Docket: 2009-1801(IT)I

BETWEEN:

CLÉMENT LÉTOURNEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 9, 2009, at Québec, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Agents for the appellant:	Laurie Beausoleil J.P. Timothée
Counsel for the respondent:	Christina Ham

JUDGMENT

The appeal from the assessment under the *Income Tax Act* for the 2007 taxation year is dismissed.

Signed at Ottawa, Canada, this 9th day of December 2009.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 25th day of February 2010.
Daniela Possamai, Translator

Citation: 2009 TCC 614
Date: 20091209
Docket: 2009-1801(IT)I

BETWEEN:

CLÉMENT LÉTOURNEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal, under the informal procedure, from an assessment made by the Minister of National Revenue (**Minister**) by which he refused to consider the income of $50,482 earned by the appellant from the accounting firm KPMG (**KPMG**) during the 2007 taxation year as pension income eligible to be split with his wife, in computing their respective incomes, within the meaning of paragraph 60(*c*) and section 60.03 of the *Income Tax Act* (**ITA**).

[2] The appellant is an accountant who practised his profession from 1965 until he retired on February 28, 1997. He was a partner of KPMG and, in that capacity, had accumulated, over the years, units of participation, which entitled him to share in the profits, losses and capital of KPMG.

[3] At the time of his departure, he became a retired partner of KPMG, thus accepting to relinquish all of his units of participation. In doing so, he became eligible for membership in a benefits plan for retired partners for the rest of his life, as provided by the company agreement, and related procedures and methods (**Procedures and Methods**).[1] The appellant left at the age of 59 and, according to his testimony, was entitled to seek reimbursement of 10% of the capital invested to

[1] Exhibit A-1, Tabs 1 and 2.

acquire his units of participation. Had he left at the mandatory retirement age of 62, he would have been entitled to up to 20% of the capital invested for those same units.

[4] Also, the appellant received a monthly retirement allowance from KPMG for life, which was calculated based on the percentage of the maximum number of units of participation that the former partner held over the course of the ten-year period prior to the date on which the partner relinquished his units of participation, multiplied by the value of each unit of participation estimated on an accrual basis upon the partner's retirement (see Procedures and Methods, Exhibit A-1, Tab 2, section XI).

[5] In the present case, the amount of the retirement allowance to be paid to the appellant was established using the calculation found at page 5 of the agreement proposed by KPMG to the appellant (Exhibit A-1, Tab 3). That allowance was set at $43,982 annually, which, according to the appellant, was reduced to $41,607 in order for the allowance to be transferred to his wife upon his death. Furthermore, the appellant explained that except with respect to the annual cost-of-living increase adjustment, of up to 3%, the retirement allowance does not fluctuate based on the profits of KPMG.

[6] The retirement allowance is derived from the annual profits of KPMG. This is reflected in Article XI, clause 3(b) of the Procedures and Methods (page 13). If the total amount of interest held by retired partners exceeds 15% of the company's profits for any fiscal year, that interest will be reduced so that the total of the interest accounts globally for 15% of the company's profits (Article XI, clause 3(f) of the Procedures and Methods, at page 14).

[7] Furthermore, it was agreed that the interest of former partners in the profits of the partnership be treated as equal to the share of the income or loss of the partnership allocated, within the meaning of subsection 96(1.1) of the ITA (section XI, subsection 9 of the Procedures and Methods, at page 16).

[8] Thus, KPMG filled out Form T5013 (Statement of Partnership Income) indicating that the appellant's professional income from the company for the 2007 taxation year was $50,482. That form was attached to the appellant's income tax return for the 2007 taxation year (Exhibit I-1, page 11). On his income tax return, the appellant reported half of that amount, $25,241, under "Professional income" (Exhibit I-1, page 2, line 137). The other half was reported on his wife's income tax return for that same year.

[9] The appellant submits that the retirement allowance is pension income within the meaning of paragraph 60(*c*), of section 60.03 and of subsection 118(7) of the ITA, and that as such, he had the right to split that income with his wife.

Legislative provisions

60. Other deductions -- There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable

. . .

(*c*) **Pension income reallocation** -- where the taxpayer is a pensioner (as defined in subsection 60.03(1)), any amount that is a split-pension amount (as defined in that subsection) in respect of the pensioner for the taxation year;

. . .

60.03 [Pension income split] –

. . .

"eligible pension income" has the same meaning as in subsection 118(7).

. . .

"pensioner" for a taxation year means an individual who

(*a*) receives eligible pension income in the taxation year; and

(*b*) is resident in Canada,

(i) if the individual dies in the taxation year, at the time that is immediately before the individual's death,

(ii) in any other case, at the end of the calendar year in which the taxation year ends.

"pension income" has the meaning assigned by section 118.

. . .

"split-pension amount" for a taxation year is the amount elected by a pensioner and a pension transferee in a joint election for the taxation year not exceeding the amount determined by the formula

$$0.5A \times B/C$$

where

> A is the eligible pension income of the pensioner for the taxation year;
>
> B is the number of months in the pensioner's taxation year at any time during which the pensioner was married to, or was in a common-law partnership with, the pension transferee; and
>
> C is the number of months in the pensioner's taxation year.
>
> . . .
>
> **118(7) Definitions** -- Subject to subsections (8) and (8.1), for the purposes of this subsection and subsection (3),
>
> **"eligible pension income"** of an individual for a taxation year means
>
> (*a*) if the individual has attained the age of 65 years before the end of the taxation year, the pension income received by the individual in the taxation year, and
>
> (*b*) if the individual has not attained the age of 65 years before the end of the taxation year, the qualified pension income received by the individual in the taxation year;
>
> **"pension income"** received by an individual in a taxation year means the total of
>
> (*a*) the total of all amounts each of which is an amount included in computing the individual's income for the year that is
>
> > (i) a payment in respect of a life annuity out of or under a superannuation or pension plan
> >
> > . . .

[10] The appellant submits that the retirement allowance he receives from KPMG qualifies as pension income as it is a life annuity out of or under a superannuation or pension plan within the meaning of subparagraph 118(7)(*a*)(i) of the ITA. The appellant acknowledges that neither he, nor the company, contributed to a pension plan during the years he was a partner.

[11] The respondent argues that the retirement allowance in question is not a life annuity out of or under a superannuation or pension plan, but rather compensation for the loss of his right to share in the future profits of the company following the relinquishment of his units of participation. According to the respondent, that is very different from a pension plan created for the benefit of the employees.

Analysis

[12] The appellant relies on two decisions of this Court to claim that the allowance received from KPMG can be likened to pension income. In *Kaiser v. Canada* [1994] T.C.J. No. 493 (QC), Rowe J.T.C.C. defined the expression "superannuation or pension plan" that at the time was contained in subparagraph 56(1)(*a*)(i) of the ITA as contemplating

> . . . a payment of a fixed or determinable allowance paid at regular intervals to a person usually, but not always, as a result of the termination of employment for the purpose of providing that person with a minimum means of existence; the formal program for the payment of the specified benefits, or the way the benefits are to be carried out, must be organized or promoted by a person other than the beneficiary since the beneficiary's right to receive the superannuation or pension benefits is determined by the superannuation or pension plan contemplated by subparagraph 56(1)(*a*)(i). In other words, the regularity and amount of the payments are made according to the terms of a plan and not at the discretion or direction of the beneficiary.

[13] Moreover, the appellant refers to *Ouellet v. Canada* [1995] T.C.J. No. 676, to argue that the assessment by the employer is not necessarily required for there to be a pension plan. Lamarre Proulx J.T.C.C. stated as follows at paragraph 39:

> What is in fact important for determining whether the arrangement is a retirement plan is to verify that it is "a set of rules forming an organized whole", in conjunction with an office or employment, that provides for the payment of pensions in case of termination of that office or employment.

[14] Counsel for the respondent distinguished the two decisions arguing that they applied to taxpayers holding an office or employment who could enjoy pension income. According to the respondent, this does not apply here. The respondent did not cite any authority or case law to support that argument.

[15] In fact, in *Kaiser*, it was admitted that the funds in question derived from a foreign retirement arrangement to be included in income within the meaning of provision 56(1)(*a*)(i)(C.1) of the ITA. The issue was whether, at the death of the beneficiary of those funds, the beneficiary designated upon his death was also subject to taxation under this same provision.

[16] In *Ouellet*, the dispute was over whether a judge appointed under the *Quebec Courts of Justice Act* was entitled to benefits under any pension fund or plan within the meaning of Paragraphs 146(5)(*a*) and (*b*) of the ITA, for the purposes of

determining the amount he could contribute to a registered retirement savings plan. The *Quebec Courts of Justice Act* deals specifically with the retirement and pension plan of judges at the Court of Quebec.

[17] In the present case, the appellant is the former partner of an accounting firm who shared in the business profits and losses of the company. He was not an employee. He did not, over the years, make contributions to a pension plan or any fund whatsoever for future pension income.

[18] In *Dunne v. Deputy Minister of Revenue of Quebec,* 2007 S.C.C. 19, the Supreme Court of Canada ruled on the legal nature of the payments received by a taxpayer in a similar situation. Mr. Dunne, a resident of Ontario, was a partner with an accounting firm for many years and became eligible to receive what he characterizes as a retirement allowance in accordance with his partnership agreement. The core issue was the legal nature of the amounts received by Mr. Dunne from the company for the purposes of determining whether a portion of those amounts could be taxed in the province of Quebec, as the accounting firm he was a partner with also carried on a business in Quebec.

[19] According to his partnership agreement, Mr. Dunne was entitled to a retirement allowance that is based on a formula under which length of service with the partnership is factored in together with the average of the retired partner's combined salary and share of profits during his or her best three-year period. Moreover, according to the Court, it is clear from the partnership agreement that this allowance was a share of the profits of the partnership, even though the allowance was intended in part as consideration for past services. The Court reached this conclusion, among others, for the following reasons. First, the agreement provided that if the gross profit was insufficient, payments to former partners could be reduced proportionately. Moreover, the agreement treated the retirement allowance as a share of the gross profit. It capped such payments in any year at 15 percent of the gross profit and provided for a proportionate reduction to keep them within the cap if necessary.

[20] Finally, the partners agreed that amounts payable in respect of the retirement allowance should be considered a share of the partnership's income for tax purposes.

[21] The Supreme Court of Canada upheld the judgment of the Quebec Court of Appeal, [2005] R.J.Q. 2184, 2007 D.T.C. 5237 (French), which stated as follows at paragraphs 38 to 44:

[TRANSLATION]

38 First, we must examine sections 608 and 609 [of the Quebec *Taxation Act*, (T.A.)], from which I again quote the relevant excerpts below:

> 608. For the purposes of sections 600, 607, 634 and 635, where the principal activity of a partnership is carrying on a business in Canada *and its members have entered into an agreement to allocate a share of the income or loss of the partnership* from any source in Canada or from sources in another place to *any person described in section 609*, *that person is deemed to be a member of the partnership* and the amount so allocated for a particular fiscal period of the partnership shall be included in computing the person's income for the taxation year in which that fiscal period of the partnership ends.
>
> 609. The person to whom section 608 applies is:
>
> (*a*) a taxpayer who at any time ceased to be a member of the partnership described therein …, where the members thereof or the members of a third partnership in which a member of such other partnership became a member immediately after the other partnership was dissolved, have entered into an agreement described in section 608 in favour of the taxpayer or of any person described in paragraph *b*; and
>
> (*b*)
>
> . . .

(Emphasis added.)

39 Thus, for the purposes of section 600 T.A., in particular, where the principal activity of a partnership is carrying on a business in Canada and its members have entered into an agreement to allocate a share of the income or loss of the partnership to any person described in section 609, that person is deemed, pursuant to section 608, to be a member of the partnership and the amount so allocated shall be included in computing the person's income. Section 609 applies, among others, to a taxpayer who, at one time or another, ceased to be a member of the partnership described in section 608.

40 The respondent's situation falls within these two provisions.

41 <u>First, the principal activity of the partnership of which the respondent was a member until 1994 carries on a business in Canada</u>, as was always the case during the 1997 taxation year.

42 Second, the members of the partnership entered into an agreement under which the respondent (like the other retired partners) received, in the form of a pension, a share of the income of the partnership. That, incidentally, is not contested by the respondent. In any case, articles 4.4 and 5.5 of the partnership agreement filed as Exhibits R-9 and R-10 confirm that the pension is a form of allocation of the income of the partnership.

43 Finally, the respondent is a person who ceased to be a member of the partnership in question.

44 Accordingly, based on sections 608 and 609 T.A., the respondent is, despite his retirement, deemed to be a member of the partnership and must therefore include in his income for the taxation year in issue the amount of retirement pension paid by the partnership. Subsection 600(f) confirms the respondent's obligation to include the amount in his income.

[Emphasis added.]

[22] Similarly, subsection 96(1.1) of the ITA states as follows:

96(1.1) **Allocation of share of income to retiring partner**. For the purposes of subsection 96(1) and sections 34.1, 34.2, 101, 103 and 249.1,

(*a*) where the principal activity of a partnership is carrying on a business in Canada and its members have entered into an agreement to allocate a share of the income or loss of the partnership from any source or from sources in a particular place, as the case may be, to any taxpayer who at any time ceased to be a member of

(i) the partnership, or

(ii) a partnership that at any time has ceased to exist or would, but for subsection 98(1), have ceased to exist, and either

(A) the members of that partnership, or

(B) the members of another partnership in which, immediately after that time, any of the members referred to in clause 96(1.1)(*a*)(ii)(A) became members

have agreed to make such an allocation

or to the taxpayer's spouse, or common-law partner, estate or heirs or to any person referred to in subsection 96(1.3), the taxpayer, spouse, or common-law partner, estate, heirs or person, as the case may be, shall be deemed to be a member of the partnership; and

(*b*) all amounts each of which is an amount equal to the share of the income or loss referred to in this subsection allocated to a taxpayer from a partnership in respect of a particular fiscal period of the partnership shall, notwithstanding any other provision of this Act, be included in computing the taxpayer's income for the taxation year in which that fiscal period of the partnership ends.

[Emphasis added.]

[23] In the present case, the partnership agreement binding the appellant and KPMG is very similar to the one analyzed in *Dunne*. Although the appellant did not produce the agreement in its entirety, in the portion of the document that was filed in Court, there are similar provisions determining a maximum amount payable to retired partners based on the profits of the partnership (the maximum being 15% of the profits for retired partners). Furthermore, the agreement specifically provides that the interest of former partners in the profits of the partnership are treated as equal to the share of the income of the partnership allocated, within the meaning of subsection 96(1.1) of the ITA.

[24] Thus, despite the fact that he is a retired partner, the appellant is deemed to be a member of the partnership and must therefore include the amount of his retirement allowance as partnership income. In *Dunne*, the Supreme Court of Canada concluded that the retired partner was deemed to have carried on a business in Quebec within the meaning of section 612.1 of the Quebec *Taxation Act*.

[25] The Quebec Court of Appeal wrote as follows at paragraphs 45 to 48:

[TRANSLATION]

45 The issue is whether the respondent should be taxed, on all or a portion of that amount, in Quebec.

46 To deal with the issue it is necessary to consider sections 612.1 and 25 T.A.

47 Section 612.1 T.A. states that

612.1 Where a partnership carries on a business in Québec at any time during a taxation year, each taxpayer who is deemed to be a member of the partnership under section 608 is deemed, for the purposes of section 25, to carry on *that* business in Québec at any time during the year.

(Emphasis added.)

> 47 This section applies to the respondent: in 1997, the partnership in issue carried on a business in Quebec and the respondent was deemed to be a member of the partnership under section 608. The respondent was therefore also deemed, for purposes of the application of section 25 T.A., to have carried on "that" business in Quebec. Which business? The very business of which he was deemed to be a member, of course. Indeed, we see in the wording that the legislator did not state that the taxpayer was deemed to have carried on "a" business in Quebec but rather that the taxpayer was deemed to have carried on "that" business, the use of the demonstrative pronoun refers directly to the business of the partnership of which the taxpayer was deemed to be a member.
>
> 48 Accordingly, considering that the respondent is deemed to have carried on the business of the partnership, he is necessarily deemed to have carried on that business in exactly the same way and by the same means as the partnership. And if the partnership is carrying on its business in an establishment located in Quebec, the respondent is also deemed to be carrying on that business in the same establishment. Essentially, his situation is exactly what it would have been had he continued to be an active member of the partnership. As explained above, a partnership is merely a conduit and the members, real or deemed, who make up and carry on their business through the partnership, are accountable for its activities, seeing as it the business is carried on in one or more establishments. There is no confusion between the concepts of business and establishment: it is rather a question of recognizing the links between the concept of business and that of establishment and of recognizing also that the former is not completely dissociated from the concept of *situs*. Section 12 T.A. illustrates well the links between the business and the establishment by defining the latter as the fixed or principal location where the taxpayer carries on his business. [Emphasis added.]

[26] Therefore, the purpose of section 612.1 is to determine the *situs* of the business income in the province of Quebec. As far as the ITA is concerned, there is no similar provision because regardless of the province in which a business is carried on, the business is carried on in Canada. We can therefore conclude that the retired member is deemed to have carried on a business in Canada.

[27] I therefore believe that the income produced cannot inevitably be anything other than business income for the former partner which he must include in his income pursuant to section 9, reproduced below, and paragraph 96(1.1)(*b*) (supra) of the ITA.

> 9**(1) Income** -- Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

[28] Income from the profits of a partnership cannot be considered pension income within the meaning of subsection 118(7) of the ITA. In fact, if it is business income, that same income cannot also be defined as a life annuity out of or under a pension plan "forming an organized whole," which would qualify as pension income, and for which a split-pension amount could be permitted under paragraph 60(*c*) of the ITA. The reason is simple. If, as suggested by the appellant according to his interpretation of the Act, that income were to be included as pension income, it would be necessary to also include that same income as business income by application of subsection 96(1.1) of the ITA. The result would be double taxation of the same amount, which the appellant surely does not want, and which, in any case, is prohibited by paragraph 248(28)(*a*) of the ITA, which reads as follows:

> **(28) Limitation respecting inclusions, deductions and tax credits** -- Unless a contrary intention is evident, no provision of this Act shall be read or construed:
>
>> (*a*) to require the inclusion or permit the deduction, either directly or indirectly, in computing a taxpayer's income, taxable income or taxable income earned in Canada, for a taxation year or in computing a taxpayer's income or loss for a taxation year from a particular source or from sources in a particular place, of any amount to the extent that the amount has already been directly or indirectly included or deducted, as the case may be, in computing such income, taxable income, taxable income earned in Canada or loss, for the year or any preceding taxation year;

[29] Since subsection 96(1.1) of the ITA requires the inclusion of that income as income of the partnership, "notwithstanding any other provision of this Act," that income can no longer qualify as otherwise, as that provision of the ITA, as it stands, trumps all other provisions of the ITA.

[30] For these reasons, I would dismiss the appeal.

Signed at Ottawa, Canada, this 7th day of October 2009.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 25th day of February 2010.
Daniela Possamai, Translator

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APPEARANCES:

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Counsel for the respondent:	Christina Ham

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