

Docket: 2004-719(IT)I

BETWEEN:

KAREN J. KLYWAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on June 3, 2004 at Brandon, Manitoba

Before: The Honourable Justice R.D. Bell

Appearances:

For the Appellant:

The Appellant herself

Counsel for the Respondent:

Penny Piper

---

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is allowed, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 13th day of August, 2004.

"R.D. Bell"

---

Bell, J.

Citation: 2004TCC523

Date: 20040813

Docket: 2004-719(IT)I

BETWEEN:

KAREN J. KLYWAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

**Bell, J.**

#### **ISSUE**

[1] Whether the cost of a hot tub acquired in 2001 is a medical expense within the definition of same in subsection 118.2(2) of the *Income Tax Act* ("Act") for the purpose of computing a medical expense credit within the meaning of subsection 118.2(1) of the *Act*.

#### **FACTS**

[2] The Appellant, in computing her tax liability for the 2001 taxation year, claimed in the computation of tax credit and tax payable, the amount of \$9,639 for medical expenses made up as follows:

Cost of hot tub	\$7,974.30
Installation of hot tub	809.30
Doctor's letter	16.25
Dental	366.08
Medical travel	464.94
Other	8.13
Total	\$9,639.00

The Respondent allowed the foregoing expenses except for the hot tub cost of \$7,974.30. This appeal is from that disallowance.

[3] The Appellant was diagnosed in 2001 with fibromyalgia. She received physiotherapy and medication for the pain. She testified that her doctor said it was in her best interest to purchase a hot tub and to use it daily to ease pain and to help her sleep. She stated that her doctor believed the cost would be a medical expense. She asserted further that she had phoned Revenue Canada and was advised that it was "OK" and was a "medical expense". She followed this with the statement that she and her husband then had the tub installed. She said that she uses it every day and sometimes more often than daily, depending upon the pain. She described it as having water jets and hot temperature and being muscle relaxing. She said that it alleviated the severe pain in her arms, shoulders, back and neck. Although a hot tub was available one-half hour away, she and her husband decided to buy and install the hot tub because driving there and back "would undo the good". She stated that a non-recliner tub would not do "the same thing" and that other models did not have the same jet system. She said that she gets into the tub and gets out of it by herself. She testified that she uses the tub twelve months a year. She said that she needed it for her health, that her husband used it occasionally and that her grandchildren used it two or three times a year, adding that it was hard to say no to children. She stated that she can get into the tub with great difficulty but finds it much easier to walk when she gets out of it. She also said, on cross examination, that she could still walk without the tub but that it would be with difficulty.

[4] The Appellant introduced in evidence a letter dated February 12, 2002 addressed "To Whom It May Concern" regarding the Appellant. It reads as follows:

This is to certify that Ms. Klywak is under my care for medical reasons.

She has a working diagnosis of fibromyalgia. She finds that moist heat is of significant benefit in controlling her symptoms.

Recently we have advised her for medical reasons to purchase a hot tub. As a result of this, her ability to work has increased and her usage of medications has decreased. She has medical indications to have her hot tub, and I hope that through Income Tax, you will be able to support this deduction.

Yours sincerely,

(signature)

Dr. Michael Omichinski

[5] The Appellant also introduced a letter dated February 16, 2004 addressed "To Whom It May Concern" respecting the Appellant signed by the same doctor and reading as follows:

This is to certify that I am Karen's physician. I have been taking care of her for the last 2½ years with regards to a problem with fibromyalgia. We have tried various medicinal and non-medicinal types of treatments to help control her symptomatology. We have not had great success, although from a medical standpoint a hot tub has resulted in a significant improvement in her symptoms to the point where she has been able to function reasonably well. Apparently they are attempting to obtain income tax credit for this and I believe that it is medically indicated that this be covered.

Thank you in advance for your attention in this matter.

Yours sincerely,

### APPELLANT'S SUBMISSIONS

[6] The Appellant stated that if she did not have the hot tub she would be loaded with medication and could not function properly. She referred to the letters from her doctor. She also referred to *Johnson v. Her Majesty the Queen*, [2003] T.C.J. No. 41, in which Little, J. of this Court allowed as a medical expense the cost of a hot tub purchased on the recommendation of the Appellant's doctor. The learned Judge said:

I accept the Appellant's credible and uncontradicted evidence that she purchased the hot tub only for the purpose of hydrotherapy and relief of pain.

[7] She also referred to *James Donaghue v. Canada*, [2003] T.C.J. No. 721, in which O'Connor, J. considered the hot tub a prescribed device since he believed that it qualified under subparagraph (i) of Regulation 5700 as a device that is designed to assist an individual in walking where the individual has a mobility impairment. He stated further that it may qualify under subparagraph 118.2(2)(m) of the *Act* since it is of a prescribed kind and since it was purchased on the advice

of a medical practitioner. He stated that there was no indication that the prescribing must be in writing and that the hot tub greatly alleviated the Appellant's problem, thus enabling him to be mobile both within and outside his home.

### RESPONDENT'S SUBMISSIONS

[8] Respondent's counsel referred to paragraph 118.2(2)(m) which reads as follows:

For the purposes of subsection (1), a medical expense of an individual is an amount paid

...

(m) **[prescribed devices]** - for any device or equipment for use by the patient that

- (i) is of a prescribed kind,
- (ii) is prescribed by a medical practitioner,
- (iii) is not described in any other paragraph of this subsection, and
- (iv) meets such conditions as may be prescribed as to its use or the reason for its acquisition,

to the extent that the amount so paid does not exceed the amount, if any prescribed in respect of the device or equipment;

Counsel then referred to section 5700 of the *Income Tax Regulations* ("*Regulations*"), the pertinent part of which reads as follows:

For the purposes of paragraph 118.2(2)(m) of the Act, a device or equipment is prescribed if it is a

- (i) device that is designed to assist an individual in walking where the individual has a mobility impairment;

[9] The Respondent submitted, with reference to Regulation 5700, that the device referred to therein was designed to assist an individual to walk where that

individual had mobility impairment and also that although it helped her with pain it did not help her to walk.

[10] Respondent's counsel referred to *Gibson v. Canada*, [2000] T.C.J. No. 753, affirmed by the Federal Court of Appeal, [2001] F.C.J. No. 1758. In this court Mogan, J. described the Appellant as having developed fibromyalgia in and around her neck, causing severe pain in the muscles around the neck and in her right arm. After a description of therapy he wrote that the Appellant found relief from being in a tub with jets of hot water focused on her neck and arms. She, therefore, had a whirlpool spa installed in her home. She found that the hot tub reduced her pain and allowed her more mobility. The judgment referred to *Vantingham v. The Queen*, [1999] 2 C.T.C. 2159 in which Rip, J. of this Court determined that the "renovation" of a bathroom may include the installation of items that were not found in the bathroom when originally built, such renovations being the cost of installing a hot tub. Judge Mogan also referred to *Clark v. The Queen*, [1994] 4 C.T.C. 2005 in which Rowe, J. of this Court dismissed the appeal of a wife who attempted to deduct as a medical expense the cost of purchasing and installing a hot tub which was prescribed by her husband's arthritis specialist. He further referred to *Ollman v. The Queen*, [2000] 1 C.T.C. 2789 in which a woman purchased a hot tub on the recommendation of her orthopaedic surgeon and physiotherapist to get relief from chronic lower back pain following a car accident and serious injuries. O'Connor, J. held that the cost of the hot tub did not qualify as a medical expense. He referred also to *Gordon v. The Queen*, [2000] 2 C.T.C. 2399 in which Gordon's wife was recovering from a car accident which left her with severe rheumatologic disorders including fibromyalgia and inflammatory osteoarthritis. Because she required frequent hot baths it was recommended that she have one installed in her home. Beaubier, J. concluded that the hot tub was not a device or equipment within the meaning of paragraph 118.2(2)(m) but he allowed the installation cost as a reasonable expense relating to a renovation or alteration of the Gordon family dwelling. Mogan, J. concluded that having regard to paragraph 118.2(2)(m) of the *Act* and the items listed in Regulation 5700 he was satisfied that the hot tub did not qualify as a "device or equipment" and allowed only the cost of installing same.

## ANALYSIS AND REASONS

[11] The first question to be answered is whether the hot tub is a device that is "designed to assist an individual in walking where the individual has a mobility impairment". Although it has been suggested that such a device must be designed,

such as a cane or crutches, to assist in the actual physical exercise of walking, why should those words be accorded such a limited interpretation? The evidence was clear that the regular and continuing use of the hot tub did assist her to walk. The words "designed to assist an individual in walking" surely cannot be interpreted to refer only to mechanical *external* aids which, although assisting the walking function, would not assist the *internal* muscular function arising from an internal disease.

[12] A "hot tub" is defined in the *New Shorter Oxford English Dictionary*, Volume I as:

A wooden tub, freq. accommodating several people, filled with hot aerated water for recreation or physical therapy.

The evidence is clear that the hot water jets in the Appellant's tub were of therapeutic value, relaxing muscles and alleviating severe pain in her arms, shoulders, back and neck. She testified that her doctor had recommended the use of a hot tub that he, the doctor, regarded as a medical expense. That doctor's letter of February 12, 2002 stated that he had advised her, for medical reasons, to purchase a hot tub resulting in increased ability to work and decreased usage of medications. I find that it was, in these circumstances, designed, in part at least, for a therapeutic purpose assisting the Appellant in walking, her fibromyalgia having produced a mobility impairment. Therefore the hot tub is "a device or equipment for use by the patient that ... is of a prescribed kind" within the meaning of 118.2(2)(m)(i).

[13] Can it be said that this hot tub was "prescribed by a medical practitioner"? The word "prescribe" is given several meanings in Volume II of the above dictionary. They include:

...write before, direct in writing, etc., ...Write first or beforehand; write with foreknowledge. ...Advise or order the use of (a medicine, remedy, etc.), esp. by an authorized prescription; *fig.* recommend as something beneficial... advise or order (a person) to take (a medicine etc.).

The Appellant's evidence that her doctor told her that it was in her best interest to purchase a hot tub and use it daily qualifies the hot tub as being "prescribed by a medical practitioner", Dr. Omichinski having described himself as a medical doctor. This is buttressed by the letter stating that he had advised her, for medical reasons, to purchase the hot tub and the subsequent letter outlining the beneficial

results from the use thereof. I agree with O'Connor, J. that "there is no indication that the prescribing must be in writing".

[14] I conclude, therefore, that the disputed cost falls within the definition of a medical expense in that it was an amount paid for use by a patient for equipment of a prescribed kind, prescribed by a medical practitioner and not described in any other portion of subsection 118.2(2).

[15] Accordingly, the appeal is allowed.

Signed at Ottawa, Canada this 13th day of August, 2004.

"R.D. Bell"

---

Bell, J.



CITATION: 2004TCC523  
COURT FILE NO.: 2004-719(IT)I  
STYLE OF CAUSE: Karen J. Klywak v. The Queen  
PLACE OF HEARING: Brandon, Manitoba  
DATE OF HEARING: June 3, 2004  
REASONS FOR JUDGMENT BY: The Honourable Justice R.D. Bell  
DATE OF JUDGMENT: August 13, 2004

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Penny Piper

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg  
Deputy Attorney General of Canada  
Ottawa, Canada