Minister of National Revenue (*Appellant*) *v.* **Sproston** (*Respondent*)

Sheppard D. J.—Vancouver, February 25, March 2, 1970.

Income Tax—Husband and wife—Separation decree—Maintenance payments made direct to children—Not deductible—Income Tax Act, s. 11 (1) (l).

By a decree of separation *S* was ordered to pay his wife as alimony $225 a month plus $90 maintenance for each of four children. *S* paid his wife the $225 as ordered but paid the $90 a month directly to the children.

Held, in computing his income *S* was not entitled by s. 11(1)(*l*) of the *Income Tax Act* to deduct the sums paid directly to the children.

Lumbers v. M.N.R. [1943] Ex. C.R. 202; *Brown v. M.N.R.* [1966] Ex. C.R. 289; *M.N.R. v. Trottier* [1967] 2 Ex. C.R. 268, [1968] S.C.R. 728; *M.N.R. v. Armstrong* [1956] S.C.R. 446, referred to.

INCOME tax appeal.

F. J. Dubrule and *J. R. Power* for appellant.

E. C. Chiasson for respondent.

SHEPPARD, D.J.—The issue is whether the respondent Edward H. Sproston under section 11(1)(*l*)[1] of the *Income Tax Act* is entitled to deduct from his taxable income for the years 1963 and 1964 the monthly payments made by him by cheque to each of his four children, and that depends upon the question whether the words in section 11(1)(*l*) "his spouse . . . to whom he was required to make the payment at the time the payment was made throughout the remainder of the year" necessitate the payments being made to the spouse which the respondent denies and the appellant affirms.

On the 30th of July 1940 the respondent Sproston was married to Frances Melrose Baillie-Hamilton and there were four children of the marriage of the respective names and years of birth as follows:

Ronald Hugh	1944	Jerilyn Melrose	1948
Russell Edward	1946	Frances Aileen	1952

Later, the respondent and his wife separated and on the 19th day of October 1962 an order for separation was made in an action in the Supreme Court of

[1] The *Income Tax Act,* Section 11(1)(*l*) reads:

"11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*l*) an amount paid by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement, 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, if he was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, his spouse or former spouse to whom he was required to make the payment at the time the payment was made and throughout the remainder of the year;"

British Columbia entitled "Frances Melrose Sproston, plaintiff, v. Edward Hugh Sproston and Gertrude Odette Hennessey, defendants", and by order of the 23rd of April 1963 in said action the court did order Sproston, the respondent herein:

> . . . that the Defendant, Edward Hugh Sproston, herein do pay to the Plaintiff for her permanent alimony the sum of Two hundred and Twenty-five dollars ($225.00) on the 1st day of each and every month together with the sum of Ninety dollars ($90.00) for the maintenance of each of her four infant children, namely: Ronald Hugh, Russell Edward, Jerilyn Melrose, and Frances Aileen Sproston, the said sums for the maintenance of each infant to be paid to the Plaintiff until each infant has attained the age of twenty-one (21) years, or has become self-supporting, and all payments hereunder to commence on the 1st day of January, A.D. 1963, and continue on the 1st day of each and every month;

Hence the defendant was ordered to pay monthly from the 1st of January 1963 to his wife, the sum of $225.00, and "for the maintenance of each of her four children" the sum of $90.00 for each child. The sums for maintenance of the children during the years 1963 and 1964 were paid monthly either in lump sum of $360.00 payable to the four children, or in a cheque for $90.00 to each child, and contained in a letter either directed to the four children or to one of them. In any event, these sums were not paid to the wife, Frances Melrose Sproston. In a letter of the 3rd of May 1963 to the four children, the respondent enclosed a cheque for $90.00 each for the five preceding months commencing the 1st day of January 1963, and by letter of 1st of June 1963 the respondent wrote "You will hear from me once a month with your cheque". When the first letter arrived the mother was out and the children opened the letter and on her return the children stated that they were going to deposit in their own bank accounts the sum received and the mother explained that she had a mortgage of $200.00 a month to meet plus the taxes on the home and therefore she was unable to continue with the allowance of $225.00 per month given her by the order. Thereupon, the children agreed to turn over to her their cheques. Accordingly, each child endorsed to the mother the cheque received by the child from the father, and the mother would cash the cheques and use the funds to maintain the home. The Minister assessed the respondent for the income tax for the years 1963 and 1964 by excluding therefrom the payments of $4,320.00 a year paid to the children but allowed the respondent certain deductions which would be excluded under section 26(5) if the respondent were to receive the credits for the payments to the children. On appeal, the Tax Appeal Board allowed the respondent the payments made to the children and the Minister has now appealed to this court.

As to the issue whether or not the payments to the children are within section 11(1)(*l*), the respondent Sproston contends (1) that the obligation created by the order of the 23rd of April 1963 is to provide for the welfare of the children, consequently that permitted the cheques to be sent directly to the children; (2) that the payments to the children were within section 11(1)(*l*) in that the words after "pursuant to" do not necessitate the payments being made to the spouse as section 11(1)(*l*) permits the deduction of "an amount paid by the taxpayer in the year pursuant to a decree, order, or

judgment of a competent tribunal" and the payments to the children are payments pursuant to the order of the 23rd of April 1963. The payments to the children are not "pursuant to" the order for the following reasons:

(1) The obligation is to pay all the moneys to the wife, the plaintiff in the action, and she alone could enforce the order to pay, hence, literally, the order requires that the payments be made to the wife. There is no evidence that the children were appointed the agents of the respondent Sproston with authority to pay the moneys on behalf of Sproston to the wife in discharge of obligation of Sproston under such order. That was not contended. Accordingly, it would follow that when the moneys were sent by the father to the children, such moneys would pass to the children absolutely and there would be no resulting trust because of the relationship of the payer and payee, and also because of the intention that the children would use the moneys and not hold for the father. That a resulting trust was excluded and a gift intended is shown by the letter of Sproston of the 1st of June 1963 wherein the respondent states "You will hear from me once a month with your cheque". In the result, the moneys paid to the children were not paid to the wife according to the order and therefore did not discharge the obligation of the respondent to his wife.

(2) The respondent contends that the words of section 11(1)(*l*) "pursuant to" are definitive of the order and do not necessitate the payment to the wife. That contention should not succeed. The section deals with payments and their deduction. That intention is indicated literally as section 11(1)(*l*) commences "an amount paid" by the taxpayer and permits the deduction of certain amounts from his taxable income. The further words of the section "to the spouse to whom he was required to make the payment at the time the payment was made" do likewise indicate the payments which are permitted to be deducted from the otherwise taxable income of the respondent.

As the section, where applicable, permits a deduction from income otherwise taxable, therefore, all the requirements of the section must be strictly complied with before it can create an exemption. In *Lumbers v. M.N.R.* [1943] Ex.C.R. 202 (2 D.T.C. 631), Thorson P. at p. 211 stated:

> It is a well established rule that the exemption provisions of a taxing Act must be construed strictly. In *Wylie v. City of Montreal*, [1885] 12 Can. S.C.R. 384 at 386, Sir W. J. Ritchie, C.J. said:
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> > I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language: that taxation is the rule and exemption the exception, and therefore to be strictly construed;
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> The rule may be expressed in a somewhat different way with specific reference to the *Income War Tax Act*. Just as receipts of money in the hands of a taxpayer are not taxable income unless the *Income War Tax Act* has clearly made them such, so also, in respect of what would otherwise be taxable

> income in his hands a taxpayer cannot succeed in claiming an exemption from income tax *unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act*; he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

One of the necessary elements in this instance is the provision for payment to the spouse, the respondent's wife. Also, the authorities hold that the words of the section do define the payments which may be deducted and are not merely definitive of the obligation pursuant to which the payment was to be made. In *Brown v. M.N.R.* [1964] D.T.C. 812 (before the Tax Appeal Board), and [1966] Ex.C.R. 289, [1965] D.T.C. 5184 (before Cattanach, J.) the taxpayer sought to deduct under section 11(1)(*l*) the sum of $1,170.00 paid to his wife's father as reimbursement of rent owing by her to her parents which was paid pursuant to an order of the Supreme Court of Ontario. W. O. Davis, Q.C. of the Tax Appeal Board said at p. 814:

> On 4th April, 1962, the appellant gave a cheque in the amount of $1,170 to Wilfred Baker, father of the appellant's wife Whilhelmina Brown, in accordance with paragraph 2 of the Senior Master's Order. This payment was disallowed by the respondent as a deduction from the appellant's income on the ground that *it was not 'an allowance payable on a periodic basis for the maintenance of the recipient thereof'*, and for further reasons given in his notification under s. 58 of the *Income Tax Act* already set forth above.

The judgment was approved by Mr. Justice Cattanach [1966] Ex. C.R. at p. 291 as follows:

> Since I am in agreement with the conclusions reached by the learned member of the Tax Appeal Board and the reasoning by which he reached those conclusions, the appeal is dismissed with costs.

In *M.N.R. v. Trottier,* [1967] 2 Ex.C.R. 268, [1968] S.C.R. 728, 67 D.T.C. 5029, the taxpayer and his wife operated a hotel and subsequently separated. The wife claimed she was entitled to one-half the hotel for which he agreed to pay $45,000.00. Later, a number of documents were executed to implement the agreement reached, including a second mortgage on the hotel for $45,000.00 and interest, and the payments of the taxpayer on account of this mortgage were claimed as a deduction under section 11(1)(*l*) but were disallowed. Cattanach J. at p. 277 stated:

> Section 11(1)(*l*) permits deduction in the computation of taxable income of: "an amount paid by the taxpayer in the year... pursuant to a written agreement, as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof. ..."
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> In order to qualify as a deduction from his income the payments made by the respondent to his wife must fall precisely within those express terms.
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> With such considerations in mind a reference to paragraph 2 of the separation agreement, Schedule D, discloses that Mrs. Trottier accepted a second mortgage on the hotel property for the sum of $45,000 'in full settlement of all claims for an allowance for herself from her husband'. While the value of the second mortgage might not be $45,000, nevertheless, in my view, the language of the paragraph indicates that what Mrs. Trottier got from her husband in exchange for her right to maintenance was in incorporeal property of value.

and:

> Therefore, in my opinion, it cannot be properly said that the payments here in question were made, in the words of section 11(1)(*l*), as an amount paid

> by the taxpayer in the year pursuant to a written agreement, as alimony or other allowance payable upon a periodic basis for the maintenance of the recipient thereof.

That judgment was approved in the Supreme Court of Canada [1968] S.C.R. 728, (1968) D.T.C. 5216 where the Chief Justice (for the Court) stated at p. 5219:

> While I have stated my reasons in my own words, I wish to express my substantial agreement with the reasons of Cattanach J.

In *M.N.R. v. Armstrong* [1956] S.C.R. 446, the taxpayer, under a divorce decree, was ordered to pay his wife monthly payments and subsequently his wife accepted the lump sum of $4,000.00 paid in full settlement of future payments. It was held that the sum of $4,000.00 was not paid pursuant to the divorce decree and therefore not within section 11(1)(*l*). The Chief Justice stated at p. 447:

> The test is whether it was paid in pursuance of a decree, order or judgment and not whether it was paid by reason of a legal obligation imposed or undertaken. There was no obligation on the part of the respondent to pay, under the decree, a lump sum in lieu of the monthly sums directed thereby to be paid.
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> The respondent urges that there is an ambiguity in the section. In my view there is not, and in that connection it is useful to refer to the statement of Viscount Simonds in *Kirkness v. John Hudson & Co. Ltd.* [1955] A.C. 696 at 712:
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> > That means that each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give weight to the opinion of others, but if at the end of the day he forms his own clear judgment and does not think that the words are "fairly and equally open to divers meanings" he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case.

Kellock J. at p. 448 stated:

> In my opinion, the payment here in question is not within the statute. It was not an amount payable 'pursuant to' or 'conformément à' (to refer to the French text) the decree but rather an amount paid to obtain a release from the liability thereby imposed.

Locke J. at p. 449 stated:

> It was for the purpose of obtaining what purported to be a release of the appellant's liability to maintain his infant child to the extent that it was imposed by the decree nisi that the $4,000.00 was paid. It cannot, in my opinion, be properly said that this lump sum was paid, in the words of the section, *pursuant* to the divorce decree. It was, it is true, paid *in consequence* of the liability imposed by the decree for the maintenance of the infant, but that does not fall within the terms of the section."

The respondent has relied upon the definition of "pursuant" in Black's Law Dictionary, page 1401 and Funk and Wagnall's New Standard Dictionary, 1943 ed. page 2014, but such definitions cannot assist in the light of the authorities defining the section.

It follows that the section requires the payment to be made to the wife before they may be deducted by the respondent as taxpayer. That has not been done. Therefore, the respondent is not permitted to deduct the payments made to the children. In conclusion the appeal is allowed, the assessment by the Minister is confirmed, but without costs as the costs are not requested by the Minister.