

Docket: 2016-3794(CPP)

BETWEEN:

PARK AVENUE FURNITURE (MFG.) CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUREYA SUNDERJI
ALYKHAN SUNDERJI
RAHIM SUNDERJI
SHAMILA SUNDERJI
SHEETAL SUNDERJI
KARIM SUNDERJI
SHIRAZ SUNDERJI,

Intervenors.

Appeal heard on February 11, 2019, at Calgary, Alberta

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant: Matthew Clark

Counsel for the Respondent: E. Ian Wiebe

Counsel for the Intervenors: Matthew Clark

JUDGMENT

The appeal from the assessment made November 25, 2014 by the Minister

of National Revenue for failure by the Appellant to remit \$25,418.98 of *Canada Pension Plan* source deductions for the year 2013 is dismissed without costs.

Signed at Ottawa, Canada, this 30th day of April 2019.

“B. Russell”

Russell J.

Docket: 2016-3806(EI)

BETWEEN:

PARK AVENUE FURNITURE (MFG.) CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUREYA SUNDERJI
ALYKHAN SUNDERJI
RAHIM SUNDERJI
SHAMILA SUNDERJI
SHEETAL SUNDERJI
KARIM SUNDERJI
SHIRAZ SUNDERJI,

Intervenors.

Appeal heard on February 11, 2019, at Calgary, Alberta

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant: Matthew Clark

Counsel for the Respondent: E. Ian Wiebe

Counsel for the Intervenor: Matthew Clark

JUDGMENT

The appeal is quashed, without costs, on the basis that neither of the

appealed assessments assessed any amount of employment insurance source deductions under the *Employment Insurance Act* (Canada).

Signed at Ottawa, Canada, this 30th day of April 2019.

“B. Russell”

Russell J.

Docket: 2016-3807(IT)G

BETWEEN:

PARK AVENUE FURNITURE (MFG.) CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 11, 2019, at Calgary, Alberta

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant: Matthew Clark

Counsel for the Respondent: E. Ian Wiebe

JUDGMENT

The appeal from the two assessments each raised November 25, 2014 under the *Income Tax Act* (Canada) for un-remitted income tax source deductions for the Appellant's 2013 and 2014 taxation years respectively is dismissed, with costs fixed at \$2,000, payable to the Respondent within 45 days of the date of this Judgment.

Signed at Ottawa, Canada, this 30th day of April 2019.

“B. Russell”

Russell J.

Citation: 2019TCC94
Date: 20190430
Docket: 2016-3794(CPP)

BETWEEN:

PARK AVENUE FURNITURE (MFG.) CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUREYA SUNDERJI,
ALYKHAN SUNDERJI,
RAHIM SUNDERJI,
SHAMILA SUNDERJI,
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KARIM SUNDERJI,
SHIRAZ SUNDERJI,

Intervenors,

Docket: 2016-3806(EI)

AND BETWEEN:

PARK AVENUE FURNITURE (MFG.) CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUREYA SUNDERJI,
ALYKHAN SUNDERJI,
RAHIM SUNDERJI,
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SHEETAL SUNDERJI,
KARIM SUNDERJI,
SHIRAZ SUNDERJI,

Intervenors,

Docket: 2016-3807(IT)G

AND BETWEEN:

PARK AVENUE FURNITURE (MFG.) CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

Introduction:

[1] These three payroll tax appeals - per the *Canada Pension Plan* (CPP), *Employment Insurance Act* (EI Act) and *Income Tax Act* (ITA) - were heard together on common evidence. The appeals are each in respect of two assessments each raised by the Minister of National Revenue (Minister), on November 25, 2014 pertaining to the Appellant's fiscal periods (taxation years) ended December 31, 2013 and 2014 respectively. The 2013 taxation year assessment assessed income tax source deductions of \$108,597, CPP source deductions of \$25,419 and nil employment insurance (EI) source deductions. The 2014 taxation year assessment assessed income tax source deductions of \$4,800.94, and nil CPP and EI source deductions.

[2] The Appellant, Park Avenue Furniture (Mfg.) Corporation, is an Alberta corporation long engaged in the business of manufacturing and selling mattresses. It is owned by three shareholders - Shiraz Sunderji (Shiraz) - 40% ownership, Sureya Sunderji (Sureya) - 40% ownership, and the Shiraz Sunderji Family Trust - 20% ownership. The seven Intervenors are all members of the Sunderji family who worked for the Appellant during the Appellant's 2013 and 2014 taxation years. They are the aforesaid Shiraz and his wife Sureya as well as their three adult sons - Alikhan, Rahim and Karim, and two daughters-in-law - Shamila and Sheetal. Shiraz is the Appellant's chief executive officer. Alikhan is the Appellant's vice president for sales & marketing.

[3] Schedule "A" of the Reply in the 2016-3807(IT)G appeal, per para. 16(j), pleads the Minister's assumption that the Appellant in its 2013 taxation year

remitted payroll taxes of \$85,840.74, and left outstanding non-remittances of \$108,597.42. Schedule “A” provides also that that \$108,597.42 is the total of non-remitted CPP source deductions of \$25,418.98 and non-remitted income tax source deductions of \$83,178.44. These same amounts of un-remitted CPP and income tax are reflected in Schedule “A” of the Reply in the 2016-3794(CPP) appeal, per para. 15(j) of that Reply.

[4] At the commencement of the hearing, the Appellant brought a motion to amend paragraph 9 of each of the three Notices of Appeal by substituting the phrase “Before the end of 2012” for the phrase “At the end of its 2013 year and before finalizing its financial statements for the year”. The Respondent opposed the motion on the basis it was brought late and would change a material fact at issue in this matter. Upon hearing submissions, including the citing by Appellant’s counsel, who had recently been appointed, of *Canderel Ltd. v. Canada*, [1994] 1 FC 3 (FCA), I was satisfied that the Respondent would not be particularly or at all prejudiced and I allowed the motion to amend, with costs to the Respondent in the amount of \$750 to be paid within 30 days of the February 11, 2019 hearing date.

Issues:

[5] The three issues raised in these appeals are:

- 1) is appeal 2016-3806(EI) valid, insofar as neither of the two appealed assessments assessed any amount of un-remitted EI source deductions?
- 2) did the Appellant pay remuneration to the seven Intervenors as employees of the Appellant during the 2013 taxation year, thereby obligating the Appellant to withhold and remit the CPP and income tax source deductions assessed by the Minister?
- 3) did the Appellant under-remit \$4,800.94 of income tax source deduction per paragraph 153(1)(a) of the IT Act during the 2014 taxation year period of January 1 to September 30?

Analysis:

(1) Is EI Act appeal 2016-3806(EI) valid?

[6] The Notice of Appeal commencing EI appeal 2016-3806(EI) states that the Appellant appeals assessed EI source deductions that the Appellant did not remit

for either of the 2013 and 2014 taxation years. However, each of the two notices of assessment evidencing these two appealed assessments (Ex. R-4 and R -5) clearly shows that “0.00” was assessed respecting “EI”. Further, it is pleaded on behalf of the Minister at paras. 19 and 20 of the Reply, that the Minister did not assess the Appellant for EI premiums in either taxation year and that the Minister had erred in her decision confirming the appealed assessments, in stating that amounts had been assessed for outstanding EI premiums.

[7] The Respondent pleads that this EI appeal should be quashed, given that neither of the appealed assessments included assessment of any EI premium. The Appellant does not contest the Respondent’s position.

[8] Based on the clarity of the pertinent notices of assessment that no EI source deductions were assessed, and noting the Minister’s acknowledgment that she mis-spoke on this point in her confirmation of the two assessments, my conclusion is that the two appealed assessments are nil assessments as to any assessment of EI source deductions. This being so, there was no EI related assessment to be appealed.

[9] Accordingly, the motion to quash is granted, and the herein appeal 2016-3806(EI) is quashed for being invalid.

(2)Did the Appellant pay remuneration to the seven Intervenors as employees during the 2013 taxation year, thereby obligating the Appellant to withhold and remit the CPP and income tax source deductions assessed by the Minister?

[10] The Appellant maintains that the assessment for the 2013 taxation year is wrong because in that year the Appellant did not pay salaries or like remuneration to any of the seven Intervenors so as to have triggered the statutory obligation to deduct and remit source deductions.

[11] Although the Appellant has been in business for some forty years, more recently it has struggled financially, due to diminished cash flow. Unaudited financial statements of the Appellant for its 2013 taxation year were entered in evidence (Ex. A-1), helping corroborate that in 2013 the Appellant was in difficult financial circumstances. It owed shareholder Shiraz repayment of a substantial shareholder loan that he had previously made to the Appellant to assist it in financing continuance of its operations as a going concern.

[12] Alikhan, as a vice president of the Appellant, sought advice as to tax planning strategies that could improve the Appellant's cash flow. S. Naicker, CPA testified that he advised over several previous years that the Appellant could avoid having to remit payroll taxes if its sales revenues were used to pay off or down Shiraz's large shareholder loan rather than to pay salaries to the Appellant's seven employed family members (constituting some but not all of the Appellant's full complement of employees). In the absence of remuneration paid to the seven family member employees, there would be no obligation per para. 153(1)(a) of the IT Act to remit payroll source deductions in respect of them.

[13] The evidence established that at all material times in the 2013 taxation year the Appellant had retained payroll services provider Ceridian Canada Ltd. (Ceridian) to maintain the Appellant's employee payroll account. The Ceridian payroll records for 2013 (Ex. R-1) includes a series of bi-weekly entries for each of the seven Intervenors as individuals each receiving "gross" and "net" pay bi-weekly, together with entries for "vacation accrual", and "EE Dedn's" which I take as meaning, "employee deductions". The employee deductions identified in the Ceridian bi-weekly entries are for "CPP", "EI" and "FTAX". I conclude from these payroll registry records that it is clear the seven individuals had worked as employees of the Appellant in the 2013 taxation year. Further, there is no evidence in the Ceridian payroll records or otherwise suggesting that any of the family seven had worked for or with the Appellant in the alternative capacity of independent contractor. Indeed the only one of the seven Intervenors who at all testified was Alikhan.

[14] The 2013 Ceridian payroll records for the seven Intervenors end with entries for the pay period ending October 11, 2013, except for a set of entries for the seven again for the pay period ending December 15, 2015. Each of the seven entries for this latter date states "reversal" in respect of all 2013 payments that had previously been recorded in these payroll records. For the October 11, 2013 pay period, Rahim was the only one of the seven family employees (Intervenors) who had had a deduction from source - \$1,890 for income tax - from his bi-weekly pay. For the immediately preceding pay period ending September 30, 2013, five of the seven, excluding only Shiraz and Sureya, had one or more source deductions from his/her bi-weekly pay. In earlier pay periods for that year typically all of the same five had had source deductions taken from their bi-weekly pays. The other two, Shiraz and Sureya, had stopped somewhat earlier in the year having source deductions taken from their bi-weekly pays.

[15] Ceridian of course makes payments to employees and remittances to CRA, but only utilizing monies funded to it for these purposes by its particular payroll payor client, in this instance the Appellant.

[16] Also, the Ceridian payroll records for 2013 reflect for each of the seven Interveners the same total amount of cumulative gross salary received for 2013 as shown in the Schedule "A" of each of the two herein CPP and IT Act appeals, being \$674,096. And as shown in each Schedule "A", it is this \$674,096 total that is the basis for calculation of the assessed outstanding CPP remittances (\$25,418.98) and income tax remittances (\$83,178.44). In this regard the Canada Revenue Agency (CRA) auditor P. McEwan testified that the 2013 taxation year assessment was based on information from the same Ceridian records.

[17] From this it is clear that the 2013 assessment is only with respect to income identified as salary income in the Ceridean payroll records for the bi-weekly pay periods in 2013 that these records speak to. The records do not speak to any 2013 income (of whatever nature) post October 11, 2013 for Rahim, and post September 30, 2013 income for any of the other six.

[18] Given this factual context, I conclude that in its 2013 taxation year the Appellant through its payroll administrator Ceridian did periodically pay each Intervener, *qua* employee, payments contemporaneously recorded by Ceridian as salary payments. The question is, did the December 2013 "reversal" of such payments reflected as salary in the Ceridean records, retroactively alter the characterization of such payments as salary, or more generally employment remuneration. I emphasize that by "reversal", my understanding is that it is not meant that the monetary payments to each Intervener actually be paid back or otherwise returned to the Appellant - there was no suggestion or evidence of that. Changed to what the evidence did not indicate, Nor would that be of any particular relevance to the issue here.

[19] The Appellant argues, largely on the basis of testimony of Alikhan, that it and the seven Interveners all had intended since the end of the 2012 taxation year that these 2013 payments would not actually be salary payments and that simply it had not seen any pressing reason to clarify that with Ceridian, prior to the end of the 2013 taxation year, so long as that Ceridian could correct its records before T4s had to be issued in early 2014. The Appellant agreed further that the December 2013 "reversal" was correction of an inaccuracy as opposed to retroactive tax planning.

[20] The law on this matter of payment characterization makes clear that it is the intention of the parties (payer and payee) at the time of payment that characterizes the nature of the payment, and that the nature of the payment as intended at that time cannot thereafter be re-characterized. See, *Adam v. Minister of National Revenue*, 1985 CarswellNat 421, [1985] 2 CTC 2383, 85 DTC 667 (TCC), paras. 13-14; *Irmen v. Her Majesty*, 2006 TCC 475, paras, 7-11.

[21] It follows from this that a correction can subsequently be made, but only in accordance with what was the shared intent of the payor and payee at time of payment.

[22] I have concluded that the evidence does not support that the subject payments made to each of the seven Intervenors, which payments Ceridian contemporaneously identified and treated as salary payments, nevertheless were not salary payments or put more generally were not payments of remuneration for work as employees of the Appellant.

[23] My reasons for so concluding are as follow. Firstly, the reason given by the Appellant for wanting to cease making salary payments to the seven family employees was to ease cash flow issues by avoiding liability for payment of withholding and remitting payroll tax, *e.g.* CPP and income tax source deductions. However, via Ceridian, on behalf of the Appellant, payroll tax remittances continued into the fall of 2013.

[24] Certainly if a decision had been made in late 2012 by the Appellant and the seven Intervenors to cease employment remuneration being paid to the seven Intervenors, rather than late 2013 when the purported “reversal” was actually documented, that decision would have been put into effect without delay so that the payroll deductions would have promptly ceased. In fact, however, in 2013 payroll deductions continued to be made for one Intervenor until and including the October 11, 2013 bi-weekly pay period and for another four of the Intervenors until and including the September 30, 2013 bi-weekly pay period. Further, all the Intervenors received total payroll remuneration in 2013 as recorded in Ceridian’s 2013 payroll records. These were the same total remuneration amounts the Minister utilized in raising the contested 2013 assessment.

[25] Secondly, there is no documentary evidence of any corporate decision-making by the Appellant, such as through directors’ or shareholders’ resolutions, indicating the Appellant would cease paying salaries to the seven family member employees.

(3) Did the Appellant under-remit \$4,800.94 of income tax per paragraph 153(1)(a) of the IT Act during the 2014 taxation year period of January 1 to September 30?

[26] The Appellant had numerous employees additional to the seven family employee Intervenors. The Minister assumed as reflected in para. 16(k) of the Reply for herein appeal 2016-3807(IT)G that for the Appellant's 2014 taxation year there was an outstanding income tax remittance of \$4,800.94. This amount was calculated on the basis of the Minister's further assumptions that the Appellant had 2014 taxation year total source deductions and obligations of \$355,680.42, less remittances already made of \$330,879.48, resulting in the said outstanding income tax remittances of \$4,800.94.

[27] The Appellant contested this \$4,800.94 assessment, but did not call evidence that specifically disputed it sufficient to establish a *prima facie* case rebutting the Minister's above-stated assumptions underlying the assessed amount. As is well known the Minister's assumptions supporting an assessment or reassessment are deemed valid to the extent, as here, the taxpayer does not raise a *prima facie* case disputing the assumption(s).

[28] The \$4,800.94 assessment was supported further by the testimony of CRA auditor McEwan, undiminished in cross-examination, who had on behalf of the Minister identified the said \$4,800.94 shortfall. Her supportive audit document "2014 Examination Details" was entered as Ex. R-2.

Conclusion:

[29] On the basis of the foregoing the EI appeal (2016-3806(EI)) is quashed, and each of the two CPP and IT Act appeals is dismissed, with costs to the Respondent of \$2,000 payable within 45 days of the date of this Judgment, which is inclusive of the \$750 in costs awarded to the Respondent on the Appellant's motion to amend.

Signed at Ottawa, Canada, this 30th day of April 2019.

"B. Russell"

Russell J.

CITATION: 2019TCC94

COURT FILE NO.: 2016-3794(CPP)
2016-3806(EI)
2016-3807(IT)G

STYLE OF CAUSE: PARK AVENUE FURNITURE (MFG.)
CORPORATION AND M.N.R. AND
SUREYA SUNDERJI, ALYKHAN
SUNDERJI, RAHIM SUNDERJI,
SHAMILA SUNDERJI, SHEETAL
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PARK AVENUE FURNITURE (MFG.)
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SUNDERJI, KARIM SUNDERJI, SHIRAZ
SUNDERJI

PARK AVENUE FURNITURE (MFG.)
CORPORATION AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: February 11, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice B. Russell

DATE OF JUDGMENT: April 30, 2019

APPEARANCES:

Counsel for the Appellant: Matthew Clark
Counsel for the Respondent: E. Ian Wiebe
Counsel for the Intervenor: Matthew Clark

COUNSEL OF RECORD:

For the Appellant:

Name: Matthew Clark

Firm: Nerland Lindsey LLP

For the Respondent:

Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada