

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20091123

Docket: A-47-09

Citation: 2009 FCA 342

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

BETWEEN:

FRANKLIN D. TALL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 23, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on November 23, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 23, 2009)

EVANS J.A.

[1] This is an appeal by Franklin D. Tall from a decision of the Tax Court of Canada (2008 TCC 677), in which Justice Valerie A. Miller dismissed Mr Tall's appeal from reassessments by the Minister of National Revenue of his tax liability for the taxation years 2001, 2002 and 2003.

[2] The Judge rejected Mr Tall's argument that the Minister's disallowance of certain medical expenses claimed under paragraph 118.2(2)(n) of the *Income Tax Act*, R.S.C 1985, c. 1(5th Supp.), violates section 15 of the *Canadian Charter of Rights and Freedoms* because that paragraph

provides that a medical expenses tax credit may only be claimed with respect to the purchase of substances “recorded by a pharmacist”. It is conceded that a pharmacist did not record the purchase by Mr Tall, a Buddhist whose religious beliefs lead him to avoid ingesting pharmaceutical products, of the substances in question in this appeal.

[3] We are not persuaded that the facts of this case are materially distinguishable from those in *Ali v. The Queen*, 2008 FCA 190, 2008 D.T.C. 6446, leave to appeal refused, [2008] SCCA No. 356 (“*Ali*”). This Court held in *Ali* that the “recorded by a pharmacist” requirement of paragraph 118.2(2)(n) does not violate section 15 of the Charter.

[4] Nor are we persuaded that the decisions of either the Tax Court in *Breger v. Canada*, 2007 TCC 254, [2007] 4 C.T.C. 2133, and in *Norton v. Canada*, 2008 TCC 29, or the Supreme Court of Canada in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 484, warrant a reconsideration of *Ali* by this Court in view of the principles established in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149.

[5] We are also of the view that the Judge made no error warranting the intervention of this Court when she exercised her discretion to award costs of the appeals to the Crown. However, we note the undertaking by the Crown that it will seek only one set of costs, namely, those with respect to the appeal of the Minister’s reassessment of the taxation year 2003.

[6] As for the award of costs of Mr Tall's appeal to this Court, we are all of the opinion that we should follow the normal rule that costs follow the event. Although Mr Tall based his appeal on a Charter issue, we note that he had a personal financial stake in the outcome and decided to proceed with his appeal even though the point in dispute had already been decided by this Court in *Ali*. In our view, an award of costs in the lump sum of \$1,500, including disbursements, would be appropriate.

[7] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-47-09

An appeal from the Judgment of Justice Miller, dated December 30, 2008, from the Tax Court of Canada File No.: 2004-657 (IT) I.

STYLE OF CAUSE: FRANKLIN D. TALL v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 23, 2009

**REASONS FOR JUDGMENT
OF THE COURT BY:** (EVANS, SHARLOW & RYER
J.J.A.)

**DELIVERED FROM THE
BENCH BY:** EVANS J.A.

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