Docket: 2010-2776(IT)I

BETWEEN:

TABATHA CAMMIDGE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 21, 2011, at Edmonton, Alberta

Before: The Honourable Justice L.M. Little

Appearances:

Agent for the Appellant:	Ryan Cammidge
Counsel for the Respondent:	Gergely Hegedus

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2008 taxation year is allowed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 21st day of March 2011.

"L.M. Little"

Little J.

Citation: 2011 TCC 172
Date: March 21 2011
Docket: 2010-2776(IT)I

BETWEEN:

TABATHA CAMMIDGE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant is a resident of Edmonton, in the Province of Alberta.

[2] The Appellant enrolled in and completed a Masters of Business Administration program through the University of Phoenix.

[3] The Appellant testified that she took a full-time course load online through the University of Phoenix from October 2007 to August 2009.

[4] The University of Phoenix offers a variety of programs through campus-based and online learning opportunities.

[5] During the hearing, the Court was advised that the University of Phoenix had campuses in Calgary, Alberta and Burnaby, British Columbia, plus many campuses throughout the United States.

[6] For the 2008 taxation year, the Appellant claimed credits of $13,673 in tuition fees, along with amounts as education tax credits for full-time study.

[7] The Minister of National Revenue (the "Minister") reassessed the Appellant on November 2, 2009, disallowing the claim for tuition fees and education tax credits, on the basis that the courses the Appellant had taken were at an institution in the United States and that the specific courses were less than 13 weeks in length.

[8] A Notice of Objection to the reassessment was filed on November 17, 2009 and was confirmed by the Minister on July 8, 2010.

[9] The Appellant filed an appeal to the Tax Court on August 30, 2010.

B. ISSUE

[10] The issue to be decided is whether the Appellant is entitled to the tuition credit for the 2008 taxation year. The claim for an education tax credit was not pursued by the Appellant.

C. ANALYSIS AND DECISION

[11] The Appellant says that, since the University of Phoenix had two locations in Canada in 2008, this makes it an "other educational institution providing courses at a post-secondary school level", satisfying subparagraph 118.5(1)(*a*)(i) of the *Income Tax Act* (the "*Act*").

[12] The Minister maintains that the applicable section of the *Act* is actually paragraph 118.5(1)(*b*). The Minister says the University of Phoenix is an educational institution located outside of Canada and the Appellant must have been in full-time attendance at that institution to claim the tuition credit. The Minister also maintains that since the Appellant's courses were less than 13 weeks in length, the program does not qualify within the legislation in the *Act*.

[13] The Minister goes further, saying that since the courses in question did not last at least 13 weeks and because the appropriate certificate was not filed, the Appellant also cannot claim the education tax credit under section 118.6 of the *Act*. As noted above, the Appellant did not pursue the claim for the education tax credit.

[14] During the hearing, the Minister noted that the Appellant received instruction from many sources located across the United States and also registered and graduated

through the University of Phoenix's campus in Phoenix, Arizona. Counsel for the Minister argued that the courses the Appellant took had no connection to the Canadian campuses, which she did not attend, and therefore the tuition fees paid for those courses is not deductible under paragraph 118.5(1)(*a*) of the *Act*.

[15] Finally, the Minister stated that, if the Appellant is entitled to the tuition fees, she should only be able to claim the portion of tuition fees for the courses taken by her in the 2008 taxation year.

[16] The *Act* allows tuition fees paid to certain institutions to be deducted from income as a non-refundable tax credit. Subsection 118.5(1) of the *Act* states, in part:

> **118.5(1) Tuition credit.** 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
>
> …
>
> (*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 individuals 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,
>
> …

[17] Section 118.6 of the *Act* allows a separate tax credit based on the amount of time spent in either full or part-time studies, and also a credit for the purchase of textbooks. Subsection 118.6(1) states, in part:

> **118.6(1) Definitions** For the purposes of sections 63 and 64 and this subdivision,
>
> *"designated educational institution"* – "designated educational institution" means

> (*a*) an educational institution in Canada that is
>
> > (i) a university, college or other educational institution designated by the Lieutenant Governor in Council of a province as a specified educational institution under the *Canada Student Loans Act*, designated by an appropriate authority under the *Canada Student Financial Assistance Act*, or designated by the Minister of Higher Education and Science of the Province of Quebec …, or
> >
> > (ii) certified by the Minister of Human Resources and Skills Development to be an educational institution providing courses, other than courses designed for university credit, that furnish a person with skills for, or improve a person's skills in, an occupation,
>
> (*b*) a university outside Canada at which the individual referred to in subsection (2) was enrolled in a course, of not less than 13 consecutive weeks duration, leading to a degree, or
>
> …

[18] The *Act* provides an expansive definition of "Canada" in section 255, which states:

> **SECTION 255: Canada**
>
> For the purposes of this Act, "Canada" is hereby declared to include and to have always included
>
> (*a*) the sea bed and subsoil of the submarine areas adjacent to the coasts of Canada in respect of which the Government of Canada or of a province grants a right, licence or privilege to explore for, drill for or take any minerals, petroleum, natural gas or any related hydrocarbons; and
>
> (*b*) the seas and airspace above the submarine areas referred to in paragraph (*a*) in respect of any activities carried on in connection with the exploration for or exploitation of the minerals, petroleum, natural gas or hydrocarbons referred to in that paragraph.

[19] In *Mersey Seafood Limited v M.N.R.*, 85 D.T.C. 731 [*Mersey Seafood*], Justice Kempo of the Tax Court had to decide if a vessel processing fish while at sea off-shore from Canada was doing those activities "in Canada". The Court undertook a detailed analysis of both the *Act* and international law in order to determine what is recognized as "in Canada". In her analysis, Justice Kempo concluded that "Canada" means the territory over which Canada has sovereignty.

[20] The case law around deductibility of tuition fees paid for online distance education from institutions in the United States has evolved over the last dozen years. Initially, the case law interpreted section 118.5 of the *Act* strictly, but recently a more relaxed approach has been applied by Judges of the Tax Court. I will refer to several Court decisions to illustrate the general approach to interpreting section 118.5 of the *Act*.

[21] In *Hlopina v The Queen*, [1998] T.C.J. No. 27, the Appellant had worked full-time in Alberta while completing a program through a correspondence school in the State of Louisiana. In that case, Justice Bowie had to decide if completing a self-paced correspondence course would be full-time study if the Appellant also worked full-time. He decided it did not. In interpreting section 118.5 of the *Act*, Justice Bowie held that prior case law showed that an individual cannot be in full-time attendance in school while also working full-time.

[22] In *Cleveland v The Queen*, 2004 TCC 34, 2004 D.T.C. 2199 [*Cleveland*], the Appellant had taken a program at Capella University leading to a Masters of Science degree. The courses were completed online while the Appellant lived in Saskatchewan. Justice McArthur held that paragraph 118.5(1)(*b*) of the *Act* required "full-time attendance" when taking courses through an institution based in the United States. The deciding issue in the case was whether completing courses online, through forums, e-mails, telephone calls and using a virtual library amounted to "attendance". Justice McArthur held that, because the statute required actual physical attendance at an institution, the Appellant did not qualify for a tuition deduction.

[23] Several months later, however, the approach followed by Judges of the Tax Court in interpreting section 118.5 of the *Act* began to change. In these subsequent cases, the Appellants in question remained employed for part or all of their studies. The evidence indicated that it was not economically feasible for these Appellants to stop working in order to attend school. In all cases, the Appellants put significant effort into their studies and the Justices held that such efforts were commendable.

[24] In *Krause v The Queen*, 2004 TCC 594, 2004 D.T.C. 3265 [*Krause*], Justice Bowman (as he then was) took a different point of view regarding the deductibility of tuition fees and education amounts. In that case, the taxpayer had taken an online PhD program through an institution in California. The Minister refused his claim to deduct tuition fees and education amounts and the taxpayer appealed. As the situation involved a nil assessment, the Court dismissed the appeal. However, Justice Bowman made many relevant remarks in *obiter*. He first held that

someone completing courses electronically through the internet is congruent with the use of the word “attend” in the *Act*. Attending full-time through electronic means satisfied the requirements of the *Act* for “full-time attendance”. I suggest that the comments of Justice Bowman recognize the realities of modern technology as it was being used for distance education.

[25] Further, Justice Bowman held that, the Appellant was attending full-time as he was considered a full-time student by the institution and did 22 to 36 hours of course work per week. Justice Bowman also stated that, simply because the Appellant was employed for 30 hours a week, did not automatically disqualify him from also being a full-time student. Put another way, Justice Bowman acknowledged that people must often put in “full-time” employment in order to afford to also be full-time students and he stated this should not affect eligibility for tuition and education deductions.

[26] This change to a more liberal interpretation of the statute was affirmed by Justice McArthur in *McGrath v The Queen*, 2007 TCC 295, 2007 D.T.C. 894. In that case, the Appellant worked full-time as a teacher while completing a Master’s Degree online through a university in Illinois. The Appellant’s studies took about 25 hours per week. Justice McArthur noted that the Appellant would not have been able to take this degree in Canada and, consequently, completed the work online. He stated that his thinking had evolved since *Cleveland* and he agreed with the reasoning of Justice Bowman in *Krause*. Since the Appellant was in full-time studies and attending the institution through an online interface, Justice McArthur allowed the appeal and permitted the Appellant to claim a tax credit for the tuition fees that he had paid.

[27] Further, in *Valente v. The Queen*, 2006 TCC 145, 2006 D.T.C. 2685, Justice Woods held that, for online educational programs to be considered full-time, they need only require the attention of the student on a “full-time” basis. She also stated that she agreed with the reasoning in *Krause*. Further, she held that section 118.5 of the *Act* should not be narrowly interpreted. She said that it is not appropriate to infer that actual physical attendance is required by the *Act* where it was not explicitly stated. This reasoning was also affirmed by Justice Sheridan in *Kuwalek v The Queen*, 2006 TCC 624, 2007 D.T.C. 199.

[28] A case most directly on point in this appeal is *Robinson v The Queen*, 2006 TCC 664, 2007 D.T.C. 348 [*Robinson*]. In that case, the Appellant had completed an MBA program from the University of Phoenix online, but was denied tuition fees and education deductions by the Minister. The issue in that case was different than prior cases, because the Court had to decide whether the University of Phoenix was

an institution in Canada. The Appellant was claiming (as in this appeal) to be eligible for tax credits for tuition fees under subparagraph 118.5(1)(*a*)(i) of the *Act*, since the University of Phoenix had a campus in Burnaby, British Columbia and since she was enrolled in an institution in Canada, she was eligible to deduct her tuition.

[29] In that case, Justice Beaubier allowed the appeal on tuition fees only, on the basis that the evidence at trial showed that the University of Phoenix was an institution in Canada since it maintained a campus in Burnaby, British Columbia. With regards to education amounts under section 118.6 of the *Act*, the appeal was dismissed on the basis that the University of Phoenix was not a "designated educational institution" as required by that section.

[30] As indicated above, Tax Court Justices have acknowledged that education is no longer classroom based and that taxpayers are choosing to take courses online in order to maintain their employment while also advancing their education. Where taxpayers have shown that they have made a credible effort to advance their education through online programs, the Tax Court has recently allowed them to claim credits for tuition fees and education tax credits where the law has room to allow it.

[31] In Canada, education has always been achieved at a distance. Canada is the second largest country in the world. It also has one of the lowest population densities. The reality is that Canadians live over such a vast area that educational opportunities for many will have to be delivered over a distance, as classroom attendance is not economically feasible. In response, Canadian institutions have a history of offering courses and programs at a distance. An example is the Faculty of Extension at the University of Alberta. It has offered education at a distance since 1912, as the need to provide courses to remote parts of Alberta was recognized early on in that institution's existence. It is submitted that such institutions exist because there is a need and a market in a country as vast as Canada to offer education at a distance, whether the mode of education has been by correspondence or through electronic means and the internet.

[32] This reality is acknowledged in section 118.5 of the *Act*. In this section, Parliament has stated that in order to qualify for tax credits for tuition fees to an institution in Canada, one need only be "enrolled" in an institution in Canada, and not necessarily attending at that institution. It seems that Parliament was indeed aware that education would occur in Canada at a distance and allowed for this in the *Act*. Whether a course is taken online or in the classroom is irrelevant to the eligibility to deduct tuition fees for income tax purposes.

[33] In the present appeal, the Appellant has established that she completed courses in a program leading to a degree through the internet while living in Canada. Therefore, the only issue left in this matter is to decide whether or not the University of Phoenix, by virtue of the existence of campuses in Calgary, Alberta, and Burnaby, British Columbia, was an institution in Canada. This requires examining the phrase "in Canada" as it relates to this section.

[34] In *Mersey Seafood*, "Canada" was held to mean where Canada has sovereignty. It is submitted that it follows that "in Canada" means to be in a place where you are subject to Canadian sovereignty. In this appeal, the University of Phoenix may have its head office in Phoenix, Arizona, but it did subject itself to Canadian sovereignty by establishing campuses in both Calgary, Alberta and Burnaby, British Columbia. There is no evidence that, despite being present in Canada, the University of Phoenix was somehow exempt from Canadian law. Therefore, the University of Phoenix was an institution within Canada.

[35] As noted above, the Respondent showed that the Appellant obtained instruction from several sources in various locations throughout the United States. However, the education of the Appellant occurred in Edmonton where she resided. It is submitted that instruction coming from sources outside Canada is not a ground to deny a deduction which the Appellant may be otherwise qualified for, especially where the language of subsection 118.5(1)(*a*) of the *Act* does not speak to a requirement that instruction occur in one place or another. To do so would be to find a qualification in subsection 118.5(1)(*a*) that has not been expressly stated, and it is submitted that the case law discourages such a finding.

[36] The Respondent cited two cases to support its argument: *Hillman v The Queen*, 2006 TCC 578, 2007 D.T.C. 81, and *Ferre v The Queen*, 2010 TCC 593, [2010] T.C.J. No. 470. Both cases related to the eligibility under subsection 118.5(1)(*b*) of the *Act*. Since the Appellant in this appeal qualifies for a deduction under subsection 118.5(1)(*a*), I do not believe that these cases assist in resolving the appeal.

[37] I have concluded that the appeal should be allowed. The courses taken by the Appellant were attended in Canada and were obtained through an institution which had locations "in Canada" at the relevant time. Therefore, they qualify under subparagraph 118.5(1)(*a*)(i) of the *Act* for tuition fees. However, I agree that the Respondent is correct that the statute only allows the portion of the tuition fees paid for courses taken in 2008 to be deductible for that taxation year. As to the education

tax credit under section 118.6 of the *Act*, the Appellant was not seeking relief under that provision and so none should be given.

[38] However, if deductibility of education tax credits under section 118.6 of the *Act* are an issue, they should be resolved as in the *Robinson* case. The facts in that appeal and the present appeal are virtually identical. The University of Phoenix does not qualify as a "designated educational institution" as required by subsection 118.6(1) of the *Act*, and no deduction under that section is available to the Appellant.

[39] In summary, the Appellant attended an institution within Canada, by virtue of the fact that the University of Phoenix maintained two campuses in Canada at the material times. Further, the Appellant was attending courses at the relevant time through her online participation in course work and instruction. She may have received instruction from several sources outside Canada, but the *Act* does not require that the source of the instruction and materials be from one location or another.

[40] I have concluded that the Appellant is entitled to claim a tax credit for the tuition fees for the courses that she took during the 2008 taxation year.

[41] The appeal is allowed, without costs.

Signed at Vancouver, British Columbia, this 21st day of March 2011.

"L.M. Little"

Little J.

CITATION:	2011 TCC 172
COURT FILE NO.:	2010-2776(IT)I
STYLE OF CAUSE:	TABATHA CAMMIDGE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	January 21, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
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