THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

GORDON WILLIAM LADE ..... RESPONDENT.

1965

*Nov. 16

Dec. 14

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit sharing plan—Stock purchase plan for employees—Whether plan qualified as an "employees profit sharing plan"—Income Tax Act, R.S.C. 1952, c. 148, ss. 6 (1)(k), 79(1), (3), (7).

The company, of which the respondent was an employee, operated a stock purchase plan under which the company contributed a monthly sum equal to 50 per cent of the employee's monthly contributions. The company undertook also to make an annual contribution of a sum based upon the ratio of its profits if such profits exceeded a certain percentage of its invested capital. During the year 1959, the company made monthly contributions but no annual contribution. The amount of the company's contributions in 1959 allocated to the respondent was ruled by the Minister to be taxable in the respondent's hands on the ground that the plan was an "employees profit sharing plan" within s. 79(1) of the *Income Tax Act*. The Minister's contention was upheld by the Tax Appeal Board, but was rejected by the Exchequer Court. The Minister was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The plan in the present case was not an "employees profit sharing plan" as defined in s. 79(1) of the *Income Tax Act*, since the payments were not computed by reference to the employer's profits from its business. An arrangement under which the amount of payments made by the employer is fixed by the amount contributed by his employees, regardless of whether he does or does not make a profit, is not brought within the definition in s. 79(1) of the Act merely because the employer agrees to make an additional payment in those years, if any, in which his profits exceed a certain ratio.

Revenu—Impôt sur le revenu—Plan de participation aux bénéfices—Plan d'achats de valeurs mobilières pour les employés—Le plan est-il un «plan de participation des employés aux bénéfices»—Loi de l'Impôt sur le revenu, S.R.C. 1952, c. 148, arts. 6(1)(k), 79(1), (3), (7).

La compagnie, dont l'intimé était un employé, administrait un plan d'achats de valeurs mobilières en vertu duquel la compagnie contribuait une somme mensuelle égale à 50 pour-cent des contributions mensuelles de l'employé. La compagnie s'engageait aussi à contribuer annuellement une somme basée sur la proportion de ses profits si ces profits excédaient un certain pourcentage de son capital investi. Durant l'année 1959, la compagnie a déposé ses contributions mensuelles mais n'a déposé aucune contribution annuelle. La Ministre a considéré que le montant des contributions de la compagnie en 1959 qui avait été alloué à l'intimé, était imposable entre les mains de l'intimé pour le

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motif que le plan était un «plan de participation des employés aux bénéfices» dans le sens de l'art. 79(1) de la *Loi de l'Impôt sur le revenu.* La prétention du Ministre fut maintenue par la Commission d'appel de l'impôt, mais fut rejetée par la Cour de l'Échiquier. Le Ministre a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le plan en question n'était pas un «plan de participation des employés aux bénéfices» tel que défini à l'art. 79(1) de la *Loi de l'Impôt sur le revenu,* puisque les paiements n'étaient pas calculés par rapport aux bénéfices de l'employeur provenant de son entreprise. Un arrangement en vertu duquel le montant des paiements de l'employeur est fixé par le montant contribué par ses employés sans se soucier si l'employeur accuse ou non un profit, ne tombe pas sous la définition de l'art. 79(1) de la loi pour la simple raison que l'employeur s'engage à payer une somme additionnelle seulement pour les années où ses profits excéderaient une certaine proportion.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], renversant un jugement de la Commission d'appel de l'impôt. Appel rejeté.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], reversing a decision of the Tax Appeal Board. Appeal dismissed.

G. W. Ainslie and *D. G. H. Bowman,* for the appellant.

P. N. Thorsteinsson, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted in accordance with the provisions of s. 84 of the *Exchequer Court Act,* from a judgment[1] of Noël J. allowing an appeal by the respondent from a decision of the Tax Appeal Board in regard to the respondent's assessment for the taxation year 1959.

There is no dispute as to the facts. The question to be decided is whether an arrangement entered into between Richfield Oil Corporation, the employer of the respondent, and certain of its employees, including the respondent, is "an employees profit sharing plan" within the meaning of that phrase as defined in s. 79 of the *Income Tax Act.*

The arrangement is in written form and is produced as an exhibit to the agreed statement of facts upon which the

[1] [1965] 1 Ex. C.R. 214, [1964] C.T.C. 305, 64 D.T.C. 5189.

matter has been dealt with. It is entitled "Stock Purchase Plan for Employees of Richfield Oil Corporation".

Membership in the plan is voluntary. It is open to any person regularly employed by Richfield Oil Corporation, hereinafter referred to as "the Company", who has completed at least one year of service with the Company, is not over sixty-five years of age if a man or over sixty years of age if a woman and who files a completed application form with the administrator of the plan. A member is obligated to contribute a monthly sum determined by himself but not less than $5 nor more than 5 per cent of his monthly salary, to be paid through authorized pay-roll deductions; he may change the amount of his contribution, within the foregoing limits, on any January 1 or July 1 by filing a written request with the administrator. Failure to make the monthly contribution is construed as a voluntary withdrawal from the plan.

The provisions of the plan providing for the payments to be made by the Company read as follows:

Contributions by Company

A. Monthly Contribution. The Company will make a monthly contribution of a sum equal to 50 per cent of the member contributions made each month. These monthly contributions by the Company shall be reduced by amounts forfeited, if any, during the preceding month by members withdrawing from the Plan.

B. Annual Contribution. The Company will make an annual contribution of a sum based upon the ratio of its profits to invested capital which will adjust the total monthly contributions made by the Company to the following schedule:

Per Cent of Profits to Invested Capital	Company Contribution as per cent of Member Contribution
Up to but less than 11%	50%
11% but less than 12%	55%
12% but less than 13%	60%
13% but less than 14%	65%
15% or over	75%
14% but less than 15%	70%

'Invested Capital' shall mean the total of all Capital Stock and Surplus (or equivalent) accounts and Long Term Debt of the Company as of the beginning of the preceding calendar year, as reflected in its printed Annual Report to stockholders.

'Profits' shall mean the Company's Net Income after taxes for the preceding calendar year, as shown in its printed Annual Report to stockholders.

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This annual contribution, if any, shall be made as of March 31 of each year, beginning in 1955, and shall be related only to total member contributions made in the preceding calendar year which have not been withdrawn as of said March 31.

Paragraph 4 of the Agreed Statement of Facts sets out the contributions made by the Company in respect of Canadian members of the plan since the inception of the plan in 1953 up to the end of 1959 as follows:

	Contributions in respect of Canadian members only.	
Year	Section IV Part A Monthly	Section IV Part B Annual
1953	$ 120	None
1954	388	None
1955	903	None
1956	1,738	$ 84
1957	3,146	None
1958	4,175	None
1959	8,592	None
	$19,062	$ 84

Section 79(1) of the *Income Tax Act* reads:

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 or by reference to his profits from his business and the profits, if any, from the business of a corporation with whom he does not deal at arm's length are made by an employer to a trustee in trust for the benefit of officers or employees of the employer or of a corporation with whom the employer does not deal at arm's length (whether or not payments are also made to the trustee by the officers or employees), and under which the trustee has, since the commencement of the plan or the end of 1949, whichever is the later, each year allocated either contingently or absolutely to individual officers or employees,

(*a*) all amounts received by him from the employer or from a corporation with whom the employer does not deal at arm's length, and

(*b*) all profits from the trust property (computed without regard to any capital gain made by the trust or capital loss sustained by it at any time since the end of 1955),

in such manner that the aggregate of all such amounts and such profits minus such portion thereof as has been paid to beneficiaries under the trust is allocated either contingently or absolutely to officers or employees who are beneficiaries thereunder.

Other sub-sections of s. 79 provide, *inter alia*, that the amount of payments into the plan made by the employer

and allocated by the trustee to an employee either contingently or absolutely during the year are required to be included in the employee's income for the year.

I agree with the submission made by counsel for the appellant that in order that the plan with which we are concerned may be considered an "employees profit-sharing plan" it must fulfil the following conditions:

(1) the employer must make payments to a trustee in trust for the benefit of its employees;

(2) the payments must be computed by reference to the employer's profits from its business;

(3) all amounts paid to the trustee and all profits (except capital gains or losses realized or sustained since 1955) must, in each year, be allocated either contingently or absolutely to individual employees.

It is common ground that the plan complies with the first and third of these conditions; the difference of opinion between the Exchequer Court and the Tax Appeal Board is as to whether it complies with the second. For the reasons given by Noël J. I agree with his conclusion that it does not and there is little that I wish to add.

The answer to this question no doubt depends primarily upon the construction of s. 79(1) read in the context of the whole Act, so that the actual results of the operation of the plan from the date of its inception up to the end of the year 1959 are not of decisive importance; but it is interesting to note that the contributions made by the Company during that period under Part A of Section IV which are computed by reference to the payments made by employees and which the Company was bound to make regardless of the amount of its profits, if any, total $19,062 while the contributions made by the Company under Part B of the section which are computed by reference to the Company's profits total only $84. It would be a strange result if an arrangement, under which no payment computed by reference to its profits was made by an employer in the taxation year in question and of the total payment it made during the seven years of the operation of the arrangement only $\frac{1}{2}$ of 1 per cent was so computed, were held to fall within the definition contained in s. 79(1).

Even if it had happened that in every year of the plan's operation the ratio of the Company's profits to invested capital had exceeded 15 per cent, the result would have been that $\frac{2}{3}$ of the payments made by the Company would have

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been computed by reference to one factor only, the amount paid by its employees, while the remaining $\frac{1}{3}$ would have been computed by reference to two factors (i) the amount paid by its employees, and (ii) the profits of the Company.

I agree with the submission of counsel for the respondent that the construction of s. 79(1) contended for by the appellant involves substituting for the words "payments computed by reference to his profits from his business" the words "payments computed by reference to a formula of which his profit from his business is one of the variable components". I do not think the words of the section are susceptible of that interpretation. In my opinion, an arrangement under which the amount of payments made by an employer is fixed by the amount contributed by his employees, regardless of whether he does or does not make a profit, is not brought within the definition in s. 79(1) merely because the employer agrees to make an additional payment in those years, if any, in which his profits exceed a certain ratio.

For the reasons given by Noël J. with which I have already expressed my agreement and those briefly stated above I would dismiss this appeal with costs which, in accordance with the terms of the order granting leave to appeal, will be taxed on a solicitor and client basis.

Appeal dismissed with costs.

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitor for the respondent: P. N. Thorsteinsson, Vancouver.