Docket: 2007-4839(IT)I

BETWEEN:

JEAN PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 9, 2008, at Sherbrooke, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal under the *Income Tax Act* ("the Act") for the 2000, 2001, 2002, 2003, 2004 and 2005 taxation years is quashed. The appeal from the assessment under the Act for the 2006 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of August 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 25th day of September 2008.
Susan Deichert, Reviser

Citation: 2008 TCC 425
Date: 20080812
Docket: 2007-4839(IT)I

BETWEEN:

JEAN PELLETIER,

Appellant,

and

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal in respect of the 2000, 2001, 2002, 2003, 2004, 2005 and 2006 taxation years.

[2] The issue is whether the Appellant was entitled to the disability tax credit for the 2006 taxation year, and whether he may bring an appeal for the 2000, 2001, 2002, 2003, 2004 and 2005 taxation years.

[3] In order to make and confirm the assessment under appeal, the Respondent relied on the assumptions of fact set out in paragraph 7 of the Reply to the Notice of Appeal, subparagraphs (a) to (d) of which read as follows:

> [TRANSLATION]
>
> (a) Upon filing his income tax return for the 2006 taxation year, the Appellant claimed the tax credit for severe and prolonged physical impairment.
>
> (b) The Appellant has been suffering from Type 1 diabetes for several years.
>
> (c) The Appellant's condition does not restrict his ability to perform basic activities of daily living.
>
> (d) According to his physician, Bruno St-Pierre, M.D., the Appellant is controlling his blood sugar well, uses an insulin pump, and, in his estimation, does not spend more than one hour per day on checking his levels, calibrating the pump and self-injecting the medication.

[4] After being sworn in, the Appellant admitted to subparagraphs (a) and (b) and denied subparagraphs (c) and (d).

[5] In addition to testifying for himself, the Appellant called his spouse, Sonia Larochelle, as well as Daniel Lacombe and Jeannine Lapierre, both of whom have been suffering from Type 1 diabetes for many years and are part of an association of individuals who have the same major health problem stemming from the condition.

[6] I began with an explanation of what the Appellant would need to show in order to meet his burden of proof. I intervened several times to reiterate in different ways that the *Income Tax Act*, and the Regulations thereunder, impose numerous conditions that must be met in order to be entitled to the credit claimed, and to note that his arguments would need to address the requirements of the Act.

[7] Despite the cautions and clarifications conveyed to him, the Appellant focussed his efforts on contesting the competency of his attending physician, a specialist in the field who has been working with him since his illness began some 20 years ago. He asserted that the physician had no business saying what he did.

[8] Intensely determined, and profoundly affected by the limitations and consequences of his Type 1 diabetes, the Appellant clearly devoted countless hours to the preparation of his appeal.

[9] Most of his efforts were spent marshalling a whole series of writings, manifestos and documents that are of little relevance because each case is different.

[10] The Act and the Regulations do not specify which illnesses qualify for the credit. One must take account of the relief that can be provided by devices, medications, treatments, etc., not the severity of the illness for people who refuse to use the available treatments.

[11] The severity, inconveniences and restrictions must be assessed on the assumption that the taxpayer is benefiting from the appropriate medications and the available medical treatment.

[12] It is clear and well known that a person who suffers from this type of diabetes is headed toward catastrophe, if not death, if he or she refuses to exercise the discipline essential to the achievement of some quality of life. In the case at bar, the evidence has established that the Appellant kept abreast of everything that could potentially help him; in fact, he obtained the most efficient devices and got the training necessary to ensure that he was getting the most out of them.

[13] The Appellant also gave a detailed presentation concerning the time spent on keeping his blood sugar levels under control and on the numerous things that he does every day in order to maintain a balance; any reading below 4 or above 7 requires immediate treatment in order to return to an acceptable level.

[14] If the blood sugar level is too low, immediate treatment is necessary, but there is a risk that such treatment will cause a rapid and dangerous increase. This can cause the patient a great deal of anxiety – anxiety that is, in fact, warranted.

[15] This can definitely be a stressor and cause a great deal of tension for an anxious person like the Appellant. In fact, the Appellant said that he had to take medications for his anxiety and stress, which undoubtedly stem from his illness.

[16] In describing the consequences of his disease, the Appellant insisted that he had to devote at least 14 hours per week to it.

[17] To substantiate his conclusion regarding the amount of time required, he tendered a document containing several pages and listing the various measures that have to be taken. The following is an excerpt from the document (Exhibit A-3, page 1):

> [TRANSLATION]
>
> Estimated time spent on treatments

- 4-8 blood sugar readings daily		20-40 min
- filling out and compiling the data in the health record and printing out data		20 min/day
- regulating the insulin pump		20-30 min/day
- preparing the glucometer calibration equipment; changing the tubing, reservoir and batteries; checking the devices . . . (ketone body glucometer), status of the pump and tubing currently in use		20 min/day
- calculating the correction bolus		15 min/day
- analyzing insulin doses		20 min/day
- downloading results		60 min/week
- reprogramming (bolus increment)		15 min/day
- checking blood sugar after correction bolus if necessary		20 min/day
- calibrating and installing glucose uptake		20 min/day
- adjusting and changing basals		30 min/day
	Total	200 min/day x 7 = 1,400 min or 23 h

[18] The Appellant's spouse also testified. She confirmed the essential elements of the Appellant's testimony. However, it could be seen that the family atmosphere has been deeply affected by the Appellant's medical condition.

[19] In order to complete her testimony, the Appellant's spouse sought to adduce a letter that she had written and that aptly describes the situation. The letter discusses the numerous problems and inconveniences that the family must endure by reason of the Appellant's illness. Moreover, it explains that the couple's son is also affected.

[20] In further support of his appeal, the Appellant called, as witnesses, two exceptional individuals who are coping with Type 1 diabetes. The first witness, Mr. Lacombe, a serene, balanced and, above all, self-disciplined man, explained how he lived with his disease.

[21] Having chosen to accept it, he dedicated himself, with great discipline, to maintaining balance, thereby securing enough quality of life that he asserted that he was in good health, adding immediately thereafter that he was in excellent health and had no particular eyesight, kidney, amputation or other problem.

[22] However, Mr. Lacombe asserted that his health was a source of preoccupation and that he had to be constantly vigilant in order to avoid predictable and inescapable difficulties or problems that frequently cause permanent after-effects, such as amputation, loss of eyesight, or severe kidney impairment.

[23] The second witness, Jeannine Lapierre, explained that she has never accepted the fact that she suffers from Type 1 diabetes. She also explained that she had to behave cautiously, vigilantly and assiduously in order to keep her blood sugar levels stable. She described the recent consequences of a careless moment in which she injected an inappropriate kind of insulin.

[24] The Appellant's evidence, which consisted of his testimony and that of three other individuals, very clearly showed that the Appellant is worried. It also made plain his stress and deep preoccupation, which tend to cause a certain amount of exaggeration.

[25] Type 1 diabetes is a severe physical disability that has significant and very serious effects. However, it is a widespread condition that is the subject of ongoing and significant research that is helping sufferers improve their quality of life.

[26] Medicine, research, medications and a variety of available devices enable reasonable people, who are receptive to obtaining the available help and support, to achieve some quality of life, though I admit that the requisite self-discipline is neither easy nor straightforward.

[27] The elements that must be taken into account cannot be assessed in an exclusively objective fashion because the same serious medical problem, such as Type 1 diabetes, does not identically affect everyone who suffers from it. In my opinion, it is important to assess the situation having regard to its reasonableness.

[28] It is also important to understand that the question of whether a person is entitled to the credit is one that must be asked afresh each year, though it must be observed that, once entitlement has been established by acceptable evidence, the Canada Revenue Agency is unlikely to reopen the question of entitlement.

[29] In the case at bar, there are truly two approaches: the approach described by the Appellant and his spouse, and the approach described by his medical specialist and his two witnesses.

[30] The Appellant's approach strikes me as somewhat of an exaggeration, not because of bad faith or dishonesty, but simply because of perception. In fact, his spouse's testimony is very relevant in this regard. Family life is deteriorating because everyone must conform to Mr. Pelletier's mood, which, based on his attitude before this Court, cannot always be easy, since he is the kind of person who must always be right. I have no doubts as to the truthfulness of the Appellant's spouse, since the Appellant's anxieties and nervousness undoubtedly generate a climate of great tension.

[31] In fact, following the Court's remarks, the Appellant got carried away; he questioned the Court's impartiality, adding that there was no justice and thereby putting an end to the debate, despite having been given all the time needed to assert his rights.

[32] This overreaction validates the theory that the Appellant tends to exaggerate certain situations. Thus, in my opinion, the Appellant's assessment of the amount of time required in order to do certain things is exaggerated.

[33] As for the other approach, the Appellant's attending physician, a diabetes specialist, estimates that the requisite amount of time is a few hours per week. Thus, there is a significant gap between his estimate and the Appellant's self-serving and subjective assessment. This is not an unimportant discrepancy attributable to the fact that each individual has a different pace. And in fact, the assessment of the Appellant's attending physician is consistent with the explanations given by the two witnesses, who, it should be recalled, testified at the Appellant's request.

[34] Fourteen hours per week is a significant amount of time for someone who dramatizes something that is, I admit, dramatic to begin with.

[35] However, for a person who realizes that he or she will have to be committed to constant and ongoing attention, supervision and vigilance for the rest of his or her life, the measures that he or she must take are part of a routine that makes a certain quality of life possible.

[36] Did Mr. Lacombe not assert that he was in good health, or even very good health? This is a significant illustration of how a person might behave even though he or she is disabled by Type 1 diabetes.

[37] The credit available under the Act is primarily for the direct consequences of the disability. Character and personality are also important, but must not be determinative in assessing the evidence pertaining to entitlement.

[38] Generally, section 118.3 of the Act provides that, in order to be entitled to the credit, there must be a medical certificate (in the prescribed form T2201) specifying that the taxpayer has a severe and prolonged impairment in physical or mental functions, and that the effects of that impairment are such that the taxpayer's ability to perform a basic activity of daily living is markedly restricted.

[39] In *MacIsaac*, Docket A-661-98, December 3, 1999, the Federal Court of Appeal specified that the requirement to obtain and provide the Minister with a medical certificate was mandatory, not directory; in other words, without the medical practitioner's certificate stating that the individual suffers from an impairment contemplated in the Act, the individual will not be entitled to a credit.

> *"THE ABILITY TO PERFORM A BASIC ACTIVITY OF DAILY LIVING IS MARKEDLY RESTRICTED"*

[40] Although this is not a mathematical formula, the wording, and its scope, are nonetheless clear. The evidence has not established that the Appellant was unable to perform a basic activity of daily living (understanding, seeing, feeding, walking or speaking.)

[41] Was the disability such that, for the 2006 taxation year, the basic activities of daily living were markedly restricted? There is no doubt about the worries, constraints and inconveniences, but, in light of the testimony given by the Appellant's two witnesses and the medical specialist who has been treating this illness since its onset, the evidence does not show that the restrictions in issue were marked restrictions.

[42] In *Buchanan*, Docket A-416-01, May 31, 2002, the Federal Court of Appeal specified that, even though the Court must be faithful to the wording of section 118.3 of the Act, which requires the certificate of a medical practitioner, the Tax Court of Canada has the authority to determine, based on *viva voce* evidence, that a negative certificate should be treated as a positive certificate. In this regard, the Honourable Justice Rothstein stated as follows, at paragraphs 17 and 18:

> [I]t is possible for the taxpayer to ask the physician to reconsider his answers on the certificate or perhaps to obtain a positive certificate from another physician who does not misinterpret the requirements of the Act. . . .
>
> In an appropriate case, the taxpayer may seek relief in the Tax Court. Proceedings in the Tax Court are not a judicial review of the correctness or reasonableness of the Minister's assessment. Rather, the function of the Tax Court is to arrive at the correct assessment itself (unless it is unable to do so and considers it necessary to refer the assessment back to the Minister for reconsideration under subparagraph 171(1)(*b*)(iii) of the *Income Tax Act*). The Tax Court's consideration of the matter will be on the basis of the evidence adduced in the Tax Court, even if that evidence was not before the Minister when he made his assessment. . . .

[43] The Act was amended for the 2005 taxation year onward so that persons are entitled to the credit if they suffer from impairments the effects of which are such that the their ability to perform more than one basic activity of daily living is significantly (but not markedly) restricted, where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living.

[44] This amendment appears to be Parliament's response to the decision of Mr. Justice Little in *Mehra v. The Queen*, Docket 2004-4745(IT)I, July 7, 2005 (T.C.C.) and the decision of Judge Rip in *Gossifidou v. The Queen*, Docket 2003-572(IT)I, September 2, 2001 (T.C.C.). There, the Appellant's medical condition did not prevent him from performing any of the basic activities of daily living, but the cumulative effect of his condition nonetheless entitled him to the tax credit.

Tammi v. The Queen, Docket 2002-1979(IT)I, September 11, 2003 (T.C.C.)
A six-year-old child had Type 1 insulin-dependent diabetes. Despite the absence of a positive medical certificate in the prescribed form, the Court found for the Appellant because the medical practitioner had added a handwritten notation in which he stated that the child needed help because of his age.

Radage v. The Queen, Docket 95-1014(IT)I, July 12, 1996 (T.C.C.).
Judge Bowman explained the intent of the disability tax credit as follows:

> The legislative intent appears to be to provide a modest relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons. The intent is neither to give the credit to every one who suffers from a disability nor to erect a hurdle that is impossible for virtually every disabled person to surmount. It obviously recognizes that disabled persons need such tax relief and it is intended to be of benefit to such persons.

Stitson v. The Queen, **Docket** 2000-2150(IT)I, May 3, 2004 (T.C.C.)
A five-year-old child had Type I insulin-dependent diabetes (diabetes mellitus). According to the medical certificate, the child was not entitled to the credit. Mr. Justice Sarchuck specified, at paragraph 25, that ". . . the function of the Tax Court Judge is not to substitute his or her opinion for that of a physician, but to determine, based on medical evidence, whether a negative certificate should be treated as a positive certificate."

[45] The Appellant further submitted that his appeal pertained to the 2000, 2001, 2002, 2003, 2004, 2005 and 2006 taxation years. However, the Appellant exercised his right of objection only for the 2006 year, with the obvious result that the objection stage, essential to having access to the Tax Court of Canada, is missing from the history of this matter.

[46] The effect of the failure to file an objection for those taxation years is that the Court is deprived of any jurisdiction for the taxation years in issue.

[47] Thus, since I have no jurisdiction with respect to the taxation years 2000 through 2005, I must quash the Notice of Appeal to the extent that it purports to apply to those years, and I must limit myself to the 2006 taxation year, respecting which the Appellant filed his objection on or about May 31, 2007, and the determination was subsequently confirmed on November 22, 2007.

[48] The Appellant complied with the time limits and the procedure for the 2006 taxation year; however, based on the evidence adduced, it cannot be concluded that the Appellant is entitled to the credit that he claimed, and so the appeal is accordingly dismissed.

Signed at Ottawa, Canada, this 12th day of August 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 25th day of September 2008.
Susan Deichert, Reviser

CITATION:	2008 TCC 425
COURT FILE NO.:	2007-4839(IT)I
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Marie-Claude Landry

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada