Docket: 2005-563(IT)I

BETWEEN:

WILLARD WOODROW WILSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 1, 2005 at Belleville, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Genevieve Lévéille Cheryl Cruz

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of December, 2005.

"T. O'Connor"

O'Connor, J.

Citation: 2005TCC816
Date: 20051223
Docket: 2005-563(IT)I

BETWEEN:

WILLARD WOODROW WILSON,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

Issue

[1] The issue in this appeal is whether in the 2003 taxation year the Appellant is entitled to a deductible tax credit for medical expenses totalling $1,920.89 in respect of the cost of certain products ("products"), namely $81.19 for Vitalux and $1,839.70 for "HMS-90". The Appellant originally also contested a disallowance of medically related travel expenses, but that matter is no longer in dispute. The Respondent ("Minister") submits the disallowance was because the products were not recorded by a pharmacist.

Facts

[2] The Appellant is a doctor. The other relevant facts are described in the following extracts from the Minister's Reply to the Notice of Appeal ("Reply").

> 1. He admits the following facts as stated in the letters attached to the Notice of Appeal ...
>
> a) the Canada Customs and Revenue Agency ("CCRA") disallowed the Appellant's claim for medical expenses with respect to the cost of "HMS-90" and "Vitalux" ... ;

b) HMS-90 is considered to be natural food supplement, cannot be purchased at any pharmacy in Canada and the Appellant purchased said product from "Immunotec Research Ltd." ("Immunotec") ... ;

...

d) HMS-90 is a natural substance and is recognized by the medical profession as a treatment for Age Related Macular Degeneration ("A.M.D.") ... ;

...

f) HMS-90 and Vitalux were disallowed as medical expenses because they were not recorded by a pharmacist ...

...

11. In so reassessing the Appellant's income tax return for the 2003 taxation year, and in confirming said reassessment, the Minister relied on the following assumptions of fact:

a) Mentions the amount of the medical expenses disallowed - ...

b) the Appellant suffers from A.M.D. ... ;

c) as part of the treatment for A.M.D., the Appellant took Vitalux and HMS-90;

d) HMS-90 is considered to be a natural dietary supplement and Vitalux is a vitamin;

e) the Appellant purchased HMS-90 from Immunotec as it was not sold at pharamacies in Canada;

f) Vitalux was sold at pharmacies on an "over the counter" basis; and

g) the purchase of Vitalux and HMS-90 did not require the recording of said purchase by a pharmacist.

Appellant's Submissions

[3] Appellant's submissions appear from the following extracts from his Notice of Appeal and attachments thereto:

> The Revenue Section at Summerside Tax Centre made the arbitrary decision to put HMS-90 and Vitalux in the "waste basket" group with herbs, vitamins and similar substances, so that they could be disallowed as a medical expense. That arbitrary decision, which completely ignored the medical facts, was illogical, unreasonable, unjust, and wrong. The medical facts are that research has proved that HMS-90 and Vitalux exert a beneficial effect in AMD. (Age Related Macular Degeneration).
>
> ...
>
> If HMS-90 and Vitalux had existed when regulations 118.2(2) and 118.2((1) were written, they certainly would have been included in the group with insulin and B12 as a medical expense.
>
> Medicine is not a static thing. Medicine is an evolving science with new discoveries and new medications every year. HMS-90 and Vitalux are fine examples, and medical research will bring forth more such examples in the future. HMS-90 and Vitalux are not specifically named in the group 118.2(2)(K) with insulin and B12, because they did not exist years ago when those regulations were written. Therefore just because HMS-90 and Vitalux are not specifically mentioned in 118.2(2)(K) does not validate the arbitrary decision to place these medications in the "waste basket" group with herbs, so that they could be disallowed as a medical expense.
>
> The regulations governing drugs in paragraph (48), especially the group in 118.2(2)(K) are out of date and obsolete. In support of this statement I will mention liver extract, which is specifically named in 118.2(2)(K). Liver extract cannot be purchased, because it is no longer made, and is totally defunct.
>
> A doctor will not prescribe any medication that does not have a beneficial effect in a medical condition. Therefore any medication that is prescribed by a doctor should qualify as a medical expense. Nothing else makes any sense. Section 118.2(2)(K) should be discorded and replaced with one simple sentence – namely – Is there written, signed proof that the medication has been prescribed by a doctor. That would cover all situations that exist at present and also in the future.
>
> If proof is supplied that a medication exerts a beneficial effect in a medical condition and also written signed proof that a doctor has prescribed such

medication, then there is something terribly wrong with the system when Revenue Canada can disallow such medications as a deductible medical expense.

Respondent's Submissions

[4] Respondent submissions are set forth as follows in the Reply:

13. He relies on subsection 118.2(1) and paragraphs 118.2(2)(k) and 118.2(2)(n) of the Income Tax Act (the "Act").

14. He submits that the Appellant is not entitled to claim amounts expended for the dietary supplement HMS-90 and the vitamin Vitalux totaling $1,920.89 as medical expenses in the computation of non-refundable credits for the 2003 taxation year pursuant to subsection 118.2(1) of the Act as said products were not recorded by a pharmacist within the meaning of paragraph 118.2(2)(n) of the Act, and furthermore, in the case of HMS-90, was not purchased from a pharmacy.

15. He further submits that the Appellant is not entitled to claim amounts expended for the dietary supplement HMS-90 and the vitamin Vitalux totaling $1,920.89 as medical expenses in the computation of non-refundable credits for the 2003 taxation year pursuant to subsection 118.2(1) of the Act as said products were not insulin, oxygen, liver extract injectible for pernicious anaemia or vitamin B12 for pernicious anaemia as prescribed by a medical practitioner in accordance with paragraph 118.2(2)(k) of the Act.

Analysis

[5] The relevant provisions of the *Act* are paragraphs 118.2(2)(*k*) and 118.2(2)(*n*). They provide in calculating the medical expense credit for the following inclusions:

(k) for an oxygen tent or other equipment necessary to administer oxygen or for insulin, oxygen, liver extract injectible for pernicious anaemia or vitamin B12 for pernicious anaemia, for use by the patient as prescribed by a medical practioner;

...

(n) for drugs, medicaments or other preparations or substances (other than those described in paragraph (k)) manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist;

[6] The products are not mentioned in paragraph 118.2(2)(k), which does not contain the requirement of "recorded by a pharmacist". Therefore the issue in this appeal narrows down to whether the costs of the products were properly disallowed because, although they were prescribed by a physician, they were not "recorded by pharmacist".

[7] This issue has been dealt with in several decisions of this Court and of the Federal Court of Appeal. Many of those decisions commented on the apparent unfairness and lack of sensitivity in the Minister's strict adherence to the letter of the law but one conclusion that emerges is that a court must interpret and apply the law as enacted; it is up to Parliament and not a court to change the law. The decision of the Federal Court of Appeal in *Ray v. Canada*, 2004 F.C.A. 1, a decision binding on this Court ruled as follows:

> 4 The basis of the Crown's application for judicial review is that the Tax Court Judge erred in his interpretation of the phrase "as recorded by a pharmacist" in paragraph 118.2(2)(n). The Crown argues that those words limit the scope of paragraph 118.2(2)(n) to substances dispensed by a pharmacist under the legally mandated procedure for prescription drugs, which requires the keeping of certain records. If the Crown is correct, Ms. Ray is not entitled to the tax relief claimed, because all of the substances in issue were purchased off the shelf.
>
> 5 The legal issue in this case has been considered many times by the Tax Court. In all of those cases, except the one now under review, the phrase "as recorded by a pharmacist" was considered to be an essential element of paragraph 118.2(2)(n): see Poesiat Canada, [2003] T.C.J. No. 503 (QL); Lajeunesse-Lebel v. Canada, [2002] T.C.J. No. 46 (QL); Claussen Estate v. Canada, [2003] T.C.J. No. 15 (QL); Bekker v. Canada, [2002] T.C.J. No. 670 (QL); Lundrigan v. Canada, [2002] T.C.J. No. 160 (QL); Melnychuk v. Canada, [2002] T.C.J. No. 84 (QL); Noaille v. Canada, [2001] T.C.J. No. 603 (QL); Bishoff v. Canada, [2001] T.C.J. No. 597 (QL); Mauro v. Canada, [2001] T.C.J. No. 415 (QL); Banman v. Canada, [2001] T.C.J. No. 111 (QL); Mantha v. Canada, [1999] T.C.J. No. 500 (QL); Williams v. Canada, [1997] T.C.J. No. 1346 (QL); Mongillo v. Canada, [1994] T.C.J. No. 831 (QL).
>
> 6 To similar effect is the following obiter dictum in the decision of Justice Rothstein, speaking for the Court in Dunn v. Canada, [2002] F.C.J. No. 1816 (QL), at paragraph 6:
>
> > [6] Although we do not need to decide the point, it would appear that the requirement that medications be recorded by a pharmacist may be to limit the entitlement to payments for medications that are only available upon

> prescription as opposed to over the counter or other medications. In this case the Tax Court Judge found that the medications provided were not available through regular pharmacies or other medical supply sources and upon our review of the record, it is certainly not obvious that the medications prescribed were prescription drugs.

7 Even in Pagnotta and Frank, the two cases cited in the quoted portion of the Tax Court decision under review, the phrase "as recorded by a pharmacist" was held to be an essential element of paragraph 118.2(2)(n). However, in those cases the recording requirement was held to be satisfied by pharmacist's sales slips or invoices.

Standard of Review

...

Meaning of the words "recorded by a pharmacist"

11 In my view, the Tax Court Judge erred in law when he concluded that the words "as recorded by a pharmacist' in paragraph 118.2(2)(n) could be ignored. I understand why he felt that those words represented an unjustifiable impediment to tax relief for Ms. Ray. Like the Tax Court Judge, I sympathize with Ms. Ray. However, it is not open to this Court, or the Tax Court, to disregard statutory requirements imposed by Parliament, even if they are difficult to rationalize on policy grounds. It is for Parliament alone to determine whether the words "as recorded by a pharmacist" should be removed from paragraph 118.2(2)(n).

12 In my view, it is reasonable to infer that the recording requirement in paragraph 118.2(2)(n) is intended to ensure that tax relief is not available for the cost of medications purchased off the shelf. There are laws throughout Canada that govern the practice of pharmacy. Although the laws are not identical for each province and territory, they have common features. Generally, they prohibit a pharmacist from dispensing certain medications without a medical prescription, and they describe the records that a pharmacist is required to keep for medications dispensed by prescription, including information that identifies the prescribing person and the patient. There is no evidence that pharmacists anywhere in Canada are required to keep such records for the substances in issue in this case.

13 I cannot accept the suggestion that, in the case of a medication that is prescribed by a physician but is purchased at a pharmacy off the shelf, a sales slip or invoice from the pharmacist would be a sufficient "recording" to meet the statutory requirement. A record in that form cannot meet the apparent function of the recording requirement. There must be a record kept by the pharmacist in his or her capacity as pharmacist. That necessarily excludes substances, however useful or beneficial, that are purchased off the shelf.

> 14 Nor do I think it relevant to the interpretation of paragraph 118.2(2)(n) that a physician may dispense prescription medicines, and even sell them, without breaching any legislation applicable to pharmacists. It appears that a patient who purchases prescription medications from a physician may not be entitled to a medical expense tax credit because there would be no recording by a pharmacist: see Dunn (cited above). Some may consider that to be an unfair or inappropriate result. Perhaps it is, but that cannot justify an interpretation of paragraph 118.2(2)(n) that ignores the words "as recorded by a pharmacist".

[8] In the present case I have no alternative but to follow the decision of the Federal Court of Appeal. Since the products are not specifically mentioned in paragraph 118.2(2)(*k*) and since they were not recorded by a pharmacist their costs cannot be included in the calculation of the medical expense credit.

[9] The appeal is dismissed.

Signed at Ottawa, Canada, this 23rd day of December, 2005.

"T. O'Connor"

O'Connor, J.

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COURT FILE NO.:	2005-563(IT)I
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Genevieve Lévéille Cheryl Cruz

COUNSEL OF RECORD:

For the :

Name:

Firm:

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