

Lump-Sum Child Support - Retroactive Increase in Monthly Obligation

Lump-Sum Child Support - Retroactive Increase in Monthly Obligation: Are They Deductible to the Payor?

James v The Queen, [2013 TCC 164](#)

Mr James agreed to a consent order to pay spousal support on a monthly basis in 2004, but in 2009 the BCCA ordered an increase of the payment retroactive to January 1 2005. Mr James paid Ms James the retroactive amounts as a lump sum. The Issue before the TCC was whether this lump sum payment was deductible as a "support amount" under paragraph 60(b) of the ITA.

The Crown argued on the basis of *Peterson v. The Queen*, (sub nom *Tossell v The Queen*) [2005 FCA 223](#), that the amounts were not paid on a periodic basis (and thus not deductible). The Taxpayer argued on the basis of *Dale v R*, [1997 CarswellNat 391](#), and *Sills v The Queen*, [1985] 2 FC 200 (CA), that the BCCA judgment created a liability retroactive to January 1, 2005, of monthly (periodic) payments, which were paid in a lump sum, thus meeting the required definition.

ANALYSIS

Justice Campbell J Miller, in another clear judgment, started by referring to the FCA decision in *Sills*, where it was stated that so long as the agreement stated that payments were to be made on a periodic basis, a lump sum payment to make up for late payments would not change the character of the periodic payments. Miller J stated that it was obvious that retroactive increase in periodic payments cannot be made on a periodic basis as time travel is not possible, and a lump sum payment was necessary. There was nothing that changed the character of the periodic payments. At paragraph 18, Miller J stated:

The fact that the concept of time has not been lassoed by science so that one can travel back in time, making it impossible to physically make 54 - \$3,250 payments from 2005 to 2009, does not strip the support from maintaining its periodic nature. This is not a situation where the purpose of the one-time lump sum payment is to settle all future support entitlements once and for all. As Justice Mogan at the trial in *Peterson* was clear, such lump sums are not deductible. Here, however, we have an arrangement of ordered periodic payments, some of which were, by necessity, paid in one lump sum.

[Emphasis Added]

The Taxpayer relied on *Dale* to argue that a retroactive order changes history and must be taken to have been true in the past: *Bayliss v. Her Majesty the Queen*, [2007 TCC 387](#).

The TCC held that the BCCA Judgment had the effect of increasing the previous monthly amounts, and therefore the periodic basis requirement was met, and stated: "The legal obligation, even if considered to be created currently, is an obligation to make good the periodic payments". (para 17). Miller J reviewed the decision of the FCA in *Peterson*, and stated that *Peterson* stood for the proposition that new legal obligations created that lack the nature of periodic payments paid in a lump sum do not meet the definition of 'support payments' - there must be sufficient proof that the lump sum was payment of periodic amounts. On that basis, *Peterson* was distinguished.