Docket: 2006-2149(IT)I

BETWEEN:

MANON LABRECQUE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 19, 2007, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Agent for the Appellant:	Richard Joly (Spouse)
Counsel for the Respondent:	Anne Poirier and Isabelle Pipon, Articling Student

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JUDGMENT

The appeal from the assessment made under the *Income Tax Act*, for the appellant for the 2003 taxation year, notice of which is dated November 1, 2004, is allowed without costs in accordance with the attached reasons for judgment, and the notice of assessment is referred to the Minister of National Revenue for reconsideration and reassessment so as to allow the entire deduction for child care expenses claimed by the appellant.

Signed at Ottawa, Canada, this 12th day of April 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 28th day of September 2007

Michael Palles, Reviser

Citation: 2007TCC195
Date: 20070412
Docket: 2006-2149(IT)I

BETWEEN:

MANON LABRECQUE,

Appellant,

and

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal by informal procedure from a new notice of assessment dated November 1, 2004, concerning the appellant's 2003 taxation year, by which the Minister of National Revenue (the "Minister") disallowed a deduction in the amount of $635 for child care expenses, as defined at subsection 63(3) of the *Income Tax Act (Canada)* (the "Act").

Facts

[2] The appellant and her spouse, Richard Joly, are both professionals who held full-time employment in 2003 in the field of finance and accounting. The couple's normal work week was approximately 40 hours from Monday to Friday between 9:00 a.m. and 5:00 p.m. The couple has two children, the elder of whom, Simon (born March 11, 1997) is a non-verbal autistic child for whom child care expenses were claimed for services rendered on Saturdays. The appellant claimed the deduction for child care expenses because she had a lower net income than her spouse in 2003.

[3] According to the documentation consulted (www.autisme.qc.ca and the *Guide pour parents et responsables d’enfant autistique* by the Quebec Society for

Autism), autism is part of a group of pervasive developmental disorders characterized by impairments in social interaction and verbal and non-verbal communication, and by repetitive, stereotypic behaviours in all activities.

[4] Autistic children require constant attention and supervision. They have a tendency to run away and self-harm. They often have sleep disorders and are generally very agitated. The slightest change in their habits may entail hysterical temper tantrums. The behavioural problems of autistic children and their inability to communicate can make family life very difficult. Parents of older autistic children, educators and professionals working with autistic children agree that it is practically impossible for parents to shoulder the entire burden of taking care of an autistic child in a home setting, and this is why it is important for parents to learn to judiciously delegate responsibilities to third parties and to structure their daily activities as best they can.

[5] The child care expenses for which the deduction is contested were paid to the Association de Parents de l'Enfance en Difficulté de la Rive-Sud de Montréal (the "Association"). The objectives of this parents' association are as follows:

- support parents in developing their parenting skills and in obtaining the services required to keep their child with the family;
- end the isolation of parents by giving them a chance to meet with support groups or participate in training sessions or information evenings; and
- promote the needs and defend the rights and interests of young people and their families.

[6] To attain its objectives, the Association actively participates in the development of resources for youngsters and their parents: respite care, leisure activities, support groups, toy library, training sessions and information evenings.

[7] Activities and services for youngsters include "Loisirs du samedi". Essentially, this is a child care service for autistic children available Saturdays from 10:00 a.m. to 3:45 p.m. The ratio of supervision is one instructor for every two children. Services are given in a recreational context and are adapted to the moods and specific limitations of the children who attend.

Nature of the case

[8] This case essentially concerns the deduction of child care expenses for an autistic child for services rendered on various dates, but always on Saturdays. Because neither of the parents works on Saturday, the Minister is of the opinion they are not eligible for a deduction for child care expenses because the expenses were not incurred to perform the duties of an office or employment.

[9] The Act defines "child care expense" at subsection 63(3). Therefore, the question to be determined is whether it is absolutely necessary for the taxpayer to hold employment at the precise moment when child care services are rendered, or whether it is enough to show that the services in question allowed the taxpayer to hold and maintain employment at any time during the other days of the week (from Monday to Friday in this case).

Relevant provisions of the Act

[10] Subsection 63(3) of the Act defines the expression "child care expense" as follows:

> "**child care expense**" means an expense incurred in a taxation year for the purpose of providing in Canada, for an eligible child of a taxpayer, child care services including baby sitting services, day nursery services or services provided at a boarding school or camp if the services were provided
>
> (*a*) to enable the taxpayer, or the supporting person of the child for the year, who resided with the child at the time the expense was incurred,
>
> (i) to perform the duties of an office or employment,
>
> (ii) to carry on a business either alone or as a partner actively engaged in the business,
>
> (iii) [Repealed]
>
> (iv) to carry on research or any similar work in respect of which the taxpayer or supporting person received a grant, or
>
> (v) to attend a designated educational institution or a secondary school, where the taxpayer is enrolled in a program of the

institution or school of not less than three consecutive weeks duration that provides that each student in the program spend not less than

(A) 10 hours per week on courses or work in the program, or

(B) 12 hours per month on courses in the program, and

(*b*) by a resident of Canada other than a person

(i) who is the father or the mother of the child,

(ii) who is a supporting person of the child or is under 18 years of age and related to the taxpayer, or

