Docket: 2010-3762(IT)I

BETWEEN:

MAY ABDALLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 10, 2011 at Windsor, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Mohammad Amer
Counsel for the Respondent:	Joanna Hill

JUDGMENT

The Appellant's appeal from the reassessment of her tax liability for 2008 is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that in determining the credit related to the Appellant's spouse's tuition transferred from the Appellant's spouse to the Appellant as provided in sections 118.8 and 118.81 of the *Income Tax Act* (the "*Act*"), the amount of $3,154 of tuition paid by her spouse to the University of Phoenix is to be included in determining the amount that the Appellant's spouse may deduct under section 118.5 of the *Act*. The Respondent shall pay costs to the Appellant which are fixed in the amount of $100.

Signed at Toronto, Ontario, this 5th day of July 2011.

"Wyman W. Webb"

Webb, J.

Citation: 2011TCC328
Date: 20110705
Docket: 2010-3762(IT)I

BETWEEN:

MAY ABDALLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant claimed a credit that was transferred to her from her spouse. This credit was based on the Appellant's spouse having paid $5,000 for tuition that the Appellant's spouse could include in his tuition credit. Of this amount, the Canada Revenue Agency disallowed the amount of $3,154 for tuition that the Appellant's spouse paid to the University of Phoenix for courses that he was taking online and therefore denied the transfer of the credit to the Appellant based on this amount.

[2] Although, in determining the credit that is transferred from an individual to his or her spouse for the purposes of the *Income Tax Act* (the "*Act*"), there is no distinction between the portion of the credit based on the tuition credit available under section 118.5 of the *Act* and the portion of the credit available under section 118.6 of the *Act*, in the Reply it is stated that the credit transferred was based on the tuition paid by the Appellant's spouse. Since the amount that the Appellant's spouse paid for tuition is greater than the maximum amount[1] that could be used to determine the amount of credit that may be transferred, it is only necessary to review the provisions related to the tuition credit in this appeal.

[1] In this case the maximum amount that could be used to determine the tuition and education credit which could be transferred to the Appellant is $3,154 because the Appellant was allowed a credit based on tuition paid by the Appellant's spouse of $1,846 and the maximum amount that can be used to determine the amount of the tuition credit and the credit available under section 118.6 of the *Act* that may be transferred is $5,000.

[3] A person may, subject to certain limitations, transfer to his or her spouse[2] any tuition credit or the credit available under section 118.6 of the *Act* that the person is unable to use to reduce his or her taxes payable. In this appeal the issue is whether the Appellant's spouse was entitled to include the amount he paid for tuition in 2008 in determining the amount he could claim as a tuition credit pursuant to section 118.5 of the *Income Tax Act* (the "*Act*"). If the tuition amount paid by the Appellant's spouse could not be included in determining the amount of the tuition credit that the Appellant's spouse could claim pursuant to this section, then the credit related to this tuition could not be transferred to the Appellant.

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

> 118.5 (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, or
> >
> > …
> >
> > 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,
> >
> > …
> >
> > (*b*) where the individual was during the year a student in full-time attendance at a university outside Canada in a course leading to a degree, 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 university, except any such fees
> >
> > > (i) paid in respect of a course of less than 13 consecutive weeks duration,
> >
> > …and

[2] The person may, instead, transfer the available credit to a parent or grandparent.

> (*c*) where the individual resided throughout the year in Canada near the boundary between Canada and the United States if the individual
>
> (i) was at any time in the year a student enrolled at an educational institution in the United States that is a university, college or other educational institution providing courses at a post-secondary school level, and
>
> (ii) commuted to that educational institution in the United States,
>
> 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 exceed $100, except to the extent that those fees
>
> (iii) are paid on the individual's behalf by the individual's employer and are not included in computing the individual's income, or
>
> (iv) were included as part of an allowance received by the individual's parent on the individual's behalf from an employer and are not included in computing the income of the parent by reason of subparagraph 6(1)(*b*)(ix).

[5] There are three possible situations contemplated by this subsection:

(a) where the individual is enrolled at an educational institution in Canada;

(b) where the individual is in full-time attendance at a university outside Canada; and

(c) where the individual resided near the border between Canada and the United States, was enrolled at an educational institution in the United States that provided courses at the post-secondary school level and the individual commuted to such institution.

[6] If either (a) or (c) is applicable, there is no restriction on the duration of the courses that must be taken. If (b) is applicable, then subparagraph 118.5(1)(*b*)(i) of the *Act* provides that the fees paid will not include the fees “paid in respect of a course of less than 13 consecutive weeks duration”.

[7] The Appellant’s spouse was taking courses over the internet from the University of Phoenix. There was no dispute that the courses would lead to a degree.

Counsel for the Respondent indicated that the Respondent did not take issue with respect to whether the Appellant's spouse was in full-time attendance at the University of Phoenix and therefore the only issue in relation to paragraph 118.5(1)(*b*) of the *Act* was the duration of the courses taken by the Appellant's spouse.

[8] The Appellant's spouse relied on the decision of Justice Little in *Cammidge* v. *The Queen*, 2011 TCC 172. In this decision Justice Little concluded that since the University of Phoenix had two locations in Canada in 2008, that the taxpayer in that case could claim the amount paid for tuition as part of the amount determined under paragraph 118.5(1)(*a*) of the *Act*. As noted above, if paragraph (a) applies, then there is no restriction on the duration of the courses taken.

[9] The Appellant's spouse did not introduce any evidence in relation to the locations that the University of Phoenix had in Canada in 2008 and was not even aware that the University of Phoenix had any locations in Canada until he read the decision of Justice Little in *Cammidge*, above.

[10] Justice Beaubier in *Robinson* v. *The Queen*, 2007 DTC 348, 2006 TCC 664 also concluded that since the University of Phoenix had a campus in Canada in 2004 that the tuition paid by the taxpayer in that case qualified for a credit pursuant to paragraph 118.5(1)(*a*) of the *Act*. Justice Beaubier stated that:

> 6 The University of Phoenix had a campus in Canada in 2004. It conforms with subparagraph 118.5(1)(a)(i) of the *Income Tax Act* since it is an "other educational institution providing courses at a post-secondary school level".

[11] In the recent decision of *Faint* v. *The Queen*, 2011 TCC 260, Justice Margeson concluded that the taxpayer, who took online courses from the University of Phoenix, was not enrolled at an educational institution in Canada, even though the University of Phoenix had a campus in Canada. The taxpayer in that case did not attend any classes at the Canadian campus nor was there any other connection to the Canadian campus.

[12] In *Cammidge* and *Robinson* there was no indication that the taxpayer attended any classes at the Canadian locations of the University of Phoenix nor was there any indication that there was any other connection between the Canadian locations and the taxpayers. Therefore it would appear that the decisions in the cases of *Cammidge* and *Robinson* cannot be reconciled with the decision in the case of *Faint*.

[13] The Supreme Court of Canada in *The Queen* v. *Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 DTC 5523 (Eng.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601, stated that:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[14] It seems to me that the requirement of paragraph 118.5(1)(*a*) of the *Act* is that the taxpayer must be "*enrolled at an educational institution in Canada*" and not simply enrolled at an educational institution that has a location in Canada. There are three situations contemplated by subsection 118.5(1) of the *Act*. The third situation is one where an individual is enrolled at an educational institution in the United States and commutes to that institution. It seems to me that this contemplates that the place of enrolment is the place where the classes will be held. It also seems to me that the same interpretation of "enrolled at an educational institution" should apply for the purposes of paragraph 118.5(1)(*a*) of the *Act*. It does not seem to me that the Appellant's spouse, who did not even know that the University of Phoenix had any locations in Canada, should be considered to have enrolled at an educational institution in Canada. He indicated that he was taking courses offered by the University of Phoenix from their location in Phoenix. He was not taking any courses at any Canadian location of the University of Phoenix. It does not seem to me that the Appellant's spouse was enrolled at an educational institution in Canada.

[15] Therefore, in order for the fees paid by the Appellant's spouse to qualify for a tuition credit, the fees must have been paid in respect of a course that was at least 13 consecutive weeks in duration. The Appellant's spouse took several courses in 2008. Each course lasted for 6 to 8 weeks and when one course finished another one began. Therefore the Appellant's spouse spent more than 13 consecutive weeks taking courses. The issue in this appeal is whether the consecutive courses, with a duration of more than 13 consecutive weeks, is sufficient to allow the amount paid for these courses to be included as tuition for the purposes of paragraph 118.5(1)(*b*) of the *Act*

when the courses, on an individual basis, were less than 13 consecutive weeks in duration.

[16] There are two conflicting decisions in relation to this matter[3]. In *Ferre* v. *The Queen*, 2010 TCC 593 Justice Paris concluded that the reference to "a course" in subparagraph 118.5(1)(*b*)(i) of the *Act* means an individual course. Justice Paris stated that:

> 24 In this case, the individual courses or "modules" taken by the Appellant in 2006 and 2007 were less than 13 weeks in length, and therefore, the fees paid in respect of those modules are not eligible for the tuition credit.

[17] In the recent decision of Justice Bowie in *Siddell* v. *The Queen*, 2011 TCC 250, Justice Bowie referred to the decision of Justice Paris in *Ferre* but concluded that "the word 'course' in this context [refers] not to the individual modules, but the entire curriculum pursued throughout the academic year". He thus concluded that the taxpayer was entitled to claim a tuition tax credit for what appears to be the same MBA program offered by the University of Liverpool that was considered in *Ferre*.

[18] I agree with the conclusion reached by Justice Bowie that individuals in the circumstances of the taxpayer in *Siddell* and the Appellant's spouse in this case should be entitled to include the fees paid for tuition in determining their tuition tax credit. It seems to me that this conclusion can be supported based on the application of the *Interpretation Act* to the *Act*.

[19] Subsections 3(1) and 33(2) of the *Interpretation Act* provide that:

> 3. (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.
>
> …
>
> 33. (2) Words in the singular include the plural, and words in the plural include the singular.

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[3] Counsel for the Respondent had also referred to the decisions of Justice Bowie in *Ali* v. *The Queen*, 2004 TCC 726, [2005] 1 C.T.C. 2230 and *Fayle* v. *The Queen*, 2005 TCC 71, [2005] 1 C.T.C. 2840. In *Ali* there were two terms in question – one was 11 weeks in duration and the other was 13 weeks in duration. The 11 week term did not qualify and the 13 week term did qualify. In *Fayle* the course lasted six weeks. Neither one of these decisions assists in resolving the meaning of "a course" in subparagraph 118.5(1)(*b*)(i) of the *Act* in the context of this appeal where the duration of the consecutive courses is 13 weeks or more.

[20] Therefore unless a contrary intention appears, the word “course” in subparagraph 118.5(1)(*b*)(i) of the *Act* will include “courses”. The language used in paragraph 118.5(1)(*b*) of the *Act* is as follows:

> … where the individual was during the year a student in full-time attendance at a university outside Canada in a course leading to a degree, 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 university, except any such fees
>
> (i) paid in respect of a course of less than 13 consecutive weeks duration,

[21] For the purposes of the tuition credit the fees are determined “in respect of the year”. Any of the fees that are determined for the year that are paid in respect of “a course” of less than 13 consecutive weeks duration are not to be included. Would it have been the intention of Parliament that a single course of not less than 13 consecutive weeks duration leading to a degree would qualify for a tuition credit but two or three courses that are taken that would lead to a degree and which are in total at least 13 consecutive weeks in duration would not qualify for a tuition credit? In either case the individual is attending class (in person or online) and working on the course materials for at least 13 consecutive weeks and in each case the course or courses lead to a degree.

[22] It does not seem to me that there is an intention that the reference to “a course” would only refer to the singular and therefore the amount paid for a single course of 13 consecutive weeks duration would qualify for a tuition credit but the amount paid for two or more courses that last for 13 consecutive weeks would not qualify for a tuition credit. As well, there is a reference to “a course” in the first part of paragraph 118.5(1)(*b*) of the *Act* (there is a requirement that the individual be “a student … in a course”) and it does not seem to me that this reference to “a course” should be interpreted as including only the singular. Paragraph 118.5(1)(*b*) of the *Act* would apply if the individual takes one course or more than one course. Since the first reference to “a course” in paragraph 118.5(1)(*b*) of the *Act* would include the plural, the second reference to “a course” in paragraph 118.5(1)(*b*) of the *Act* (which is in subparagraph 118.5(1)(b)(i) of the *Act*) should also include the plural.

[23] Counsel for the Respondent referred to the definition of “qualifying educational program” in subsection 118.6(1) of the *Act*. This definition provides, in part, as follows:

> "qualifying educational program" means a program of not less than three consecutive weeks duration that provides that each student taking the program spend not less than ten hours per week on courses or work in the program …"

[24] The argument of counsel for the Respondent was that different language was used in this definition and therefore if Parliament would have intended that "a course" would mean a course of study then language such as that used in this definition would have been used. However, this does not address the question of whether the singular should include the plural. It seems to me that the wording in this provision supports a finding that the singular "a course" in subparagraph 118.5(1)(*b*)(i) of the *Act* should include the plural. In this definition only the plural form of "courses" is used. It does not seem to me that a program would not be a qualifying educational program if it otherwise satisfies this definition but each student spends his or her time on only one course and not multiple courses. It seems to me that the use of the plural in this definition would include the singular and therefore it would seem logical that the use of the singular "a course" in subparagraph 118.5(1)(*b*)(i) of the *Act* would include the plural.

[25] It also seems to me that if subparagraph 118.5(1)(*b*)(i) of the *Act* were to refer to a *particular* course of less than 13 consecutive weeks duration or otherwise were to specify that each course for which the person paid fees (which were to be included for the tuition credit) had to be at least 13 consecutive weeks in duration, then this would support the position of the Respondent. It also seems to me that the additional limitations that are also imposed, *i.e.*, that the course must lead to a degree and that the course or courses must still be 13 consecutive weeks in duration, will limit the types of courses for which tuition fees may be claimed.

[26] As a result it seems to me that the exception in subparagraph 118.5(1)(*b*)(i) of the *Act* should be read as follows (to include the plural for "a course"):

> … except any such fees
>
> > (i) paid in respect of a course [or courses] of less than 13 consecutive weeks duration,

[27] Therefore tuition fees paid by an individual will qualify under paragraph 118.5(1)(*b*) of the *Act* for a credit if the fees are paid for a course or for courses that lead to a degree and the course or the courses are at least 13 consecutive weeks in duration. Since the courses taken by the Appellant's spouse were at least 13

consecutive weeks in duration, the tuition fees paid by the Appellant's spouse will qualify for a credit pursuant to paragraph 118.5(1)(*b*) of the *Act* and therefore this credit can be transferred to the Appellant.

[28] As a result the Appellant's appeal from the reassessment of her tax liability for 2008 is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that in determining the credit related to the Appellant's spouse's tuition transferred from the Appellant's spouse to the Appellant as provided in sections 118.8 and 118.81 of the *Act*, the amount of $3,154 of tuition paid by her spouse to the University of Phoenix is to be included in determining the amount that the Appellant's spouse may deduct under section 118.5 of the *Act*. The Respondent shall pay costs to the Appellant which are fixed in the amount of $100.

Signed at Toronto, Ontario, this 5th day of July 2011.

"Wyman W. Webb"

Webb, J.

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STYLE OF CAUSE:	MAY ABDALLA AND HER MAJESTY THE QUEEN
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APPEARANCES:

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