

Docket: 2010-2410(IT)I

BETWEEN:

HOWARD OSTLUND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on March 28, 2011, at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Bryn Frape

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**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 2007 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 1<sup>st</sup> day of April 2011.

“G. A. Sheridan”

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Sheridan J.

Citation: 2011TCC197  
Date: 20110401  
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BETWEEN:

HOWARD OSTLUND,

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and

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Respondent.

### **REASONS FOR JUDGMENT**

Sheridan J.

[1] The issue in this appeal is whether the Minister of National Revenue properly disallowed the claim of the Appellant, Howard Ostlund, for a Disability Tax Credit in 2007 in respect of his son who has been diagnosed with Asperger's Syndrome. Mr. Ostlund and his wife, Sandra Ostlund, testified at the hearing and were entirely credible in their evidence.

[2] But as Mr. Ostlund explained at the hearing, it is not so much the facts that are in dispute as the Minister's restrictive application of the eligibility criteria for the Disability Tax Credit as set out in sections 118.3 and 118.4 of the *Income Tax Act*. These are detailed and technical provisions which include the eligibility criteria and the formula for the calculation of the credit but briefly summarized, a Disability Tax Credit will be available where the person in respect of whom it is claimed has a severe and prolonged physical or mental impairment that markedly restricts his ability to perform a single basic activity of daily living as further defined in the *Act*.

[3] In reassessing the 2007 taxation year, the Minister made the following assumptions of fact:

- a. P.O. was born in 1990;
- b. P.O. has been diagnosed with Asperger Syndrome;

- c. P.O. is able to perform daily living skills such as simple chores, personal hygiene and simple purchases;
- d. P.O. is able to express his basic needs, but has difficulty interpreting social cues or making friends;
- e. P.O. can make appropriate decisions and judgments in day to day situations;
- f. P.O. has no significant memory deficits;
- g. P.O. requires an excessive amount of support to adapt to change, but only during periods of exacerbation or in stressful situations;
- h. P.O. requires little or no supervision;
- i. P.O.'s mental functions necessary for everyday life are intact;
- j. P.O. does not have a severe and prolonged mental or physical impairment; and
- k. P.O.'s ability to perform a basic activity of daily living was not markedly restricted and, more specifically, P.O. was not markedly restricted in his ability to perform mental functions.

[4] Mr. and Mrs. Ostlund agreed with the essence of the above description of their son's medical condition. They were candid in their admission that as of 2007, Asperger Syndrome did not "markedly restrict" his ability to perform daily living skills or mental functions. Their point in appealing was to show the unfairness of the Disability Tax Credit provisions to parents who invest themselves - physically, emotionally and financially - in the task of enhancing their children's potential. In their case, Mrs. Ostlund gave up a career in the civil service to attend to their son's needs; as for Mr. Ostlund, having only one income put a greater burden on him. Happily, their efforts have borne fruit - their son has just completed his third year of university and is looking forward to further success in the sciences, an area in which his parents say he excels.

[5] While the Ostlunds are pleased with the improvement in their son's condition, they argued that they ought not to be penalized for having helped him to reduce his degree of impairment. In his argument, Mr. Ostlund reminded the Court of the purpose of the Disability Tax Credit, citing the following passage from a document

entitled *Disability tax Fairness, Report of the Technical Advisory Committee in Tax Measures for Persons with Disabilities*<sup>1</sup>:

The purpose of the disability tax credit is to provide for greater tax equity by allowing some relief for disability costs, since these are an unavoidable additional expense not faced by other taxpayers. In effect, the disability tax credit provides tax relief for assumed non-itemizable costs of \$6,486 (the credit amount for 2004), which translates to a reduction of federal income tax otherwise owing or payable of a maximum of \$1,038 (16 percent of \$6,486). The credit therefore is intended to act as a tax fairness measure rather than a subsidy or support for persons with disabilities.<sup>2</sup>

[6] In the Ostlunds' view, the Disability Tax Credit provisions should be changed to recognize the true "non-itemizable" cost to parents of helping a child to overcome his disabilities.

[7] The Ostlunds were well informed and eloquent in their explanation of their son's disability and their concerns with the legislation. As I explained to them at the hearing, however, such a presentation is more usefully made to the legislators. What they were effectively asking me to do was to change the law, a power conferred exclusively on Parliament; my authority is restricted to applying the law as it is. Thus, while I have no reason to doubt their evidence of the impact of their son's condition on their family, it is equally clear that in 2007, his disability was not one which met the criteria under sections 118.3 and 118.4 of the *Act*. For that reason, the appeal of the 2007 taxation year must be dismissed.

Signed at Ottawa, Canada, this 1<sup>st</sup> day of April 2011.

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"G. A. Sheridan"

Sheridan J.

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<sup>1</sup> Exhibit A-2.

<sup>2</sup> Original footnotes deleted from the text.

CITATION: 2011TCC197

COURT FILE NO.: 2010-2410(IT)I

STYLE OF CAUSE: HOWARD OSTLUND AND HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: March 28, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: April 1, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Bryn Frape

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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