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COMMENT

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SPOUSAL SUPPORT

When couples experience a break down in their relationship, one of the issues that often forms part of their separation settlement is financial support. While statements within a written agreement or court order regarding the tax consequences of support payments can be valuable to clarify the intent, the actual tax treatment is not established by the contracting parties. Rather, the taxation of payments under the agreement must ultimately follow the treatment set out in the *Income Tax Act* (ITA).

When support payments are paid pursuant to a court order or written agreement and are solely for the maintenance of a spouse or common-law partner or a former spouse or former common-law partner, the term spousal support typically applies, and payments are deductible by the payor and taxable to the recipient. Without a court order or written agreement, spousal support payments are not deductible by the payor nor taxable to the recipient. Understanding the requirements for a payment to be treated as spousal support is an important consideration because support payments that align with the label of child support are treated differently for income tax purposes. Child support payments are not deductible by the payor nor taxable to the recipient under any circumstances.

A spousal support payment must be payable/receivable as an allowance on a periodic basis (e.g., weekly, bi-weekly, monthly) and for a specific amount (e.g., specified sum of money either as a fixed amount or a formula), where the timing of the payment is referenced in the court order or written agreement. The payment must be made for the support and maintenance of the recipient with the recipient having full discretion as to the use of the proceeds. Actual payment is to be made to the recipient or to an agent enforcing the collection of the amount.

While the recipient must have the right to determine the use of the funds, there may be circumstances where payments can be made to a third party in a way that limits the recipient's discretionary use of the funds. In such a case, the payment to the third party must be pursuant to a written agreement or a court order. Examples of these types of payments could include rent, property taxes, insurance premiums, education or medical expenses, and maintenance costs for the former spouse's home.

The term 'spouse' means a person to whom the taxpayer is legally married so 'former spouse' would mean a person to whom the taxpayer had previously been legally married. The term 'common-law' includes a person who has cohabited in a conjugal relationship with the taxpayer throughout a continuous period of at least 12 months, or who is a person who is cohabiting in a conjugal relationship with the taxpayer and is the parent of a child of the taxpayer. Once individuals fall within the definition of common-law partners, they are deemed to continue this relationship until they live separate and apart for a period of 90 consecutive days due to a breakdown of their conjugal relationship. Common-law partners are considered to be separated when they have been living separate and apart because of a breakdown of their relationship for a period of at least 90 days.

As much as the rules seem to be reasonably straightforward, there are circumstances where the taxpayer turns to the courts for decisions with respect to interpreting the income tax rules as they apply to spousal support.

In the case *Dicks v. The Queen*, the taxpayer had deducted, as spousal support, a $200 monthly payment he had made to his former spouse throughout 2015, but was reassessed by the Canada Revenue Agency (CRA) and denied the deduction. The taxpayer's separation agreement included details specific to the payment of spousal support, which provided that spousal support payments of $1,200 would be paid from December 1, 2011 to November 1, 2014 after which time spousal support would terminate.

Another clause in the agreement referred to the fact that after November 1, 2014, there would be no spousal support maintenance paid and both parties released all rights and claims. There was another clause in the agreement that provided for a $200 monthly contribution by the taxpayer to an investment account, as chosen by the taxpayer's former spouse, that would begin January 15, 2012 and continue until the taxpayer reached age 60. The taxpayer testified that the $200

monthly payment was made directly to the former spouse's bank account and not an investment account, as requested by the former spouse.

In analyzing the situation, the Court considered the fact that the agreement explicitly stated that spousal support payments were payable only until November 1, 2014, after which no spousal support would be paid. Also addressed was the language in the agreement surrounding the $200 monthly payment into the investment account. The court concluded the payment to the investment account, based on the original agreement, was not intended by either former spouse to constitute a support payment.

In addition, although the taxpayer suggested that the $200 deposited to his former spouse's bank account could be viewed as being paid for the spouse's personal maintenance, the court concluded that this was immaterial as the payment to the bank account (instead of the investment fund) was not done pursuant to a written agreement. As such, the court concluded that the $200 monthly amount claimed by the taxpayer did not meet the conditions required to be deductible as support payments.

