Citation: 2016 TCC 76
Date: 20160329
Docket: 2015-3020(IT)G

BETWEEN:

DAVID CUDDY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER AND REASONS FOR ORDER

Jorré J.

[1] The parties agree on part of the timetable for this litigation. They disagree on whether the order should provide for follow-up questions, if any, resulting from the answers to the undertakings.[1] The dispute is premised on the follow-up questions being conducted by resuming the oral examination for discovery.

[2] The Appellant says that providing for such a step amounts to authorizing a second discovery, something that is only permitted with leave of the Court pursuant to rule 93(1) of the *Tax Court of Canada Rules (General Procedure)*. He is unwilling to consent to additional discovery.

[3] The Respondent says that this proposed step does not amount to a second discovery because a party is limited to proper follow-up questions arising from discovery undertakings.[2]

[4] I agree with the main point made by both parties' submissions; they are not inconsistent, however. They address related, but different, matters.

[5] The Appellant is correct that the rule requires leave for a second discovery.

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[1] The parties have agreed that I should deal with this on the basis of written submissions.
[2] In support, the Respondent cites *Senechal v. Muskoka (Municipality)*, [2005] O.J. No. 1406 (QL).

[6] The Respondent is also correct that proper follow-up questions to undertakings do not amount to a second discovery. Rule 95(2) deals with undertakings. It states:

> (2) Prior to the examination for discovery, the person to be examined shall make all reasonable inquiries regarding the matters in issue from all of the party's officers, servants, agents and employees, past or present, either within or outside Canada and, if necessary, the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned.

[7] The second part of rule 95(2) clearly provides that, after a person has informed himself, the discovery may be resumed thereby placing the examining party back in the position that the examining party would have been in had the answer been available immediately without the need for the examinee to undertake to find the answer.[3]

[8] Thus, there is a general right to ask follow-up questions resulting from answers to undertakings. However, that right in itself does not open the door to additional discovery beyond follow-up questions. It is also worth bearing in mind that discovery is always subject to the supervision of the Court.[4]

[9] Consequently, it is reasonable for a timetable to provide not only for a time to complete discovery,[5] but also for a time to answer undertakings and follow-up questions.

[10] I would add that I cannot see why a party should, in the normal course, be required to make an application in order to complete the discovery to which the party is entitled. There may at times be special circumstances but, in the absence of special circumstances, one should not introduce a step requiring an interlocutory application as a matter of course where someone wishes to complete discovery as permitted by rule 95(2).

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[3] This is the point made by Master MacLeod in paragraph 5 of *Senechal*. See also paragraph 12 of the decision of Justice Bowie in *Labow v. The Queen*, 2008 TCC 511; in that case this Court held that the party wishing to resume the discovery sought to ask questions going beyond proper follow-up questions.

[4] As is clearly expressed in paragraph 6 and following of *Senechal*.

[5] Subject to the undertakings or any questions taken under advisement.

[11] If, at a resumed hearing, questions are asked that go beyond what the examinee believes to be proper follow-up questions, then the examinee can refuse to answer and the examining party may apply to the Court for an order compelling the examinee to answer.

[12] The Respondent expressed the view that because rule 92 says the examining party can conduct an oral examination or a written examination but that party cannot do both unless given leave by the Court, the examining party must ask follow-up questions by resuming the oral examination for discovery. While that is correct, I do not read the rules as preventing the parties from agreeing not only that the undertakings will be answered in writing but also that follow-up questions, if any, will also be dealt with in writing.[6]

[13] Of course, if the parties agree on both written responses to the undertakings and written follow-up questions and answers, then the examinee can respond to proper follow-up questions and refuse to respond to questions the examinee believes to go beyond proper follow-up. It would then be up to the party who is examining to bring a motion to compel.

[14] For these reasons, this order will deal with follow-up questions in the timetable.

[15] The language used in the submissions indicates that both parties are assuming undertakings will be answered in writing. In his submissions, while the Appellant takes the position that leave of the Court would be required for follow-up questions if done by way of oral examination, he also takes the position that the appropriate way to proceed is by follow-up questions in writing without there being a motion for further discovery. Given that the Respondent's position was that having opted for oral discovery she was obliged to do follow-up questions orally and would do so "unless leave of the Court is granted to do otherwise", it is clear it that the Respondent is also willing to have written follow-up questions. As a result, it is clear that the parties are prepared to proceed by written follow-up questions and that will be reflected in my order.

[6] The rule says that the examining party "is not entitled" to do both without leave; that is not a bar to parties agreeing to such an arrangement.

[16] Accordingly, the order of 3 March 2016 is replaced by the following order:

1. Each party shall prepare a list of documents pursuant to section 81 of the *Tax Court of Canada Rules (General Procedure)* and shall file and serve the list on the opposing party no later than 31 March 2016.

2. The examinations for discovery shall be completed no later than 27 May 2016.

3. Undertakings given at the examinations for discovery shall be satisfied no later than 30 June 2016.

4. Follow-up questions arising from the answers to the undertakings, if any, shall be delivered no later than 29 July 2016.

5. Answers to the follow-up questions shall be delivered no later than 31 August 2016.

6. The parties shall communicate with the hearings coordinator in writing, no later than 14 October 2016, to advise the Court whether the case will settle, whether a settlement conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* by said date.

[17] Given that the written submissions only dealt, in a limited way, with dates after 30 June 2016, I have somewhat arbitrarily added in more time for subsequent steps. Should any of the dates subsequent to 30 June 2016 be problematic for either party, I invite them to make submissions in writing or, even better, a joint submission and I will reconsider those dates.

Signed at Ottawa, Ontario, this 29th day of March 2016.

"Gaston Jorré"

Jorré J.

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COURT FILE NO.:	2015-3020(IT)G
STYLE OF CAUSE:	DAVID CUDDY v. THE QUEEN
REASONS FOR ORDER BY:	The Honourable Justice Gaston Jorré
DATE OF ORDER:	29 March 2016
DATES OF SUBMISSIONS BY LETTER:	19 and 29 February 2016, 1 and 14 March 2016

SIGNATORIES OF SUBMISSIONS:

Counsel for the Appellant:	Natalie Worsfold
Counsel for the Respondent:	Rita Araujo

COUNSEL OF RECORD:

For the Appellant:	Peter Aprile
Firm:	Counter Tax Lawyers Toronto, Ontario
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada