Docket: 2010-3221(IT)I

BETWEEN:

MARION BERG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 22, 2011, at Kelowna, British Columbia.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2008 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of November 2011.

"Robert J. Hogan"

Hogan J.

Citation: 2011 TCC 528
Date: 20111121
Docket: 2010-3221(IT)I

BETWEEN:

MARION BERG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] The appeal is against the disallowance by the Minister of National Revenue (the "Minister") of $2,806.73 in medical expenses claimed for the 2008 taxation year.

I. FACTS

[2] The Appellant, Marion Berg, suffers from several conditions, including fibromyalgia, chronic fatigue syndrome, and polymyalgia rheumatica.

[3] According to the Appellant, prescription medications provided little relief and often caused significant side effects. In her efforts to alleviate her suffering, the Appellant has tried various vitamins, supplements, and over-the-counter products (collectively hereinafter referred to as "supplements") in the hope that they would relieve her symptoms where prescription drugs have failed.

[4] The Minister first reassessed the Appellant on September 17, 2009, disallowing all medical expenses, totalling $11,677, claimed for 2008.

[5] On September 28, 2009, the Minister again reassessed Ms. Berg, this time allowing $7,401 of the medical expenses originally claimed. The Minister likewise allowed an additional $770 on November 23, 2009, and another $1,002 on February 26, 2010. The allowed expenses thus totalled $9,173.

[6] Despite the Appellant's objection, the Minister confirmed his most recent reassessment on August 18, 2010, concluding that $1,522.66 of the Appellant's claim with respect to supplements did not constitute medical expenses under paragraph 118.2(2)(*n*) of the *Income Tax Act* (the "Act") and therefore does not qualify for the medical expense credit under subsection 118.2(1).

[7] The Minister also confirmed that an additional $1,284.07 in kinesiology treatments did not qualify as a medical expense under paragraph 118.2(2)(*a*). During the trial, however, it became clear that no kinesiology treatments were actually claimed and that, rather, the expenses were for supplements recommended by a kinesiologist. The issue as regards that claim, therefore, is likewise whether the supplements are eligible for the medical expense credit.

[8] The Minister also disallowed a claim for a membership fee paid and a $10 donation made to a health advocacy organization because those items did not qualify as medical expenses under subsection 118.2(2).

II. APPELLANT'S POSITION

[9] The Appellant submits that her expense claims for supplements should qualify for the medical expense credit because prescription drugs provide her with little or no relief. She turned to supplements in the absence of alternatives from the medical profession, and did so generally on the recommendation of other health practitioners, and always with the permission of her general practitioner. She put documentation before the Court indicating that supplements may provide the best possible relief for her conditions, as well as articles that describe expenses for supplements as giving rise to valid claims for the medical expense credit. In addition, the Appellant cited in support of her position *Ray v. R.*,[1] a decision in which the Tax Court of Canada allowed a taxpayer to claim various costs, including those for her bottled water, for the purpose of the medical expense credit under the previous version of paragraph 118.2(2)(*n*).

[10] The Appellant also submits that the Canada Revenue Agency erroneously attributed an amount of $1,284.07 to kinesiology treatments, when the expense was in fact for supplements purchased from Abaco Health for $633.29.

III. RESPONDENT'S POSITION

[1] [2002] 4 C.T.C. 259.

[11] The Respondent argues that none of the expenses are eligible for the medical expense credit under subsection 118.2(2) of the Act. She submits that the supplements do not fall within expenses related to "drugs, medicaments or other preparations or substances" (collectively hereinafter referred to as "substances") as described in paragraph 118.2(2)(*n*) and section 5701 of the *Income Tax Regulations* (the "Regulations").

[12] The Respondent further submits that because kinesiologists are not recognized as medical practitioners in British Columbia, any expenses relating to kinesiology treatments are excluded under paragraph 118.2(2)(*a*). The Respondent argues that subsection 118.4(2), which in effect defines the term "medical practitioner", excludes claims for a kinesiologist's services. The question of whether kinesiology is a covered treatment is irrelevant, however, as the Appellant demonstrated at trial that the claim was for supplements purchased on the recommendation of a kinesiologist and not actual kinesiology treatments. In response, the Respondent submits that this additional claim for supplements, like the other claims for supplement expenses, should not be allowed.

IV. ISSUE

[13] Are the Appellant's claims eligible medical expenses under subsection 118.2(2)?

V. THE LAW AND ITS APPLICATION

The History of the Legislative Amendments

[14] Most of the Appellant's claims must be unsuccessful because she incurred the expenses after the 2008 federal budget introduced amendments to the Act. The amendments came as a response to several Tax Court of Canada decisions that read the former paragraph 118.2(2)(*n*) as allowing supplements as medical expenses so long as they were prescribed by a medical practitioner or dentist and recorded by a pharmacist. The amendments clarify that the medical expense credit is not intended to include supplements.[2]

[15] The former text of paragraph 118.2(2)(*n*) is as follows:

[2] Tax Measures: Supplementary Information, Annex 4 to the February 26, 2008 federal budget.