(iii) in respect of whom an amount is deducted under section 118 in computing the tax payable under this Part for the year by the taxpayer or by a supporting person of the child,

except that

(*c*) any such expenses paid in the year for a child's attendance at a boarding school or camp to the extent that the total of those expenses exceeds the product obtained when the periodic child care expense amount in respect of the child for the year is multiplied by the number of weeks in the year during which the child attended the school or camp, and

(*d*) for greater certainty, any expenses described in subsection 118.2(2) and any other expenses that are paid for medical or hospital care, clothing, transportation or education or for board and lodging, except as otherwise expressly provided in this definition, are not child care expenses;

[11] For the purposes of these proceedings, it is admitted that Simon is an eligible child and that the services provided through "Loisirs du samedi" are child care expenses and not eligible medical expenses. To be eligible, the expenses must have been incurred for the purpose of providing in Canada, for an eligible child, child care services if the services were provided to enable the taxpayer to perform the duties of an office or employment.

<u>Parliament's intent and case law</u>

[12] To highlight the purpose and spirit underlying the deduction for child care expenses, in *Symes v. The Queen*, [1993] 4 S.C.R. 695, 94 DTC 6001, Iacobucci J. cited the following excerpt from "Proposals for Tax Reform" (1969) (E.J. Benson, Minister of Finance):

> 2.7 We propose to permit deduction of the child care expenses that face many working parents today. The problem of adequately caring for children when both parents are working, or when there is only one parent in the family and she or he is working, is both a personal and a social one. We consider it desirable on social as well as economic grounds to permit a tax deduction for child care expenses, under carefully controlled terms, in addition to the general deduction for children.
>
> 2.9 This new deduction for child care costs would be a major reform. While it is not possible to make an accurate forecast of the number who would benefit from this new deduction, it seems likely to be several hundred thousand families. It would assist many mothers who work or want to work to provide or supplement the family income, but are discouraged by the cost of having their children cared for.

[13] In *Bailey v. The Queen*, 2005 DTC 673, Rip J. of this Court made the following comment about section 63 of the Act:

> Section 63 provides a limited tax deduction for parents who require their children to be supervised because they are employed outside the home. Subsection 63(3) provides for a general deduction of expenses a working parent pays for the purpose of caring for their children. This deduction is restricted when the amount was paid for various other services such as education, hospital care or board and lodging.

[14] In *Sawicki v. The Queen*, 98 DTC 3355, Lamarre Proulx J. of this Court made the following comment:

> The child care services included in the definition are baby-sitting services, day nursery services or services provided at a boarding school or camp. It follows from the use of these associated words that the child care services contemplated in s. 63 of the *Act* are services provided for the care of children when the parent cannot provide such care because of his employment or his business. It is in this sense that the child care services enable the parent to perform his employment duties or to carry on business.

[15] This case involved child care expenses incurred on weekends and holidays so that the taxpayer would be less prone to stress and depression while working weekdays. The taxpayer's appeal was dismissed mainly because no evidence was adduced apart from proof that the child care expenses were paid.

[16] In *Andrée d'Amours v. Minister of National Revenue*, 90 DTC 1824, Lamarre Proulx J. stated the problem as follows:

> In a case such as this we must analyse the child care expenses claimed and determine whether they were related to the employment. I have concluded that the expenses claimed in this appeal were incurred to enable the appellant to perform the duties of her employment.

[17] Lamarre Proulx J. allowed the appeal on the basis of the following facts:

> The appellant is a dental hygienist employed by the CLSC in Paspébiac. In late October 1984, when she was pregnant with her fourth child, she was allowed to leave her work as a preventive measure. The child was born on November 29, 1984. Under the collective agreement that applied to her, the appellant continued to receive 95 per cent of her salary in accordance with the following formula: the employee received the benefits to which she was entitled under the unemployment insurance scheme and the employer made up the difference.
>
> The appellant employed a babysitter in 1984 and kept this babysitter in her employ in the first four months of 1985. Between May and August the babysitter agreed temporarily to stop working for the appellant and began again in September, at which time the appellant returned to the duties of her employment. It is the expenses incurred for the services performed by this babysitter in the first four months of 1985 that are the subject of the dispute.

[18] According to Lamarre Proulx J., the legislation did not restrict the right to deduct child care expenses to only those persons who are physically at work. She wrote the following at page 1826:

> (3) If Parliament had wished to limit the application of this right to the period in which the person is physically at work, why would it have included in the definition of earned income certain sources of income other than earnings and gratuities such as, for example, the benefits described in paragraph 6(1)(*f*). Parliament could have limited the definition of earned income to wages, salaries and other remuneration, including gratuities, received by the person in respect of, in the course of or by virtue of offices and employments. If the respondent's reasoning is taken to the limit, Parliament could even have excluded income earned during vacations from the definition of earned income. I am forced to conclude, therefore, that Parliament did not rule out situations where the person receives benefits in respect of, in the course of or by virtue of employment that he still holds, without being physically present at the work place, to the extent that the expenses claimed were incurred to perform the duties of the employment.
>
> . . .

