

Docket: 2012-3549(IT)I

BETWEEN:

TRUDY TALLON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 3, 2014 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: David Bullough

Counsel for the Respondent: Ryan Gellings

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2009 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to a medical expense tax credit with respect to additional expenses in the amount of \$17,494.50.

The appellant is awarded costs in accordance with the tariff except for any additional expenses involved in attending the hearing in Toronto.

Signed at Toronto, Ontario this 10th day of June 2014.

“J.M. Woods”

Woods J.

Citation: 2014 TCC 193
Date: 20140610
Docket: 2012-3549(IT)I

BETWEEN:

TRUDY TALLON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] This appeal by Trudy Tallon is from an assessment issued under the *Income Tax Act* which disallowed a portion of a medical expense tax credit (METC) claimed with respect to travel expenses incurred in the 2009 taxation year. Similar expenses incurred by Ms. Tallon were disallowed for the 2008 taxation year, and Ms. Tallon was successful in having the 2008 assessment reversed by this Court in an earlier appeal (2010-3659(IT)I).

[2] Ms. Tallon, a resident of Thunder Bay, Ontario, suffers from severe chronic pain. On the recommendation of her doctor many years ago, she spends the winters in warm climates in order to alleviate her condition. It was brought out in cross-examination that the places that she and her spouse have visited include Thailand, Indonesia, Cambodia, Vietnam, Malaysia, Philippines, Burma, Ecuador, Venezuela, Honduras, Mexico, Costa Rica and India. They do not winter in the United States because it is not warm enough and the medical costs are too high.

[3] In the relevant taxation year, 2009, the couple had made plans to spend the winter in the Dominican Republic but the weather turned out to be unsuitable for Ms. Tallon's condition and alternate arrangements had to be made at the last minute. They ended up spending several weeks in Thailand and the balance of the winter in Indonesia when their visas in Thailand expired.

[4] The expenses at issue involve flights, accommodations and meals for the Thailand/Indonesia trip which took place between January 2, 2009 to May 4, 2009. The aggregate amount of the disputed claim is \$17,494.50 (which excludes an amount of \$36.02 which was conceded by Ms. Tallon at the hearing).

Legislative Provisions

[5] The legislative provisions that are relevant to this appeal are set out in s. 118.2(2)(g) and (h) of the *Act*, which are reproduced below.

(2) **Medical Expenses** - For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid

[...]

(g) **[transportation]** - to a person engaged in the business of providing transportation services, to the extent that the payment is made for the transportation of

i) the patient, and

(ii) one individual who accompanied the patient, where the patient was, and has been certified in writing by a medical practitioner to be, incapable of travelling without the assistance of an attendant

from the locality where the patient dwells to a place, not less than 40 kilometres from that locality, where medical services are normally provided, or from that place to that locality, if

(iii) substantially equivalent medical services are not available in that locality,

(iv) the route travelled by the patient is, having regard to the circumstances, a reasonably direct route, and

(v) the patient travels to that place to obtain medical services for himself or herself and it is reasonable, having regard to the circumstances, for the patient to travel to that place to obtain those services;

(h) **[travel expenses]** - for reasonable travel expenses (other than expenses described in paragraph (g)) incurred in respect of the patient and, where the patient was, and has been certified in writing by a medical practitioner to be, incapable of travelling without the assistance of an attendant, in respect of one individual who accompanied the patient, to obtain medical services in a place that

is not less than 80 km from the locality where the patient dwells if the circumstances described in subparagraphs (g)(iii) to (v) apply;

Positions of parties

[6] The Crown submits that a METC is not available for these travel expenses because Ms. Tallon did not incur the expenses to obtain medical services, as required by s. 118.2(2)(g)(v).

[7] The Crown relies on the reasoning in *Goodwin v The Queen*, [2001] 4 CTC 2906 (TCC), which was an appeal heard under the informal procedure which denied a METC for expenses incurred in short trips to the southern United States to alleviating symptoms of severe psoriasis. In deciding that such travel was not to obtain medical services, Teskey J. stated:

[26] In order for a taxpayer to get travel expenses under either paragraph, he or she must travel and receive medical service from some person in the health care field. Of course, it goes without saying also the other provision of these paragraphs must be satisfied.

[27] Being exposed to the sun is not a medical service even though it may give relief to the sufferer. The same can be said for losing weight, cutting down caffeine, getting more exercise or stopping smoking. None of these examples require a health care provider to do or render anything to the patient

[8] Ms. Tallon's argument relies on the Tax Court decision that was rendered in her favour for the 2008 taxation year. Her position was stated in the notice of appeal as follows:

The taxpayer had her 2008 out of country medical travel disallowed. She took the matter to tax court and won. The Tax Court of Canada agreed with the tax payer that her medical travel was necessary and reinstated all previously denied medical travel for 2008. A copy of that Judgment is attached for your reference. Therefore, since the taxpayer suffered from the same medical condition in 2009 as in 2008 the medical travel for 2009 should be allowed in full.

[9] In addition to this issue, the Crown submits that the spouse's expenses do not qualify for the METC because the certificate requirement in s. 118.2(2)(h) was not satisfied. Although Ms. Tallon obtained a doctor's certificate, the Crown submits that it is deficient. This issue was not raised in the prior appeal for the 2008 taxation year.

Analysis

[10] This appeal concerns the legislative requirements for a METC with respect to travel expenses incurred to obtain medical services. In order to qualify, the medical services must not be available in the local community, the route taken must be a direct route, and it must be reasonable for the taxpayer to travel to that place to obtain the services.

[11] The claim can include expenses of an attendant if the taxpayer is incapable of traveling on her own, and she has obtained a certificate of a medical practitioner to that effect.

[12] The Crown acknowledges that expenses similar to the ones at issue were allowed by this Court for Ms. Tallon's 2008 taxation year. Justice Lamarre allowed the appeal for reasons rendered orally from the bench in Thunder Bay. According to the written Judgment dated May 4, 2011, expenses in the amount of \$22,509.77 were allowed.

[13] This decision was not appealed, but the Minister did not follow it in assessing the following taxation year.

[14] Counsel for the Crown informed me that Justice Lamarre did not endorse the reasoning in the *Goodwin* case, above, because subsequent decisions of this Court have broadened the meaning of the term "medical services." Counsel provided me with copies of these cases and submitted that the later decisions do not go as far as supporting that exposure to a warm climate is a medical service.

[15] I have difficulty with the position of the Crown in this appeal. The Court is being asked to disagree with a decision of another judge involving the same taxpayer, on the same issue, in an immediately succeeding year. There would be nothing wrong with this if the reasons of Justice Lamarre were provided to me so that I could consider them. But they were not, and no explanation was provided for failing to provide a transcript of these reasons.

[16] I find this situation to be very unfair to the taxpayer. If Ms. Tallon is to be deprived of the benefit of the prior decision for a subsequent year, it is only fair to her that the Court give careful consideration to the reasons in the prior case. I was not able to do this.

[17] Counsel for the Crown attempted to communicate Justice Lamarre's oral reasons in general way at the hearing, but I did not find this to be illuminating.

[18] Counsel also offered to arrange for a transcript of the oral reasons subsequent to the hearing. This would be appropriate in many cases, but in this particular case the additional time and cost do not justify this course of action (See *Burton v The Queen*, 2006 FCA 67).

[19] If the transcript is obtained subsequent to the hearing, not only would this involve a delay in the decision in this informal procedure appeal, but it would involve time and expense in arranging for the Court to hear the parties' submissions on the transcript. I also note that this hearing was scheduled for Toronto rather than Thunder Bay because Ms. Tallon wished an expeditious hearing and was willing to travel to another city for this purpose.

[20] For this reason, it is appropriate to follow the decision of Justice Lamarre. I would conclude that Ms. Tallon's travel expenses incurred in 2009 were to obtain medical services for purposes of s. 118.2(2)(g) and (h).

[21] There is an additional issue to consider which was not raised in the appeal for the 2008 taxation year. The question is whether Ms. Tallon has a satisfactory certificate by a medical practitioner in relation to the requirement that she be accompanied by an attendant, which in this case was her spouse.

[22] The Crown submits that the certificate from the doctor does not satisfy this requirement because it is not specific to the 2009 taxation year and it does not clearly state that Ms. Tallon is incapable of traveling on her own.

[23] Counsel also argued at the hearing that, regardless of the certificate, Ms. Tallon did not require an attendant. To support this argument, counsel noted that Ms. Tallon had traveled to Texas on her own for a medical appointment.

[24] As for the certificate requirement, I am satisfied that this requirement is satisfied by a letter provided by Ms. Tallon's doctor dated August 12, 2013 (Ex. A-4). The letter is not specific to 2009, but it appears to have been obtained as soon as Ms. Tallon became aware of the need for such a letter. In addition, the letter states that travel without a companion would be "extremely difficult ... if not impossible." This satisfies the legislative requirement that an attendant is necessary, in my view.

[25] As for the Crown's argument at the hearing that Ms. Tallon was able to travel by herself because she had gone to Texas on her own for a medical appointment, this argument was not raised in the Reply and it is too late to first

raise it during argument. In any event, I am satisfied from the evidence that Ms. Tallon would be unable to travel for a lengthy period on her own. A short trip to Texas for a medical appointment is an entirely different matter than a winter-long journey.

[26] I find that the requirements for attendant expenses are accordingly satisfied.

[27] Before concluding, I would mention that I am troubled about the number and location of countries that Ms. Tallon and her spouse have visited over the years, which are mentioned above. This leaves me with the impression that these locations were not chosen only for medical reasons. I leave this issue for another day because the Crown did not argue that the reasonableness requirement in s. 118.2(2)(v) was not satisfied.

[28] In the result, I will allow the appeal except with respect to expenses in the amount of \$36.12.

[29] As for costs, Ms. Tallon will be awarded costs in accordance with the tariff except for any additional expenses involved in attending the hearing in Toronto which was at Ms. Tallon's request.

Signed at Toronto, Ontario this 10th day of June 2014.

“J.M. Woods”

Woods J.

CITATION: 2014 TCC 193
COURT FILE NO.: 2012-3549(IT)I
STYLE OF CAUSE: TRUDY TALLON and HER MAJESTY
THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: June 3, 2014
REASONS FOR JUDGMENT BY: The Honourable Justice Woods
DATE OF JUDGMENT: June 10, 2014

APPEARANCES:

Agent for the Appellant: David Bullough
Counsel for the Respondent: Ryan Gellings

COUNSEL OF RECORD:

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Name: n/a

Firm:

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