Docket: 2004-1415(IT)G

BETWEEN:

HUGH STANFIELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 7, 2007, at Vancouver, British Columbia.

Before: The Honourable Gerald J. Rip, Associate Chief Justice

Appearances:

Counsel for the Appellant:	Edwin G. Kroft and Elizabeth Junkin
Counsel for the Respondent:	Ron Wilhelm

ORDERS

Whereas the appellant applied for an Order pursuant to paragraphs 53(*a*) and (*c*) of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*"),

(a) to strike out or expunge all or part of paragraphs 14(b), (c), (d), (f), (g), (h), (j), (l), (u), (v), (z), (aa), (bb), (cc), (dd), (ee), (ff), (gg), (hh), (ii), (jj), (mm), (xx), (ccc), (ddd), (eee) and (iii) (the "Subject Paragraphs") of the reply to the notice of appeal; and

(b) to award costs, payable forthwith.

And whereas the appellant also applied for an Order pursuant to paragraph 10(*a*) of the *Rules*,

(a) directing Mr. Larry Kuhn ("Mr. Kuhn") to reattend the examination for discovery, at the respondent's expense, and answer the questions listed in Schedule "A" to this Order and to answer all proper question arising from the answers;

(b) directing Mr. Kuhn to produce the documents listed in Schedule "B" to this Order, the production of which was requested by the appellant and refused by the Respondent;

(c) directing Mr. Kuhn to answer all proper questions arising from the documents directed to be produced in response to paragraph (b) of this Notice of Motion; and

(d) to award costs, payable forthwith.

And whereas the respondent applied for an Order pursuant to paragraph 110(*a*) of the *Rules*,

(a) directing the appellant at his expense to reattend the examination for discovery at the appellant's expense and to answer all questions which either the appellant refused to answer or was instructed not to answer at the examination for discovery of the appellant on March 7, 8 and 9, 2006; and,

(b) directing costs be awarded to the respondent, payable forthwith.

It is ordered that:

A. The appellant's motion to strike is allowed and:

i) the following paragraphs of the respondent's reply to the notice of appeal are struck: subparagraphs 14(b), (c), (d) and (f);

ii) portions of the following subparagraphs are struck:

in subparagraph 14(h), the words "and a Permanent Loss Scheme in 1999" and "connected with Global Prosperity";

in subparagraph 14(j), the words "was claimed on the basis of the Appellant entering into the Permanent Loss Scheme";

in subparagraph 14(l), the words "is associated with Global Prosperity, and" and "the Permanent Loss Scheme and various other schemes offered by Global Prosperity";

in subparagraph 14(z), the words "Global Prosperity promoted"; and

in subparagraph 14(aa), the words "associated with Global Prosperity and was also" and "the Permanent Loss Scheme and various other schemes offered by Global Prosperity".

iii) the respondent may amend her reply to the notice of appeal within 60 days of the date of this order provided she does not report facts alleged in paragraph 15 of her reply to the notice of appeal;

iv) the appellant shall be entitled to his costs of this motion, including costs thrown away.

B. i) Mr. Larry Kuhn shall reattend at his expense his examination for discovery to produce documents and to answer questions relating to the production of these documents referred to in Schedules "A" and "B" to this Order at such time and place as the parties may agree or as the Court, at the request of either party, may order;

ii) costs of the respondent's motion to reattend shall be in the cause.

C. i) Mr. Hugh Stanfield shall reattend at his expense his examination for discovery and answer questions described in Appendix 2, attached, provided such questions shall be limited to events prior to 2000, at such time and place as the parties may agree or as the Court, at the request of either party, may order;

ii) the appellant is entitled to his costs on this motion.

Signed at Ottawa, Canada, this 10th day of May 2007.

"Gerald J. Rip"

Rip A.C.J.

Citation: 2007TCC480
Date: 20070510
Docket: 2004-1415(IT)G

BETWEEN:

HUGH STANFIELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip, A.C.J.

[1] The appellant brings two motions: the first seeks an order pursuant to paragraphs 53(*a*) and (*c*) of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*"), to strike or expunge all or part of the respondent's reply to the notice of appeal ("Motion to Strike"); and the second seeks an order compelling the respondent's nominee to reattend an examination for discovery, to produce documents, to answer questions relating to the production of these documents ("Motion to Reattend").

[2] The respondent also seeks a motion for an order to compel the appellant to reattend the examination for discovery ("Respondent's Motion to Reatttend").

[3] The appellant's appeal is from a reassessment for 1998, notice of which is dated July 17, 2002. On August 3, 2002, the appellant served a notice of objection to the reassessment on the Minister of National Revenue ("Minister"). The issues in appeal include whether certain transactions were shams, if a business was carried on by the appellant, if transactions were a "tax shelter" within the meaning of subsection 237.1 of the *Income Tax Act* ("*Act*") and if the appellant has deducted a purported loss in 1998 in accordance with the provisions of the *Act*.

Appellant's Motion to Strike

[4] The appellant's motion is to strike out or expunge all or part of the paragraphs 14(b), (c), (d), (f), (g), (h), (j), (l), (u), (v), (z), (aa), (bb), (cc), (dd), (ee), (ff), (ii), (jj), (mm), (xx), (ccc), (ddd), (eee) and (iii) (the "Subject Paragraphs") of the reply.[1]

The grounds for the motion are as follows:

1. The Subject Paragraphs are prefaced with the phrase "in so reassessing the appellant, the Minister relied on the following assumptions";

2. The Audit Division of the Canada Revenue Agency ("CRA") did not assume all or part of the Subject Paragraphs in issuing the Notice of Reassessment; dated July 17, 2002 to the appellant with respect to his 1998 taxation year;

3. The Appeals Division of the CRA did not review or analyse the merits of the contents of the Appellant's Notice of Objection prior to the date (April 7, 2004) on which the appellant filed the Notice of Appeal to this Honourable Court; and

4. In reassessing the appellant for the 1998 taxation year, the Minister did not assume all or part of the Subject Paragraphs.

[5] Paragraphs 53(1)(*a*) and (*c*) of the *Rules* read:

Striking out a Pleading or other Document	*Radiation d'un acte de procédure ou d'un autre document*
53. The Court may strike out or expunge all or part of a pleading or other documents, with or without leave to amend, on the ground that the pleading or other document,	53. La Cour peut radier un acte de procédure ou un autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document:
(*a*) may prejudice or delay the fair hearing of the action,	*a*) peut compromettre ou retarder l'instruction équitable de l'appel;
(*b*) is scandalous, frivolous or vexatious, or	*b*) est sandaleux, frivole ou vexatoire;
(*c*) is an abuse of the process of the Court.	*c*) constitue un recours abusif à la Cour.

[1] See para. 10, *infra.*

[6] Counsel for the appellant's primary argument is that the Subject Paragraphs were not assumed before or at the time of reassessment, as required by paragraph 49(1)(*d*) of the *Rules*. Therefore, they are not material facts and are an abuse of process.

[7] Appellant's counsel also suggested that evidence brought by way of the transcripts from the examination for discovery indicates that certain of the Subject Paragraphs are not relevant to the issue in appeal, as they pertain to third parties and do not relate directly to the appellant or his reassessment. As a result, counsel for the appellant maintains these Subject Paragraphs should be struck because it would be prejudicial to the appellant to have to disprove these assumptions, pursuant to paragraph 53(1)(*a*) of the *Rules*.

1. Subject Paragraphs were not assumed at the time of reassessment

[8] The appellant bears the onus of proving that the Minister did not make the assumption at the time of reassessment.[2] Additionally, the onus is high on the party seeking to strike pleadings.[3]

[9] *Rule* 49(1)(*d*) states:

49.(1) Subject to subsection (1.1), every reply shall state (*d*) the findings or assumptions of fact made by the Minister when making the assessment,	49.(1) Sous réserve du paragraphe (1.1), la réponse indique : *d*) les conclusions ou les hypothèses de fait sur lesquelles le ministre s'est fondé en établissant sa cotisation;

[10] The Subject Paragraphs follow:

> 14. In so reassessing the Appellant, the Minister relied on the following assumptions:
>
> . . .
>
> **Global Prosperity**

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2 *Johnston v. M.N.R.*, [1948] S.C.R. 486, [1948] C.T.C. 195, 3 DTC 1182 (SCC); *Anderson Logging Co. v. R.*, [1925] S.C.R. 45, [1925] 2 D.L.R. 143 at para. 9; *Canada v. Loewen*, 2004 FCA 146.

3 *Robertson v. Canada*, [2006] T.C.J. No. 93 (QL), 2006 TCC 147 at para. 13, 16-18; *Hickman Motors Limited v. The Queen*, 97 DTC 5363 at p. 5376.

b) Global Prosperity is one of the names given by a group of individuals to a program which promoted taxpayers' "opting out" of the Canadian and American tax systems by means of:

i) getting refunds for taxes paid in the current and past taxation years and obtaining access to registered retirement funds on a tax free basis;

ii) removing assets from the jurisdiction such that tax cannot be collected; and

iii) moving assets to low or no tax jurisdictions;

c) Global Prosperity offered a number of schemes in order to generate losses and refunds, including the following:

i) the generating of a tax loss sufficient to wipe out an individual's income for the current, plus the prior three years, but purportedly entering into foreign currency futures or forward contracts through a United Kingdom broker called Union Cal Limited ("Unioncal") and then purporting to enter into offsetting currency futures or forward contracts, with the individual claiming the loss leg in 1998 and the gain leg in 1999; and

ii) the generating of a tax loss sufficient to wipe out the 1999 gain leg by purportedly carrying on trading through another non-resident broker such as LFG or LLC (the "Permanent Loss Scheme");

d) in 1998, the Appellant and numerous other individuals entered into the scheme outlined in paragraph 14(c) by way of their purported participation in one or more joint ventures through Unioncal (the "Union Joint Ventures");

. . .

f) the tax refund so obtained was in some cases used by individuals to access the Permanent Loss Scheme, as cash was needed to pay the promoter associated with Global Prosperity to access the various Permanent Loss Schemes, commissions to the accommodating non-resident broker, such as LFG or LLC, and for capital for the purported trades in 1999;

g) the cash needed by an individual wanting to enter into a Permanent Loss Scheme was 13% of the loss they wanted to generate;

h) the Appellant purportedly entered into currency futures or forward contracts with Unioncal in 1998 and a Permanent Loss Scheme in 1999, pursuant to the promotion by various individuals connected with Global Prosperity, including Gordon Feil ("Feil");

. . .

j) the Appellant's claimed 1999 "trading losses and expenses" of $3,952,543 was claimed on the basis of the Appellant entering into the Permanent Loss Scheme;

Gordon Feil

. . .

l) Feil is associated with Global Prosperity, and is one of a number of individuals who promoted the Unioncal Joint Ventures, the Permanent Loss Scheme and various other schemes offered by Global Prosperity;

. . .

The Unioncal Joint Ventures

. . .

u) the majority of the Participants paid cash for their units, while the remainder borrowed funds from a company called 16857 Yukon Inc. ("Yukon") to purchase their units;

v) Yukon was incorported in the Yukon, and had a non-resident director and shareholder, but at all times Feil had Power of Attorney and signing authority with respect to Yukon's bank accounts and those bank accounts were under Feil's name;

. . .

z) 33 of the Participants purportedly participated in the Unioncal Trading Joint Venture 1998 and, in total, subscribed for 97 joint venture units while also purportedly participating in another Global Prosperity promoted joint venture called the Futures Trading Joint Venture, claiming losses of $13,229,945 from the Unioncal Trading Joint 1998 and $1,593,654 from the Futures Trading Joint Venture;

aa) Nelson Bayford ("Bayford"), administrator of the Futures Trading Joint Venture, was associated with Global Prosperity and was also one of a number of individuals who promoted the Unioncal Joint Ventures, the Permanent Loss Scheme and various other schemes offered by Global Prosperity;

bb) 32 of the Participants purportedly participated in the Unioncal Trading Joint Ventures #1 and, in total, subscribed for 90 joint venture units and claimed losses of $20,431,672 and interest expenses of $760,264;

cc) 23 of the Participants who purportedly participated in the Unioncal Trading Joint Venture #1 also purportedly participated in another purported joint venture promoted by Feil called the Westview, LLC ("Westview"), and claimed further losses of $4,714,543 while being allocated a greater proportion of the Unioncal Trading Jointe Venture #1 losses on a ratio of US $1.6667 to every US $1 for the non-Westview Participants;

dd) the Participants who purportedly participated in Westview borrowed money from Yukon to finance their entire Westview investment and subscription costs;

ee) only three of the nine Participants in the Unioncal Trading Joint Venture #1 who did not participate in Westview put up any funds for their investment and subscription costs;

ff) most of the Participants in the Unioncal Joint Ventures were middle-income earners with little or no investment or trading history;

. . .

ii) other than Feil, none of the Participants provided Unioncal with any information with respect to their net worth or financial position before being issued units in a Unioncal Joint Venture;

jj) on or about December 17, 1998, Feil purportedly signed a Client Agreement and opened a trading account with Unioncal;

. . .

mm) no further funds were ever asked for or deposited into Feil's Unioncal account or any other account with Unioncal respecting the Participants, and no margin calls were ever made or satisfied;

. . .

xx) one Swiss Francs contract was not offset and was never reflected on the Open Position Statement for 1998;

. . .

> ddd) when the results of all the contracts were netted there was a gain of $63,765, and when the purported trading ceased on February 4, 1999 there was a cash balance of $739,007 in the Feil's Unioncal account;
>
> eee) between January 11, 1999 and February 2, Feil's Unioncal cash account was in an overdraft position ranging from US$37,350,174 as at January 11, 1999 to $66,539,854 as at January 22, 1999;
>
> . . .
>
> iii) no commissions were payable under the standard form Client Agreement purportedly entered into between Feil and Unioncal;

[11] It is obvious that assumptions of facts which were not assumed at the time they were claimed cannot meet the test articulated in *Rule* 49 and they should be struck.

[12] In *The Queen v. Anchor Pointe Energy Ltd.*,[4] the Court of Appeal stated that the pleadings of assumptions are a powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions:

> . . . The facts in a tax appeal are peculiarly within the knowledge of the taxpayer. The practice is for the Crown to disclose in its pleadings, assumptions of fact made by the Minister upon which his determination of the tax owing is based. Where peladed, the assumptions have the effect of reversing the burden of proof and casting on the taxpayer the onus of disproving that which the Minister has assumed. (See *Pollock v. The Queen (1993)*, 94 DTC 6050 at 6053 per Hugessen, J.A. (as he then was).) Therefore, it is important to determine whether assumptions made at the time of the Minister's confirmation of a reassessment may be included in the Crown's pleadings.
>
> . . .
>
> . . . The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.[5]

[13] The Court emphasized that

> The Crown has a serious obligation to set out honestly and fully the actual assumptions upon which the Minister acted in making the assessment, whether

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4 2003 DTC 5512, 2003 FCA 294, 308 N.R. 125, [2004] 5 C.T.C. 98 (FCA).

5 *Ibid*. at para. 2 and 23.

> they support the assessment or not. Pleadings that the Minister assumed facts that he could not possibly have assumed is not a fulfillment of that obligation.[6]

[14] Soon after its decision in *Anchor Pointe*, *supra*, the Court of Appeal made the following comments in *Canada v. Loewen*:[7]

> 8 The Minister's factual assumptions, as stated in the Crown's pleadings, are taken as fact unless they are disproved or it is established that the Minister did not make the assumptions that are said to have been made. The taxpayer has the onus of proving that the Minister's assumptions are not true or that they were not made. It is also open to the taxpayer to attempt to establish by [page9] argument that, even if the assumed facts are true, they do not justify the assessment as a matter of law: *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Minister of National Revenue v. Pillsbury Holdings Ltd.*, [1965] 1 Ex. C.R. 676.
>
> **9** It is the obligation of the Crown to ensure that the assumptions paragraph is clear and accurate. For example, the Crown cannot say that the Minister assumed, when making the assessment, that a certain car was green and also that the same car was red, because it is impossible for the Minister to have made both of those assumptions at the same time: *Brewster, N C v. The Queen*, [1976] CTC 107 (F.C.T.D.).
>
> **10** Nor is it open to the Crown to plead that the Minister made a certain assumption when making the assessment, if in fact that assumption was not made until later, for example, when the Minister confirmed the assessment following a notice of objection. The Crown may, however, plead that the Minister assumed, when confirming an assessment, something that was not assumed when the assessment was first made: *Anchor Pointe Energy Ltd. v. Canada*, 2003 DTC 5512 (F.C.A.).
>
> **11** The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This is well explained in *Schultz v. Canada*, [1996] 1 F.C. 423 (C.A.) leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 4.

[15] The appellant claims that the reassessment in question was based solely on the auditor's assessment. At the objection stage the officials failed to review or

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6 *Anchor Pointe Energy Ltd. v. The Queen*, 2002 DTC 2071, at para. 26, (TCC).

7 2004 FCA 146, [2004] F.C.J. No. 638 (QL), 2004 DTC 6321, [2004] 3 C.T.C. 6, 319 A.R. 97, [2004] 4 F.C.R. 3.

analyze the merits of the content of the appellant's notice of objection. No facts assumed by the tax officials after reassessment should be included in the reply under the heading of Assumption of Fact. To do so would be an abuse of this powerful tool by the respondent.

[16] Counsel for the appellant relies on transcript excerpts from the examination for discovery to prove that the Minister did not assume the Tax Shelter theory or the Permanent Loss Scheme theory at the time of reassessment on or before July 17, 2002. Counsel also relied on documents provided by the respondent, in particular an Audit Letter dated February 12, 2002; the Auditor's Report dated April 29, 2002; and a Position Paper dated July 11, 2002.

[17] Counsel for the respondent disagrees with the appellant's position. She claims that the contested Subject Paragraphs were assumed by the Minister at the time of reassessment in 2002, and therefore should not be struck. Further, her counsel argues the obligation of the Crown is to inform the appellant of the full case he must meet and therefore she is justified in alleging the Subject Paragraphs under the heading of Assumptions of Fact.

[18] Respondent's counsel claims that the Subject Paragraphs were known by the Minister at the time of reassessment and this is demonstrated by the excerpts of transcripts from the examination for discovery that took place on June 1, 2 and 8, 2006. Counsel also states that the Audit Letter, Audit Report and Position Papers all make it clear that the facts in the Subject Paragraphs were all assumed at the time of reassessment.

[19] In *Status-One Investment Inc. c. R.*,[8] I discussed the role of an Examination for Discovery:

> **18** It should be emphasized that, while all the pleadings have been filed in the instant case, no examinations for discovery have been held so far. Thus, the appellant is not yet in a situation where it can no longer examine an officer of the Crown for discovery to determine exactly which facts the Minister assumed in making the assessments under appeal and which evidence the appellant will have to rebut.

[20] Footnote 13 of the same case reads:

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[8] 2004 CCI 473, 2004 TCC 473, 2004 DTC 3042, [2005] 3 C.T.C. 2301, 2005 DTC 821 (Eng.) (T.C.C. [General Procedure]), at para. 14, aff'd 2005 F.C.A. 119, 2006 DTC 6236.

> Naturally, if the appellant doubts that the Minister actually assumed the facts set out in paragraph 11 when it made the assessments, the appellant may, in the course of discovery, obtain evidence indicating precisely which facts the Minister relied on to assess it.[9]

[21] In *Foss v. Canada*,[10] my colleague Bowie J. refused to strike out assumptions of fact pursuant to *Rule* 8. This rule requires that a motion to attack a proceeding for irregularity shall not be made after the expiry of a reasonable time or if the moving party has taken further steps in the proceeding after obtaining knowledge of the irregularity. In the case at bar, counsel for the appellant informed the Court of its intention to seek a motion in the fall of 2006. The motion was filed in late December 2006 after conducting the examination for discovery between March and June 2006. This seems to be well within a "reasonable time" required by *Rule* 8. Additionally, no fresh steps were undertaken outside the examination for discovery to adduce evidence. Consequently, both counsel are justified in relying on the transcripts of the examination for discovery to prove their respective positions.

[22] The appellant relies on transcripts of the respondent's nominee during the examination for discovery. In many instances the nominee explicitly states that two theories for assessment, the Permanent Loss Scheme theory and the Tax Shelter theory, were developed after the appellant was reassessed. Additionally, the transcripts demonstrate that the general scheme of Global Prosperity was not directly related to the appellant until after the reassessment. The following are some of the excerpts from the examination for discovery.

> 53. Q So the big picture then was a factor in the reassessment of Mr. Stanfield?
>
> A Well, to the extent that it would affect the tax shelter position that we had taken that this was one of a number of tax shelters that were promoted by Global Prosperity.
>
> 54. Q But again, these were facts in paragraph 14 that the Minister relied upon, or assumptions the Minister relied upon in reassessing Mr. Stanfield, and you gave evidence yesterday the tax shelter argument wasn't developed until 2003, long after Mr. Stanfield was reassessed. So what do you have to say about that?

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[9] *Ibid*. The footnote was in reference to the following sentence: "I do not find any of the statements therein obviously irrelevant to the issues involved in the appeals".

[10] 2007 TCC 201, [2007] T.C.J. No. 99 (QL).

A That that tax shelter position was developed subsequent to the date of the reassessment of the Union CAL trading joint venture.

. . .