In another recent case, *Ross v. The Queen*, the court found in favour of the taxpayer who had attempted to claim $42,000 as spousal support payments in 2015. As background, the taxpayer had claimed $42,000 as spousal support on his 2015 income tax return, but the deduction was denied by the CRA on the basis that the payments were not "paid as an allowance on a periodic basis for the maintenance of a former spouse." The issue at hand was not a dispute with respect to whether the payments were made to a former spouse, but rather focused on a payment in-kind and the timing.

In this case, the taxpayer was a lobster fisherman, so was financially reliant on seasonal work. To accommodate the seasonal nature of the taxpayer's income and minimize the possibility of missed payments, the agreement included larger payments in the last quarter of the year. The payments were structured over a two-year period. One of the payments was detailed in the agreement as a transfer in-kind of a specific automobile. While unusual, the court found that the in-kind payment was specifically intended to allow the former spouse to undertake the normal tasks of daily life and did not represent a lump sum capital payment, which would not qualify as periodic in nature. The court viewed the in-kind transfer as one of multiple periodic payments to the former spouse.

The court acknowledged that the case presented what it termed as "blurriness" because of "the odd combination of seasonally necessary payments and a payment in-kind." Based on the facts presented, the court decided in favour of the taxpayer, permitting his $42,000 deduction for spousal support.

In the 2018 case, *Stewart v. The Queen*, the courts addressed the issue of whether a payment made by the taxpayer to a third party met the income tax requirements for spousal support in order to be deductible by the taxpayer. The taxpayer had made $2,056.06 in payments to a third party for health insurance on behalf of his former spouse and subsequently claimed this amount, along with $15,033.06 paid directly to his former spouse, as a spousal support deduction on his 2015 income tax return. The CRA denied the deduction of $2,056.06 that was paid directly to the third-party for the health insurance premium and the taxpayer appealed to the Tax Court of Canada.

In analyzing the issue, the court found that the wording of the couple's separation agreement required the taxpayer to increase the amount payable, each month as periodic spousal support, by the amount of the premium payable by the former spouse to cover her healthcare coverage. For convenience, the former spouse directed the taxpayer to pay the amount directly to the insurance carrier. The former spouse included the payment amount in her income as required by the receipt of money classified as spousal support.

In allowing the appeal, the court considered the actions of the couple and found that they clearly intended to treat this amount as spousal support. To arrive at this decision, the court relied upon prior jurisprudence whereby "if an agreement is ambiguous or silent, the circumstances in which it was drafted and entered into and the parties' conduct after it was signed become relevant in determining that intention and knowledge." As such, the courts ruled in favour of the taxpayer and allowed the $2,056.06 to be deducted as spousal support.

The taxation of support payments is generally well understood, but there will continue to be issues that will require the courts to weigh-in and settle disputes between taxpayers and the CRA.

COMBATTING TAX EVASION THROUGH INCREASED TRANSPARENCY

While Canada has always strived to root out delinquent taxpayers, new collaborative agreements between Canada and the tax authorities in a host of other countries have increased the probability of detecting a taxpayer's hidden assets or unreported income.

Canada and more than 100 other jurisdictions have agreed to implement a new international standard for the automatic exchange of financial account information, called the Common Reporting Standard (CRS). Under the CRS agreement, financial institutions in each of the participating jurisdictions must report pre-determined information to their country's tax authorities, who in turn are expected to share the information with other participating jurisdictions. The focus is on non-residents who hold financial accounts in countries outside of the jurisdiction in which they reside.

The Canada Revenue Agency (CRA) now receives information from financial institutions in Canada about non-residents who hold accounts with them, and the CRA subsequently shares this information with tax administrators in participating foreign jurisdictions. Similarly, financial institutions in other countries are collecting and reporting similar information about Canadians who hold financial accounts in their jurisdiction. This information is being shared with the local tax authorities who, in turn, share the information with the CRA.

From Canada's perspective, the objective is to use collaboration and information sharing across jurisdictions as a means by which to uncover instances where Canadian residents have not disclosed the foreign assets they own, or income they earn, and are subsequently not paying their appropriate share of Canadian income tax.

The type of information being shared between tax authorities includes the name, address and date of birth of an account holder, account numbers, account balance and amounts paid or credited to an account.

Another tool being used by the CRA to combat tax evasion is the requirement that financial institutions in Canada report all international electronic fund transfers (EFTs) of $10,000 or more to the CRA. In addition, a transfer that involves two or more EFTs of less than $10,000 each that are made within a 24-hour consecutive period by, or on behalf of, the same individual or entity must also be reported to the CRA when the EFTs total $10,000 or more. These requirements are in place for EFTs that are entering and leaving Canada. The CRA recently reported that during the 39-month period between January 1, 2015, when the EFT reporting requirement came into force, and March 31, 2018, more than 187,000 EFTs have been scrutinized.

EASING THE FINANCIAL STRAIN OF THE GIFT-GIVING SEASON

While the holiday season is a time of celebration, unchecked spending can lead to financial distress in the new year when credit card bills and bank statements begin to arrive. Below are a few ideas to help manage the financial strain often associated with the holiday season.

1. Many people find that working on a cash budget, rather than credit cards, can help with cash-flow management and limit excessive spending. A similar strategy can work well for gift-giving. By following a cash-only approach when purchasing gifts, it can help to limit the overall costs to a manageable amount.

2. When the circle of gift-giving involves several people, the cost can add up quickly. Collaborating with family and/or friends to pre-set a per-gift value or an overall limit for the total value of all gifts exchanged amongst the group can be helpful. Alternatively, the expense can be even better managed by opting for a gift exchange among family members where names are drawn, and each person gives and receives only one gift rather than purchasing gifts for all family members.

3. Developing a budget with an upper-limit is a strategy that can help to ensure there are no post-season financial surprises. This assumes, of course, that the budget is realistic and manageable within your overall cash flow and that, once the budget is established, you stick to it.

4. Giving a gift of "services" can be both rewarding and financially savvy because the types of gifts can be as diverse as one's imagination. Babysitting your family or friend's children for an evening, taking care of a pet while the owner is on vacation, detailing your elderly neighbor's car or making dinner for a special event are just a few examples of the endless possibilities.

5. Be creative and look for low-cost fun activities that you can share with others, such as taking in a movie, a day of entertainment on the toboggan hill or hiking through the local conservation area.

CANADA/QUEBEC PENSION PLAN AND EMPLOYMENT INSURANCE 2019

Contributions under the Canada/Quebec Pension Plan (C/QPP) and Employment Insurance (EI) change annually. The following table presents the 2019 C/QPP and EI contributions amounts based on the new maximum earning amounts and the 2019 rates, with comparable figures for each of the four prior years.

		2019	2018	2017	2016	2015
C/QPP	Maximum Pensionable Earnings	$57,400	$55,300	$54,900	$53,600	$53,600
CPP	CPP Rate	5.10%	4.95%	4.95%	4.95%	4.95%
	Basic Exemption Amount	$3,500	$3,500	$3,500	$3,500	$3,500
	Employee Contribution	$2,748.90	$2,564.10	$2,544.30	$2,479.95	$2,479.95
QPP	QPP Rate	5.55%	5.40%	5.325%	5.25%	5.25%
	Employee Contribution	$3,099.60	$2,797.20	$2,737.05	$2,630.25	$2,630.25
Federal						
EI	Maximum Insurable Earnings	$53,100	$51,300	$50,800	$49,500	$49,500
	Employee Rate	1.62%	1.63%	1.88%	1.88%	1.88%
	Employee Contribution	$860.22	$836.19	$955.04	$930.60	$930.60
Quebec						
EI	Maximum Insurable Earnings	$53,100	$51,300	$50,800	$49,500	$49,500
	Employee Rate	1.25%	1.27%	1.52%	1.54%	1.54%
	Employee Contribution	$663.75	$651.51	$772.16	$762.30	$762.30

For CPP and EI, an employer will withhold amounts, based on the schedule above, from the employee's periodic pay and remit the amounts withheld to the Receiver General. In addition to the employee's contribution to each of these plans, there is an employer required contribution as well. Employers are required to match the employee's contribution to CPP and to contribute 1.4 times the employee's contribution for EI.

A self-employed individual is responsible for their own CPP contributions and must submit an amount equal to twice the employee contribution amount. Generally, a self-employed person is not responsible for EI contributions nor eligible for an EI benefit unless registered for the EI Special Benefits for Self-Employed People.

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