Federal Court of Appeal | Cour d'appel fédérale

Date: 20130530

Docket: A-432-12

Citation: 2013 FCA 142

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
WEBB J.A.

BETWEEN:

GARY JACKSON PROFESSIONAL CORPORATION

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on May 21, 2013.

Judgment delivered at Ottawa, Ontario, on May 30, 2013.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of Weisman D.J. (the Judge) of the Tax Court of Canada (Court File No. 2012-1506(CPP)). The appellant had been assessed for contributions under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP) for 2009 in relation to the amounts that the appellant claimed had been paid to an employees profit sharing plan and allocated to Gary Jackson. The appellant's position was that no contributions under the CPP should have been payable in relation to such payments. The Judge dismissed the appellant's appeal on the basis that the appellant had not established a valid employees profit sharing plan for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), (the ITA).

[2] In this appeal, the appellant focused on the Judge's findings that the documents related to the arrangement in question did not contemplate that only one trustee would perform the tasks that were to be performed by all three trustees and that a portion of the amount was paid by Gary Jackson — not the appellant. The position of the respondent is that the arrangement was not an employees profit sharing plan for the purposes of the ITA. In particular, the respondent submitted that the arrangement failed to comply with the requirement that payments are required to be computed by reference to profits.

[3] The Canada Revenue Agency has taken the position for several years that the payment of amounts by an employer to the trustees under a valid employees profit sharing plan (and the allocation of such payments to employees) will not result in contributions being payable under the CPP. The Respondent acknowledged that this has been the position of the Canada Revenue Agency and that this position has not changed. Since, in my opinion, the payments made by the appellant in 2009 would not be payments made to the trustees under an employees profit sharing plan, it is not necessary to determine whether this position of the Canada Revenue Agency is correct based on the provisions of sections 8, 9 and 12 of the CPP.

[4] Gary Jackson is a chartered accountant. The appellant is the company that he formed to provide chartered accounting services to Roberts, Marlowe, Jackson, Jackson & Associates. There were three employees of the appellant – Gary Jackson, Gay Jackson (the spouse of Gary Jackson) and their son, however, Gary Jackson was the only person who performed the chartered accounting services. The appellant entered into an Employee Profit Sharing Plan Trust Indenture (Trust Indenture). The appellant made the following payments during its fiscal year ending October 31,

2009 (or within 120 days thereafter) to an account opened as the bank account for this Trust Indenture:

Date	**Amount**
October 30, 2009	$100
October 30, 2009	$60,000
January 14, 2010	$50,000
January 14, 2010	$10,000

[5] On the same day that the payments were made to this account, the funds (except the initial deposit of $100) were transferred to Gary Jackson.

[6] An employees profit sharing plan is defined in subsection 144(1) of the ITA. For the purposes of this appeal, the relevant provisions of this definition are as follows:

"employees profit sharing plan" at a particular time means an arrangement	« régime de participation des employés aux bénéfices » À un moment donné, arrangement dans le cadre duquel, à la fois :
(a) under which payments computed by reference to (i) an employer's profits from the employer's business, … are required to be made by the employer to a trustee under the arrangement for the benefit of employees of the employer …; and	a) un employeur est tenu de faire des versements — calculés en fonction soit des bénéfices qu'il tire de son entreprise,… à un fiduciaire dans le cadre de l'arrangement au profit de ses employés …;
(b) in respect of which the trustee has… allocated, either contingently or absolutely, to those employees (i) in each year that ended at or before the particular time, all amounts received in the year by the trustee from	b) le fiduciaire a attribué, conditionnellement ou non, à ces employés … les montants suivants (i) au cours de chaque année terminée au moment donné ou antérieurement, les montants que le fiduciaire a reçus au

the employer …	cours de l'année de l'employeur…

[7] In order for an arrangement to be an employees profit sharing plan:

(a) subject to the comments below in relation to subsection 144(10) of the ITA, the employer must be obligated to make payments to the trustees under the arrangement and such payments must be computed by reference to profits; and

(b) the trustees must annually allocate all of the payments received.

[8] Under the ITA, the payments made by the employer to the trustees under the arrangement are deductible (subsection 144(5) and paragraph 20(1)(w) of the ITA) and the amounts allocated to the employees are included in their income as income from an office or employment (subsection 144(3) and paragraph 6(1)(d) of the ITA) in the year that the amounts are allocated. Since the amounts are included in the income of the employees when the amounts are allocated to them, when the amounts are subsequently paid to those employees no amount is then included in their income (subsection 144(6) of the ITA).

[9] Subsection 144(10) of the ITA provides that:

(10) Where the terms of an arrangement under which an employer makes payments to a trustee specifically provide that the payments shall be made "out of profits", the arrangement shall, if the employer so elects in prescribed manner, be deemed, for the purpose of subsection 144(1), to be an arrangement under which payments computed by reference to the	(10) Pour l'application du paragraphe (1), lorsque les modalités d'un arrangement en vertu duquel un employeur fait des versements à un fiduciaire prévoient expressément que les versements sont à faire « sur les bénéfices », l'arrangement est réputé, si l'employeur fait un choix en ce sens selon les modalités réglementaires, constituer un arrangement dans le cadre

employer's profits are required.	duquel des versements calculés en fonction des bénéfices de l'employeur sont à faire.

[10] If the election as provided in this subsection is made, and the arrangement specifically provides that the payments will be made from profits, the condition that the arrangement must provide that payments computed by reference to profits are required will be satisfied. In this case, the appellant did not make the election as contemplated by subsection 144(10) of the ITA. Therefore, the arrangement must satisfy the condition that payments computed by reference to the appellant's profits are required to be made.

[11] Paragraph 4.02 of the Trust Indenture provides that:

> Within 120 days of each fiscal year end, the Company, in its absolute discretion, will contribute the following amounts from its accumulated undistributed Profits to the Trustees:
>
> (i) a minimum of One Hundred Canadian dollars ($100) per Participating Beneficiary per Plan Year; or
>
> (ii) an amount that is determinable by a formula to be established from time to time by the Board of Directors.
>
> In any event the total Company contribution for a Plan Year shall be not less than 1% of the Profits earned by the Company for the fiscal year whose end falls during the Plan Year. Participating Beneficiaries shall not be permitted to make contributions to the Trust.

[12] The Board of Directors of the appellant did not, at any relevant time, establish the formula contemplated by paragraph 4.02(ii) of the Trust Indenture.

[13] In *Lade* v. *Minister of National Revenue*, [1964] C.T.C. 305, [1965] 1 Ex. C.R. 214, Noël J. discussed the requirements for an employees profit sharing plan and in particular the requirement that the payments must be computed by reference to profits. He stated that:

> 25 The definition contained in Section 79(1) "an arrangement under which payments computed by reference to profits ... are made by an employer to a trustee" restricts the above conception by limiting the plan to one only where the payments of the employer are computed by reference to profits and paid into the trust. This limitation is such that it apparently became necessary to insure by Section 79(7) that a plan, which merely says that the employer's contributions will be made "out of profits" be deemed an employees' profit sharing plan if the employer so elects in accordance with the regulations, be brought back under the definition as, although such a plan would have qualified under the heading of the section, it would not without Section 79(7) have qualified under the definition. Indeed, had this not been done, such a plan would not have been considered an employees profit sharing plan under the Act although it would have been one under the ordinary concept of an employees profit sharing plan. This exclusion by the definition of subsection (1) of Section 79 of a plan based merely on the employees' contributions being made "out of profits" points out that something else than a mere contribution out of profits is required to qualify a plan under the section.
>
> …
>
> 27 The definition of a profit sharing plan under the Act is therefore, except to the extent it is or may be affected by what I have just pointed out above, to be taken to mean what it says which is that a set formula is worked out by reference to the employer's profits whereby a total amount of profits to be distributed to his employees or shared by the employer with them is determined and must be paid to a trustee when there is such a profit.
>
> 28 It may be useful here to reproduce the definition of such a plan under Section 79(1):
>
> > "79. (1) In this Act 'an employees profit sharing plan' means an arrangement under which *payments* computed by reference to his profits from his business ... *are made* by an employer to a trustee in trust for the benefit of officers or employees ..." (emphasis added by Noël, J.).
>
> 29 What indeed appears to be required is a binding obligation by the employer to make payments in accordance with a formula which refers to profits and which must be paid in the event of profits. It is in this sense only, I believe, that it can be "computed by reference to profits" and paid as required under the section.

[14] The appeal of this decision of Noël J. was dismissed by the Supreme Court of Canada ([1965] C.T.C. 525). The definition of employees profit sharing plan has been amended to make it clear that the employer is required to make payments computed by reference to profits. Therefore, if the election under subsection 144(10) of the ITA has not been made, there must be a set formula which, when applied, will produce an amount that has been computed by reference to profits and the employer must be obligated to pay that amount to the trustees under the arrangement.

[15] Paragraph 4.02 of the Trust Indenture (which is the only provision that was submitted that could be considered to contain an obligation to make payments) provides that the Company in its absolute discretion will contribute the amounts referred to in paragraph 4.02 (i) or (ii). Since no formula was determined by the board of directors of the appellant, the only remaining part of this paragraph that is relevant is paragraph 4.02 (i). The payment under this paragraph is based on the number of Participating Beneficiaries. This payment is not computed by reference to profits but since this payment is subject to the absolute discretion of the appellant, it would appear that the appellant may not be obligated to make this payment in any event.

[16] Paragraph 4.02 of the Trust Indenture also provides that the total Company contribution for a Plan Year must not be less than 1% of the Profits for the fiscal year referred to therein. This could create an obligation to make this minimum payment. However, according to the Income Statement submitted by the appellant, it would appear that its gross profit for the 2009 fiscal year before any expenses are deducted (which will produce an amount that is greater than the profit of the appellant when the expenses are taken into account) was $157,800. One percent of this amount (which would also be greater than 1% of the profit) is only $1,578.

[17] The payments made by the appellant (which are listed in paragraph 3 above) were arbitrary payments that Gary Jackson stated were made from profits. However, since no election had been filed under subsection 144(10) of the ITA, the payments had to be payments that the appellant was required to make and that were computed by reference to profits. The payments that were made bore no resemblance to the minimum required payment of 1% of profits. Therefore, these payments were not payments made under an arrangement that would qualify as an employees profit sharing plan under the ITA. These payments would be contributory salary and wages of Gary Jackson for the purposes of the CPP. Since the Year's Maximum Pensionable Earnings for the purposes of the CPP in 2009 were $46,300, the payment of $60,000 on October 30, 2009 would generate the maximum contributions payable under the CPP for 2009.

[18] As a result, I would dismiss the appeal with costs.

"Wyman W. Webb"

J.A.

"I agree,
J.D. Pelletier J.A."

"I agree,
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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