Docket: 2004-202(IT)I

BETWEEN:

GREGORY J. FLOWER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 26, 2005 at Calgary, Alberta

By: The Honourable Justice R.D. Bell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mark Heseltine

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2001 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13th day of April, 2005.

"R.D. Bell"

Bell, J.

Citation: 2005TCC268
Date:20050413
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BETWEEN:

GREGORY J. FLOWER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bell, J.

ISSUE

[1] The issue is whether the sum of $13,370 paid by the Appellant to Rundle College Academy ("Academy") was "a medical expense" within the meaning of Section 118.2 of the *Income Tax Act* ("*Act*").

[2] More specifically, the question is whether that amount:

> a medical expense … paid, within the meaning of Section 118.2(2)(*e*) for the care, or the care and training, at a school, institution or other place of the patient, who has been certified by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient;

The Appellant, representing himself, produced as a witness, Dr. Brent Macdonald ("Macdonald"). He, during the period in question, was an associate principal and school psychologist at the Academy. He stated that he is a psychologist, has

experience in learning disability assessments, has a master's degree in school psychology and a Ph.d. in applied psychology. He said further that he worked at learning disabilities for ten years.

[3] He testified that any student at the Academy must have the designation of a learning disability, this usually being determined by a psychologist. He assessed the Appellant's two sons in the fall of 2001. He said that the results of his assessment of them, K and Z, indicated they had learning disabilities.

[4] He stated that K was in grade five but could read only at the grade three level. He said that the public school system had put him at that level and he was unable to deal with it. He described a learning disability, attributed to K, as a "life long condition". He said that such condition is treatable and that there are many strategies for same. He spoke of the goal being to maximize one's potential even if there was a significant difference between intellectual ability and academic skill. He described K as a student with a strong desire to read and said that he had a passionate, high interest so to do.

[5] He said that Z, in grade eight, was assessed in the same fashion and assessed with the same result. He stated that Z showed average to above average intellectual ability but a lower level of academic performance. He testified that this grade eight student had the academic skills of grade five or grade six level.

[6] Macdonald also stated that Z and K had access to a helpful software program. He said that both boys had responded well and that Z accepted extra help in a positive way and that K feared academics but, had gained confidence and displayed improvements. He explained the difference between remediation education, which involved taking away the curriculum and working with the student, and an accommodation education, in which the curriculum was the same but the manner of delivery and assessing was changed, for example, extra time given for assignments, reading the text to students and examinations on tape or with the assistance of scribes.

[7] Macdonald described K as being more geared to remedial instruction and spoke of, for example, his ability to understand concepts but not to be able to read about them. The accommodation included books on tape to help him read and also working separately with him. He described the improvement in K's reading ability but rather static condition respecting written expression.

[8] Macdonald then described Z as being given double time to write tests, using books on tape, the general focus being accommodation instead of remedial.

[9] Generally, he said that all children would benefit from smaller classes and lower teacher-student ratios.

[10] Macdonald stated clearly that he was not a medical practitioner but that the data collected strongly indicated the presence of learning disability with respect to the two boys. He also said that there were four independent schools in Calgary similar to the Academy and that they were all over subscribed.

[11] The Appellant gave evidence with respect to one of the Respondent's stated facts in the Reply to the Notice of Appeal which reads,

> the Appellants reason for enrolling both (Z) and (K) at the College is that both (Z) and (K) do not perform to their assessed intellectual abilities in certain areas;

The Appellant stated that the reason to enroll them was that they had learning disabilities and not because they were not performing to their "assessed intellectual abilities". He submitted that the boys had a "mental handicap" which was not defined in the *Act* and that they were suffering from physical or mental disabilities. He said that the boys were falling behind in public school, that he recognized the need to intervene and that they needed special facilities, equipment and care. He submitted that Macdonald had "certified" that both Z and K had learning disabilities requiring the Academy's facilities. He also said that he had never intended to apply for the credit but that a chartered accountant had told him to do so.

