

TAX COURT OF CANADA

BETWEEN:

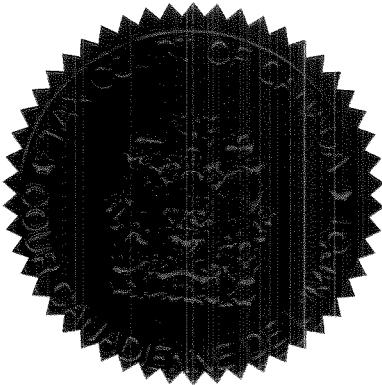
GARY SALZMANN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent



HEARD BEFORE THE HONOURABLE MR. JUSTICE LITTLE

in the Courts Administration Service, Courtroom 6A,

180 Queen Street West,

Toronto, Ontario

on Friday, August 22, 2008 at 9:35 a.m.

ORAL REASONS AND DECISION

APPEARANCES:

Mr. Howard J. Alpert

For the Appellant

Ms. Andrea Jackett

For the Respondent

Also Present:

Mr. William O'Brien

Court Registrar

Ms. Linda O'Brien

Court Reporter

A.S.A.P. Reporting Services Inc. 8 2008

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1 Toronto, Ontario

2 --- Upon commencing the excerpt on Friday,

3 August 22, 2008 at 9:35 a.m.

4 THE REGISTRAR: Before the court
5 case number 2006-1761(IT)G between Gary Salzmann,
6 appellant, and Her Majesty the Queen, respondent.
7 This case is being called for judgment.

8 JUSTICE LITTLE: Thank you.

9 The reasons for judgment in Gary
10 Salzmann:

11 A. FACTS: The appellant was married
12 to Francis Elizabeth Salzmann (hereinafter referred
13 to as the former spouse). The marriage broke down
14 effective November 16, 2001.

15 By a court order issued by
16 Justice MacDougall of the Ontario Superior Court
17 dated December 11, 2003, the appellant was ordered to
18 pay interim spousal support to the former spouse in
19 the sum of \$3,600 per month retroactive to
20 November 16, 2001.

21 The retroactive payment to be made
22 by the appellant to his former spouse pursuant to
23 this order totalled \$90,000. The amount was paid by
24 the appellant in April 2004. The appellant also
25 commenced to pay the sum of \$3,600 per month to his

1 former spouse effective the first day of
2 January 2004.

3 When the appellant filed his income
4 tax return for the 2004 taxation year, he deducted
5 the following spousal support payments: (1) \$90,000;
6 (2) \$43,200.

7 By notice of reassessment issued by
8 the Minister of National Revenue (the "Minister") for
9 the 2004 taxation year, the Minister denied the
10 deduction of the \$90,000 payment that the appellant
11 had made to his former spouse. The Minister allowed
12 the appellant to deduct the spousal support payment
13 made to the former spouse in the amount of \$43,200.

14 B. ISSUE: The issue is whether the
15 appellant is allowed to deduct the sum of \$90,000
16 that he paid to his former spouse.

17 C. ANALYSIS AND DECISION: The court
18 order of Justice MacDougall of the Ontario Superior
19 Court stated that all spousal support payments
20 ordered for a period prior to the effective date of
21 the court order shall be deductible to the appellant
22 and taxable to the former spouse pursuant to
23 subsection 56.1(3) and subsection 60.1(3) of the
24 *Income Tax Act* (the "Act").

25 The deductibility for tax purposes

1 of spousal support payments has been considered by
2 Canadian courts on a number of occasions.

3 In *Brian Baylis v. The Queen*,
4 2007 DTC 1278, the taxpayer and his former spouse
5 separated in August 2001. In a judgment dated
6 June 19, 2003, the Ontario Superior Court ordered
7 that (a) the taxpayer pay his former spouse
8 retroactive monthly support payments totalling
9 \$16,800 commencing August 1, 2001 for twelve months
10 at a monthly rate of \$1,400; and, (b) this \$16,800 be
11 deducted from the taxpayer's share of the proceeds of
12 sale of the matrimonial home.

