

Docket: 2005-3616(IT)I

BETWEEN:

LISE C. COUTURE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 11, 2007, at London, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Andrew Miller

JUDGMENT

The appeal from the reassessments made under the *Income tax Act* for the 2003 and 2004 taxation years is allowed with costs. The reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the traditional Chinese medicine and acupuncture treatments received by the Appellant were medical services provided by a medical practitioner.

Signed at Ottawa, Canada, this 27th day of March 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC171
Date: 20080327
Docket: 2005-3616(IT)I

BETWEEN:

LISE C. COUTURE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle, J.

[1] The Appellant is appealing reassessments of her 2003 and 2004 taxation years in which she was denied the section 118.2 Medical Expense Tax Credit (the “METC”) in respect of acupuncturist services received by her in Ontario in those years.

I. Facts

[2] The facts are not in dispute. Ms. Couture was diagnosed in late 2001 with hyperthyroidism, which is, in simple terms, an overactive thyroid gland. The diagnosis was made by an endocrinologist to whom she had been referred by her family doctor. She had consulted her family doctor when a chiropractor whom she was attending for an unrelated back problem noticed an apparent swelling of her thyroid gland.

[3] Her family doctor had, among other things, sent her for blood tests. The results of these tests suggested the thyroid problem and for this reason the family doctor referred her to the endocrinologist. The endocrinologist made the diagnosis and recommended three choices of treatment, each being what Ms. Couture described as conventional western medicine. These were (i) medication to address the problems, (ii) radiation to inhibit or destroy some of the thyroid’s cells, or

(iii) surgery to remove all or part of the gland. Not surprisingly, each of these has associated side effects and medical health risks. Ms. Couture was not satisfied with the side effects and risks associated with the three interventions suggested by the endocrinologist. She did not pursue any of them apart from having had a preliminary iodine ingestion test which was a necessary precursor to radiation treatment.

[4] Ms. Couture raised with her endocrinologist the possibility of traditional Chinese medicine or other alternative approaches to treatment of her hyperthyroidism. The endocrinologist did not think such an approach would work for her and did not encourage it. Ms. Couture looked into alternative methods of treatment on her own and opted for traditional Chinese medicine and acupuncture (“TCMA”). She was aware that TCMA treatments would not be covered by Ontario’s health insurance plan. The core of the TCMA treatments was acupuncture treatments which she had two or three times a week as well as herbal supplements taken daily. The TCMA therapy also included counselling, dietary precautions, tongue examinations, Chinese pulse examinations and occasional blood pressure tests.

[5] Ms. Couture was treated by an eminent Canadian acupuncturist and practitioner of traditional Chinese medicine. Professor Cedric Cheung testified at the trial. Professor Cheung is a qualified and credentialed professor and doctor of Chinese medicine and acupuncture in several Chinese jurisdictions. He has 40 years of clinical experience in traditional Chinese medicine and acupuncture. He is a Vice-President of the World Federation of Acupuncture-Moxibustion Societies, an organization recognized by the World Health Organization with members in 72 countries including Canada. Professor Cheung is the National President of the Chinese Medicine and Acupuncture Association of Canada which has chapters in eight provinces including Ontario. This association, among other things, promotes and lobbies for the regulation of traditional Chinese medicine and acupuncture as health services in Canada. It has been successful in having the provinces of Alberta, British Columbia and Quebec join Saskatchewan in regulating TCMA. Most recently, it has been successful in persuading Ontario to add TCMA as a regulated health profession. Under the new Ontario laws, the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario has been created. Professor Cheung is on the Council of that College and is under consideration to be its Vice-President.

[6] Professor Cheung operated the Institute of Chinese Medicine & Acupuncture in London, Ontario. It was there that Professor Cheung provided the acupuncturist services to Ms. Couture.

[7] Ms. Couture began her treatments in January 2002 and ended them in early 2004. By the time the treatments ended, her blood tests were consistently showing thyroid-associated results in the normal range. Fortunately for Ms. Couture these results have continued and it appears that her TCMA acupuncture and related treatments were successful in largely healing her thyroid condition. At the time of the hearing, more than three years after her treatments ended, Ms. Couture regards herself as healed and reports that her blood tests have continued to show satisfactory normal range readings associated with the thyroid-related blood tests.

[8] In her 2002 tax return, Ms. Couture claimed the cost of her acupuncture treatments, the related transportation costs as well as the cost of the herbal supplements. Canada Revenue Agency did not allow her claim for the herbal supplements for purposes of the METC in 2002. In 2003 and 2004, the years under appeal, Ms. Couture claimed the cost of the acupuncturist services and the related transportation costs but did not claim the cost of the herbal supplements for purposes of calculating her METC. The amounts claimed by Ms. Couture in 2003 were \$7,760 and in 2004 were \$3,906. CRA has denied her 2003 and 2004 claims.

II. Position of the parties

[9] Ms. Couture is understandably most pleased that, with two years of non-invasive traditional Chinese medicine and acupuncture treatments, she is healed of her hyperthyroidism and seemingly has a normally functioning thyroid gland. Over the two years, these treatments cost her approximately \$12,000. Ms. Couture knew when she opted for those treatments that their costs would not be covered by Ontario's health insurance plan. She was not aware that they would not qualify for the METC in the *Income Tax Act* and contends in Court that these expenses should and do qualify for the METC. Among other things, she points out that (i) in the years in question acupuncturist services qualified for METC in several other Canadian provinces which at that time regulated acupuncturists, and (ii) since the end of 2006, Ontario has added acupuncturists and traditional Chinese medicine practitioners to the schedules of the *Regulated Health Professions Act* with the result that CRA now accepts that acupuncturist services received in Ontario after 2006 can qualify for the METC.

[10] Ms. Couture also points out that CRA accepted these as medical expenses in her 2002 taxation year. This does appear somewhat odd given that CRA obviously reviewed her claim since it disallowed her herbal supplement expenses for METC purposes in 2002 and appears to have expressly permitted her acupuncturist expenses. No reason was offered by the Crown for this. Unfortunately for Ms. Couture, CRA's assessment of an individual in one taxation year does not in any way preclude it from reconsidering and taking a different position in other taxation years.

[11] Ms. Couture further points to the CRA's unequal and more favourable treatment of Canadian taxpayers for METC purposes under the *Income Tax Act* who received their traditional Chinese medicine or acupuncture treatments in those provinces in which it is accepted by CRA as being provided by "medical practitioners", such as British Columbia, Saskatchewan, Quebec and Alberta, contrasted with those like her who received the same treatments from similarly qualified practitioners and acupuncturists in Ontario. Specifically, she points out that, had she traveled to British Columbia for her treatments, her expenses would have been allowed by CRA. It is also to be noted that Professor Cheung in his testimony indicated he met all of the credentialing requirements in those other provinces and could have readily obtained his membership in their provincial colleges.

[12] It is the Crown's position that Ms. Couture's acupuncturist expenses did not qualify for the METC because in 2003 and 2004 Ontario did not regulate acupuncturists and, hence, Professor Cheung was not a "medical practitioner" as defined in subsection 118.4(2). The Crown's Reply also takes the position that the services in question were not "medical services" for purposes of subsection 118.2(2).

III. Applicable Legislation

118.2(2) For the purposes of subsection 118.2(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

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

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

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;

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;

IV. Analysis

A. *Subsection 118.4(2): Medical Practitioner*

[13] In order for Ms. Couture’s traditional Chinese medicine acupuncturist’s expenses to qualify as a “medical expense” that generates a “medical expense tax credit”, the amounts paid to Professor Cheung must be able to be considered to be payments to a “medical practitioner”.

[14] The term “medical practitioner” is not defined in the *Income Tax Act* although section 118.4(2) does place restrictions on which medical practitioners will qualify. It was said by the Crown in argument, and it is often said, that an

alternative medical provider will only be considered a qualified medical practitioner if the person's particular profession is regulated as a health profession in the province in which they provide their services. That is not entirely correct. Clearly the language of 118.4(2) says something quite different.

[15] What subsection 118.4(2) requires is a two-step analysis. Firstly, is an acupuncturist or trained traditional Chinese medicine practitioner a "medical practitioner" within the accepted meaning of that term outside the *Income Tax Act*? This is necessary because acupuncturists and traditional Chinese medicine practitioners are not described by name as are dentists, nurses, audiologists and the like. Secondly, if an acupuncturist is a medical practitioner, does the province in which the acupuncturist provides services authorize him or her to practise as a "medical practitioner"? That is the clear meaning of the use of the words "authorized to practise as such". Notably, this distinction means that putative medical practitioners must be authorized to practise as a "medical practitioner". It is not a requirement that their particular area of medical practice be regulated by the province, although regulation may be a common form of authorization.

[16] The definition of "medical practitioner" in the *Income Tax Act* is somewhat awkward. The use of the words "as such" means the term is defined by reference to itself. If a careful two-step analysis is not undertaken, the definition risks becoming a circular exercise. This is also true of the French version which defines "médecin" by reference to "sa profession".

(1) First step: Medical Practitioner

[17] In deciding first if Professor Cheung was a medical practitioner within the accepted meaning of that term outside the *Income Tax Act*, I note that the *Canada Health Act* defines "medical practitioner" for the purposes of that Act as "a person lawfully entitled to practise medicine in a place in which the practice is carried on by that person". The *Canada Health Act* does not define the practice of medicine. This Act's purpose is to provide federal funding to provincial health care régimes. This definition is not of assistance.

[18] The Ontario *Interpretation Act* defines "legally qualified medical practitioner" and "duly qualified medical practitioner" for purposes of Ontario provincial legislation as a member of the College of Physicians and Surgeons of Ontario. This definition effectively equates medical practitioners to medical doctors. This definition does not apply to the federal *Income Tax Act*. Any definition of medical practitioner which is limited to medical doctors cannot be

correct for *Income Tax Act* purposes since the *Income Tax Act*, as described below, uses each of those terms differently not interchangeably.

[19] Ontario's *Medicine Act, 1991* defines the practice of medicine for purposes of that Act as "the assessment of the physical or the mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction". While this language appears to be capable of broad meaning, since this Act is the legislative authority for the Ontario College of Physicians and Surgeons, I suspect that it is only referring to the practice of medical doctors. In any event, this Ontario Act does not apply for the purposes of the *Income Tax Act*.

[20] It is clear from the language used in the *Income Tax Act* that any definition of medical practitioner or practice of medicine that equates it, or limits it, to medical doctors cannot assist in the analysis. Nor can any argument by the Crown that equates "medical practitioner" (médecin) and "medical doctor" (médecin en titre) succeed.

[21] The first reason for this is that both terms "medical practitioner" and "medical doctor" are used in the list of professional health services in subsection 118.4(2). If they mean the same thing, one wonders why they are listed separately. It is sensible to presume Parliament had a reason for using two separate terms and did not intend them to be interchangeable.

[22] Secondly, it is clear from a review of the language used in the medical expense related provisions of the *Income Tax Act* that the two terms were intended to have different meanings. Specifically, the *Income Tax Act* is clear that medical doctors are one subset of medical practitioners. For instance, paragraph 118.3(1)(a.2) uses the phrase "where the medical practitioner is a medical doctor...". This same distinction appears consistently in paragraph 118.3(1)(a.3).

[23] Thirdly, this is confirmed by the legislative history of subsection 118.4(2) itself. The 1985 revisions of the Statutes of Canada dropped the phrase "medical doctor" from the subsection 118.4(2) meaning of the phrase "medical practitioner". The term medical doctor was restored retroactively and the accompanying Department of Finance Technical Notes to the amending legislation says that the term medical doctor had been erroneously omitted.

[24] Clearly a medical practitioner can be a person carrying on a profession other than that of being a medical doctor for purposes of the first paragraph of the

analysis of “medical practitioner” under the *Income Tax Act* as well as for purposes of subsection 118.4(2) as a whole.

[25] In fairness, CRA has not administered the *Income Tax Act* to restrictively limit “medical practitioners” to “medical doctors” and others specifically identified by profession in subsection 118.4(2). CRA has not treated the separately identified medical practitioners such as audiologists and nurses as a closed listing of medical practitioners. For instance, CRA recognizes a number of types of therapists other than the named “occupational therapists”. See, for example, CRA’s technical interpretation 2004-0091401E5 attached as a schedule to these reasons. Instead it appears, and was argued, that CRA recognizes Ontario medical practitioners if they are regulated by Ontario’s *Regulated Health Professions Act*. That Act will be considered below as part of the second stage determination of being authorized to practise.

[26] It also cannot be that the meaning of medical practitioners in subsection 118.4(2) is limited to the named professions. Otherwise, the meaning would have to be amended each time a province authorizes, or in the Crown’s view, regulates a health profession. This was not done when other provinces began specifically regulating acupuncturists nor was it done since 2006 when Ontario began regulating them.

[27] I am satisfied that, for purposes of the first step in this analysis, an Ontario acupuncturist such as Professor Cheung could be considered a medical practitioner in 2003 and 2004. I do not see how it can be otherwise since, in those years, acupuncturists in other provinces than Ontario were regulated provincially as health professionals and were accepted by CRA as medical practitioners described in subsection 118.4(2). This is confirmed by acupuncturists being listed in CRA’s Interpretation Bulletin IT-519 in the years in question. The first step in the analysis, unlike the second, does not turn on provincial niceties.

(2) Second step: Authorized to Practise

[28] The Crown relies upon the *Regulated Health Professions Act* of Ontario and points out that in the years in question, and prior to the passage of the *Traditional Chinese Medicine Act, 2006* (Ontario), traditional Chinese medicine practitioners and acupuncturists were not regulated under that Ontario Act. The Crown was, however, unable to direct me to anything in that Act, nor could I find anything in that Act, which prohibited the practice of traditional Chinese medicine or acupuncture in Ontario in 2003 and 2004. Indeed, Professor Cheung’s Institute appears to have been

an entirely above board and legitimate business operating lawfully in Ontario in 2003 and 2004. With respect to that argument, I do not see anything in the Ontario *Regulated Health Professions Act* which suggests that Professor Cheung's Institute was not authorized to practise traditional Chinese medicine and acupuncture in 2003 and 2004.

[29] I note in particular that the Explanatory Note to Ontario's *Traditional Chinese Medicine Act, 2006* says "The Bill amends Ontario Regulation 107/96 (Controlled Acts) under the *Regulated Health Professions Act, 1991* by revoking the provisions allowing anyone to perform acupuncture" (emphasis added). This is a reference to subsection 8(1) of Ontario Regulation 107/96 "Controlled Acts".

[30] The Ontario *Regulated Health Professions Act* applies to Ontario's self-governing health professions. Indeed, Schedule 1 of that Act is titled Self-Governing Health Professions and "health profession" is limited to those in Schedule 1. There is no reason to conclude that all health professionals must be part of a self-governing profession to be a medical practitioner for purposes of the *Income Tax Act*. This Ontario Act regulates the self-governing bodies. It also restricts the use of the term doctor but not medical practitioner or other term. It restricts the holding out as a regulatory college or as a health profession corporation.

[31] Subsection 27(1) of this Ontario Act provides that only members of a health profession regulated by that Act can perform controlled acts. Subsection 27(2) defines controlled acts to include performing a procedure on tissue below the dermis. However, acupuncture was specifically excluded by regulation from the definition of controlled acts altogether in the years in question. The clear result of this was that, as Ontario's 2006 Explanatory Note said, until that time anyone was allowed to perform acupuncture in Ontario. 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".

[32] I conclude that Ontario acupuncturists such as Professor Cheung satisfied the subsection 118.4(2) meaning of the term "medical practitioner" in 2003 and 2004.

B. *Subsection 118.2(2): Medical Services*

[33] Having decided that an acupuncturist is a medical practitioner, it follows that acupuncture services are medical services. Dictionary definitions of "acupuncture"

describe it as a branch of medicine. Even the Crown's Reply describes it as a "traditional Chinese medical treatment". If it were otherwise, acupuncturist services could never qualify for the METC even in provinces or taxation years in which there is no issue about acupuncturists being medical practitioners.

[34] I will be allowing Ms. Couture's appeal with costs.

Signed at Ottawa, Canada, this 27th day of March 2008.

"Patrick Boyle"

Boyle, J.

SCHEDULE

Tax Window Files

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Query=2004-0091401e5

Medical Expense - Shiatsu

December 08, 2004

Document number: 2004-0091401E5

Income Tax Act: 118.2, 118.4(2)

Interpretation Bulletins: IT-519R2, Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction (Consolidated)

Information Circulars: IC 70-6R5, Advance Income Tax Rulings

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA.

Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: Is a Shiatsu Therapist considered a medical practitioner for purposes of the Medical Expense Tax Credit?

POSITION: No.

REASONS: Shiatsu therapist not authorized under the laws of Ontario.

XXXXXXXXXXXX

2004-009140
Shaun Harkin, CMA

December 8, 2004

Dear XXXXXXXXXXXX :

Re: Technical Interpretation Request: Section 118.2

We are writing in reply to your letter of August 12, 2004, wherein you asked whether payments to a Shiatsu Therapist would be eligible for the medical expense tax credit and could be covered under a private health services plan ("PHSP").

Our Comments

In order for a plan to be a PHSP, coverage must be limited to hospital care or

Query=2004-0091401e5

expenses or medical care or expenses, which normally would otherwise have qualified as a medical expense under the Income Tax Act (the "Act").

Subsection 118.2(2) of the Act provides a list of the types of expenditures which qualify as medical expenses for the purposes of the medical expense tax credit. Paragraph 118.2(2)(a) of the Act states that a medical expense of an individual includes an amount paid "to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services." Paragraph 118.4(2)(a) of the Act provides that, for the purposes of section 118.2 of the Act, a reference to a medical practitioner, dentist, pharmacist, nurse or optometrist is a reference to a person authorized to practice as such, according to the laws of the jurisdiction in which the service is rendered. To the extent that expenditures are described within the above comments, they would be regarded as medical expenses.

We refer you to paragraphs 2 and 3 of Interpretation Bulletin IT-51982 (Consolidated), Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction. As noted, a medical practitioner may, depending upon the laws of the jurisdiction in which the service is provided, include a therapist (also referred to as a therapist). The reference in paragraph 3 of IT-51982 (Consolidated) to a therapist, or therapist, is a general reference to a number of different health professionals, to whom payments may be considered to be amounts paid to a medical practitioner for medical services. For example, in the province of Ontario, a "therapist" includes those therapists governed by the Regulated Health Professions Act, 1991. These therapists include speech-language pathologists (a protected title under the Audiology and Speech-Language Pathology Act, 1991, as is the title "speech therapist"), denture therapists (a restricted title under the Denturism Act, 1991), massage therapists (a restricted title under the Massage Therapy Act, 1991), an occupational therapist (protected title under the Occupational Therapy Act, 1991), a respiratory therapist (protected title under the Respiratory Therapy Act, 1991) and a physiotherapist (protected title under the Physiotherapy Act, 1991). Each of these health professionals is authorized to practice in the province of Ontario in accordance with the provisions of the Regulated Health Professions Act, 1991, and the relevant Act respecting the regulation of the specific health profession.

The practice of shiatsu therapy does not appear to be authorized under the laws of Ontario. Therefore, a fee paid to a Shiatsu Therapist in Ontario for shiatsu therapy is not considered to be an expenditure which qualifies as a medical expense for purposes of the medical expense tax credit. As such, the cost for shiatsu therapy performed in Ontario may not qualify for coverage under a PHSP.

The foregoing comments represent our general views with respect to the subject matter. As indicated in paragraph 22 of Information Circular 70-6R5, the above comments do not constitute an income tax ruling and accordingly are not binding on the Canada Revenue Agency. Our practice is to make this specific disclaimer in all instances in which we provide an opinion.

Query=2004-0091401e5

We trust our comments will be of some assistance.

Yours truly,

Wayne Antle, CGA
for Director
Business and Partnerships Division
Income Tax Rulings Directorate

CITATION: 2008TCC171

COURT FILE NO.: 2005-3616(IT)I

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

PLACE OF HEARING: London, Ontario

DATE OF HEARING: October 11, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: March 27, 2008

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Andrew Miller

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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