughout their married life, the husband managed the family and all of the finances; the appellant took care of raising the children and of ensuring their well-being.

[3] At the time, the matrimonial home was located at 52 Maplewood Avenue, Outremont, Quebec. The appellant inherited the house from her parents in 1991. She also inherited a sum of money, which she used to undertake extensive renovations on the house. Although the house belonged to the appellant, her husband requested that she transfer to him the undivided 50% share in the matrimonial home. On November 1, 2005, the appellant transferred to her husband the undivided 40% share in the family residence for $1.

[4] Unfortunately, the marriage failed and the spouses separated on August 8, 2008. On October 19, 2009, the appellant served on her husband a motion to institute divorce proceedings and corollary relief. On December 17, 2009, a consent to interim judgment was signed by the appellant and her husband (see Exhibit A-1); the consent to judgment was ratified by a judgment of the Superior Court (Family Division). In accordance with the consent to judgment, the husband had to pay support for the benefit of the children and of the appellant. For the purposes of this case, the relevant clauses of the consent to judgment are as follows:

> [TRANSLATION]
> WHEREAS the plaintiff [appellant] has exclusive use of the family residence located at 52 Maplewood Avenue, Outremont, Province of Quebec, since the parties' separation;
> . . .
> **SUPPORT FOR THE BENEFIT OF THE PLAINTIFF**
>
> [18] The defendant [husband] shall pay the plaintiff [appellant] a gross support amount of $6,450 per month for her own personal benefit;
>
> . . .
>
> [20] The plaintiff [appellant] shall pay out of the support provided by the defendant [husband] the costs related to the residence located at 52 Maplewood Avenue, Outremont, representing household expenses of approximately $1,750 per month, including
>
> (a) municipal and school taxes
> (b) home insurance
> (c) electric and oil heating
> (d) cable television and telephone
> (e) maintenance, housekeeping and landscaping
> (f) bottled water
>
> [21] The plaintiff [appellant] will also pay from the support provided by the defendant [husband] her cellular telephone expenses as well as gasoline expenses for the use of her vehicle, a 1999 Honda CRV;
>
> . . .
>
> **USE OF THE RESIDENCE LOCATED AT 52 MAPLEWOOD AVENUE, OUTREMONT**
>
> [34] The plaintiff [appellant] will maintain exclusive use of the family residence located at 52 Maplewood Avenue, Outremont;

[5] Today, the appellant is the sole owner of the residence following the divorce settlement.

[6] During the taxation year, the appellant received $77,400 from her husband in support amounts in accordance with the interim consent to judgment. However, she reported only $56,400 in computing her income for the taxation year. In computing her income for the taxation year, the appellant failed to include amounts totalling $1,750 per month, that is, $21,000 per year, provided in paragraph 20 of the consent to judgment for municipal and school taxes, home insurance, electric and oil heating, cable television and telephone, maintenance, housekeeping and landscaping, and bottled water.

[7] On May 24, 2011, the Minister of National Revenue (the Minister) issued to the appellant an initial Notice of Assessment in respect of the 2010 taxation year. On June 16, 2011, the Minister issued to the appellant a Notice of Reassessment in respect of the taxation year, in which he had revised the appellant's income by making the following changes:

Reported support amount	$56,400
Revised support amount	$77,400
Change	**$21,000**

[8] On September 6, 2011, the appellant served on the Minister a Notice of Objection to this reassessment. On April 13, 2012, the Minister confirmed the reassessment.

[9] The appellant testified at the hearing. She agreed that the municipal and school taxes vary each year; they never remain the same and increase each year. Home insurance remains relatively stable, but can vary. Heating, whether by electricity or oil, varies considerably from month to month. Maintenance costs include the wages of a cleaning lady once a week. Sometimes, the services of a plumber, electrician or other tradesperson are needed in order to make repairs to the house. These expenses do not recur every month, and they are incurred when necessary. It was the husband who determined the approximate amount of all of these expenses. If the total amount of expenses increases, the appellant does not receive additional support amounts. Similarly, if such expenses decrease, the appellant is not required to reimburse her husband for the difference between the expenses and the support amount she

received. Clearly, these expenses, while necessary, were under the appellant's control.

[10] The issue is whether the Minister was justified in adding to the appellant's income the $21,000 that the appellant had received in support amounts.

The appellant's position

[11] The appellant submits that the $21,000 does not have to be included in computing her income because it is not a taxable support amount under the provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act). The appellant argued that the amounts paid are not characteristic of an allowance on a periodic basis in accordance with the provisions of subsection 56.1(4) of the Act as she does not have discretion as to the use of these amounts. The appellant must use these amounts in accordance with the interim consent to judgment. She argues that she has no choice and that she has to pay the expenses that are listed in the consent to judgment. If she does not use the amounts in question in the way set out in the judgment, this results in a breach of the obligation contained in the judgment, and therefore she does not have discretion as to the use of the amounts.

[12] Therefore, the appellant submits that she is fully within her rights in not including those amounts in computing her income, and she requests that the Court allow her appeal.

The respondent's position

[13] The respondent is relying on paragraph 56(1)(*b*) and subsections 56.1(4) and 248(1) of the Act. The respondent submits that the Minister was justified, in accordance with subsection 56.1(4) of the Act, in adding to the appellant's income the $21,000 that the appellant received as support because she did have discretion as to the use of that amount.

[14] Therefore, the respondent seeks dismissal of the appeal.

Statutory provisions

[15] The relevant provisions of the amended Act read as follows:

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

. . .

(*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.

. . .

248(1) In this Act,.

> ***"separation agreement"*** includes an agreement by which a person agrees to make payments on a periodic basis for the maintenance of a former spouse or common-law partner, children of the marriage or common-law partnership or both the former spouse or common-law partner and children of the marriage or common-law partnership, after the marriage or common-law partnership has been dissolved, whether the agreement was made before or after the marriage or common-law partnership was dissolved;.

Analysis

[16] The parties agreed that an amount can only qualify as a support amount within the meaning of subsection 56.1(4) of the Act if the recipient has discretion as to the use of the amount. The notion of discretion is included in the definition of "support amount" and remains an essential condition for an amount to be taxable and deductible as a support amount. Therefore, the issue is whether the appellant has discretion as to the use of the amount periodically paid to her. If so, the amounts are taxable. Otherwise, the amounts are not taxable.

[17] The expression "discretion as to the use" has generated much case law in Canadian tax law. There seems to be two conflicting lines of authority. The one, based on the decision in *Assaf v. Canada*, [1992] T.C.J. No. 46 (QL), seems to attribute a restrictive meaning to the expression to the effect that the scope of the support recipient's discretion would be limited. The other line of authority is based on the decision in *Canada v. Pascoe*, [1975] F.C.J. No. 139 (QL). This line of authority appears to give a broader meaning to the expression "discretion as to the use".

[18] The appellant is relying on decisions based on *Assaf v. Canada*, *supra*. In *Assaf*, Chief Judge Garon had to decide whether the amounts paid to a former spouse, to defray part of the cost of their children's university education, could be deducted from the appellant's income. Judge Garon determined that it was not an allowance within the meaning of subsection 56(12) of the former *Income Tax Act*, because the former spouse had no discretion as to the use of this money. Judge Garon ruled as follows:

> In interpreting subs. 56(12) it should be noted that, for amounts received for example by a spouse or former spouse to be an allowance within the meaning of this subsection, it does not matter that the person paying the alimony does not control or attempt to control the use of the money in question. However, the judgment or agreement, as the case may be, must not specify the use to be made of these amounts. If there is such an indication, it follows that if the spouse or former spouse

> receiving the money in question does not use it in the way specified in the judgment or agreement, he or she will be failing to perform the obligation contained in the judgment or agreement. It is in this sense that the recipient of the amounts in question does not legally have discretion as to their use under subs. 56(12).

