

NOTICE OF APPEAL
(INFORMAL PROCEDURE)

TAX COURT OF CANADA

BETWEEN:

JOHN DOE

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

TAKE NOTICE THAT John Doe appeals to the Court the assessment by the Canada Revenue Agency (CRA) to disallow the Disability Tax Credit (DTC) for the 2016 tax year as stated in the Notice of Confirmation, dated September 7, 2016 although CRA had previously allowed the claim from 1990 to 2015.

A. Reasons for the appeal.

1. The Appellant has a severe and prolonged mental impairment.
2. The Appellant was diagnosed with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder (ADHD) at an early age.
3. The Appellant has received the DTC from 1990 to 2015 because the Canada Revenue Agency determined that he is markedly restricted in his mental functions.
4. The Appellant was asked to reapply for the DTC for the 2016 taxation year.
5. The qualified medical practitioner, Dr. F certified in Form T2201 Disability Tax Credit Certificate that the Appellant is markedly restricted in performing the mental functions necessary for everyday life, all or substantially all of the time.

In Form T2201, Dr. F noted that the Appellant's diagnosis is "autism and ADHD." There is nothing ambiguous about her description of the disabling effects in the following details of the Appellant's mental impairment:

- He has poor communication skills, and has difficulty interacting and socializing with other people.

- He has difficulties with decision making.
- He has poor insight into judging whether a situation is dangerous and may act inappropriately.
- He needs supervision and guidance in the workplace.

6. There is no compelling evidence with respect to the Appellant's restrictions in the follow-up Clarification Letter dated September 29, 2017 that contradicts the information provided by Dr. F in Form T2201.

- Question: Does the patient have the capacity to live independently without daily supervision and support from others?

Answer: No, he is very dependent on emotional and financial support from his parents.

- Question: Can your patient make appropriate decisions and judgments in day-to-day situations.

Answer: No. Patient functions okay in situations + places he is familiar with. He becomes uncomfortable and may react inappropriately when in unfamiliar situation and places.

- Question: To your knowledge, is your patient able to work all or substantially all of the time? Please provide details.

Answer: He is able to work the hours given to him at the restaurant.

A question referring to ability to work "all or substantially all of the time" is not a legal test for the DTC since CRA guidelines in Form T2201 Disability Tax Credit Certificate specifically state: "Working, housekeeping... are not considered basic activities of daily living."

- Question: Can your patient perform his daily living skills independently (e.g., perform self-care, go out in the community, make simple purchases without the assistance/supervision of another person)?

Answer: Yes.

These examples of adaptive functioning are to be read as disjunctive examples, not taken together, for an accurate assessment of specific daily living skills.

Although the Appellant's mother agrees with the doctor's assessment that her son is able to take care of his personal hygiene needs, and take the bus to his place of work in Richmond.

As far as self-care is concerned, the Appellant is not capable of making an appropriate judgement as far as suitable clothing choices depending on the weather outside. His mother must remind constantly how to dress properly for hot and cold outdoor temperatures.

Although, the Appellant is able to make a simple purchase such as buying a snack at a convenience store, he must do so with a \$5 or \$10 bill since he cannot calculate the specific change required for the purchase. Nor can he determine whether he has been given the correct change by the clerk.

- Question: Does your patient have a severe memory impairment?

Answer: No.

Although the Appeal's Officer has advised (during a telephone call on August 16, 2017) that this was one of the determining factors to disallow the DTC, the response from Dr. F is not useful since it is highly unlikely that she has the basis to determine the reliability of his memory. She has already indicated in Form T2201 that her patient's verbal communication skills are very limited.

- Question: Is your patient's ability to perform the mental functions necessary for everyday life likely to improve?

Answer: No.

7. The Notice of Determination sent to the Appellant, dated October 4, 2016, disallowed the DTC for the 2016 tax year.

The basis to disallow the DTC is the following:

"Your restriction in performing the mental functions necessary for everyday life is present when performing complex tasks and/or present only during periods of exacerbation or in stressful situations. Therefore these restrictions are not considered present all or substantially all of the time (at least 90% of the time).

"For the DTC, the presence of difficulties in areas such as managing a bank account and working are not considered marked restrictions in performing mental functions necessary for everyday life."

CRA makes the assumption that the Appellant's restriction in performing mental functions necessary for everyday life is limited to performing complex tasks during periods of exacerbation or in stressful situations. Such a narrow interpretation of the information provided by Dr. F does not reflect the reality of

living with a severe mental impairment such as autism which is always present and therefore the basis to disallow the DTC is not applicable to the Appellant.

There is no statutory basis to define “all of substantially all of the time” as being at least 90% of the time. Furthermore, such a strict quantitative interpretation is contrary to CRA’s own policy guidelines in *Income Tax S1-F1-C2 Disability Tax Credit Folio*.

There are no references to managing a bank account in the information provided by Dr. F. Although CRA refers to “difficulties in areas such as... working are not considered marked restrictions in performing mental functions for everyday life,” the Clarification Letter contains a specific question linking the ability to work with mental functions which is not a legal test for the DTC.

- Question: “If you believe that your patient is markedly restricted in his mental functions, indicate how this impacts his ability to work.”

Answer: He is capable of simple tasks which he has been taught. He has difficulties when the work requires decision making and social interaction with other people.”

8. The Notice of Objection was filed on April 27, 2017 with the Chief of Appeals by Lembi Buchanan, representing the Appellant. The Objection stated that the Notice of Determination does not address the specific details of the Appellant’s profound challenges in his mental functions as outlined by Dr. F in Form T2201 and the Clarification Letter.
9. In a subsequent telephone call on August 15, 2017, the Appeals Officer NB stated that she supports the decision in the Notice of Determination (October 4, 2016) to disallow the claim. On the basis of her review, she stated that the Appellant is only “significantly” but not “markedly restricted” in his mental functions because Dr. F has indicated that he is able to perform self-care without supervision and does not have a memory impairment.
10. CRA has failed to recognize that the severity of the Appellant’s cognitive deficits, his inability to interact socially with others and dependence on his family for the basic necessities of life, including shelter, clothing and meals, meet the legal test for being markedly restricted in mental functions all or substantially all of the time.

B. Statement of relevant facts in support of the appeal.

John Doe is a 27-year-old resident of XXXXXXXX who lives at home with his mother, an aunt and his younger sister.

Although he is severely autistic, with profound cognitive and communication challenges, he has been gainfully employed for many years on a part-time basis because of considerable accommodations offered in the workplace by his employer.

John Doe works under close supervision in the employee cafeteria of the corporate offices of a major global technology company, performing relatively simple routine tasks such as clearing and cleaning tables, washing dishes and also assisting with the cleaning of the cafeteria and kitchen. The position was made available in 2009 through the XXXXXXXX University's Access Program for Persons with Disabilities.

John Doe's mother Mrs. R began to suspect that her son was not developing normally when he was only two years old with poor communication skills and difficulty engaging in age appropriate play. When he went to preschool, he was placed in a special needs class since he was unable to interact with other children and follow simple directives from his teachers.

John Doe continued to be severely limited as far as learning when he entered elementary school. He did not have the mental capacity to meet the challenges of the academic curriculum in the public school system and required the assistance of a resource person who worked with him on modified educational programs in the elementary school system designed for children with special needs.

John Doe was also disruptive, wandering around in the classroom because he had difficulty maintaining focus long enough to complete even the simplest tasks. He also suffered from echolalia, repeating statements made by others, over and over again. His doctor prescribed Ritalin but the medication made him very anxious. It was subsequently withdrawn and replaced with Dexedrine. That, too, was not particularly useful, except for its sedative properties but it had other negative side effects including bouts of abdominal pain.

A medical report (July 30, 2001) by paediatrician Dr. B, underlined the major concerns facing the 11-year-old boy including "his language delay as well as poor communication and socialization.... (who) is unable to read social cues."

Dr. B also noted that "he has difficulty following the rules" and "is very anxious and nervous most of the time...He is very distractible and has a very short attention span." The results of his auditory memory test for both digits and sentences was that of a child 4 ½ to 5 years of age.

When John Doe was 12 years old, he was referred for a psycho-educational assessment conducted by School District No. 38 (XXXXXXXX) to determine his learning strengths and special needs to assist with program planning and his transition to high school.

John Doe scored in the deficient range, that is, less than 1 percentile in the majority of the tests. His verbal IQ (measuring comprehension, reasoning and attention) was 45; his performance IQ (measuring planning and organizational ability) was 57 and; his full scale IQ was rated as 48. His communications and social skills were also less than in the 1 percentile range.

John Doe continued as a special needs student throughout secondary school since he did not have the mental capacity to handle any of the academic studies. Instead, the focus on learning was improving social interaction with peers and teachers, daily living skills to achieve a certain degree of independence and even job entry skills to provide these students with the supports to enable them to participate more fully in our society.

Like many students who graduate from high school who dream of a real job for real pay, the BC government believed that students with major intellectual challenges should not be deprived of similar aspirations. Although John Doe has very severe limitations, he can take considerable pride achieving a steady, albeit part-time job. He should not be disallowed the DTC because he has learned certain skills specific to a very limited number of activities of daily living as well as working at a job that he enjoys.

John Doe and his mother have been receiving support from the XXXXXXXX Centre for Disability for more than 10 years. XXXXXXXX, the executive director with the agency sent a supporting letter to the Disability Tax Credit Unit dated December 20, 2016, which is on file with the Canada Revenue Agency, providing further details of the mental challenges that John Doe faces every day including the following:

- John Doe is unable to plan his daily activities by himself; he is helpless in prioritization, very impulsive in jumping from one task to another, and becomes restless and unfocused the entire day.
- John Doe is unable to finish chores by himself if not reminded on a constant basis, he is distracted easily in carrying out tasks and leave jobs unfinished all the time.
- Problem solving is difficult because John Doe is unable to make sound decisions by himself; not able to pick up social cues and unaware of other people's emotion or any harmful situations all the time.
- John Doe's adaptive functioning is very limited; he is not able to make transition easily and would obsess on some minor things or ruminate on the same thought or conversation the whole day.

- John Doe has profound challenges with his abilities related to self-care and social interaction because of his poor adaptive functioning.
- John Doe does not have the ability to understand reasoning, rationale and flexibility beyond his daily routine.
- John Doe cannot organize his daily schedule, meal planning or grocery shopping.

John Doe meets the legislative requirement for the DTC as it is defined by Section 118 of the *Income Tax Act*. The facts clearly demonstrate that he is unable to perform the necessary mental tasks required to live and function independently and competently in everyday life. John Doe's myriad of mental challenges is such a marked departure from the normal range of mental functioning that his impairment justifies the tax credit.

I ELECT to have the informal procedure provided by Sections 18.1 to 18.28 of the *Tax Court of Canada Act* apply to this appeal.

DATE:

TO: The Registrar
 Tax Court of Canada
 200 Kent Street
 Ottawa, ON K1A 0M1

(Signature and name and address of
Parent or Agent for Appellant, John Doe)