Docket: 2011-3077(IT)G

BETWEEN:

ANNELORE ARSTALL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 25, 2014, at Vancouver, British Columbia

Before: The Honourable Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Alistair Campbell
Counsel for the Respondent:	Raj Grewal

ORDER

IN ACCORDANCE with the reasons for order delivered orally during a conference call held on this date, the Respondent's motion to amend the Reply is dismissed save and except for the proposed amendment to subparagraph 24(cc). Costs on the motion are awarded to the Appellant on a solicitor and client scale to be payable within thirty (30) days of the Respondent's receipt of the bill of costs of the Appellant's counsel.

Signed at Ottawa, Ontario, this 20th day of May, 2014.

"R.S. Bocock"

Bocock J.

Citation:2014TCC186
Date:20140604
Docket: 2011-3077(IT)G

BETWEEN:

ANNELORE ARSTALL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Delivered orally by conference call on May 20, 2014, in Ottawa, Ontario.)

Bocock J.

[1] These are oral reasons for an Order delivered this May 20, 2014, from written notes arising from the hearing of a motion brought in appeal 2011-3077(IT)G between *Annelore Arstall and Her Majesty The Queen* which motion was heard at Vancouver, British Columbia on the 25th day of April, 2014.

[2] The Respondent brings this contested motion to further amend the Reply to add additional assumptions of fact, concordant additional statutory provisions and grounds to be relied upon. There is one housekeeping amendment to the Reply which is unopposed and accordingly, will be reflected separately in the Order when issued. The factual basis for the requested amendments is a handwritten auditor's report (the "Auditor's Report") purportedly emanating from an audit conducted for the taxation years 1985 through 1987 and recently discovered in September 2012.

[3] The Court uses the phrase "recently discovered in September 2012" both advisedly and relatively. While it is improbable this is the longest running reassessment in Canadian tax history it is nonetheless well aged; the mists of time accompanying its age surround it and breathe life to the Appellant's opposition to this request to amend the Reply. Not surprisingly then, the factual history and documentary record to the reassessment of this taxpayer is lengthy, complicated and frequently murky. The appeal challenges a section 160 non-arms length transferee assessment and also challenges the underlying assessment of the

transferor spouse (the "Spouse"). The year in question concerns the Spouse's 1987 taxation year (the "Appeal Year") arising from a reassessment of the Spouse in 2004 (the "2004 Reassessment").

[4] Initial pleadings were exchanged in late 2011. Further amended pleadings were exchanged in the early part of 2012 at which time the Appellant expanded her challenge of the Spouse's 2004 Reassessment. During a four day period in late September of 2012, 25 years following the relevant taxation year the pace of litigation accelerated dramatically. In the run up to examinations for discovery, a representative of the Respondent, one Mr. Folstad, conducted a search for the Auditor's Report after he was alerted by a reference in certain related documents.

[5] As of September 24, 2012, no Auditor's Report was found as reflected in an email confirming non-existence. Two days later, during discovery preparation with Respondent's counsel, Mr. Folstad had discovered the "Auditor's Report". At discoveries, the Auditor's Report was produced, identified by Mr. Folstad and became an exhibit to the examinations for discovery as witnesses the transcript. Discoveries were adjourned by the Appellant pending compliance with undertakings. The pace slowed again somewhat. Two related appeals were ultimately settled. Moreover, Respondent's counsel advised in June 2013 that the Respondent intended to amend its reply in the present appeal by relying upon information contained in the Auditor's Report. By November 2013, settlement discussions were abandoned, the motion was served in January of 2014 and the matter now sits in the present time and is the subject of this motion.

[6] In support of the motion, the Respondent filed one substantive factual affidavit of a legal secretary employed at Respondent counsel's office (the "Secretary's Affidavit"). The Secretary's Affidavit references all of the above–noted events and appends the purported email, discovery transcript of Mr. Folstad, other correspondence and the hand written Auditor's Report. Generically, the affiant asserts the boiler plate preamble of personal knowledge, or where stated, based upon information and belief.

[7] Respondent's Counsel asserts that the request for the amendments to the Reply, given the unavoidable, recent discovery of the Auditor's Report, is required to appropriately reflect the Minister's impetus, theory and basis for the reassessment process undertaken with respect to the Spouse's tax liability. The amendments to the Reply will more fully establish, reveal and expand the case which the Appellant must meet: the authority used is *Her Majesty the Queen v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, at paragraph 29. Further, no prejudice

exists regarding delay, given the already prolonged history and the Appellant's concession on that point. Further, the amendments *per se* qualify because the case is not beyond doubt, their inclusion assists in placing the real issues in dispute before the Court and there is no injustice or prejudice in their inclusion which cannot otherwise be compensated for in costs: reference is made to *Camoplast Inc. v. Soucy International Inc.*, 27 CPR (4th) 411, at paragraphs 15, 16 and 17.

[8] In opposing the motion, Appellant's counsel agrees there is no prejudice, but the concessions end there. In the first line of attack, the Appellant challenges the amendments as improper assumptions of fact because they are either conclusions of law or commingled and uncoupled statements of mixed fact and law; generally outlined and precluded as factual assumption under the authority of *Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122, at paragraphs 92 and 93 ("*CIBC*"). These impugned subparagraphs in the proposed amended Reply contain the following offending phrases:

> […] paragraph 24(ee) reads as follows:
>
> at all material times, the Spouse acted in concert with Pioneer Metals and did not deal at arms length with Pioneer Metals;
>
> […]
>
> Proposed paragraph 24(hh) reads as follows:
>
> the Spouse held shares of Pioneer Metals and shares of "Maverick" as inventory and traded them as a business on account of income;

[9] In response to this assertion, Respondent's counsel concedes that subparagraphs (kk) and (mm) are conclusions of law. They shall be struck. With respect to the phrases "acting in concert", "did not deal at arms-length", "inventory" and as a "business on account of income," Respondent's counsel says the utilization of these legal terms shorten pleadings and preclude expansive pleadings of fact which unduly lengthen and complicate pleadings. While this may be true, the Federal Court of Appeal in *CIBC* thinks otherwise. The Court commends paragraph 93 to the Respondent. Similarly to the Federal Court of Appeal, this Court thinks it is not a difficult task to expand the elemental factual underpinnings of these terms of art or convenience and thereby lay bare the primary factual assumptions relied upon. It may lengthen the paragraph slightly, but the enhancements of clarity, simplicity and understanding would outweigh the increase in verbiage. It will also reveal whether elemental factual assumptions

existed for such conclusive and commingled pronouncements, also in compliance with paragraph 93 of *CIBC*. The present paragraphs are therefore not to form part of the amended Reply as they presently stand.

[10] With respect to the second assault of the proposed amendments to the Reply, the Appellant takes a more generic approach to the quality and substance of the evidence proffered to show why the Reply was not correctly pleaded initially and how the proposed amendments will not correct the omission: the test enunciated in *Labow v. Her Majesty the Queen*, 2008 TCC 511. The Appellant argues that the numerous representations that no further documents existed prior to the late discovery of the Auditor's Report require the Respondent to provide evidence showing why it was missed twice. Quite apart from this two hump hurdle, the evidence itself is insufficient to surmount even one: namely, there is no affiant with personal knowledge; no authenticating testimony of the Auditor's Report; the liberal use of hearsay when better and compliant evidence was available from others; the use of discovery evidence on a motion; and, the deficiency of the affiant availing herself of confirming statements. Lastly, the Appellant argues there is no evidence proving that the information contained in the Auditor's Report is connected to the assumptions now sought since neither the affiant nor the referred to Mr. Folstad are factually indicated to have been involved in the audit or reassessment or, more logically, to have reviewed and referenced the Auditor's Report regarding the tax liability of the Spouse in the context of the amendments sought.

[11] The Respondent in reply states that hearsay evidence is permitted on motions and the Secretary's Affidavit is admissible, reliable and uncontroverted. Further, if facts deposed within the affidavit are challenged, cross-examination should have occurred on those points. The contents of the Auditor's Report and Mr. Folstad's discovery of same were more properly dealt with at examinations for discovery and were not pursued. The Auditor's Report was occasioned by the Spouse's own request. Moreover, the opposition to the amendments is a strategic litigation ploy of the Appellant, who in reality will be helped by the expansion of the factual assumptions in the Reply.

[12] The Court is prepared to accept that the passage of time affords some leniency to the Respondent with respect to the following:

a) the proposed amendments to the Reply, on the basis of the Auditor's Report, were brought as soon as circumstances permitted because previous Replies pre-dated the discovery of the Auditor's Report;

b) the affidavit, while far from optimal, is sufficient to establish the circumstances surrounding the discovery of the Auditor's Report, its likely authenticity (to be further proved at trial) and the justification for the previous representations regarding no further documentation; and,

c) the probable existence of the Auditor's Report at the time of the spouse's underlying reassessment which is the subject of the appeal.

Accordingly, the Court is prepared to make such related findings of fact.

[13] However, the test for allowing an amendment to a pleading well after the close of pleadings and examinations for discovery is a different matter than a motion to strike certain paragraphs in pleadings. To gain the Court's discretion to add the paragraphs, the Respondent must not only establish the *prima facie* factual existence of the document, the reasons for its late revelation and its likely authenticity, but the Respondent must link these findings, by evidence given by someone, as a justification for the amendment: reference is made to *Goldman Holdings Ltd. v. Her Majesty the Queen*, 2011 TCC 250.

[14] The Court knows that the Respondent's discovery of the Auditor's Report causes a yearning to amend the Reply. This is the reason for the motion. However, the Court must ask itself: where is the evidence before the Court that the Auditor's Report contains facts, assertions or analysis which demonstrates that these proposed amendments will remedy the previous error or deficiency? The Secretary's Affidavit, which is the only evidence before the Court (which has been given its highest and best value as evidence) contains not one reference, general, specific, hearsay or speculative, as to why the contents of the Auditor's Report constitute the factual basis for the fresh assumptions now sought. The same is true of Mr. Folstad's transcript from examinations for discovery referenced in the Secretary's Affidavit. As well, there is no other document referenced, nor more importantly facts within such a document, which justify the amendments on the basis that same will remedy the deficiency or omission.

[15] More is required than simply proving a dated document was recently discovered. The Court cannot assume the nexus between the Auditor's Report and the sought amendments in the absence of some or even any factual statement that it contains certain statements which were not previously in the Respondent's file when drafting the previous Replies, that is: what were the additional historical facts which underpinned the relevant reassessment and are now revealed by the

discovery? The mere existence of the Auditor's Report does not do this. The assumptions, facts and details contained within it may. Someone needs to tell to the Court under oath the brief nature of those facts, briefly why they differ from or enhance those in the present Reply and why they will enhance the Reply to accurately reflect the historical underpinnings of the assessment. Counsel could then argue the amendments connected to the Auditor's Report will remedy the deficiency. In the absence of evidence of such a linkage, how can the Court find that the Auditor's Report contains facts which assist in the "determination of the real questions in controversy between the parties" (*Camoplast* at paragraph 16)?

[16] Given the leniency the Court has shown in regard to the Secretary's Affidavit, even a few, cursory factual statements to that effect may have sufficed. In the absence of any, there is no evidence that the discovery of the Auditor's Report *per se* allowed the revelation of additional facts and assumptions justifying the proposed amendments to the Reply. The Court cannot make that linkage in the absence of such evidence and related representations.

[17] Therefore the motion to amend the Reply at this post discovery stage of the appeal is dismissed *pro tem* save for the conceded housekeeping amendment to correct a typographical error. There is no evidence before the Court that the lately discovered Auditor's Report contains assumptions or facts connected to the 2004 Reassessment and that their additions will correct or remedy the original deficiencies or omissions in the Reply. The Reply, if so amended, may become much more fulsomely reflective and consistent with the Auditor's Report. At present, there is simply no evidence hinting or suggesting this would be the case. As such, this hurdle has not been surmounted.

[18] Since this motion is dismissed because of a deficiency or absence of evidence, logically, it is arguably without prejudice to the Respondent bringing the motion again with the fresh evidence missing from this motion. That right is not to be decided at this time.

[19] As to costs, the Court notes the following factors laid down in the guiding principles under *Rule* 147 which cause the Court to award costs to the Appellant (the responding party on this motion) beyond the Tariff:

a) the Appellant was successful on all grounds;

b) this motion is material to the case the Appellant must meet and therefore the amounts in issue are for the Appellant personally significant;

c) the volume of work appears to relatively routine, along with the complexity of the issues; and,

d) with respect to conduct, a number of the pleadings were inappropriate statements of law and should have been struck by consent of the Respondent prior to the motion. While the Court is somewhat sympathetic of the time pressures of modern law practice and information retrieval at the CRA, one is left with the feeling that greater lead time in the searching of files, preparation by counsel and clients in anticipation of discoveries (which after all led to the very late discovery of the Auditor's Report) and the preparation, review and analysis of motion materials prior to service and filing would have prevented these contested proceedings or at least their extent and unsatisfactory result.

[20] All considered, the Respondent shall pay costs to the Appellant on the basis of full disbursements and the Appellant's solicitor and client costs within 30 days of receipt of Appellant's counsel's Bill of Costs. The Court notes that even had the Respondent fully won today's motion, a compelling argument may have been marshalled by the Appellant that costs should not have been awarded to the Respondent or even awarded to the Appellant, in any event, given the nature and facts surrounding the motion in the first instance. On that basis, as well, the award of costs is justifiable.

Signed at Ottawa, Ontario, this 4th day of June 2014.

"R.S. Bocock"

Bocock J.

CITATION:	2014TCC186
COURT FILE NO.:	2011-3077(IT)G
STYLE OF CAUSE:	ANNELORE ARSTALL AND
PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR ORDER BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF ORDER:	June 4, 2014

APPEARANCES:

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Counsel for the Respondent:	Raj Grewal

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