Docket: 2005-4290(IT)G

BETWEEN:

ARIZONA LEASING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4298(IT)G

DELTA PROPERTIES CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4299(IT)G

DIAMOND DEVELOPMENTS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4295(IT)G

WESTANA INVESTMENT GROUP #2 INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4294(IT)G

WESTANA INVESTMENT GROUP #3 INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4293(IT)G

WESTANA FINANCIAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4291(IT)G

CAMDEN FINANCIAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AND BETWEEN:

Docket: 2005-4297(IT)G

724190 ALBERTA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on January 20, 2011 at Edmonton, Alberta

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant:	Chad J. Brown
Counsel for the Respondent:	Carla Lamash

ORDER

Upon Motion by the Respondent for an Order:

a) Pursuant to sections 95 and 110 of the *Tax Court of Canada Rules (General Procedure)*, compelling the Appellants' officer to answer the requests posed during Examinations for Discovery for which the officer:

   i) undertook to answer; and

   ii) undertook, under advisement, to answer;

but for which the officer subsequently refused to answer, in whole or in part, specifically undertakings requests 4, 5, 6, 7, 21, 22, 23, 24, 25, 27, and 37 (as further set out in the attached Schedule "A");

b) Requiring the Appellants' officer to answer the questions asked of the Appellants' nominee at page 68, line 4 to page 70, line 11 of the transcript of his Examination for Discovery;

c) Requiring the court-ordered deadline for the completion of litigation steps, set out in the order of the Tax Court dated August 13, 2010, to be amended;

d) Further, or in the alternative, requiring the Appellants' appeals be case-managed;

e) Requiring the Appellants to pay the costs of this motion, in any event of the cause, forthwith; and

f) Such further and other relief as this Honourable Court may deem just.

And upon hearing submissions from the parties;

IT IS ORDERED THAT:

1. The Appellant companies shall provide answers to undertakings 21, 22, 23, 24, 25 and 27 to the Respondent on or before August 15, 2011.

2. The Examinations for Discovery shall be completed on or before September 30, 2011.

3. The Appellant companies shall pay costs to the Respondent in the amount of $1,000.00 on or before August 15, 2011. The costs payable

by the Appellant companies are $1,000.00 in total, not $1,000.00 paid by each Appellant company.

Signed at Vancouver, British Columbia, this 12th day of July 2011.

"L.M. Little"

Little J.

Citation: 2011 TCC 347
Date: July 12, 2011
Docket: 2005-4290(IT)G

BETWEEN:

ARIZONA LEASING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

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DELTA PROPERTIES CORPORATION,

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Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Little J.

A. FACTS

[1] The Appellant companies were incorporated under the laws of the Province of Alberta.

[2] Each of the Appellant companies was in the business of owning and leasing assets.

[3] Each of the Appellant companies was reassessed (the "Reassessments") by the Minister of National Revenue (the "Minister").

[4] Each of the Appellant companies filed Notices of Objection to the Reassessments and the Reassessments were confirmed by the Minister.

[5] Counsel for the Respondent filed Notices of Motion with respect to each Appellant company in which she sought an Order to compel each of the Appellant companies to answer undertakings which were provided at the Examinations for Discovery.

[6] Counsel for the Respondent said that there were also statements made by Counsel for the Appellant companies at the Examinations for Discovery in which he undertook to answer various questions but he later refused to answer the questions.

[7] Counsel for the Respondent also asked for costs in the Notice of Motion.

[8] In support of the Motion, Counsel for the Respondent noted that the main issue in the appeals is the basis of the Capital Cost Allowance calculations claimed by the Appellant companies. Counsel for the Respondent stated that she has not been able to determine the position of the Appellant companies on this point.

[9] Counsel for the Respondent stated that, with respect to "refused undertakings", they are listed under Schedule "A" of her written brief.

[10] Counsel for the Respondent also noted that the "refused undertakings" under Schedule "B" of her written brief are no longer in issue. She said that the Appellant companies have agreed to satisfy these undertakings.

[11] Counsel for the Respondent stated that the only undertakings that, in her opinion, must be answered are undertakings numbers 21 to 25 inclusive and undertaking number 27.

Undertaking #	**Undertaking/Response**	**Transcript**
21	Advise what facts are within each Appellants' respective knowledge that relate to or support the allegation in paragraph 27(c) of Westana's Notice of Appeal.	Pages 68-71
22	Advise which equipment the Appellants are referring to as equipment that was not specified leasing property as referenced in 27(e) in Notice of Appeal.	Pages 71-72
23	Referencing paragraph 12 of the Notice of Appeal, advise what leases hold property that the Appellant maintains is exempt property; also advise what property or what leases that the Appellant maintains constitute specified leasing property.	Page 73

24	Advise for each lease in issue for the taxation years in issue that the Appellant specify the type of property leased, the date of lease and the length of lease, the aggregate fair market value of the lease property at the time the lease was made, whether the respective appellant is claiming a specified or exempt property, and what payments were made by the lessee in the years in issue.	
25	Advise with respect to each Appellant as to what CCA they are claiming and how it is calculated.	Pages 74-75
27	Advise what is the fair market value of the property at the time any of the Appellants maintain the conversion took place.	Pages 76-77

Respondent's Position

[12] Counsel for the Respondent said that section 95 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") require that the Appellant companies' officials answer to the best of their knowledge, information and belief any proper question relevant to the matter in issue.

[13] Counsel for the Respondent said that, if the Appellant companies are found to have failed to answer proper questions, section 110 of the *Rules* provides the remedy. She stated that the *Rule* basically directs that the Appellant companies answer the undertakings, re-attend at Examinations for Discovery, as well as pay costs of the Motion.

[14] Counsel for the Respondent stated that the Appellant companies did not claim any capital cost allowance in their tax returns and, therefore, they did not provide a Capital Cost Allowance Schedule with the tax returns. However, Counsel for the Respondent stated that the Appellant companies changed their position when they filed Notices of Appeal and indicated that they wished to deduct capital cost allowance.

[15] Counsel for the Respondent said:

> In essence all these undertakings are -- that the respondent has asked for are simply an attempt to understand the facts and the position of the appellant as to what CCA they're claiming and how they arrived at it or how they'll arrive at that calculation.
>
> (Transcript, page 22, lines 19 to 24)

[16] Counsel for the Respondent said:

> Now, the appellant's response was the appellant refuses to answer the question on the grounds that it requires the appellant to undertake a legal analysis and such is a question of law. Well, the respondent's position -- this is based directly on the respondent's pleadings. The case law clearly indicates that it is proper for the appellant's officer -- or for the respondent to ask the appellant's officer for the facts underlying the allegation in the appellant's Notice of Appeal. That's referred to in the Kossow case, which is at Tab 6 of the respondent's authorities, paragraphs 50 and paragraphs 60.
>
> (Transcript, page 25, line 18 to page 26, line 5)

[17] At page 28 of the transcript, Counsel for the Respondent said:

> Also, I note that at the HSBC decision, which is at Tab 5, and that's the decision of Justice Campbell Miller, he also reiterates that point, again, makes a summary of -- to say that asking a witness for the facts underlying allegation in their pleadings is a proper question. Evidence is not, but asking for facts is.
>
> (Transcript, page 28, lines 16 to 22)

[18] And at page 31 of the transcript, Counsel for the Respondent said:

> I believe what the other -- I believe it's Justice Bowie in another one of our authorities, in the Teelucksingh case, he also makes that point, and then also in the Sandia case. You can ask for facts of an allegation because that's a factual inquiry. And that is exactly how this undertaking request was worded. It was asking for facts of a particular allegation in the appellant's Notice of Appeal. Not evidence, just a breakdown of the facts.
>
> (Transcript, page 31, lines 11 to 20)

[19] At page 34 of the transcript, Counsel for the Respondent said:

> Now, again, the respondent's position is this requires a legal analysis. Well, it's not -- it's basically a CCA claim. CCA claim is a fact. We need to know what -- it's a self-assessing system. We need to know what their CCA is.
>
> (Transcript, page 34, lines 11 to 15)

[20] At page 47 of the transcript, Counsel for the Respondent said:

> Again, my review was quite brief this morning too, but the appellant maintains that Questions 21 to 24 that there's no fact-finding. These are all questions of law. Well, no, the questions were specifically designed for facts, all of them were designed to ascertain the facts regarding their position regarding CCA.
>
> (Transcript, page 47, lines 14 to 20)

[21] At page 49 of the transcript, Counsel for the Respondent said:

> There's also the – also maintain the position that the request that we be provided with CCA calculation, the appellant's counsel has now maintained that these are litigation privileged. The CCA calculation -- giving the Minister a calculation of the CCA would be litigation privileged. Again, this wasn't maintained -- this is the first time we heard of this position. But, again, it's because -- my understanding is, and I'm sure you'll hear more from my friend on this, that because the taxpayers never actually claimed CCA initially, but now want -- and, you know, after they were reassessed and now claiming CCA, and they're saying, well, it's now part of the litigation process.
>
> (Transcript, page 49, lines 7 to 20)

[22] At page 51 of the transcript, Counsel for the Respondent said:

> The ancillary relief that we're seeking is, again, a request for an amendment, a court order timeline. The appellants were to answer -- after several extensions they were tasked to answer their undertakings by September 30th, and Examinations for Discovery were to be completed by November 30th. However, in light of the large number of undertakings that were refused, the respondent didn't proceed on -- to examine on the answer to undertakings as we wanted to wait until this motion and the disputed undertakings were dealt with.
>
> Thus, regardless of the outcome of whether these undertakings are provided all or none or some, we still need an extension on the time to examine on the undertakings that have been provided and the –

(Transcript, page 51, line 11 to page 52, line 1)

Appellants' Position

[23] Counsel for the Appellant said:

> Sir, if we take this application down to the basics, there's two questions that need to be answered, and -- on the affirmative or in the negative. And those will decide whether or not the question should be answered or not, and those questions are twofold. One is is the respondent -- or, sorry, are the appellants required to at this point in time synthesize and prepare and produce a capital costs allowance schedule taking into account all the hundreds of leases that you've heard about, applying the rules applicable to capital cost allowance and the specified leasing property rules and prepare in the context of Discovery a capital cost allowance calculation and provide it as a formal admission in the context of Discovery to the respondent? My submission on that, sir, would be no.
>
> The second question is -- and this is just sort of breaking out all the different undertaking requests -- are the appellants required to provide opinion evidence on the fair market value of each of these hundreds of leasing properties at the date that they were disposed of to the various lessee? So each property was at the end of the lease sold to the lessee for a dollar.

(Transcript, page 56, line 9 to page 57, line 7)

[24] At page 59 of the transcript, Counsel for the Appellant said:

> So that's the primary argument. And even my friend in her own submissions said that, to use her words, the economic reality that this was a financing situation, to quote her. And she's right and that's why it was reported that way.
>
> The alternative argument, sir, was capital cost allowance. The appellants say, if you don't accept our primary argument, our alternative is that we want to claim capital cost allowance on these properties if we are required to capitalize them.

(Transcript, page 59, lines 9 to 19)

[25] Counsel for the Respondent commented as follows:

> … It's an argument that is part of the pleadings, so, again, the CCA in our view is the main issue because the income is not calculated correctly so it the is main issue. We need to know the CCA.
>
> In a self-assessing system the taxpayer has to tell us what the CCA is and the basis for that. Again, he has suggested that he'll -- we can show up at trial with our CCA calculations, explain to the court how -- that's not how a trial works. You can't just show up with the calculations and say, this is what we've done. You have to provide the background and the evidence and the basis for that calculation.

(Transcript, page 73, line 24 to page 74, line 12)

Conclusion

[26] In *HSBC Bank Canada v The Queen*, 2010 D.T.C. 1159, Justice Campbell Miller reviewed the scope of examinations for discovery. Justice Campbell Miller said:

> [13] Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R.*
>
> 1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50:
>
>   a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;
>
>   b) A motions judge should not second guess the discretion of counsel by examining minutely each question of asking counsel for the party being examined to justify each question or explain its relevancy;
>
>   c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;
>
>   d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.
>
> 2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp v. Imperial Oil Ltd.*

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen* [2005 DTC 206]

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: *SmithKline Beecham Animal Health Inc. v. R.* [2001 DTC 192]

5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents: *SmithKline Beecham Animal Health Inc. v. The Queen* [2001 DTC 192]

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada Ltd., v. R.* [87 DTC 5157]

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v. R.* [2003 DTC 211]

8. Under the Rules a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. R.* [2006 DTC 3543]

9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada*.

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen* [2003 DTC 211]

[14] The following additional principles can be gleaned from some other recent Tax Court of Canada case authority:

1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": *Teelucksingh v. The Queen*

2. The court should preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant": *John Fluevog Boots & Shoes Ltd. v. The Queen*

[15] Finally in the recent decision of *4145356 Canada Limited v. The Queen* I concluded:

(a) Documents that lead to an assessment are relevant;

(b) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request;

(c) Files reviewed by a person to prepare for an examination for discovery are *prima facie* relevant; and

(d) The fact that a party has not agreed to full disclosure under section 82 of the Rules does not prevent a request for documents that may seem like a one-way full disclosure.

[27] I agree with the comments made by Justice Campbell Miller.

[28] I have considered the points made by Counsel for the Respondent and the points made by Counsel for the Appellant companies and I have concluded that the questions contained in the undertakings in issue are proper questions relevant to the matters in issue. In my opinion, the Appellant companies should be compelled to provide answers to undertakings 21 to 25 and undertaking 27 on or before August 15, 2011.

[29] The Examinations for Discovery are to be completed on or before September 30, 2011.

[30] I also order that the Appellant companies pay costs to the Respondent in the amount of $1,000.00 on or before August 15, 2011. The costs payable by the Appellant companies are $1,000.00 in total, not $1,000.00 paid by each Appellant company.

Signed at Vancouver, British Columbia, this 12th day of July 2011.

"L.M. Little"

Little J.

CITATION:	2011 TCC 347
COURT FILE NOS.:	2005-4290(IT)G; 2005-4298(IT)G; 2005-4299(IT)G; 2005-4295(IT)G; 2005-4294(IT)G; 2005-4293(IT)G; 2005-4291(IT)G; 2005-4297 (IT)G
STYLE OF CAUSE:	Arizona Leasing Ltd., Delta Properties Corporation, Diamond Developments Ltd., Westana Investment Group #2 Inc., Westana Investment Group #3 Inc., Westana Financial Corporation, Camden Financial Corporation, 724190 Alberta Ltd., and Her Majesty The Queen
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	January 20, 2011
REASONS FOR ORDER BY:	The Honourable Justice L.M. Little
DATE OF ORDER:	July 12, 2011

APPEARANCES:

Counsel for the Appellant:	Chad J. Brown
Counsel for the Respondent:	Carla Lamash

COUNSEL OF RECORD:

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