

Restaurant Goes Mano a Mano Against the CRA

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Businesses operating restaurants faced particular challenges during COVID-19 as people were asked to stay home and we started experimenting with at-home recipes (remember the baked feta pasta Tik Tok?). When restaurants started to reopen and the number of patrons at restaurants increased, it seemed as if the tipping rate increased with it to compensate for tips lost while restaurants were closed. Another impact of COVID-19 was the further digitization of payments so that now we can pay for almost anything by tapping our credit cards. So, what happens to the electronic tips we leave at restaurants – are they subject to the Canada Pension Plan (CPP) and Employment Insurance (EI) regimes?

In *Ristorante a Mano Limited v Canada (National Revenue) (Ristorante a Mano)*, the Federal Court of Appeal (FCA) held that electronic tips are subject to CPP and EI and the restaurant (i.e., the taxpayer) had an obligation to pay employer contribution amounts of CPP and employer premium amounts of EI to the Canada Revenue Agency (CRA). In *Ristorante a Mano*, the restaurant operated under a standard tip arrangement within the restaurant industry.

- If customers paid only in cash, the server would keep the portion of cash that amounted to their tips and paid any remainder to the restaurant.
- If customers paid only by electronic means, the restaurant would use its cash on hand to pay the server their tips.
- If some customers paid in cash and other customers paid by electronic means, the servers would calculate their total tips earned (in cash and electronically) and pay any cash remaining to the restaurant. If there was a shortfall (because customers' bills were mostly paid electronically), the restaurant would use its cash on hand to pay the server for the shortfall.

The restaurant's position was that their servers' tips were not contributory salary and wages for CPP purposes or insurable earnings for EI purposes. Thus, the restaurant did not include any tips in its calculations of employer contribution amounts of CPP or employer premium amounts of EI. The CRA reassessed the taxpayer and the Tax Court of Canada upheld the Minister's reassessment. It is important to note that the CRA only reassessed the taxpayer for CPP and EI amounts in respect of electronic tips, but not cash tips.

At the FCA, it was not disputed that tips constitute income. The issue was whether the electronic tips were "paid" by the taxpayer, as this is one of the requirements to trigger the employer contribution amounts of CPP and employer premium amounts of EI. Since the electronic tips came into the taxpayer's possession (i.e., were deposited into its bank account electronically) and were then transferred to the servers, the FCA concluded that this was sufficient to determine that the electronic tips were paid by the taxpayer. Therefore,

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the FCA upheld the reassessed amounts of employer contribution amounts of CPP and employer premium amounts of EI.

The FCA may have reached the correct conclusion based on the legislation and case law, but what is the policy rationale in differentiating between tips received in cash versus tips received electronically? Now that electronic payments are becoming the standard method of payment, the *Ristorante a Mano* decision clarifies that restaurants' obligations as employers will be heightened under the CPP and EI regimes.

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