13 In assessing the taxpayer for 2003,
14 the Minister disallowed the deduction of the \$16,800
15 provided in the order. The taxpayer appealed to the
16 Tax Court of Canada.

17 The taxpayer's appeal was allowed,
18 and the court held that the \$16,800 was a single
19 payment of accumulated arrears of periodic payments.

20 It was therefore found to be deductible support
21 amounts within the principles set out in the
22 Federal Court of Appeal in *The Queen v. Sills*,
23 85 DTC 5096.

24 In reaching his conclusion in
25 *Baylis*, Justice Bowie said at paragraph 8 of the

1 decision:

2 "The principle applicable here
3 is that expressed by the
4 Federal Court of Appeal in
5 *Dale v. The Queen*. It was
6 held in that case that an
7 order made by a Superior Court
8 is not subject to collateral
9 attack in subsequent
10 proceedings, and when that
11 order purports to operate
12 retroactively that must be
13 taken as effectively changing
14 history. When Wood J. issued
15 his order, one effect of it
16 was to create a liability on
17 the part of the appellant to
18 pay accumulated arrears of
19 spousal support from 2001 and
20 2002 in the total amount of
21 \$16,800. When that liability
22 was satisfied by a payment
23 from Mr. Baylis's share of the
24 proceeds from the sale of the
25 home, that payment was a

1 payment of accumulated arrears
2 of periodic payments. As a
3 single payment of arrears of
4 unpaid periodic payments, that
5 payment falls within the
6 principle expressed by the
7 Federal Court of Appeal in
8 *The Queen v. Sills*, which is
9 that those payments, although
10 made late and all at once,
11 maintain the character of
12 periodic payments."

13 I have also reviewed the decision of
14 Madam Justice Sharlow of the Federal Court of Appeal
15 in *Tossell v. The Queen et al.*, 2005 DTC 5365. In
16 *Tossell*, Justice Sharlow was considering a deduction
17 of \$36,000 in child support payments (i.e. equivalent
18 to 36 months' arrears), whereas it was noted that the
19 father was in default for approximately 43 months in
20 arrears.

21 In the situation before us today,
22 the payment of \$90,000 was exactly equivalent to the
23 arrears. In other words, it could not be said that
24 it was a payment of anything except the arrears.

25 I have also reviewed the appeal of

1 *Mary J. Leduc v. The Queen*, 2007 DTC 1117, a decision
2 of Justice Rossiter (now Associate Chief Justice
3 Rossiter).

4 The facts in that case were as
5 follows: The taxpayer and her former spouse divorced
6 on October 15, 2002. In an endorsement issued by the
7 Ontario Superior Court of Justice on January 29,
8 2004, the taxpayer was ordered to pay her former
9 spouse monthly support amounts of \$1,250. She was
10 also credited \$9,000 against \$25,000 in owed support
11 arrears and was ordered to pay the \$16,000 arrears
12 balance in monthly amounts of \$250.

13 In assessing the taxpayer for 2004,
14 the Minister denied the deduction of the
15 \$9,000 credit provided in the endorsement and another
16 \$5,000 amount paid to her former spouse during 2004.

17 The Minister's position was that these payments were
18 not periodic in nature as required by
19 paragraphs 56(1)(b) and 60(b) and subsection 56.1(4)
20 of the Act.

21 The taxpayer appealed to the
22 Tax Court. The taxpayer's appeal was allowed.
23 Applying the principles set out by the Federal Court
24 of Appeal in *Tossell*, the \$9,000 and \$5,000 payments
25 in dispute when taken with the other payments

1 provided in the endorsement were periodic in nature.

2 I also refer to the decision of the
3 Federal Court of Appeal in *Sills*. Under the terms of
4 a written separation agreement the taxpayer was to
5 receive a defined monthly payment from her husband.
6 The taxpayer actually received three lump sum
7 payments at random times during the taxation years in
8 issue. The Minister included the amounts in the
9 taxpayer's income as alimony.

10 On the taxpayer's appeal, the
11 Tax Review Board found that the payments were not
12 proper alimony payments. The Crown's appeal to the
13 Federal Court Trial Division in *Sills*, 83 DTC 5070,
14 was dismissed.

15 The Crown further appealed to the
16 Federal Court of Appeal. In the Federal Court of
17 Appeal, the Crown's appeal was allowed. The Court
18 found that the amounts were received pursuant to the
19 separation agreement and were properly included in
20 the taxpayer's income. So long as the agreement
21 provided that amounts were payable on a periodic
22 basis, their character was not changed by the fact
23 that they were not paid on time.

24 The relevant legislation did not
25 require that the amount be received according to the

1 terms of agreement before they would be included in
2 income.

3 While I believe that the reasoning
4 contained in the above decisions indicates that the
5 support payments are deductible by the appellant, I
6 also wish to comment on statements made by my
7 colleague, Justice Hershfield.

8 In *Garth Stephenson v. The Queen*,
9 2007 DTC 1608, Justice Hershfield said at
10 paragraph 8:

11 "While I agree that Judges of
12 Family Courts have no
13 jurisdiction to prescribe tax
14 consequences in their Orders
15 or Judgments, it is surely
16 imperative to give effect to
17 the expressly articulated
18 intentions of an Order made by
19 a Superior Court Judge where a
20 reasonable construction of the
21 terms of that Order allows it.

22 Indeed, in this case, I find
23 that the only reasonable
24 construction of the
25 Final Order is that it ordered

1 the \$7,500 be paid as
2 arrears."

3 In *Hinkelman v. The Queen*,
4 2001 DTC 732, Justice Hershfield also made a comment
5 which I think is worth considering. At paragraph 22
6 Justice Hershfield said:

7 "It should go without saying
8 that giving full force and
9 effect to an order of a
10 Superior Court should be
11 facilitated where possible. To
12 do otherwise can do little
13 else but undermine respect for
14 and confidence in our judicial
15 system. There was nothing in
16 our tax system, as it applied
17 to the subject year in this
18 case, that prohibited the
19 deduction of a maintenance
20 payment intended to benefit
21 step-children for whom
22 responsibility derived from a
23 marriage to the natural parent
24 of such children. To give
25 effect to this permissive

1 scheme was the express
2 directive of Justice Warren.
3 Recognizing that Deborah is
4 the link in the chain that
5 connects the Appellant's
6 support obligation to
7 Mr. McKee gives effect to both
8 such scheme and such express
9 directive of Justice Warren."

10 May I say I agree with those
11 comments, but I realize that a Superior Court of a
12 province cannot bind this court with respect to an
13 interpretation on support payments. I have concluded,
14 as indicated above, that the support payments come
15 within the provisions of the Act and should be
16 allowed.

17 Finally, I wish to note that the
18 appellant recognized his family obligations and paid
19 support payments to his former spouse. In other
20 words, he did not attempt to avoid liability. In my
21 opinion, he should not be denied deductibility based
22 upon a narrow, rigid technicality.

23 The appeal is allowed with costs.

24 Thank you.

25 THE REGISTRAR: Order. Please rise.

1 This sitting of the Tax Court of Canada is now
2 closed.

3 --- Whereupon the proceedings adjourned
4 at 9:47 a.m.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by Shorthand and transcribed therefrom, the
foregoing proceeding.

Linda O'Brien, Computer-Aided Transcription
Certified Court Reporter

CITATION: 2008 TCC 527

COURT FILE NO.: 2006-1761(IT)G

STYLE OF CAUSE: Gary Salzmann and
Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 19, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF ORAL JUDGMENT: August 22, 2008

APPEARANCES:

For the Appellant: Howard J. Alpert

Counsel for the Respondent: Andrea Jackett

COUNSEL OF RECORD:

For the Appellant:

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Firm: Alpert Law Firm
Toronto, Ontario

For the Respondent: John H. Sims, Q.C.
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