

Failure of Family Lawyers on Support - Sas Ansari

Author : admin

Failure of Family Lawyers on Support Payments

Harder v The Queen, [2016 TCC 197](#)

This is an all too common scenario before the Tax Court - A divorce happens, financial obligations are finalized, and the family lawyers involved don't understand the tax consequences and tax law requirements. Their clients end up not getting the financial outcome they expected and lawyers end up getting sued. Family lawyers need to engage an experienced tax professional to help them plan the division of property and support obligations. The [Income Tax Act](#) is convoluted and detailed.

```
medianet_width = "160"; medianet_height = "90"; medianet_crid = "749795932";  
medianet_versionId = "111299"; (function() { var isSSL = 'https:' == document.location.protocol;  
var mnSrc = (isSSL ? 'https:' : 'http:') + '//contextual.media.net/nmedianet.js?cid=8CUW8XQ2I' +  
(isSSL ? '&https=1' : ''); document.write(""); })();
```

FACTS

The taxpayer and his spouse separated and had dealt with the usual stressful, difficult, and emotional matters that go along with a divorce. The family lawyers involved thought they had gotten the financial right, but they had not. The taxpayer was denied deductions for child support payments and the Tax Court had no choice but to dismiss his appeal all because the family lawyers didn't understand the [ITA's](#) requirements.

ANALYSIS

The [Income Tax Act](#) prevents a person from deducting an amount in respect of a person where the individual is required to pay a support amount (defined in 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person where, among other things, the two live separate and apart throughout the year because of a breakdown of the relationship - ITA s 118(5). There is an exception to allow for a deduction, but only where the application to the facts would result in no person being able to claim the deduction - ITA s 118(5.1).

For tax purposes, the use of the Federal Child Support Guidelines is a starting point that leads to spouses coming to an agreed "support amount". A set-off mechanism doesn't render, memorialize, or transform the distinct values entered along that path into support amounts for purposes of the ITA - *Contino v Leonelli-Contino*, [2005 SCC 63](#) at paragraph 32. The result is a unilateral payment from one spouse to another - *Ladell v R.*, [2011 TCC 314](#) at paragraph 11.

In shared parenting situations as these - *Perrin v Her Majesty the Queen*, [2010 TCC 331](#) at

paragraph 16 - where the other spouse is not required to pay a support payment to the net payor, the ITA does not allow a deduction for the dependent amount by the unilateral payor - *Cunningham v Her Majesty the Queen*, [2012 TCC 279](#) at paragraph 14; *Verones v R.*, [2013 FCA 69](#) at paragraph 6. The exception allowing both parents to claim the dependent deduction only applies where both parents are required, factually, to pay to the other an amount for child support. Factual or actual payment by both parents to the other require a payment for the time the child is in the care of the other parent - *Rabb v R.*, [2006 TCC 140](#); *Ochitwa v R.*, [2014 TCC 263](#). The dependent deduction is also available where child support payments are adjusted for further expenses when they are distinctly paid to the other spouse and the amounts are clearly reflected in a written agreement mandating such a payment.

That the tax act requires is a mandatory requirement for each parent to pay to the other an amount reflected in a court order or formal agreement along with conclusive evidence of such payments actually being made - the use of a computer software program to get a unilateral net amount is not enough. The Court noted at paragraph 11:

[11] The practising family law Bar should take note. The engagement of the combined effect of subsections 118(5) and 118(5.1), at a minimum, requires a comprehensive documentary and evidentiary record. If separating spouses, seeking joint custody, wish to avail themselves of a dependent deduction for both spouses in such situations, surely family law lawyers can deploy their usual flexible skills to ignore the set off provisions within the paradoxically named "Divorce Mate" for a brief moment and mandate and effect actual periodic payments by both spouses to each other in cases of shared parenting of two or more children. Surely cheques, or even their more modern replacement of recurring e-transfers, may evidence a clearly enumerated, reciprocal and mandatory support amount paid by each spouse to the other.

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

[If you like this website, please share it with others.](#)

[Back To Top OR Home](#)

```
medianet_width = "160"; medianet_height = "90"; medianet_crid = "749795932";
medianet_versionId = "111299"; (function() { var isSSL = 'https:' == document.location.protocol;
var mnSrc = (isSSL ? 'https:' : 'http:') + '//contextual.media.net/nmedianet.js?cid=8CUW8XQ2I' +
(isSSL ? '&https=1' : ''); document.write(""); })();
```