

Marmer Penner Inc. Newsletter

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Tax Court Decision on Support Per Written Agreement

In December 2022, the Tax Court of Canada released its decision in *Vohra v. The King* [2022 TCC 165 (CanLII)]. Dr. Vohra and his former spouse separated in 2010. In 2011, they drafted their own separation agreement without the assistance of legal counsel. Notwithstanding that the agreement contained the clause “Once signed and witnessed”, the agreement was not witnessed and contained the hand-written qualifier “This is subject to approval by legal counsel” at the bottom.

The agreement called for Dr. Vohra to “pay spousal support to party 2 in the amount of \$3,500 monthly commencing Dec 8/10 and ending Dec 8/14”. The parties honored the terms of the written agreement. The appellant paid \$3,500 per month in spousal support throughout the term of the agreement and for several years thereafter including 2018. In 2018, as in prior years, the recipient declared the support payments of \$42,000 she received as income in her personal income tax return and Dr. Vohra deducted the same amount. The Minister of Revenue denied Dr. Vohra’s \$42,000 deduction paid to his former spouse in 2018 on the basis that the payments were made without a written separation agreement being in place. We are unaware why no issue was made of the 2015 to 2017 amounts that were also paid after the agreement’s apparent expiry.

The Minister of Revenue relied on the wording of *The Income Tax Act* that, for spousal support to be deductible (and taxable), it needed to be pursuant to a written agreement. Dr. Vohra argued that, despite the expiry of the support payment obligation on December 8, 2014, that an implied contract continued to exist between him and his former spouse.

The court allowed the deduction on the basis that:

- (a) The payments made by the appellant in 2018 were made pursuant to a written agreement;
- (b) “The formal requirements of a properly drawn up contract should not overwhelm my analysis. There is no question that the contract the parties relied upon was flawed. Yet it was an agreement in writing, setting out the support payments”; and
- (c) “The parties continued through the 2018 taxation year to consider themselves bound by their 2011 separation agreement. The conduct of the parties supports the conclusion that a meeting of the minds continued to exist concerning spousal support obligations. What was set out in the 2011 separation agreement was treated by the parties as continuing to be in force up to and including 2018”.

We find the decision surprising as we would have expected that, had Dr. Vohra stopped paying support after 2014, there would have been no support agreement requiring him to pay. However, the good news here could be that your clients may be able to deduct periodic support to a spouse or former spouse pursuant to a written agreement notwithstanding its apparent unenforceability. After all, as the Tax Court has tacitly indicated, the legislation refers to a “written agreement” and not a “valid” or “enforceable” written agreement.

This newsletter is not intended to substitute for proper professional planning. It is intended to highlight areas where professional assistance may be required or enough to discuss at the next hoedown. The professionals at Marmer Penner Inc. will be pleased to assist you with any matters that arise. Please feel free to visit our website at www.marmerpenner.com.