

Docket: 2011-3204(IT)I

BETWEEN:

JOHN R. POWER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 6, 2012, at Ottawa, Canada

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant: The Appellant Himself
Counsel for the Respondent: Natasha Wallace

JUDGMENT

The Appellant's appeal is allowed, without costs, in relation to the amount paid to Dr. Smith and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to include in determining his medical expenses for the purposes of the medical expense tax credit the amount of \$84 paid by the Appellant to Dr. Smith.

Signed at Ottawa, Canada, this 5th day of April 2012.

“Wyman W. Webb”

Webb J.

Citation: 2012TCC113
Date: 20120405
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BETWEEN:

JOHN R. POWER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal¹ is whether the Appellant is entitled to include in his claim for a tax credit based on medical expenses, the amounts that were paid to an individual, who is not a licensed medical practitioner, for acupuncture treatments for the Appellant and his spouse.

[2] In 2009 the following payments were made for acupuncture treatments for the Appellant and his spouse:

Acupuncture services rendered by:	Amount
Ermin Zhu T.C.M.D. Dr. Ac.	\$1,860
E. J. Smith, M.D., CAFCI	\$84

[3] During the hearing counsel for the Respondent acknowledged that the amount paid to Dr. Smith could be included in determining the medical expense tax credit of the Appellant. As a result the only amount in dispute is the amount paid for the acupuncture services rendered by Ermin Zhu.

¹ In the Appellant's Notice of Appeal he also stated that he was appealing the denial of his claim for homeopathic medication. At the commencement of the hearing the Appellant indicated that he was no longer pursuing his claim for the amounts spent on homeopathic medication.

[4] Paragraph 118.2(2)(a) and subsection 118.4(2) (in part) of the *Income Tax Act* provide as follows:

(2) For the purposes of subsection (1), a medical expense of an individual is an amount paid

(a) 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 (in this subsection referred to as the “patient”) who is the individual, the individual's spouse or common-law partner or a dependant of the individual (within the meaning assigned by subsection 118(6)) in the taxation year in which the expense was incurred;

...

(2) For the purposes of sections 63, 64, 118.2, 118.3 and 118.6, a reference to an audiologist, dentist, medical doctor, medical practitioner, nurse, occupational therapist, optometrist, pharmacist, physiotherapist, psychologist or speech-language pathologist is a reference to a person authorized to practise as such,

(a) where the reference is used in respect of a service rendered to a taxpayer, pursuant to the laws of the jurisdiction in which the service is rendered;

...

[5] The issue in this case is whether Ermin Zhu was authorized to perform acupuncture services in the province of Ontario in 2009. In *The Queen v. Couture*, 2008 FCA 412, Justice Ryer, writing on behalf of the Federal Court of Appeal, stated as follows:

[12] With respect, I do not agree with the proposition that the phrase “authorized to practise” in subsection 118.4(2) is synonymous with permitted to practise or not prohibited from practising. In my view, the dictionary definitions of the term “authorize” that are contained in paragraphs 20 and 21 of the respondent's factum establish the plain meaning of that term in the present circumstances. *The Shorter Oxford English Dictionary*, 3d ed., defines authorize as follows:

1. To set up or acknowledge as authoritative;
2. To give legal force to; and
3. To give formal approval to; to sanction, countenance.

Black's Law Dictionary, 7th ed., defines authorize as follows:

1. To give legal authority; to empower; and

2. To formally approve; to sanction.

[13] Each of these definitions states that “authorize” can be taken to mean “to give formal approval to” or “to formally approve”. In my view, those meanings are appropriate with respect to the interpretation of the phrase “authorized to practise” in subsection 118.4(2). Thus, some formality or formal recognition of acupuncture as a discipline that is legally countenanced under Ontario law must be shown.

[14] The Tax Court Judge found that the removal of a prohibition against performing the act of acupuncture by virtue of section 8 of the Controlled Acts Regulations provides a sufficient level of provincial authorization for the practice of acupuncture. In my view, that conclusion is unwarranted having regard to the ordinary meaning of that term, as adopted above in relation to the interpretation of subsection 118.4(2). The mere fact that an action is no longer prohibited does not lead to the conclusion that such action has been formally approved.

[15] The Crown argues that specific legislative approval and regulation of a particular area of practice or profession, in this case acupuncture, is required to demonstrate that such practice had been authorized by the applicable law. In support of that contention, the Crown refers to a passage from *Noddin*, in which Bowie J. states, at paragraph 8:

Clearly the policy objective is that the credit is to be available only where there is some legislated assurance of competence of the person administering the service.

[16] In my view, the level of legislative approval put forward by the Crown would be clearly sufficient to demonstrate the requisite legislative authorization. However, I would not rule out the possibility that something else might be sufficient in other circumstances. In the present circumstances, the only legislative reference to acupuncture was its inclusion in the Controlled Acts Regulations as something that is no longer prohibited as a controlled act. As previously stated, I am of the view that this level of legislative reference is insufficient to establish that the practice of acupuncture was formally approved by Ontario law in 2003 and 2004.

