

Docket: 2007-565(IT)I

BETWEEN:

MAREK D. TARKOWSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 11, 2007, at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant: Stella Tarkowski  
Counsel for the Respondent: Brandon Siegal

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**JUDGMENT**

The appeal is allowed, with costs, and the reassessments of the Appellant's 2003 and 2004 taxation years are vacated.

Signed at Halifax, Nova Scotia, this 18<sup>th</sup> day of October 2007.

“Wyman W. Webb”

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Webb J.

Citation: 2007TCC632  
Date: 20071018  
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BETWEEN:

MAREK D. TARKOWSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Webb J.

[1] The Appellant claimed a tuition credit in relation to tuition fees that were paid in 2003 and 2004 for music lessons that were taken by the Appellant's son. The credits were transferred to the Appellant under section 118.9 of the *Income Tax Act* ("Act").

[2] The issue in this case is whether the tuition fees that were paid were in relation to a post-secondary school level course taken at an educational institution that provided courses at this level.

[3] Subsection 118.5(1) of the *Act* provides in part as follows:

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

(a) where the individual was during the year a student enrolled at an educational institution in Canada that is

(i) a university, college or other educational institution providing courses at a post-secondary school level ...

an amount equal to the product obtained when the appropriate percentage for the year is multiplied by the amount of any fees for the individual's tuition paid in respect of the year to the educational institution if the total of those fees exceeds \$100, except to the extent that those fees

(ii.1) are paid to an educational institution described in subparagraph (i) in respect of courses that are not at the post-secondary school level,

[4] Therefore in order for the Appellant's son to claim the tuition credit (and thereby create a tuition credit that could be transferred to the Appellant) the Appellant's son would have to have been enrolled at an educational institution in Canada that was providing courses at a post-secondary level and the amounts paid would have to have been paid for these courses.

[5] The Appellant's son was taking music lessons at the Mississauga School of Music. In 2003 the lessons that the son was taking were at the Grade 3 Theory level and in 2004 they were at the Grade 9 Piano level and at the Grades 3 and 4 Harmony level. Grades 3 and 4 Harmony courses are at a higher level than the Grade 8 Piano and Grade 2 Theory courses. The levels are established by the Royal Conservatory of Music. The Appellant's son received a Grade 12 credit in music from his high school, Michael Power St. Joseph High School, as a result of his having completed Grade 8 Piano performance and Grade 2 Theory.

[6] The Respondent raised two main issues in relation to this matter. The Respondent raised the issue of whether this course was at the post-secondary school level and whether the Mississauga School of Music was an educational institution for the purposes of subsection 118.5(1) of the *Act*.

[7] In paragraph 12 of the Reply it is stated that:

During the 2003 and 2004 taxation years the Son was a student at Mississauga School of Music ("MSM").

[8] The Son referred to above is Mateusz Tarkowski who is the son of the Appellant.

[9] Therefore since one of the assumptions was that Mateusz Tarkowski was a student at Mississauga School of Music I find that he was enrolled as a student at the Mississauga School of Music.

[10] The Mississauga School of Music was a school that was teaching the courses referred to above. In *Hillman v. The Queen*, 2006 TCC 578 Rip J. (as he then was) made the following comments:

[12] Although I have already determined that BAR/BRI is not an educational institution in Canada, it may serve some purpose to consider whether it is an education institution. In *Friedland v. R.*,<sup>1</sup> Rowe D.J.T.C.C., after noting that there does not appear to be a universal definition of "educational institution", attempted to establish the parameters of the definition as it pertains to the *Act*:

The Oxford English Dictionary defines "education" as:

3. the systematic instruction, schooling or training given to the young in preparation for the work of life; by extension similar instruction or training obtained in adult age. Also, the whole course of scholastic instruction which a person has received. Often with limiting words denoting the nature or the predominant subject of the instruction or kind of life for which it prepares, as *classical, legal, medical, technical, commercial, art education*.

and "institution" as:

7. an establishment, organization, or association, instituted for the promotion of some object, esp. one of public or general utility, religious, charitable, educational, etc., e.g. a church, school, college, hospital, asylum, reformatory, mission or the like; [...] The name is often popularly applied to the building of the appropriated to the work of a benevolent or educational institution.

[13] Black's Law Dictionary, 6th Edition, defines "educational institution" as follows:

A school, seminary, college, university, or other educational establishment, not necessarily a chartered institution. As used in zoning ordinance, the term may include not only buildings, but also all grounds necessary for the accomplishment of the full scope of educational instruction, including those things essential to mental, moral, and physical development.

[11] Mateusz Tarkowski was taking Grade 3 and Grade 4 Harmony and Grade 9 Piano lessons at the Mississauga School of Music at the school's premises. He was tutored at the school by a teacher.

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<sup>1</sup> [2000] 1 C.T.C. 2938 (T.C.C.).

[12] Therefore it seems clear that the Mississauga School of Music was an educational institution as it was providing Mateusz Tarkowski with an education in music. The method of teaching was by tutoring but this is simply the method by which the courses were taught. The fact that the Mississauga School of Music itself did not have examinations did not mean that they were not providing him with an education or that he was not taking courses.

[13] In the Canadian Oxford Dictionary, second edition, “course” is defined as “a series of lectures, lessons, etc., in a particular subject”. Courses can be taught that do not have examinations at the end. There can still be “systematic instruction, schooling or training”, without examinations. As a result I find that the Mississauga School of Music is an educational institution.

[14] The next issue is whether or not the courses that Mateusz Tarkowski was taking were courses at a post-secondary school level. Mateusz Tarkowski did not graduate from high school until after 2004. Courses at the post-secondary school level would be courses that would be at a higher level than would be taught at a secondary school. It is the status of the course that is being taken that determines whether or not it is a post-secondary level course and not the status of the individual taking the course. Since Mateusz Tarkowski received a Grade 12 high school credit for Grade 8 Piano and Grade 2 Theory and since Grade 12 high school was his last year of high school, any courses taken at a higher level of music and theory than those for which he received his Grade 12 credit must be at a post-secondary school level. The Grade 9 Piano and Grades 3 and 4 Harmony courses must have been post-secondary courses as a Grade 12 high school credit was a prerequisite to taking these courses. Music courses are courses that are taught at universities. In *Setchell v. The Queen*, 2006 TCC 37, [2006] 2 C.T.C. 2259, 2006 DTC 2279 Woods J. noted that:

the SAP courses did not require completion of secondary school as a requirement.

[15] In this case however the Grade 9 Piano and Grades 3 and 4 Harmony courses that Mateusz Tarkowski was taking did require the completion of the secondary school level of music. Since these courses required the completion of the high school level music courses these courses were at the post-secondary school level. As a result I find that the Mississauga School of Music was providing courses at the post-secondary school level and that the amounts in issue that were paid for tuition for 2003 and 2004 were paid for tuition for post-secondary school level courses.

[16] Counsel for the Respondent had also raised the issue of the age of Mateusz Tarkowski as he was born in 1989 and therefore would have been 14 - 15 years old in 2003 and 2004. However, as a result of subparagraph 118.5(1)(a)(ii.2) of the *Act*, the age of the person taking the course is only relevant for individuals taking courses described in subparagraph 118.5(1)(a)(ii) of the *Act*. The age of the person taking the course is not relevant in relation to individuals taking courses described in subparagraph 118.5(1)(a)(i) of the *Act*, which are the courses that are the subject of this appeal.

[17] The appeal is allowed and the reassessments are vacated. The Appellant is entitled to his costs as determined in accordance with the *Tax Court of Canada Rules (Informal Procedure)*.

Signed at Halifax, Nova Scotia, this 18<sup>th</sup> day of October 2007.

“Wyman W. Webb”

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Webb J.

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COURT FILE NO.: 2007-565(IT)I  
STYLE OF CAUSE: MAREK D. TARKOWSKI AND HER  
MAJESTY THE QUEEN  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: October 11, 2007  
REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb  
DATE OF JUDGMENT: October 18, 2007

APPEARANCES:

Agent for the Appellant: Stella Tarkowski  
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COUNSEL OF RECORD:

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