Docket: 2015-4080(IT)G

BETWEEN:

CANADIAN WESTERN TRUST COMPANY AS TRUSTEE OF THE FAREED AHAMED TFSA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on May 15, 2019 at Vancouver, British Columbia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Timothy W. Clarke
Counsel for the Respondent:	Perry Derksen Jasmine Sidhu

ORDER

The Appellant's motion pursuant to subsections 116(2) and (4) of the *Tax Court of Canada General Rules of Procedure* is dismissed. The Respondent is awarded costs in any event of the cause.

Signed at Ottawa, Canada, this 24th day of May 2019.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2019 TCC 121
Date: 20190524
Docket: 2015-4080(IT)G

BETWEEN:

CANADIAN WESTERN TRUST COMPANY AS TRUSTEE OF THE FAREED AHAMED TFSA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Pizzitelli J.

[1] The Appellant brings a motion pursuant to subsections 116(2) and (4) of the *Tax Court of Canada General Rules of Procedure* to compel the Respondent to either answer questions on written discovery or supplementary questions he advises were refused by the Respondent or to compel the Respondent to produce certain documents.

[2] The aforementioned rules read as follows:

> 116(2) Where the person being examined refuses or fails to answer a proper question or where the answer to a question is insufficient, the Court may direct the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.
>
> 116(4) Where a person refuses or fails to answer a proper question on written examination or to produce a document which that person is required to produce, the Court may, in addition to imposing the sanctions provided in subsections (2) and (3)
>
> (a) if the person is a party or a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,
>
> (b) strike out all or part of the person's evidence and

(c) give such other direction as is just.

[3] Notwithstanding the alternative relief the Court may grant pursuant to paragraphs (a) to (c) above, such relief is not requested by the Appellant in this motion, who only seeks to compel the Respondent to answer questions or provide documents.

[4] In order to give context to the motion, it should be noted the Appellant was reassessed for its 2009 to 2013 taxation years to include business income or losses and interest thereon on the basis it carried on one or more businesses within the meaning of subsection 146.2(6) of the *Income Tax Act* (the "Act"). The Minister assumed in paragraph 11(t) of the Reply that the Appellant carried on business through its trading activities in those years, set out in schedules to the Reply and earned the income or suffered the losses therein stated per respective year.

[5] Section 146.2 of the Act deals with tax free savings accounts and subsection 146.2(6) deals with the tax treatment thereof and reads as follows:

> 146.2(6)-**Trust not taxable -** No tax is payable under this Part by a trust that is governed by a TFSA on its taxable income for a taxation year, **except that,** if at any time in the taxation year, **it carries on one or more businesses or holds one or more properties that are non-qualified investments** (as defined in subsection 207.01(1)) for the trust, **tax is payable** under this Part **by the trust on the amount that would be its taxable income for the taxation year if it had no incomes or losses from sources other than those businesses and properties,** and no capital gains or capital losses other than from dispositions of those properties, and for that purpose,
>
> (a) "income" includes dividends described in section 83;
>
> (b) the trust's taxable capital gain or allowable capital loss from the disposition of property is equal to its capital gain or capital loss, as the case may be, from the disposition, and;
>
> (c)the trust's income shall be computed without reference to subsection 104(6).
>
> [bold emphasis mine]

[6] The only issue in these matters is whether the Appellant, as a trust, “carried on one or more businesses” within the meaning of the above subsection. There is no dispute that the statutory interpretation of the above clause in the said subsection is what is in issue. It is clear from the Appellant’s Amended Notice of Appeal that the Appellant is arguing that the activity of trading in qualifying investments does not constitute the carrying on of a business while the Respondent, also in its assumptions, assumes the short ownership period of the ownership of securities and the non-dividend and speculative attributes of the majority of securities traded by the Trust evidence it was carrying on a business and is caught by the exemption exception above.

[7] The Appellant concedes that this is a pure case of ordinary statutory interpretation.

[8] The Appellant lists 19 questions in its motion, which include requests for documents, into 7 categories, but in essence, 3 of his categories deal with document disclosure and 4 with seeking to compel answers so I will address the Appellant’s categories under those two main headings, but first I will review the general principles of discovery.

I. General Principles of Discovery

[9] The general principles of discovery have been established throughout the years and succinctly summarized in *MP Western et al. v. Canada*, 2017 TCC 82 at paragraphs 19 to 22, affirmed by the Federal Court of Appeal in 2019-FCA 19:

> General Principles of Discovery
>
> 19. There is considerable jurisprudence with respect to the principles applicable to an examination for discovery: *Kossow v. R.*, 2008 TCC 422 at paragraph 60; *HSBC Bank Canada v. R.*, 2010 TCC 228 at paragraph 13; *Teelucksingh v. R.*, 2010 TCC 94 at paragraph 15.
>
> 20. While these principles serve as guidelines, the analysis does not simply end with the application of a general principle. There is “no magic formula”. Whether, as here, a particular document ought to be produced at discovery is largely a fact-based inquiry that must be assessed on a case-by-case basis: *R. v. Lehigh Cement Ltd.*, 2011 FCA 120 at paragraphs 24 and 25

21. The Appellants' request for disclosure is supported by the following general principles:

a) Relevancy on discovery ought to be "broadly and liberally construed and wide latitude should be given": *Baxter v. Canada*, 2004 TCC 636 at paragraph 13.

b) Relevancy at discovery is a lower threshold than that at trial: *4145356 Canada Ltd. v. R.*, 2010 TCC 613. In fact, Rule 90 of the *Rules* expressly provides that the production of a document at discovery is not an admission of its relevance or admissibility.

c) All documents relied on or reviewed by the Minister in making his assessment must be disclosed to the taxpayer: *Amp of Canada Ltd. v. R.*, [1987] 1 C.T.C. 256 (FCTD).

d) Documents that lead to an assessment are relevant: *HSBC v. The Queen*, (*supra*) at paragraph 15.

e) 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: *HSBC* (*supra*) at paragraph 15.

f) The examining party is entitled to have 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: *Lloyd M. Teelucksingh v. The Queen*, 2010 TCC 94 at paragraph 15.

22. Whereas, the Respondent's refusal to disclose the documents is supported by the following general principles:

a) An indiscriminate request for the production of documents in the hope of uncovering helpful information or the hope of it leading to a train of inquiry is not permitted: *Harris v. The Queen*, 2001 DTC 5322 (FCA) at paragraph 45; *Fluevog* (*supra*) at paragraph 18.

b) Earlier drafts of a final position paper do not have to be disclosed. The mental process of the Minister or his officials in raising the assessments is not relevant: *Rezek* (*supra*) at paragraph 16.

c) A party is entitled to know the position of the other party with respect to an issue of law, but it is not entitled to have access to either the legal

research or the reasoning by which that position is arrived at: *Teelucksingh* (*supra*) at paragraph 15.

d) Even where relevance is established, the Court has a residual discretion to disallow the production of documents. This principle was described in *Lehigh* (*supra*) at paragraph 35 as follows:

> The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

A. Disclosure of Documents

[10] Questions 11, 12, 13 and 14 request that the Respondent provide copies of documents available in the public domain such as information bulletins, information circulars, press releases, rulings, technical interpretations or explanatory notes or Hansard or Parliamentary committee transcripts, which the Appellants say are relevant and admissible as they would help explain the object, spirit and purpose of the RRSP legislation and in particular what Parliament meant when it decided to make business income taxable in an RRSP in 1972. The Appellant suggests he diligently looked but either only found what he found or found nothing.

[11] I agree entirely with the position of the Respondent who answered it was not the Respondent's responsibility to do the Appellant's research for it. The Respondent's answer even gave the Appellant a relevant web site to seek such documents. Frankly, there is absolutely no merit to the Appellant's request and such request is improper on the grounds that there is no evidence the Minister relied on any of these documents, the Appellant can obtain any of the public documents which he requested on its own and it would place undue hardship on the Minister is if it was required to do the taxpayers research for them. The Appellant's request is also so broad and vague that it amounts to a fishing

expedition. See *Dilalla v. The Queen*, 2015-5070(IT)G affirmed by the Federal Court of Appeal in *Dilalla v. Canada*, 2018 FCA 28.

[12] As for question 39, this question was a supplementary question following initial written discovery and essentially requests the Respondent to produce to the Appellant un-redacted documents in respect of which the Appellant obtained redacted versions pursuant to the *Access to Information Act* from the Department of Finance that appear to be internal finance documents including communications amongst senior officials thereof, which the Appellant included in its list of documents. The Appellant states he is requesting these because the Respondent refuses to admit the authenticity and/or admissibility of same or whether they were made in the usual and ordinary course of business. While I will discuss the Respondent's refusal to admit authenticity and/or whether such documents were made in the usual and ordinary course of business when discussing question 36 later, regardless of such analyses, the Minister is under no automatic obligation to provide un-redacted copies. If the Appellant is not satisfied with the redactions, it may first seek its remedy from the Information Commissioner, which the Appellants in argument advised they have in fact done, then, if not satisfied, the Federal Court to consider same under the provisions for the *Access to Information Act*, not to ask the Minister of Revenue to overrule it. That is not within the jurisdiction of the Minister of Revenue nor this Court to consider, except where otherwise required at law as per the Court decisions regarding such disclosure at discovery.

[13] From the discussion of the relevant law as to the general principles of discovery referenced above in *MP Western*, the Appellant argues that relevance on discovery ought to be broadly and liberally construed and that relevance at discovery is a lower threshold than at trial, arguing that such extrinsic evidence may fairly lead to a train of inquiry that may directly or indirectly advance his case, essentially paraphrasing some of the general principles above mentioned. The Appellant mainly relies on chapter 23 in Ruth Sullivan's, *Sullivan on the Construction of Statutes*, 6th ed., Lexis Nexis Canada Inc. 2014 wherein the author, after reviewing relevant principles of discovery, suggests at paragraph 23.11 that extrinsic aids should be admissible if they meet the threshold test of relevance and reliability and suggests that the views or reports of "a government employee participating in the legislative process" should be considered as part of the legislative history. The Appellant also relies on an affidavit of Wayne Adams, a former government official which speaks to the important role CRA officials play

in recommending the enactment or changes to legislation whose recommendations are often accepted as evidenced when, in the example given with respect to 1970's RRSP legislation, such recommendations find their way in the final product. Such a person, argues the Appellant, is the "government employee participating in the legislative process" that Sullivan referred to above. For these reasons, argues the Appellant, the Minister should provide the requested un-redacted copies.

[14] The Appellant, of course, has stressed that the threshold test in discovery is a low one. Be that as it may, there is still a threshold to relevancy, and that threshold has been repeatedly and clearly enunciated by the Courts in various decisions, most recently in *Superior Plus Corp. v. Canada*, 2016 TCC 217 by Hogan J. at paragraph 34, relied upon by *MP Properties* and *Total Energy Services Inc. v. Canada*, 2019 TCC 112, amongst others:

> [34] As discussed more fully in my treatment of individual questions, I am however of the view that the Appellant's submissions conflate the Minister's awareness of Finance's deliberations in deciding how to deal with the issue raised by the Appellant's conversion and the actual deliberations undertaken by Finance. **It seems to me that the internal communications or deliberations in the halls of Finance to which the Minister was not privy could not be relevant to the Minister's mental process in auditing and assessing the taxpayer. Nor could they be relevant to ascertaining Parliamentary intent for the purposes of the GAAR analysis at trial.**

[15] Moreover, there is no dispute amongst the parties, that in the context of the section 245 General Anti-Avoidance Rule ("GAAR") cases, taxpayers have the right to be informed of the object, spirit and purpose of the provision or provisions the Minister alleges they abused. This is entirely consistent with the textual, contextual and purposive analyses dictated by *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 [see par 10] to determine, namely whether there was an abuse of a particular provision of the Act. In GAAR cases, there is no doubt from *Total Energy* above at paragraph 32, relying on *Superior Plus Corp. v. Canada*, 2015 TCC 132 that in certain circumstances extrinsic documents prepared by government officials may have to be produced as part of the process:

> 32. In tax appeals, the mental process of the Minister and her officials are normally not relevant and the Respondent may not be compelled to produce draft documents: *Rezek (supra)* paragraph 16. However, the issue in *Rezek* was not a GAAR assessment. It is my view that in a GAAR appeal, draft documents prepared in the context of a taxpayer's audit or considered by officials involved in

> or consulted during the audit and assessment of the taxpayer should be disclosed. They inform the Minister's mental process leading up to an assessment. They may also inform the Minister's understanding of the policy at issue. As Hogan J stated, these documents in the end may or may not be relevant or admissible at trial, but they can certainly lead to a train of inquiry that meets the lower threshold of disclosure in discovery: *Superior Plus No. 1* at paragraph 35.

[16] Accordingly, even if this matter was a GAAR case, or the Appellant is correct in stating the disclosure test should be the same as in a GAAR case, the above test would not be met here as there is no evidence that any of the redacted documents were prepared in the context of the audit or considered by officials involved in or consulted during the audit or assessment.

[17] Since the Appellant also raised it, this case is also different from *Canada v. Lehigh Cement Limited*, 2011 FCA 120, discussed by the Federal Court of Appeal in *MP Properties*, 2019 FCA 19, where the Court required that the disputed documents should be disclosed in un-redacted form because the Crown itself had disclosed the document in its list of documents. The matter at hand does not have the same applicable facts - the Respondent disclosed no such redacted documents that the Appellant places in issue. I do not agree that just because the said documents were disclosed under *Access to Information* that we should apply *Lehigh*. Such disclosure was not made by the Respondent in the course of this litigation.

[18] Finally, I agree with the Respondent that the statutory interpretation of the provision in dispute is a question of law, not a question of fact, to be determined by the Court so such redacted documents have very little or no relevance to that determination as confirmed by the Federal Court of Appeal in *MP Properties* above at paragraph 28.

B. Questions seeking to Compel Answers

[19] As I mentioned these types of questions seek to compel answers to 4 categories of inquiry by the Appellant so I will follow such four categories:

(1) <u>Questions dealing with a Draft Statement of Agreed Facts:</u>

[20] The Appellant states that since the Respondent has refused to sign the draft Statement of Agreed Facts, that question 31, asking him whether he disputes any facts in the draft is proper.

[21] The Appellant assumes the Minister has agreed with all the facts in the draft Statement of Facts. Until a Statement of Facts is executed by both parties, there is no Agreed Statement of Facts. As the Respondent has argued, the process of agreeing to an Agreed Statement of Fact is a matter of confidential, without prejudice, negotiation between the parties and the Minister in this case is not prepared to agree to the draft in issue as there may be prejudice to its position in so doing. Counsel for the Respondent adverted to the fact that once an Agreed Statement of Facts is signed, leverage is lost. Such decisions are a party's right and the Court has no role in interfering with those negotiations or concerns.

[22] It is also not proper to ask whether he refutes any question amongst many. A party should not be put in the position on discovery of having to recall by memory all of the facts that may have been admitted in the pleadings. Rather, the Appellant could have asked specific questions with a view to obtaining an admission and did not. The Appellant can also specify the particular fact or facts in respect of which he wishes to serve a notice to admit and that is the procedure he could also follow as an alternative found in Rules 130-131. It is noteworthy at Rule 131 that a party is only deemed to admit the facts specifically listed in the request to admit and no others. The Appellants should follow the Rules of the Court in seeking admissions of fact, not undertake a motion to compel as a first option.

(2) Questions dealing with the Policy and Object, Spirit and Purpose and "Mischief" of provisions of Act Respondent relied upon.

[23] The provisions of the Act the Respondent relies upon are contained in paragraph 13 of the Reply. He relies on sections 9, 39, 111, 146.2 and 248, subsections 146.2(6) and 146.3(3) and paragraphs 146(4)(b),146.1(2.1)(c) and 146.4(5)(b) of the *Income Tax Act*, R.S.C 1985, c.1 (5th Supp), as amended.

[24] The questions in questions 1, 2, 10 and 19 all ask the Respondent to state what assumptions of fact she relied upon in considering the policy underlying, or what the objects, spirit and purpose of most of those various provisions of the Act or what mischief does she assume in the enactment of paragraph 146(4)(b), a 1972 amendment essentially being the RRSP and earlier provision adopted into the

TFSA regime under subsection 146.2(6) that excludes from tax exemption income from the trust from carrying on business.

[25] The responses of the Respondent first point out that the Minister makes assumptions of fact, not the Respondent, and that the Minister's assumptions of fact are those as set out in paragraph 11 of its Reply. The fact the Minister does not make assumptions of fact relating to the policy, object, spirit and purpose of the legislative provisions relied upon by the Respondent or as to the mischief a contextual provision referenced by the Respondent has, does not mean the Minister is required to do so in its pleadings or on discovery. It is entirely up to the Minister to determine what factual assumptions it wishes to include in its pleadings. The effect of not including assumptions of any facts is that the onus would be on the Respondent to establish that fact at trial, not on the Appellants.

[26] In oral argument, the Appellant suggested he may have misstated the questions and is really asking the Respondent to disclose what policy it relies on in interpreting the provisions.

[27] I agree with the Respondent that asking the Minister to set out her assumptions on the policy or spirit, object or purpose of a provision is to invite legal argument. The statutory interpretation of these sections is a question of law, and not a matter of fact and is for the Court to ultimately determine at trial as referenced in *MP Properties* by Gleason J. at paragraph 28 above referred to. The Appellant is entitled to know the Respondent's position on the law, but not its evidence it relies on nor its legal argument. It is clear from other questions the Appellant asked on discovery and from the reply itself, that the Respondent's position on the interpretation of subsection 146.2(6) is that the carrying on one or more businesses includes whether the trading involved qualifying or non-qualifying investments.

[28] I also agree that the Appellant's reliance of *Birchcliffe Energy Ltd. v The Queen*, (2012) [2013] 3 CTC 2169 is misplaced. *Birchcliffe* involved the GAAR, and it is trite law that the textual, contextual and purposive approach of *Canada Trustco* is different in a GAAR case where the taxpayer is entitled to be informed about the spirit, object and purpose of the provision which the Minister alleges has been abused. *Birchcliffe* stands for the proposition that the Respondent should disclose the policy he alleges is abused. In non-GAAR cases of pure statutory interpretation, it is only to find out what the meaning of the provision itself is. A

simple question of statutory interpretation is a question of law and not fact as indicated and as C. Miller J. stated in *Birchcliffe*, “it does not follow that evidence on the policy will be admissible at trial as matters of law are for the court to determine”.

[29] Accordingly, these questions are improper as they invite legal argument and are contrary to the general principle that a party is not entitled to know the evidence or legal argument of the other in advance as above.

(3) Questions dealing with Department of Finance Policy on TFSA’s

[30] Questions 24 - 30 related contextually to a heavily redacted table created by an employee of the Department of Finance before the TFSA legislation was enacted that suggests only “unrelated business income is taxable in the hands of a TFSA or an RRSP as a matter of policy”, obviously referring to Subsection 146.2(6) and paragraph 146(4)(b) respectively. The Appellant from its Notice of Amended Appeal clearly takes the position that 146.2(6)’s “carrying on one or more businesses” should be interpreted in a narrower context than the Respondent so that it means only unrelated businesses.

[31] The aforesaid questions ask the Respondent to confirm that limited interpretation as a policy or relate to explaining the policy and whether it existed, whether it was changed and to produce documents corroborating the change in policy.

[32] The Respondent responded that the redacted table was obtained by the Appellant under the *Access to Information Act* and that it is an internal working document of an employee of the Department of Finance and Department of Finance working papers, communications or deliberations are not relevant to the statutory interpretation issue in this appeal. Moreover, the Respondent answered that these are questions respecting the policy or legislative rationale of those sections and concern questions of law, which of course invite legal argument.

[33] The other concern of course is that the Appellant has premised its argument on the fact the table only seems to refer to unrelated business income, but if it is heavily redacted, such presumption is at best suspect.

[34] For the same reasons expressed on the questions in 2 above, the questions invite legal argument or a disclosure of the Respondent's evidence in support of same and are improper. For the same reasons discussed in heading A above dealing with question 39, the request to disclose an internal working paper of a finance employee is improper as such working paper is irrelevant to the determination of a question of law.

(4) Questions dealing with whether Appellant's documents obtained as redacted copies are made in usual and ordinary course of business?

[35] The Appellant asks, pursuant to questions 36 and 38 that since the Appellant refused to admit the authenticity of the Appellant's documents 2 - 6, being the redacted copies the Appellant obtained under his access to information inquiry or of the Appellant's documents 9 - 11, he asks in relation to documents 2 - 6 and 11 whether the Respondent admits the said documents were made in the usual and ordinary course of business.

[36] It should be noted that the Respondent initially refused to admit the admissibility of documents 2 - 6 on the basis that the relevancy could be determined by the judge at trial and so it was an improper question at discovery and further that the documents concern internal finance documents, communications or deliberations and so were irrelevant. Likewise the Respondent initially refused to admit their authenticity. Again, the Respondent was not prepared to do so partially on the basis the Appellant could seek that admission under a Request to Admit, the proper procedure with respect thereto.

[37] Following the Respondent's refusals regarding authenticity and admissibility, the Appellant in supplementary questions then sought to seek an admission that such documents were created in the usual and ordinary course of business in order to establish grounds for their admissibility at trial. The Respondent takes the position the new questions are improper as not arising from the previous response but instead as constituting a new line of inquiry and essentially that if the Appellant's purpose is to argue that under the *Canada Evidence Act* they are business records and so admissible, they may do so before the judge but its position is still that they are irrelevant.

[38] While I agree with the Respondent's position, I would also find the questions improper on the basis the Appellant is seeking to admit earlier versions

of policy statements or statements intent for the purpose of establishing policy other than the Minister's final version which are not relevant as per my earlier reasoning. The approach taken by the Appellant appears to be a circuitous way to get around the established law in this regard.

[39] For the reasons given above, the Appellant's motion is dismissed in its entirety. There was little or no merit to any of the arguments made by the Appellant and it is improper to the point of abusive to expect the Respondent to undertake the Appellant's research for it. Accordingly, the Respondent is awarded costs in any event of the cause.

Signed at Ottawa, Canada, this 24th day of May 2019.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2019 TCC 121
COURT FILE NO.:	2015-4080(IT)G
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APPEARANCES:	
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