> I believe that if I allow the deduction claimed by the appellant, I am taking into account the economic realities facing a parent who employs a babysitter, and I feel that my interpretation is consistent with both the wording and the object of the tax legislation.

[19] In *Jo-Anne McCluskie v. The Queen*, 94 DTC 1735, Rip J. of this Court allowed the appellant's appeal, concluding that the amounts paid to a babysitter for the seven-day period immediately preceding the appellant's return to work should be considered to be child care expenses. The following excerpt from the reasons of Rip J. is relevant:

> [31] To my mind the words "to perform the duties of an office or employment" and "de remplir les fonctions d'une charge ou d'un emploi" in paragraph 63(3)(*a*) means that the child care expense must be incurred to enable the taxpayer to execute or perform the job for which she was hired. If the taxpayer is not performing her duties of employment (or office) during the period for which the expense is incurred it may be argued by definition, she has not incurred a child care expense.
>
> [32] Now there may be times when a parent will be permitted a child care deduction with respect to a period she or he is not physically present at the work place. The parent may be on sick leave, for example. To dismiss the baby-sitter on such occasion would be disruptive. The child care deduction may also be available to permit the parents, the children and a newly hired baby-sitter a period of time to get oriented with, and familiar to, each other. It is not acceptable from a welfare point of view, for example, for a newly hired baby-sitter to arrive at the taxpayer's door step early Monday morning, when the parents leave for work, to start providing services without prior introduction and some preparation. I cannot imagine that the costs incurred during such periods were not contemplated by Parliament as a child care expense. To include baby-sitting expenses incurred during such periods as a child care expense is within the "object and spirit" of section 63. However the lengths of leave and orientation would have to be reasonable, depending on circumstances, and not remote from the time the taxpayer continues to perform his or her occupation.

[20] In *Judy E. McLelan v. The Queen*, 95 DTC 856, O'Connor J. of this Court allowed a deduction for child care expenses for the amounts paid to a babysitter during the appellant's maternity leave from August 2 to October 10, 1992, while the appellant was still employed by the RCMP, even though she did not receive any pay during that period. In that case, the babysitter had been hired to take care of the appellant's three children so that the appellant would be mentally fit to return to work on October 11, 1992.

Analysis

[21] Parliament's intent, as reproduced in *Symes*, *supra*, offers few clues as to how to interpret section 63 of the Act. Since this measure was enacted, labour market conditions have changed considerably, and the social and economic realities of families are now very different from what they were at the beginning of the 1970s.

[22] The definition of "child care expense" in subsection 63(3) of the Act is vague in certain respects. However, this has the advantage of allowing some flexibility in its interpretation and application. For example, contrary to what one might have thought, the expression "at the time the expense was incurred" found in paragraph (*a*) serves to qualify the taxpayer's residence with the child rather than the performance of one of the eligible activities described in subparagraphs (*a*)(i) and (ii). The difference in the drafting of subparagraphs (*a*)(i) and (ii) also raises the question as to whether subparagraph (*a*)(i) must be interpreted more restrictively than subparagraph (ii), because subparagraph (ii) simply refers to an activity of carrying on a business, whereas subparagraph (i) refers to the performance of the duties of an office or employment. In my opinion, the expression "perform the duties of an office or employment" is equivalent to "hold an office or an employment" and must not be interpreted more restrictively than subparagraph (*a*)(ii). Day nursery services or services provided at a boarding school or camp are eligible to the extent that they do not exceed the maximum amount calculated under paragraph (*c*) of the definition of "child care expense". It is interesting to note that the maximum eligible amount is calculated in relation to the number of weeks of the year during which the child went to boarding school or camp, and that no reference is made to the number of days during which the parent claiming the child care expenses engaged in an eligible activity.

[23] The definition does not specifically require that there be a connection between the time when the child care services are given and the time when employment duties are performed. If that was Parliament's intent, it would have been very easy to state it explicitly.

[24] The *McLelan, McCluskie* and *D'Amours* judgments, *supra*, clearly show that it is not necessary for the child care services to be rendered at the same time the employment duties are performed by the taxpayer to constitute eligible child care expenses under the Act and still uphold Parliament's intent.

[25] *Sawicki, supra*, does not in any way contradict the appellant's position. In a context where one of the members of a family of four is an autistic child, it must be

understood that none of the usual domestic tasks, such as housekeeping, shopping and groceries, can be done with Simon present. In these circumstances, Simon has to be taken into care on Saturdays to allow the appellant to hold full-time employment from Monday to Friday. Without child care services for Simon on Saturdays, the appellant would have to give up her employment or hold part-time employment, which is not at all easy to do in the case of a professional.

Conclusion

[26] The Court is of the opinion that the appellant does indeed meet the conditions under section 63 in the specific circumstances of this case and, consequently, allows the appeal, without costs.

"Réal Favreau"

Favreau J.

Translation certified true
on this 28th day of September 2007

Michael Palles, Reviser

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APPEARANCES:

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