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OBTAINING, VARYING, ENFORCING, OR RESCINDING A CHILD OR SPOUSAL SUPPORT ORDER: HAVE YOU DEDUCTED YOUR LEGAL FEES THIS YEAR?

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WHAT CONSTITUTES A SUPPORT PAYMENT?

To be considered a support payment according to both the federal and provincial tax laws and regulations, payments must consist of an amount that is receivable on a periodic basis for the maintenance of the recipient and/or a child of the recipient. The recipient, or creditor of support, must have discretion as to the use of this amount. In addition, the payer, or debtor of support, must live separate and apart from the recipient due to the breakdown of their relationship. The support may be ordered by a competent court or be provided for in an agreement between the parties that is subsequently ratified by the court.

In Québec, the recipient of spousal support is usually the payer's current or former spouse by marriage, since partners by a *de facto union* (referred to as *common law partners* in other Canadian provinces) are not legally entitled to spousal support in Québec.

The recipient of child support need not be the spouse or former spouse by marriage of the payer, but must be the parent of the child of whom the payer is also the legal parent.

While periodic spousal support is taxable in the hands of the recipient and tax deductible for the payer, the same is not true of child support, which is tax-free in the hands of the recipient and not tax deductible for the payer.

Specific rules also apply to the deductibility of legal costs incurred to obtain, vary, enforce or rescind a child or spousal support order. These rules are identical whether one is dealing with child or spousal support orders or agreements. However, the federal and provincial rules pertaining to the deductibility of legal costs differ. Put simply, most costs pertaining to child and spousal support orders are deductible for both the support payer and recipient provincially, but only for the support recipient federally. The following is an overview of these rules, and serves as a friendly reminder to include these deductions in your income tax returns, where applicable.

LEGAL FEES PAID TO OBTAIN, ENFORCE, VARY, OR RESCIND A SUPPORT ORDER: FEDERAL DEDUCTIONS

LEGAL FEES OF THE SUPPORT RECIPIENT

Prior to 2002

Prior to 2002, the legal costs incurred in establishing one's *initial* right to spousal support under the *Divorce Act*¹, or under provincial legislation in the case of a separation as to bed and board, were not tax deductible. Such costs were viewed as being costs on account of capital or as personal or living expenses, and thus were non-deductible. Similarly, legal fees incurred in seeking to obtain an increase in spousal or child support, or to make child support non-taxable under the *Federal Child Support Guidelines*,² were also not tax deductible.³

¹ R.S.C. 1985, c. 3 (2nd Supp.), hereinafter the "Divorce Act".

² SOR/97-175, hereinafter the "Federal Child Support Guideline".

³ Canada Customs and Revenue Agency, Interpretation Bulletin IT-99R5, para.17.

On the other hand, legal costs incurred to obtain an initial order for child support have always been and continue to be tax deductible on the basis that children are considered to have a pre-existing legal entitlement to support.⁴

Moreover, the legal costs incurred by a support recipient to *enforce* a pre-existing right to spousal or child support were also tax deductible prior to 2002, and continue to be tax deductible. Such pre-existing rights to support may be based on a written agreement between the parties, a court judgment, or the legislation in the case of child support.⁵ A classic example of legal fees incurred on such a basis are fees paid to recover owed but unpaid child or spousal support payments (commonly referred to as arrears).

Lastly, legal costs incurred by a support payer to contest a recipient's claim for the reduction or termination of periodic support payments were deductible prior to 2002, and continue to be deductible.⁶

After 2002

Following the Tax Court of Canada's decision in *Gallien v. The Queen*,⁷ the Canada Customs and Revenue Agency ("CCRA") revised its position on the deductibility of legal fees incurred in establishing an initial right to spousal support, in seeking an increase in spousal or child support, and in making child support non-taxable under the *Federal Child Support Guidelines*.

Indeed, in the document entitled "Technical News No. 24" issued on October 10, 2002, the CCRA established that costs incurred to obtain an initial order for spousal support under the *Divorce Act*, or under provincial legislation in the case of a separation, are considered to have been incurred to enforce a pre-existing right to support, and are thus tax deductible.⁸ In the same statement, the CCRA also announced its acceptance of the deductibility of legal costs incurred in seeking to increase spousal or child support or to make non-taxable child support under the *Federal Child Support Guidelines*. The CCRA's change in position is not retroactive and only applies to the years 2002 and following.

A support recipient cannot however deduct legal costs incurred to obtain a separation or a divorce, or to establish the custody of or access rights to a child.⁹

LEGAL FEES OF THE SUPPORT PAYER

For the support payer, the rules regarding the deductibility of legal fees are quite simple. Legal fees incurred in negotiating or contesting an initial application for child or spousal support payments, or for the purpose of terminating, reducing, or contesting the increase of a pre-existing order for support are not tax deductible.¹⁰

LEGAL FEES PAID TO OBTAIN, ENFORCE, VARY, OR RESCIND A SUPPORT ORDER: PROVINCIAL DEDUCTIONS

Legal fees of the support recipient

In 2003, *Revenu Québec* also modified its rules to allow the deductibility of legal fees incurred to establish one's initial right to spousal or child support. This modification applies to 2003 and subsequent taxation years. It may also apply to the years prior to 2003 in the event that the Minister of Revenue issues an assessment or reassessment¹¹ after December 12, 2003 pursuant to section 1010 of the *Taxation Act*.

Section 336.0.5 of the *Taxation Act* also provides for the deductibility of fees incurred to collect outstanding child or spousal support payments (arrears), to seek an increase of a pre-existing spousal or child support obligation, or to defend against a support payer's attempt to decrease or terminate support payments.

In order to be tax deductible, the legal fees must have been paid by the taxpayer during the taxation year for which the deduction is claimed. In addition, the taxpayer must not have been reimbursed for the said fees or be entitled to such a reimbursement, and must not have already deducted the amount from his or her income in preceding years.¹² Thus, a support recipient may not deduct legal fees incurred and paid to obtain an initial support order, collect arrears, or revise a pre-existing order if the fees were reimbursed by the other party by way of a provision for costs.¹³

LEGAL FEES OF THE SUPPORT PAYER

The provincial rules on the deductibility of legal expenses relating to support for the support payer are far more flexible than the federal rules.

Indeed, pursuant to the modification of its rules in 2003, Revenu Québec also allows support payers to deduct the legal fees incurred and paid for the purpose of determining their *initial obligation* to pay spousal or child support to a support recipient,¹⁴ provided the taxpayer has not been reimbursed for the said legal fees, is not entitled to a reimbursement thereof, and has not already deducted the legal fees in question in previous taxation years.

Legal fees incurred to reduce or terminate support payments, revise the payer's obligation to pay support, or to contest a support recipient's application for increased support are also tax deductible according to section 336.0.5 of the *Taxation Act*.

Lastly, the second paragraph of section 336.0.5 of the *Taxation Act* also allows a support payer to deduct legal fees incurred by the support recipient but paid by the payer as a provision for costs pursuant to a court order. This would seem to allow the support payer to claim in his or her provincial income tax return the provision for costs that a court ordered him or her to pay to the recipient of periodic support payments.¹⁵

Similarly to the federal rules, a taxpayer may not deduct legal costs incurred to obtain a divorce or separation, or to establish the custody of or access rights to a child.¹⁶

CONCLUSION

Readers are encouraged to keep the aforementioned rules in mind and to consult a professional with regards to the deductibility of their specific legal fees when preparing their annual income tax returns. Unknown to many taxpayers, the deductibility of legal costs related to a child or spousal support order may provide for some financial relief, and encourage individuals to seek the assistance of legal advisors, whose services thereby become more affordable from a cost/benefit perspective.

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⁴ Canada Customs and Revenue Agency, Interpretation Bulletin IT-99R5, para.17.

⁵ Canada Customs and Revenue Agency, Interpretation Bulletin IT-99R5, para.18.

⁶ Canada Customs and Revenue Agency, Interpretation Bulletin IT-99R5, para.18.

⁷ 2000 CanLII 324(T.C.C.).

⁸ Canada Customs and Revenue Agency, *Income tax: Technical News*, No. 24, October 10, 2002, p.1.

⁹ Canada Revenue Agency, "Support Payments", P102(E) Rev. 08, p.11.

¹⁰ Canada Customs and Revenue Agency, Interpretation Bulletin IT-99R5, para. 21.

¹¹ Revenu Québec, *Bulletin d'information* 2003-7, "Modifications d'ordre technique visant à accroître l'intégrité et la cohérence du régime fiscal", December 12, 2003, p. 3-4; Revenu Québec, Interpretation Bulletin Imp. 336.0.5-1/R1, "Judicial and extrajudicial expenses relating to a support amount", April 28, 2006.

¹² Revenu Québec, Interpretation Bulletin Imp. 336.0.5-1/R1, "Judicial and extrajudicial expenses relating to a support amount", April 28, 2006.

¹³ An amount which can be ordered by a court or agreed upon which is paid by one party to another in reimbursement of the latter's legal fees.

¹⁴ Revenu Québec, *Bulletin d'information* 2003-7, "Modifications d'ordre technique visant à accroître l'intégrité et la cohérence du régime fiscal", December 12, 2003, p. 3-4

¹⁵ This position was endorsed by Revenu Québec in its technical interpretation of article 336.0.5 of the *Taxation Act*: See *Service de l'interprétation relative aux particuliers*, "05-010505 - Demande de révision d'une pension alimentaire et condamnation à verser une provision pour frais - déduction des frais judiciaires et extrajudiciaires excédant la provision pour frais pour l'ex-conjoint qui la reçoit - Déduction de la provision pour frais pour celui qui la verse", November 1, 2005, *Collection fiscale du Québec, 2010, Publications CCH*.

¹⁶ Revenu Québec, Interpretation Bulletin Imp. 336.0.5-1/R1, "Judicial and extrajudicial expenses relating to a support amount", April 28, 2006.

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