Docket: 2008-1545(IT)I

BETWEEN:

KATHLEEN GREENAWAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 4, 2009, at Windsor, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: David G. Greenaway

Counsel for the Respondent: Jack Warren

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to the Appellant's 2006 taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

It is further ordered that the filing fee in the amount of $100 be reimbursed to the Appellant.

Signed at Ottawa, Canada, this 2nd day of February 2010.

"Robert J. Hogan"

Hogan J.

Citation: 2010 TCC 42
Date: 20100202
Docket: 2008-1545(IT)I

BETWEEN:

KATHLEEN GREENAWAY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] This is an appeal by Kathleen Greenaway (the "Appellant") from an assessment which disallowed her claim for a disability tax credit under subsection 118.3(1) of the *Income Tax Act* (the "*ITA*").

I. Issues and Factual Background

[2] The Appellant has progressive multiple sclerosis. She is in an advanced stage of this disease and is unable to walk, feed herself and perform most basic life functions.

[3] In 2006, the Appellant claimed a medical expense tax credit under paragraph 118.2(2)(*e*) and a disability tax credit under subsection 118.3(1) of the *ITA* in respect of expenses totalling $24,896.43. This amount was paid to the Huron Lodge Home for the Aged (the "Home") located in Windsor, Ontario, to cover her expenses for prescriptions ($391.80), accommodation at the Home ($6,570.05) and nursing care ($17,934.58).

[4] In its reply to the Appellant's Notice of Appeal, the Minister of National Revenue (the "Minister") assumed, *inter alia*, that (i) the amount paid to the Home

was not for the use of special equipment, facilities or personnel for the specific disability suffered by the Appellant and (ii) the Home is not a school, institution or other place that provides care for individuals suffering from the same handicap as that suffered from the Appellant. The Minister allowed a medical expense credit under paragraph 118.2(2)(*b*) with respect to expenses for an attendant or for nursing home care. The Minister disallowed the subsection 118.3(1) disability tax credit on the grounds that the disability credit is denied where the expenses qualify as attendant or nursing home expenses under subsection 118.3(1).

[5] The Appellant argues that the exclusion of nursing home care expenses in paragraph 118.3(1)(*c*) does not apply because the medical expense tax credit was claimed under paragraph 118.2(2)(*e*) and not as an attendant or nursing home expense.

[6] The crux of the issues in this case is:

(i) whether the conditions set out in paragraph 118.2(2)(*e*) of the *ITA* have been met such as to allow all or part of the Appellant's medical expenses to be claimed under that provision;

(ii) in the affirmative, whether the conditions prescribed with respect to claiming a disability tax credit under subsection 118.3(1) have been satisfied; and

(iii) in the affirmative, does the scheme of the *ITA* allow the Appellant to claim both a credit for medical expenses under paragraph 118.2(2)(*e*) and a disability tax credit under subsection 118.3(1) of the *ITA*?

[7] It is undisputed between the parties that the Appellant suffers from a serious neurological disorder and that the advanced state of her disease has limited her control of her bodily functions to breathing, talking and moving her eyes. She is confined to her bed most of the day except for the limited time she spends in a special chair. She needs to be fed and bathed. Bathing requires her to be hoisted out of and back into her bed. It is also undisputed between the parties that the Appellant would die without constant attendant care.

[8] The medical director of the Home, Dr. John Robert Greenaway, who happens to be the Appellant's brother, testified regarding the level of care and treatment provided by the Home to the Appellant. Counsel for the Appellant was David G. Greenaway who is also the Appellant's brother.

[9] The evidence shows that roughly 50% of the patients at the Home in the 2006 taxation year suffered from neurological disorders. Of these patients, half required constant supervision and care. Ninety-five percent of the residents of the Home were non-ambulatory and they suffered from a wide variety of illnesses. Only 5% of the Home's residents required minimal care.

[10] Because 95% of the residents of the Home were non-ambulatory, the Home had to have specialized equipment and staff trained to treat patients suffering from handicaps that rendered them non-ambulatory. This meant that qualified personnel and special equipment were required to assist the patients in moving to and from their beds for eating, sitting and bathing. Dr. Greenaway testified that there were always unregistered and registered practical nurses and other personnel on duty to provide this type of care to the Home's patients.

[11] Dr. Greenaway explained that health care in the province of Ontario has undergone major structural changes similar to changes made throughout Canada. Over the last decade, chronic care patients have been transferred from hospitals to smaller medical institutions such as the Home in order to control medical costs and provide improved care in smaller community-based institutions. He explained that the Home was required to adapt to these changes by acquiring equipment and trained personnel to deal with non-ambulatory patients. Patients who could walk and who required less medical care would not reside at the Home.

