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Proposed Changes to Deferred Stock Option Benefits (oh what a relief it is . . . or is it?)

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In February 2000, the federal government tabled a Budget which included provisions proposing a deferral, in certain circumstances, in respect of the employment income to be recognized where employees of a non-CCPC exercise stock options granted to them by their employer.[1] It was proposed that, where a qualifying person granted an option to issue shares of the qualifying person (or a non-arm's length qualifying person) to an employee, and the employee filed the appropriate election, the employment income which would otherwise be included in income in the year the option is exercised, would be deferred until the taxation year in which the employee disposes of, or exchanges, the shares. The deferral was to be subject to an annual limit of $100,000. It was noted that the proposed provisions were generally similar to those for incentive stock options in the United States.

The Budget 2000 documents indicated that the employee stock option provisions were being amended because many corporations used stock options to encourage their employees to take an ownership stake in the corporation, most notably in the fast growing high technology industries. It was noted that stock options provide employees with the right to acquire shares in the employer for a predetermined price, they assist corporations in attracting and retaining high caliber workers, and that the proposed amendments would make the Canadian tax treatment of employee stock options more competitive with the United States. The Budget 2000 provisions came into force effective February 28, 2000.

Fast forward to the year 2010. While the intent of these provisions may have been meritorious – the results have (in some cases) been less than desirable, particularly in the high technology industries. For example, some employees who took advantage of the special election were able

Inside

to defer significant amounts of employment income, but the value of the shares acquired subsequently plummeted to a point where the income taxes payable in respect of the deferred employment income were greater than the proceeds of disposition received from the sale of the shares. Not surprisingly, some employees who disposed of their shares cried foul claiming that the tax system was operating unfairly because, in their view, they never "received" the employment income yet were required to pay income taxes on the full amount.

As advisors are aware, once a share is acquired pursuant to an employee stock option plan, a subsequent drop in the market value of the share is generally treated as a capital loss (or capital gain in the case of an increase). A significant drop in value is an unfortunate turn of events from the employee's perspective but the view of the Canada Revenue Agency is that this is a market risk the employee took when choosing to hold the shares acquired pursuant to the stock option plan. There are several technical interpretations issued by the Canada Revenue Agency addressing this issue.[2] The Department of Finance also examined this issue in 2002. The Joint Committee on Taxation submitted a letter dated March 15, 2002, recommending that the ITA be amended to allow any capital loss realized on the disposition of such shares to offset the income otherwise realized on the exercise of the option. The Department of Finance refused to provide such relief, equating employees who exercise stock options and choose to hold the shares to individuals acquiring shares with after-tax or borrowed dollars. That is, each investor who chooses to hold shares accepts a market risk in the expectation of a return on investment including future appreciation of the value of the share.

Notwithstanding the foregoing, two Remission Orders were granted in respect of former employees of SDL Optics, Inc.[3] According to the Remission Orders issued, the tax relief was in respect of employment income calculated pursuant to subsection 7(1).

Employees have made various arguments to obtain tax relief, such as claiming that the losses were on account of income and not capital. These arguments were rejected in *Ellis*[4] and *Baird*[5] but accepted in *Howard*.[6] In *Howard*, the employee was considered to be a trader or dealer with respect to his employer's shares and had special knowledge and expertise in his employer's operations and the market. As a result, the losses realized by the employee on disposition of the optioned shares were considered to be losses from a business.

Budget 2010 was tabled on March 4, 2010. It contains four significant proposed changes to the taxation of employee stock options. First, changes are proposed to eliminate the "double-dip" that may occur where an employee "cashes-out" of his or her stock options and is required to include only 50% of the employment income in income while the employer is entitled to a full deduction of the amount paid in determining its income from business. Second, changes are proposed to clarify existing withholding tax requirements to ensure that an amount in respect of tax on the full amount (not just 50%) of the employment income associated with the issuance of a share is required to be remitted by the employer at the same time as the share is issued. These measures attempt to avoid situations in which an employee is unable to meet his or her tax obligations as a result of a decrease in the value of the shares. Third, changes are proposed to eliminate the election permitting a deferral of the employment income for non-CCPCs. Finally, changes are proposed that will provide tax relief where employees elected to defer the employment income and have experienced financial loss as a result of a decline of the value of the shares acquired. These latter changes are the subject of this article.

Budget 2010 proposes that, where an employee has exercised an option to acquire shares, has made an election pursuant to subsection 7(10) in a prior taxation year to defer the employment income, and the income tax liability arising in respect of the employment income in the year the shares are sold is greater than the proceeds of disposition of the optioned shares, then the employee may choose to elect to pay a special tax for the year equal to the proceeds of disposition, if any, from the sale or other disposition of the optioned shares. Where an employee files the proposed election the following will result:[7]

(a) in determining taxable income, the employee may claim a deduction equal to the full amount of the

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employment income (as opposed to 50% as currently provided by paragraphs 110(1)(*d*) and (*d*.1));

(b) an amount equal to one-half of the lesser of:

(i) the amount otherwise included in employment income;

(ii) the capital loss from the disposition of the share,

is required to be included in the employee's income as a taxable capital gain in the same taxation year as the shares were disposed of. This deemed taxable capital gain may be offset by the allowable capital loss arising from the disposition of the optioned share, provided the loss is not otherwise utilized by the employee;

(c) a special tax equal to the employee's proceeds of disposition of the optioned shares (2/3 of the proceeds of disposition for residents of Quebec) is payable in the year of disposition; and

(d) the deemed taxable capital gain is disregarded for purposes of the definition "adjusted income" for purposes of certain credits (e.g., GST).

An election filed outside of the normal reassessment period (within the meaning of subsection 152(3.1)) is considered to be an application made by the employee, under subsection 152(4.2), to the Minister of National Revenue for a determination of a refund or reduction of tax. Such a determination is at the discretion of the Minister of National Revenue and must be made on or before the day that is 10 calendar years after the end of the taxation year of the employee to which the refund or reduction relates. This will permit reassessments to occur in respect of statute-barred taxation years. Advisors should consult with their clients as soon as possible in 2010 to avoid losing the opportunity to apply these proposed provisions for the 2000 taxation year.

Only shares disposed of in respect of which the related employment income was deferred pursuant to the election in subsection 7(10) will qualify for this proposed tax treatment. Employees who disposed of such shares prior to 2010 will have the opportunity to file the proposed election on or before the filing due-date of their 2010 taxation year (April 30, 2011 or June 15, 2011, as the case may be). Individuals who have not disposed of their optioned shares prior to 2010 may choose to do so prior to 2015. They will then have until their filing due-date for the taxation year of disposition to file the proposed election adopting this treatment (generally April 30, 2015 or June 15, 2015, as the case may be). Where an individual does not dispose of his or her optioned shares prior to 2015, it appears that the employment income deferral continues until the optioned shares are disposed of, albeit without the benefit of the proposed election and tax relief.

To Elect or Not?

On its face, the proposed election appears to be quite beneficial. It would appear that choosing to pay a tax equal to the proceeds of disposition rather than paying a greater tax in respect of the employment income is a simple decision to make. What escapes the eye, however, is the value of the capital losses that are lost when the employee files the proposed election. Recall that, on filing the proposed election, the employee is deemed to have realized a taxable capital gain equal to one-half of the lesser of the employment income or the capital loss arising on the sale of optioned shares. The deemed taxable capital gain will be offset (partially or in full) by the allowable capital loss arising from the disposition of the optioned share. This begs the question – what is the value of the allowable capital loss that is used and, therefore, not available to offset other taxable capital gains? This is best illustrated by example.

Assume that an employee acquires shares pursuant to an employment stock option plan at an exercise price of $2 per share. At that time, the shares traded at $10 per share. The employee elects to defer the employment income of $8 per share (assume the 50% stock option deduction is available pursuant to paragraph 110(1)(*d*)). The employee's marginal income tax rate is 46.41%. Therefore, the tax deferral in respect of the employment income, net of the 50% stock option deduction, is $1.86 per share. The shares currently trade at $1 per share. In these circumstances, it appears beneficial to file the proposed election, as shown below:

Disposition of Share

Proceeds of disposition (POD)	$ 1.00
Adjusted cost base	10.00
Capital loss	($9.00)
Allowable capital loss	($4.50)

Tax Consequences

Tax payable on net employment income if proposed election not filed	$1.86
Tax payable if proposed election filed (POD)	(1.00)
Benefit by filing proposed election	$0.86

By filing the proposed election, the employee is deemed to have realized a taxable capital gain equal to $4 (1/2 of the lesser of the employment income and the capital loss arising on sale of the optioned shares). Therefore, the employee must use $4 of the $4.50 allowable capital loss realized on the disposition of the optioned shares to shelter the deemed taxable capital gain from immediate taxation. This leaves an allowable capital loss of $0.50 per share. Assuming the employee is able to utilize this allowable capital loss in determining taxable income in the cur-

rent year, the employee's further tax savings from utilizing the allowable capital loss will amount to $0.23 per share. This is illustrated below:

Allowable capital loss from disposition of shares	$4.50
Utilized to shelter deemed taxable capital gain	(4.00)
Balance	$0.50
Potential tax savings at 46.41%	$0.23

The above analysis suggests that the proposed election is worth $1.09 to the employee ($0.86 + $0.23). Consider, however, the tax consequences arising where the employee is able to utilize the entire allowable capital loss arising from a disposition of the optioned shares as a deduction in determining the net taxable capital gains in the current taxation year. This is not an outside possibility given the rather dramatic recovery of the Canadian stock markets in 2009. By filing the proposed election, the employee will lose a $4 allowable capital loss, which is worth $1.86 ($4 × 46.41% = $1.86). The employee saves the tax on the net employment income which is also worth $1.86 (50% of $8 × 46.41%) but must pay a tax equal to the proceeds of disposition received from the sale of the shares. There is a net cash loss realized of $1 ($1.86 - $1.86 - $1) per share by filing the proposed election. Of course, this is true only if the employee had other taxable capital gains in the same year. If the employee does not expect to have taxable capital gains in the near future, then the cost of not filing the proposed election is $0.86. These concepts are illustrated by the cash flow summary below (based upon the above example:

	Proposed election	**No election but other TCG**	**No election and no other TCG**
Proceeds of disposition	$1.00	$1.00	$1.00
Tax on "net" employment income benefit	n/a	(1.86)	(1.86)
Immediate tax savings from utilizing the allowable capital loss	0.23	2.09	n/a
Tax payable due to proposed election	(1.00)	n/a	n/a
Net to employee	$0.23	$1.23	($0.86)

As indicated above, if there are no other taxable capital gains in the same taxation year, the employee is better off by $0.86 if he or she files the proposed election. However, what should the employee do if he or she expects to realize a taxable capital gain in the next year or two such that the loss preserved by not filing the proposed election can be fully or partially utilized? This requires an analysis of the time value of money to determine the value of the tax savings in today's dollars.

While the above analysis is complicated, and can be made more complicated by introducing the concept of time value of money, it does not appear that there are a significant number of circumstances where an employee would want to file the proposed election. Generally, the proposed election only makes economic sense where the employee has deferred a significant amount of employment income, the shares have suffered a significant loss of value and the employee has no reasonable expectation of realizing a taxable capital gain in the near future. In fairness to the Department of Finance, this is likely exactly what was desired. However, advisors must be careful not to rush into recommending the proposed election until they take into account potential future taxable capital gains that the client may realize. Where an employee is able to utilize the capital loss arising on disposition of the optioned shares in the same taxation year, there are no circumstances under which the employee would benefit from filing the proposed election. However, the analysis will be different from the above if the employee is not entitled to the 50% stock option deduction. Finally, advisors should consider the availability of an allowable capital loss in the year of death, which may be applied against income from any source and not just against taxable capital gains.

As a cautionary note, at the date of writing this article, the Department of Finance has not released draft legislation in respect of the tax relief in respect of deferred stock option benefits. As such, the comments contained in this article are based on the Notice of Ways and Means Motion contained in Annex 5 to the Budget 2010 documents. The draft legislation actually released may contain changes not discussed in this article.

A number of tax lawyers from Fraser Milner Casgrain LLP write commentary for CCH's Canadian Tax Reporter *and sit on its Editorial Board as well as on the Editorial Board for CCH's* Canadian Income Tax Act with Regulations, Annotated. *Fraser Milner Casgrain lawyers also write the commentary for CCH's* Federal Tax Practice *reporter and the summaries for CCH's* Window on Canadian Tax. *Fraser Milner Casgrain lawyers wrote the commentary for* Canada–U.S. Tax Treaty: A Practical Interpretation *and have authored other books published by CCH:* Federal Tax Practice; Charities, Non-Profits and Philanthropy Under the Income Tax Act; Corporation Capital Tax in Canada; *and* Canadian Transfer Pricing. *Tony Schweitzer, a Tax Partner with the Toronto Office of Fraser Milner Casgrain LLP, and a member of the Editorial Board of CCH's* Canadian Tax

REPORTER, *is the editor of the firm's regular monthly feature articles appearing in* TAX TOPICS.

Notes:

[1] These provisions were enacted and in present form are contained in subsections 7(8) to (16) of the *Income Tax Act* (Canada) (the "ITA"). Unless otherwise indicated, all statutory references in this article are to the ITA.

[2] See, for example, documents 2003-0007795, 2009-0319621M4, and 2009-0325281M4.

[3] See *Certain Former Employees of SDL Optics, Inc. Remission Order*, dated October 25, 2007 and *Certain Former Employees of SDL Optics, Inc. Remission Order No. 2*, dated May 29, 2008. Both Remission Orders granted income tax and interest relief to certain named employees where the tax assessed on the employment income benefit exceeded the total proceeds of disposition realized on the disposition shares and the market value of any of those shares held on December 29, 2006. Employees were also required to reduce the adjusted cost base of their securities held on December 29, 2006 pursuant to a formula contained therein.

[4] *Ellis v. The Queen*, 2008 DTC 6230 (F.C.A.).

[5] *Baird v. The Queen*, 2010 DTC 5035 (F.C.A.).

[6] *Howard v. The Queen*, 2008 DTC 2788 (T.C.C.).

[7] Resolution 29 of the Notice of Ways and Means Motion contained in Annex 5 of Budget 2010 documents.

Hot News Items

Manitoba Adds New Organ Donor Leave

Manitoba recently passed new legislation granting employees the right to take unpaid leave for the purpose of living organ and tissue donation.

Under the legislation, employees are entitled to up to 13 weeks of unpaid leave to prepare for, undergo, and recover from transplant surgery. The leave can be extended for up to an additional 13 weeks, if recommended by a medical practitioner. To be eligible for the leave, an employee must have worked for his or her employer for at least 30 days, and must provide a medical certificate stating the anticipated start and end date for the leave.

Upon returning from organ donor leave, employees must be allowed to return to the same job or a comparable job with the same or greater benefits and pay.

Manitoba is the second Canadian province to provide organ donor leave. Ontario passed similar legislation in June 2009.

Bill 227, *The Employment Standards Code Amendment Act (Unpaid Leave Related to Donating an Organ)*, received first reading on May 6, 2010, second reading on June 15, and third reading and Royal Assent on June 17. The new organ donor leave became law when Bill 227 received Royal Assent on June 17.

Federal Privacy Act (PIPEDA) Amendments Introduced

A recently introduced Bill proposes to add significant provisions to the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

The proposed amendments to PIPEDA will, among other things,

(a) exclude, in certain circumstances, business contact information from protection;

(b) specify the elements of valid consent for the collection, use, or disclosure of personal information;

(c) permit federal works, undertakings, and businesses to collect, use, and disclose personal information without the knowledge or consent of the individual to establish, manage, or terminate employment relationships;

(d) permit the disclosure of personal information without the knowledge or consent of the individual for the purposes of:

(i) identifying an injured, ill, or deceased individual and communicating with his or her next of kin,

(ii) performing police services,

(iii) preventing, detecting, or suppressing fraud, or

(iv) protecting victims of financial abuse;

(e) clarify the meaning of lawful authority for the purpose of disclosures to government institutions of personal information without the knowledge or consent of the individual;

(f) permit organizations, for certain purposes, to collect, use, and disclose, without the knowledge or consent of the individual, personal information:

(i) contained in witness statements related to insurance claims, or

(ii) produced by the individual in the course of their employment, business, or profession;

(g) permit organizations, for certain purposes, to use and disclose, without the knowledge or consent of the individual, personal information related to prospective or completed business transactions;

(h) provide a framework for organizations to notify individuals proactively about disclosures of their personal information made in certain circumstances to government institutions; and

(i) require organizations to report material breaches of security safeguards to the Privacy Commissioner and to notify certain individuals and organizations of breaches that create a real risk of significant harm.

The amendments are contained in Bill C-29, the *Safeguarding Canadians' Personal Information Act*, which received first reading in the House of Commons on May 25, 2010. Subscribers will be notified of the progress of this Bill.

Need To Know

Newfoundland and Labrador Minimum Wage Increase

Effective July 1, 2010, the Newfoundland and Labrador minimum wage will increase to $10.00 per hour, up from the current rate of $9.50 per hour.

The minimum wage rates are located in the "Employment Standards" section of PaySource at ¶5710 and ¶5771.

Recent Cases and Rulings

Consultant with fixed-term contract that became indeterminate was an employee

• • • **Quebec** • • • Santos worked for HMI Industries on a part-time basis from June 1, 2002 to October 1, 2002. His contract was extended, and one year later it became an agreement of indeterminate duration. Santos performed his work under the close supervision of HMI Industries, and he was required to comply in every respect to the policies of HMI Industries. Santos worked as a consultant, and he was allowed to set his own schedule and organize his daily activities. Santos was terminated on January 10, 2005, and he was paid the equivalent of a two-month notice of termination. Santos brought a wrongful dismissal action. The trial judge awarded him 18 months' notice of termination, finding that Santos had signed a contract of employment and there was an employment relationship between the parties. HMI Industries appealed.

The appeal was allowed, in part. Given that Santos was closely supervised by HMI Industries, and was subject to their policies, the consulting agreements between the parties were contracts of employment, not contracts for services. Santos did work for various periods for different and unrelated employers, but these periods should not be combined, and could not be considered as employment in the service of HMI Industries. The notice of termination awarded by the trial judge was excessive. Given that Santos had actually worked for HMI Industries for a period of 31 months, a six-month notice of termination was reasonable.

HMI Industries Inc. v. Santos, (Que. C.A.), 2010 CLLC ¶210-024

Class Action Against Bank For Unpaid Overtime Certified

• • • **Ontario** • • • Fulawka had worked for Scotiabank since 1986 in a variety of full-time sales positions, both in Saskatchewan and Ontario. She applied for a class action on her own behalf, and on behalf of current and former employees who worked in full-time front line sales positions. Fulawka often worked overtime as part of her regular job, and she alleged that the culture of the workplace was such that it was assumed that employees would work overtime, usually unauthorized. The initial overtime policy at Scotiabank set out that authorized overtime was paid if an employee worked more than eight hours in a day or more than 37.5 hours in a week, at one-and-a-half times the employee's regular pay. The policy required overtime to be approved in advance by the employee's branch manager or department head, and did not allow for approval of overtime after the fact. A new overtime policy, put in place in 2008, allowed for approval of overtime after it had been worked if the work was critical and prior approval was not possible. Fulawka alleged that it was an express or implied term of the contracts of employment that the affected employees would be paid for overtime worked at one-and-a-half times their hourly rates. In addition, she claimed that Scotiabank had been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the proposed class members, and that Scotiabank breached their duty of good faith by failing to pay for hours worked and creating a work environment where overtime was required.

The motion was allowed, and the action was certified as a class action. It was not plain and obvious that the causes of action for breach of contract, unjust enrichment, breach of duty of good faith, and negligence would fail. There was an identifiable class, and the class definition was appropriate. There was an evidentiary basis of systemic wrongs giving rise to common issues. The systemic wrongs came from the bank policy, which failed to reflect the realities of the workplace by putting the onus on the employees to obtain prior approval for overtime instead of requiring that the bank ensure that overtime was properly paid. The failure of Scotiabank to establish a system-wide procedure to record overtime made it more difficult for the employees to obtain compensation for their overtime. There was evidence to demonstrate that the failure to pay overtime occurred because of the overtime policy, and that it was the result of systemic conditions, rather than individual circumstances. This was unlike the situation in *Fresco v. Canadian Imperial Bank of Commerce* 2009 CLLC ¶210-032. With respect to the allegations that Scotiabank was required to comply with the *Canada Labour Code*, the Code sets out minimum standards, contains its own enforcement mechanism, and does not give rise to a civil cause of action. Therefore, the portions of the

statement of claim seeking to directly enforce the Code were struck. Despite this, the Code could be implied into the contracts of employment as a matter of fact. Therefore, the requirements of the Code, including the duty to pay overtime for hours worked, and to keep accurate records of hours worked, were implied terms of the contracts of the class members and were not struck out.

Fulawka v. The Bank of Nova Scotia, (Ont. S.C.J.), 2010 CLLC ¶210-025.

Employee Had Little Independence and Was Not Considered a Manager

• • • **Canada** • • • Torre was dismissed from her position at CIBC for having breached the bank's confidentiality rules. Under the *Canada Labour Code* (the "Code"), an employee who believes that he or she has been unjustly dismissed may file a complaint against the employer, as long as the employee has worked for 12 consecutive months. An employee who is a "manager" is excluded from this provision of the Code. Torre brought an action for unjust dismissal. CIBC brought a preliminary motion to dismiss the complaint for lack of jurisdiction, claiming she was a manager. Torre held the position of manager of the Langelier Banking Centre, and supervised five employees. The adjudicator determined in an interlocutory decision that he had jurisdiction to hear the complaint. CIBC brought an application for judicial review.

The application for judicial review was dismissed. Manager was not defined in the Code. Therefore, in determining whether an employee is a manager, the court will look at whether the employee had significant autonomy, discretion, and authority in the conduct of the business of the employer. The adjudicator in this case made a reasonable determination based on the facts. Torre had little independence in her position. She complied with CIBC's directives concerning discipline, hiring, dismissal, preparing schedules, and establishing salaries so that the branch's objectives were met by the staff in office. As a result, her role was more similar to a supervisor than a manager.

Canadian Imperial Bank of Commerce v. Torre, (F.C.), 2010 CLLC ¶210-026.

No Taxable Benefit By Occasionally Parking In Lot

At issue was whether the Minister correctly assessed the taxpayer for a taxable benefit for parking under s. 6(1)(*a*) of the *Income Tax Act* for 2004 and 2005. The taxpayer was an employee of Adelaide Motors (the "Dealership"), a car dealership where he worked as a mechanic. There was a parking lot (the "Lot") adjacent to the Dealership where many employees parked their cars. The taxpayer did not require a car in his duties, but occasionally drove to work and parked in the Lot, while at other times he took public transit or carpooled with others. After a payroll audit conducted on the Dealership in 2007, some employees, including the taxpayer, received a T4 from the Dealership that ascribed taxable benefits to them for parking in the Lot. The taxpayer was subsequently reassessed and the amounts of $1,201.75 and $1,311 were included in his 2004 and 2005 taxation years, respectively. The taxpayer argued that the practice of using the Lot was never discussed with him, that he never expected or requested that parking be made available to him as part of his employment, and if he knew it would form part of his remuneration he would not have accepted it. The taxpayer also argued that the Lot was often used by unidentified non-employees visiting the neighbouring business.

The taxpayer's appeal was allowed. The Dealership did not consider the implications of employees' use of the Lot, and did not have policies in place for the Lot. The Lot did not have any assigned spots for employees and was more like scramble parking. Therefore, the taxpayer did not receive any taxable benefit from the Dealership by virtue of occasionally parking his vehicle in the Lot. The reassessments of the taxpayer were vacated.

Long, (T.C. C.), 2010 DTC 1122.

Employee's Use of Free Parking Spaces Constituted Benefits

The Toronto Parking Authority (the "TPA") gave its employees, including the individual taxpayer, B, a free parking space at work. The Minister included a benefit under paragraph 6(1)(*a*) of the *Income Tax Act* in B's income, and assessed both the TPA and B for Canada Pension Plan ("CPP") contributions on the benefit. B and the TPA appealed to the Tax Court of Canada. The TPA's other affected employees were joined as intervenors.

The taxpayers' appeals were dismissed. B and the TPA's other employees had received from the TPA, by virtue of their employment, a benefit in the form of a measurable economic advantage equal to the value of the parking spaces that they were permitted to occupy. The primary beneficiaries of this benefit were B and the TPA's other employees, and any benefit accruing to the TPA was purely ancillary. For CPP purposes, this benefit also constituted a direct payment from the TPA to B and its other employees. The Minister's assessments were affirmed accordingly.

The Toronto Parking Authority et al., (T. C. C.), 2010 DTC 1139.

Taxpayer Received Economic Advantage From Free Use of Employer's parking Space

Woods, J. of the Tax Court of Canada dismissed the taxpayer's appeal from an assessment including, as a benefit, the value of a free parking pass obtained from his employer in his income for 1998, 2002, and 2003 (2009 DTC 1038). Applying *Adler v. The Queen* (2007 DTC 783) (T.C.C.), Woods, J. concluded that: (a) the taxpayer's decision to drive to work and to use the free parking space (the "Space") was a matter of personal choice as opposed to the result of a directive from his employer; (b) the taxpayer was the primary beneficiary of the Space; and (c) the value of that benefit should be the fair market value of the Space. The taxpayer appealed to the Federal Court of Appeal.

The taxpayer's appeal was dismissed. By following the approach taken in the *Adler* case, Woods, J. was, in effect, concluding that the taxpayer received an economic advantage from the free use of the Space. Nor did Woods, J. err: (a) in rejecting the taxpayer's argument that the cost of using the Space eliminated any economic advantage accruing to him; or (b) in finding that the fair market value of the Space was the measure of its economic advantage to the taxpayer. The Minister's assessments were affirmed accordingly.

Schroter, (F.C.A.), 2010 DTC 5062.

Standby Charge – Use of Employer-Provided Vehicle

The issue the CRA was asked to consider involved professionals who, in the course of their employment duties, were required to make interventions. Because those interventions were made very early in the morning, they were asked to leave the office with the employer-provided automobile on Friday night after their regular shift, thus avoiding having to return to the office on Monday morning to pick up the automobile before going to the client.

By proceeding like this, they could make an earlier intervention on Monday morning. The CRA was asked if those professionals would have to include a standby charge in their income for the use of the employer-provided automobile. The CRA confirmed that the professionals would not have to include a taxable benefit in the form of a standby charge in their income for the use of the automobile on Monday to go from their domicile to the client and from the client back to their domicile. However, they would have to include one for the travel from their office to their domicile on Friday night and from their domicile to the office on Tuesday morning. The CRA noted that the personal use of an automobile for the purpose of determining if a standby charge had to be included in an employee's income included the following: (1) vacation trips; (2) personal errands; and (3) travel between domicile and place of work even if the employer required the employee to use the employer-provided automobile to return home. Personal use includes any use by the employee or persons related to the employee if it is not for the purpose of his/her employment. Of course, there is no taxable benefit in respect of the use of the automobile to go directly to a place other than the employee's regular place of work (e.g., to meet a client). Note that the automobile ceases being available to the employee and producing a standby charge once all the keys of the vehicle have been returned to the employer.

Technical Interpretation, Business and Partnerships Division, March 15, 2010, Document No. 2009-0323081I7

Personal Versus Employment Travel

The CRA was asked whether certain travel by an employee using an employer-provided vehicle was a taxable benefit to the employee.

The employee used an employer-provided vehicle to report to an office location and to travel frequently to various predetermined school locations in a school district. The employee was also required to travel to various meetings and conferences throughout the province.

The CRA stated its long-standing position that travel between an employee's home and his/her regular place of employment is personal travel. Whether a particular location is a regular place of employment is a question of fact, and an employee may have more than one regular place of employment. In this case, the employer's office location and the school locations are places of business of the employer where the employee regularly reports for work. Accordingly, the use of the employer-provided vehicle to travel between the employee's home and these locations would be personal travel and the use of the employer's vehicle for this travel would give rise to a taxable benefit under section 6 of the Act.

In respect of the meeting and conference locations, it is a question of fact whether these are regular places of employment to the employee. If these meetings and conferences are not conducted at the employee's regular place of employment, the occasional and infrequent travel between these locations and the employee's home would not be considered personal travel.

Technical Interpretation, Business and Partnerships Division, April 15, 2010, Document No. 2009-0311091E5

Early Retirement Program – Salary Deferral Arrangement

The CRA ruled that the early retirement program described below was a salary deferral arrangement within the meaning of this expression in subsection 248(1) of the Act because the employee covered under that program would have the right in a taxation year to receive an amount (called "deferred amount") after that year on account of salary or wages for services rendered during that year. The CRA also noted that one of the main purposes of the early retirement agreement was to postpone the payment of the tax payable under the Act by the employee on the deferred amount regardless of whether the services were rendered in the current or prior year. Any amount that the employee would be entitled to receive under the early retirement agreement at the end of the taxation year would be deemed to be received as a taxable benefit during that year for the purpose of applying sections 6(1)(*a*) and 6(11) of the Act. No such benefit would be deemed to be received if it was otherwise included in the taxpayer's income in the current or preceding taxation year.

The details of the proposed early retirement program are as follows:

- The employer does not enter into an individual employment contract with each employee and only provides them with an employment confirmation letter including their proposed annual salary.
- The early retirement program is defined as a program offered to employees who wish to take an early retirement under which their annual salary for a certain number of work years would be apportioned and paid over a certain number of years.
- An employee intending to participate in the early retirement program would proceed as follows in accordance with the early retirement agreement: (1) for a certain period of time, the employee would continue to perform his/her regular employment duties and be entitled to a certain number of vacation weeks; (2) for a certain period of time, he/she could take consecutive paid vacation weeks; (3) for a certain period of time, his/her annual remuneration would be reduced but he/she would still be entitled to his/her employment benefits; and (4) from a certain date, the employer-employee relationship would be terminated and the employee could benefit from the early retirement program. The main purpose of the early retirement program is to help the employees retire early by allowing them to manage their cash flow entries in an optimal way.

Note that we could not be more specific on the number of years subject to the deferral and duration of the periods referred to in the program because that information was blacked out by the CRA.

Tax Ruling, Financial Sector and Exempt Entities Division, 2010, Document No. 2009-0352241R3.

Group Sickness and Accident Insurance Plan – Pooling of Assets and Use of an Agent

The transactions the CRA was asked to rule on involved the company ACO and a group of employers covering their employees and retirees for life under a group sickness and accident insurance plan (the "Plan") that was guaranteed by an insurance policy issued by the insurer BCO.

The employers and ACO were the policyholders and paid the full cost of the insurance premiums. The Plan covered the current employees and retirees of the employers and ACO. The policy would include the employees of the employers of ACO and of the new company CCO that retired after a specific date. The employers, ACO and CCO would sign an agency agreement under which ACO would act as an agent for their group and open bank accounts (the "Fund") to pool those contributions required to satisfy their obligations under the Plan in respect of employees and retirees. At the end of each fiscal period of the Fund, ACO would provide every employer with an audited statement of its contributions and share of the assets held in the Fund. ACO and each employer would remain the owner of the Fund assets in proportion of their share and could not shield them from potential claims from their creditors. The income and gains related to the Fund assets would be credited to the Fund and the losses and expenses incurred in respect of the Fund would be deducted. A joint committee composed of members of the employers and the two companies would monitor the growth of the Fund. The relationships created between the employers and ACO should not be interpreted as a trust, stipulation for another, deposit arrangement, partnership or other similar grouping. ACO and the employer would continue to subscribe to the policy but a new group would be created to include the employees having retired after a specific date. The policy premiums due by ACO and the employers would now be paid from the Fund and a separate invoice would be issued by BCO for the premiums paid for employees having retired after a specific date. Those retirees would be reimbursed for their eligible medical expenses by filing claims supported by valid receipts directly with BCO. The policy included life insurance protection for the retirees but none of the premiums could be attributed to that coverage since it was entirely paid-up. The purpose of the Fund was to provide a separate accounting for the sums used to pay the policy premiums and ensure the management and investment of the sums by ACO and the joint committee.

The CRA was asked if the proposed transactions (including the implementation of the Fund and agency agreement for the purpose of funding the Plan) would

trigger a taxable benefit for the above employees and retirees in accordance with paragraph 6(1)(*a*) of the Act, or alternatively result in the creation of a salary deferral arrangement ("SDA", a retirement compensation arrangement ("RCA") or an employee benefit plan ("EBP"). The CRA ruled that the value of any benefit that an employee or retiree could enjoy as a result of the above transactions could not be included in his/her income under paragraph 6(1)(*a*) of the Act. Subparagraph (i) of that provision excludes specifically any benefit derived from the employer's contributions to a group sickness or accident insurance plan. The CRA also ruled that the transactions would not result in the creation of an SDA, an RCA or an EBP as those terms are defined in subsection 248(1) of Act and that the general anti-avoidance rule described in subsection 245(2) would not apply to the proposed transactions. The employees and retirees were entitled to a reimbursement of their medical expenses but did not have any right to the employer's contributions. The existence or creation of their right to insurance benefits did not arise from an amount on account of salary or wages for services rendered by them. Note the absence of payments to a custodian, which is a necessary condition to have an RCA or EBP.

Tax Ruling, Financial Sector and Exempt Entities Division, 2010, Document No. 2009-0311181R3.

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