

Date: 20081219

Docket: A-181-08

Citation: 2008 FCA 412

**CORAM: SEXTON J.A.
EVANS J.A.
RYER J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LISE C. COUTURE

Respondent

Heard at Toronto, Ontario, on December 10, 2008.

Judgment delivered at Ottawa, Ontario, on December 19, 2008.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

**SEXTON J.A.
EVANS J.A.**

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal by Her Majesty the Queen from a decision of Justice Boyle (the “Tax Court Judge”) of the Tax Court of Canada (2008 TCC 171) allowing the appeal of Lise C. Couture, under the informal procedure in the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, against reassessments issued pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “ITA”), for her 2003 and 2004 taxation years. Unless otherwise indicated, a reference to a statutory provision in these reasons is a reference to the corresponding provision of the ITA for those years.

[2] Ms. Couture claimed a tax credit under subsection 118.2(1) (the “medical expense tax credit”) that was calculated by reference to certain amounts that she paid to Professor Cedric Cheung for acupuncture treatments that he provided to her in London, Ontario, in 2003 and 2004. The reassessments denied her claim for the medical expense tax credit on the basis that the amounts she paid to Professor Cheung were not medical expenses, within the meaning of paragraph 118.2(2)(a), because he did not qualify as a medical practitioner, for the purposes of that provision, in those years.

Legislative Overview

[3] In computing the amount of income tax payable under Part I of the ITA, subsection 118.2(1) permits individuals to deduct a medical expense tax credit with respect to the total of their medical expenses, within the meaning of subsection 118.2(2) (a “medical expense”), that they can establish that they have paid within the time period specified in that provision.

[4] Under paragraph 118.2(2)(a), an amount paid to a medical practitioner in respect of medical services provided to a person will qualify as a medical expense of that person for the taxation year in which the expense was incurred. While the ITA does not contain a specific definition of the term “medical practitioner”, subsection 118.4(2) effectively provides one, for the purposes of several provisions of the ITA, including section 118.2, which contains an enumeration of the types of costs that qualify as medical expenses.

[5] The relevant statutory provisions for the purposes of this appeal are reproduced in an appendix hereto.

The Decision of the Tax Court of Canada

[6] The Tax Court Judge concluded that Professor Cheung was a medical practitioner within the meaning of that term in subsection 118.4(2). He determined that the interpretation of that provision required a “two-step analysis”. In the first step, the Tax Court Judge held that Professor Cheung, as an acupuncturist, could be considered to be a medical practitioner “within the accepted meaning of that term outside the *Income Tax Act*”. He then found, in the second step, that the laws of Ontario, the jurisdiction in which Professor Cheung provided his services as an acupuncturist, authorized him to practise as an acupuncturist.

[7] In reaching his conclusion on the “second step”, the Tax Court Judge found that the Crown had not shown, and he was unable to find, anything in the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, that prohibited the practice of traditional Chinese medicine or acupuncture in Ontario in 2003 and 2004. He further stated that he did not see anything in that legislation that suggested that Professor Cheung was not authorized to practise traditional Chinese medicine and acupuncture in 2003 and 2004. Finally, the Tax Court Judge found that the removal of a prohibition against acupuncture, as a controlled act under subsection 27(1) of the *Regulated Health Profession Act 1991*, by virtue of section 8 of the *Controlled Acts*, O. Reg. 107/96 (the “Controlled Acts Regulations”), meant that in the relevant years, anyone was allowed to perform acupuncture in Ontario. Specifically, at paragraph 31 of his reasons, the Tax Court Judge stated:

A specific provincial law which allows a person to do something authorizes a person to do it. There is no reason not to equate “authorized” with “permitted”.

Issue

[8] The issue in this appeal is whether the Tax Court Judge erred in finding that Professor Cheung qualified as a medical practitioner, within the meaning of subsection 118.4(2), in 2003 and 2004.

