
WEST HILL REDEVELOPMENT COMPANY LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Toronto 1969 June 26-27

Ottawa Oct. 6

Income tax—Pension plan—Contributions for present and past service—Deductibility—Bona fides of plan—Registration of plan—Approval of lump sum contribution for past service—Revocation of by Minister—Whether income "artificially" reduced—"Pension"—Income Tax Act, secs 11(1)(g), 76(1), 139(1)(ahh).

In December 1964 appellant, a private company incorporated in Ontario, set up a pension plan and a deferred profit sharing plan for its two executive officers, *W* and *J*, who were its controlling shareholders and also directors of the company and the trustees of both plans The company made application under sec. 139(1)(*ahh*) of the *Income Tax Act* for registration of the pension plan and under sec 76(1) for approval of a lump sum contribution of $195,244 for past service. While the applications were pending the company paid $6,000 to the plan for current service and in March 1965 $195,244 for past service Such payment was made conditional upon registration of the plan and approval of the lump sum contribution, which occurred in April and September 1965 respectively. In March 1965, immediately following payment of the lump sum contribution of $195,244, the pension plan was terminated and the funds therein paid to *W* and *J*, who paid an equivalent amount to the deferred profit sharing plan, whose trustees (*W* and *J*) invested it in preference shares of appellant.

According to appellant this course was followed to overcome a provision in an Ontario statute prohibiting the investment of pension funds in a private company.

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

In computing its income for 1964, 1965, and 1966 appellant sought to deduct the amounts paid to the pension plan as described. In July 1967 appellant was advised of the Minister's withdrawal of the registration and approval previously given, and the deductions claimed were disallowed. In the belief that *W* and *J* would in consequence be personally subject to tax unless the funds were returned to the pension plan, the preference shares were then redeemed, the deferred profit sharing plan terminated, and its assets returned to the company.

Held, the company was not entitled to deduct the payments to the pension plan.

While the company's by-laws and agreements and its two plans purported to create legal rights and obligations and to establish a pension plan and a deferred profit sharing plan, the surrounding circumstances and the course followed show that it did not intend to establish and did not establish real and true plans of that character. There was no intention that the pension plan would operate long enough to make annuity or periodical payments, which was requisite having regard to the meaning of "pension" in secs. 11(1)(*g*), 76(1) and 139(1)(*ahh*). The plans as submitted by the company were simulates. Moreover, deduction of the payments would artificially reduce the company's income and so violate s. 137.

Dominion Taxicab Ass'n v. M.N.R. [1954] S.C.R. 82; *Atlantic Sugar Refineries Ltd v. M.N.R.* [1949] S.C.R. 706, referred to.

The Minister on becoming aware that the payments in their true character were not deductible was entitled to withdraw the registration and approval previously given.

INCOME tax appeal.

Wolfe D. Goodman, Q.C. and *Franklyn E. Cappell* for appellant.

George W. Ainslie, Q.C. and *Ian H. Pitfield* for respondent.

KERR J.:—This is an appeal from income tax assessments in respect of the appellant's taxation years 1964, 1965 and 1966[1] whereby the respondent disallowed deductions claimed by the appellant in computing its income as having been paid by it into a pension plan for its executive employees. I shall refer to that pension plan as "the pension plan" or "the plan". It is distinguished from a deferred profit sharing plan which is referred to elsewhere herein.

The appellant is a private company incorporated under the Ontario *Corporations Act.* Its principal officers, at all times relevant to this appeal, were two brothers, Wolf Lebovic and Joseph Lebovic. Wolf was president and Joseph was secretary. They held all the issued common shares (except for two nominee shares held in trust, one

[1] The appellant's fiscal year ended on the last day of February.

for each brother) and were in control of the company. They also were the executive employees for whose benefit the pension plan and the deferred profit sharing plan were established. They were trustees of both plans.

The appellant says that the plans were established on the advice of an auditor and that the intention was to make payments into the pension plan for current and past service of the brothers Lebovic, then to pay out the money to them and terminate that plan, whereupon they would pay the money into the deferred profit sharing plan, of which they would be trustees, and as such trustees they would use the money to purchase preference shares of the company as an investment, which shares when redeemed would provide money for retirement benefits for themselves; and that, pursuant to that intention, the appellant established the pension plan by its By-law No. 5 on December 28, 1964, and appointed the brothers as trustees of the plan; that it applied to the respondent for registration of the plan under section 139(1)(*ahh*) of the *Income Tax Act* and it was so registered by the respondent on April 5, 1965, under that section; that the appellant also applied to the respondent for approval of a lump sum contribution of $195,244.20 to the plan in respect of past service of the brothers pursuant to section 76 of the Act and to a recommendation by a qualified actuary, and was advised by a letter from the respondent dated September 8, 1965, that the actuary's calculations had been confirmed and that payments made to liquidate the liability in that respect could be claimed as a "special payment" under section 76; that, acting in reliance on the anticipated approval of the plan and the lump sum past service contribution, the company had paid the following amounts into the plan:

(a) Current service contributions:	
December 29, 1964	$ 3,000
March 3, 1965	$ 3,000
(b) Past service contributions:	
February 26, 1965	$ 60,000
March 2, 1965	$135,244.20

and in filing its income tax returns it claimed deductions on account of the said payments.

By a letter dated July 21, 1967, the Department of National Revenue advised the appellant that the respondent's previous registration of the pension plan and the

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

approval of the special payment of $195,244.20 were both withdrawn and that the plan was considered to be in the same position as if it had never been registered. And, eventually, after disallowance of the claimed deductions and dispute thereover, the amount that was paid out by the appellant, and which went by a circuitous route through the pension plan and the deferred profit sharing plan and then back to the company in payment of preference shares, was refunded to the company by an equally circuitous reverse route in which the company redeemed the shares from the deferred profit sharing plan and caused the assets of that plan to be transferred back to the company.

The respondent says, *inter alia,* that the pension plan was neither a superannuation or pension fund or plan within the meaning of section 11(1)(*g*) of the Act, nor an employees' superannuation or pension fund or plan within the meaning of section 76, but was a mere sham designed for the purpose of cloaking or disguising the payment by the appellant of $63,000 and $135,244.20 to the brothers as trustees of a deferred profit sharing plan; that the registration of the pension plan with the respondent was a nullity because the appellant failed, at the time it sought registration, to disclose all material facts, and therefore was not entitled to any deduction under the said provisions of the Act; that there was no legitimate business purpose or business reason for the pension plan and therefore the appellant was not entitled to any deduction under the said provisions; that the payments of $60,000 and $135,244 in respect of past service of the brothers were not payments which had irrevocably vested in or for the pension plan nor were they payments which had been approved by the respondent and therefore the appellant was not entitled pursuant to section 76(1) to deduct either amount in computing its income; and that the deduction of any of the amounts paid to the brothers as trustees of the pension plan would unduly or artificially reduce the appellant's income and therefore any such deduction is prohibited by section 137(1) of the Act.

Sections 11(1)(*g*), 76(1), 79C(1)(*a*) & (*b*), 137(1) and 139(1)(*ahh*) of the Act read as follows:

> 11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year
>
> ...

(*g*) an amount paid by the taxpayer in the year or within 120 days from the end of the year to or under a registered pension fund or plan in respect of services rendered by employees of the taxpayer in the year, subject, however, as follows:

(i) in any case where the amount so paid is the aggregate of amounts each of which is identifiable as a specified amount in respect of an individual employee of the taxpayer, the amount deductible under this paragraph in respect of any one such individual employee is the lesser of the amount so specified in respect of that employee or $1,500, and

(ii) in any other case, the amount deductible under this paragraph is the lesser of the amount so paid or an amount determined in prescribed manner, not exceeding, however, $1,500 multiplied by the number of employees of the taxpayer in respect of whom the amount so paid by the taxpayer was paid by him,

plus such amount as may be deducted as a special contribution under section 76;

76. (1) Where a taxpayer is an employer and has made a special payment in a taxation year on account of an employees' superannuation or pension fund or plan in respect of past services of employees pursuant to a recommendation by a qualified actuary in whose opinion the resources of the fund or plan required to be augmented by an amount not less than the amount of the special payment to ensure that all the obligations of the fund or plan to the employees may be discharged in full and has made the payment so that it is irrevocably vested in or for the fund or plan and the payment has been approved by the Minister on the advice of the Superintendent of Insurance, there may be deducted in computing the income of the taxpayer for the taxation year the amount of the special payment

79c. (1) In this Act,

(*a*) "deferred profit sharing plan" means a profit sharing plan accepted by the Minister for registration for the purposes of this Act, upon application therefor in prescribed manner by a trustee under the plan and an employer of employees who are beneficiaries under the plan, as complying with the requirements of this section, and

(*b*) "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 or have been made by an employer to a trustee in trust for the benefit of employees of that employer or employees of any other employer, whether or not payments are or have been also made to the trustee by the employees.

137. (1) In computing income for the purposes of this Act no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

139. (1) In this Act,

...

(*ahh*) "registered pension fund or plan" means an employees' superannuation or pension fund or plan accepted by the Minister

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

for registration for the purposes of this Act in respect of its constitution and operations for the taxation year under consideration;

Certain by-laws and minutes of meetings of the appellant's directors and shareholders and other books and records were introduced in evidence in one form or another and, in addition, Joseph Lebovic gave evidence as to what took place and as to events in issue. I shall set forth next the more significant actions and transactions, as I appreciate the evidence and try to piece it together.

December 28, 1964, 11 a.m. Meeting of Directors. The minutes state that By-laws No. 5 and No. 6 were enacted. No. 5 established the pension plan. No. 6 established the deferred profit sharing plan. The records sometimes designate the latter By-law as No. 5 and sometimes refer to it as No. 6. I am satisfied that the correct number is No. 6.

December 28, 1964, 11:30 a.m. Special General Meeting of the Shareholders. The minutes state that the By-laws, No. 5 and No. 6, were by resolution approved, adopted, sanctioned and confirmed.

December 28, 1964. The appellant appointed Wolf and Joseph Lebovic as trustees of the pension plan by a trust agreement and appointed them as trustees of the deferred profit sharing plan by another trust agreement (Exhibit 43), both agreements bearing date of December 28, 1964.

December 28, 1964. The appellant sent to the respondent an application under section 139(1)(*ahh*) for registration of the pension plan, with certain supporting documents and information as to the salaries of the brothers Lebovic. A letter from the Department of National Revenue, dated April 5, 1965, advised the company that the plan had been registered under that section.

December 29, 1964. The appellant issued a cheque for $3,000 to the trustees of the pension plan, and they endorsed it to Industrial Life Insurance Company in payment of a premium on a group retirement annuity policy issued by that company, effective December 29, 1964, for the benefit of the brothers Lebovic.

January 27, 1965. Meeting of Directors. The minutes state that the treasurer reported that the company was now in a position to fund its obligation to the pension plan and that the amount of past service liability was $99,444.89 for Joseph Lebovic and $95,799.31 for Wolf Lebovic, a total

of $195,244.20; and that the directors approved the treasurer's report and directed that arrangements be made for the company to make contributions to the plan.

February 16, 1965. Meeting of Directors. The following appears in the minutes of the meeting:

> The Treasurer advised that the Company now wished to make a contribution to the recently established executive pension plan on behalf of Messrs. Joseph Lebovic and Wolf Lebovic. He stated at this time it was not known how much of the estimated past liability in the amount of $195,244.20 would be approved as being a deductible expense under Section 76 of the Income Tax Act and he stated that the Company should now make a contribution to the pension plan in the amount of $60,000.00, upon condition that if the plan is not accepted for registration with the Department of National Revenue or to the extent that the contribution is not allowed as a deduction from income as provided by Section 76 of the Income Tax Act, the surplus amount, if any, being the over contribution, would be refunded by the Trustees to the Company. He pointed out that he had already discussed this with the Trustees and they had agreed to accept the contribution on that basis.
>
> A full discussion ensued, following which it was decided to proceed along the lines outlined by the Secretary-Treasurer.

February 25, 1965. The appellant filed an application with the Department of National Revenue under section 79c(1)(*a*) of the *Income Tax Act* for registration of the company's deferred profit sharing plan. The Department advised the company by letter dated June 17, 1965, that the plan had been accepted by the Minister for registration under that section.

February 26, 1965. The appellant issued a cheque for $60,000 to the brothers as trustees of the pension plan in respect of their past service. The appellant's account with the Bank of Montreal shows this amount debited on March 1, 1965. The pension plan's account with that bank shows that amount credited on that same day.

March 2, 1965. Meeting of Directors. The following appears in the minutes of the meeting:

> The Secretary-Treasurer advised that the Company now wished to make a further contribution to the recently established executive pension plan on behalf of Mr. Joseph Lebovic and Mr. Wolf Lebovic, on the same basis as the previous contribution, namely, if the plan is not accepted for registration with the Department of National Revenue or to the extent that the contribution is not allowed as a deduction from income as provided by Section 76 of the Income Tax Act, the surplus amount, if any, being the over contribution, would be refunded by the Trustees. He pointed out that he had already discussed this with the Trustees and they had agreed to accept the contribution on that basis.
>
> A full discussion ensured, following which it was decided to proceed along the lines outlined by the Secretary-Treasurer.

1969

WEST HILL REDEVELOPMENT CO LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

March 2, 1965. The appellant issued a cheque for $135,242.20 to the brothers as trustees of the pension plan in respect of their past service. The company's account with the Bank of Montreal shows this amount debited on March 3 and another debit of $2 on March 4. The pension plan's bank account shows credits of similar sums on March 2 and March 4, respectively[2].

March 3, 1965, 11 a.m. Meeting of Directors. The minutes state that the chairman indicated that it was in order for the company to agree with the trustees of the pension plan that the plan be wound up and that the amounts contributed thereto by the company be paid out to the participants; and that the following resolution was passed:

> THAT the company enter into an Agreement with the Trustees of the West Hill Redevelopment Company Limited Executive Pension Plan amending the Trust Agreement to the end that the Executive Employee Pension Plan is hereby terminated and the amounts contributed thereto by the company be paid out to the participants of the Plan.

Cheques, dated March 3, 1965, for $95,799.31 and $99,444.89, payable to Wolf Lebovic and Joseph Lebovic, respectively, were issued by the trustees of the pension plan. The plan's bank account shows debits of those amounts on March 3 and no money in the account thereafter.

Cheques, dated March 4, 1965, for similar amounts were issued by Wolf Lebovic and Joseph Lebovic, respectively, payable to the deferred profit sharing plan.

March 3, 1965, 1:30 p.m. Meeting of Directors. The minutes state that the meeting was called for the purpose of considering a subscription for preference shares of the company which had been received from the trustees of the deferred profit sharing plan, together with a cheque for $195,240.00, and a resolution was passed accepting the subscription for 19,524 preference shares at $10 each and the shares were allotted and issued to the said trustees; and the Board approved the decision of the trustees to make the investment in the preference shares of the company. The company's account with the Bank of Montreal shows $195,244.20 credited on March 5.

March 2, 1965. A share certificate dated March 2, 1965, issued by the company shows the trustees of the deferred profit sharing plan as registered owner of 19,524 preference shares.

---

[2] These sums and the previous $60,000 make a total of $195,244 20.

March 2, 1965. The share register of the company shows entries of various issues of shares on November 1, 1963, and May 10, 1965, in that sequence, followed by an issue on March 2, 1965, of 19,524 preference shares to the trustees of the deferred profit sharing plan. From its position on the register the latter entry appears to have been made subsequent to May 10, 1965. The only other issue of preference shares shown in the register is 6,390 shares issued on November 1, 1963. The register does not show redemption or cancellation of any preference shares, but the minutes of a meeting of directors held on December 28, 1967, state that a resolution was passed to redeem on that date 4,000 of the preference shares issued in the names of the trustees of the deferred profit sharing plan and that the trustees consented to such redemption, and the minutes of a meeting of directors on May 24, 1968, state that a resolution was passed redeeming 15,524 preference shares issued to the trustees.

The letters patent of the appellant, issued on December 12, 1955, provide for an authorized capital of 9,000 preference shares with a par value of $10 each and 10,000 common shares without par value. Supplementary letters patent, dated March 3, 1965, increased the authorized capital by an additional 20,000 preference shares with a par value of $10 each, and an additional 30,000 common shares without par value. Evidence was received that the original application for supplementary letters patent, dated March 2, 1965, contained errors and was corrected on March 8 and that the supplementary letters patent were actually signed, engrossed and gazetted on March 10, 1965, although dated March 3.

The appellant sent returns of information and particulars, as of March 31 in each of the years 1964 to 1968, inclusive, to the Provincial Secretary of Ontario, certified by either Joseph or Wolf Lebovic as true and correct. They state that 6,390 preference shares and 10,000 common shares had been issued by the company. Obviously the returns did not include the 19,524 preference shares issued to the trustees and to that extent are incorrect.

The preference shares are non-voting, non-cumulative 5% dividend shares redeemable at the option of the company on payment of the amount paid up thereon plus a

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

premium of $1.00. The right to transfer shares of the company is restricted in that no shares shall be transferred without the express sanction of the holders of a majority of the shares, to be signified by a resolution passed at a meeting of the shareholders.

Exhibit 54 consists of sheets from the appellant's account book in respect of the pension plan. They show receipt of $60,000 on February 26 and $135,242.20 and $2 on March 2, 1965; and disbursements on March 3 of $95,799.31 to Wolf Lebovic and $99,444.89 to Joseph Lebovic. The sheets also show as of December 29, 1964, a credit of $3,000 and a corresponding debit in respect of the premium on the Industrial Life policy, and similar entries for March 3, 1965.

Exhibit 53 consists of sheets from the appellant's account book in respect of the deferred profit sharing plan. They show receipts of $95,799.31 from Wolf Lebovic and $99,444.89 from Joseph Lebovic on March 3, 1965; disbursement of $195,244.20 to the appellant on March 5, 1965; and an investment of $195,240 in preference shares of the appellant and a loan of $4.20 to the company.

February 28, 1968. Meeting of Directors. The minutes state that an agreement of that date between the company and the brothers Lebovic personally and as trustees of the pension plan and of the deferred profit sharing plan was approved and the officers of the company were authorized to execute it. All the voting shareholders ratified and confirmed the acts and resolution set forth in the minutes. This agreement was entered into after the respondent had disallowed the deductions claimed by the appellant, and the brothers had reason to believe that they would be assessed income tax on the sums paid to them unless the assets of the deferred profit sharing plan were returned to the company. The agreement provides for a revival of the pension plan, redemption of 15,524 preference shares of the company then held by the deferred profit sharing plan, an assignment of all the assets of the deferred profit sharing plan to the brothers Lebovic and an assignment in turn by them of the said assets to the pension plan and, finally, an assignment of the assets back to the company as a refund of the $195,244.20 paid by the company to the pension plan.

That agreement also recited that the trustees of the deferred profit sharing plan had purchased 1,000 common shares of Revenue Properties Company Limited at a cost of $19,700 and 700 common shares of Alcan Aluminum Limited at a cost of $20,302.19, and held them, along with 15,524 preference shares of the appellant as of the date of the agreement. There was a paucity of evidence otherwise respecting the purchase of Revenue Properties and Alcan shares.

May 24, 1968, 10 a.m. Meeting of Directors. The minutes state that resolutions were passed (*a*) reviving the pension plan, (*b*) redeeming at par 15,524 preference shares issued in the name of the trustees of the deferred profit sharing plan, and (*c*) directing the trustees of the deferred profit sharing plan to refund to Wolf Lebovic $96,699.31 and to Joseph Lebovic $100,344.89 by distribution of the following assets to them *pro rata:*

To Joseph Lebovic	– cheque	$ 79,443 79
	– 350 shares Alcan	10,151.10
	– 1,000 shares Revenue Properties	10,750,00
		$100,344.89
To Wolf Lebovic	– cheque	$ 75,798.22
	– 350 shares Alcan	10,151.10
	– 1,000 shares Revenue Properties	10,750.00
		$ 96,699 31

and to transfer to the brothers the ownership of certificates of the policy issued by Industrial Life Insurance Company on their lives.

May 24, 1968, 10:30 a.m. Meeting of Directors. The minutes state that a resolution was passed directing the trustees of the revived pension plan to refund to the company the following assets:

cheque	$155,242 01
2,000 shares Revenue Properties	21,500 00
700 shares Alcan	20,302.19

and the certificates of the Industrial Life policy.

May 24, 1968, 11 a.m. Meeting of Directors. The minutes state that the chairman reported that the company had received from the trustees of the pension plan the assets last above mentioned representing a refund of contributions.

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

The following cashed cheques all dated May 24, 1968, were put in evidence as having been issued pursuant to the agreement of February 28, 1968:

From	*To*	*$ Amount*
Appellant	Trustees of deferred profit sharing plan for redemption of preference shares	155,240 00
Trustees of deferred profit sharing plan	Wolf Lebovic	75,798 22
Trustees of deferred profit sharing plan	Wolf Lebovic	100 00
Trustees of deferred profit sharing plan	Joseph Lebovic	79,443 79
Trustees of deferred profit sharing plan	Joseph Lebovic	100 00
Wolf Lebovic	Pension plan	75,798 22
Wolf Lebovic	Pension plan	100 00
Joseph Lebovic	Pension plan	79,443.79
Joseph Lebovic	Pension plan	100 00
Trustees of pension plan	Appellant	155,242 01
Trustees of pension plan	Appellant	200 00
Joseph Lebovic	Deferred profit sharing plan	4.10
Wolf Lebovic	Deferred profit sharing plan	4 10

Mr. R. M. Anson-Cartwright, a chartered accountant and partner in Price Waterhouse & Co., was called as an expert witness by the respondent. He expressed his opinion that the appellant's preference shares "had, marketwise, only a nuisance value". He agreed, however, that the value of the shares to the holder is not necessarily the same as the fair market value and that the Lebovic brothers, by virtue of their control of the company, could have been in a position to cause the company to redeem the shares and, in that event the company would, if solvent, pay out $11 per share in redemption of the shares held by the deferred profit sharing plan.

Counsel for the appellant submitted that the Minister's withdrawal of the registration of the pension plan and of the approval of the payment of $195,244.20 was unwarranted and ineffective and that by reason of such registration and approval the Minister is precluded from contesting the deduction of that payment in computing the appellant's income. In that respect my view is that if by reason of its true character the payment was not one that could be

deducted pursuant to the Act it was proper for the Minister, when he became aware that such was the case, to withdraw the registration and approval which he had previously given at a time when he was not aware of the true character of the payment and of the transaction of which it was a part. It was in March 1965 that the money was paid by the appellant to the pension plan and was almost simultaneously paid out of that plan by its trustees and used to purchase preference shares of the company. All this was done before the Minister notified the appellant of the registration of the pension plan and approval of the payment into it, and all of it was done on the appellant's anticipation that the Minister would give his approval. It was not done in reliance upon any representation by the Minister of registration or approval, for he had made no such representation. In the circumstances there is no estoppel of the Minister in favour of the appellant in that respect. Nor does the approval which the Minister gave and later withdrew defeat the statutory liability of the appellant in respect of payment of income tax[3].

One of the requisites for deduction of a "special payment" pursuant to section 76 is that the taxpayer has made the payment so that it is "irrevocably vested" in or for the employees' superannuation or pension fund or plan. Counsel for the respondent argued, as one point of attack on the deduction of the payment of $195,244.20, that it had not been "irrevocably vested", within the meaning of the section, inasmuch as it had been paid conditionally upon the anticipated approval of the pension plan and of the lump sum past services contribution. Counsel for the appellant argued that the registration of the plan under section 139(1)(*ahh*) and the Minister's approval of the payment under section 76 satisfied the condition and the payment was irrevocably vested in the plan. As I am disposing of the appeal on other grounds it is not necessary for me to express an opinion on this point.

Counsel for the appellant submitted that the deferred profit sharing plan was a pension plan within section 76, even although for some purposes it is called a deferred profit sharing plan, that a special payment to a pension plan in

[3] On a question of estoppel and statutory obligation, see *Maritime Electric Co. v. General Dairies* [1937] A.C. 610.

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

respect of past services of employees may be deducted pursuant to the section even if the plan is unregistered, and that, looking at both plans of the company and the arrangements in question as a group, it is evident that the company's intention was to set up a pension plan to provide retirement income for the brothers. However, it was the pension plan, not the deferred profit sharing plan, that the appellant sent to the Minister for registration and for approval of the payment of the said $195,244.20 pursuant to section 76; and the actuary's certificate was in respect of the pension plan. Whatever part the deferred profit sharing plan played in the arrangements, there was no special payment approved by the Minister pursuant to section 76 of that plan.

Counsel for the respondent submitted that the appellant had no power to issue the 19,524 preference shares to the trustees on March 2 or 3, 1965, because the supplementary letters patent increasing the capital of the company were not actually signed and engrossed or gazetted until March 10, 1965, although they bore an issue date of March 3. He cited a decision of Cattanach J., of this Court, in *Oakfield Developments (Toronto) Ltd. v. M.N.R.*[4], (on appeal) which held, in effect, that shares issued on December 21, 1960, by a company incorporated by letters patent under the laws of the Province of Ontario were not validly issued inasmuch as supplementary letters patent creating the shares did not issue until February 1961 although dated December 20, 1960. However, I do not think that the determination of the issue whether the deductions claimed by the appellant were allowable depends on or requires a decision on the question whether the company had power to issue those preference shares or whether the allotment of them was effective, for, if the payment into the pension plan qualified for deduction pursuant to section 76 the right to that deduction would not be lost by reason of an ineffective issue of the preference shares; and if, on the other hand, the payment did not so qualify for deduction, the issue of the shares, whether effective or not, would not change that situation. The issue of the shares is, nevertheless, a factor in considering the broader question of the true character of the payment and the transaction of which it was a part.

[4] [1969] 2 Ex. C.R. p. 149.

Coming now to consideration of the question of the character of the transaction or arrangements by which the payments in question were made, it is well settled that in considering whether a particular transaction brings a party within the terms of the *Income Tax Act* its substance rather than its form is to be regarded, and also that the intention with which a transaction is entered into is an important matter under the Act and the whole sum of the relevant circumstances must be taken into account[5]. Consequently I must endeavour as best I can to ascertain the real character and substance of the transaction or arrangements by which the payments in question were made and in doing so I must consider individually and collectively the agreements that were entered into and the surrounding circumstances and the course that was followed.

I think that in the final analysis what I must determine is whether the appellant established a true superannuation or pension plan and made thereto the payments in question for the purposes of such plan, or whether its pension plan was a sham designed to give an appearance of *bona fides* to the payments which would enable the appellant to deduct them in computing its income and thereby escape some payment of income tax.

In the context in which the words "pension fund or plan" are used in sections 11(1)(*g*), 76(1) and 139(1)(*ahh*) for the purposes of the Act, I think that the word "pension" is used in the fourth sense defined by the *Shorter Oxford English Dictionary* as follows:

> 4. An annuity or other periodical payment made, esp. by a government, a company, or an employer of labour, in consideration of past services...

It is not disputed that there can be a sufficient business reason for the establishment of a superannuation or pension plan for employees and that such a plan can have a legitimate business purpose. But the respondent disputes that in the present instance there was such a reason or legitimate business purpose. The answer depends largely on whether there was a true pension plan.

The respondent disputes that the appellant's purpose was to establish a true pension plan. The appellant's explanation for the roundabout arrangements and course

[5] *Dominion Taxicab Ass'n v. M.N.R.* [1954] S.C.R. 82; *Atlantic Sugar Refineries Ltd v. M.N.R.* [1949] S.C.R. 706.

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

is that under the laws of Ontario the investment of pension funds in a private company was not permitted, and, as the brothers preferred investment of the available money in their own company, the money was paid into the pension plan and then was "rolled over" (to use counsel's expression) into the deferred profit sharing plan where it could be used to accomplish a lawful investment in the preference shares of the appellant company. The company's auditor, who was said to have advised the company respecting the establishment of the plans and who conceivably might have been able to shed light on their inception and the reasons for them, was not called to testify in that respect.

By-laws No. 5 and No. 6, the pension plan, the deferred profit sharing plan and the trust agreements, taken at their face value, purport to create legal rights and obligations and to establish a pension plan and a deferred profit sharing plan. But, considering them in all the circumstances and in the course that was followed, it is my conviction that the appellant did not intend to establish and did not establish real and true plans of that character. There was no intention that the pension plan would operate long enough to make annuity or periodical payments. It was in fact terminated and its funds were disbursed within a short time after it was established, and when eventually the money was put back into the revived plan it was immediately taken from it and returned to the company rather than left in the plan or invested by the plan for the purpose of paying pensions. It is my conviction that the plans were, as submitted by the respondent, simulates used as a cloak to disguise the payments in question and make them appear to be what they really were not, namely, payments into a pension plan which would qualify for deduction in computing the appellant's income for income tax purposes. In my view, also, the payments, if allowed to be deducted, would artificially reduce the appellant's income; and section 137 prohibits their deduction.

The appellant's records are less satisfactory than one would like to see when they are pertinent to and may influence the outcome of proceedings in court. For example: the minute book does not contain the originals of By-laws No. 5 and No. 6; waivers of notice of meetings of directors were signed by the brothers Lebovic but not by the other directors; the minutes of directors' meetings show meetings

held on March 2, 1965, at the same time in two separate buildings; the share certificate for the 19,524 preference shares issued to the trustees of the deferred profit sharing plan is dated March 2, 1965, but the minutes of the meeting at which they were allotted say that it was held on March 3; the notation of the issue of the shares in the share register follows the notation of a later issue of shares; although the shares were said to have been redeemed, the share register does not show their redemption and the share certificate is not endorsed as having been cancelled or redeemed; the company's returns to the Province of Ontario for the years ending March 31, 1965 to 1968, although certified thereon as correct, do not include those preference shares; the books produced do not show any purchase of Revenue Properties or Alcan shares; the agreement dated February 28, 1968, recites that the trustees of the deferred profit sharing plan had purchased 1000 shares of Revenue Properties but the minutes of the two meetings of directors on May 24, 1968, refer to 2000 shares of Revenue Properties; the copy of the trust agreement in respect of the deferred profit sharing plan shows two trustees, but the copy in the minute book shows three trustees. It is possible that some of those are mere clerical errors or irregularities or deficiencies which are not significant. But the court is left to conjecture in respect of them.

Although there is no affirmative evidence directly contradicting the evidence of Joseph Lebovic, secretary-treasurer of the company, that the agreements and arrangements were what they purported to be, his evidence to that effect was not convincing to me. For one who occupied the position of secretary-treasurer and director and with his brother owned the company and controlled and managed its affairs, and who also was the only witness called by the company in support of its appeal, he showed a lack of knowledge and memory respecting the affairs of the company and an inability to explain things which called for explanation, which was, to me at least, surprising.

The dividing line between the brothers Lebovic as directors and shareholders and trustees and in their personal capacity could be crossed at any time at their will and pleasure. They were answerable only to themselves. The intentions of the company and themselves were one and the same. The company has no mind of its own, its will

1969

WEST HILL REDEVELOPMENT CO. LTD v. MINISTER OF NATIONAL REVENUE

Kerr J.

must be sought in the brothers who were really the directing mind and will of the company. In my view the course that was followed was devious and unnatural and not in accordance with normal business practice. I think that in retrospect it shows that what was intended was to provide the brothers with a retirement insurance policy with Industrial Life and to obtain an income deduction of nearly $200,000 for the company, without involving any real payment out by it, except for the sum paid to the insurance company. The various payments were accomplished by practically simultaneous exchange of cheques. The cheques from the company to the pension plan were matched by a cheque for a like amount back to the company, which in effect made no reduction in the company's funds. The cheques went through the bank and were entered in bookkeeping records, but each cheque out was taken care of by a corresponding cheque in. Care was taken to make the $195,244.20 payment to the pension plan conditional on tax deduction and the amount was simultaneously given back to the company without awaiting a reply from the Minister. The choice of the company's preference shares as the best or a good investment is very questionable. There is a paucity of evidence as to when and with what funds any shares of Revenue Properties and Alcan were purchased. The scheme was ingenious and was pursued step by step, but the steps add up to one large stride intended, in my opinion, not really to provide pensions but predominantly to achieve for the company a substantial deduction from income. While a taxpayer may arrange his affairs so as to legitimately obtain a deduction from income, he is not entitled to it if he does not clearly bring his claim for deduction within the terms of the provision conferring the right of deduction from what would otherwise be taxable income[6]. If a claim for deduction of payments into a pension plan is to succeed the plan must be a true pension plan and not a plan which masquerades as a true pension plan but is not one.

In the result the appeal will be dismissed with costs; but in accordance with an agreement of the appellant and respondent filed at the hearing of the appeal the assessments will be referred back to the respondent so that he can reassess so as to implement the terms of the agreement.

[6] *Sheaffer Pen Co. v. M.N.R.* [1953] Ex. C.R. 251.