Docket: 2013-4183(IT)I

BETWEEN:

AB,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 4, 2014, at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Annie Paré

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the 2011 taxation year is allowed, without costs, with respect to the Respondent's concessions only, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 16th day of May 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 157
Date: 20140516
Docket: 2013-4183(IT)I

BETWEEN:

AB,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant is appealing the decision of the Minister of National Revenue (the "Minister"), in respect to her 2011 taxation year, which denied her claim for numerous medical expenses incurred in the process of locating an egg donor to assist her in becoming pregnant.

[2] The Appellant was diagnosed, a number of years ago, with premature ovary failure, which prevents her from becoming pregnant. Consequently, she not only required an egg donor but she also had to subject herself to a variety of treatments and medications. To receive treatment, she had to deal with an agency or with a clinic in either Canada or outside of this country. According to her evidence, based on the advice of her doctors and friends, she decided to seek this treatment at clinics outside Canada. She gave a number of reasons in her testimony to support this decision. First, she stated that Canadian clinics have a limited number of donors, particularly in respect to her preferred choice of East African descent. Second, treatments in Canada were more expensive. Finally, the number of embryos that can be transferred in Canada is limited.

[3] From 2008 to 2009, the Appellant underwent in-vitro fertilization treatments in Syracuse, New York. She testified that she chose to go to the United States because this location accepted monthly payments for the treatments, while in Canada, payment had to be made upfront. On cross-examination, she confirmed

that the in-vitro fertilization treatment that she received was available in Canada and, more particularly, in the City of Toronto, where she resided.

[4] Apparently, the treatments the Appellant received in Syracuse were unsuccessful and she then looked to obtain similar treatments in the Ukraine. She went there on the recommendation of her support group, some of whom had experienced success with the treatments.

[5] In calculating tax payable for the 2011 taxation year, the Appellant claimed the cost of treatments, various transportation costs, including airfare, bus and car rental expenses, together with accommodation and food in the computation of a gross non-refundable tax credit for medical expenses. These expenses related to treatments she received in both the United States and the Ukraine. Some of these claimed expenses related to her husband's costs in accompanying the Appellant.

[6] Although the Appellant did have a health coverage plan through her employment, it did not cover any costs associated with these procedures.

[7] At paragraphs 11(b) and 16 of the Reply to the Notice of Appeal, and also confirmed by Respondent Counsel in her oral submissions, amounts paid by the Appellant to the treatment clinics in both the United States and the Ukraine, qualify as deductible medical expenses and should be allowed in the computation of her gross non-refundable tax credits. That concession left the expenses relating to the egg donor fees, transportation and accommodation of the Appellant and her husband, together with wiring and banking charges.

[8] The Respondent's position, in not allowing these remaining expenses, is that they do not meet the requirements of subsection 118.2(2) of the *Income Tax Act* (the "*Act*").

Analysis

[9] The issue is whether any of the Appellant's claimed expenses can be permitted pursuant to section 118.2 of the *Act*.

[10] The relevant portions of section 118.2 state:

> **118.2(1) Medical expense credit.** For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted the amount determined by the formula

A x [(B - C) + D]

where

[…]

(2) Medical expenses. 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 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;

[…]

(*l*.1) on behalf of the patient who requires a bone marrow or organ transplant,

(i) for reasonable expenses (other than expenses described in subparagraph 118.2(2)(*l.1*)(ii)), including legal fees and insurance premiums, to locate a compatible donor and to arrange for the transplant, and

(ii) for reasonable travel, board and lodging expenses (other than expenses described in paragraphs 118.2(2)(*g*) and 118.2(2)(*h*)) of the donor (and one other person who accompanies the donor) and the patient (and one other person who accompanies the patient) incurred in respect of the transplant;

[11] This provision contains wording that is exhaustive. In *Mantha v The Queen*, [1999] TCJ No. 500, Justice Lamarre Proulx, at paragraph 10, made the following comments:

> … Subsection 118.2(2) of the Act is a statutory provision which describes the medical expenses which are eligible for the tax credit provided for by subsection 118.2(1) of the Act. As drafted, this provision is exhaustive. If the purpose of the expense incurred for therapeutic purposes is not described in paragraph 118.2(2)(n) of the Act, that expense is not included in medical expenses. …

[12] Similarly, the Federal Court of Appeal, in *Ali v The Queen*, 2008 FCA 190, 2008 DTC 6446, at paragraph 2, stated:

> For the purpose of computing the tax payable under Part I of the ITA by an individual for a taxation year, subsection 118.2(1) of the ITA permits that individual to deduct an amount, referred to as the medical expense tax credit (the "METC"), in respect of the total of the individual's medical expenses that are established to have been paid for by the individual within the time period specified in that provision. For the taxation years under consideration in these

> appeals, paragraphs 118.2(2)(*a*) to (*q*) of the ITA specify the types of medical expenses that qualify for the purposes of the METC. It is clear that the METC is not available in respect of all types of medical expenses in those years.

[13] Respondent Counsel relied on two cases, *Bekker v The Queen*, 2004 FCA 186, 2004 DTC 6404, and *Ray v The Queen*, 2009 TCC 140, 2009 DTC 1104, to further support the proposition that the legislative requirements set out in section 118.2 must be satisfied before a medical expense will be allowed, that is, if the expense is not specifically identified in section 118.2, then it will not qualify.

(1) Egg Donor Fee

[14] This expense included the costs associated with finding a suitable donor, locating the egg donor, as well as all other aspects related to this transaction.

[15] The Respondent argued that this expense did not meet the requirement in paragraph (*a*) of subsection 118.2(2), which includes amounts paid "to a medical practitioner … or a public or licensed private hospital …" for medical services provided to a person, the Appellant in this appeal. However, the "services" included in the egg donor fee are not the types of medical services that will be covered by paragraph (*a*), according to the analysis of this term in the reasons contained in *Patton v The Queen*, 2005 TCC 704, 2005 DTC 1786, at paragraph 22 and *Sienema v The Queen*, 2010 TCC 468, 2010 DTC 1320, at paragraph 24. Even if these services did fall within the meaning of medical services, which they do not, they would still not qualify because they were not provided to the Appellant, as required by the wording in paragraph 118.2(2)(*a*), but are instead amounts paid to or on behalf of the donor. This conclusion is also supported by Canada Revenue Agency Interpretation Letter No. 2009-0311051E5, "In-Vitro Fertilization" (April 01, 2009) (Tax Net Pro, Views).

[16] Although the Respondent relied on paragraph 118.2(2)(*a*) to support its position against allowing these expenses, it is my view that the egg donor fees may be more appropriately analyzed pursuant to paragraph (*l*.1) of subsection 118.2(2), which covers "reasonable expenses … to locate a compatible donor and to arrange for the transplant". The issue is therefore whether egg donation qualifies as "organ transplant", according to the wording in this subsection.

[17] In this regard, the only relevant case is *Zieber v The Queen*, 2008 TCC 328, 2008 DTC 4175, where the Court had to decide whether a fertilized egg or embryo was an "organ", as described in paragraph 118.2(2)(*l*.1). After reviewing the

definitions of "embryo" and "organ", the Court decided, at paragraphs 7 and 8, that:

> 7 … In the view of the Court, a fertilized egg or embryo such as the one in question, is adapted by its structure to grow into a complete human being.
>
> 8 For these reasons, the Court finds that the embryo transplant in question constituted an organ transplant within the meaning of paragraph 118.2(2)(*l*.1) of the Act and the expenses allowable are those described therein. …

[18] The facts in *Zieber*, which was decided pursuant to paragraph 118.2(2)(*l*.1), can be distinguished from those in the present appeal. *Zieber* dealt with an embryo which is a "fertilized egg". Based on the Appellant's explanation of the procedure in the appeal before me, the donated egg from a donor is an "unfertilized egg" which is subsequently fertilized by the sperm belonging to the Appellant's spouse and then implanted into the Appellant's body. The difference between a fertilized egg and an unfertilized egg is an important distinction in concluding that the decision in *Zieber* has no application to the facts in this appeal. Nevertheless, the question remains as to whether an egg or ovum is an organ.

[19] Justice Beaubier, at paragraph 7 of *Zieber*, defined an "organism" and "organ" in the following manner:

> [7] The *Shorter Oxford Dictionary*, 1973, defines an "organism" as:
>
> > 2. An organized or organic system; a whole consisting of dependent and interdependent parts, compared to a living being …
>
> And it defines an "organ" as:
>
> > II. A part or member of an animal or plant body adapted by its structure for a particular vital function ….
>
> In the view of the Court, a fertilized egg or embryo such as the one in question, is adapted by its structure to grow into a complete human being.

The Court in *Zieber* found that the fertilized embryo constituted a human organism and thus the expense was allowed.

[20] Based on the conclusions in *Zieber*, it cannot be similarly concluded that a donor egg is a human organism or that it was a transplant.

[21] The following medical definitions, taken from *Dorland's Illustrated Medical Dictionary*, W.A. Newman Dorland (Philadelphia: W.B. Saunders, 2000), illustrate how an ovum can be differentiated from an embryo:

> **Organ** … a somewhat independent part of the body that performs a special function or functions; see *organum*
>
> **…**
>
> **Organum** … an organ; a somewhat independent part of the body that is arranged according to a characteristic structural plan, and performs a special function or functions; it is composed of various tissues, one of which is primary in function.
>
> …
>
> internal female genital organs: the various organs in the female that are concerned with reproduction, including the ovary, uterine tube, uterus, and vagina.
>
> …
>
> **Ovum** … 1. the female reproductive cell which, after fertilization, becomes a zygote that develops into a new member of the same species. Called also *egg*. …

[22] In the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, at section 3, the following definitions also support the essential differences in these terms as they are generally applied and used:

> "human reproductive material" means a sperm, ovum or other human cell or a human gene, and includes a part of any of them.
>
> …
>
> "*in vitro* embryo" means an embryo that exists outside the body of a human being.

[23] According to these definitions, an ovum is clearly a "cell" but it is not an "organ". It is not a part of the body that "performs a function". If it were an organ, it would be included in the list of "internal female genital organs" (as defined in *Dorland's*), but it is not included. Since an ovum is not an organ, an egg donation cannot be considered to be an "organ transplant". Therefore, paragraph 118.2(2)(*l*.1) would not apply either to allow this expense.

(2) <u>Travel and Accommodation Expenses of the Appellant</u>

[24] Since substantially similar treatment, that the Appellant obtained in both the United States and the Ukraine, was also available in Canada, her travel expenses, which included airfare, taxi and bus fares and car rental, are precluded pursuant to paragraphs (*g*) and (*h*) of subsection 118.2(2). Those expenses simply do not meet the requirements of either of these paragraphs of subsection 118.2(2). The Appellant's reasons for leaving Canada to receive her treatments were strictly personal. She was seeking a particular type of donor. It was cheaper to go elsewhere. She followed recommendations of her friends and support group members. The Ukrainian clinic offered to oversee everything for the Appellant, which appealed to her. All of these reasons are personal to the Appellant but they do not make the services less available in Canada.

[25] This appeal is similar to the facts in *Tokarski v The Queen*, 2012 TCC 115, 2012 DTC 1138, where the Court concluded that the Appellant, who took treatment in Poland instead of Victoria, British Columbia, could not succeed if the services were available locally, even where the cost of that service in Canada was prohibitive to her. At paragraph 31 of *Tokarski*, the Court stated the following:

> 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.

[26] By the Appellant's own admission, there were equivalent treatments available to her in Canada and, more specifically, in Toronto where she resided. Since her reasons, for seeking treatment elsewhere, were completely personal, they cannot be considered in the analysis of the "availability" requirement in paragraphs 118.2(2)(*g*) and (*h*). Therefore, the Appellant's travel expenses were properly disallowed.

[27] In respect to the Appellant's claim for food and accommodation expenses, her evidence was that these expenses were incurred in the course of travelling and not as part of a long-term stay program (Transcript, pages 62 and 63). If the Appellant had utilized the services of a donor clinic in Toronto, she would not have incurred those expenses. Because there were substantial equivalent services available to the Appellant locally, the food and accommodation expenses do not qualify under paragraph 118.2(2)(*h*).

[28] Respondent Counsel directed the Court to a number of other cases, some favourable to the Minister's position and some not. In *Bissonnette v The Queen*, [2002] TCJ No. 94, expenses relating to travel, room and board were denied because they were not medical services within the meaning of paragraph 118.2(2)(*a*) rather than being denied pursuant to paragraph (*h*) of subsection 118.2(2). The Court in *Bissonnette* was correct in analyzing the expenses pursuant to paragraph (*a*) of subsection 118.2(2) because they were not "travel expenses", as they were paid to the medical facility as part of the overall fee charged for the stay there.

[29] In *Demont v The Queen*, [2002] TCJ No. 562, Justice Margeson followed the reasons in *Bissonnette* and disallowed accommodation expenses, again pursuant to paragraph (*a*) of subsection 118.2(2), where there was no equivalent treatment available to them locally. The expenses in *Demont* related to hotel stays so that the taxpayers could attend courses and were not, strictly speaking, travel expenses. Consequently, the analysis proceeded pursuant to paragraph (*a*) of subsection 118.2(2). *Demont's* reliance on *Bissonnette* may be misguided as the taxpayers in *Demont* did not pay accommodation fees to the clinic as part of an all-inclusive treatment, which was the case in *Bissonnette*.

[30] In *Sienema*, Justice Little allowed reasonable meal expenses, although in allowing those expenses, it is unclear which of the paragraphs in subsection 118.2(2) he relied upon. The meal expenses were required as part of the daily travel to take advantage of treatment aids located at his parents' residence. I assume he was relying on paragraph 118.2(2)(*h*) and not (*a*) even though not specifically mentioned. He did not rely on the cases of *Bissonnette* or *Demont*. An inconsistency remains in this decision because the taxpayer's parents' home, where he used a hot tub and UVB phototherapy unit, was only 51 kilometres from his home, which should have barred the application of paragraph (*h*) of subsection 118.2(2).

(3) Travel and Accommodation Expenses of the Appellant's Spouse

[31] The expenses of the spouse related to food in both the United States and the Ukraine, airfare to Ukraine and accommodation in Ukraine. The same reasoning I applied, in disallowing the Appellant's travel expenses due to the availability of equivalent treatment services in Toronto, also applies to her claim for travel expenses of the airfare to the Ukraine for her husband. In addition, the Appellant presented no evidence certifying that she was incapable of travelling alone, a requirement necessary pursuant to the wording in paragraph 118.2(2)(*g*).

[32] I also make the same conclusion in respect to accommodation and food expenses of the Appellant's spouse as I did in respect to the Appellant’s similar claims.

[33] Respondent Counsel referred me to the case of Justice Woods in *Jordan v The Queen*, 2012 TCC 394, 2013 DTC 1015, where she followed the decision in *Bell v The Queen*, 2009 TCC 523, 2009 DTC 1342, to allow the taxpayer’s motor vehicle expenses, which he incurred to travel from his home to visit his wife in a long-term care facility. The taxpayer in *Jordan* made the trips alone to visit his wife. The requirement of the provision for the patient not being able to travel alone was clearly absent in the circumstances in *Jordan*. Although I am of the view that the decision in *Jordan* is over-reaching in light of the wording in that provision, it is not necessary for me to reconcile it to the facts before me because equivalent treatment was available to the Appellant in the Toronto area and she was not required to receive treatment outside Canada. In addition, as previously discussed, there was no certification that she was unable to travel alone, which is a requirement for accommodation and meal expenses, as claimed by the Appellant for herself and her spouse, to be deductible pursuant to paragraph 118.2(2)(*h*).

(4) Wiring and Banking Fees

[34] As the Respondent noted, wiring fees are not itemized in subsection 118.2(2). Nor does the provision contain any reference to similar expenses.

[35] Similarly, interest charges are not specifically listed in this provision. Although it might be argued that interest could be claimed under paragraph (*a*) of subsection 118.2(2) as the interest could be part of the payment to obtain medical services, because the interest was not paid to a medical practitioner but to a bank, the requirement in paragraph (*a*) is not met. Neither wiring nor interest charges were paid to a medical practitioner but, more importantly, neither of these

expenses are specifically itemized in subsection 118.2(2). Therefore, since the provision is very specific in setting out what items will qualify as medical expenses, they were properly disallowed by the Minister.

Conclusion

[36] In summary, the appeal is allowed, without costs, but only to allow the Respondent's two concessions relating to the amount paid to the fertility clinic in the United States and the amount paid to the clinic in the Ukraine. In all other respects, her claim for the remaining expenses is dismissed.

[37] The amounts conceded by the Respondent are substantial allowances, which should please the Appellant. In addition, although the Appellant was visibly upset throughout the entire hearing, again there should be more reasons for her to be happy than upset because the result of her treatment is that she is now several months pregnant.

Signed at Ottawa, Canada, this 16th day of May 2014.

"Diane Campbell"

Campbell J.

CITATION:	2014 TCC 157
COURT FILE NO.:	2013-4183(IT)I
STYLE OF CAUSE:	AB and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
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APPEARANCES:

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