

PETER H. ALBERTIN

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

TAX COURT OF CANADA

Calgary, Alberta

Court File No. 96-353(IT)I

Judgment: August 14, 1996

By: The Honourable Justice J. Rip

Agent for the Appellant: Appellant appeared on his own behalf.
Counsel for the Respondent: John C. O'Callaghan.

JUDGMENT

Peter H. Albertin, the appellant, has appealed an income tax assessment for the 1994 taxation year on the basis that his mother-in-law Aleksandra Rybotycka ("Mrs. Rybotycka") was, in 1994, markedly restricted in her basic activities of daily living due to a severe and prolonged mental impairment and, therefore, is entitled to a disability tax credit in accordance with subsections 118.3(1) and 118.3(2) of the *Income Tax Act* ("Act").

The appellant had also claimed a tax credit pursuant to paragraph 118(1)(d) of the Act in respect of Mrs. Rybotycka on the basis she was dependent on him because of a mental or physical infirmity. In assessing, the Minister of National Revenue ("Minister") denied this claim but, at the opening of trial, counsel for the Respondent conceded that Mr. Albertin is entitled to the personal tax credit in accordance with this provision. However the amount to which Mr. Albertin is entitled, counsel stated, is \$1,410. and not \$1,583. as claimed. Apparently Mrs. Rybotycka has pension income from Poland which affected the amount of tax credit to which Mr. Albertin is entitled. Mr. Albertin agreed that the amount of the tax credit should be \$1,410.

In assessing the appellant for 1994, the Minister assumed, amongst others, the following facts:

(a) Mrs. Rybotycka is the Appellant's mother-in-law;

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(d) Mrs. Rybotycka was not dependent on the Appellant because of mental or physical infirmity;

(e) the Appellant submitted prescribed form T2201 which was certified by a medical doctor, stating that Mrs. Rybotycka has a prolonged and severe impairment;

(f) the effects of the impairment are such that Mrs. Rybotycka's ability to perform a basic activity of daily living in the 1994 taxation year was not markedly restricted.

The issue to be decided by me is whether the appellant is entitled to the disability tax credit in respect of Mrs. Rybotycka.

Paragraphs 118.4(1)(b) and (c) provide that:

(b) an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living;

(c) a basic activity of daily living in relation to an individual means

(i) perceiving, thinking and remembering,

(ii) feeding and dressing oneself,

(iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,

(iv) hearing so as to understand, in a quiet setting another person familiar with the individual,

(v) eliminating (bowel or bladder functions), or

(vi) walking; ...

Mrs. Rybotycka lived with Mr. and Mrs. Albertin, their children and Mrs. Albertin's brother, her son. Mrs. Rybotycka turned 73 years old in December 1994.

From the evidence it appears to me that Mrs. Rybotycka had a mental impairment. The appellant gave certain examples of her irrational or abnormal behaviour starting in 1994. For example, in February or March 1994 she would go on the balcony in minus 20 C temperature dressed only in a blouse and slacks. She would not remove herself from the balcony until asked to do so by members of the family. Mr. Albertin also stated that while his mother-in-law could go to the bathroom herself she required assistance from her daughter to help her wash.

Mr. Albertin also testified his mother-in-law underwent surgery for varicose veins. After surgery she refused to walk, although this was part of the recovery procedure. Mr. Albertin recalled his mother-in-law would stay in bed and refuse any assistance. I believe Mrs. Rybotycka was suffering a mental disorder rather than a physical problem of not walking. I am of the view the refusal to walk was not a physical impairment that was so prolonged that it would be expected to last for 12 months.

Mr. Albertin also testified that while Mrs. Rybotycka could feed herself, she occasionally would refuse to eat for three to four days at a time. He said she could also dress herself but if she was given free rein to choose her clothes, her choice of clothes would be inappropriate. For example, she would choose winter clothing during the summer and summer clothing during the winter.

Mr. Albertin said that Mrs. Rybotycka was never left alone. The appellant's brother-in-law, who is on a disability pension, was at home to care for Mrs. Rybotycka when either Mr. Albertin or his wife were out of the house. Mr. Albertin's brother-in-law was diagnosed as a schizophrenic or manic depressive and was unable to live on his own. According to Mr. Albertin, however, his "brother-in-law had enough common sense" to tell Mrs. Rybotycka what to do in a particular situation.

Finally, Mr. Albertin acknowledged that Mrs. Rybotycka's mental problem was not continuous; her erratic behaviour was not constant. He estimated that she was mentally impaired perhaps 50 per cent of the time. However, he said, she was unpredictable.

Mrs. Rybotycka's physician, Dr. H. Ficek, signed a Disability Tax Credit on April 26, 1995 and Mr. Albertin filed the certificate for his 1994 taxation year. The certificate was also signed by Mrs. Rybotycka. Revenue Canada queried Dr. Ficek as to whether Mrs. Rybotycka could walk 100 metres and whether she is 100 per cent mentally incompetent in view of the fact she signed the form. In reply, Dr. Ficek changed her answer as to walking, saying Mrs. Rybotycka could walk with a cane 100 metres. She also indicated Mrs. Rybotycka required daily supervision of daily chores and confirmed that she could not manage her personal affairs.

Dr. Ficek said her patient is “not 100 per cent mentally incompetent”. However, Dr. Ficek maintained her opinion that Mrs. Rybotycka had a prolonged impairment that markedly restricted her ability to perform one of the basic activities of daily living even with aids or medication.

With respect to the fact that Mrs. Rybotycka signed the disability tax credit form, Mr. Albertin recalled that “he talked to her about it and she signed it”. He said he told her the doctor would sign it for tax purposes. Mr. Albertin thought his mother-in-law had the capacity to sign the document.

Counsel for the respondent asked Mr. Albertin whether his mother-in-law was stubborn or whether her inability or insistence to stay in bed and refuse to walk was due to a mental impairment. Mr. Albertin replied that his family never experienced problems with her before and she never had previously refused reasonable requests. He said that her decisions were not rational decisions. He acknowledged that she was lucid 50 per cent of the time but during the other 50 per cent of the time she could endanger other people in their home.

Mr. Albertin noted that his mother-in-law would insist his youngest child dress in warm clothing on hot summer days. Another example of her erratic behaviour, according to the appellant, was that Mrs. Rybotycka had a habit of placing a tray on the dinner table in such a way that it, and all that was on it, could easily tip over.

Mr. Albertin described how his mother-in-law kept medication. He noticed that she put all her pills into a single bottle. In other words, for example, antibiotics and pain killers were put in the same container and she had no way of knowing which pill was an antibiotic and which was a pain killer.

Mr. Albertin stated that he did not consider having his mother-in-law attend the trial or testify. He said she has mental problems but she does realize what is going on. In his view, she would be offended by his evidence that she is mentally incompetent.

Mr. Albertin and his family were living with a person whose mental health was deteriorating and who, in 1994, was exhibiting a course of conduct that was potentially dangerous to her. This caused concern to Mr. and Mrs. Albertin. Even though Mrs. Rybotycka was lucid about 50 per cent of the time, according to Mr. Albertin, she could not be left alone. Her conduct was unpredictable.

The evidence at trial indicates that Mrs. Rybotycka's mental impairment continues today and, no doubt, will continue indefinitely. In 1994 she had a prolonged mental impairment. The issue is whether it is so severe that her ability to perform a basic activity of daily living is markedly restricted. There is no doubt that her ability to perceive, think and remember has been affected. I find her actions erratic and not stubborn.

It is obvious that in 1994 Mrs. Rybotycka's actions caused by her inability to perceive, at least, was endangering her safety and health. I do not subscribe to the view that since she was lucid 50 per cent of the time, her impairment was not continuous. That Mrs. Rybotycka signed the disability tax credit form is not that significant in my view. Her signing of the form is consistent with the appellant's evidence she was lucid 50 per cent of the time. The fact is that her erratic behaviour could be triggered without warning at any time during a lucid period. This, in my view, makes the impairment continuous for purposes of paragraph 118.4(1)(a) and markedly restricted her ability to perceive, think and remember, even during periods of lucidity.

The appeal will be allowed with costs, if any.