

Cunningham v The Queen, 2012 TCC 279

Author : admin

Claiming the Child Tax Benefit pursuant to ITA Section 118 - Differences Between Section 8 and Section 9 of the *Federal Child Support Guidelines*.

[Cunningham v The Queen, 2012 TCC 279](#)

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At issue was whether, on joint custody of a single child, the parents were able to both claim the Canada Child Tax Benefit according to their agreement pursuant to subsection 118(5.1).

The Court held that a joint custody agreement under section 9 of the *Guidelines* is one single payment, not a set-off payment, and therefore ITA subsection 118(5.1) does not come into play, and the parent who pays child support cannot claim the credit pursuant to 118(5) of the ITA.

The Husband ("taxpayer") and his wife divorced and in their separation agreement shared custody of their only child. The child has resided with each of them for about 50% of the time. The parties agreement with respect to child support specified that they based it on section 9 of the [Federal Child Support Guidelines, SOR/97-175](#) dealing with shares custody. In their separation agreement, the parties agreed that they would alternate in taking the Canada Child Tax Benefit.

The Father claimed the benefit in 2009, but the MNR reassessed and denied the benefit to the taxpayer pursuant to subsection 118(5) on the basis that the taxpayer was required to pay support to his spouse or former spouse.

Justice Boyle reviewed the law applicable. Paragraph 118(1)(b.1) provides a tax credit in respect of a taxpayer's child under 18, but subsection 118(5) denies that credit to a taxpayer who has paid child support to his spouse or former spouse. Subsection 118(5.1) restricts the application of 118(5), such that the latter will not apply if the effect would be to deny the credit to both partners. In case that 118(5.1) applies, paragraph 118(4)(b.1) provides that both parents are entitled to the credit according to their agreement as to which one will claim it on an annual basis (failing which the credit it denied to both of them).

The relevant provisions read:

118. (1) For the purpose of computing the tax payable under this Part by an individual

for a taxation year, there may be deducted an amount determined by the formula

[...]

(b.1) if

(i) a child, who is under the age of 18 years at the end of the taxation year, of the individual ordinarily resides throughout the taxation year with the individual together with another parent of the child, the total of

[...]

(4) For the purposes of subsection 118(1), the following rules apply:

[...]

(b.1) not more than one individual is entitled to a deduction under subsection (1) because of paragraph (b.1) of the description of B in that subsection for a taxation year in respect of the same child and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them;

[...]

(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or

(b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

[...]

(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (b) or (b.1) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

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The Court referred to past cases where in cases of **joint custody** the taxpayer's appeals have been dismissed by the TCC, including: reasons for judgment of Woods J. in [Perrin v. Her Majesty the Queen, 2010 TCC 331](#), those of Webb J. in [Melnyk v. Her Majesty the Queen, 2007 TCC 733](#), and those of Lamarre J. in [Ladell v. Her Majesty the Queen, 2011 TCC 314](#).

Shared custody arrangements are governed by the guidelines, and there are not two offsetting support payments payable by the parents - there is only one parent required to make support payments. The SCC in [Contino v. Leonelli?Contino \[2005\] 3 SCR 217](#), stated that in shared custody under section 9 of the guidelines, child support was NOT payable on a set-off basis, but rather the parent with the higher income is required to make net payments equal to the difference between the two support amounts. This is in contrast to section 9 cases of split custody (each parent having custody of a different child), which does provide for a set-off.

Therefore, since there is only one support payment made under section 9 of the guidelines in joint custody, ITA subsection 118(5.1) does not come into play and the parent who pays support cannot claim the credit.

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

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