> **118.2(2) Medical expenses** — For the purposes of subsection (1), a medical expense of an individual is an amount paid
>
> . . .
>
> (*n*) **[drugs]** — for drugs, medicaments or other preparations or substances (other than those described in paragraph 118.2(2)(*k*)) manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist.

[16] The *Ray* decision by Judge O'Connor was the high-water mark of the Court's decisions allowing claims for over-the-counter products under the medical expense credit.[3] In that case, in which the products were not purchased in a pharmacy,[4] Judge O'Connor concluded that the requirement under the former version of paragraph 118.2(2)(*n*) that a record be kept by a pharmacist could be set aside in exceptional cases. The Federal Court of Appeal rejected that analysis and, in allowing the Minister's appeal, emphasized that statutory requirements cannot be ignored.[5] The Court further commented that a sales slip from a pharmacist for an over-the-counter product did not qualify as a recording by a pharmacist for the purpose of the medical expense credit. Rather, the Court determined, the previous version of paragraph 118.2(2)(*n*) required "a record kept by the pharmacist in his or her capacity as pharmacist. That necessarily excludes substances, however useful or beneficial, that are purchased off the shelf."[6]

[17] Despite the Federal Court of Appeal's finding in *Ray v. Canada*, later Tax Court decisions nonetheless allowed claims for supplements so long as the appellant had a prescription and a pharmacist had made an adequate record. In *Breger v. The Queen*,[7] the Court allowed a claim for supplements by a medical doctor who had prescribed the supplements for his wife in order to relieve her symptoms. The supplements so prescribed were recorded and dispensed by a Quebec pharmacist. The Court found that Quebec law requires pharmacists to keep a record of all prescriptions, and distinguished the facts in that case from *Ray*, where there was no pharmacist's record and no provincial requirement that a pharmacist keep such a record.[8] Similarly, in *Norton v. The Queen*,[9] this Court accepted claims for ASA

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[3] *Supra* note 1.
[4] *Ibid.* at para. 17.
[5] *Ray v. Canada*, 2004 FCA 1.
[6] *Ibid.* at para. 13.
[7] 2007 TCC 254.
[8] *Ibid*. at para. 13.

tablets that, although available over the counter, were doctor-prescribed and pharmacist-recorded in a manner that went beyond the mere issuing of a sales slip.[10]

The Current Legislative Framework

[18] In 2008, in response to Tax Court of Canada decisions such as *Breger* and *Norton*, the Federal Government amended the Act. The new paragraph 118.2(2)(*n*), along with the new section 5701 of the Regulations, specifies that substances available over the counter are not eligible for the medical expense credit unless such a substance is prescribed and can only be lawfully obtained through the intervention of a medical practitioner, or the substance is listed in paragraph 118.2(2)(*k*).

[19] Subsection 118.2(1) establishes the formula for calculating the medical expense amount that is deductible when computing the tax payable for a taxation year. Subsection 118.2(2) then sets out in detail the expenses eligible for the medical expense credit. The relevant portions of subsection 118.2(2) are the following:

> **118.2(2) Medical expenses** — For the purposes of subsection (1), a medical expense of an individual is an amount paid
>
> . . .
>
> (*k*) **[various]** — for an oxygen tent or other equipment necessary to administer oxygen or for insulin, oxygen, liver extract injectible for pernicious anaemia or vitamin B12 for pernicious anaemia, for use by the patient as prescribed by a medical practitioner;
>
> . . .
>
> (*n*) **[drugs]** — for
>
> (i) drugs, medicaments or other preparations or substances (other than those described in paragraph (*k*))
>
> (A) that are manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder or abnormal physical state, or its symptoms, or in restoring, correcting or modifying an organic function,
>
> (B) that can lawfully be acquired for use by the patient only if prescribed by a medical practitioner or dentist, and
>
> (C) the purchase of which is recorded by a pharmacist, or

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[9] 2008 TCC 29, [2007] T.C.J. No. 573 (QL), 2007 CarswellNat 4987.
[10] *Ibid.* at para. 21.

> (ii) drugs, medicaments or other preparations or substances that are prescribed by regulation.

[20] Paragraph 118.2(2)(*n*) establishes that substances do not qualify for the medical expense credit unless they fall under paragraph 118.2(2)(*k*), or are only lawfully available with a prescription from a medical practitioner or dentist, or are prescribed by regulation – i.e., section 5701 of the Regulations under subparagraph 118.2(2)(*n*)(ii). The requirement that prescriptions be recorded by a pharmacist remains under subparagraph 118.2(2)(*n*)(i), but the additional criterion, namely, that the substance must only be legally accessible with a prescription, excludes over-the-counter supplements unless they fall under paragraph 118.2(2)(*k*) or are prescribed by regulation under subparagraph 118.2(2)(*n*)(ii).

[21] None of the supplements for which expenses were incurred by Ms. Berg are among the items listed in paragraph 118.2(2)(*k*). Nor do the Appellant's claims come within the scope of the phrase "prescribed by regulation" in subparagraph 118.2(2)(*n*)(ii), the term "prescribed" being defined in section 5701 of the Regulations, which reads as follows:

> **5701.** For the purpose of subparagraph 118.2(2)(*n*)(ii) of the Act, a drug, medicament or other preparation or substance is prescribed if it
>
> (*a*) is manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder or abnormal physical state, or its symptoms, or in restoring, correcting or modifying an organic function;
>
> (*b*) is prescribed for a patient by a medical practitioner; and
>
> (*c*) may, in the jurisdiction in which it is acquired, be lawfully acquired for use by the patient only with the intervention of a medical practitioner.

[22] Section 5701 of the Regulations requires that for a medical expense to qualify under subparagraph 118.2(2)(*n*)(ii), the claimant must have a prescription, and the substance must only be available through the intervention of a medical practitioner. It is possible for a substance available without a prescription to be an eligible expense, but only if the intervention of a medical practitioner is required in order to have access to it and the patient has a prescription. The Appellant's supplements, then, being available from multiple sources without the intervention of a pharmacist or other medical practitioner, are also excluded from the medical expense credit under subparagraph 118.2(2)(*n*)(ii).

Expenses Incurred Before the Amendments

[23] The only possibility that the Appellant has of succeeding in any of her claims is if the expenses were incurred before the amendments came into effect. Paragraph 118.2(2)(*n*) applies to any expenses incurred after February 26, 2008, and section 5701 of the Regulations is deemed to have come into force on February 27, 2008. Two receipts may possibly find relief from the new amendments. The first is for the supplements prescribed by Dr. Terry Johnson and ordered by him for the Appellant from his Kelowna, B.C., office on December 10, 2007. This claim actually may fall within the previous taxation year, depending on the twelve-month period that the Appellant elected for her medical expenses in the 2008 taxation year. Paragraph 118.2(1)(*d*) provides that a taxpayer may elect the twelve-month period during which medical expenses are claimed, so long as it ends in the taxation year for which the claim is made. The relevant portion of that paragraph is the following:

> **118.2(1) Medical expense credit** — For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted the amount . . .
>
> . . .
>
> > . . . is the total of the individual's medical expenses in respect of the individual, the individual's spouse, the individual's common-law partner or a child of the individual who has not attained the age of 18 years before the end of the taxation year
> >
> > . . .
> >
> > (*d*) that were paid by the individual or the individual's legal representative within any period of 12 months that ends in the taxation year or, if those expenses were in respect of a person (including the individual) who died in the taxation year, within any period of 24 months that includes the day of the person's death.

[24] Regardless of the applicable taxation year, this particular claim with respect to supplements, totalling $135.93, is excluded from eligibility under the former version of paragraph 118.2(2)(*n*) because it would not meet the requirement that the prescription be recorded by a pharmacist.

[25] The second claim that predates the amendments is for $100 worth of pain treatment undertaken at the Spa Club. The exact nature of the pain treatment is unclear. In the Appellant's submissions to the Court, she described the miscellaneous receipts that included the Spa Club claim as "different herbal – looking for some kind

of relief for CFS/FM",[11] so it can be assumed that this treatment also consisted of supplements and would only be eligible if it fell under the former paragraph 118.2(2)(*n*). That paragraph, as it was then worded, excludes the Spa Club claim because a pharmacist did not record the treatment and there is no evidence that a medical practitioner or dentist prescribed it.

[26] Finally, the claim for the $25 membership fee for the health advocacy group and the $10 donation to the same group are not eligible as these expenses are not among the medical expenses listed in subsection 118.2(2). The $10 donation, for which the organization provided a receipt to the Appellant for tax purposes, may be eligible for the charitable donation credit.

[27] There is no doubt from the evidence before the Court that the Appellant's health conditions cause her daily suffering and that prescription medication offers little or no relief. It is entirely understandable that Ms. Berg would turn to costly alternative treatments in an effort to improve her quality of life. While the Appellant's case arouses a great deal of sympathy, unfortunately, the legislation here is clear and the Court is not in a position to ease the Appellant's burden by allowing her appeal. None of the claims are eligible expenses for the purposes of the medical expense credit. For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 21st day of November 2011.

"Robert J. Hogan"

Hogan J.

CITATION:	2011 TCC 528
COURT FILE NO.:	2010-3221(IT)I
STYLE OF CAUSE:	MARION BERG v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kelowna, British Columbia
DATE OF HEARING:	August 22, 2011

[11] Appellant's submissions to the Tax Court of Canada, "Information to Accompany Medical Receipts".

REASONS FOR JUDGMENT BY: Robert J. Hogan

DATE OF JUDGMENT: November 21, 2011

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Shankar Kamath

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada