Docket: 2006-1418(CPP)

BETWEEN:

Allan A. Greber Professional Corporation,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 16, 2006, at Edmonton, Alberta

Before: The Honourable M.H. Porter, Deputy Judge

Appearances:

Counsel for the Appellant:	Gordon Beck
Counsel for the Respondent:	Darcie Charlton

JUDGMENT

The appeal is allowed and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 8th day of February 2007.

"M.H. Porter"

Porter D.J.

Citation: 2004TCC78
Date: 070208
Docket: 2006-1418(CPP)

BETWEEN:

ALLAN A. GREBER PROFESSIONAL CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Porter, D.J.

Introduction

[1] This case concerns an Employee Profit Sharing Plan ("EPSP"). It is of interest as there is very little of jurisprudence on the subject of these plans despite their having been around in Canada for over 50 years.

[2] These plans are set up, pursuant to section 144 of the *Income Tax Act* ("*ITA*"), for the benefit of employees, principally to enable them to participate in the profits of their employer. In contrast to regular bonuses, they enable the employees to do some tax deferral. They also assist the employees to become involved in a form of savings and investment plan.

[3] In the case at hand Mr. Greber, a lawyer practicing in Grande Prairie, Alberta, channeled all the emoluments, which he and his wife who worked with him in the practice as his assistant were to receive from his professional corporation, the Appellant, in this case, through an EPSP, which he had set up upon the advice of his accountant.

[4] In the course of the arrangements under that plan being implemented, no deductions were made by the Appellant for income taxes or *Canada Pension Plan* (the "*Plan*") contributions. By virtue of the legislation, once the trustees made an allocation of funds to Mr. Greber and his wife, which had to be done during the same calendar year as the funds were paid into the plan, they became taxable income in their hands for the purposes of declaring and paying income tax, pursuant to 6(1)(*d*) and 144 (3) of the *ITA*.

[5] At issue however is whether the Appellant was liable to deduct CPP contributions at the time it paid the funds into the plan. A number of Canada Revenue Agency ("CRA") bulletins, as well as professionally written articles filed with the Court, opined that such contributions need not be deducted. More recently however that position has been questioned by the CRA in situations where an owner/operator of a business channels all of his financial emoluments from his corporation through an EPSP.

[6] By Notice of Assessment dated June 2, 2003 the Appellant was assessed for CPP contributions with respect to Mr. Greber and his wife in the amount of $6,692.80 for the 2002 taxation year.

[7] On July the 15th 2003 the Appellant appealed to the Minister of National Revenue (the "Minister") for reconsideration of that assessment. By letter dated January 12th, 2006 the Minister informed the Appellant of his decision to confirm the assessment. The basis for doing so, was that the employment was pensionable during the 2002 taxation year as the employees were employed under contracts of service and as the EPSP allocations formed part of their contributory earnings under the *Plan*. The Appellant has appealed that decision to this Court.

[8] The issue to be decided as set out by the Minister, in his Reply to the Notice of Appeal is whether the payments received by the Grebers out of the EPSP were from pensionable employment and were therefore contributory salary and wages pursuant to section 12 of the *Plan*. At the hearing of the appeal counsel for the Minister submitted that there is a second issue, namely whether the Appellant was properly assessed for the Canada Pension contributions.

The Relevant Legislation

[9] Section 6(1)(*a*) of the *Plan* defines pensionable employment as:

> (*a*) employment in Canada that is not excepted employment;
>
> …

[10] Section 12 of the *Plan* reads

> The amount of the contributory salary and wages of a person for a year is the person's income for the year from pensionable employment, computed in accordance with the *Income Tax Act* (read without reference to subsection 7(8) of that *Act*), plus any deductions for the year made in computing that income otherwise than under paragraph 8(1)(*c*) of that *Act*, but does not include any such income received by the person
>
> *(a)* before he reaches eighteen years of age;
>
> (*b*) during any month that is excluded from that person's contributory period under this *Act* or under a provincial pension plan by reason of disability; or
>
> (*c*) after he reaches seventy years of age or after a retirement pension becomes payable to him under this *Act* or under a provincial pension plan.
>
> (2) In the case of a person who is a contributor under the *Public Service Superannuation Act*, there shall be included in computing the amount of that person's contributory salary and wages for a year the amount of his salary, as defined in that *Act*, that is not otherwise included in computing income for the purposes of the *Income Tax Act*.

> (2.1) In the case of an Indian, as defined in the *Indian Act*, to the extent provided by regulations pursuant to subsection 7(1) and subject to any conditions prescribed by those regulations, there shall be included in computing the amount of that person's contributory salary and wages for a year the amount of his income from employment that would otherwise be excepted pursuant to paragraph 6(2)(*j*.1).
>
> (3) A reference in this *Act* to the contributory salary and wages of a person for a year shall, in relation to any remuneration paid to him in respect of pensionable employment in a province providing a comprehensive pension plan, be construed as a reference to his income for the year from that employment as that income is required to be computed under the provincial pension plan of that province.

[11] Sections 21(1) and 21(2) of the *Plan* reads:

> (1) Every employer paying remuneration to an employee employed by the employer at any time in pensionable employment shall deduct from that remuneration as or on account of the employee's contribution for the year in which the remuneration for the pensionable employment is paid to the employee such amount as is determined in accordance with prescribed rules and shall remit that amount, together with such amount as is prescribed with respect to the contribution required to be made by the employer under this *Act*, to the Receiver General at such time as is prescribed and, where at that prescribed time the employer is a prescribed person, the remittance shall be made to the account of the Receiver General at a financial institution (within the meaning that would be assigned by the definition "financial institution" in subsection 190(1) of the *Income Tax Act* if that definition were read without reference to paragraphs (*d*) and (*e*) thereof).
>
> (2) Subject to subsection (3), every employer who fails to deduct and remit an amount from the remuneration of an employee as and when required under subsection (1) is liable to pay to Her Majesty the whole amount that should have been deducted and remitted from the time it should have been deducted.

[12] Section 144 of the *ITA* reads:

> "employees profit sharing plan" at a particular time means an arrangement
>
> (*a*) under which payments computed by reference to
>
> (i) an employer's profits from the employer's business,
>
> (ii) the profits from the business of a corporation with which the employer does not deal at arm's length, or
>
> (iii) any combination of the amounts described in subparagraphs 144(1) employees profit sharing plan (a)(i) and 144(1) employees profit sharing plan (a)(ii)
>
> are required to be made by the employer to a trustee under the arrangement for the benefit of employees of the employer or of a corporation with which the employer does not deal at arm's length; …
>
> …
>
> (2) No tax is payable under this Part by a trust on the taxable income of the trust for a taxation year throughout which the trust is governed by an employees profit sharing plan.
>
> (3) There shall be included in computing the income for a taxation year of an employee who is a beneficiary under an employees profit sharing plan each amount that is allocated to the employee contingently or absolutely by the trustee under the plan at any time in the year otherwise than in respect of
>
> (*a*) a payment made by the employee to the trustee;
>
> (*b*) a capital gain made by the trust before 1972;
>
> (*c*) a capital gain of the trust for a taxation year ending after 1971;
>
> (*d*) a gain made by the trust after 1971 from the disposition of a capital property except to the extent that the gain is a capital gain described in paragraph 144(3)(c); or
>
> (*e*) a dividend received by the trust from a taxable Canadian corporation.
>
> (*f*) (Repealed by S.C. 1994, c. 21, s. 68(2).)
>
> …

(5) An amount paid by an employer to a trustee under an employees profit sharing plan during a taxation year or within 120 days thereafter may be deducted in computing the employer's income for the taxation year to the extent that it was not deductible in computing income for a previous taxation year.

(6) An amount received in a taxation year by a beneficiary from a trustee under an employees profit sharing plan shall not be included in computing the beneficiary's income for the year.

[13] Section 6(1)(*d*) of the *ITA* reads as follows:

There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:

…

(*d*) amounts allocated to the taxpayer in the year by a trustee under an employees profit sharing plan as provided by section 144 except subsection 144(4), and amounts required by subsection 144(7) to be included in computing the taxpayer's income for the year;

The Evidence

[14] The parties entered an agreed statement of facts which reads as follows:

1. The parties accept as proven, for the purposes of this Appeal and any appeals therefrom or any other proceeding taken in this matter, the facts set out herein. No evidence inconsistent with the Statement of Agreed Facts may be adduced at the hearing of this Appeal or at any appeals therefrom. Additional evidence, not inconsistent with this Statement of Agreed Facts, may be adduced by either party.

2. Unless otherwise specified, all facts relate to the period from January 1, 2002 to December 31, 2002.

3. The parties agree on the following facts:

The Appellant and the Workers

a. The Appellant was assessed for Canada Pension Plan contributions in respect of Allan Greber and Michelle Greber ("the Workers") plus related penalty and interest for the period from January 1, 2002 to December 31, 2002. Those Canada Pension Plan Contributions are the subject matter of this appeal;

b. The Appellant is a body corporate, duly incorporated pursuant to the laws of Alberta, which carried on the business of providing legal services;

c. The worker, Allan Greber, is also the sole shareholder of the Appellant;

d. The worker, Allen Greber, is also an officer and director of the Appellant;

e. Michelle Greber is the spouse of Allan Greber;

f. The Workers were employed by the Appellant under contracts of service;

g. In 1999, Allan Greber received and reported employment income from the Appellant in the amount of $65,000 and Michelle Greber received and reported employment income from the Appellant in the amount of $55,000.

h. In 2000, Allan Greber reported employment income from the Appellant in the amount of $66,000 and Michelle Greber reported employment income from the [appellant] in the amount of $62,000.

i. In 2001, Allan Greber reported employment income from the Appellant in the amount of $132,000 and Michelle Greber reported income from employment in the amount of $83,250.

The Creation of the Employees Profit Sharing Plan

j. The Appellant established an Employees Profit Sharing Plan (the "Plan"), as defined in subsection 144(1) of the *Income Tax Act* (Canada), R.S.C. 1985, 5th Supplement, as amended (the "ITA");

k. The Plan was signed so as to become effective January 1, 2000;

l. The Appellant entered into a trust agreement relating to the Plan on January 1, 2000;

m. Both the Workers were designated by the Appellant as trustees for the Plan;

n. Both of the Workers were participants in the Plan;

o. By letter dated October 31, 2000, the Appellant made an election pursuant to subsection 144(10) of the ITA;

p. Under the Plan, the Appellant's Board of Directors was to appoint a committee to administer the Plan and give instructions to the trustee;

q. The committee was formed and was comprised of the Director of the Corporation, Allan Greber;

r. A separate bank account was opened for the Plan;

s. Allan Greber had sole signing authority on the bank account for the Plan;

The Implementation of the Employees Profit Sharing Plan

t. The Appellant made monthly contributions to the Plan by way of Resolutions of the Directors;

u. The Resolutions of the Directors state how the income paid into the Plan shall be allocated to the Workers, as participants;

v. The Appellant transferred the contributions to the Plan from its business account to the account for the Plan on a monthly basis;

w. In 2002, amounts paid into the Plan that were allocated to Allan Greber totaled $131,508.17 and amounts paid into the Plan that were allocated to Michelle Greber totaled $87,072.11, as set out in Schedule A of this Statement of Agreed Facts;

x. The amounts allocated to the Workers, as participants in the Plan, were transferred from the account for the Plan to the personal accounts of the Workers on a monthly basis;

y. In 2002, the amounts transferred from the account for the Plan to the personal accounts of the Workers totaled $131,508.17 for Allan Greber and $87,072.11 for Michelle Greber as set out in Schedule B attached to and forming part of the Reply to the Notice of Appeal;

z. The retained earnings, gross revenue, wages and benefits expense and net income (loss) of the Appellant for 2001 and 2002 were as follows:

	2001	2002
Gross Revenue	$639,791.00	$175,231.00
Wages and Benefits Expense	$377,970.00	$219,955.00
Net Income (Loss)	$89,018.00	($43,678.00)
Retained Earnings	$154,936.00	$125,398.00

The Reporting of EPSP contributions for the purposes of Income Tax

aa. The trustee of the Plan completed and remitted to the Respondent the necessary T4PS forms and summaries concerning amounts allocated to the Workers as beneficiaries;

bb. The Workers reported all amounts allocated to them by the trustee of the Plan on their respective personal income tax returns; and

cc. The trustee of the Plan did not withhold and remit Canada Pension Plan contributions from amounts allocated to the Workers as beneficiaries.

SCHEDULE A
BREAKDOWN OF AMOUNTS PAID INTO AND ALLOCATED UNDER THE PLAN

Month	Total Paid Into Plan	Allocated to Allan Greber	Allocated to Michelle Greber
January, 2002	$ 14,023.20	$ 8,413.92	$ 5,609.28
February, 2002	12,497.99	7,498.79	4,999.20
March, 2002	36,009.99	21,605.99	14,404.00
April, 2002	41,998.00	25,558.80	16,439.20
May, 2002	18,030.21	10,818.13	7,212.08
June, 2002	13,000.00	7,800.00	5,200.00
July, 2002	11,000.90	6,600.54	4,400.36
August, 2002	15,019.99	9,011.99	6,008.00
September, 2002	22,000.00	13,200.00	8,800.00
October, 2002	15,000.00	9,000.00	6,000.00
November, 2002	15,000.00	9,000.00	6,000.00
December, 2002	5,000.00	3,000.01	1,999.99
TOTAL	$ 218,580.28	$ 131,508.17	$ 87,072.11

SCHEDULE B
BREAKDOWN OF AMOUNTS PAID OUT OF THE PLAN

Month	Total Paid Into Plan	Allocated to Allan Greber	Allocated to Michelle Greber
January, 2002	$ 14,023.20	$ 8,413.92	$ 5,609.28

February, 2002	12,497.99	7,498.79	4,999.20
March, 2002	36,009.99	21,605.99	14,404.00
April, 2002	41,998.00	25,558.80	16,439.20
May, 2002	18,030.21	10,818.13	7,212.08
June, 2002	13,000.00	7,800.00	5,200.00
July, 2002	11,000.90	6,600.54	4,400.36
August, 2002	15,019.99	9,011.99	6,008.00
September, 2002	22,000.00	13,200.00	8,800.00
October, 2002	15,000.00	9,000.00	6,000.00
November, 2002	15,000.00	9,000.00	6,000.00
December, 2002	5,000.00	3,000.01	1,999.99
TOTAL	$ 218,580.28	$ 131,508.17	$ 87,072.11

[15] The parties also entered into evidence the following exhibits:

i) The EPSP in question which amongst other things provides for a committee to be appointed by the board of directors of the professional corporation to administer the plan and give instructions to the trustee.

ii) The trust agreement appointing Allan Greber and Michelle Greber trustees of the monies and other assets contributed to the EPSP.

iii) Various resolutions of the board of directors of the professional corporations (Allan Greber alone) directing payment of funds to the EPSP and how they should be allocated through the participants.

iv) Various resolutions of the trustees (Allan Greber and Michelle Greber) making an allocation of funds to the participants (themselves) and directing payment of the funds, so allocated, to themselves respectively.

v) CRA Examiner's notes dated May 23rd, 2003 showing the result of the audit.

[16] Mr. Greber himself gave evidence. He said that he set up the EPSP upon the advice of his accountant. He indicated that it was done to bonus out employees and put more money in their pockets; to share income with his spouse; to help transition an articling student into the partnership and to avoid having to deduct CPP contributions.

[17] He set up a separate bank account, on which he was the sole signatory to accommodate the EPSP.

[18] He basically confirmed the agreed statement of facts.

[19] John Fuller, the Grebers accountant, also gave evidence. He confirmed that he had assisted Mr. Greber to set up the EPSP. He produced financial statements for the corporation in 2002. He referred to his experience with EPSPs and alluded to the fact that this one was not the only one being challenged by the Minister on the same grounds.

The Position of the Minister.

[20] Counsel for the Minister clearly accepted that this EPSP was a valid and properly constituted plan. She did so on the record. When I asked her if she was in effect saying that what had been set up was a fiction, she stated quite clearly that no, it was real.

[21] The Minister starts from the position that the Grebers were both in pensionable employment. There is not really any disagreement they were employed and that employment was pensionable under section 6(1) of the *Plan*.

[22] The Minister's submission goes on to refer to Provincial legislation which sets standards for minimum earnings that have to be paid. These are of course way below the amounts actually received into income from the EPSP by the Grebers. However counsel makes the jump that as, under provincial law there was an obligation to pay remuneration to the Grebers as employees, that obligation was satisfied by the allocation of funds to them in the plan and the subsequent payment to them, out of the plan. The obligation she says was not satisfied in any other way.

[23] The submission continues that as sections 6(1)(*d*) and 144 (3) of the *ITA* both require funds allocated in an EPSP, to be included the income for an employee for the year, those amounts are therefore income from pensionable employment under section 12 of the *Plan*. The argument is that "Salary and Wages" are in effect received by the employees in the guise of "Allotments to beneficiaries of an EPSP". Counsel pointed out that the payments made by the trustees of the plan to the Grebers were the only source of remuneration received by them from the Appellant. She

submitted that they were not profits shared by the Appellant with employees at all, but simply their remuneration, and that if those payments had been made as straight remuneration there would have been no profits to share.

[24] Counsel also pointed out that profits are defined in Black's Law Dictionary as "The excess of revenues over expenditures" and that in 2002 expenditures of the Appellant were $40,000 greater than the revenues received. She says the amounts contributed to the EPSP were calculated before any reference to remuneration to the Grebers and that in essence they were not profits at all.

[25] Counsel in her brief suggested that the Appellant improperly circumvented the *Plan* and denied the employees (the Grebers) the benefit of their CPP contributions by means of using the EPSP in this manner. She relied on the decision of Weisman J in *DNS Signs Ltd. v Canada,* [2006] T.C.J. No. 352, where he said in that case:

> The purpose of section 144 of the *Act* is to provide certainty regarding the income tax consequences of contributions to employees profit sharing plans; of incentive allocations to employees out of such plans; of income earned on trust assets; and of distributions thereof. The section is not intended to be used as a means of circumventing the *Plan* and avoiding the contributions required by it. The *Plan* is remedial legislation designed to provide social insurance for Canadians[5]. It should therefore be given fair, large and liberal construction, and its objectives should not be frustrated by improper use of section 144 of the *Act*.

[26] Counsel also relied on the Supreme Court of Canada case of *Canadian Pacific LTD v Canada (Attorney General)* [1986] S.C.J. No. 30 where Laforest J said:

> 26. I would add that if the Appellant is obliged to pay premiums solely in relation to the pat of the earnings of his employee that comes out of his pocket, then it is in a better situation than other employers who pay these premiums in relation to all the earnings accruing to the employee from his work. The employer obviously benefits from the fact that some of his employees are in a position where they can obtain tips. He is able to retain their services at a better price. It, therefore, appears unjust that he should also be able to divest himself of a part of the obligation that all other employers

5 *Granovski v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703.

> must carry, or to restrict the amount of [page 690] benefits of his employees whose earnings come in good part from tips.

[27] Counsel accepted that the CRA Payroll Deductions and Remittances T4001 (E) Rev.06 "Employers Guide":

> **Excluded benefits and payments**
>
> Do not deduct CPP contributions from:
>
> pension payments, lump-sum payments from a pension plan, death benefits, amounts that a trustee allocated under a profit sharing plan or that a trustee paid under a deferred profit sharing plan, benefits received under a supplementary unemployment benefit plan (SUBP) that qualifies as a SUBP plan under the *Income Tax Act*, and retiring allowances or severance payments received upon or after retirement to recognize long service or for loss of office or employment;
> …
>
> **Employee profit sharing plan (EPSP)**
>
> An EPSP is an arrangement that allows an employer to share profits with all or a designated group of employees. Under an EPSP, amounts are paid to a trustee to be held and invested for the benefit of the employees who are beneficiaries of the plan.
>
> Each year, the trustee is required to allocate to such beneficiaries all employer contributions, profits from trust property, capital gains and losses, and certain amounts in respect of forfeitures.
>
> Report payments from EPSPs on a T4PS slip instead of a T4 slip. See Interpretation Bulletin IT-379, *Employees Profit Sharing Plans – Allocations to Beneficiaries.*

However she submitted the Guide does not address the situation in which the ***total*** remuneration received by employees is by means of a distribution through an EPSP.

[28] Counsel referred to an article written on the subject by Kim G.C. Moody in a Canada Tax Foundation publication where he said:

> Hence, some practitioners design owner-manager remuneration so that the owner-manager is remunerated wholly through employer contributions to an EPSP in order to avoid withholdings such as income tax, CPP, and EI. For plans designed to avoid CPP and EI withholdings entirely, all of the owner-manager's remuneration is

> directed through an EPSP. This leads to the obvious question whether such a position will be challenged by the CRA. The CRA has opined in two technical interpretations that whether or not the payment of an employee's total remuneration through an ESPS is acceptable is a question of fact.

[29] Counsel went on to refer to the obligation of an employer to deduct and remit contributions under section 21 of the *Plan* calculated on the amount of the remuneration (salary and wages) paid to each employee. She pointed out that the Appellant was in a position to know the amounts being allocated to each employee, as a committee (in the form of Mr. Greber) was to determine these amounts and under the EPSP it directed the trustees to allocate them accordingly. The trustees then distributed in accordance with that "directed" allocation. The trustees she points out were relieved of all responsibility, which rested with the committee.

[30] Counsel submitted that in effect the trust set up in this case under the EPSP was simply a conduit for transmitting the salary and wages paid by the Appellant to the employees. In this she relied on the case of *Sheridan v Canada*, [1985] F.C.J. No. 230, where Heald J, speaking for the Federal Court of Appeal, said:

> … If her role was that of a mere conduit, she would simply have transmitted the remuneration in [total]. I think also that a mere conduit would not have been involved in fixing the quantum of remuneration….

[31] Counsel also pointed out that there was a deficiency in the EPSP in that no committee was ever established, but rather Mr. Greber as sole director of the corporation, authorized the payment to the EPSP, and directed the allocation that trustees were required to make.

[32] Finally counsel pointed out that the trustees simply carried out the direction of the corporation and in effect acted as its agent.

[33] The second submission by counsel, on behalf of the Minister, was that the Appellant was properly assessed for CPP contributions. Counsel sought to establish that "allocations" in an EPSP can be subject to CPP contributions. She stated that under section 12 of the *Plan* the commission, salary and wages of a person for a year is his income for a year from pensionable employment computed in accordance with the *Income Tax Act*. Therefore it follows, she said, that as allocations are included in

income, pursuant to section 6(1)(*d*) of the *ITA*, they are therefore also "contributory salary and wages" pursuant section 12 of the CPP.

[34] It is at this point perhaps, that the Minister's arguments became a little vague. It is one thing to establish that the income is contributory income. It is another question, where the legislative authority is for the Minister to assess for those contributions.

[35] First counsel maintained that the Appellant was properly assessed because it was the employer. Counsel said that the position of the Minister was reliant upon three points:

> i) The Appellant was assessed as the Grebers employer
>
> ii) The Appellant was in a position to know the amount of salary and wages the Grebers received because Mr. Greber determined the allocations and
>
> iii) Under the EPSP the Appellant, not the trustees were liable for the payments made to the beneficiaries, the trustees being absolved of all responsibility.

[36] In hearing these points, Miss Charlton has moved some what away from her legal agreement and moved more into the realm of facts in this particular case, for the same could be said of any payments made by an employer into an EPSP.

[37] Counsel referred to two interpretation bulletins issued by the CRA, one dated April 6, 2000 (number IT280R) sets out the following questions and answers:

> **Salary Paid to Epsp**
> April 06, 2000
> **Document number**: 2000-0017116
> **Income Tax Act**: 144(1)
> **Interpretation Bulletins**: IT-280R, Employees Profit Sharing Plans – Payments Computed by Reference to profits
>
> PRINCIPAL ISSUES:
>
> 1) Can an employee's total salary be paid to an EPSP?

…

POSITION:

1) Question of fact.

…

[38] The second bulletin December 4, 2000 reads as follows:

> The second issue the CCRA was asked to comment on was whether section 144 would apply where the total salary of a shareholder-manager was paid through an EPSP. The CCRA was not prepared to comment except in the form of an advance ruling. We note that in a 1990 technical interpretation (see document number ACC9276 in the Tax Window Files), Revenue Canada indicated that an EPSP could not be established for one employee, which could be a consideration where all of a shareholder-manager's remuneration was paid through an EPSP.

[39] Whilst not legally binding, these bulletins are authoritative and it is noteworthy that in answer to the question raised to whether an employee's total salary could be paid through an EPSP, the answer in both bulletins was that it was a "question of fact".

[40] Thus counsel hangs her hat, on behalf of the Minister, on the basis of the facts in this case. She points out that exactly the same amounts were channeled through to the Grebers from the EPSP, as the amounts paid into the EPSP by the Appellant (see Schedule to Statement of Facts). It was instantaneous. She points out that the trustees under the plan were obliged to follow the directions of the Appellant, ostensibly through the committee, but in fact by direction of the sole director of the Appellant, Allan Greber, and that they were absolved of all liability for anything they did as trustees, by the Appellant.

[41] Consequently she says the monies were in reality "salary and wages", conduited through the EPSP, but still "remuneration paid to employees" by the Appellant as a **matter of fact,** and thus the Appellant can be assessed for CPP contributions by the Minister.

[42] In answer to a question from the court, counsel was unable to demonstrate where the line, she seeks to establish, should be drawn, that is which payments should be in or which ones out in any given situation; for example if 80% of the remuneration was conduited through and 20% was retained in the trust. She conceded that there were no guidelines, and that it was a slippery slope that was being embarked upon. However she maintained that in this case, regardless of what may happen in any other case, the situation as a "matter of fact" was clear.

[43] Those were the submissions made on behalf of the Minister.

The Position of the Appellant

[44] Counsel for the Appellant took a different tack.

[45] First he relied on the statement of facts and the concession by counsel for the Minister that the EPSP was properly set up. He referred to the decision of Weisman J in the case of *DNS v Canada* (above), where he set out the three requirements necessary to have a valid EPSP for the purposes of section 144 of the *ITA:*

> 1) Payments are required to be made by an employer to a trustee under the arrangement for the benefit of employees;
>
> 2) These payments must be computed by reference to the profits of the employer from the employer's business;
>
> 3) All amounts received by the trustee must be allocated to the employees on an ongoing annual basis.

[46] Mr. Beck then suggested that there were two more requirements namely:

> 4) That the requirement that payments to the EPSP must be computed with reference to profits, is modified if the EPSP is one for which the employer has made an election under section 144(10) ITA, which in this case was done and
>
> 5) That amounts be allocated, but not necessarily paid, to employees each year.

[47] The thrust of the Appellant's first submission is that this case (and others like it) represents the long standing position of the Minister, that neither contributions to, nor allocations within an EPSP, are subject to withholding Income Tax, EI premiums, or CPP contributions. The reason for this, he advocates, as expressed by Weisman J, is because allocations to beneficiaries from an EPSP are of trust income and are not employee's contributory salaries, wages etc.

[48] Mr. Beck went on to rely on a ruling by the Minister, reference TE1 "conference 95 Question 5 Employee Profit Sharing Plans" July 18, 1995

> Whilst the employer's contributions to an EPSP are included in the employee's income under paragraph 6(1)(d) of the *Income Tax Act*, there is no withholding requirement when the employer makes the contribution nor on the allocation to the employee by the trustee…

[49] The proposition seems to be, first, that the payment made by the employer to the trust is not a payment "to the employee" as the employee may never receive it so there is no liability to contribute at that juncture. Secondly it is only when the trustee "allocates" an amount to an employee/beneficiary, that it falls into the latter's income for Income Tax purposes under the *ITA*, when again it may not necessarily be paid to that employee or beneficiary. Thirdly when it is ultimately paid, it comes out from the EPSP, not in the form of salary or wages but rather as trust income.

[50] In essence he says that as there is no payment under section 153(1) (*ITA*), absent some legislative plug to fill the hole, there would be no income tax payable in this situation. Section 6(1)(*d*) and section 144 of the *ITA* between them, legislatively fill that gap for income tax purposes.

[51] By analogy he says the same reasoning applies to CPP contributions. Hence the past rulings by the Minister.

[52] Mr. Beck then raises the question as to why the Minister in this case has abandoned his longstanding position. He points out that there has been no legislative change nor has any court called into question this situation, other than the DNS case (above).

[53] Counsel also referred to the issue of whether the payments to the EPSP exceeded the profits for the year in question and whether the retained earnings for that year or the previous year should be brought into play. I do not think very much turns on those issues. The fundamental question raised by the Minister is that of the conduit or flow of the funds from the employer through the EPSP to the employees. The only relevant point with reference to profits would be that if these funds had been treated and paid as salary and wages there would have been no profits left over to share with employees in the EPSP. That seems to be clear from the facts, but it is not the principal issue raised by the Minister.

[54] Mr. Beck also argued vociferously that the Appellant should have the right to direct the trustees as to how to allocate the funds which it pays into the EPSP, and that nothing should turn on that, nor on the fact that Mr. Greber himself wore all three hats at the same time namely, director of the Appellant, trustee and beneficiary.

[55] Those in essence are the submissions of the Appellant.

Analysis

[56] There are good arguments on both sides of this issue. A good case has been made for both points of view.

[57] On the one hand the Minister has accepted for 50 years or more that payments made to an EPSP are not payments of remuneration to an employee for the purposes of deducting Income Tax, EI payments or CPP contributions. Indeed not only has the Minister accepted this situation throughout that time, but it has been legislatively recognized in the *ITA* with respect to the deduction of income taxes at source. No taxes are deducted at source by an employer making a payment into an EPSP. Undoubtedly the reason for that is because the amounts (as per the IT bulletin) are not **paid** to the **employee** and may in fact, never be paid to the employee. More than that if the trust was completely independent from the employer, and nothing

legislatively says it has to be, the allocation itself may not be made to any particular employee or class of employees.

[58] Thus Parliament in its wisdom has made provision for income tax to be payable by the employee/beneficiary ***after*** the funds are allocated in the trust, to that employee beneficiary and it has also made provision for refunds in the event that the funds are never ultimately paid to the particular employee who paid tax upon the allocation being made.

[59] In the *Plan* there is no corresponding legislation dealing with the treatment of CPP contributions on funds paid into an EPSP. There is clearly no legislation requiring an employer to deduct and remit such contributions from payments into the fund, they not being "payments to an employee". There is no corresponding requirement on the trustees or the beneficiaries to deduct or remit contributions upon an allocation of funds being made within the plan, as is the case with income tax; nor is there any such provision upon payment out to the beneficiaries of the funds so allocated.

[60] It is a very compelling argument that the principles should be the same for both income tax and CPP contributions and indeed the Minister has accepted such, for many decades up to now.

[61] Counsel for the Appellant asked as to why the Minister has now changed his position. It strikes me that the answer is obvious. Whilst a court should only look outside the legislation, to seek its intent, if the wording of the statute is unclear or ambiguous, where the purpose is self evident within the legislation, the court can, and should take note of it. In this case the intent of the legislation seems to me, to be quite clear.

[62] The whole thrust of section 144 of the *ITA*, in making provision for these employee profit sharing plans, is to enable employees generally, not necessarily only

owner/managers, to share in the profits generated by a business, and furthermore not just to share in them but to be able to leave them in a pool of savings, whereby they may be invested and grow to the general advantage of the employees/beneficiaries, until they need them. It is like a forced savings and investment plan designed to encourage employees to be interested and involved in their employers business and encourage participation in its success, with the ability to take out the funds, perhaps when they change jobs or retire, as a sort of nest egg.

[63] It was clearly set up in a different era when tax was not so burdensome on the citizen and social programs were not so available.

[64] It seems to me that the legislation contemplated that these funds, paid into an EPSP, would rest more long term in the trust. Section 144 of the *ITA* refers specifically to income being earned on the trust funds, capital gains and losses, credits for dividend income and so on. These are not consistent with short term or immediate payments in and out of the plan, but are more consistent with the investment of funds over a longer term.

[65] It is evident from the various CRA bulletins, that the question has been more recently raised, to whether an owner/manager's salary can be 100% paid through an EPSP. The evidence of Mr. Fuller, the accountant, was that these plans are being used today by ingenious employers and their tax advisors for different reasons. Tax can be deferred and the money used for up to one year, income splitting can take place, and up until now CPP contributions have avoided being paid. There is nothing to say that there is anything improper in all of this. In particular there is nothing to say that Mr. Greber has done anything improper. Quite the contrary, as a taxpayer he is entitled to arrange his affairs in strictly accordance with the legislation so as to pay the minimum amount of tax possible. Everything he has done has been perfectly straight forward and above board.

[66] However it does answer Mr. Beck's question as to why the Minister is changing his longstanding position. Clearly it is, because these plans and this legislation are being used in a new and different manner to that originally contemplated by the framers of the legislation.

[67] The situation in the case at hand, stares one in the face. Far from being a profit sharing, investment scheme, an incentive program for employees of an employer, the EPSP here was set up and used at this time for reasons of tax planning, income splitting and avoidance of CPP contributions. Again I stress that there is nothing improper or illegal in that, but it is clearly a different concept to that contemplated by the legislation.

[68] Essentially the Minister sees an employer, working through his professional corporation, pay himself and his wife by means of an EPSP. Mr. Greber is the sole director. He makes the decision as to the amount of funds to be paid into the plan, in point of fact, exactly equal to the remuneration he wishes to take out of the corporation. He also directs the trustees how to allocate the funds, the trustees being he and his wife. The direction is that each month as the funds come in, they are to be allocated to him and his wife, who are the employees and the beneficiaries. The trustees play no role, except as counsel for the Minister says, to process the money through like a conduit. True under the EPSP the trustees have all the powers of trustees to invest funds and do the things trustees normally do, but they are directed to allocate and pay the funds directly out to the beneficiaries, who are the Grebers themselves. Whilst it may not have to be, this is far from being arm's length and it smacks of a certain degree of artificiality. Thus the Minister says these are in effect wages and salary being channeled through the EPSP and thus should be treated as such and assessed with CPP contributions.

[69] The arguments of the Minister are very compelling. I am not sure I agree with Weisman J when he says in the in the DNS case (above) that the CPP is remedial legislation, but it is certainly social legislation designed to provide some social benefits for Canadians, generally when they reach their golden years. For many of those paying into the plan, that may seem far off, for others less so. I do agree however that the purpose of section 144 of the *ITA*, whatever it may be with respect to EPSP, was not that it to be used to circumvent the CPP.

[70] The DNS case (above) can be distinguished on its facts, for in that case, there were no actual payment into the EPSP, which had been set up. In the case at hand, payments were made into the EPSP, but they passed straight through to the employee/ beneficiaries.

[71] The real question is to what extent the court should step in to prevent the use of an EPSP, which has the effect of circumventing the *Plan*, or to what extent that should be left to the Minister to deal with, if he wishes to do so through Parliament.

[72] It is certainly not for this court to in effect legislate on behalf of the Minister. If the whole thing was a sham, different considerations might apply. The Minister however has not sought to say that. He agreed that on the whole the EPSP in this case has been set up properly and validly. There were minor arguments between counsel to whether the profits were sufficient, whether the trustees were left with any discretion, whether the administrator was actually appointed and so on, but the fundamental question was whether the use of the EPSP in this manner where funds go straight through, using the plan as a conduit, makes those funds "remuneration paid to an employee" liable to assessment on the part of the employer for CPP contributions.

Conclusion

[73] Glaring as it may be to use the legislation in this way, the movement of funds was in accordance with the legislation setting up the EPSP, that is section 144 of the *ITA*. It may not be a procedure that was originally within the purview of that legislation, but it does conform to it.

[74] It is not a question in my view of the Minister unilaterally changing his position on how these things should be handled. He issued his bulletins and directions over the years with good reason, following the wording of the legislature. That position has been recognized legislatively. Otherwise there would be no need for the provisions in section 144(4) of the *ITA* relating to the taxing of the funds in an EPSP when they are allocated to the beneficiaries. They would have been taxed at source either with the employer or with the trustees, during the appropriate deduction remittances, when they made the respective payment or allocation. That did not fit the legislation so there had to be a different taxing provision.

[75] I do not find that that this issue is to be decided as a simple question of fact. The payments into and out of the EPSP were made in accordance with a strict interpretation of the legislation. They may not have complied with the spirit of the legislation but they did comply with the wording of it. There is nothing in the legislation that says the funds have to be held or that ***if in effect*** it is a salary and wages being conduited through at exactly the same time, then different considerations should apply.

[76] It may be that this is a loophole in the legislation, so that it can be used in a manner, not originally intended by Parliament, but it is not for this Court to close loopholes. If the Minister wishes to close such a loophole he has the ability to do that through legislation. As was conceded by counsel for the Minister, it is a slippery slope for the court to embark on deciding whether any one situation crosses the line or not, without some legislative guidelines.

[77] I find that the funds in question paid into the EPSP allocated to the Grebers and paid out to them by the trustees were not remuneration, **"paid" by an employer to** "**an employee"** and that accordingly there was no obligation on the Appellant to deduct or remit CPP contributions with respect thereto. It follows that the Appellant was not properly assessed. The appeal is allowed and the assessment is vacated.

Signed at Calgary, Alberta, this 8th day of February 2007.

"M.H. Porter"

Porter D.J.

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