[12] Respondent's counsel referred to the above wording in Section 118.2 referring specifically to "medical expense" and "amount paid" for "care" or "care and training". He submitted that the word "care" must be read in context.

[13] He referred to Section 118.2 of the *Income Tax Act* ("*Act*") under which a taxpayer is permitted to deduct a formula determined amount, one of the components thereof being the "individual's medical expenses". Subsection (2) states that, for that purpose, a medical expense of an individual is an amount paid…

> (*e*) for the care, or the care and training, at a school, institution or other place of the patient, who has been certified by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel

> specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient;

He referred to entries printed from *Oxford English Dictionary Online*. The first of these defined the word "medical", *inter alia*, as:

> Characteristic of or appropriate for a doctor or other medical practitioner.

and:

> Of, relating to, or designating the science or practice of medicine in general…

One of the meanings of "medicine" was:

> The science or practice of the diagnosis, treatment, and prevention of disease…

The word "treatment" was defined, partially, as:

> Management in the application of remedies; medical or surgical application or service.

One of the definitions of the word "care" included under a heading described as "DRAFT ADDITIONS JUNE 2001" read:

> The attention and treatment given to a patient by a doctor or other health worker.

The word "patient" from the online dictionary was defined, in part, as follows:

> One who is under medical treatment for the cure of some disease or wound; one of the sick persons whom a medical man attends; an inmate of an infirmary or hospital.

In referring to that dictionary's meaning of "mental", Respondent's counsel read

the following passage:

> … mental handicap, a condition in which the intellectual capacity of a person is permanently lowered or underdeveloped to a degree that prevents normal function in society (the term is now increasingly avoided).

[14] Counsel submitted that “care” had to be specific to “medical” as opposed to nurturing. He also said that the word “patient” was coloured by the surrounding words. Counsel referred to *Anka v. HMQ*, [1995] T.C.J. No. 1493 in which Bonner, J. of this Court said that services, respecting a child with speech and language problems who had been enrolled in nursery schools, an elementary school, in summer courses and in swimming and ballet lessons, did not fall, so far as tuition was concerned, within the ambit of the above quoted section. He said:

> I can find no merit whatever in this contention. Nothing in the evidence suggests that the child received as a patient either at nursery school or at elementary school anything remotely resembling either care or care and training or that any amount was paid for any such thing. What was paid to the nursery school was tuition. What was received at all schools was education, albeit education tailored to fit the child's special needs. Even if, contrary to my view, the words "equipment, facilities or personnel specially provided by the school" are elastic enough to cover audio-visual and printed material dealing with the proper response to language problems they cannot be said to be provided for the care or care and training of children with language problems within the meaning of paragraph (e). The statutory language must be interpreted in context. It must be remembered that the words "care or care and training" are used in the context of a definition of a medical expense and they take colour from that context.

This decision was upheld by the Federal Court of Appeal. [1997] DTC 5290

[15] I am entirely in accord with the submissions of Respondent’s counsel and of the words of Bonner, J. quoted above. The words, appearing in Section 118.2(2)(*e*), namely, “care and training”, “place of the patient”, “physical or mental handicap”, “institution or other place for … care and training … of individuals suffering from the handicap suffered by the patient” all indicate to me that the context in which an expenditure must be analyzed is a medical context. That is not the case here. The boys were attending an institution where special assistance was given. The evidence indicates that there were a number of such institutions in the family’s city. There is no evidence supporting a conclusion that

the institution could be construed as would be necessary for it to fall within the medical context of the words in paragraph (*e*). While I have no doubt the boys needed the assistance that they received and profited from it, there is no legislation in the *Act* which permits a credit or deduction in respect of such assistance.

[16] Accordingly, the appeal will be dismissed.

Signed at Ottawa, Canada, this 13th day of April, 2005.

"R.D. Bell"

Bell, J.

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APPEARANCES:

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