Docket: 2022-1462(IT)I

BETWEEN:

SUSSEX GROUP – ALLAN SUTTON REALTY CORP.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on November 30, 2023, at Vancouver, British Columbia

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

Agent for the Appellant:	Brian Dougherty
Counsel for the Respondent:	Jean Murray

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal made in respect of the Notice of Assessment dated February 11, 2020, for the 2018 taxation year, is hereby allowed, without costs.

Signed at Belleville, Ontario, this 8th day of January 2024.

"J.M. Gagnon"

Gagnon J.

Citation: 2024 TCC 1
Date: 20240108
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REASONS FOR JUDGMENT

Gagnon J.

I. Introduction

[1] The Appellant has instituted an appeal under the informal procedure in respect of an assessment made under the *Income Tax Act* (**ITA**) by the Minister of National Revenue (**Minister**), for the 2018 taxation year. By virtue of this assessment, the Minister imposed a penalty of $5,858 under subsection 227(9) ITA upon alleged late remittances of payroll source deductions for the 2018 year in the total amount of $61,084.96.

[2] Subsection 227(9) ITA reads as follows:

> Withholding taxes
>
> Penalty
>
> (9) Subject to subsection 227(9.5), every person who in a calendar year has failed to remit or pay as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation or an amount of tax that the person is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of
>
> (a) subject to paragraph (b), if

> (i) […],
>
> (ii) the Receiver General receives that amount
>
> (A) […],
>
> (B) […], or
>
> (C) […], or
>
> (iii) that amount is not paid or remitted on or before the seventh day after it was due, 10% of that amount; or
>
> (b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been remitted or paid during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.

[3] The penalty imposed in the present case was 10%.

[4] The decision of the Minister to impose the penalty is essentially the result of a conflict between the parties over the salaries paid by the Appellant to two employees. The Appellant has determined, at the end of 2018, a final remuneration to each employee for the year. After having completed a trust accounts examination of the Appellant's payroll for that year, the Canada Revenue Agency (**CRA**) determined a different salary allocation between the two employees, which resulted in a restatement of the Appellant's remittances of payroll deductions under the ITA and the applicable regulations. The penalty is based on the Appellant's late remittances.

[5] The sole shareholder, director and officer of the Appellant is Mr. Allan Sutton. The Appellant operates a real estate business as a licence real estate corporation, as opposed to a personal real estate corporation. Mr. Sutton is a real estate sales agent and is referred to as the primary source of revenue for the Appellant. Mrs. Angela Sutton, Mr. Sutton's spouse, is also employed by the Appellant. She is a licensed broker acting as the managing broker for the Appellant's real estate activities. Her status allows the Appellant to qualify as a licence real estate corporation. With Mrs. Sutton, the Appellant can carry on business without depending on a brokerage firm. Mr. Sutton describes this advantage as a higher standard requiring the corporation to keep trust accounts, to do accounting reports, to file annual reports with the provincial Financial Services Authority. Mr. Sutton adds that with a higher standard comes governance at a much higher level.

[6] Mr. and Mrs. Sutton are the two employees of the Appellant. For many years, the Appellant, through Mr. and Mrs. Sutton's arrangement, determines at the end of the year the contribution that each made to the Appellant's success and revenues for the given year. Mr. Sutton testified that Mrs. Sutton is a key addition to the Appellant's activities and, without her, the Appellant's success would certainly be different. She allows him to focus on specific aspects of the Appellant's business while she is responsible for all other tasks. In addition, she assists him on particular mandates in the year. She may also find referrals. For Mr. Sutton, she is an asset for the corporation and deserves a fair recognition.

[7] For 2018, the Appellant made payroll deductions remittances based on an estimate salary for each employee. At the end of the year, the two employees carried out their review of the year and determined a salary based on their contributions in the business. Prescribed forms and slips for 2018 were filed by the Appellant on that basis. In summary, Mrs. and Mr. Sutton received a total remuneration of $165,000 and $192,000, respectively.

[8] By notice of assessment dated February 11, 2020, the Minister assessed the Appellant a late balance payroll deductions remittance for 2018 of $1,745 and a 10% corresponding penalty of $124. This assessment was made following the trust accounts examination by the CRA. The CRA determined, *inter alia*, a different remuneration allocation between the two employees based from amounts deposited in Mrs. and Mr. Sutton's personal bank accounts of cheques received from the Appellant.

[9] A second assessment by notice of assessment dated February 11, 2020, was also made in respect of the Appellant's 2018 payroll remittances strictly to levy a 10% late remittance penalty in the amount of $5,858. This second penalty relates to a reallocation of the monthly payroll remittances by the CRA that the Appellant should have done on the basis of the new remuneration allocation between the two employees. Only this second assessment is under appeal.

[10] This appeal is to dispose of a penalty. The Respondent acknowledged at the hearing that the Crown bears the onus for the penalty. This means that if the reallocation of remuneration determined by the Respondent is incorrect or, I should say, is not proved by the Respondent, there is no reason to maintain the penalty.

[11] The Respondent did not call any witness in support of his position. Counsel for the Respondent confirmed that the only basis for the Minister to make this redetermination of remuneration among the two employees is after the sole review

of the banking statements of the Appellant, copies of Appellant's cheques and to whom the cheques were made payable. Based on this sole review, cheques and banking statements confirmed that the total amount for the remuneration for both employees was deposited in Mr. Sutton's personal bank account, except for a total amount of $12,675 deposited in Mrs. Sutton's personal bank account.

[12] The Court did not hear from any CRA's officers or employees. During the trust accounts examination by the CRA, the Appellant was not called or asked to explain the reasons for supporting the payment option retained by the Appellant, nor Mrs. Sutton, Mr. Sutton or their accountant.

[13] For the Court, the procedure followed by the CRA to carry out the examination is not the most convincing. The procedure reflects clearly a selective review, which gives the appearance of a partial examination only of the actual context. This is particularly apparent in the absence of any testimony from the CRA to support their position and of any contact during the trust accounts audit with the interested parties. This is rather problematic in a context where the burden lies with the Respondent.

[14] Mrs. and Mr. Sutton testified at the hearing. The Court considers both being credible. Both showed a knowledge of the Appellant's business and were able to explain in reasonable terms the considerations surrounding their decision to fix the remuneration paid by the Appellant.

[15] Mr. Sutton was the first to testify. In summary, the witness did not deny the amounts paid to them by the Appellant. He exposed how they agree on their remuneration and when they do so. He is signing the Appellant's cheques. The Court understands that this is a relatively small business and given the volatility of the markets, it can be difficult to predict a fair compensation without knowing what has been achieved by each of them until the end of the year. He explained the reasons why his spouse was receiving a small monthly pay payable to her directly and what was the origin of the amount. Mrs. Sutton also confirmed the same reasons for being a monthly fee that she used to charge other real estate firms in consideration of basic brokerage services.

[16] He did not deny that both remunerations were in fact deposited through his personal bank account in one single cheque that he signs based on the available cash flow of the Appellant from time to time. He did not confirm that the deposit was his alone. He also confirmed that the procedure could have been different and he could have signed two cheques. He did not think that this was determinant as far as they

both agree on the procedure and the final allocation they determine at the end of the year. For him, the deposits in one single account and the right to a fair remuneration were distinct and one was certainly not a pledge of the other.

[17] Mrs. Sutton testified about on her own understanding of her remuneration. She was relatively brief but clear and truthful. The Court did not believe that her role was marginal, but a real employee to whom remuneration is payable in return of a real performance. She testified that her work performance overall could vary over the years, with each year having to assume her responsibilities as a licence broker.

[18] Mrs. Sutton explained that for her the fact that her remuneration was deposited in her spouse's personal bank account was not a concern. She was able to benefit from that money. She made it clear that she consented to this arrangement and gave her authorization that the money be deposited in one single account. Her way to explain the situation was that "… I was constructively receiving money through our account. So, the account would pay for my personal direct bills, visa, and it would also pay for our share expenses."

[19] The cross-examination did not allow the Respondent to demolish the positions expressed by both witnesses. However, it is not excluded that Exhibit A-1 and Exhibit A-7 filed by the Appellant show a certain discrepancy as for the exact determination of the salary paid to each employee. This is due in part to the fact confirmed by Mrs. Sutton about the percentage of common expenses that she supported in 2018. She confirmed that her share of the common expenses was 11%, not 50%. This confirmation might be false or might be correct. For that reason, the allocation as initially determined between the Appellant and the employees would then be incorrect.

[20] Notwithstanding the preceding paragraph, it remains clear for the Court that the remuneration paid to Mrs. Sutton in 2018 exceeded $12,675. The fact that such remuneration has been in part paid to Mrs. Sutton through Mr. Sutton's bank account does not preclude the position of Mrs. Sutton and the Appellant that she received the remuneration from the Appellant. Considering that the evidence supports that Mrs. Sutton authorized the amounts be directed into Mr. Sutton's bank account and she still derived benefit from the deposit to that account, and had an unconditional right to be paid the remuneration, constructive receipt applies.

[21] Constructive receipt, for purposes of the ITA, has two central factors that allow funds to be "received" by a taxpayer even if they do not directly have it "in their hands". Under subsection 5(1) ITA income is salary received by a taxpayer in

a year. Case law has noted that the word "receive" means to get or to derive benefit from something, therefore to "enjoy its advantages without necessarily having it in one's hands" [1]. Moreover, an amount of money is deemed received by an employee when it is available to the employee [2]. An example of this was seen in *Blenkarn*, where the money to pay the taxpayer's salary in 1960 was available [to the taxpayer] but he voluntarily chose not to be paid until 1961. The taxpayer was considered to have actually received the money because the payment was held to be "received" as soon as he had an unconditional right to be paid, which was in 1960.