Standard of Review

[9] In my view, the interpretation of subsection 118.4(2) and, in particular, the meaning of the term medical practitioner, is a question of law. Accordingly, the standard of review of the decision of the Tax Court Judge on that question is correctness (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).

Analysis

[10] At the outset, I observe that in reaching his decision, the Tax Court Judge applied a novel approach to the matter that was before him, having regard to other jurisprudence in the Tax Court of Canada, in particular the decisions in *Pagnotta v. Canada*, [2001] 4 C.T.C. 2613, *Laurie v. Canada*, 2003TCC105, *Noddin v. Canada*, 2004TCC687, and *Davar v. Canada*, 2005TCC715.

Unfortunately for Ms. Couture, I am of the view that the decision of the Tax Court Judge cannot be sustained.

[11] While I am not convinced of the appropriateness of the “two-step analysis” that the Tax Court Judge applied in interpreting subsection 118.4(2), that is not a matter that must be decided in order to dispose of this appeal. In my view, the appeal must be allowed for reasons that relate the analysis of the Tax Court Judge with respect to the matter of whether Professor Cheung was authorized to practise acupuncture under Ontario law in 2003 and 2004.

[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.

[17] Having concluded that the Tax Court Judge erred in finding that Professor Cheung was a medical practitioner, within the meaning of that term in subsection 118.4(2), it follows that the amounts paid by Ms. Couture to Professor Cheung in 2003 and 2004 are not medical expenses. Accordingly, those amounts cannot form the basis of a valid claim for the medical expense tax credit by Ms. Couture in those years.

Disposition

[18] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Tax Court Judge and reinstate the reassessments of Ms. Couture for her 2003 and 2004 taxation years. Pursuant to section 18.25 of the *Tax Court of Canada Act*, Ms. Couture is entitled to reasonable and proper costs in respect of this appeal.

“C. Michael Ryer”

J.A.

“I agree
J. Edgar Sexton J.A.”

“I agree
John M. Evans J.A.”

APPENDIX

118.2(1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted the amount determined by the formula

$$A \times [(B - C) + D]$$

where

A is the appropriate percentage for the taxation year;

B 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

(a) that are evidenced by receipts filed with the Minister,

(b) that were not included in determining an amount under this subsection, section 64 or subsection 122.51(2), for a preceding taxation year,

(c) that are not included in determining an amount under this subsection, section 64 or subsection 122.51(2), by any other taxpayer for any taxation year, and

(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

118.2(1) La somme obtenue par la formule ci-après est déductible dans le calcul de l'impôt payable par un particulier en vertu de la présente partie pour une année d'imposition :

$$A \times [(B - C) + D]$$

où :

A représente le taux de base pour l'année;

B le total des frais médicaux du particulier, engagés à son égard ou à l'égard de son époux ou conjoint de fait ou de son enfant qui n'a pas atteint l'âge de 18 ans avant la fin de l'année et qui, à la fois :

a) sont attestés par des reçus présentés au ministre,

b) n'ont pas été inclus dans le calcul d'un montant selon le présent paragraphe, l'article 64 ou le paragraphe 122.51(2) pour une année d'imposition antérieure,

c) ne sont pas inclus dans le calcul d'un montant selon le présent paragraphe, l'article 64 ou le paragraphe 122.51(2) par un autre contribuable pour une année d'imposition quelconque,

d) ont été payés par le particulier ou par son représentant légal au cours de toute période de 12 mois se terminant dans l'année ou, s'ils ont été engagés à l'égard d'une personne, y compris le particulier, qui est décédée dans l'année, au cours de toute période de 24 mois

includes the day of the person's death;

C is the lesser of \$1,813 and 3% of the individual's income for the taxation year; and

D is the total of all amounts each of which is, in respect of a dependant of the individual (within the meaning assigned by subsection 118(6), other than a child of the individual who has not attained the age of 18 years before the end of the taxation year), the lesser of \$10,000 and the amount determined by the formula

E - F

where

E is the total of the individual's medical expenses in respect of the dependant

(a) that are evidenced by receipts filed with the Minister,

(b) that were not included in determining an amount under this subsection, or subsection 122.51(2), in respect of the individual for a preceding taxation year,

(c) that are not included in determining an amount under this subsection, or subsection 122.51(2), by any other taxpayer for any taxation year, and

(d) that were paid by the individual or the individual's legal representative within the period referred to in paragraph (d) of the description of B; and

comprenant le jour du décès;

C 1 813 \$ ou, si elle est moins élevée, la somme représentant 3 % du revenu du particulier pour l'année;

D le total des sommes dont chacune représente, à l'égard d'une personne à charge du particulier, au sens du paragraphe 118(6), à l'exception d'un enfant du particulier qui n'a pas atteint l'âge de 18 ans avant la fin de l'année, 10 000 \$ ou, si elle est moins élevée, la somme obtenue par la formule suivante :

E - F

où :

E représente le total des frais médicaux du particulier, engagés à l'égard de la personne à charge et qui, à la fois :

a) sont attestés par des reçus présentés au ministre,

b) n'ont pas été inclus dans le calcul d'un montant selon le présent paragraphe ou le paragraphe 122.51(2) à l'égard du particulier pour une année d'imposition antérieure,

c) ne sont pas inclus dans le calcul d'un montant selon le présent paragraphe ou le paragraphe 122.51(2) par un autre contribuable pour une année d'imposition quelconque,

d) ont été payés par le particulier ou par son représentant légal au cours de la période visée à l'alinéa d) de l'élément B,

F is the lesser of \$1,813 and 3% of the dependant's income for the taxation year.

F 1 813 \$ ou, si elle est moins élevée, la somme représentant 3 % du revenu de la personne à charge pour l'année.

118.2(2) For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid

118.2(2) Pour l'application du paragraphe (1), les frais médicaux d'un particulier sont les frais payés :

(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;

a) à un médecin, à un dentiste, à une infirmière ou un infirmier, à un hôpital public ou à un hôpital privé agréé, pour les services médicaux ou dentaires fournis au particulier, à son époux ou conjoint de fait ou à une personne à la charge du particulier (au sens du paragraphe 118(6)) au cours de l'année d'imposition où les frais ont été engagés;

118.4(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,

118.4(2) Tout audiologiste, dentiste, ergothérapeute, infirmier, infirmière, médecin, médecin en titre, optométriste, orthophoniste, pharmacien, physiothérapeute ou psychologue visé aux articles 63, 64, 118.2, 118.3 et 118.6 doit être autorisé à exercer sa profession :

(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;

a) par la législation applicable là où il rend ses services, s'il est question de services;

(b) where the reference is used in respect of a certificate issued by the person in respect of a taxpayer, pursuant to the laws of the jurisdiction in which the taxpayer resides or of a province; and

b) s'il doit délivrer une attestation concernant un particulier, soit par la législation applicable là où le particulier réside, soit par la législation provinciale applicable;

(c) where the reference is used in respect

c) s'il doit délivrer une ordonnance pour des biens à fournir à un particulier ou destinés à être utilisés par un particulier, soit par la législation applicable là où le

of a prescription issued by the person for property to be provided to or for the use of a taxpayer, pursuant to the laws of the jurisdiction in which the taxpayer resides, of a province or of the jurisdiction in which the property is provided.

particulier réside, soit par la législation provinciale applicable, soit enfin par la législation applicable là où les biens sont fournis.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-181-08

**APPEAL FROM A DECISION OF THE TAX COURT JUDGE (2008TCC171) DATED
MARCH 27, 2008**

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
LISE C. COUTURE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 10, 2008

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: SEXTON J.A.
EVANS J.A.

DATED: DECEMBER 19, 2008

APPEARANCES:

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