

Saskatoon
1967
Oct. 10-11

BETWEEN:

THE MINISTER OF NATIONAL
REVENUE

APPELLANT;

AND

WILLIAM ALBERT HANSENRESPONDENT.

Income tax—Alimony or maintenance—Separation agreement—Payment of lump sum in monthly instalments—Whether paid for maintenance of wife—Income Tax Act, s. 11(1)(l).

A separation agreement provided *inter alia* for a division of property between husband and wife and for payment by the husband to the wife "in full and final settlement of the husband's obligation to support and maintain the wife during their joint lives" the sum of \$20,000 as follows: \$6,000 on execution of the agreement and \$14,000 in monthly instalments of \$100.

Held, on the proper construction of the agreement read as a whole the monthly instalments were for the maintenance of the wife and they were therefore deductible under s. 11(1)(l) of the *Income Tax Act* in computing the husband's income.

INCOME TAX APPEAL.

Gordon V. Anderson for appellant.

Benjamin Goldstein for respondent.

JACKETT P.:—This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board allowing, in part, an appeal by the respondent from his assessment under the *Income Tax Act* for the 1961 and 1962 taxation years.

The only question in issue in the appeal to this Court is whether the Tax Appeal Board was in error in holding that the respondent was entitled, by virtue of section 11(1)(l) of the *Income Tax Act*, to deduct, in the computation of his income for the purpose of that Act for each of those years, twelve payments of \$100 made to his former wife pursuant to an agreement made by him with his wife before they were divorced.

Section 11(1)(l) of the *Income Tax Act*, in so far as it is relevant, reads as follows:

11. (1)...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 written agreement, as...allowance payable on a periodic basis for the maintenance of the recipient thereof...if he was living apart from, and was separated pursuant to a... 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;

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There is no dispute as to the facts. It is common ground that the respondent and his wife entered into a so-called "Property Settlement and Separation Agreement" on September 27, 1960, and it is common ground that the payments in question were made by the respondent in accordance with the terms of that agreement. The only question is whether such payments fall within the class of payments the deduction of which is permitted by section 11(1)(l). This question depends upon a proper understanding of the effect of the agreement.

The agreement must be considered as a whole and I find it necessary, therefore, to quote a large part of it. It reads in part as follows:

1. CONSIDERATION. The consideration for this Agreement is the mutual promises and agreements herein contained.

2. SEPARATION. It shall be lawful for each party at all times hereafter to live separate and apart from the other party at such place or places as he or she may from time to time choose or deem fit.

3. NO INTERFERENCE. Each party shall be free from interference, authority, and control, direct or indirect, by the other party as fully as if he or she were single and unmarried. Neither shall molest the other, or compel or endeavor to compel the other to co-habit or dwell with him or her.

4. WIFE'S DEBTS. The wife represents and warrants to the Husband that she has not incurred any debts or made any contracts for which the Husband or his estate may be liable. The Wife will not incur any such debts or make any such contracts so long as the Husband performs all of his obligations under this agreement. If the Wife violates this provision, and as a result thereof the Husband is obligated to make a payment or payments to others, he shall have the right to deduct the amount of such payment or payments from the next earliest amounts payable to the Wife under this Agreement.

5. MUTUAL RELEASE. Subject to the provisions of this agreement each party has released and discharged, and by this agreement does for himself and herself, and his or her heirs, legal representatives, executors, administrators, and assigns, release and discharge the other of and from all causes of action, claims, rights, or demands, whatsoever in law or equity, which either of the parties ever had or now has against the other, except any or all cause or causes of action for divorce.

6. DIVISION OF PERSONAL PROPERTY. The parties have divided between them, to their mutual satisfaction, the personal effects, household furniture and furnishings, and all other articles of personal property which have heretofore been used by them in common, and neither party will make any claim to any such items which are now in the possession or under the control of the other.

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7. PAYMENT. In full and final settlement of the Husband's obligation to support and maintain the Wife during their joint lives, the Husband agrees to pay the Wife the sum of Twenty-Thousand Dollars (\$20,000.00) in lawful currency of Canada, as follows:

(1) The sum of Six Thousand Dollars (\$6,000.00) in lawful Canadian currency upon execution of this Agreement.

(2) The sum of Fourteen Thousand Dollars (\$14,000 00) by equal consecutive monthly instalments of One Hundred Dollars (\$100 00) each, payable on the First (1st) day of each and every month, in each and every year, the first of such payments to become due and be paid on the First day of November, A.D. 1960.

(3) The deferred payments hereinbefore referred to shall be made payable to the wife by deposit to her account in the Royal Bank of Canada, Main Branch, Saskatoon, Saskatchewan, on the First day of each month during the currency of this Agreement.

(4) In the event of any other payments made by the Husband to the Wife, the balance due and owing will be reduced proportionately.

8. WAIVERS OF CLAIMS AGAINST ESTATE. Except as herein otherwise provided, each party may dispose of his or her property in any manner, and each party hereby waives and relinquishes any and all rights she or he may now and/or hereafter acquire, under the present or future laws of any jurisdiction, to share in the property or the estate of the other as a result of the marital relationship, including without limitation, dower, thirds, curtesy, statutory allowance, widow's allowance, homestead rights, right to take in intestacy, right to take against the will of the other, and right to act as administrator or executor of the other's estate, and each party will, at the request of the other, execute, acknowledge, and deliver any and all instruments which may be necessary or advisable to carry into effect this mutual waiver and relinquishments of all such interests, rights, and claims.

9. ACCEPTANCE BY WIFE. The Wife acknowledges that the provisions of this agreement for her support and maintenance are fair, adequate, and satisfactory to her and in keeping with her accustomed standard of living for her reasonable requirements. The Wife, therefore, accepts these provisions in full and final settlement and satisfaction of all claims and demands for alimony or for any other provision for support and maintenance, and fully discharges the Husband from any such claim and demands except as provided in this agreement.

10. SUBSEQUENT DIVORCE. Nothing herein contained shall be deemed to prevent either of the parties from maintaining a suit for absolute divorce against the other in any jurisdiction based upon any past or future conduct of the other, nor to bar the other from defending any such suit. In the event any such action is instituted, the parties shall be bound by all the terms of this agreement. If consistent with the rules or practice of the Court granting a decree of absolute divorce, the provisions of this agreement, or the substance thereof, shall be incorporated in such decree, but, notwithstanding such incorporation, this agreement shall not be merged in said decree, but shall in all respects survive the same and be forever binding and conclusive upon the parties.

11. BREACH. If the Husband breaches any provision of this agreement, the Wife shall have the right, at her election, to sue for damages for such breach, or seek such other remedies or relief as may be available to her.

12. ADDITIONAL INSTRUMENTS. Each of the parties shall from time to time, at the request of the other, execute, acknowledge, and deliver to the other party any and all further instruments that may be reasonably required to give full force and effect to the provisions of this agreement, and in particular, the Wife covenants and agrees to relinquish her Homestead rights in property known as the Arrow Confectionery and Barber Shop, situate at Civic No. 616, 33rd Street West, being Lot Eight (8) and the East Eight Feet (8') of Lot Nine (9), in Block Six (6), Plan FU, in the City of Saskatoon, Province of Saskatchewan, at or before the signing of this Agreement;

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AND FURTHER, the Husband covenants and agrees with the Wife that notwithstanding anything contained in the within Agreement, the wife has the right to register a Homestead Caveat against the property known as Civic No. 518—3rd Avenue North, being Lot Ten (10), in Block One Hundred and Eighty-Four (184), Plan Q13, in the City of Saskatoon, Province of Saskatchewan, such Homestead Caveat to be released upon payment in full of the \$14,000.00 as aforesaid.

* * *

18. BINDING EFFECT. Except as otherwise stated herein, all the provisions of this agreement shall be binding upon the representatives, the representative heirs, next of kin, executors, and administrators of the parties.

The payments in question are the twelve monthly payments made in each of the years 1961 and 1962 pursuant to that part of paragraph 7 of the agreement that reads:

“... the Husband agrees to pay the Wife the sum of ... \$20,000 ... as follows:

- (1) The sum of ... \$6,000 ... upon execution of this Agreement.
- (2) The sum of ... \$14,000 ... by equal consecutive monthly instalments of ... \$100 ... each ... the First ... to become due ... on the First day of November, A.D. 1960.”

There is no question between the parties that each of the payments in question was an amount paid by the respondent pursuant to a written agreement on a periodic basis; there is similarly no doubt that the payments were made in the taxation years in question; and finally there is no doubt that, at the time the payments were made and subsequent thereto, the appellant was living apart from, and separated pursuant to a written separation agreement¹ from, his spouse or former spouse to whom he was required to make the payments.

The appellant's position is, however, that the monthly payments in question were not made “as ... allowance

¹ A divorce took place following the execution of the separation agreement but counsel for the Minister took the position that the divorce did not alter the position as far as section 11(1)(l) is concerned from what it would have been had there been no divorce.

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payable . . . for the maintenance of the recipient thereof” and for that reason, and that reason alone, do not fall within the class of amounts the deduction of which is permitted by section 11(1)(l).

The appellant's position that the monthly instalments of \$100 in question were not paid as “allowances payable . . . for the maintenance of the recipient”, as I understand it, was based on the following submissions:

- (a) that such monthly payments were merely payments on account of the sum of \$20,000, which is what counsel for the appellant describes as a “lump sum payment” that the appellant bound himself by the agreement to pay, and the lump sum payment of \$20,000 was either the consideration for settlement of all the wife's property rights and for a release of all the obligations of the appellant to his wife pertaining to the marriage relationship, or it was a lump sum payment in relation to his obligation to maintain his wife;
- (b) alternatively, the payments were payments for a release of the obligation to maintain the wife and were not made as allowances for her maintenance; and
- (c) alternatively, the payments were part of the amount payable by the appellant under the agreement in respect of the wife's claims in respect of the appellant's property, her rights against his estate *and* her right to maintenance, and, for that reason, cannot be regarded as allowances for her maintenance within section 11(1)(l).

The preamble of the agreement shows that the purpose of the agreement was to confirm the separation of the parties that had already taken place, and to make arrangements in connection therewith, including

- (a) arrangements for settlement of their property rights,
- (b) arrangements for the support and maintenance of the wife, and
- (c) arrangements in respect of other rights and obligations growing out of the marriage relationship.

When the substantive provisions of the agreement are examined, it is found that, as forecast by the preamble, the

agreement does "make arrangements" for the settlement of the property rights of the parties. For example, paragraph 6 records and confirms a division that had taken place of the personal property that had been used by them in common and, by paragraph 8, they waived all rights against each other's property or estates. The agreement also contains many provisions making arrangements in respect of other rights and obligations growing out of the marriage relationship. For example, paragraph 2 provides for their living separate and apart, by paragraph 3 they agree not to interfere with, or molest, each other, paragraph 4 absolves the appellant from liability for the wife's debts, and, by paragraph 5, they mutually release each other from all legal obligations one might have had against the other.

Finally, as forecast by the preamble, the agreement contains a provision which, in my view, was intended as "arrangements" for "the support and maintenance of the wife". I refer, of course, to paragraph 7.

If there could have been any doubt that paragraph 7, read by itself, is a provision for the maintenance of the wife (by reason of the use of the rather inept language "In full and final settlement of the Husband's obligation to support and maintain the Wife . . ." instead of some more appropriate words such as "For the support and maintenance of the Wife . . ."), and I am not to be taken as suggesting that there could have been any such doubt, when paragraph 7 is read with the preamble and with the reference in paragraph 9 to "the provisions of this agreement for her support and maintenance", there cannot, in my view, be any doubt that paragraph 7 provides exclusively for the maintenance of the wife.

A supplementary argument was made for the appellant that the paragraph 7 payments cannot be regarded as allowances for maintenance within section 11(1)(l) because they lack certain characteristics of provisions for the maintenance of a wife. Reference was made, for example, to the fact that the amounts are not expressed to be payable during the wife's life, the fact that the husband is permitted to make prepayments, and the fact that the payments are assignable. Some such considerations may be helpful in certain cases in deciding whether particular payments are to be made for the wife's maintenance or not. I do not, however, find any of the factors upon which counsel for the

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appellant relied for that purpose in this case, to the extent that they seemed to exist, to be inconsistent with the conclusion that I have reached that the agreement read as a whole points clearly to the conclusion that the parties intended the paragraph 7 payments to be provision for the wife's maintenance.

With reference to the contention that the payments were really part of the consideration running from the appellant under the agreement for all the various benefits accruing to him under the agreement, I have already made it clear that, as I read the agreement, it has been so constructed so as to make paragraph 7 a provision for maintenance and nothing else.

Finally, I reject the contention that paragraph 7 provides for a "lump sum payment" of \$20,000 and that the monthly payments in question are merely payments on account of that lump sum. Quite the contrary, in my view, paragraph 7 provides for a number of payments totalling \$20,000 and the monthly payments in question are some of the payments so provided for. A reference to the words of the paragraph makes it quite clear. It says, "the Husband agrees to pay the Wife the sum of . . . \$20,000 . . . as follows", and then it sets out the actual payments that are to be made. The real question is, of course, whether the payments were made pursuant to a provision for payments on a periodic basis and, in my view, paragraph 7(2), pursuant to which the payments in question were made, is precisely that.

The appeal is dismissed with costs.