

Emond v The Queen, 2012 TCC 304

Assignment of Pension Benefits vs Division of Matrimonial Property (ie pension amounts)

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At issue here was whether the payment from the ex-husband to the ex-wife (Taxpayer) as part of a separation agreement and division of matrimonial property, calculated as 1/2 of his net annuity payments, ought to be included in income for the ex-wife under subparagraph 56(1)(a)(i) of the ITA and on the definition of "superannuation or pension benefit" in subsection 248(1)?

The Court held that the payments here were agreed to be net amounts, and were the division of the husband's income, and that these amounts received in accordance to the separation agreement, being a division of property, are not taxable as pension income pursuant to subparagraph 56(1)(a)(i) of the ITA. The Court drew a distinction between the assignment of pension benefits to the ex-spouse (which would be taxable to the receiving ex-spouse) and an agreement to split another's income as part of the division of matrimonial property (not taxable to receiving ex-spouse).

FACTS

The Taxpayer's marriage broke down in 2001, and by consent order the spouses agreed that the spouse of the taxpayer was to make payments to the taxpayer for spousal support and as a portion of his retirement annuity. The taxpayer failed to include the payments received from her spouse that represented a portion of his retirement annuity for the taxpayers under appeal. The consent order stated that the split of the annuity payments, being part of the division of marital property, was "not to be considered spousal support by" either of them, and was to consist of 1/2 of the net amount of the annuity payment.

ARGUMENTS

The CRA took the position that the consent order was not clear, and did not specify who was responsible for the tax. The CRA relied on subparagraph 56(1)(a)(i) of the ITA and on the definition of "superannuation or pension benefit" in subsection 248(1) to argue that the taxpayer was taxable on the half of the annuity she received from her former spouse.

The CRA argued that it was the intention of the consent order to divide the source of income equally among the spouses, and that each would pay tax on the income from that source. Thus, the pension benefits were received by the taxpayer in lieu of the support amounts initially received. The CRA relied on the FCA decision in *Walker v. R.*, 1999 CarswellNat 2307, and on the TCC decision in *Lane v. The Queen*, [2007 TCC 674](#). The Court noted, however, that in those cases the spouses agreed to assign 1/2 of the GROSS proceeds and this was to be divided at source.

ANALYSIS

The Court looked at the decision in *Andrews v. The Queen*, [2005 TCC 246](#), where the ex-husband was paid the full amount of the pension, and the husband paid the portion to the ex-wife directly. Bowman CJ felt bound by the FCA decision in *Walker, supra*, but said that the payments directly from the ex-husband to the ex-wife were not superannuation or pension benefits in the hands of the ex-wife within the meaning of s 248(1), but was rather a division of matrimonial assets, being neither a support amount nor a pension benefit in the hands of the recipient ex-spouse. Bowman CJ had difficulty with the decision of the FCA in *Walker* because "an actuarial calculation of the present value of the husband's pension and a lump sum paid to her by her husband, the lump sum would clearly not have been taxable, either as a pension benefit or as a support amount", and asked why a monthly payment would then be taxable. He also

found the reasoning in *Walker* difficult to reconcile with concepts firmly entrenched in income tax law:

- (a) absent sham, the form of a transaction prevails over notions of "substance" or "economic reality".
- (b) the tax consequences of a transaction are to be determined on the basis of what was in fact done not what might have been done.
- (c) the parties to a transaction cannot bind either the Court or the Minister by an agreement as to the tax consequences of the transaction.

The Court then referred to the decision in [St-Jacques v. Canada, \[1999\] T.C.J. No. 929 \(QL\), 1999 CarswellNat 3121](#), which distinguished *Walker* and stated that all that was occurring when the husband agreed to share his pension income was that, an agreement to share his income with another person - It did not make the recipient one who was receiving income, and thus 56(1)(a)(i) did not apply. The TCC there said that " assigning entitlement to a gross pension income does not have the same effect as sharing net pension income with another person."