1956
*Feb. 1
*Mar. 28

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

JOHN JAMES ARMSTRONG ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Alimony—Maintenance of child—Monthly payments ordered by decree—Whether lump sum paid by arrangement between parties in full settlement deductible—Income Tax Act, 1948, s. 11(1)(j).

Under a divorce decree, the respondent was ordered to pay to his wife $100 a month for the maintenance of their daughter. Subsequently, the wife accepted a lump sum of $4,000 in full settlement of all future payments. The Minister disallowed the deduction of this lump sum from the respondent's income. Both the Income Tax Appeal Board and the Exchequer Court held the amount to be deductible.

Held: The appeal should be allowed.

Since the $4,000 was not an amount paid "pursuant" to the divorce decree but was paid by arrangement between the respondent and his wife, it was not deductible under s. 11(1)(*j*) of *The Income Tax Act*.

APPEAL from the judgment of the Exchequer Court of Canada, Potter J. (1), affirming the decision of the Income Tax Appeal Board.

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

J. W. Swackhamer for the respondent.

The judgment of Kerwin C.J., Taschereau and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—The Income Tax Appeal Board and the Exchequer Court have found that the sum of $4,000 was properly deductible by the respondent from his income tax for the taxation year 1950, within the provisions of section 11(1)(*j*) of *The Income Tax Act*. I am unable to agree as, in my opinion, the sum was not "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

*PRESENT: Kerwin C.J., Taschereau, Kellock, Locke and Fauteux JJ.

(1) [1954] Ex. C.R. 529.

payable on a periodic basis . . .". Nor if one refers to the French version was it "un montant payé par le contribuable pendant l'année, conformément à un décret, ordonnance ou jugement rendu par un tribunal compétent dans une action ou instance en divorce ou en séparation judiciaire, ou en conformité d'une convention écrite de séparation, à titre de pension alimentaire ou autre allocation payable périodiquement . . .". 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.

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.* (1):

> 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.

The appeal should be allowed, the judgments below set aside, with costs in this Court and in the Exchequer Court, and the assessment of the Minister, as amended by his notification of April 29, 1952, restored.

KELLOCK J.:—In this case the sum of $4,000 was paid by the respondent "in full settlement" of all payments due or to become due under a decree nisi which obligated him to pay to his former wife the sum of $100 a month for maintenance of the infant child of the parties until the latter should attain the age of sixteen years. In consideration of this payment the respondent was released by the wife "from any further liability" under the said judgment.

S. 11, s-s. (1)(*j*) of *The Income Tax Act* permits deduction in the computation of taxable income of

> an amount paid by the taxpayer . . . pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation . . . as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage . . .

(1) [1955] A.C. 696 at 712.

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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.

If, for example, the respondent had agreed with his wife that he should purchase for her a house in return for a release of all further liability under the decree, the purchase price could not, by any stretch of language, be brought within the section. The same principle must equally apply to a lump sum paid directly to the wife to purchase the release. Such an outlay made in commutation of the periodic sums payable under the decree is in the nature of a capital payment to which the statute does not extend.

I am therefore of opinion that the appeal must be allowed and the judgment below set aside with costs throughout.

LOCKE J.:—By the decree nisi made on September 21, 1948 in the action for divorce brought by the appellant's wife Jean Isobel Armstrong, the latter was granted the sole custody and control of the child born of the marriage on October 12, 1939, and the appellant was ordered to pay to the plaintiff in the action the sum of $100 a month for the maintenance of the child until she should attain the age of sixteen years or "until this court doth otherwise order." No order was made for the wife's maintenance.

The decree, by its terms, became absolute six months from its date, unless sufficient cause should be shown to the court to the contrary, and the marriage was dissolved at the expiration of that period.

On June 30, 1950, when the child born of the marriage was less than eleven years old, the appellant made an arrangement with his wife whereby, in consideration of a sum of $4,000, she purported to release him of any further liability under the judgment.

The question as to whether this purported release relieved the appellant of the obligation imposed by the decree to maintain the child, or which might thereafter be imposed upon him under the provisions of the *Matrimonial Causes Act* (c. 226, R.S.O. 1950), was not argued before us

and I mention the matter only to say that I express no opinion as to its legal effect as between the appellant and the child.

The appellant claims to be entitled to deduct the amount so paid from his income for the year 1950 under the terms of s. 11(1)(*j*) of *The Income Tax Act,* which permits the deduction of an amount paid by the taxpayer "pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce . . . payable on a periodic basis for the maintenance of . . . children of the marriage."

The liability of the appellant to make these monthly payments until the child attained the age of sixteen years was not absolute under the terms of the decree but remained subject to the further order of the court. Had the child died before attaining that age, no doubt, on his application, the court would have ordered the suspension of the payments. Equally, it may be said, in view of changed circumstances, the court might have increased or diminished the amount of the payments. The jurisdiction of the court under the Act to make orders respecting the custody, maintenance and education of children continues during the whole period of their infancy, that is, until they attain the age of twenty-one years (*Thomasset* v. *Thomasset* (1): *Eversley on Domestic Relations,* 6th Ed. p. 134).

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 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.

It is only payments made for the purposes and in the manner specified in s. 11(1)(*j*) which may be deducted in computing the income of the taxpayer. There was no means of determining on June 30, 1950, the amount which the appellant would be required to pay under the terms of the decree up to the date of the child's sixteenth birthday, for the reasons above stated. The amount might have

(1) [1894] P. 295.

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been much less or much more than $4,000. The appellant was prepared to pay that amount to compound his liability, for the reasons explained by him in his evidence, and the mother was prepared to accept it. The amount was paid under the terms of the agreement made between the parties and not pursuant to the decree of the court.

With the greatest respect for the opinion of the late Mr. Justice Potter in this matter, I am unable to agree with his conclusion and would allow this appeal with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *A. A. McGrory.*

Solicitors for the respondent: *Fasken, Robertson, Aitchison, Pickup & Calvin.*