II. Analysis

[12] The relevant parts of subsection 118.2(2) read as follows:

> (2) **Medical expenses** — For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid
>
> > (*a*) **[medical and dental services]** — to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to a person . . .
> >
> > (*b*) **[attendant or nursing home care]** — as remuneration for one full-time attendant (other than a person who, at the time the remuneration is paid, is the individual's spouse or common-law partner or is under 18 years of age) on, or for the full-time care in a nursing home of, the patient in respect of whom an amount would, but for paragraph 118.3(1)(*c*), be deductible under section 118.3 in computing a taxpayer's tax payable under this Part for the taxation year in which the expense was incurred;
> >
> > (*b.1*) **[attendant]** — as remuneration for attendant care provided in Canada to the patient if

> (i) the patient is a person in respect of whom an amount may be deducted under section 118.3 in computing a taxpayer's tax payable under this Part for the taxation year in which the expense was incurred,
>
> (ii) no part of the remuneration is included in computing a deduction claimed in respect of the patient under section 63 or 64 or paragraph (*b*), (*b.2*), (*c*), (*d*) or (*e*) for any taxation year,
>
> (iii) at the time the remuneration is paid, the attendant is neither the individual's spouse or common- law partner nor under 18 years of age, and
>
> (iv) each receipt filed with the Minister to prove payment of the remuneration was issued by the payee and contains, where the payee is an individual, that individual's Social Insurance Number,
>
> to the extent that the total of amounts so paid does not exceed $10,000 (or $20,000 if the individual dies in the year);
>
> . . .
>
> (*d*) **[nursing home care]** — for the full-time care in a nursing home of the patient, who has been certified by a medical practitioner to be a person who, by reason of lack of normal mental capacity, is and in the foreseeable future will continue to be dependent on others for the patient's personal needs and care;
>
> (*e*) **[school, institution, etc.]** — 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;

[13] In *Canada v. Scott*,[1] Madam Justice Trudel of the Federal Court of Appeal, quoting from the case of *Collins v. Canada*,[2] states that the conditions that must be met in order for expenses to be eligible under paragraph 118.2(2)(*e*) are as follows:

> [4] The requirements that the taxpayer has to meet in order to claim expenses under paragraph 118.2(2)(*e*) are set out in *Collins v. Canada* [1998] T.C.J. No. 396 at paragraph 20 as follows:
>
> 1 The taxpayer must pay an amount for the care or care and training at a school, institution or other place.
>
> 2 The patient must suffer from a mental handicap.

[1] *Canada v. Scott*, 2008 FCA 286, 2008 DTC 6682.
[2] *Collins v. Canada*, [1998] T.C.J. No. 396[QL].

> 3 The school, institution or other place must specially provide to the patient suffering from the handicap, equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.
>
> 4 An appropriately qualified person must certify the mental or physical handicap is the reason the patient requires that the school specially provide the equipment, facilities or personnel for the care or the care and training of individuals suffering from the same handicap.

[14] The first two points are not at issue. The third and fourth points are at issue. I now turn to these points. Is the Home an institution or other place that specifically provides care for patients suffering from a similar handicap? The Appellant suffers from numerous physical handicaps, including the inability to walk. Ninety-five percent of the residents of the Home are non-ambulatory. The evidence shows that Home's staff must be trained to provide care to non-ambulatory patients. The Home must have specialized equipment such as hoists to assist patients suffering from the handicap. The evidence is uncontradicted on this fact.

[15] I note that paragraph 118.2(2)(*e*) requires that the care and equipment be provided to patients suffering from the handicap from which the taxpayer suffers. The provision does not require that the patients all have the same handicaps in cases where they may suffer from more than one. That would likely be an impossible standard to meet in communities of small population that could not afford to build facilities to deal exclusively with multiple sclerosis. In any event, the disease is progressive so that patients afflicted with it would suffer from different physical handicaps depending on the stage to which it had progressed. I also note that the French version of the provision does not require that the handicap of the other patients be the handicap suffered from by the taxpayer. Rather, the French version provides that the handicap be similar ("semblable") to that of the taxpayer. The rules relating to the interpretation of bilingual statutes require me to determine whether both versions can be reconciled through a shared meaning. Here, they can be so reconciled by interpreting the English version to mean a similar handicap.

[16] Counsel for the Respondent argues that if I find that the conditions in paragraph 118.2(2)(*e*) have been met, the part of the expense that relates to accommodation is not eligible. This issue was considered by Madam Justice Sharlow of the Federal Court of Appeal in the case of *Lister v. Canada.*[3] She arrived at a different conclusion than that suggested by the Crown regarding situations where accommodations expenses are incidental to the care provided to the patient, as follows:

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[3] *Lister v. Canada*, 2006 FCA 331, 2006 DTC 6721.

> [18] . . . The circularity of this provision makes its interpretation somewhat awkward but it is reasonably clear, at least, that paragraph 118.2(2)(*e*) contemplates institutional care. For that reason, paragraph 118.2(2)(*e*) indirectly but necessarily provides tax relief for accommodation and other ordinary living costs that are included in the cost of care. However, given the context of subsection 118.2(2), an organization that functions mainly as a provider of residential accommodation should not fall within the scope of paragraph 118.2(2)(*e*) merely because it incidentally provides some medical services to its residents.

[17] Out of a total of $24,896 charged to the Appellant by the Home, $17,934 related to care. Only $6,570 related just to the bed occupied by the Appellant. The allocation of the total expenses incurred by the Appellant was not disputed by the Respondent, and the evidence shows that the accommodation expenses are clearly incidental to the medical expenses and care expenses in the case at bar.

[18] In the present case, it is possible, if the term "nursing home" is given a broad definition, that the medical expense tax credit could also have been claimed under paragraph 118.2(2)(*d*), which covers expenses for full-time care in a nursing home. In the present case, the potential for overlap between that two provision and paragraph 118.2(2)(*e*) can be avoided by ascribing to the term "nursing home" a meaning which excludes an institution or other place that provides care to a group of patients suffering from a similar handicap. By virtue of such an interpretation, a taxpayer could make a claim under paragraph 118.2(2)(*e*) for specialized care intended generally for all patients suffering from the same handicap and under paragraph 118.2(2)(*d*) more general care (i.e. care that may vary from patient to patient where the patients may or may not have a similar handicap). In the latter case, the disability tax credit could not be claimed. That being said, Parliament could have provided an exclusion in paragraph 118.2(2)(*e*) for expenses that could otherwise be claimed under paragraph 118.2(2)(*d*). It did not do so. It is not for the courts to change the law. Therefore, to the extent that an expense can qualify under different paragraphs of subsection 118.2(2), taxpayers are free to choose the more favourable treatment, particularly if this allows them to claim a disability tax credit under subsection 118.3(1) by avoiding the restriction set out in paragraph 118.3(1)(*c*).

[19] In an external interpretation,[4] the CRA acknowledges that some claims made under paragraph 118.2(2)(*e*) might also fall under paragraph 118.2(2)(*b*) as an expense in respect of a nursing home. According to the CRA, this does not preclude the taxpayer from claiming a disability tax credit if the conditions under paragraph 118.2(2)(*e*) are otherwise met. The relevant portions of the CRA's response to a taxpayer's inquiry read as follows:

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[4] Interpretation – external 2005-0155731E5 – Disability tax credit and care in nursing home.

> . . . You have asked whether the disability tax credit may be claimed for a person with dementia if the full cost of care in a nursing home is also being claimed by someone as a medical expense.
>
> . . .
>
> The general rule is that the disability tax credit may not be claimed if remuneration for general care in a nursing home was claimed by anyone in computing their medical expense tax credit. This would be the case if medical expenses were claimed under paragraph 118.2(2)(*b*) for remuneration for the full-time care in a nursing home of a person with a severe or prolonged mental or physical impairment or, under paragraph 118.2(2)(*d*), of a person who, by reason of lack of normal mental capacity, is dependent on others for their personal needs and care.
>
> However, a disability tax credit may be available to a person in circumstances where medical expenses have been claimed for the "care, or the care and training at a school, an institution or another place of the patient, who has been certified in writing 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" under paragraph 118.2(2)(*e*). In such circumstances, the fact that the "school, institution or other place" is a nursing home will not preclude the person's claim for the disability tax credit provided the following conditions have been met:
>
> - The payment is made for care or care and training of the individual in an institution, school or another place;
> - The payment is for special equipment, facilities or personnel supplied for the specific disability of the individual;
> - The individual has been certified by an appropriately qualified person to require the equipment, facilities or personnel specifically provided by the institution; and
> - The payment is not for full time attendant care.
>
> [Emphasis added.]

[20] There is still one point that I must dispose of with respect to subsection 118.3(1). Counsel for the Respondent argues that the Appellant was late in filing the medical certification required under subsection 118.3(1) as she only filed it at trial. He relies on Trudel J.A.'s decision in *Canada v. Scott*, above, as authority for this proposition. I do not believe that decidendi stands for the proposition that the medical certification must be filed with the taxpayer's tax return. In fact, I believe Trudel J.A. found that the doctor had merely given a recommendation to the parents of the child who allegedly required specialized learning classes. Trudel J.A. found that the doctor did

not certify that the training offered at the school was specifically required to treat the student's handicap, as follows at paragraph 23:

> However there must be true certification: one which specifies the mental or physical handicap from which the patient suffers, and the equipment, facilities or personnel that the patient requires in order to obtain the care or training needed to deal with that handicap: *Title Estate v. Canada* [2001] F.C.J. No. 530 at paragraph 5.

[21] When the *ITA* requires a form or other document to be filed by a certain date, it specifically provides that the filing must be completed by that date. For example, subsection 8(10) of the *ITA* provides that there shall be no deduction of a particular amount unless a prescribed form is filed with the taxpayer's return of income for the year:

> 8(10) Certificate of employer – An amount otherwise deductible for a taxation year under paragraph (1)(*c*), (*f*), (*h*) or (*h*.1) or subparagraph (l)(*i*)(*ii*) or (*iii*) by a taxpayer shall not be deducted unless a prescribed form, signed by the taxpayer's employer certifying that the conditions set out in the applicable provision were met in the year in respect of the taxpayer, is filed with the taxpayer's return of income for the year.
>
> [Emphasis added.]

No such language is found in section 118.3 and I therefore believe that there has been proper certification for the purpose of claiming the expenses, as required by that provision.

[22] For all of these reasons, I would allow the appeal.

Signed at Ottawa, Canada, this 2nd day of February 2010.

"Robert J. Hogan"

Hogan J.

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APPEARANCES:

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