Docket: 2009-2230(IT)I

BETWEEN:

CAROL-ANNE FAINT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 4, 2011, at Kamloops, British Columbia.

Before: The Honourable Justice T.E. Margeson

Appearances:

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

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is dismissed, and the Minister's reassessment is confirmed.

Signed at Ottawa, Canada, this 11th day of May 2011.

"T.E. Margeson"

Margeson J.

Citation: 2011 TCC 260
Date: 20110511
Docket: 2009-2230(IT)I

BETWEEN:

CAROL-ANNE FAINT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] In the 2007 taxation year, the Appellant claimed a tuition fee tax credit of $14,023.26, an education amount tax credit of $3,960 and a post-secondary textbook tax credit of $645. These were disallowed by the Minister of National Revenue (the "Minister"). From this decision, the taxpayer filed this appeal.

Evidence

[2] The Appellant while giving testimony confirmed all of the facts presumed by the Minister as set out in the Reply to the Notice of Appeal with the exception of paragraph 8(f). She took the position that the University of Phoenix ("Phoenix") and Northcentral University ("Northcentral") were "designated educational institutions" as defined in subsection 118.6(1) of the *Income Tax Act* (the "*Act*").

[3] During the 2007 taxation year, the Appellant enrolled in courses through the on-line arms of these two universities located in the United States of America ("U.S."). Northcentral does not have a campus in Canada. Phoenix did have a campus in Vancouver, British Columbia, in 2007 but it did not offer the courses that the Appellant wished to take.

[4] The Appellant confirmed that all of the courses that she took were less than thirteen weeks in duration. She said that no universities in Canada have courses that are thirteen weeks in duration. Further, the degrees that she was pursuing were not available in Canada. She could not go to university for two to three years at a time.

[5] In cross-examination, she said that she resided in Canada and that all of the courses that she took were "on-line" courses. If she needed on-line support, it was obtained through the U.S. campuses. She graduated from the Phoenix campus.

Argument on behalf of the Respondent

[6] Counsel for the Respondent argued that there is only one issue in this case and that is whether the Appellant is entitled to claim the tuition credit, the education amount credit and the textbook amount credit. Her conclusion was that she was not entitled to claim any of these amounts.

[7] The first consideration is whether or not Phoenix is an educational institution in Canada by virtue of having had a campus in Canada during the year in issue. One must consider the provisions of paragraph 118.5(1)(*a*) of the *Act* in that regard.

[8] Phoenix is not an educational institution in Canada under this provision and therefore would be subject to the criteria set out in paragraph 118.5(1)(*b*) and be classified as a university outside Canada.

[9] If Phoenix is an educational institution in Canada, it is not a designated educational institution for the purposes of subsection 118.6(2) and (2.1) of the *Act* and therefore the Appellant is not eligible for the education or textbook credits.

[10] Counsel referred to the case of *Cammidge v. Her Majesty the Queen*, 2011 TCC 172, [2011] T.C.J. No. 132 (QL), where the Court found that the University of Phoenix was an educational institution in Canada on the basis that the university had campuses in Canada that were subject to Canadian law and that 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.

[11] Counsel opined that this did not amount to a sufficient connection to the Canadian campuses of the University of Phoenix, to be able to say that the Appellant was enrolled at an educational institution in Canada.

[12] In the case at bar, the Appellant had no connection whatsoever to the Canadian campus of the University of Phoenix. The courses which she took were not offered at the Canadian campus. She enrolled through the Phoenix campus. She paid her fees in U.S. dollars to the Phoenix campus. Her exams were marked by professors in the United States and she graduated from the campus of the University of Phoenix.

[13] Counsel also referred to and relied upon the decision of Mogan J. in *Gilbert v. Canada*, [1999] 2 C.T.C. 2127, where he indicated that the legislation is more confining in paragraph 118.5(1)(*b*) than it is in paragraph 118.5(1)(*a*) of the *Act* and he speculated that the reason for this difference was "to give some measure of control as to the kinds of tuition paid to institutions outside Canada which will give the payer or parent a tax credit."

[14] Counsel argued that the University of Phoenix was not a designated educational institution for the purposes of subsections 118.6(2) and 118.6(2.1) and therefore the Appellant is not eligible for the education or textbook tax credits that she seeks. The University of Phoenix is not designated by the provinces under either the *Canada Student Loans Act* or the *Canada Student Financial Assistance Act*, and is therefore not a designated educational institution for that section.

[15] In order to receive the tuition credit for attendance at a university outside of Canada, the individual must be in full-time studies at a university in a course of no less than thirteen weeks in duration.

[16] Subsections 118.6(2) and 118.6(2.1) require that where the university is outside Canada, the course must be for no less than thirteen consecutive weeks. Counsel relied upon the decision in *Ferre v. Canada*, 2010 TCC 593, 2011 DTC 1405, to support her position that the courses themselves must be at least thirteen weeks in duration and not the whole program. Likewise, she quoted with approval the decision of Bowie J. in *Fayle v. Canada*, 2005 TCC 71, [2005] 1 C.T.C. 2840, to support her position.

[17] The appeal should be dismissed.

Argument on behalf of the Appellant

[18] The Appellant said that the reason that she took the courses in the U.S. was that they were not offered in Canada. She relied upon *Robinson v. Canada*, 2006 TCC 664, 2007 DTC 348, in support of her position that she should be entitled to the tuition credit even where her courses were less than thirteen weeks in duration.

[19] She said that she attended at the Chan Centre in Canada at the University of British Columbia for her graduation from the University of Phoenix, which also has a campus in Canada. She was "part of that family of graduates from Canada, so we are strongly linked to Canada."

[20] She also argued that it was a designated educational institution. It was a continuous program that she was in. There was no break in her education, "it was a constant flow of class." She signed up for the degree program and not just one course.

[21] The appeal should be allowed.

Analysis and Decision

[22] The Court is satisfied that counsel for the Respondent has properly characterized the issues in this case and they are also properly referred to in the Reply to the Notice of Appeal.

[23] At the heart of the issue is whether or not either of the two universities here in question were universities inside Canada or outside Canada. There is no real dispute as to the facts relevant to this question. It is set out in the Reply that Northcentral is located in the United States and does not have a campus in Canada. This was not rebutted by any evidence before the Court. There was no evidence connecting this university to Canada in any way. The Court is satisfied that Northcentral was a university outside Canada.

[24] During the year in question, with respect to this university, the Appellant did not attend an educational institution as described in subsection 118.5(1) of the *Act* and is not entitled to the tuition credit under subsection 118.5(1) of the *Act.*

[25] With respect to Phoenix, the only connection to Canada was the evidence that this university had a campus in Canada during the year in question. However, the Appellant did not take any courses at that campus, did not have any exams set or marked by that campus, did not pay fees to that campus, did not attend any classes at that campus, did not receive any instructions from that campus or receive any technical support from that campus.

[26] Under these circumstances, the Court cannot conclude that there were any connecting factors established to allow it to conclude that Phoenix was an institution in Canada under paragraph 118.5(1)(*a*) of the *Act*.

[27] The factors referred to by the Appellant in her argument do not disclose any sufficient connection to the Vancouver campus which would convince the Court to decide otherwise.

[28] The Appellant took the position that the decision in *Robinson* above was on all fours with the case at bar and is determinative of the issue here. This Court believes otherwise.

[29] This brings the Court to a consideration of paragraph 118.5(1)(*b*) and subsections 118.6(1), 118.6(2) and 118.6(2.1) of the *Act*.

[30] Paragraph 118.5(1)(*b*) requires that the student be enrolled at a university outside of Canada in a course not less than thirteen weeks in duration.

[31] Subsection 118.6(1) defines a designated educational institution for the purposes of the deduction under subsections 118.6(2) and 118.6(2.1). These provisions require the individual to be enrolled in a course of not less than thirteen weeks in duration.

[32] The Appellant argues that this requirement is related to the length of her whole program and not just the courses within a whole program. Unfortunately for the Appellant, this is not the state of the law at this time.

[33] This matter was dealt with by Paris J. in *Ferre* above where he determined that the intent of Parliament was “to refer to the individual courses within a program of studies, rather than to the entire program itself, . . .”.

[34] Likewise, Bowie J. in *Ali v. Canada*, 2004 TCC 726, [2005] 1 C.T.C. 2230, came to the same conclusion even though he agreed that the Appellant in that case, like other students may be placed at a disadvantage that may not have been intended.

[35] In light of the decision above that Phoenix is not an educational institution in Canada, it is not necessary for the Court to consider the provisions of subsection 118.6(1) of the *Act*, but it does so and concludes that Phoenix is not a designated educational institution for the purposes of subsections 118.6(2) and 118.6(2.1) of the *Act* and therefore the Appellant is not eligible for the education or textbook credits.

[36] In the end result, the Court finds that the Appellant is not entitled to any of the amounts claimed.

[37] The appeal is dismissed and the Minister's assessment is confirmed.

[38] The Court appreciates the difficulties that the Appellant faced in trying to further her university education and why she believes that the system is unfair to students like her. However, as Bowie J. opined in *Ali* above, "That, however, is a matter for the executive, not the Court, to decide."

Signed at Ottawa, Canada, this 11th day of May 2011.

"T.E. Margeson"

Margeson J.

CITATION:	2011 TCC 260
COURT FILE NO.:	2009-2230(IT)I
STYLE OF CAUSE:	CAROL-ANNE FAINT and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kamloops, British Columbia
DATE OF HEARING:	April 4, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice T.E. Margeson
DATE OF JUDGMENT:	May 11, 2011

APPEARANCES:

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

COUNSEL OF RECORD:

For the Appellant:

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Firm:	

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