[19] In *Hamer v. R.* (1997), [1998] 3 C.T.C. 2030 (T.C.C.), affirmed by the Federal Court of Appeal, the appellants challenged the inclusion in their income of amounts received as support paid exclusively for the benefit or maintenance of their children. Judge Dussault of the Tax Court of Canada held as follows:

> 16 Section 56(1)(*b*) relates specifically to an amount received by a spouse or former spouse "as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage" provided the other conditions stated in the paragraph are met. Paragraphs (*c*) and (*c.1*) cover similar payments in different circumstances. Nothing in these provisions requires that the spouse or former spouse receiving amounts for the benefit or maintenance of children in his or her custody be the owner or be himself or herself the creditor of the alimony. The *Civil Code of Quebec* provides that proceedings for the support of a minor child may be instituted by the holder of parental authority and that the alimony or allowance may be ordered payable to the person who has custody of the child. The *Divorce Act* also provides that the spouse or former spouse may apply to a tribunal for a support order for dependent children. Certainly, an alimony or an allowance paid pursuant to a judgment or order for the maintenance of children only gives a spouse or former spouse receiving it authority to use it in his or her discretion while achieving its ultimate purpose, unless the judgment or order makes some other provision by indicating or specifying the purpose to which it must be allocated or how it should be used for the children's benefit. The usual and consistent interpretation of s. 56(12) in its context leads to the conclusion that the purpose of adopting it was simply to exclude from the word "allowance" for the purposes of s. 56(1)(*b*), (*c*) and (*c.1*) and corresponding paragraphs of s. 60 any amount the use of which was specified in this way, with the obvious consequence of substituting the payer's wishes for the free will of the recipient as to the manner in which the money should be used. I do not think that s. 56(12) can be given a wider meaning, the effect of which would be to neutralize the application of s. 56(1)(*b*), (*c*) and (*c.1*) and of the corresponding paragraphs of s. 60 simply because an alimony or allowance is paid for the maintenance of children only.

[20] In *Badeau v. The Queen*, [2002] 1 C.T.C. 2627, 2000 D.T.C. 2300, Chief Judge Garon had to consider child support amounts. On October 30, 1992, The Superior Court of Québec rendered a judgment requiring the appellant's former spouse to pay to the appellant certain amounts as child support. The disposition of the judgment reads as follows:

> ORDERS the respondent to pay the applicant, for her children, monthly alimony of $2,750, with the applicant being required to pay the household expenses, including mortgage, heating, tax, electricity and other payments; this amount shall be deposited on the first of each month to the applicant's bank account, no. 208104, at the Caisse d'Économie des Cantons.

[21] Judge Garon, relying on Judge Dussault's decision in *Hamer*, *supra*, was of the view that the recipient of child support could not use these amounts at her discretion if there had been a nexus between the obligation imposed on the former spouse to pay support amounts and the appellant's obligation to pay expenses related to the family home. Judge Garon held as follows at paragraph 18:

> [18] Considering the paragraph cited above, in paragraph 14 of these reasons, taken from the judgment of October 30, 1992, and having regard to the above observations, it may be seen that a relationship is established in that paragraph between the obligation imposed on the former spouse to pay the appellant monthly alimony of $2,750 for her children and the appellant's obligation to pay the expenses relating to the family home that are described in that paragraph. In view of this obligation imposed on the appellant to pay the said expenses, I find that the appellant did not have discretion as to the use of the portion of the monthly payments of $2,750 made pursuant to the judgment of October 30, 1992, which went to pay those expenses. Payment of the expenses relating to the family home was the only purely financial obligation imposed on the appellant by the judgment. The wording of the aforementioned paragraph from the judgment suggests that the appellant's obligation to pay the expenses in question is to a certain degree the counterpart of the former spouse's obligation to make the monthly payments of $2,750. It is particularly significant that the expense amounts relating to the family residence paid by the appellant in 1993 were taken by direct debit from the appellant's account into which the amounts were paid by her former spouse, as appears from paragraphs 5 and 6 of the "Partial Agreement on the Facts".

