FTR Now

Remuneration of Office-Holders may not be Pensionable for CPP Purposes

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In two recent cases – *Real Estate Council of Alberta v. The Minister of National Revenue ("RECA")* and *Her Majesty the Queen in Right of Ontario v. The Minister of National Revenue ("HMQ")* – the Tax Court of Canada ("TCC") ruled, respectively, that attendance and *per diem* fees paid to persons holding an office were not pensionable for purposes of the *Canada Pension Plan* (*"CPP"*), as the amounts received in any year could not have been known in advance.

As we discuss in this *FTR Now*, the TCC's decisions in *RECA* and *HMQ* call into question whether certain amounts paid to board members, council members and other office-holders should be treated as pensionable earnings and subject to CPP contributions.

BACKGROUND IN THE *RECA* AND *HMQ* CASES

At issue in the *RECA* case was the treatment of meeting attendance fees paid to Beverly Andre-Kopp – a member of the Real Estate Council of Alberta ("Council"). The Council is the regulatory body for the Alberta real estate industry, responsible for setting and enforcing standards of conduct and administering the Alberta *Real Estate Act* with a view to promoting the integrity of the real estate industry. The fees in question were paid to Andre-Kopp in accordance with the Council's meeting fee schedule, which provides for fees to be paid based on attendance at Council and committee meetings. No *CPP* contributions were deducted from meeting fees paid to Andre-Kopp.

The *HMQ* case dealt with amounts paid to Roger Davidson and Gail Stiffler – both members of Ontario's Judicial Appointments Advisory Committee ("JAAC"). The JAAC is responsible for making judicial appointment recommendations to the Attorney General of Ontario. As JAAC members, Davidson and Stiffler were each entitled to a *per diem* for services provided to the JAAC. As in RECA, CPP contributions were not deducted from the *per diems* paid to Davidson and Stiffler.

In both cases, the Minister of National Revenue ("MNR") determined that the amounts paid (the meeting fees and *per diems*) were pensionable and subject to *CPP* contributions. These decisions were appealed to the TCC.

THE TCC'S DECISIONS

In both the *RECA* and *HMQ* cases the remuneration at issue was paid to persons who provide services in their capacity as office-holders, not as employees. The issue before the TCC was whether the remuneration was nonetheless captured by the *CPP*, as being pensionable and subject to *CPP* contributions.

Key to the TCC's analysis was paragraph 6(1)(a) of the *CPP*, which governs whether employment is pensionable (and subject to contributions) for *CPP* purposes. Paragraph 6(1)(a) states:

pensionable employment is employment in Canada that is not exempted employment

The term "employment" is defined in subsection 2(1) of the CPP as follows:

employment' means the performance of services under an express or implied contract of service… and includes the tenure of an office

Since employment includes “the tenure of an office”, for persons who are not employees it is necessary to look at the *CPP* definition of “office” to determine whether amounts paid to such persons are pensionable and subject to *CPP* contributions. Subsection 2(1) of the *CPP* defines “office” as follows:

office’ means the position of an individual entitling him to a *fixed or ascertainable* stipend or remuneration… …and ‘officer’ means a person holding such an office [emphasis added]

In other words, for a person who is not employed, amounts paid for services will only be captured by the *CPP* if the person is in a position that entitles him to a fixed or ascertainable stipend or remuneration. Applying the reasoning of earlier jurisprudence in which the meaning of “fixed or ascertainable” had been examined, the TCC concluded that remuneration which is not fixed must be known or calculable *in advance* in order for it to be “ascertainable.”

In *RECA*, Andre-Kopp (and other Council members) received remuneration for attending Council and committee meetings, based on a fee schedule. The TCC determined that since the number of meetings in a year and the duration of the meetings could not be known in advance, there was insufficient information to allow for the advance calculation of remuneration that would be earned from meeting fees in a year. On this basis, the TCC held that the meeting fees paid to Andre-Kopp were not fixed or ascertainable, and that Andre-Kopp was not engaged under a tenure of office within the meaning of section 2 of the *CPP*. Consequently, the TCC ruled that meeting attendance fees were not pensionable or subject to *CPP* contributions.

Similarly, in *HMQ* the TCC determined that the amount of *per diems* to be paid to JAAC members could not reasonably be known in advance, and that the *per diems* were also not fixed or ascertainable. Thus, according to the TCC, the JAAC members were not in an “office” within the meaning of subsection 2(1) of the *CPP*, and the *per diems* were not pensionable or subject to *CPP* contributions. The Court explained its reasons, in part, as follows:

For the purposes of subsection 2(1) of the *Plan* the stipend or remuneration must be ascertainable; they must be known to both the payer and payee or be calculable to a reasonable degree of certainty before the term of office begins. Remuneration is ascertainable for example if a person knows or reasonable expects that he or she will be called upon to attend approximately 20 meetings of a committee during the year and will receive payment of $100 for each meeting. The person would know with a reasonable degree of certainty that the remuneration from the office will be approximately $2,000 for the year. If at the commencement of the year or beginning of the tenure of the position, the person has no idea how many meetings he or she will attend in a year, there is no way to reasonably ascertain the stipend or remuneration.

The MNR has since appealed the TCC’s decisions in both the *RECA* and *HMQ* cases to the Federal Court of Appeal.

IMPLICATIONS

On the TCC’s reasoning in the *RECA* and *HMQ* cases, office-holders whose earnings are not fixed and not reasonably ascertainable in advance (i.e. because they are based on attendance at meetings or for providing services that cannot reasonably be known in advance) will not be considered engaged in pensionable employment and no *CPP* deductions should be made from their remuneration. However, as both the *RECA* and *HMQ* decisions are under appeal, the treatment of such earnings for *CPP* purposes is not yet settled.

We will be following the appeals of the *RECA* and *HMQ* cases and will report on the outcomes in a future update. In the meantime, please contact a member of the Pension & Benefits Practice Group if you wish to discuss the potential implications of these cases for your organization.

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