[22] In *Markman* [3], this Court stated that when money is paid by an employer to a third party for the benefit of the taxpayer, the payment constitutes constructive receipt in the hands of the taxpayer. Justice Bowman in *Belusic* [4], noted that for a finding of constructive receipt one, or both, of the following two conditions must be satisfied:

> (1) The appellant would need to have authorized or in any event acquiesced in the payment; or
> (2) Even in the event he had not authorized or acquiesced in the payment, at least he would have had to be under a legal obligation to make the repayment so that the payment… had the effect of relieving him of that obligation

[23] Justice Bowman's factors for finding constructive receipt have been cited in subsequent cases. More recently this Court in *Sherman* [5], in citing *Morin*, stated the theory of constructive receipt is that the payee did not receive the amount in question but need only receive a corresponding benefit. These concepts have been echoed by the Federal Court of Appeal in *Cheema* [6], citing *Innovative Installation* [7], held that constructive receipt could apply where a person had a contractual right to receive a payment.

[24] This Court is of the view that the evidence in this appeal supports that constructive receipt applies with respect to Mrs. Sutton's remuneration received from the Appellant.

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[1] *Morin v The Queen*, [1975] CTC 106 [*Morin*].
[2] *Blenkarn v MNR*, 63 DTC 581 [*Blenkarn*].
[3] *Markman v MNR*, [1989]1 CTC 2381 [*Markman*].
[4] *Belusic v Canada*, [1997]3 CTC 2908 [*Belusic*].
[5] *Sherman v Canada*, 2008 TCC 487 [*Sherman*].
[6] *Canada v Cheema*, 2018 FCA 45 [*Cheema*].
[7] *Canada v Innovative Installation Inc.*, 2010 FCA 285 [*Innovative Installation*].

[25] As mentioned above, although this Court cannot confirm the exact remuneration received by Mrs. Sutton, and indirectly by Mr. Sutton, it remains clear that the remuneration used by the CRA to assess the penalty is incorrect.

[26] In *Simard* [8], the Federal Court of Appeal provided insight as to this Court's jurisdiction regarding the imposition, and ruling of, penalties. *Simard* was an issue of gross negligence penalties under subsection 163(2) ITA, however, the Federal Court of Appeal used broad language in commenting on the extent to which this Court can interfere with the imposition of penalties. The Court of Appeal stated:

> The Minister's decision regarding a penalty may be challenged by appeal to the Tax Court of Canada against the assessment levying it, but where the Court finds that the facts give rise to a penalty it can only confirm its application. As the Minister, the Court has no discretion as to the amount of the penalty, nor does it have any regarding interest.

[27] In *Portland* [9], Justice Mogan stated:

> The obligations to withhold are inflexible and the obligations to remit are equally inflexible. The penalty authorized under subsection 227(9) is fixed by statute, and this Court does not have authority to reduce the penalty or cancel it because it is imposed by Parliament. If the conditions are met which permit the penalty to come into play (a late remittance), then the liability is fixed.

[28] The role of the Court is to determine whether the penalty was either validly imposed or not. There is no other issue under appeal. And adjusting the quantum of a given penalty would be beyond the jurisdiction of this Court. On that basis, it is determined that the evidence in the present case does not support that the conditions to levy the penalty as determined by the Minister have been established. In fact, the remuneration received by the employees and used by the Minister to assess the penalty is incorrect and necessarily result in an erroneous penalty.

[29] Based on the foregoing, the facts of this appeal do not give rise to the penalty as determined by the Minister. The Court has no authority in respect of a penalty other than to allow (deny the penalty) or dismiss (confirm the penalty) the appeal. Consequently, the appeal is allowed, without costs.

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[8] *Canada (Attorney General) v Simard*, 2003 FCA 427 [*Simard*].
[9] *Portland Hotel Society v The Queen*, 2004 TCC 64 [*Portland*].

Signed at Belleville, Ontario, this 8th day of January 2024.

"J.M. Gagnon"

Gagnon J.

CITATION:	2024 TCC 1
COURT FILE NO.:	2022-1462(IT)I
STYLE OF CAUSE:	SUSSEX GROUP – ALLAN SUTTON REALTY CORP. AND HIS MAJESTY THE KING
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 30, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Jean Marc Gagnon
DATE OF JUDGMENT:	January 8, 2024

APPEARANCES:

Agent for the Appellant:	Brian Dougherty
Counsel for the Respondent:	Jean Murray

COUNSEL OF RECORD:

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada