Docket: 2014-1385(IT)I

BETWEEN:

ELLEN LEIBOVICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 16, 2015, at Montréal, Québec

Before: The Honourable Justice G. Smith

Appearances:

Agent for the Appellant:	Charles Leibovich
Counsel for the Respondent:	Sara Jahanbakhsh

JUDGMENT

In accordance with the attached reasons for judgment, the appeal from the reassessment made under the *Income Tax Act* for the 2011 taxation year is dismissed without costs.

Signed at Ottawa, Canada, this 6th day of January 2016.

"Guy R. Smith"

Smith J.

Citation: 2016 TCC 6
Date: 20160106
Docket: 2014-1385(IT)I

BETWEEN:

ELLEN LEIBOVICH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

[1] For the 2011 taxation year, the Appellant included tuition fees paid to the St. George's School of Montreal ("St. George's") as "medical expenses" in the computation of her medical expense tax credit pursuant to subsection 118.2(2) of the *Income Tax Act* (the "Act")[1].

[2] The tuition fees were paid for the attendance of the Appellant's infant son, J. It is not disputed that the amount paid was $18,560.12.

[3] The Minister denied the credit on the basis that the tuition fees were not "medical expenses". Paragraph (e) of subsection 118.2(2) includes as "medical expenses", an amount paid:

> (e) for the care, or the care and training, at a school, an institution or another place of the patient, who has been certified in writing by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient;

[4] At the outset of the hearing, the Respondent conceded that J suffered from a "mental handicap" for the purposes of the paragraph noted above (though this

point had initially been disputed in the pleadings). The remaining issues in this appeal can thus be summarized as follows:

a) does the school ("St. George's") specially provide equipment, facilities or personnel for the care, or the care and training of individuals suffering from the handicap suffered by J; and

b) for the relevant taxation year, has J been certified as someone who, by reason of his mental handicap, requires the equipment, facilities or personnel specially provided by St. George's.

Preliminary issue

[5] In the Reply to the Notice of Appeal, the Respondent raised as a preliminary matter its view that the Notice of Appeal had been filed 91 days after the Notice of Confirmation and as such that it was out of time. There was also a statement that the Minister would not object to an application for an extension of time but such an application was never filed. At the hearing, counsel for the Respondent took the position that the delay was *de minimis* and that she was prepared to treat the Notice of Appeal as having been validly filed.

[6] Having reserved on this issue at the hearing, I now find that the Notice of Appeal was filed within the proper time limits. Section 26 of the *Interpretation Act*[3] provides that when the time limit for doing a thing expires or falls on a holiday (in this case on a Sunday), the thing may be done on the next business day. Calculating the number of days from the Notice of Confirmation, I find that the Notice of Appeal filed on Monday, April 7, 2014, was validly filed.

Facts

[7] The Appellant was not present at the hearing but she was represented by Ron Evans, her husband and J's father. He was the only person to testify. He tendered as evidence, a number of clinical assessments that I will refer to individually or collectively as the clinical reports (the "Clinical Report(s)").[2]

[8] J was born on March 13, 1999. There is no doubt that his parents were concerned with his speech and language skills at an early age and that they sought the assistance of qualified medical professionals. The Clinical Report completed on March 5, 2003 – when J was almost 4 years old, recommended "speech and

language therapy" as well as psychological testing to clarify J "strengths and weaknesses" and "help his parents make choices for his schooling".

[9] J attended United Talmud School ("UTS"), an elementary school in Montreal, from Kindergarten to grade 7 where he studied in French, Hebrew and English. He was active in sports and was part of a chess group.

[10] As a result of ongoing difficulties in school, he was assessed several times. The Clinical Report of March 2006 noted that J "was seen by the school's special needs teacher twice a week" and that he "has been tutored in private every second week". It made several recommendations including continued speech-language therapy and the use of "visual aids to learning".

[11] Further clinical testing in 2007 and 2008 confirmed that J suffered from auditory processing difficulties and lead to a diagnosis of "Central Auditory Processing Dysfunction" or CAPD ("CAPD"). In practise, this meant that J had difficulty processing, discriminating, recognizing or comprehending auditory information even though, according to the Clinical Report of 2008, a person suffering from CAPD "has normal intelligence and hearing sensitivity".

[12] The Clinical Report of 2007 made several recommendations for the classroom including the use of a personal FM auditory system, visual aids, flow-charting, graphically or schematically representing steps in a set task or project including the use of various computer based programs. The report concluded (at pages 11 and 12):

> [. . .] Irrespective of the future educational placement, [J] requires the opportunity for constant one-to-one/small group direct therapeutic intervention, be it through Special Education, a volunteer, resource person, special aide, etc. This affords the chance for a concentrated academic remedial emphasis in an optimized listening environment. [. . .]
>
> [. . .] School based tutoring with close coordination between tutor and teacher is recommended for optimal therapeutic effect. [. . .]
>
> [. . .] Teaching [J] how to analyze body language (gestures and facial expressions) would be helpful since these are important clues for a student who has difficulty processing speech quickly.
>
> [. . .] This student needs an academic environment with a favourable teacher-pupil ratio, where there is opportunity for ono-to-one work (and continuity between the

> remedial and teaching colleagues) and possibly where academics could be internalized in the first language. [. . .]

[13] The report of 2007 (page 10) refers to the availability of certain software that is "directed to aspects of phonemic decoding and/or phonics" and states that the program was available at, amongst other places, "Vanguard School (for students with severe learning disabilities but good academic potential)". This is the only school that is specifically referred to in the Clinical Reports.

[14] The Appellant testified that an application was filed for J to attend Vanguard Elementary School ("Vanguard") and that he was accepted as a student. A letter dated March 26, 2007 from the Vanguard was tendered as evidence to corroborate this though a careful reading of the letter suggests that J's admission was still tentative. He was viewed as "an eligible candidate".

[15] J never attended Vanguard. In the end, according to Mr. Evans' testimony, (and confirmed in the Clinical Report of March 31, 2008 – page 4), J's parents were pleased with the educational services offered by UTS and that is where he remained to complete his elementary schooling.

[16] Though not directly relevant to the issues in this matter, it is worth noting that in cross-examination, Mr. Evans admitted that UTS offered a regular school program and that J followed the same curriculum as all other students.

[17] Following his graduation from UTS, J was enrolled in St. George's for the grade 8 academic year. Mr. Evans produced a copy of St. George's 2015-2016 School Prospectus and provided a description of the school. He testified that it was highly regarded in the academic community and viewed favourably because of its low teacher-pupil ratio as compared to public schools. It could also offer the opportunity for one-on-one work and accommodate J's needs.

[18] Mr. Evans testified that approximately 40% of the students in J's class suffered from some form of learning disability and that, although it was not advertised, it was generally well known in the community that St. George's catered to student suffering from learning disabilities.

[19] The Appellant testified that St. George's was informed of J's learning disabilities, that copies of the Clinical Reports were provided to them prior to his admission, that they expressed the view that they would be able to accommodate his concerns and that J would be well served.

[20] The Appellant tendered as evidence, a copy of J's academic record for the year ending June 2015 - a rather glowing report with an average of 86.88% for that year. The report was also tendered to attest to St. George's success in accommodating and dealing with J's learning disabilities.

[21] During cross-examination, Mr. Evans admitted that apart from the adapted academic environment and special accommodations offered to deal with J's learning disabilities, he followed the same school program and curriculum as all other students. Mr. Evans was also shown a letter from St. George's addressed to him and dated March 30, 2012 (the "Letter")[4] that references several of the Clinical Reports and states:

> [. . .] Although the school does not specifically cater to students with learning disorders, we feel our approach to teaching, the enhanced, child-centered curriculum and various resources are well suited to respond to (J's) specific needs, [. . .]
>
> [. . .]
>
> St. George's is an environment which successfully nurtures all of its students, including many with a broad variety of learning disabilities. I believe that our school will allow Joshua to develop to his full potential.
>
> [my emphasis]

[22] Mr. Evans acknowledged receipt of the Letter but did not provide any context as to its preparation in March 2012.

Position of the parties

[23] The Appellant's basic position is that J has been diagnosed with a learning disability described as CAPD, that this qualifies as a mental handicap, that he has been certified as someone who requires special equipment, facilities or personnel and that St. George's provides such equipment, facilities or personnel for the care and training of other students who suffer from similar disabilities.

[24] The Appellant takes the position that J was accepted by Vanguard, a school that specifically caters to students with severe mental disabilities but strong learning potential, and that if St. George's was able to accommodate J as successfully as it has, then it follows logically that it too is a school that caters to students with severe mental disabilities but strong learning potential.

[25] On the issue of certification, Mr. Evans recognized that he was unable to obtain or provide any direct evidence since no one, including the medical practitioners consulted, were prepared to recommend any specific schools. He argued that a significant number of J's classmates also suffered from some form of learning disability though it would not be readily apparent to someone who entered the classroom. He argued that St. George's does in fact cater to children with severe disabilities, that this is well known in the educational community, and that St. George's simply could not survive financially if it did not cater to such students.

