

BETWEEN:

TRUDY TALLON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on September 6 and 7, 2017, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant: Leigh Sommerville Taylor

For the Respondent: Ryan Gellings

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2012 taxation year is allowed in part and the matter is referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

On consent of the parties, the Appellant withdrew her appeal for the 2013 taxation year.

The appeal from the reassessment made under the *Income Tax Act* for the 2014 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 13th day of December 2017.

“Rommel G. Masse”

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Masse D.J.

Citation: 2017 TCC 244

Date: 20171213

Docket: 2015-5603(IT)I

BETWEEN:

TRUDY TALLON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Masse D.J.

[1] This is an appeal by Trudy Tallon from the disallowance by the Minister of National Revenue (the “Minister”) of her medical expense tax credits (“METC”) claimed with respect to travel expenses incurred by her and her spouse in the 2012, 2013 and 2014 taxation years.

[2] The parties have arrived at a partial settlement of this appeal. The parties agree that, with respect to the 2012 taxation year, the appeal is to be allowed in part and the matter is referred back to the Minister for reconsideration and reassessment on the understanding that the Appellant’s travel expenses to the United States in the amount of \$958.97 is allowed as a medical expense. In all other respects, the appeal is dismissed.

[3] With respect to the 2013 taxation year, the Appellant withdraws her appeal insofar as the appeal relates to travelling expenses to Thailand on the basis that there was a nil assessment of federal tax.

[4] The sole issue before the Court is whether the Appellant may claim as medical expenses, amounts she and her husband incurred for travel, meals and accommodations relating to travel to Thailand and Cambodia between December 2013 and May 2014. The Appellant claims that these expenses are properly allowable as medical expenses as contemplated by subsection 118.2(2) paragraphs (g) and (h) of the *Income Act*, R.S.C., 1985, c. 1 (5<sup>th</sup> supp.), (the “Act”).

The amount of expenses in dispute is \$15,104.47. If the Appellant is successful in her appeal, it is agreed that this would result in a net advantage to her, amounting to a reduction in her federal income taxes of \$710.21.

### **Factual Context**

[5] The only witness who testified at this hearing was David Bullough, the Appellant's spouse. The Appellant also filed a large binder of documents (Exhibit A-1) which set out in detail all of her medical records for the period in question as well as documenting all of her and her husband's expenses for travel, accommodation and meals while travelling to and staying in Thailand and Cambodia during the period here under consideration.

[6] Some background is necessary in order to understand the parties' positions. The Appellant is a resident of Thunder Bay, Ontario. She has a long history of serious medical problems. She suffers from temporomandibular joint (TMJ) dysfunction, a debilitating and very painful condition. In the late 1980's, she received Teflon Proplast jaw prostheses that were surgically implanted in an effort to try and correct her painful condition. The use of these Teflon implants was disastrous for the Appellant. The Teflon implants eventually fragmented which lead to progressive bone degenerative change and a phenomenon known as giant cell reaction. Minute Teflon fragments were disbursed throughout her system and these fragments or fibers acted like millions of tiny drill bits as they invaded the entire body through the bloodstream. The end result was the erosion and deterioration of the bones of her jaw, her temporomandibular joints as well as the surrounding skull. The Appellant's local doctor, Dr. Franchi, conducted much research and consultations with other doctors in order to find a solution to the Appellant's problem. In Dr. Franchi's opinion, there was no Canadian solution. Consequently, the Appellant was referred to Dr. Larry Wolford, a world renowned oral and maxillofacial surgeon, at Baylor medical University Centre located in Dallas, Texas. Dr. Wolford removed as much as possible of the Teflon implants from the appellant's jaw and inserted in their stead, titanium metal TMJ prosthetic devices in late 2004. Since then, the Appellant has gone to Dallas for annual checkups with Dr. Wolford.

[7] According to Dr. Wolford, because the Appellant now has these metallic TMJ prosthetic devices, the cold weather in Thunder Bay during the winter time, exacerbates her pain. Dr. Wolford was of the view that living in a warm climate during the Canadian cold winter months would reduce the Appellant's pain and improve her quality of life. Dr. Wolford provided a letter of opinion dated

November 3, 2009, to the Ontario Ministry of Health and Long Term Care (Exhibit A-1, Tab 1). This opinion provides:

My patient, Trudy Tallon, has no choice but to seek a warmer climate during the coldest 6 months of the year (November to May). Cold temperatures severely exacerbate the pain in patients with her type of condition even with the use of narcotics. Therefore I have advised my patient to continue to have her annual checkup in Dallas, Texas USA, as well as to seek a warmer climate, for the winter. If she does not seek a warmer climate, her condition will likely lead to further deterioration in both her physical and mental health, possibly resulting in hospitalization.

[8] In a memo dated August 12, 2013 (Exhibit A-1, Tab 4), Dr. Franchi certified that it is necessary for the Appellant to travel to warmer climates during the winter time in order to alleviate her pain. The Appellant still requires daily assistance with many aspects of normal life. It is therefore necessary, according to Dr. Franchi, for the Appellant to have a travel companion, ideally her husband. Without a travel companion, she would find it extremely difficult, if not impossible, to cope with life in a foreign country while she attempts to cope with her many extreme health issues.

[9] The Appellant and her husband have indeed been spending their winter months in warmer climates ever since 1988. They have gone to Thailand, Indonesia, India, Costa Rica, Venezuela, Ecuador, Mexico, Honduras, Brazil, Argentina and the Philippines. They travelled to all of these countries primarily for the warm climate as well as for other considerations. One of the considerations that determined where they would travel was the availability of medical services since it was highly likely that the Appellant would require such services no matter where she was. They travelled to Thailand and Cambodia starting at the end of 2013 and carrying on into 2014. For this period, the Appellant reported \$19,318 in medical expenses for the 2014 taxation year including travel expenses for her and her husband. Even though they stayed in both Thailand and Cambodia, the Appellant did not obtain any medical treatment in Cambodia. When they stayed in Cambodia, they would fly to Thailand if the Appellant needed medical treatment at the hospital located there.

[10] The Appellant's husband agrees that when they go to Thailand and Cambodia, they go there for the climate. It is evident that they do not go to Thailand in order to access specific pre-planned medical services. They go there for the warm climate but they also choose a place where they can be close to a hospital or other providers of medical services, should the Appellant need medical services. They went to Thailand rather than the southern United States because of reasons of affordability.

[11] Mr. Bullough testified that while in Thailand, the Appellant sought medical services for three specific problems:

- (a) Accelerated heart rate;
- (b) Thyroid problem; and
- (c) A dermatological problem.

#### Heart problem

[12] In Canada, the Appellant was experiencing episodes of accelerated heart rates. These episodes resulted in shortness of breath to the point where she had difficulty breathing. She found these episodes to be incapacitating. Her doctor in Canada attributed this to stress and anxiety. The Appellant and her husband did not accept this. While in Thailand, she underwent some tests and it was determined that, in Mr. Bullough's words, the blood in her heart was flowing in the wrong direction. It was suspected that there was a hole in her heart. It was recommended that she take Bisoprolol to control her symptoms. Upon her return to Canada, she went to see a new doctor, Dr. Robrock, who directed the Appellant to immediately attend a hospital the next time she experienced an episode of accelerated heart rate. The Appellant did so. Further investigation confirmed that she had a cardiac problem that required cardiac ablation surgery in order to remedy the heart condition. The surgery was performed in London, Ontario.

#### Thyroid problem

[13] The Appellant began to experience weight gain and her throat was swelling to the point that it became difficult for her to swallow and breathe. She went to see a physician in Thunder Bay in order to see if she had any thyroid problems. Tests revealed that her thyroid was within normal limits albeit at the lower end of the acceptable spectrum. Her doctor in Thunder Bay recommended that the condition be monitored and that she return in a year for follow-up. The Appellant and her husband were not satisfied with this. When in Thailand, she decided to see a thyroid specialist. By that time, there were enlarged nodules on the lobes of her thyroid. These nodules were aspirated and a significant amount of fluid was extracted. This immediately alleviated her symptoms. The Thai doctor also greatly increased her dosage of thyroxin.

#### Facial lesion

[14] The Appellant developed a black dot or lesion on her cheek. Doctors in Canada simply advised her to keep monitoring it. Not satisfied with this, the Appellant went to the hospital when in Thailand to have this lesion further investigated. When she was examined at the hospital, she was taken to surgery and a growth the size of one's thumb was excised from her cheek. Pathology showed that this tissue was non-cancerous.

### **Position of the Parties**

[15] The Appellant is not asking this Court to find that the health benefits of a warm climate are medical services. It has already been decided by the Federal Court of Appeal that they are not: see *The Queen v. Tallon*, 2015 FCA 156. The Appellant urges this Court to find that the travel expenses she incurred for the medical services she obtained in Thailand qualified for the METC. It is submitted that the route travelled by the Appellant and her husband was a reasonably direct route having regard to all the circumstances. She needed to be accompanied by her husband since she was incapable of travelling without his assistance and this has been certified by a medical practitioner. It is submitted that they travelled to Thailand and Cambodia for the purpose of obtaining medical services for the Appellant and substantially equivalent medical services were not available closer to home. Counsel for the Appellant submits that it was reasonable in all the circumstances for the Appellant and her husband to travel to Thailand in order to obtain those medical services. Therefore, she argues that these expenses are properly allowed pursuant to paragraphs 118.2(2)(g) and (h) of the *Act* and the Appellant is therefore entitled to the disputed METC. Therefore, she submits that the appeal in relation to the 2014 taxation year be allowed.

[16] Counsel for the Respondent takes the position that the purpose of the travel has to be in order to obtain medical services. In the instant case, it is true that the Appellant did obtain medical services while travelling to Thailand but that was not the purpose of her travel to that country. It is submitted that the Appellant's purpose in travelling to Thailand and Cambodia was not in order to obtain medical services but rather it was in order to benefit from the salutary effects of the warm climate. The salutary effects of a warm climate do not constitute a medical service within the meaning of subparagraph 118.2(2)(g)(v) of the *Act*. If a taxpayer happens to obtain a medical service while travelling, this does not automatically entitle the taxpayer to claim a METC for travel expenses since that was not the purpose of the travel. Counsel for the Respondent also argues that even if the purpose of the Appellant's travels to Thailand was to obtain medical services, then it has not been shown that substantially equivalent medical services were not

available closer to where she lives. In addition, the route travelled was not reasonably direct. The Respondent therefore urges this Court to dismiss the appeal regarding the 2014 taxation year.

### **Legislative Provisions**

[17] The relevant provisions of the *Act* are as follows:

118.2(2) For the purposes of subsection (1), a medical expense of an individual is an amount paid

(a) to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to a person (in this subsection referred to as the “patient”) who is the individual, the individual’s spouse or common-law partner or a dependant of the individual (within the meaning assigned by subsection 118(6)) in the taxation year in which the expense was incurred;

...

(g) to a person engaged in the business of providing transportation services, to the extent that the payment is made for the transportation of

- (i) the patient, and
- (ii) one individual who accompanied the patient, where the patient was, and has been certified in writing by a medical practitioner to be, incapable of travelling without the assistance of an attendant

from the locality where the patient dwells to a place, not less than 40 kilometres from that locality, where medical services are normally provided, or from that place to that locality, if

- (iii) substantially equivalent medical services are not available in that locality,
  - (iv) the route travelled by the patient is, having regard to the circumstances, a reasonably direct route, and
  - (v) the patient travels to that place to obtain medical services for himself or herself and it is reasonable, having regard to the circumstances, for the patient to travel to that place to obtain those services;
- (h) for reasonable travel expenses (other than expenses described in paragraph (g)) incurred in respect of the patient and, where the patient was, and has been certified in writing by a medical practitioner to be, incapable of travelling without the assistance of an attendant, in respect of one individual who accompanied the patient, to obtain medical services in a place that is not less than 80 km from the locality where the patient dwells if the circumstances described in subparagraphs (g)(iii) to (v) apply;



## **Analysis**

[18] The sole issue before this Court is whether the Appellant may claim METC in relation to expenses she and her husband incurred for travel, meals and accommodation in Thailand and Cambodia between December 2013 and May of 2014.

[19] In *Tokarski v. Canada*, 2012 TCC 115, Justice Hershfield of this Court, observed that these provisions of the *Act* were meant to assist people in remote or rural areas or people requiring specialized treatment in distant centres. It is meant to benefit those living in smaller communities across Canada where some of the specialized medical services are not close or easily available and where Canadians go to the larger centres for more specialized treatment.

[20] Justice Campbell of this Court has held that personal reasons for travelling to obtain medical services elsewhere do not entitle a taxpayer to a medical expense credit: *Ismael v The Queen*, 2014 TCC 157. Therefore, the personal likes or dislikes of a taxpayer regarding local medical services does not mean that equivalent medical services are not available locally.

[21] The Federal Court of appeal in the matter of *The Queen v. Tallon*, 2015 FCA 156, explained the purpose of the METC in paragraphs 22 to 26 of that decision. The METC provides a measure of fiscal relief in relation to the specific type of medical expenses that are enumerated in paragraphs 118.2(2) of the *Act*. Paragraph 118.2(2)(a) includes as a Medical Expense an amount paid to a medical practitioner, nurse or a public or licensed private hospital in respect of medical services provided to a patient, who is the individual claiming the METC, the individual's spouse or common-law partner, or a dependent of the individual.

[22] Paragraphs 118.2(2)(g) and (h) of the *Act* provide for a medical expense credit in relation to travel, meals and accommodation expenses where a patient receives care away from home.

[23] Paragraph 118.2(2)(g) includes as a medical expense an amount paid to a person in the business of providing transportation services for the transportation of the patient, and a necessary accompanying person, from the locality in which the patient resides to and from a place more than 40 kilometers away, where medical services are normally provided.

[24] Paragraph 118.2(2)(h) includes as a medical expense an amount paid for reasonable travel expenses (other than transportation costs described in paragraph 118.2(2)(g)) incurred in respect of the patient to obtain medical services in a place not less than 80 kilometers away from the locality where the patient resides. Also included are similar costs incurred in respect of an attending person where the patient has been certified by a medical practitioner to be incapable of travelling without assistance.

[25] However, some strict conditions must be fulfilled before a taxpayer may claim these medical expenses. These conditions are:

- (a) Substantially equivalent medical services are not available in that locality;
- (b) The route taken to that place is reasonably direct; and
- (c) The patient travels to that place to obtain medical services for himself or herself and travelling to that place to obtain such services is reasonable.

[26] The Court stated in *Tallon* that the purpose of paragraph 118.2(2)(g) is to provide fiscal support to Canadians who are required to travel away from their home in order to access specialized medical services not available to them where they live. The Court held at paragraph 39:

A purposive analysis of paragraph 118.2(2)(g) of the Act leads me to conclude that by enacting this provision, Parliament intended to provide fiscal support, through the METC, to Canadians who are required to travel from their home communities to other locations in order to access specialized medical services that are not available to them where they live. That said, the circumstances in which such fiscal support will be available have been carefully circumscribed by the limitations that are spelled out in this paragraph. Such limitations cannot be ignored or relaxed in the face of sympathetic circumstances.

[Emphasis added.]

[27] The Court held that “medical services” as that term is used in paragraph 118.2(2)(g) of the *Act* must be services provided to the patient by a person or hospital. Therefore, because the salutary effects of the warm Thai climate were not provided to the Taxpayer by a person or hospital, those effects cannot constitute a medical service obtained by the Taxpayer, within the meaning of either paragraphs 118.2(2)(g) or (h) of the *Act*.

[28] The Appellant is not asking this Court to find that the warm climate was a medical service, but rather asks the Court to find that the travel expenses she incurred

for the medical services she did obtain in Thailand were medical services within the ambit of paragraphs 118.2(2)(g) and (h) of the *Act*. In order to so find, it must be established that:

- (a) Substantially equivalent medical services were not available locally;
- (b) The route travelled by the Appellant was, having regard to the circumstances, a reasonably direct route; and
- (c) The Appellant travelled to that place to obtain medical services and it was reasonable, having regard to the circumstances, for her to travel to that place to obtain those services.

The burden of proof is on the Appellant to establish these criteria on the balance of probabilities.

[29] The Appellant is relying on the Minister's published advanced rulings interpreting the reasonability and availability requirements. These rulings are found at Tabs 2 through 10 of the Appellant's Brief of Authorities. These advanced rulings are not binding on the Court although they can be of persuasive authority. It is to be noted that in these advanced rulings, the Minister provided a large, liberal and compassionate interpretation of the "reasonability" requirement and the availability of "substantially equivalent medical services" requirement. However, all of these advanced rulings make it very clear that the taxpayer in those rulings was contemplating travel in order to obtain specified medical services ahead of undertaking the travel. In other words, the purpose of travel is determined prior to the travel being undertaken. It was also made clear that all of the conditions of paragraph 118.2(2) had to be met and this was essentially a question of fact.

[30] The Appellant argues that she required ongoing medical treatment and services in respect of her debilitating condition. She and her spouse travelled to obtain medical services outside Canada and did in fact obtain medical services from medical practitioners outside Canada. The Appellant argues that these medical services were not available at home and she had to travel to Bangkok in order to obtain those services. It is submitted that travelling to Bangkok was reasonable in the Appellant's very unique circumstances.

#### The purpose of the travel

[31] What was the purpose of the Appellant's trip to Thailand? Having considered the entirety of the evidence, it is clear that the purpose of travelling to Thailand was primarily to reap the health benefits of the warm climate. I have no

doubt that spending time in a warm climate during the winter months certainly alleviated her pain. Unfortunately, the benefits of a warm climate does not constitute medical services within the meaning of paragraph 118.2(2)(g) or (h) of the *Act*. It is undoubted that while she was there, the Appellant did obtain some particularized medical services for her accelerated heart rate, her thyroid condition and her facial lesion. However, that was not the reason for her travel to that faraway foreign land. She obtained the medical services in Thailand because she happened to be there at the time she obtained those medical services. She did not go to Thailand in order to obtain those medical services. There is no evidence that the Appellant was contemplating any specific medical services before she went to Thailand which would have given her trip there a purpose other than receiving the benefits of a warm climate.

Substantially equivalent medical services

[32] Were substantially equivalent medical services available closer to home? The Appellant bears the burden of establishing that equivalent medical services were **not** available to her near her home. I am of the view, based upon the entirety of the evidence, that she has not established this requirement on a balance of probabilities. In fact, no evidence has led to the lack of substantially equivalent services closer to home.

[33] It is noteworthy that Dr. Franchi provided his opinion in writing that there was no made in Canada solution for the Appellant's Teflon implant problem and that it was necessary for her to go to Texas to see Dr. Wolford, a specialist in that field of medicine. In the instant case, there is no evidence from any doctor or other knowledgeable person indicating that it was reasonable for the Appellant to go to Thailand in order to obtain relief for her racing heartbeat, her swollen thyroid or her facial growth because such treatment was not available closer to home. I do not think it is necessary to produce an expert witness to testify that substantially equivalent medical services are not available locally and to establish where the closest reasonably equivalent services can be accessed. However, there must be some evidence presented to address this requirement. In the informal procedure, the Court may well be satisfied by a letter of opinion from a knowledgeable medical practitioner, like that of Dr. Franchi, asserting that equivalent medical services are not available locally and suggesting where such services may reasonably be accessed. I have no such evidence in the instant case.

[34] I can take cognizance of the fact that the health care system in Ontario may have its problems. However, there are qualified cardiologists in Ontario who can

diagnose and treat the Appellant's racing heart rate. In fact, she was diagnosed at home and she did have surgery in London, Ontario. Thus, substantially equivalent medical services for her heart problem were available to her much closer to home than Thailand.

[35] There are dermatologists in Ontario and there is no evidence that these dermatologists were not qualified to excise a benign facial tumor. Again, Mr. Bullough testified that the Appellant was being monitored once a year by a specialist with respect to her facial growth. The specialist was of the view that this condition should continue to be monitored. The appellant chose to have the growth removed in Thailand, but that does not support the conclusion that substantially equivalent medical services were not available in Thunder Bay. It just shows that the Appellant was not happy with the recommendations of her doctor and she chose not to follow the recommendation of her doctor.

[36] There was no real explanation given as to why the appellant needed to travel to Thailand in order to have her thyroid problems investigated. She was examined and tested in Ontario and although her tests rendered results at the lower end of the acceptable spectrum, they were still within the acceptable range. It was recommended that the condition be monitored. Again, the Appellant did not like this advice. There are endocrinologists in Ontario and there is no evidence that they are not qualified to treat the Appellant's thyroid problem. There is no evidence presented to the Court to indicate that aspirating the thyroid nodules, if this was a necessary and specialized medical procedure, could not have been done much closer to home.

[37] This is not a situation where services were not available; it is a situation where the Appellant and her husband did not agree with recommendations of her local doctors and they believed that the treatment available locally was subpar compared to that received in Thailand. It is not the purpose of paragraphs 118.2(2)(g) and (h) to provide fiscal support to those taxpayers who disagree with the recommendations of their local doctors and who decide to seek alternative options in a far remote jurisdiction for an extended period of time. As already indicated, personal reasons for travelling to obtain medical services elsewhere do not entitle a taxpayer to a medical expense credit: *Ismael v The Queen*, 2014 TCC 157. The personal likes or dislikes of a taxpayer regarding local medical services does not mean that equivalent medical services are not available locally.

### Reasonableness

[38] In addition, I am not satisfied that it was reasonable in all the circumstances for the Appellant to travel thousands of kilometers away to Thailand and Cambodia and to remain there for four and a half months in order to obtain the medical services in relation to her three enumerated medical problems. There is simply no reason why she could not have accessed medical services closer to home for a fraction of the cost.

### **Conclusion**

[39] For all of the foregoing reasons, I conclude as follows:

(a) With respect to the 2012 taxation year

On consent of the parties, the appeal is allowed in part and the matter is referred back to the Minister for reconsideration and reassessment on the understanding that the Appellant's travel expenses to the United States in the amount of \$958.97 will be allowed as a medical expense. In all other respects, the appeal is dismissed.

(b) With respect to the 2013 taxation year

On the consent of the parties, the Appellant withdraws her appeal insofar as the appeal relates to travelling expenses to Thailand on the basis that there was a nil assessment of federal tax.

(c) With respect to the 2014 taxation year

The appeal is dismissed.

[40] I would like to take this opportunity to thank Ms. Sommerville Taylor, counsel for the Appellant, and Mr. Gellings, counsel for the Respondent, for the professional manner in which they represented their respective clients. They are a credit to the profession.

Signed at Kingston, Ontario, this 13th day of December 2017.

“Rommel G. Masse”

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Masse D.J.

CITATION: 2017 TCC 244

COURT FILE NO.: 2015-5603(IT)I

STYLE OF CAUSE: Trudy Tallon and Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 6 and 7, 2017

REASONS FOR JUDGMENT BY: The Honourable Rommel G. Masse, Deputy Judge

DATE OF JUDGMENT: December 13, 2017

APPEARANCES:

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