

Docket: 2007-3826(IT)I

BETWEEN:

RICHARD BEAUCHAMP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on March 10, 2008, at Montréal, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant      Jean-François Lambert

Counsel for the Respondent:      Anne Poirier

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**JUDGMENT**

The appeal from the assessment in respect of the credit for severe and prolonged physical impairment, made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of April 2008.

"Paul Bédard"

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Bédard J.

Translation certified true  
on this 9th day of May 2008.

Brian McCordick, Translator

Citation: 2008TCC189  
Date: 20080414  
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**REASONS FOR JUDGMENT**

Bédard J.

[1] The Minister of National Revenue ("the Minister") disallowed the Appellant's claim of a tax credit for severe and prolonged physical impairment in respect of his 2003, 2004 and 2005 taxation years. The Appellant is appealing from this decision.

[2] The issues are as follows:

- (a) Is the Appellant entitled to bring an appeal before this Court in respect of the 2003 and 2004 taxation years?
- (b) In computing his non-refundable income tax credits for the 2005 taxation year, is the Appellant entitled to the credit for severe and prolonged mental or physical impairment?

[3] I will immediately note that, to the extent that it applies to the 2003 and 2004 taxation years, the Notice of Appeal cannot be entertained because no notice of objection was served on the Minister in accordance with section 165 and 169 of the *Income Tax Act* ("the Act") with respect to those taxation years. In fact, no right of appeal ever came into existence because the Appellant never served a notice of objection on the Minister with regard to the assessments made for those years.

[4] The Appellant was the only person who testified in support of his appeal. His testimony discloses the following:

- (a) He has been suffering from severe sleep apnea since 1995, a condition that causes him to stop breathing for short periods during his sleep. The Appellant explained that these "respiratory events" are followed by a reaction whereby he wakes up and resumes breathing. The Appellant added that this resulted in fragmented sleep and daytime sleepiness.
- (b) In order to remedy his condition – that is to say, in order to be able to sleep – he has been using a device known as a CPAP (continuous positive airway pressure) device since 1995. It consists of a mask attached by a tube to an oxygen tank. The Appellant explained that the use of the mask exerts positive pressure on the breathing passages and keeps them open, which normally suppresses the respiratory events and generally eliminates daytime sleepiness. The Appellant added that he must also take a sedative in order to facilitate sleep. He also explained that he has been using the CPAP device every night since 1995 for an average of eight hours, and that he occasionally uses it during the daytime when he takes a nap. Lastly, the Appellant explained that he cannot sleep without a CPAP device.
- (c) Because of his health problems, he had to take 84 days off work in 1999, 19 days in 2000, 26.5 days in 2001, 42.5 days in 2002, and 208 days in 2003.
- (d) The Appellant had to quit his job in 2004 because of his numerous health problems. He added that the Régie des rentes du Québec and his employer have considered him disabled since January 2004.

[5] The evidence further discloses as follows:

- (a) In October 2006, upon filing a request for an adjustment with a view to obtaining a tax credit, the Appellant sent the Minister a Form T2201 (Exhibit A-1) "Disability Tax Credit Certificate", which was filled out by Dr. Baltzan, a qualified person, who diagnosed his patient with sleep apnea syndrome.
- (b) On May 2, 2007, the Minister forwarded the form T2201 to the programs section responsible for the Disability Tax Credit.
- (c) In a questionnaire dated May 7, 2007 (Exhibit I-1), which he appears to have filled out on the same day, Dr. Baltzan noted that the reason for using the CPAP device is to reduce neurological drowsiness, not to provide a solution to an underlying diagnosis that would indicate that the treatment is essential to sustaining a vital function. In the same questionnaire, Dr. Baltzan clearly stated that the Appellant can live without using a CPAP device. However, in a letter dated February 27, 2008, Dr. Baltzan made the following statement with respect to the Appellant's health: "I feel that this is essential medical care for this particular patient because he is exposed to excessive risk of falling asleep in daytime, destabilization of his hypertension and potential stroke, heart attack and death, should he not use his CPAP for severe sleep apnea." It should be added that, in his letter dated June 27, 2008, Dr. Baltzan did not specify whether the comments quoted above applied to the 2005 taxation year. I would immediately point out that the stance taken by Dr. Baltzan (who, it should be noted, did not testify in support of the Appellant's position) as to whether the use of the CPAP device was essential to sustain life, is ambiguous at best.

The Appellant's position

[6] At the hearing, the appellant essentially reiterated the position that he stated in his Notice of Appeal, which reads:

[TRANSLATION]

I have been under supervised treatment since July 1995 and, according to the specialists that I have met, the only truly effective treatment to combat the effects of this illness is the use of a CPAP (a pump that delivers air through the nose during sleep at a pressure of 17 cm H<sub>2</sub>O, out of a possible maximum of 18 cm). This treatment is essential to sustain my vital functions, namely, my breathing. I use this treatment every day, 365 days a year, for an average of eight hours per day.

...

Consequently, I meet all the criteria set out in section 118.3 of the *Income Tax Act* and a use therapy that is essential to sustain a vital condition, namely my breathing. This treatment is administered more than three times a week and requires me to spend more than 14 hours a week apart from my normal everyday activities.

Analysis and determination

[7] The relevant provisions of the Act read as follows:

**118.3(1)** Where

(a) an individual has one or more severe and prolonged impairments in physical or mental functions,

...

(a.1) the effects of the impairment or impairments are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living or are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy that

(i) is essential to sustain a vital function of the individual,

(ii) is required to be administered at least three times each week for a total duration averaging not less than 14 hours a week, and

(iii) cannot reasonably be expected to be of significant benefit to persons who are not so impaired,

...

**(1.1) Time spent on therapy** – For the purpose of paragraph 118.3(1)(a.1), in determining whether therapy is required to be administered at least three times each week for a total duration averaging not less than an average of 14 hours a week, the time spent on administering therapy

(a) includes only time spent on activities that require the individual to take time away from normal everyday activities in order to receive the therapy;

...

**118.4(1) Nature of impairment** -- For the purposes of subsection 6(16), sections 118.2 and 118.3 and this subsection,

...

(b) an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living;

...

[8] The effect of paragraph 118.3(1)(a.1) of the Act is to make the tax credit for mental or physical impairment available to people whose ability to perform a basic activity of daily living would be markedly restricted but for the therapy that they are receiving at least three times a day for a total duration averaging not less than 14 hours a week for the purpose of maintaining a vital function. The provision makes the tax credit available to persons who, but for the therapy to which they must devote a substantial amount of their time, would have impairments that would markedly restrict their ability to perform a basic activity of daily living. Subsection 118.3(1.1) of the Act specifies the activities that are included in the time devoted to receiving therapy for the purposes of paragraph 118.3(1)(a.1) of the Act. To this end, the paragraph specifies that the time spent on administering therapy is calculated on the basis, *inter alia*, that it includes only time spent on activities that require the individual to take time away from normal everyday activities in order to receive the therapy. In themselves, the provisions concerning the time spent on therapy essential to sustaining a vital function do not cause a person to be eligible if the person is receiving therapy in a way that does not interrupt the person's everyday activities.

[9] In my opinion, the Appellant's use of the CPAP device did not require him to interrupt his everyday activities in any way. Indeed, I do not see what everyday activity could have been interrupted by wearing a mask at night in the case at bar. Thus, the Appellant did not receive vital function sustaining therapy for the amount of time required by the Act, that is to say, at least three times a week for a total duration averaging not less than 14 hours a week. Consequently, the Appellant was not eligible for the tax credit for severe and prolonged mental or physical impairment for the years concerned. In other words, the Appellant was not eligible for this tax credit because, among other reasons, he did not devote a substantial amount of his time to receiving therapy to sustain his vital functions.

[10] I would add that the use of a CPAP device is not to be considered "therapy" for the purposes of paragraph 118.3(1)(a.1) of the Act. In this regard, Paris J. held as follows in *Girard*:<sup>1</sup>

In any case, it cannot be said that the use of the CPAP device represented therapy essential to sustain a vital function. It also seems that the use of the CPAP device would not be considered therapeutic care. The Canadian Oxford Dictionary defines the word "care" as being, *inter alia*, a "process of looking after or

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<sup>1</sup> *Girard v. The Queen*, 2005TCC104, 2005 DTC 292, at paragraph 13.

providing for someone or something." If Parliament had wanted to include therapeutic devices in paragraph 118.3(1)(a.1) of the Act, it would have specifically mentioned them as it did in subsection 118.4(1) which refers to ". . . therapy and the use of appropriate devices and medication . . ."

[11] Lastly, it is my opinion that the Appellant is not entitled to this tax credit because he did not prove that the wearing of the mask, assuming it can be considered "therapy", was essential to sustaining a vital function. In this regard, the Appellant would have had to prove that, in 2001, his life would have been in immediate or proximate danger if he had not used the CPAP. There was no such proof in the case at bar.

[12] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 14th day of April 2008.

"Paul Bédard"

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Bédard J.

Translation certified true  
on this 9th day of May 2008.

Brian McCordick, Translator



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DATE OF HEARING: March 10, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: April 14, 2008

APPEARANCES:

Counsel for the Appellant: Jean-François Lambert  
Counsel for the respondent: Anne Poirier

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