[26] Mr. Evans argued that paragraph 118.2(2)(e) of the Act should be interpreted broadly, that it would be wrong to give it a narrow interpretation that required a school to be dedicated solely to serving the needs of children with disabilities and that the modern trend was for schools to be inclusive.

[27] The Respondent's basic position is that J attended the same school program and curriculum as all the other students at St. George's and that, although appropriately qualified persons had attested to J's mental handicap and his need for an adapted academic environment, no one had certified what special equipment, facilities or personnel was required for his care and training.

[28] The Respondent argued moreover that there was no evidence and nothing in St. George's prospectus to suggest that it catered to students with disabilities and that the Letter clearly set out the school's position that it does not in fact specifically cater to students with learning disabilities.

The applicable law

[29] According to the definition set out in 118.2(2)(e) of the Act (reproduced again for ease of reference) tuition fees may be claimed as medical expenses where the amount is paid:

> (e) -- for the care, or the care and training, at a school, an institution or another place of the patient, who has been certified in writing by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient;
>
> [my emphasis]

[30] The decision of *Collins v. Canada*, (1998) 3 C.T.C. 2981, of this Court is perhaps the leading case on tuition fees as medical expenses and, not surprisingly, was raised by both parties. It sets out a four-prong test (at paragraph 20):

> 20. A reading of the above provision makes it clear there are several criteria to be satisfied which are as follows:
>
> 1. The taxpayer must pay an amount for the care or care and training at a school, institution or other place.
>
> 2. The patient must suffer from a mental handicap.
>
> 3. The school, institution or other place must specially provide to the patient suffering from the handicap, equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.
>
> 4. An appropriately qualified person must certify the mental or physical handicap is the reason the patient requires that the school specially provide the equipment, facilities or personnel for the care or the care and training of individuals suffering from the same handicap.

[31] Having concluded that the Appellant's infant son suffered from a mental handicap, Rowe J. found:

> 36. [. . .] there is ample evidence [. . .] that Choice was a school that had personnel who were specially trained and provided to deal with gifted children who were also suffering from learning disorders sufficiently serious to constitute a mental handicap. No special equipment is needed but the key is small class size with a great deal of individualising attention in accordance with the appropriate program designed for a particular student [. . .]."
>
> 38. I conclude that Choice was a school which specially provided [. . .] both facilities and personnel for the care or for the care and training of persons suffering from the same mental handicap – ADHD – although only one or the other is required to meet the language of the provision.

[32] Rowe J. then addressed the issue of certification and, having noted that "there is no longer any special form of certification", found that the medical practitioner consulted by the Appellant had concluded that the child:

> 40. [. . .] should be educated at a school which could provide proper care or care and training for someone suffering from ADHD [. . .] Choice was an

> appropriate school to assist in treating that disorder and otherwise dealing with the mental handicap [. . .] .

[33] On that basis, Rowe, J. concluded that Choice had been properly certified.

[34] The issue of certification was also addressed by the Federal Court of Appeal in *Title Estate v. Canada*, (2001) FCA 106, where the court found that the certificates submitted were "simply too vague" to meet the requirements of the Act. Sharlow J.A. noted:

> 5. In our view, a certificate under paragraph 118.2(2)(e) must at least specify the mental or physical handicap from which the patient suffers, and the equipment, facilities or personnel that the patient requires in order to obtain the care or training needed to deal with that handicap.

[35] The later decision of *Scott v. Canada*, (2008) FCA 286, was an appeal from a decision of this Court where Campbell, J. found that the Appellant had satisfied the four-pong test in *Collins v. Canada*, supra. The Minister did not agree and appealed on the basis that the third and fourth requirements had not been met. As to the third requirement, Trudel, J. A. commented as follows:

> 10. The third of the Collins factors requires Rothesay to be a school that specially provided to the student equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.
>
> 11. To satisfy this requirement, first of all, the respondent's son must have a specific need. Second, the expenses of Rothesay must be inextricably tied to this specific need resulting from his disability: *Lister v. Canada*, [2006] F.C.J. No. 1541, 2006 FCA 331 at paragraph 15. Third, Rothesay must be an institution that is capable of addressing the need of a group with disabilities similar to those of the respondent's son.
>
> [. . .]
>
> 14. All students have access to the same services and the tuition fees are the same for all. The school's focus is not on the provision of medical services and it does not specially provide equipment, facilities or personnel for the care of students with particular needs such as those of the respondent's son.
>
> [. . .]

> 18. The fact that some of the services offered to the general student body were beneficial to the respondent's son and other students with special needs is insufficient to bring Rothesay within the ambit of the provision under study.
>
> [my emphasis]

[36] Trudel J.A. then turned to the fourth requirement. Having noted that it was not necessary that certification be in a particular format, she noted that:

> 23. However there must be true certification: one which specifies the mental or physical handicap from which the patient suffers, and the equipment, facilities or personnel that the patient requires in order to obtain the care or training needed to deal with that handicap: Title *Estate v. Canada* [2001] F.C.J. No. 530 at paragraph 5.
>
> 24. While the judge was in a unique and privileged position to weigh the evidence before her, based on a careful review of the transcript against the standard set out in *Title Estate* above, I find no evidentiary support for her conclusion on certification.

[37] The Respondent also referred to the decision of *Lister v. Canada*, (2006) FCA 331, an appeal from a decision of this Court involving the deductibility of fees paid to a senior's residence as medical expenses pursuant to paragraph 118.2(2)(e) of the Act. Sharlow J. A. made the following assessment:

> 11. The Tax Court Judge reasoned that, as Ms. Lister suffered from handicaps that met the description in paragraph 118.2(2)(e), and those handicaps were accommodated by the facilities of Hawthorn Park, it followed that Hawthorn Park "specially provided" the facilities she needed for her care.
>
> 12. The Crown argues that this reasoning is not correct. The Crown argues that in order to determine whether a particular payment is eligible for the medical expense credit under paragraph 118.2(2)(e), it is necessary to consider two questions independently. The first question is whether the individual in respect of whom the credit is claimed has the requisite physical or mental handicap (in this case it is undisputed that Ms. Lister meets that test). The second question is whether the place that received the payment is a place that is within the scope of paragraph 118.2(2)(e). I agree with the Crown that this is the correct way to approach the interpretation of paragraph 118.2(2)(e).
>
> [my emphasis]

[38] Having noted that subsection 118.2(2) sets out a lengthy and detailed list of expenses that form the basis for the calculation of the medical expense tax credit, Sharlow J.A. noted that:

> 15. One theme that emerges from subsection 118.2(2) is that no tax relief is provided for the ordinary expenses of living such as the costs of accommodation and food, except where those expenses are inextricably tied to a specific need resulting from a physical or mental impairment.
>
> [my emphasis]

[39] She then turned her attention to paragraph (e) and stated:

> 18. Given that statutory context, what kind of place is contemplated by paragraph 118.2(2)(e)? According to the words of the provision, an institution comes within paragraph 118.2(2)(e) if it "specially provides" the equipment, facilities or personnel needed for the care or training of its residents who require that specially provided equipment, facilities or personnel by reason of a physical or mental handicap. The circularity of this provision makes its interpretation somewhat awkward but it is reasonably clear, at least, that paragraph 118.2(2)(e) contemplates institutional care. For that reason, paragraph 118.2(2)(e) indirectly but necessarily provides tax relief for accommodation and other ordinary living costs that are included in the cost of care. However, given the context of subsection 118.2(2), an organization that functions mainly as a provider of residential accommodation should not fall within the scope of paragraph 118.2(2)(e) merely because it incidentally provides some medical services to its residents.
>
> [my emphasis]

[40] The Appellant argued that the *Lister v. Canada* should be distinguished on the basis that it made no sense to compare the type of 24 hour institutional care offered in a senior's residence with the services offered to students in a school. While the facts are different, the analysis of paragraph 118.2(2)(e) is certainly compelling.

[41] Several more recent cases were brought to my attention. At least two are worth mentioning. In *Piper v. Canada*, 2010 TCC 492, Bowie J. dealt with a similar fact situation. The Appellant's daughter D suffered from certain learning disabilities as documented in a psychological assessment and attended a private school described as GNS. The head of that school testified at the hearing and Bowie, J. observed that:

> 7. Mr. Bruce-Lockhart testified that the GNS schools do not provide a special program for students with learning disabilities, but they do admit students, like (D) who have learning disabilities, and they do accommodate them within the normal program [. . .]
>
> 8. It is not necessary in this case to decide whether (D's) learning disability amounted to a mental handicap, as that expression is used in paragraph 118.2(2)(e). The Federal Court of Appeal has held in *Lister v. Canada*, 2 and again in *Canada v. Scott*, 3 that paragraph 118.2(2)(e) creates a purpose test, which is to say that for the taxpayer to be entitled to the credit that it provides, the expense associated with a child attending the institution must be inextricably tied to the specific needs of that child. In Scott, Trudel JA, speaking for herself and Desjardins and Noël JJA, said this:
>
> > The fact that some of the services offered to the general student body were beneficial to the respondent's son and other students with special needs is insufficient to bring Rothesay within the ambit of the provision under study.4
>
> 9. Precisely the same is true of the GNS in the present case. GNS is not a school that has the education of handicapped children, or children with learning disabilities, as a dominant purpose.
>
> [my emphasis]

[42] And finally, in the decision of *Vita-Finzi v. Canada*, 2008 TCC 565, special assistance was provided to a student with a learning disability but Hershfield J. found that while the child suffered from a mental handicap, the nexus between the program offered and the tuition fees paid to the private school, was insufficient to meet the requirements of paragraph 118.2(2)(e) as set out in *Scott v. Canada*, supra.

Analysis

[43] It is agreed that the Appellant has met the first and second requirements as described in the *Collins v. Canada* decision above but the issue that remains to be determined is whether she has met the third and fourth requirements.

[44] Does St. George's specially provide equipment, facilities or personnel for the care or the care and training of persons suffering from the handicap suffered by J?

[45] Mr. Evans' has argued that it does but I find that there is little in the way of corroborating evidence to support his position and that the documentary evidence points in the opposite direction. The school prospectus does not refer to any special program for children suffering from learning disabilities and in fact the evidence before the court is that it "does not specifically cater to students with learning disorders". The Letter goes on to say that it is able to provide an enhanced curriculum, various resources and an environment that nurtures all of its students including "many with a broad variety of learning disabilities". In my view, that is insufficient to support a finding that the school specially provides equipment, facilities or personnel for the care and training of students suffering from disabilities for the purpose of paragraph 118.2(2)(e).

[46] Reviewing the requirements of the case law noted above, I find that the school in question simply does not meet the threshold. It offers the same school program and curriculum to all students and the adapted academic environment offered to J and other students with learning disabilities, as described by Mr. Evans, is incidental and ancillary to its primary or dominant purpose of providing a high school education to all its students, including J.

[47] The next issue relates to certification and the question is whether an appropriately qualified person has certified that J, by reason of his mental handicap, requires the equipment, facilities or personnel specially provided by St. George's.

[48] I accept that J was diagnosed by appropriately qualified persons as someone who suffered from a medically recognized learning disability, that he required special attention and an adapted academic environment but find that the Clinical Reports fail to establish a need for special equipment, facilities or personnel. Although there are practical suggestions such as the use of a personal FM auditory system and visual learning aids, for example, many of the recommendations would apply to the general student population. In any event, I have already concluded that any accommodation provided to J by St. George's was at best incidental and ancillary.

[49] I find that nothing turns on the fact that J was deemed "an eligible candidate" by Vanguard since he never attended nor paid any tuition fees to that school.

[50] On balance I find that the Appellant has not met the burden with respect to the third and fourth requirements mentioned in *Collins v. Canada*.

[51] For all of the foregoing, this appeal is dismissed without costs.

Signed at Ottawa, Canada, this 6th day of January 2016.

"Guy R. Smith"

Smith J.

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[1] *Income Tax Act* R.S.C. 1985, c.1 (5th Supp.)
[1] *Interpretion Act* (R.S., 1985, c. l-21)
[1] Clinical reports listed in chronological order:

1. Speech Language Update Report dated March 3, 2003 prepared by the Speech Language Pathology Services, Queen Elizabeth Health Complex;
2. Learning Progress Clinic Summary Report dated October 23, 2006 prepared by the Montreal Children's Hospital, Child Development Program;
3. Report of Psychological Consultation dated October 23, 2006, prepared by Judith Le Gallais, Psychologist, Montreal Children's Hospital, Department of Psychology;
4. Peripheral and Central Auditory Processing Assessment dated September 26, 2007, prepared by I. M. Hoshko, Audiologist;
5. Central Auditory Processing Evaluation dated March 31, 2008, prepared by the Montreal Children's Hospital, Development and Behavioral Pediatrics Services;
6. Assessment prepared by Judith Le Gallais, Psychologist, referencing assessments of November 23, 2013 and January 4, 2013;

[1] Letter from St. George's School of Montreal, signed by the Head of School, James Officer and dated March 30, 2012.

CITATION:	2016 TCC 6
COURT FILE NO.:	2014-1385(IT)I
STYLE OF CAUSE:	ELLEN LEIBOVICH AND HER MAJESTY THE QUEEN
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