[6] The taxation years under appeal in *Couture* were the 2003 and 2004 taxation years. In 2006 the Ontario legislature passed the *Traditional Chinese Medicine Act*. Section 4 of this *Act* provides as follows:

Authorized acts

4. In the course of engaging in the practice of traditional Chinese medicine, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:

1. Performing a procedure on tissue below the dermis and below the surface of a mucous membrane for the purpose of performing acupuncture.
2. Communicating a traditional Chinese medicine diagnosis identifying a body system disorder as the cause of a person's symptoms using traditional Chinese medicine techniques.

[7] Section 19 of this *Act* provides that paragraph 1 of section 8 of the Controlled Acts Regulation (which is the paragraph that exempts acupuncture from subsection 27(1) of the *Regulated Health Professions Act, 1991*) would be revoked.

[8] However, section 20 of the *Traditional Chinese Medicine Act* provides as follows:

Commencement

20. (1) Subject to subsection (2), this Act comes into force on the day it receives Royal Assent.

Same

(2) Sections 3 to 12, 14, 18 and 19 come into force on a day to be named by proclamation of the Lieutenant Governor.

[9] In 2009 none of the sections referred to in subsection 20(2) of the *Chinese Traditional Medicine Act* had been proclaimed, nor had these provisions been proclaimed at the time of the hearing of this appeal.

[10] In *Schneider v. British Columbia*, [1982] 2 S.C.R. 112, the Supreme Court of Canada stated that:

In advancing this argument the appellant relies to a great extent upon Part II of the *Narcotic Control Act*. McFarlane J.A. and McEachern C.J.S.C. declined to consider the provisions of that Part on the ground that it is as yet unproclaimed and of no legal effect. This is consistent with the decision of this Court in *Canadian Indemnity Company v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504. In that case the Court, speaking through Mr. Justice Martland, referring to certain sections of the *Automobile Insurance Act* of British Columbia said at pp. 512-13: "None of these provisions has been proclaimed since this Act was enacted on April 18, 1973, and, consequently, they have never had any legal effect. In these circumstances I do not consider it necessary to determine the extent of their application, if proclaimed"

[11] As the provisions of the *Traditional Chinese Medicine Act* that would provide the authorization for a person to perform acupuncture had not been proclaimed as of 2009, they were of no legal effect in 2009. The legislative provisions applicable to the performance of acupuncture in Ontario in 2009 were the same legislative provisions that were applicable to the performance of acupuncture in 2003 and 2004. In each of these years a person could perform acupuncture because the performance of acupuncture was not prohibited. Paragraph 8 of the Controlled Acts Regulations exempts acupuncture (as well as ear or body piercing for accommodating jewellery, electrolysis and tattooing for cosmetic purposes) from subsection 27(1) of the *Regulated Health Professions Act, 1991* which otherwise would have prohibited the performance of these acts except by a person who is a member authorized by a health profession Act to perform such acts or by a person to whom the performance of the act has been delegated by such a member.

[12] There was no indication that Ermin Zhu was authorized by any health profession Act to perform acupuncture in 2009 or that Ermin Zhu was delegated this task by anyone who was so authorized. The reason that Ermin Zhu could perform acupuncture was because Ermin Zhu was not prohibited from performing acupuncture. Since the provisions of the *Traditional Chinese Medicine Act* that would provide specific authority for a person to perform acupuncture were not proclaimed, they are of no legal effect and in 2009 there was still no formal approval for a person to perform acupuncture. Therefore Ermin Zhu was not *authorized* to perform the acupuncture treatments in 2009.

[13] The Appellant placed a great deal of emphasis on another decision of a Judge of this Court in *Murphy v. The Queen*, 2010 TCC 434. In that case it was held that the passing of the *Chinese Traditional Medicine Act* was sufficient to find that the person was authorized to perform acupuncture treatments. However, I am unable to agree with this decision. Until the provisions of the *Traditional Chinese Medicine Act* related to the persons who are authorized to perform acupuncture are proclaimed, there is no formal approval for any particular person to perform acupuncture and anyone can perform acupuncture. The reason that Ermin Zhu was allowed to perform acupuncture in 2009 was the same reason that a person was allowed to perform acupuncture in 2003 and 2004 and that was because the performance of acupuncture was not prohibited. How can a person be *authorized* to perform acupuncture if anyone can perform this service?

[14] As a result the amount incurred in relation to the acupuncture services performed by Ermin Zhu is not included as part of the medical expenses eligible for a credit under the *Act*.

[15] The Appellant's appeal is therefore allowed, without costs, in relation to the amount paid to Dr. Smith and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to include in determining his medical expenses for the purposes of the medical expense tax credit for 2009 the amount of \$84 paid by the Appellant to Dr. Smith.

Signed at Ottawa, Canada, this 5th day of April 2012.

“Wyman W. Webb”

Webb J.

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DATE OF JUDGMENT: April 5, 2012

APPEARANCES:

For the Appellant: The Appellant Himself
Counsel for the Respondent: Natasha Wallace

COUNSEL OF RECORD:

For the Appellant:

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