Docket: 2009-1939(IT)I

BETWEEN:

CAMERON HUMPHREYS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 20, 2010, at Victoria, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Holly Popenia

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Income Tax Act* is allowed, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Humphreys is entitled to tuition and education credits, as claimed, in the 2007 taxation year.

Signed at Montréal, Quebec, this 16th day of February, 2010.

"G. A. Sheridan"

Sheridan J.

Citation: 2010TCC88
Date: 20100216
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BETWEEN:

CAMERON HUMPHREYS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Cameron Humphreys, is appealing the disallowance of tuition credits and an education and textbook credit under sections 118.5 and 118.6, respectively, of the *Income Tax Act*. The Minister of National Revenue denied his claims on the basis that Mr. Humphreys had not satisfied the criteria in those provisions.

[2] In order to succeed in his appeal, Mr. Humphreys has the onus of proving either that, under paragraph 118.5(1)(*b*) of the *Act*, he was "… a student in full-time attendance at a university outside Canada in a course leading to a degree …"; or that, under paragraph 118.5(1)(*c*), he … "resided throughout the year in Canada near the boundary between Canada and the United States" and that he:

> (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,

[3] The same criteria applies for claiming an education credit through the operation of subsection 118.6(2) and paragraph 118.6(1)(*c*) of the *Act*.

[4] From September 2007 to April 2008, Mr. Humphreys was in full-time attendance at the Divers Institute of Technology in Seattle, Washington. He achieved an academic grade average of 90.73%[1] and later, received certification as an "Unrestricted Surface Supplied Diver" from the Diver Certification Board of Canada[2].

[5] Turning, first, to paragraph 118.5(1)(*b*) of the *Act*, Mr. Humphreys' situation does not come within the criteria of that provision. While the Divers Institute was "accredited" by certain organizations in Canada and the United States in 2007, it did not offer courses "leading to a degree" as that term has been interpreted in the jurisprudence[3]. The evidence is clear that the Divers Institute issued only diplomas.

[6] I am persuaded, however, that Mr. Humphreys has satisfied the requirements for tuition and education credits under paragraphs 118.5(1)(*c*) and 118.6(1)(*c*), respectively.

[7] In 2007, Mr. Humphreys was resident in Brentwood Bay, British Columbia. He was enrolled in and commuted to the Divers Institute which meets the requirements of "an educational institution providing courses at a post-secondary school level" under paragraph 118.5(1)(*c*) and the definition of a "designated educational institution" under paragraph 118.6(1)(*c*) of the *Act.* The only question is whether Mr. Humphreys resided "near the boundary between Canada and the United States" and "commuted" to the Divers Institute.

[8] The Minister's position is that it cannot be said that Mr. Humphreys resided "near" the Canada-US border or that he "commuted" to Seattle because it took him more than four hours to drive from Brentwood Bay to Seattle. In support of this contention, counsel for the Respondent referred the Court to a decision of Dussault, J., *Van de Water v. Minister of National Revenue*[4], in which he held that a student who commuted from his home in Pierrefonds, a suburb of Montreal located 80 kilometers from the Canada-US border, to a college in Plattsburg, New York did not reside "near" the boundary between the two countries.

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[1] Exhibit A-1.

[2] Exhibit A-3.

[3] *Gilbert v. R.*, [1998] T.C.J. No. 1091 (TCC).

[4] [1991] 1 C.T.C 2200. (T.C.C.).

[9] In reaching this conclusion, Dussault, J. first noted that the word “near” is not defined in the *Income Tax Act* and then went on to consider its ordinary dictionary meanings before turning to the definition in *Black's Law Dictionary*[5]:

…

> Proximate; close-by; about; adjacent; contiguous; abutting. The word as applied to space is a relative term without positive or precise meaning, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. Closely akin or related by blood; as, a near relative. Close to one's interests and affections, etc; touching or affecting intimately, as one's near affairs, friends. Not far distant in time, place or degree; not remote; adjoining.

[10] Mr. Justice Dussault then considered the purpose of paragraph 118.5(1)(*c*) as follows:

> Obviously, words are to be interpreted and given a meaning depending on the subject matter and the context in which they are used. We are dealing here with a specific relief granted by Parliament to individuals living in a border town or a border zone. The relief is granted so that those individuals could have access to educational institutions situated on the other side of the border but perhaps less distant than the ones situated in Canada and this, without being penalized *vis-à-vis* individuals attending institutions situated in Canada to which relief is granted by paragraph 118.5(1)(a) of the Act. By its very nature, paragraph 118.5(1)(c) is to be seen as an exception.
>
> The adverb "near" should then be construed according to its plain and natural meaning given the context in which it is used. Most of all, it is not to be given a meaning not reasonably compatible with the object sought. Applying it to the particular circumstances of the present case, I am of the opinion that an individual residing some 75 to 80 kilometres from the U.S. border is not residing "... near the boundary between Canada and the United States ...". I do not think that the place of residence of the appellant, namely Pierrefonds, Québec, qualifies as such a place of residence because it lacks the element of proximity, contiguity or vicinity to the border zone that, I feel, was contemplated in enacting that particular provision of the Act.
>
> Having arrived to that conclusion, I can also draw some comfort from the Act read as a whole. I would indicate here that a 40 kilometre test is used to determine if an individual can claim moving expenses under section 62 of the Act. The underlying assumption in that case, I suppose, is that the new place of work is

[5] 6th ed., at page 1029.

> far enough from the old residence as to warrant the deduction of moving expenses to the new residence: or, to put it in another way, is not *near* enough.

[11] I do not read *Van de Water* as standing for the proposition that any distance greater than 80 kilometers is, by definition, not "near" the boundary between Canada and the United States. The word "near", as noted in the *Black's* definition, is "a relative term", the interpretation of which will depend on the particular circumstances of each case. What may be "not near enough" in the confined spaces of urban Quebec may be very "near" indeed in the watery expanses of the Pacific coast. It seems to me that by choosing to use the word "near" in these provisions, rather than specifying a particular distance, Parliament intended to recognize the great diversity of Canada's geography and demographics.

[12] To qualify for the deduction under paragraphs 118.5(1)(*c*) and 118.6(1)(*c*), the taxpayer must show that he resided "near" the boundary between Canada and the United States and, by implication, that the educational institution is close enough to be within commuting distance to his residence.

[13] In the present case, there is no question that Seattle was within commuting distance for Mr. Humphreys because that is, in fact, what he did through the 2007-08 academic year. As for whether he resided "near" the international boundary, Mr. Humphreys' weekly commute from his residence to the Divers Institute in Seattle, Washington took over four hours, a journey which included a ferry ride from Vancouver Island. Mr. Humphreys represented himself in a very clear and well-organized manner but not anticipating the applicability of these provisions, did not present any evidence as to how far Brentwood Bay is from the boundary between Canada and the United States. However, I take judicial notice of the fact that as the international boundary snakes its way through the many islands in the Strait of Juan de Fuca, it runs, relative to other communities in those waters, quite "near" Brentwood Bay. Furthermore, as an itinerant judge whose jurisdiction spans the entire country, I am well placed to know that there is not necessarily a direct correlation between the time spent travelling between two points and their physical proximity. Thus, when considered in the context of the vast northwest coast of North America, the evidence supports the conclusion that Mr. Humphreys resided "near" the Canada-United States border.

[14] The appeal is allowed and the matter referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Humphreys is entitled to tuition and education credits, as claimed, in the 2007 taxation year.

Signed at Montréal, Quebec, this 16th day of February, 2010.

"G. A. Sheridan"

Sheridan J.

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APPEARANCES:

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