[22] In *Riendeau v. Canada*, [2002] T.C.J. No. 130 (QL), [2004] 1 C.T.C. 2170, Judge Tardif of this Court considered the following clauses of an agreement between the parties, which was ratified by the Superior Court in a judgment dated December 11, 1996:

> (a) the respondent herself shall make the mortgage payments (including municipal and school taxes) directly for the residence at 755 De La Bolduc Crescent, in Ville Ste-Catherine, by direct deposit to the applicant's bank account with the Caisse Populaire de Kateri in Ville Ste-Catherine, the said deposits to be made on the 13th day of every month and in monthly amounts of approximately $800;

> (b) the respondent shall also pay such things as the Hydro-Québec, Bell Canada and cable bills and the homeowner's insurance for the residence at 755 De La Bolduc Crescent in Ville Ste-Catherine;
>
> (c) the respondent shall be responsible for current maintenance costs for the residence located at 755 De La Bolduc Crescent in Ville Ste-Catherine;

[23] The appellant in *Riendeau* claimed that a portion of the amount received from her former spouse should not have been characterized as taxable support. She maintained that all amounts in respect of the commitments that she had to meet under the agreement, using the lump sum amount received from her former spouse, should have been excluded from the support that was taxable in her hands. According to her, those were amounts over which she had no discretion, being required to pay them to third parties pursuant to very clear and well-defined instructions.

[24] Judge Tardif ruled unequivocally: the appellant had no discretion with regard to the amounts for which she had to assume responsibility under the agreement. Thus, Judge Tardif allowed the appeal. He held at paragraph 19 et seq:

> [19] At this time, I must determine whether the agreement meets the requirements for full taxability in the appellant's hands.
>
> [20] The wording of the agreement is clear and unequivocal: from the lump sum amount received from her former spouse, the appellant was to take off specific or well-defined amounts to meet payment obligations toward third parties.
>
> [21] To state the matter clearly, the appellant acted as an intermediary or agent for the support payer. The fact that a portion of the amount received by the appellant was to be used in a specific way in order to meet explicitly defined obligations meant that she had no discretion or latitude in respect of the enjoyment of that portion.
>
> [22] Despite this clarity, the Minister apparently would have wanted the appellant to have acted as the bearer or deliverer of cheques made out by her former spouse to the order of the third-party creditors before he would admit that the appellant had no discretion over the amounts in question.
>
> [23] My understanding of the wording used in the agreement is that the appellant had no discretion regarding the money for the payments for which she was made responsible under the agreement.

[25] Thus, according to this line of case law, it would seem that if under an agreement or order, the recipient of a support amount received payments on the condition that he or she be responsible for certain expenses for the benefit of the recipient or his or her children, and said expenses are specific and well-defined in the agreement or order, the recipient may not use these payments at his or her discretion and the support payments are not taxable in his or her hands.

[26] However, in support of her arguments, the respondent relied on the second line of cases that is based on the Federal Court of Appeal decision in *Canada v. Pascoe*, *supra*. In *Pascoe*, the only issue was whether, in computing his income, the respondent was entitled to deduct certain amounts that he had paid to his former wife for medical, hospital and dental accounts on behalf of the wife and infant children and the educational expenses for the infant children under a separation agreement and decree nisi. At issue was the interpretation of the wording of paragraph 11(1)(*l*) of the former *Income Tax Act*, which read as follows:

> . . . the following amounts may be deducted in computing the income of a taxpayer for a taxation year . . . an amount paid by the taxpayer . . . as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage . . .

[27] Justice Pratte of the Federal Court of Appeal was of the view that neither the amounts paid by the respondent for the education of his children nor those paid for medical expenses were deductible from the payer's income. He ruled as follows at paragraph 7:

> 7 First, we are of opinion that the payment of those sums did not constitute the payment of an allowance within the meaning of section 11(1)(*l*). An allowance is, in our view, a limited predetermined sum of money paid to enable the recipient to provide for certain kinds of expense; its amount is determined in advance and, once paid, it is at the complete disposition of the recipient who is not required to account for it. A payment in satisfaction of an obligation to indemnify or reimburse someone or to defray his or her actual expenses is not an allowance; it is not a sum allowed to the recipient to be applied in his or her discretion to certain kinds of expense.

[28] In *Byers v. M.N.R.* (1985), 85 DTC 129, the husband was required by an order of the Superior Court of British Columbia to pay $700 per month to his wife as alimony. The order requires the wife to pay the monthly mortgage payments. Judge Bonner decided that these amounts were deductible from the husband's income and taxable as income in his wife's hands. Judge Bonner explained as follows:

> In my view the word 'allowance' in its ordinary meaning comprehends payments intended to cover defined classes of expense. For example a payment or series of payments made by a parent to a child can properly be called an allowance, even though the parent specifies the use to which the money is to be applied.
>
> I construe the Court Order in question here as doing nothing more than specifying one of the classes of expense intended to be covered by the $700.00 monthly payment. It is evident that the parties so construed the Order because, as previously noted, when the mortgage payments increased the monthly payments made by the Appellant to Mrs. Byers did not. It was, I assume, thought necessary in drafting the Order to identify Mrs. Byers as the person liable to make the mortgage payments because the house was owned jointly and both she and the Appellant were, without doubt, jointly liable on the usual covenant in the mortgage to repay the borrowed money.
>
> There is, in my view, a marked distinction between the allowance in question here which was intended to cover a myriad of purposes, only one of which was the mortgage component of Mrs. Byers shelter costs, and obligations to pay creditors directly or to indemnify a spouse against named classes of expense of the sort in question in the *Pascoe* … *Weaver* … and *Gagnon* … cases relied on by counsel for the Minister. I note too that the Appellant's obligation to pay $700.00 per month is not expressly made conditional on payments by Mrs. Byers of the mortgage instalments.

[29] In *Fry v. Canada*, [1995] T.C.J. No. 223 (QL), the appellant received the amount of $3,000 each month as alimony pursuant to an interim order of the Ontario Court (General Division). However, the appellant was required by the terms of that order to pay the mortgage, property taxes, home insurance and utilities. It can be seen therefore that *Fry* is a very similar case to the case at bar. The appellant argued that those amounts were deductible from her income under subsection 56(1) of the former *Income Tax Act*, because the appellant's obligations under the order did not allow her any discretion with regard to those expenses. Judge Sarchuk of the Tax Court of Canada did not accept this argument and therefore dismissed the appeal. He found that the appellant had exclusive use of the residence and was responsible for paying the mortgage, taxes, insurance and utilities. She was not obliged to report to her husband and therefore she had discretion as to the use of the alimony payments.

[30] In *Arsenault v. Canada*, [1995] T.C.J. No. 241 (QL), in computing his income, the appellant had deducted the amount of $8,560 as alimony, maintenance or child support payments. Pursuant to a separation agreement, the appellant was required to pay maintenance to his spouse. The appellant paid the rent for his spouse by means of monthly rent cheques made payable to the landlord but given to the spouse. She in turn delivered them to the landlord. The appellant claimed that those rent payments

were maintenance payments in accordance with the written separation agreement. The Minister of Revenue had disallowed those deductions. In allowing the appeal, Judge Brulé of the Tax Court of Canada decided that the payments were deductible from the payer's income and therefore taxable in the recipient's hands. He ruled as follows:

> 18 There is certainly no dispute that the amounts to be paid be limited and predetermined and that such amounts must be paid to enable the recipient to discharge a certain type of expense. The sole question is whether the amounts in this case were at the complete disposition of the recipient, who is not required to account for them to anyone.
>
> 19 Here the Court is of the opinion that there was complete agreement between the Appellant and the spouse. She received the cheques directed to the landlord (the explanation for such is found *supra*) and then paid them over. She could have insisted on payment to her but it was more convenient and beneficial to carry out the procedure adopted.
>
> 20 The Appellant's former spouse had constructive receipt of the amounts involved. She had acquiesced in the Appellant's payment thereof to her landlord, thereby effectively constituting the landlord as her agent for the receipt and appropriate expenditure of the amounts involved. . . .
>
> 21 In this case the spouse had a legally enforceable right to demand payment to her, not to the landlord. This is where the discretion lies.

[31] On appeal from that decision ([1996] F.C.J. No. 202 (QL)), Justice Strayer of the Federal Court of Appeal affirmed Judge Brulé's decision. He agreed that, based on the facts of the case, the taxpayer's former spouse retained a discretion as to how the money was paid pursuant to the separation agreement.

[32] In *Hak v. Canada*, [1998] T.C.J. No. 921 (QL), the Minister disallowed the appellant's deduction in the amount of $12,000 as alimony or maintenance paid to his estranged spouse. Pursuant to a separation agreement, the husband (the appellant) undertook as follows:

> 5. That Anwar Hak [the appellant] will provide $1000 per month for alimony and support, or
>
> | | |
> |---|---|
> | Pay apartment rent of | $455.00/month |
> | Utility bills of approximately | $200.00/month |
> | Health care premium approximately | $100.00/month |
> | Total | $750.00/month [sic] |

> and the remainder of $245/month for miscellaneous expenses for a total of $1,000 per month.
>
> . . .
>
> 7. Any additional expenses to be provided by Anwar Hak at this [sic] discretion.

[33] Thus, instead of paying these amounts to his spouse, the appellant paid them directly to the persons entitled to receive the payments on behalf and for the benefit of the appellant's spouse. Judge Bowman of the Tax Court of Canada had to determine whether the appellant's spouse had discretion as to the use of the payments. If so, the expenses were deductible from the appellant's income and were taxable in his spouse's hands.

[34] At paragraph 17 of his Reasons for Judgment, Judge Bowman held as follows:

> It appears quite obvious that Fazima Hak [the spouse] had a discretion with respect to the entire $1,000, and she exercised that discretion by constituting her husband her agent to pay on her behalf certain expenses such as utility bills and rent. What Fazima Hak is saying in effect is "You are to pay me $1,000 per month. You can satisfy part of that obligation by paying some of my bills."

[35] Judge Bowman noted the following at paragraph 31:

> 31. . . . The payment of the rent and utility expenses was simply an alternative means, agreed to by the spouses, of satisfying a portion of the appellant's obligation to pay his spouse the periodic allowance of $1,000 per month. The failure to mention in the agreement that a provision that has no application in any event should apply to the payments cannot be fatal to deductibility under paragraph 60(*b*).

[36] Judge Bowman then discussed two decisions of the Federal Court of Appeal: *Arsenault v. Canada, supra,* and *Armstrong v. Canada*, [1996] F.C.J. No. 599 (QL). *Armstrong* was decided only three months after *Arsenault*. These two decisions handed down by the same court seem to contradict each other. The panel in *Arsenault* was comprised of Justices Stone, Strayer and MacGuigan. The panel in *Armstrong* was comprised of Justices Stone, Linden and Chief Justice Isaac. The judgment in *Armstrong* was rendered by Justice Stone, who was the dissenting judge in *Arsenault*. In *Armstrong*, the trial court had ordered the taxpayer to make monthly mortgage payments for the matrimonial home where his spouse lived. The Federal Court of Appeal decided that these payments were not an "allowance" within the meaning of subsection 56(12) as the spouse could not use the mortgage payments at

her discretion. Judge Bowman noted the contradictory result of these two decisions in similar circumstances. He held as follows:

> 37. . . . Here we have payments that in my view, are covered by paragraph 60(*b*) and an agreement between the spouses that does no more than permit the appellant to fulfil in part his obligation to pay the periodic amount of $1,000 by paying certain bills that the wife would otherwise have to pay out of the $1,000 monthly allowance. In my view, this case is much more specifically covered by *Arsenault*. I cannot assume, in the absence of a clear indication to the contrary, that the Federal Court of Appeal in *Armstrong* intended to overrule its own decision of three months earlier in *Arsenault*. Indeed, this case is stronger than *Arsenault*. In *Arsenault*, the husband unilaterally presented his wife with cheques payable to third parties. In this case, the payments were made with the wife's express consent.
>
> 38 The appeal is allowed . . .

[37] Judge Bowman determined that the recipient had discretion as to the use of the alimony payments; accordingly, the expenses were deductible from the appellant's income and taxable in the hands of his spouse.

[38] *Andrée Larivière v. The Queen*, 2011-1480(IT)I, appeal heard on January 30, 2013, judgment dated March 27, 2013, is a very similar case to the case at bar. The Minister had added to the appellant's income an amount of $21,871 that the appellant had received during the 2009 taxation year as support from her former spouse. The spouses had concluded a draft agreement on December 15, 2008 (ratified by the Superior Court of Québec on January 28, 2009), whereby the husband agreed to pay the appellant spousal support of $420 per week ($1,806 per month) commencing November 10, 2008.

[39] According to the draft agreement, the appellant had exclusive use of the family residence, but she was solely responsible for all of the costs related to the residence totalling $1,701.45 per month, including the following:

- municipal and school taxes ($166 per month);
- hypothec payments ($1,200 per month);
- insurance ($39.45 per month);
- Vidéotron cable and telephone services ($130 per month);
- Hydro-Québec electricity bills ($166 per month)

[40] Justice Favreau had to consider paragraph 56(1)(*b*) and subsections 56.1(1) and 56.1(4) of the Act. He proceeded to observe that the purpose of these statutory provisions is to define the support amount received by a taxpayer in a year, which

must be included in computing the taxpayer's income for the year. Justice Favreau explained that, prior to 1997, all amounts received as support payments had to be included in the taxpayer's income. Since 1997, child support payments have been non taxable. Therefore, only amounts received that are not attributable to child support must be included in the recipient's income. It should be noted that, under subsection 56.1(4) of the Act, support is considered a child support amount if it is not identified as being solely for the support of a recipient who is a former spouse.

[41] Justice Favreau explained that, for an amount receivable to be considered a support amount, it is necessary, according to the definition of subsection 56.1(4) of the Act, that the amount be 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 if the conditions of paragraph (*a*) or paragraph (*b*) of the definition are met. The only issue that Justice Favreau had to decide was whether the appellant had discretion as to the use of the support amount she received from her former spouse. Justice Favreau decided that she could use the support amount at her discretion, and therefore the Minister was justified in including the amount at issue in the appellant's income, and Justice Favreau dismissed the appeal.

[42] Justice Favreau properly considered and reviewed the case law on the issue of discretion as to the use of the support amount. Justice Favreau explained that the term "allowance" as discussed in *Pascoe, supra*, and as defined in the former *Income Tax Act* stopped being used in the Act following the repeal of subsection 56(12) by subsection 8(3) of chapter 25 of the *Statutes of Canada, 1997*, but the requirement that the recipient can exercise his or her discretion as to the use of the support amount was included in the definition itself of the expression "support amount" in subsection 56.1(4) of the Act. This means that the case law decided under the former *Pascoe, supra*, regime, while subsection 56(12) of the Act was in existence, continues to be applicable in determining whether a payment received by a recipient qualifies as a "support amount" within the meaning of subsection 56.1(4) of the Act. Justice Favreau then discussed *Fontaine v. Canada* [1993] T.C.J. no 587 (QL). In *Fontaine*, the appellant claimed, as was the case in *Larivière* and as is the case here, that the expenses related to the matrimonial home, which she was required to pay pursuant to a judgment ratifying the draft agreement between the spouses, were not, according to her, fully at her disposal and should not therefore have been considered as a taxable allowance. That argument was not accepted by the Tax Court judge, and the appeal was accordingly dismissed. Justice Favreau noted that in *Arsenault*, *supra*, the Federal Court of Appeal held that Mr. Arsenault's former spouse had discretion as to the use of the sum of money was paid pursuant to the separation agreement and judgment and, as such,

had discretion as to its use, even though the amount paid to her was in the form of cheques made payable to a third party that could not be used for any other purpose. In *Larivière*, Justice Favreau found that the appellant could use the support payments at her discretion and therefore dismissed the appeal. The main points of his judgment are at paragraphs 25 et seq.:

> [25] A close reading of clauses 2, 3 and 9 of the draft agreement of December 15, 2008, reveals that the spousal support of $420 per week was determined by taking into account expenses related to the principal residence but that the obligation to pay the spousal support was not subject to any condition. Accordingly, the appellant had discretion as to its use.
>
> [26] The obligation to pay the expenses related to the family residence was exclusively linked to the use of the residence until it was sold. It is, of course, understood that if the appellant had not paid the expenses related to the residence, the intervener would have had the right to take legal action against the appellant to receive indemnification for the damages and losses he may have suffered.
>
> [27] The fact that the appellant was unable to make changes to either the ownership of the family residence or the hypothec on it, or the accounts with Hydro-Québec and Vidéotron Ltd., did not prevent the appellant from exercising her discretion as to the use of the support amount she received from the intervener.

[43] In my view, the reasoning of Judge Bowman in *Hak*, *supra*, and of Justice Favreau in *Larivière*, *supra*, cannot be attacked. In addition, the circumstances in *Byers*, *Hak* and *Larivière*, *supra*, are similar to the circumstances of this case.

Conclusion

[44] Having considered all of the evidence as well as the submissions before me, I have made the following findings:

a. In this case, the support amount received by the appellant was paid to her [TRANSLATION] "for her own personal benefit". This wording suggests that the appellant could use the support payments at her discretion.

b. The appellant had exclusive use of the family residence. The obligation to pay the expenses related to the family residence was exclusively linked to the use of the residence.

c. The expenses related to the residence were not set, limited or predetermined. The total amount of these expenses was only estimated at $1,760 per month, and that amount could vary from month to month.

d. The husband's obligation to make the support payments was not subject to any conditions. Whether the appellant pays the expenses at issue or not, nothing in the consent to judgment would allow the husband to reduce the support amount or to not pay the support amount to the appellant because the expenses were not paid.

e. As for the home insurance, cable television, telephone, heating, maintenance, landscaping, housekeeping and bottled water, the appellant had the full power to increase, decrease or cancel these services. She had the power to change providers and the nature and quality of the services. Regardless of the amount she pays as residence expenses, the support amount would remain the same, in accordance with the agreement.

f. The fact that the appellant was required to make monthly hypothec payments did not prevent the appellant from using the support amount at her discretion.

g. The appellant was not required to provide support documents as proof that she had paid the expenses. She was not required to report to her husband. In addition, she did not act as an agent or intermediary for her husband.

[45] For these reasons, I find that the appellant was free to dispose of the amounts at issue and she had discretion as to the use of the support payments.

[46] The appeal is dismissed.

Signed at Montréal, Quebec, this 20th day of November 2013.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 3rd day of December 2013
Margarita Gorbounova, Translator

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APPEARANCES:

Counsel for the appellant:	Marc-André Paquin
Counsel for the respondent:	Marie-France Camiré

COUNSEL OF RECORD:

For the appellant:

Name:	Marc-André Paquin
Firm:	Jurifisc avocats et fiscalistes inc. Laval, Quebec

For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada