

Philp et al (Appellants) v. Minister of National Revenue (Respondent)

Thurlow J.—Toronto, May 20, 21; Ottawa, June 4, 1970.

Income tax—Grocery business—Sales promotional contest—Convention trip for meeting sales quota—Value of trip as holiday—Whether taxable—Income Tax Act ss. 4 and 5 (1)(a).

A wholesale grocer conducted a promotional scheme under which each retail outlet meeting a sales quota was entitled to send a representative and his wife to Nassau for six days. The three appellants *P*, *B*, and *C* and their wives were among the 311 persons who made the trip in April 1964. All of the expenses for transportation, hotel, etc. were paid by the wholesaler. At Nassau there were formal business sessions on three mornings and discussion of business problems took place between dealers at other times, but most of the time was spent on activities of a leisure or entertainment nature. *P* was manager of one of the wholesaler's retail outlets; *B* was a member of a firm which operated a retail grocery; *C* was an employee and principal shareholder of an incorporated independent retail grocery. *B* and *C* were each assessed to income tax on \$663.36, being their pro rata portions of the total sum paid by the wholesaler on the trip, and *C*, who had personally contributed \$84 toward the trip because his store had not fully met its quota, was assessed at \$84 less.

Held, the trip or the right or opportunity to take it accrued to *P*, *B*, and *C* in virtue of their business or employment, and its value as a holiday trip was accordingly assessable under sec. 4 or 5 (1)(a) of the *Income Tax Act*. On the evidence, that value should be put at one-half of the \$633.36 assessed *P* and *B*.

Hale v. M.N.R. [1969] 1 Ex. C.R. 259; *Waffle v. M.N.R.* [1969] 1 Ex. C.R. 384, referred to.

INCOME tax appeal.

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

F. J. Dubrule and *J. C. Gilliland* for respondent.

THURLOW, J.—The issue in each of these three appeals, which at the request of the parties, were heard together on common evidence, is whether the appellant is liable for income tax in respect of an amount representing expenses paid by The Oshawa Wholesale Limited of a six day trip to Nassau in the Bahamas made by the appellant and his wife in April 1964. The three appellants and their wives were members of a party of 311 persons who made the trip most of whom did so at the expense of The Oshawa Wholesale Limited which had promoted the project and made the arrangements for it. In the case of each of the appellants, Philp and Bermack the amount added to the appellants' income and assessed was \$633.36. In the case of the appellant Cairns the amount was \$549.36. It was stated in opening that the present are in the nature of test cases since the results may bear on the tax liability of a number of the others who participated.

The Oshawa Wholesale Limited (hereafter referred to as Oshawa) is a corporation carrying on business primarily as a wholesale grocer selling its goods to a chain of independent franchised retailers in southern Ontario, all operating under the IGA name, but also supplying and operating some retail food stores of its own. The retailers are bound by contract to purchase their supplies from Oshawa and to conform to selling policies originated by it. Oshawa on its part provides advertising and merchandising services and by reason of its ability to purchase in large quantities is able to supply goods to the retailers at prices which enable them to compete with retail chain stores.

The plan to provide expense paid trips to Nassau for certain personnel of the retail IGA stores in Oshawa's franchise area and their wives was devised by Oshawa in the early part of 1963. It had as its object the promotion of Oshawa's business by providing an incentive to the persons in charge of retail stores, whether managers of Oshawa's own stores or independent dealers, to put forth a greater effort to sell more goods and by securing as well the benefits to be derived from a well attended convention of its retailers. These objectives were secured first through a quota system prescribing the increase in sales over a period of forty weeks preceding the trip necessary for each particular retail outlet to qualify for a representative and his wife to take the trip and by arranging for business sessions to be held on three of the six days of the trip. The sessions themselves were, moreover, of a sort calculated to stimulate subsequent informal discussions of the subjects dealt with in the formal proceedings. As the trip was made by charter flights and the persons concerned were all accommodated at the same hotel opportunities were also provided for executive personnel of Oshawa to talk informally with these persons during the week and to discuss business problems with them. Opportunities also arose throughout the trip for dealer personnel to discuss their business problems with one another and to gain information of use in conducting their businesses. Oshawa, on its part, collected most of the expense from suppliers of goods who agreed to contribute to it in consideration of promotion of their lines of goods and the consequent increase in purchases from them. From Oshawa's point of view the whole scheme was a resounding success in increased sales, in the generation of ideas for improvement in its operation and in improved communications and relationships with its franchised retail dealers.

While in communications sent by Oshawa to the retail dealers the holiday aspect of the trip was heavily emphasized from the beginning to the end of the scheme there is, to my mind, no reason to doubt that from the point of view of Oshawa the benefits to be secured for its business in the promotion of sales, in carrying out a training project for its dealers and their wives, and in improving its relationship with its dealers, whose ability to carry on their

own business to advantage would also be improved both by the course and by the discussions they had the opportunity to have both with executives of Oshawa and with other dealers carrying on business in similar or even dissimilar situations, constituted the whole reason and justification for carrying out the project.

[His Lordship here reproduced excerpts from various communications by Oshawa to dealers, and then continued as follows:]

An examination of the program for the six days reveals that with the possible exception of the President's dinner near the end of the period the only scheduled events of a business nature were the two hour business sessions referred to as College of Profit on three mornings of the stay in Nassau. All the other items on the program for mornings, afternoons and evenings were either meals or suggestions of tours, fishing trips, boat rides and other activities of a leisure or entertainment nature. The first and last days were of course largely occupied by travel and activities incidental thereto. The business sessions themselves were apparently well conceived to interest both the husbands and their wives and were said to have been well attended by both on each of the three occasions. They were also said to have lasted each day well beyond the scheduled time. In addition all three appellants gave evidence of having spent much of their time in general discussions of business problems with other dealers.

On the evidence there appear to have been as well, from the point of view of Oshawa, sound business reasons both for selecting a somewhat distant holiday resort as the destination for the trip and the site of a business convention and for including the wives of dealers and managers among the persons who might attend at Oshawa's expense. Conferences had previously been held on two occasions at Toronto with less than perfect attendance and attention both because there was not the interest generated by holding the conference at a holiday resort and because nearness to the sites of their business interests invited distractions such as telephone communications with the persons left in charge and errands of their own while in Toronto. Having wives of the personnel attend was considered advantageous for several reasons among which were the fact that many of the dealers operated comparatively small family businesses in which their wives were actively engaged and being familiar with the business would be interested in the business sessions, the fact that in other instances the wife was often an officer of a family corporation carrying on the business and was in that way involved in it and able to contribute women's views which were of importance in a business the customers of which were predominantly women, the fact of the goodwill that could be expected to accrue from Oshawa having included them in what was expected to be a pleasant occasion and finally the fact that with the wives present the convention could be expected to be more orderly and businesslike.

Of the 311 persons who made the trip 13 were guests who paid their own way by a payment to Oshawa of \$350 per person. Oshawa permitted

these persons to take the trip because of some close family or other connection which they had with dealers who were eligible to take the trip at Oshawa's expense. In some cases they were children of persons eligible to go. Ten other persons, including the appellant Cairns and his wife, also took the trip partially at their own expense, the store they represented not having attained the sales quota necessary to permit them to make the trip entirely at Oshawa's expense. In Cairn's case the contribution required was \$84 which accounts for the difference in the amount in respect of which he has been assessed and that in the other two appeals. As I understand the evidence no money was paid or credited by Oshawa to any of the appellants for any of the expenses of the trip, Oshawa having simply contracted for the transportation, hotel accommodation and other items forming part of the scheme in respect of the whole group and paid the airline, hotel and other persons accordingly.

From the point of view of the retail dealers and store managers the business aspects of the trip consisted not merely of the three formal business sessions but of the informal discussions with others of ideas both on subjects dealt with at the formal sessions and on stores, people, merchandise, employees, pilferage, deliveries and criticism of Oshawa itself. Both Bermack and Cairns regarded the project from the start as a business convention which Cairns characterized as a "get together where we all meet to pick each others brains." Cairns himself took advantage of the occasion to discuss and promote his own plans for an additional store with the president of Oshawa, a vice-president in charge of real estate development and an official responsible for the awarding of franchises. Neither he nor Bermack regarded the trip as his annual vacation and I was left with the impression that pleasant as the trip no doubt was none of the three appellants would have been likely to have purchased this trip for \$633.36 of his own money purely as a vacation for himself and his wife.

At the times material to his appeal the appellant Philp was an employee of Oshawa who managed one of its retail food stores. The appellant, Bermack, at the material times, was a partner in a firm which carried on a retail food business and which was a customer to whom Oshawa supplied goods in the course of its wholesale food business. The appellant, Cairns, at the material times was an employee and the principal shareholder of V. R. Cairns (Orillia) Limited which carried on a retail food business and was also a customer to whom Oshawa supplied goods in the course of its wholesale food business.

In the case of the appellant, Philp, the Minister's position is that the amount paid by Oshawa for the expenses of himself and his wife represents a benefit received or enjoyed by the appellant in respect of, in the course of, or by virtue of his employment in respect of which he is liable for tax under section 5 (1) (a) of the *Income Tax Act*.

In the case of the appellant, Bermack, the Minister's position is that the amount paid by Oshawa for the expenses of himself and his wife was a

profit from his business within the meaning of section 4 of the Act or in any event was income from a source of income within the meaning of section 3.

In the case of the appellant, Cairns, the Minister's position is that the expenses paid by Oshawa for himself and his wife represent a benefit received or enjoyed by him in respect of, in the course of, or by virtue of his employment in respect of which he is liable for tax under section 5 (1) (a) of the Act and in the alternative represents a benefit or advantage conferred on a shareholder in respect of which he is liable for tax under section 8 (1) (c) of the Act.

In each case, however, the amount added by the Minister was not in fact expense paid by Oshawa in respect of the appellant and his wife but simply a pro rata amount of total expenses incurred by Oshawa for the project.

So far as material the statutory provisions referred to read as follows:

Sec. 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

- (a) businesses,
- (b) property, and
- (c) offices and employments.

Sec. 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Sec. 5. (1) Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus

- (a) The value of board, lodging and other benefits of any kind whatsoever . . . received or enjoyed by him in the year in respect of, in the course of, or by virtue of the office or employment;

* * *

Sec. 8 (1) Where, in a taxation year,

* * *

- (c) a benefit or advantage has been conferred on a shareholder by a corporation,

* * *

the amount or value thereof shall be included in computing the income of the shareholder for the year.

While the statutory provisions applicable to each particular appellant thus differ somewhat the case put forward on their behalf was not based on such differences and the result, as I see it, is not affected by them. If, in Bermack's case, the trip or the right or opportunity to take it represented what for lack of a name I shall call "something of value" it seems obvious that that something arose from his business and that the value of it represented a gain or profit from his business. Had that value been conferred in cash or by a discount on the price of goods or in any other monetary way it would have formed part of the receipts of the business or been represented by a reduction in the cost of goods and I see no reason

to think it could properly be excluded from the computation of profit merely because it was conferred on Bermack in the form of a trip to Nassau. The same applies to his wife's trip since the right or opportunity for her to take the trip at Oshawa's expense, in my view, accrued to Bermack himself, who dealt with Oshawa, and not to his wife directly. In the cases of Philp and Cairns the matter turns on whether the trip or the right or opportunity to make it represented a benefit within the meaning of the statute but the test is, I think, the same. For if the trip or the right or opportunity to make it represented something of value in the material sense it would in my view be within the scope of the meaning of "benefit" in sections 5 (1) (a) and 8 (1) (c) of the Act. See *Hale v. M.N.R.* [1969] 1 Ex.C.R. 259 and *Waffle v. M.N.R.* [1969] 1 Ex.C.R. 384. In the latter case the Caribbean cruise which was given as an award and which was held to be a benefit within the meaning of section 5 (1) (a) was I think clearly something of value in an economic sense and was so regarded by the court.

On the other hand I should not have thought that attendance at or the right or opportunity to attend a mere business convention was in itself something of value which could be characterized either as a benefit within the meaning of sections 5 or 8 or as a profit from a business. Indeed in *Hale's case* (above) no attempt appears to have been made to tax any supposed benefit in respect of his own attendance at the convention. Advantage of some sort is no doubt the object of any such gathering but advantage in the form of knowledge or information acquired thereat or in the promotion of business relationships is not, as I see it, the sort of thing that enters as such into a profit and loss account or that can be valued and treated for this purpose as a benefit to an employee within the meaning of section 5 (1) (a).

If, however, the right or opportunity to take the trip represented something of value in an economic sense there appears to be no difficulty on the facts in reaching the conclusion that it accrued to Philp by virtue of his employment and that the award of it to him by Oshawa was an award to him of the right both for himself and for his wife. In the case of Cairns it was V. R. Cairns (Orillia) Limited to whom the right or opportunity to nominate an employee and his wife to take the trip partially at the expense of Oshawa accrued and the appellant Cairns as well, having accepted this from his company, is, as I see it, required to bring the value, if any, into the computation of his income under section 5 (1) (a) as a benefit received by virtue of his employment. See *Waffle v. M.N.R.* [1969] 1 Ex.C.R. 384 at pages 388-9. It is therefore unnecessary to consider whether such value, if any, would also constitute a "benefit" conferred upon a shareholder within the meaning of section 8 (1) (c) of the Act.

The case put forward on behalf of all three of the present appellants was that the trip to Nassau was not remuneration or compensation of any sort to the persons who made it for anything that they had done or accomplished, but was simply part of a scheme which had been devised by Oshawa

for the purpose of promoting its own business and of enabling it to conduct that business more effectively, in particular, by improving the marketing skills of its dealers. Counsel went on to emphasize the business aspects of the trip itself and its program, and to characterize the whole trip as a business convention. Counsel for the Minister, on the other hand, relied heavily on the suggestions of a holiday trip in Oshawa's communications to the dealers, to the preponderance of time available for leisure activities in the program even for the ordinary business hours of the days spent at Nassau and on the method by which the right to attend the trip at Oshawa's expense, which he characterized as a contest, was obtained.

While, as I have already indicated, from the point of view of Oshawa I see no reason to disagree with Mr. Goodman's submission that the scheme and all parts of it, including the emphasis placed on the holiday aspect of the trip both in the communications to dealers and in the program as well, constituted a project for the promotion of its business I find it impossible to regard the trip to Nassau as being exclusively or even primarily of a business nature from the point of view of the retail dealers and store managers who made it. I find it equally impossible, however, to regard the trip as having been exclusively or even primarily of a holiday nature from their point of view. Rather, in my view, the trip was precisely what it has been proposed as being, that is to say, a combination of the two.

The substantial question to be determined in all three cases is therefore, as I see it, whether the right or occasion for the appellant and his wife to make such a trip was something of value having regard to what it was, that is to say, a combined business and holiday trip taken in the circumstances as I have endeavoured to describe them.

In my opinion the evidence shows that there was something of value in an economic sense in the trip or in the right or occasion to make it. There is first the evidence that the expenditure of extra effort was necessary to attain the sales quota that would qualify a dealer or manager to take the trip at Oshawa's expense. No doubt the sale of more goods by a dealer could in itself be rewarding but the prospect of the trip was intended to be and was, in my view, in fact, an incentive to put forth greater effort to sell goods which, to my mind, suggests that the trip was to have value as a holiday apart from any business to be transacted during the course of it. Next there is the evidence that an amount of \$350 was paid by a number of persons not otherwise qualified to take the trip for the right to be included in it. These were not dealers or store managers and while some were children of dealers others were adults who, I would infer, paid for and took the trip as a holiday. Moreover, several persons, including Cairns, being partially qualified to attend at Oshawa's expense paid something from their own pockets for the opportunity to take the trip. Finally, there is the evidence that apart from what was arranged for and carried out in the usual leisure or after hours of the day a considerable portion of the usual business or working hours of each day was made available for leisure with an organized program of recreational activities arranged for those who wished to parti-

cipate in them. These activities as well as the transportation, hotel rooms, meals and reception were all included in the project and were paid for by Oshawa. To my mind it is clear therefor that to persons interested in such an outing as a holiday, as indeed many people are, the right to take such a trip represents something of value in the material sense.

There remains the matter of what value should be placed on the right or occasion to make such a trip. Here the question to be answered in my opinion is not "what was the value of the holiday portion of the trip?" but rather "what was the value as a holiday trip of such a combined business and holiday trip regarded as a whole?"

The evidence of what the trip cost Oshawa and what persons not otherwise qualified paid for the opportunity to make it persuades me that its value as a combined business and holiday trip was not less than the \$633.36 which the Minister has used in making the assessments. On the other hand I think it is reasonable to assume that the business sessions were not what attracted unqualified persons, whether adults or children, and that, despite the amount they were called upon to pay to be included, the value of the combined trip as a holiday was somewhat less. Having regard to these considerations as well as to the evidence bearing on the value for that purpose, including that of Mr. Heifetz, I am of the opinion that 50% of the \$633.36 assessed by the Minister represents as nearly as it can be estimated the holiday value of the trip. On this basis in the cases of Philip and Bermack the assessable amount will be reduced to \$316.88 and in the case of Cairns the value of the benefit received will be set at \$232.68, that is to say, the difference between \$316.68 and the \$84 which he paid to Oshawa.

The appeals therefore succeed to the extent indicated and they will be allowed accordingly. The appellants are entitled to their costs.