Docket: 2011-3068(IT)I

BETWEEN:

JANINA TOKARSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 28, 2012 at Victoria, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Agent for the Appellant:	James Mitchell
Counsel for the Respondent:	Amandeep K. Sandhu

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year is dismissed, without costs, in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada this 5th day of April 2012.

"J.E. Hershfield"

Hershfield J.

Citation: 2012 TCC 115
Date: 20120405
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BETWEEN:

JANINA TOKARSKI,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] The Appellant claimed medical expenses in respect of her 2009 taxation year. Her initial claim was denied and a revised claim was made in the amount of $9,205 of which $2,497 was disallowed.

[2] The amount disallowed was incurred by the Appellant to travel to Poland for dental implant surgery and fusing porcelain/ceramic crowns. Abdominal surgeries put her at risk of infection due to significant dental and gum deterioration. There is no issue that the cost of the dental services provided were medical expenses for the purpose of section 118.2 of the *Income Tax Act* (the "*Act*"). The issue in this appeal is whether her travel costs to Poland of $2,497 also qualify as medical expenses. The Appellant was assessed on the basis that they were not.

[3] The Appellant testified at the hearing and I am satisfied with her evidence that the dental work she had done in Poland involved as many as seven implants and ten porcelain/ceramic crowns. I also accept the Appellant's testimony that she required bone grafts as part of the procedure for the implant placements. I also accept her testimony as to her need to go to Poland on two occasions, namely in April and in December 2009 and to stay there each time for extended periods to complete the required dental services.

[4] I also accept that equivalent dental services were available locally in Victoria, British Columbia where she lived at the time.

[5] It is on that basis that her travel costs were denied since the *Act* stipulates that travel costs are only included as a medical expense if substantially equivalent medical services are not available within 40 kilometers of where she dwells.

[6] The Respondent relies on paragraph 118.2(2)(*g*) of the *Act* which reads as follows:

> 118.2(2) **Medical expenses --** For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid
> …
> (*g*) **[transportation] --** 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 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;

[7] The Respondent asserts that since substantially equivalent medical services were available within 40 kilometres of where she dwelled, the Appellant's travel cost must be denied.

[8] As well, Respondent's counsel pressed the point that the Appellant chose to have the dental work done in Poland because she had family there who she stayed with and visited while having the dental work done and that it was because of such

personal considerations that the Appellant chose to go to Poland. That is, she went to Poland, the particular location in Poland and the particular dentist all on the basis of those personal considerations. While the import of such emphasis was that there was a strong personal element to the travel to Poland, I do not believe that the personal element here is significant enough to warrant my disallowing the travel expenses in this case on the basis of it being a personal expenditure or on the basis that the personal considerations were the reason she went to Poland thereby casting doubt on the Appellant's testimony that she went specifically to obtain the services.

[9] To the contrary, I accept that she went to Poland because the cost of getting it done in Victoria was prohibitive. Indeed, the Reply to the Notice of Appeal (the "Reply") states: "… the Appellant chose to travel to Poland for the dental implant services rather than obtain the services locally on the basis of cost; …" That was clearly the evidence of the Appellant at the hearing and I accept that evidence without reservation or hesitation.

[10] In fact, the Appellant produced an estimate of what the treatment that she received in Poland would have cost in Victoria. The estimate produced showed the cost of $14,000 for the implant placement surgery and $14,400 for the crowns. That is, the total cost of rehabilitating her mouth was estimated to be $28,400 if she had it done where she lived. I might also take judicial notice that the cost of the work done would not likely vary significantly had it been done, by dentists specially trained to do the work, anywhere else in Canada.

[11] The actual cost for the same services being done in Poland was $9,849.05.[1] Clearly then, she had good economic reasons to go to Poland for the dental work.

[12] The problem, however, is that the requirement in the *Act* at clause 118.2(2)(*g*)(iii) for travel costs to be included as a medical expense is that substantially equivalent medical services not be available in Victoria. They were – but at a price that she testified was not one she could really afford to pay. Again, I

[1] There appears to be a discrepancy in the evidence as to the actual dental costs. There is evidence of two payments to the dentist in Poland totalling $9,849.05 excluding the travel costs. The Appellant's accountant who testified at the trial said the claim for 2009 was $4,905 and $4,943 for 2010 both exclusive of travel costs. However, the reassessment allowed $6,708 for 2009 exclusive of travel. While the numbers do not reconcile with the evidence, the issue before me was clearly stated to be whether the travel costs were medical expenses under the *Act*. I have limited my judgment accordingly. However, if I have missed an issue, I would be prepared to consider amending this judgment pursuant to paragraph 172(1)(*b*) of the *Tax Court of Canada Rules (General Procedure)* regardless that this appeal is under the Informal Procedure.

accept her testimony on this. Her income was a modest $13,000 in 2009 not counting her RRSP withdrawals that were required for her to live.

[13] The issue then is whether substantially equivalent services were "available" in the locale in which she lived – namely Victoria. The Appellant cannot succeed if the services can be found to be "available" there, even if the cost of availing that service was prohibitive to her.

[14] Respondent's counsel referred me to the French version of the subject provision which reads:

> (iii) il n'est pas possible d'obtenir dans cette localité des services médicaux sensiblement équivalents,

[15] I was referred, as well, to the following cases:

- *Young v. R.,* 2009 TCC 628; and
- *Scully v. R.,* 2008 TCC 617.

[16] The Respondent's counsel also went through the legislative history of this provision that allowed travel costs as a medical expense. It was first added in 1973 for travel if more than 25 miles was required to obtain the medical service. The budget speech at that time referred to this amendment as travel to obtain medical services "at a hospital, clinic or doctor's office" and went on to say "This is expected to assist people in remote or rural areas or people requiring specialized treatment in distant centres."

[17] Respondent's counsel went further and referred me to Commons Debates of April 5, 1973 and April 6, 1973. On April 5, the Honorouble John N. Turner (Minister of Finance) stated as follows:

> It is also proposed to include as a deductible medical expense amounts paid to commercial transport services for transportation of a taxpayer or his spouse, or dependent, and an attendant if necessary, to and from hospital, clinic or doctor's office to which the individual has travelled a distance in excess of 25 miles to obtain medical services not otherwise available nearer home. I believe that this will be of untold benefit to 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.

[18] On April 6 another member of the House of Commons spoke of the amendment as follows:

> We also have the fact that all across Canada the facilities and services available to society are fewer in the rural and lesser populated areas than they are in the urban centres. Invariably, or almost universally across the land, if you have an extreme or rare ailment, or even moderately rare ailment, you do not get the medical attention that is necessary in your home town if it is a smaller sized community. You have to travel to the larger centre to get that. In Manitoba, the movement of people has to be towards Winnipeg, Brandon and Portage – that part of the province – in order to get the special medical attention that may be necessary. In British Columbia, it is to Vancouver or to Victoria on Vancouver Island. I do not know Ontario that well, but I am quite sure that people in Northern Ontario do not have medical facilities available to them to the extent that they are available to people in the Toronto-Hamilton area.

Analysis

[19] In *Young*, Justice C. Miller denied travel expenses from Edmonton to Calgary as the appellant had not brought any evidence that substantially similar services were not available in Edmonton. He found that the appellant did not even look for options in Edmonton since the decision to go to Calgary was based on family reasons.

[20] While there are similarities to that case and the one at bar, I am satisfied that the Appellant in the case at bar has brought all the evidence she needed to for me to address the distinct question her case poses - a question that was not before Justice Miller at all.

[21] Similarly in *Scully*, Justice Hogan found that there was no evidence that the facility in question, a swimming facility, was not available at a location near his home. Again, I am satisfied that the Appellant in the case at bar has brought all the evidence she needed to for me to address the distinct question her case poses - a question that was not before Justice Hogan at all.

[22] Given the historical research that Respondent’s counsel did in respect of the subject section, I pressed her to go further and look for other authorities that might shed light on the distinct question this case poses. She confirmed after the hearing that she could find none. Nor could I.

[23] So, it appears the distinct question before me is without precedent. That question of course is: Can it be found that the medical services performed for the Appellant in Poland were “available” in Victoria if the cost of availing that service was prohibitive to her?

[24] In considering the Respondent's argument, I make three observations.

[25] First, in *Young* at paragraph 9, Justice Miller said that it was clear that "travel expenses are to accommodate those who cannot *access* medical services where they dwell". [Emphasis added.] The word "access" sheds little light on the question. I find it reasonable to conclude that "access" can be denied if the cost of it is prohibitive. The same can be said of the word "available".

[26] Second, in the French version of the subject provision the operative phrase is "it is not possible to obtain …" the medical services where the taxpayer dwells. That language is equally ambiguous in terms of answering the question before me. That is, I find it reasonable to conclude that it is not possible to "obtain" a service that is beyond my ability to pay for it. The same can be said of the word "available".

[27] Third, in the House of Common debates referred to above, it seems clear to me that what was being addressed were medical services that are covered by provincial health care programs. Travel necessitated as a result of the cost of the service was not in the minds of the legislators.

[28] That is to say, it is impossible to say what Parliament intended in respect of travel expenses in a case like this except to note that if fiscal issues were being considered, Parliament might well have wanted to allow the travel expense in this case. If, for example, the medical expense credit cost the government 30% of the expense, the cost to the fisc of the Appellant having the work done in Victoria would have been $8,400. Allowing the Appellant to go to Poland and claim her travel costs would cost the fisc less than half that amount. Two of three interested parties seem to be winners in such case.

[29] Still, recognizing that I am satisfied that Parliament never actually put its mind to the facts of the case at bar, I do not know what it would have legislated had it done so.

[30] Although what the Appellant asks of me seems totally reasonable, I cannot put myself in the shoes of Parliament. How would it have framed the inclusion of travel costs on the basis of the affordability of a medical service to a particular taxpayer? Would there be a reasonableness test? Would it lead to abuse of the use of estimated costs of services? Would there be a dollar limit on the travel amount or distance limitation or an exclusion of travel outside Canada?

[31] Further, and most importantly, the express language of the subject provision does not invite a subjective construction of the circumstances of the particular taxpayer requiring the medical services. The language “substantially equivalent medical services are not available in that locality”, does not speak of whether the service is available to the particular taxpayer. The circumstances of the taxpayer seeking to claim the travel cost are not addressed in this requirement.

[32] As well, there is already a reasonableness test in the clause (v) of this subparagraph (g) of subsection 118.2(2):

> (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;

[33] This is an additional requirement to the requirement that substantially equivalent medical services not be available in the locality in which the taxpayer dwells. The reasonableness of the expenditure on travel, such as in this case where the travel was clearly reasonable, is not enough.

[34] Admittedly, there may be a gap in the current legislation that requires Parliament to consider. However, I am not at liberty to fill it. I would join the Appellant in asking Parliament to consider the problem of affordability but I cannot read the current legislation other than as the Minster of National Revenue has applied it in this case.

[35] Accordingly, the appeal must be dismissed, without costs.

Signed at Ottawa, Canada this 5th day of April 2012.

"J.E. Hershfield"

Hershfield J.

CITATION:	2012 TCC 115
COURT FILE NO.:	2011-3068(IT)I
STYLE OF CAUSE:	JANINA TOKARSKI AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
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REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
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APPEARANCES:

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