1954

May 27

June 17

BETWEEN:

MINISTER OF NATIONAL REVENUE ..APPELLANT;

AND

ALFRED OWEN TORRANCE BEARDMORE .....RESPONDENT.

Revenue—Income—The Income Tax Act S. of C. 1948, 11-12 Geo. VI, c. 52, s. 11(1)(j)—No deduction allowed for payments to adult child except as provided in the Act.

Respondent in compliance with the terms of a separation agreement entered into between him and his wife paid, after the wife's death, the sum of $375 to a daughter of their marriage who was an adult at the time the separation agreement was entered into. Respondent claims such payment as a deduction from income for the year it was paid. This was disallowed and on appeal to the Income Tax Appeal Board the assessment was set aside. The Minister appealed to this Court.

Held: That there is no provision in the Income Tax Act which entitles a taxpayer to deduct from his income amounts paid for the support of his children who are over the age of 21 years unless they are dependent upon him by reason of bodily or mental infirmity with the exception of the provision made for wholly dependent children over the age of 21 years who are in full-time attendance at school or university.

2. That the sum of $375 was properly added to respondent's income and the appeal must be allowed.

APPEAL from the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Potter at Toronto.

D. W. Mundell, Q.C., J. D. C. Boland and *J. C. Couture* for appellant.

J. S. Boeck for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board, dated November 6, 1953, and mailed on November 13, 1953, allowing an appeal from an assessment by the appellant dated November 18, 1952,

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whereby the appellant added to the income of the respondent for the taxation year of 1950 the sum of $375.00, which had been deducted by the respondent from his income for that year as a payment made to his second daughter, Nora Margaret Torrance Beardmore, allegedly, pursuant to a written separation agreement dated the 17th day of November, 1939, and made between the respondent of the first part, Laura Beardmore, his wife, of the second part, and National Trust Company, Limited of the third part, and which the respondent claimed to be entitled to deduct under the provisions of section 11 (1) (*j*), formerly section 11 (1) (*l*), of the Income Tax Act, hereinafter set forth.

The agreement recited that the husband and wife had agreed to live separately from each other in the future; that there were two surviving children of their marriage, namely Mary Frances Torrance Beardmore, born January 5, 1912, then an adult, and Nora Margaret Torrance Beardmore, born July 18, 1925, then an infant under the age of 21 years, and provided *inter alia* that the respondent would pay to his wife the sum of $625.00 on the execution of the agreement, plus the sum of $300.00 for her legal expenses in connection therewith, and thereafter the sum of $7,500.00 annually in twelve equal monthly instalments of $625.00 each on the first day of each month during their joint lives, the wife to have the custody of the infant daughter until she attained her majority, the respondent to pay her maintenance and expenses if she attended a boarding school approved by him and, subject to such provision, the wife would support and maintain herself and the said children and keep the husband indemnified against all debts and liabilities thereafter contracted or incurred by her.

Paragraph 9 of the agreement was as follows:—

> 9. And that the husband shall, in the event of the wife predeceasing him or remarrying, pay thereafter to each said child, Mary Frances Torrance and Nora Margaret Torrance, during his lifetime a sum annually of fifteen hundred dollars ($1,500.00) in equal monthly instalments of one hundred and twenty-five dollars ($125.00) each.

Paragraph 15 of the said agreement contained provisions to the effect that the respondent made thereby certain grants, conveyances and assignments to the National Trust

Company, Limited, as trustee, to the amount of three-fifths of his estate, to take effect only on his death, to insure certain payments would be made to the wife and/or the said daughters, but counsel for both parties conceded that the whole of such paragraph had, after the death of the wife, been declared void by the court after a hearing at which all parties were represented.

The agreement contained no other provision creating any trust for the payment of the said, or any, sums to the daughters.

The wife died September 4, 1950, and beginning shortly after her death the respondent paid to his second daughter, Nora Margaret Torrance, sums totalling $375.00 during that year.

In his income tax return for the taxation year 1950, dated March 13, 1951, the respondent included in deductions made by him the sum of $375.00 paid to his daughter Nora Margaret Torrance during the taxation year 1950 as deductible in pursuance of the said agreement.

By his notice of re-assessment mailed November 18, 1952, the appellant added to the declared income of the respondent the said sum of $375.00.

The respondent gave Notice of Objection dated December 31, 1952, to which was attached a statement giving, among other things, his reasons as follows:—

> The assessment is objected to because in computing my income for the taxation year 1950 no deduction was made in respect of $375.00 paid by me in the year 1950 pursuant to a written separation agreement dated November 17, 1939, as an allowance payable on a periodic basis for the maintenance of a child of the marriage to which the agreement relates, namely, Nora Margaret Torrance Beardmore.

Section 11 (1) (*j*) of the Income Tax Act is as follows:—

> 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:
>
> (*j*) an amount paid by the taxpayer in the year pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or pursuant to a written separation 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 is living apart from the spouse or former spouse to whom he is required to make the payment.

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The Notification by the Minister dated April 20, 1953, confirmed the assessment on the ground that the amount of $375.00, shown as paid in the year 1950, did not come within the provisions of paragraph (*j*) of subsection (1) of section 11 of the Act.

On June 16, 1953, the respondent appealed to the Income Tax Appeal Board, before which the appeal was heard on October 29, 1953, and by which judgment was given on November 6, 1953, allowing the appeal.

The appellant herein appealed to this Court.

The question for decision in this case is whether or not payments made, after the death of a wife, to a child of a marriage who was then 25 years of age, are deductible under the provisions of section 11 (1) (*j*), as payments made pursuant to a written separation agreement.

Alimony, strictly speaking, is a provision made by a husband for his wife while the relation continues to exist, but it is commonly understood to mean the allowance which a husband, by order of a court, pays to his wife, living separate from him, for her maintenance. In cases in which the wife has the custody of minor children it may include an amount sufficient to enable her to maintain them.

Interim alimony is a provision made *pendente lite* whether in a suit for divorce, judicial separation, or otherwise.

Permanent alimony is a provision made after a judicial separation.

Maintenance is a provision made by a man for a woman formerly his wife, following a decree of dissolution of the marriage.

It has been held as a matter of law that maintenance follows custody and, as custody must be limited to the years of minority, maintenance cannot be awarded by a court beyond that time.

Section 11 (1) (*j*) permits a deduction in computing the income of a taxpayer of:—

1. an amount paid by the taxpayer in the year.
2. pursuant to:
   (*a*) a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or;
   (*b*) a written separation agreement.

3. as alimony or other allowance.
4. payable on a periodic basis.
5. for the maintenance of:
   (*a*) the recipient thereof;
   (*b*) children of the marriage, or
   (*c*) both the recipient and children of the marriage.
6. if he is living apart from the spouse or former spouse to whom he is required to make the payment.

It is clear that the amount which the taxpayer is entitled to deduct from his income, if living apart from his spouse, must be paid by him (*a*) by reason of a legal obligation imposed upon him by a competent tribunal in an action or proceeding for divorce or judicial separation, or (*b*) by reason of a legal obligation undertaken by him upon his signing a written separation agreement.

In my opinion the word "pursuant", as used in section 11 (1) (*j*), means "by reason of" a legal obligation so imposed or undertaken.

If the obligation to pay is imposed upon him by a decree, order or judgment of a court, it is commonly called alimony if payable to his wife or former wife, but it may be some other allowance, and if the payment is made as a result of a legal obligation to support his children undertaken by him by signing a written separation agreement, it is not alimony but some other allowance payable on a periodic basis, and in neither case is he entitled to make a deduction unless he is living apart from the spouse to whom he is required to make the payment.

Under section 6 (*d*) of the Act, the respondent's wife, during the time she was in receipt of the payments amounting to $7,500.00 a year, was obliged to include the same in computing her income. The section is as follows:—

6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(*d*) amounts received by the taxpayer in the year pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or pursuant to a written separation 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 the recipient is living apart from the spouse or former spouse required to make the payments.

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The wife of the respondent would have been unable to claim, under section 25 (1) (*c*), exemption for the younger daughter after she attained her majority on the 18th day of July, 1946, and she was never able to claim exemption for the elder daughter, for she was over the age of 21 years at the time the agreement was signed.

The agreement of November 17, 1939, as already stated, does not create any trust in favour of the daughters; they are not parties to it and it confers no right for them to sue for such payments. The payments were, therefore, not made pursuant to the agreement in the sense that the word is used in section 11 (1) (*j*).

In *Re Miller's Agreement, Uniacke* v. *Attorney General* (1), a retiring partner had entered into an agreement with two continuing partners who covenanted, on the death of the retiring partner, to pay certain annuities to his three daughters for their respective lives, but no trust was created in their favour. While the purpose of the proceeding was to determine another question, Wynn-Parry, J., held that the daughters had no right to sue for the annuities under the agreement.

The Act, in making special provisions for deductions in the event of expenditures made for the maintenance or education of children, either expressly or by implication refers to a child under the age of 21 years or, if over the age of 21 years, who is dependent by reason of mental or physical infirmity, or in one case in full-time attendance at a school or university.

Section 25 (1) (*c*) is as follows:—

25. (1) For the purpose of computing the taxable income of an individual for a taxation year, there may be deducted from his income for the year such of the following amounts as are applicable:

(*c*) for each child or grandchild of the taxpayer who, during the year, was wholly dependent upon him for support and was

(i) under 21 years of age,

(ii) 21 years of age or over and dependent by reason of mental or physical infirmity, or

(iii) 21 years of age or over and in full-time attendance at a school or university,

$150.00 if the child or grandchild was a child qualified for family allowance and $400.00 if the child or grandchild was not so qualified;

(1) [1947] 1 Ch. 615.

There is no provision in the Act which entitles a taxpayer to deduct from his income amounts paid for the support of his children who are over the age of 21 years unless they are dependent upon him by reason of bodily or mental infirmity, with the exception of the provision made for wholly dependent children over the age of 21 years who are in full-time attendance at a school or university.

To give effect to the respondent's submission that, because of the existence of a separation agreement made with his wife, since deceased, he is entitled to deduct from his income tax greater amounts than he would be permitted to deduct if his children were under the age of 21 years and dependent, would be to place him in a better position than his wife was in at the time of her death and to permit deductions for children over the age of 21 years, which is not authorized by the Act.

It is unnecessary to consider whether or not the respondent was living apart from his spouse to whom he was required to make the payments, for at the death of his wife he ceased to have a spouse from whom he could live apart or to whom he could be required to make payments.

I therefore hold that the sum of $375.00 was properly added to the income of the respondent by the appellant.

The appeal will be allowed, the assessment restored, and the appellant will have his costs.

Judgment accordingly.

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated November 6, 1953, allowing an appeal from an assessment by the appellant, dated November 10, 1952, whereby the appellant added to the income of the respondent for the taxation year of 1951 the sum of $3,000.00, which had been deducted by the respondent from his income for that year as payments made to his daughters, viz. Nora Margaret Torrance Beardmore and Mary Frances Torrance Beardmore (Mrs. William Steele) during the year 1951, allegedly, pursuant to a written separation agreement dated November 17, 1939, and made between the respondent of the first part, Laura

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Beardmore, his wife, of the second part, and National Trust Company, Limited of the third part, and which the respondent claimed to be entitled to deduct under the provisions of section 11 (1) (*j*) of the Income Tax Act, formerly section 11 (1) (*l*) thereof.

The agreement, which is more fully set out and discussed in the judgment in the previous appeal between the same parties, hereinafter referred to, provided for an annual payment to the wife of $7,500.00 in twelve equal monthly instalments of $625.00 each, and paragraph 9 provided that, in the event of the wife predeceasing the respondent, he would thereafter pay to each of the said daughters, during his lifetime, a sum annually of $1,500.00 in equal monthly instalments of $125.00 each.

The wife died September 4, 1950, and during the year 1951 the respondent paid to his daughters sums totalling $1,500.00 each, or together $3,000.00, and claimed to be entitled to deduct that amount from his taxable income for that year.

Following the assessment by the appellant, the respondent, in accordance with the procedure laid down by the Income Tax Act, appealed to the Income Tax Appeal Board, which on November 6, 1953, allowed the appeal and directed that the assessment be referred back to the appellant for re-assessment by allowing the amount of $3,000.00 as a deduction in computing the respondent's taxable income.

An appeal from the judgment of the Income Tax Appeal Board came on for hearing before this Court at Toronto on May 27, 1954, at the same time as the appellant's appeal in another matter, numbered 84251, and between the appellant and the respondent, who were represented in both appeals by the same counsel, and as the same points of law were involved in both appeals it was agreed by counsel for both parties that the arguments in the first-mentioned appeal, No. 84251, would be used as the arguments in this appeal and that the judgment in the first appeal would, *mutatis mutandis,* be taken as the judgment in this appeal.

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For the reasons given in the judgment in appeal No. 84251, I hold that the sum of $3,000.00, the total of the payments made by the respondent to his said daughters, were not payments deductible from the respondent's income for the taxation year of 1951 under section 11 (1) (*j*) of the Income Tax Act.

The appeal will be allowed and the assessment restored, and the appellant will have his costs.

Judgment accordingly.