Dockets: 2019-1216(EI)
2019-1217(CPP)

BETWEEN:

RISTORANTE A MANO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on October 26 and 27, 2020 at Halifax, Nova Scotia

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Brian Casey Edward R. Sawa Doug Schipilow
Counsel for the Respondent:	Devon E. Peavoy

JUDGMENT

The appeal of the three *Canada Pension Plan* assessments raised April 26, 2018, April 26, 2018 and May 1, 2018 respectively for taxation years 2015, 2016 and 2017 is dismissed, with costs fixed at $740.

The appeal of the three *Employment Insurance Act* assessments raised April 26, 2018, April 26, 2018 and May 1, 2018 respectively for taxation years 2015, 2016 and 2017 is dismissed, with costs fixed at $760.

Signed at Halifax, Nova Scotia, this 18th day of March 2021.

"B. Russell"

Russell J.

Citation: 2021 TCC 22
Date: 20210318
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2019-1217(CPP)

BETWEEN:

RISTORANTE A MANO LIMITED,

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REASONS FOR JUDGMENT

Russell J.

[1] For some years the Appellant, Ristorante a Mano Limited (RML), has owned and operated a well-regarded dining establishment in Halifax's waterfront area. In connection with that business RML appeals three *Canada Pension Plan* (CPP) and three *Employment Insurance Act* (EIA, EI) assessments.

[2] In raising these six assessments the Minister of National Revenue (Minister) took into consideration gratuities left by dining patrons through credit and debit card payments, *i.e.* electronic tips, for servers employed at RML's restaurant. RML asserts that the Minister erred in so doing, and that the assessments are bad accordingly.

[3] On January 28, 2019 the Minister confirmed the said CPP assessments respecting employer contribution amounts for taxation years and amounts as follow: 2015 - $23,216.84; 2016 - $21,989.12; 2017 - $25,191.68.

[4] Likewise on January 28, 2019 the Minister confirmed the said EIA assessments respecting EI employer premium amounts for taxation years and amounts as follow: 2015 - $12,910.55; 2016 - $11,853.53; 2017 - $11,307.22.

[5] The statutory underpinnings of the appealed CPP assessments commence with paragraph 9(1)(a) of the CPP. It provides that the quantum of an employer's CPP

contribution is in part determined by, "the contributory salary and wages of the employee paid by the employer". Subsection 12(1) defines "contributory salary and wages" as, "income from pensionable employment computed in accordance with the *Income Tax Act*". Pursuant to subsection 5(1) of the federal *Income Tax Act,* tips constitute income. Thus the CPP term, "contributory salary and wages" encompasses tips.

[6] What remains to be resolved for CPP purposes is, as required also by paragraph 9(1)(a), whether the electronic tips were, "paid by the employer".

[7] Turning now to the statutory underpinnings for the appealed EIA assessments, section 68 of the EIA establishes the quantum of an employer's EI premium as being an arithmetic function of "insurable earnings". Subsection 2(1) defines "insurable earnings" as, "the total amount of earnings that an insured person has from insurable employment". And, subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations*, Can. Reg. 97-33 (IECPR), provides regarding "insurable earnings":

> 2(1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the [EIA]…the total amount of earnings that an insured person has from insurable employment is
>
> (a) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person <u>that are paid to the person by the person's employer in respect of that employment</u>, and… [underlining added]

[8] Thus, akin to the above identified CPP issue, the EIA issue is whether the subject portion of electronic tips (which of course, per paragraph 2(1)(a) above, are "amounts, whether wholly or partly pecuniary"), were "paid" to each server by his/her employer, RML.

[9] And so, the common question for both CPP and EIA purposes herein is whether employer RML "paid" the subject tips to the servers.

[10] Additionally, in the EIA context, the IECPR requires the employer to have paid, "in respect of that employment". RML's counsel focused on that wording in his submissions, asserting that in this matter the subject payments would not be, "in respect of that employment". I will address that here.

[11] Counsel argued that this was so in the same way that the fact that his law firm will reimburse him for the expense he would incur for parking his car at the

courthouse to attend at the hearing of this matter, would not make the firm's payment as having been, "in respect of [his] employment" at the firm.

[12] I do not agree. I expect there would be no basis for his firm to reimburse him for the parking disbursement absent his being employed by (or a partner of) the firm.

[13] In any event, the phrase "in respect of" was addressed in the oft-cited decision of *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39. The Supreme Court of Canada (SCC) per Dickson, J. as he then was, wrote:

> The words 'in respect of' are, in my opinion, words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters.

[14] In accordance with the SCC guidance in *Nowegijick*, I accept that any tips paid to RML employed servers working at RML's restaurant, particularly including if paid by RML itself, readily could be said to have been so paid, "in respect of [their] employment".

[15] I now address the particular factual circumstances of this matter, in considering whether the electronic tips were or were not paid by the employer, RML. Evidence adduced at the hearing established that at all material times servers employed by RML at its restaurant received tips both in cash and electronically. Cash tips were received and kept by servers. Cash tips were neither received nor tracked by RML. However, most tips were tendered electronically. A patron would add the server's gratuity to the billed dining room invoiced amount and then pay the resultant total, by credit or debit card, solely to the favour of RML.

[16] At the end of each server's shift, that server prepared a "cash-out sheet" showing *inter alia* net food and drink sales and quantum of electronic (but not cash) tips. Also at shift's end, each server was to utilize as necessary a personally funded cash float to "tip out" in cash 2% of net sales to on site management staff (manager, assistant manager), and also another cash amount - 1% to 3% of net sales - to support staff of that shift, including busser(s), host/hostess(es) and bartender(s). The server would put these two cash amounts in separate envelopes or zip-lock bags for delivery directly to those designated recipients.

[17] The cash-out sheet, handed to RML management at shift's end, showed the total of the server's electronic tips. Of that total RML retained 2% to reimburse itself for its bank's charge for converting electronic tip dollars to cash. RML also retained

from the electronic tips total the amount of 1% of food sales, as a gratuity to be passed on to its kitchen staff. The remaining amount of electronic tips, referred to as the "due-back", was tendered to the particular server. RML's accounting staff sought to ensure each server received their "due-back" by the next weekday morning via electronic deposit in the individual servers' personal bank accounts. (Previously this had been done by RML's prompt issuance via its accounting staff of individual cheques to the individual servers).

[18] The due-back portion of the electronic tips is the focus here. It is that portion of total electronic tips of each server amount that the Minister says was, both for CPP and EIA purposes, "paid" by RML as employer to each server.

[19] The evidence established that the substantive ownership of RML had inherited this described tipping procedure, upon a December 2014 change in ownership of the holding company owning RML. In evidence is a March 2014 memo to "all managers and staff" headed "Revised Tip-Out Procedures" that describes the tip-out procedure similarly as described above, except at this earlier time due-backs were delivered to servers via "the [s]erver's cash envelope" which, the document said, could be held by the manager until outstanding tip out amounts owed by the server were fully paid.

[20] Also in evidence is a July 23, 2016 email from an RML manager ("Melanie") headed "Tip Out Protocol", sent to numerous staff including servers. It does not significantly change the tip out procedure as already described, but states that the procedure applies even if the server does not think he/she was assisted by support staff such as bussers. It states that, "any breech [*sic*] of this [procedure], including rounding down the tip out, will be considered theft & the employee will immediately terminated [*sic*]."

[21] This to me is indicative that during the relevant period RML was more than passively aware of the tip out process, to the extent of indicating severe employment discipline if servers did not follow certain aspects of the established procedure.

[22] There is long-standing jurisprudence relevant to the issue in this matter of whether the employer RML "paid" the subject amounts to its server employees.

[23] *Canadian Pacific Ltd. v. Canada*, [1986] 1 S.C.R. 678, handed down now thirty-five years ago, remains the leading decision on this issue. In that matter the SCC had for consideration gratuities that Canadian Pacific Ltd. (CP), as owner of the Chateau Frontenac in Quebec City, had received from patrons of functions convened at that venue. CP distributed these tips to staff employees, in accordance

with employer – employee written agreements. The question was whether these distributed tips constituted "insurable earnings" under the then federal *Unemployment Insurance Act* (UIA), being predecessor of the EIA.

[24] A majority of the SCC per LaForest, J., determined that that question turned on whether the tips constituted, per subparagraph 3(1)(a)(i) of the UIA, an employee's:

> …remuneration… paid by his employer in respect of a pay period, and includes (a) any amount paid to him by his employer as…or in satisfaction of (i) a…gratuity… [underlining added]

[25] The SCC majority observed (p. 687) that in that UIA provision the word "paid", "…can equally well mean mere distribution by the employer or payment of a debt owing by him", and that both the words "remuneration" and "paid" should be given "broad meaning".

[26] The SCC majority stated also, regarding purpose of the UIA (p.689):

> The interpretation I have given to 'insurable earnings' is consistent with the purpose of the [UIA], which is to pay, to persons who have lost their employment, benefits calculated in terms of a percentage of their insurable earnings. Otherwise, an employee who received a good part of his earnings as tips would not benefit to the same degree as his colleagues who receive the whole of their earnings directly from the pocket of their employer. By adding to the definition of remuneration a whole series of benefits an employee receives by reason of his employment, the regulations clearly indicate that the expression should be given a broad interpretation. Moreover, as noted, a law dealing with social security should be interpreted in a manner consistent with its purpose. We are not concerned with a taxation statute. [underlining added]

[27] Notably, the SCC majority also observed (p. 690) that, "[i]t goes without saying that insurable earnings include many tips collected in ways other than the ones collected in this case. For example, those added when paying a bill by credit card." [underlining added]

[28] Accordingly the SCC majority in *Canadian Pacific* concluded that the tips CP as employer had distributed had been "paid" by it to its employees. Hence the distributed amounts constituted "insurable earnings" under the UIA. (CPP legislation was not in issue in *Canadian Pacific*.)

[29] Twenty-one years later, in *Lake City Casinos Ltd. v. Canada*, 2007 FCA 100, the Federal Court of Appeal (FCA) issued from the bench a brief decision that articulated its view of the SCC conclusion in *Canadian Pacific*, in part as follows:

> 2. In order to succeed, it was incumbent upon the Appellant to show that the tips were paid by the employer in the liberal sense attributed to this word by the Supreme Court of Canada in *Canadian Pacific Ltd. v. Canada*… This required a demonstration that the tips came into the possession of the employer who then remitted them to the employees. [underlining added]
>
> 3. Having regard to the agreed statement of facts, it was open to the Tax Court judge to hold that the tips were physically distributed by the employees themselves and not by the employer.

[30] Thus, the thinking of the FCA was that tips "paid" by the employer to employees, "in the liberal sense attributed to this word by the Supreme Court of Canada in Canadian Pacific", required showing simply that "the tips came into the possession of the employer who then remitted them to the employees." Nevertheless, tips were not "paid" by the employer if, "…the tips were physically distributed by the employees themselves…"

[31] These two decisions of the SCC (1986) and FCA (2007) constitute still today the ranking jurisprudence regarding the matter of employer "paid" tips for purposes of social security legislation which would include the statutes CPP and EIA.

[32] These two decisions and related jurisprudence were canvassed by my colleague Justice Campbell in *Andrew Peller Ltd. v. Canada*, [2015] T.C.J. No. 249. In that matter the corporate Appellant, as employer, had a tip policy involving the pooling of tips, to be distributed based on employees' respective roles.

[33] At paragraph 61 of her reasons Justice Campbell concluded, based on *Canadian Pacific*, that the test was not (as in *Tampopo Garden Ltd.*, 2011 TCC 110) whether, "…the employer had controlled the tips and gratuities". Rather, "the operative question must be: whether the employer 'paid' those amounts."

[34] Justice Campbell elaborated at paragraph 64 of her reasons, stating that in *Canadian Pacific* the SCC:

> … interpreted the word 'paid' in Social Security legislation, liberally to mean mere distribution of gratuity amounts by an employer. The Federal Court of Appeal in *Lake City* elaborated that the liberal meeting of 'paid' required that the employer

> had 'possession' of the tips and subsequently remitted those amounts back to the employees.

[35] Justice Campbell concluded in *Peller* that, liberally construed, the employer had "paid" the subject tips. Accordingly, the appeal was dismissed.

[36] RML cites *Lake City Casinos Ltd. v. Canada*, 2006 TCC 225, being the trial level decision that was unsuccessfully appealed to the FCA. The agreed statement of facts referenced in the FCA's brief decision is pertinent. It is comprised of 133 agreed upon factual statements. Statements 49, 50, 52, 53, 58, 60, 88 and 89 are set out below. They make clear, most particularly statement 88, with the other statements included for appropriate context, the specific factual basis for the FCA finding that the tips had not come "into the possession of the employer who then remitted them to the employees".

[37] That is, the FCA said from the bench, without finding it necessary to delve into Justice Hershfield's legal analysis, that evidence sourced from the agreed statement of facts sufficiently enabled His Honour's conclusion at trial that the employer had not "paid" (liberally construed) the tips to the employees.

[38] The following are the several agreed statements of which I take particular note:

> 49. At the end of each day, the committees placed all the tips and the forms showing the amount of tips in the envelopes which were then taken from the cashiers station to the vault by the committee members accompanied by a gaming supervisor and casino shift manager. The envelopes were then placed in a box in the Appellant's vault for safekeeping.
>
> 50. The tip envelopes were segregated in the vault from any of the Appellant's property.
>
> 52. Each casino had its own [Tip] Committees, and within each casino, the slot attendants, dealers and servers each had their own Committee for pooling and distributing tips.
>
> 53. Members of the [Tip] Committees were chosen solely by the employees in that group (i.e., dealers, slot attendants and servers) from volunteers among their own number.
>
> 58. The Committees divided the tips among the workers in the tip pool based on the distribution formula.

> 60. Different of the Appellant's casinos used different formulas, and these formulas were determined by the workers in the tip pool in the particular casino.… All of the formulas were generally based on time worked over the two week distribution period.
>
> 88. The Committees physically distributed the tips to the recipients.
>
> 89. The Committee, not the Appellant's management, counted the tips, converted the tips to cash, put the cash in the vault, and distributed it to its members.

[39] Here, RML asserts that the *Lake City* facts are closer to its facts than are the facts of *Canadian Pacific*. The urged similarity is that in *Lake City* the tips, in cash and in casino chips immediately convertible into cash, were temporarily stored in the casino employer's safe by a small collective of employer and employer representatives, before being handed off to a committee of employees that determined and carried out physical distribution of the tips.

[40] My read of this is that the pertinent point is who distributed the tips to employees. The casino employer specifically was not involved in tip payments ultimately tendered to employees. Rather, a committee of employees carried out the actual distribution of tips. That appears consistent with application of the "paid" test, liberally construed, that the SCC identified in *Canadian Pacific* and that was relied upon by the FCA two decades late in its brief *Lake City* reasons. However, that does not strike me as equating with the facts of the case at bar,

[41] RML cites also *BLAJ Hospitality Inc. v. Canada*, [2008] T.C.J. No. 346, per Justice Angers of this Court. This decision concerned tips left by patrons of a well-regarded dining room in a heritage New Brunswick inn. In that matter too the evidence was to the effect that electronic tips less the credit card commission would be deducted from the total of electronic tips and an employee hostess would distribute 70% of the remainder in envelopes to individual servers, as she determined, that same evening or the next day. The remaining 30% she would leave in a box for kitchen staff. Sometimes the husband of the married couple who owned the corporate Appellant, would fill in as a host, rather than the aforementioned hostess, for a shift. As such he would carry out the above described actions of the hostess regarding distribution of tips.

[42] The Appellant in *BLAJ* was successful, with the Court writing, at paragraphs 26 and 27:

> 26. The procedure described above is different from that set out in the Minister's assumptions of fact, in which it is alleged that BLAJ kept track of each server's credit card tips in a daily revenue report and that the tips were paid to the servers and the kitchen staff "periodically" by the Appellants. The evidence disclosed the BLAJ's daily revenue report kept track of each server's gross tip revenues but that the hostess did the net tip calculation by hand to determine the actual amount of tips it handed over to each server. The actual net tips received by the servers did not form part of BLAJ's records. (See exhibit A-1.)
>
> 27. I therefore find that, in light of the above-described circumstances, which I believe to be the procedure that was in fact followed, the net tips never came into the possession of BLAJ and BLAJ never actually handed them over or paid them to its servers (employees). It was the hostess (an employee) who had the responsibility of actually distributing the net tips in accordance with the system in place and adhered to by all the employees. I also accept the fact that the net tips were distributed in cash by the hostess at the end of each day. There is nothing in the fact situation of this case that would suggest BLAJ was in a position to control the distribution of the tips as contemplated by the Canada Revenue Agency's technical interpretation. The tips here were paid to the servers and for their benefit and never actually became the property of BLAJ, nor were they distributed to the servers in the form of pay. [underlining added]

[43] Thus, a key aspect of *BLAJ*, in favour of the employer, was this Court's determination that the hostess employee had paid the subject electronic tips to the recipient employee servers. But as well, the Court seems to have relied upon his found fact that the employer was not, "in a position to control the distribution of the tips".

[44] However, as specifically noted in *Peller*, the matter of control by an employer is not part of the applicable test. The applicable test is, simply, whether it was the employer who "paid" (liberally construed) the tips to the servers - as pronounced by the SCC in *Canadian Pacific* and reiterated by the FCA in *Lake City*.

[45] Utilizing that SCC and FCA endorsed test, in this present case the subject tips were, I conclude, "paid" to the server employees by their employer RML. The electronic tips had not previously been paid to or otherwise in possession of the servers. The patrons had tendered to RML their electronic tips (as an added part of each patron's single electronic payment made to RML in settling RML's dining invoice).

[46] Thus, as assessed, the subject tips ("due-backs") that RML "paid" to its employee servers constitute "contributory salary and wages of the employee paid by

the employer" per subsection 9(1) of the CPP and "insurable earnings" per subsection 2(1) of the EIA.

[47] Accordingly these two CPP and EIA appeals will be dismissed.

Signed at Halifax, Nova Scotia, this 18th day of March 2021.

"B. Russell"

Russell J.

CITATION:	2021 TCC 22
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