58. Q So the fact that many others not just the Lisoways were investing in these types of arrangements promoted by Global Prosperity was a factor in reassessing Mr. Stanfield?

A Well, as I said is this fact is a description of – of what was going on and how these – how these schemes were being promoted, and it's – it's made in the interest of explaining the general picture of what was going on. And to the extent that it relates to a promotion of tax shelters and the tax shelter argument the Minister has put forward, then it is relevant to – to that.

. . .

60. Q Was it a factor in the reassessment of Mr. Stanfield for 1998 other than for the tax shelter argument?

A No.

. . .

88. Q But, sir, I'll make the comment once again, it says in so reassessing the Appellant. Maybe you misunderstand my question to begin with. The Minister didn't rely on any assumptions regarding permanent loss schemes in raising the assessment for 1998 against Mr. Stanfield did it?

A Not for permanent loss schemes.

. . .

195. Q But the tax shelter reassessment position was developed after July 17th, 2002 as you've given evidence about, correct?

A Yes.

196. Q So this audit strategy that was shown related only to the raising of the tax shelter argument in 2003 and not to the reassessment position taken when raising the reassessment on July 17th, 2002?

. . .

A Well, the – the tax shelter position was developed starting at this time and forward for – for – as a consideration for all the arrangements, including the Union CAL trading joint venture.

197. Q But not for Mr. Stanfield's 1998 taxation year at that time? In other words, he was already being reassessed without the tax shelter argument ever having been considered?

A He was at that point, yes.

198. Q So that argument was developed later?

A Yes.

199. Q Therefore, what you're suggesting, Mr. Kuhn, and I'm understanding is that the audit strategy found in paragraphs 23 through 27 was strategy that was to support an argument for tax shelter, which was added later.

A For the Union CAL trading joint ventures, yes, it would – it would have been.

[23] The Subject Paragraphs pertaining to Global Prosperity as a general Tax Shelter theory and Permanent Loss Scheme theory were not assumed by the Minister at the time of reassessment. As a result, they should be struck from the pleading. The following Subject Paragraphs are struck from the reply: 14(b), (c), (d) and (f).

[24] For the same reasons I would strike parts of subparagraphs 14(h), (j) and (l). They are as follows: in subparagraph 14(h), the words "and a Permanent Loss Scheme in 1999" and "connected with Global Prosperity"; in subparagraph 14(j) the words "on the basis of the Appellant entering into the Permanent Loss Scheme"; in subparagraph 14(l), the words "is associated with Global Prosperity, and" and "the Permanent Loss Scheme and various other schemes offered by Global Prosperity"; in subparagraph 14(z), the words "Global Prosperity promoted"; and in subparagraph 14(aa), the words "associated with Global Prosperity and was also" and "the Permanent Loss Scheme and various other schemes offered by Global Prosperity".

[25] A subsidiary issue which arises as a result of this discussion is that certain Subject Paragraphs ought to be struck because they are evidence rather than material facts and thus breach *Rule* 49.

[26] In *Foss*, *supra*, my colleague Bowie J. commented on the basic rule of pleadings, canvassing case law pertaining to the unique nature of assumptions of

fact in tax litigation. He also surveyed the onus of proof placed on the taxpayer, the obligation of the Crown in drafting its pleadings and the difference between materiality and relevance.

[27] At paragraph 6, he summarizes the rule of pleading:

> This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

[28] Bowie J. concludes his analysis by stating at paragraph 11:

> The purpose of pleadings is to define the issues between the parties for the purposes of discovery, both documentary and testamentary, and trial. That requires no more than a statement of the "precise findings of fact" that underpin the assessment. It is potentially prejudicial to the appellant to plead more -- certainly to plead more by way of assumptions of fact. The appellant is, of course, entitled to particulars of the evidence that the Crown intends to lead at trial, but these are properly obtained on discovery, not disguised as material facts as to which the Crown at trial may claim a presumption of truth.

[29] I agree with Justice Bowie. Those Subject Paragraphs that are evidence rather than material facts are to be striked from the reply. The Motion to Strike is granted in part with respect to Subject Paragraph 14(g), (ddd), (eee) which are not material facts, but rather evidence.

2. Subject Paragraphs not relevant to the appellant's appeal

[30] The evidence (particularly the documents provided by the respondent to the appellant) demonstrates that the remaining Subject Paragraphs were known by the Minister at the time of reassessment. The appellant's counsel argued many of the remaining Subject Paragraphs do not relate directly or indirectly to the appellant's reassessment of his 1998 taxation year and they should be struck for being irrelevant.

[31] The appellant alleged that the respondent has failed to "plead assumptions directly related to issues raised in appeal of [the] reassessment".[11] In particular, the appellant maintains that certain Subject Paragraphs made by the respondent are not relevant to the particular appellant, Mr. Stanfield, but rather pertain to third parties. As such, leaving these questionable Subject Paragraphs under the heading of Assumptions of Fact is prejudicial to the appellant.

[32] Striking out assumptions of fact on the basis that the pleadings are not relevant has been discussed in recent case law. Following the reasoning of *Global Communications Limited v. The Queen*,[12] I found in *Status-One*, *supra*, that while sometimes assumptions of facts may demonstrate a relationship between an appellant and a third party, the Minister must assess the taxpayer on his or her conduct and not that of a third party. At paragraph 30 I wrote:

> Subparagraphs 11(uu) and (ww) muddy the appeal process. At this stage of the process, Equicap's actions appear to have no direct bearing on the fundamental issues raised by the appeals. Considerable caution should be exercised when third parties are involved. The relevant actions are those of the appellant, which has been assessed and is entitled to know why. In some cases, it is quite possible that relationships or ties between an appellant and third parties will be relevant. Among other things, I have in mind cases involving securities trading. However, I have found nothing in the parties' pleadings to indicate that the facts alleged in subparagraphs 11(uu) and (ww) are relevant. An appellant must always make his own case. The Minister must assess taxpayers based on what the taxpayers have or have not done, and not, generally, on the conduct of a third party.

[33] *Rule* 53 is a discretionary rule, which empowers the Court to strike the relevant parts of the pleadings, but the Court is not under any obligation to do so. Rather, as I stated in *Status-One*, *supra*, at paragraph 14:

> Lastly, this Court has stated on several occasions that the question of whether a pleading should be struck out in whole or in part is one for the trial judge to determine, and is not matter to be determined in an interlocutory motion: . . . The trial judge is in a far better position than a judge hearing a preliminary motion to consider which assumptions of fact, if any, should be stuck out. It is up to the trial judge to decide what is relevant and what is not.

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[11] *MacIver v. Canada*, 2005 TCC 250, [2005] T.C.J. No. 178 (QL), 2005 DTC 654 (Eng.), [2005] 2 C.T.C. 2772 (T.C.C. [General Procedure]).

[12] 1999 CarswellNat 1027, (sub nom. Global Communications Ltd. v. Minister of National Revenue) 243 N.R. 134, 99 DTC 5377, [1999] 3 C.T.C. 537 (FCA).

[34] In *Mungovan v. The Queen*,[13] the Court explained:

> Assumptions are not quite like pleadings in an ordinary lawsuit. They are more in the nature of particulars of the facts on which the Minister acted in assessing. It is essential that they be complete and truthful. . . .

[35] While a motion judge should be cautious in striking out pleading, case law provides several examples where it is appropriate to strike out part or all of the assumptions of fact.

[36] The Federal Court of Appeal asserted in *The Queen v. Enterac Property Corporation*[14] that the appellant must prove that it is "clear and obvious" that the Subject Paragraphs are not relevant. This test, the "plain and obvious" test, is found in the Supreme Court of Canada's decision in *Hunt v. Carey Canada Inc.* [15] This test now applies to both *Rules* 53 and 58 of this Court. In *Status-One, supra*, which was upheld by the Federal Court of Appeal, the relevance of impugned paragraphs was critical:

> Similarly, in *Enterac Property Corp. v. R.*, the Court hesitated to strike out a pleading in whole or in part, having found that the requesting party had not made it clear and obvious that the impugned paragraphs were not relevant.[16]

[37] Notwithstanding the foregoing, in *Gould v. Canada*[17] Bowman C.J. stated that there is nothing wrong with describing generally a "scheme" in which the appellant participated. Relevancy is to be left to the trial judge, unless it is "plain and obvious" that the pleadings are not relevant:

> **11** I can see nothing wrong with the Overview. It describes generally the "scheme" in which the Minister alleges the appellant participated. I think it is arguably relevant that the appellant's charitable donations are not an isolated phenomenon but form part of a larger pattern. What weight if any should be given to this fact will be a matter for the judge who hears the case. It would be premature and indeed inappropriate for me, sitting as a motions judge, without the benefit of having heard any evidence to decide whether so broad a description of an alleged "scheme" is relevant. To do so would be to usurp the function of the trial judge.

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13 [2001] T.C.J. No. 445 (QL), 2001 DTC 691, at para. 10.
14 98 DTC 6202 (FCA), at para. 1.
15 [1990] 2 S.C.R. 959 (SCC).
16 *Supra*, note 10 at para. 12.
17 2005 TCC 556 at para. 11 and 23, [2005] T.C.J. No. 403 (QL).

> **12** One must bear in mind that in tax litigation pleadings serve several functions. For example, the reply should set out fully the respondent's position. It should plead honestly and comprehensively the assumptions upon which the assessment is based. It should be informative to the judge so that he or she will know the Crown's position and the issues that must be decided, matters that are being put in issue and the facts the Crown assumes or intends to prove. It should also inform the appellant of the case that is to be met. The essential and important function that pleadings serve in litigation is a practical one of providing information about the party's case.

[38] The appellant submits several of the Subject Paragraphs, particularly those dealing with the role of 16857 Yukon Inc. ("Yukon Inc."), other investor and joint ventures other than the Unioncal Trading Joint Ventures are not relevant to the appellant's appeal. On several occasions during the examination for discovery, the witness for the respondent indicated that certain Subject Paragraphs respecting Yukon and other joint ventures were not directly related to the appellant,[18] as the latter never participated in or was involved with these entities.

[39] Yukon Inc. is a corporation that allegedly provided loans to prospective investors for the various alleged Joint Ventures. However, the evidence submitted clearly indicates that the Subject Paragraphs referencing Yukon Inc. do not pertain to this particular appellant. As such, counsel argues that pleadings referring to Yukon Inc. are irrelevant to the appeal in issue. Furthermore, they should be struck because they pertain to third parties which the appellant could never disprove. Lastly, counsel for the appellant argued that the existence of these Subject Paragraphs does not assist the respondent’s case of a general scheme in relation to the appellant.

[40] On the other hand, counsel for the respondent relies heavily on the *Gould* decision, which states the weight and relevance of assumptions of fact are best left to the trial judge. He argued that the Subject Paragraphs involving third parties and the existence of the general scheme of the joint ventures are relevant to the Crown’s case and therefore ought not to be struck.

[41] Respondent's counsel also contends that the Motion Judge should make the distinction between the relevance to the reassessment versus the relevance to the issue in appeal. Unlike *Status-One*, *supra*, the Subject Paragraphs in the current case dealing with the tax shelter support directly the reassessment and are relevant to the issue in appeal. Relevance to the reassessment would entail an allegation with respect to the factual situation surrounding the reassessment, whereas the relevance to the

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[18] See Appendix 1 to these reasons, particularly Subject Paragraphs 14u), v), z), aa), bb), cc), dd), ee), ff).

issue in appeal would be determining whether the losses claimed by the appellant are actual business losses.

[42] The appellant is not likely to be prejudiced by these Subject Paragraphs. Although the Subject Paragraphs may not directly relate to the appellant, his counsel can disprove their relevance at trial. Again in *Gould*, *supra*, Bowman C.J. found that it may be to the appellant's advantage to demonstrate the contradictions and illogic of the respondent's pleadings.

[43] With regard to third parties, Bowman C.J. at paragraph 21 of *Gould* states:

> . . . A central component in the assessment which disallowed the charitable donations is the existence of a "scheme" in which it is alleged that the appellant participated and which enabled the participants to obtain what the Crown sees as artificial or inflated charitable tax credits. It of necessity involved third parties and if the existence of a scheme is essential to the Crown's case it should be able to plead and prove all of the components of the scheme. To say, as the appellant does, that *Global* and *Status-One* preclude any reference to third party transactions unless the appellant knows of or is privy to those transactions goes too far. If the existence of a scheme is germane to the disallowance it cannot be ignored whether or not the Minister assumed that the appellant knew about or was a party to the third party transactions that, according to the Reply, were an integral part of the scheme. If any of the facts assumed are truly within only the Crown's knowledge the Crown probably has the onus of proving them although this is ultimately for the trial judge to decide.

[44] While the *Gould* decision does not prevent the Motion Judge from striking out assumptions of fact which are clearly and obviously not relevant to the appeal and would be an abuse of process, it encourages the respondent to make full disclosure of the case the appellant must meet as well as extends the scope of pleadings to include assumptions of fact pertaining to third party involvement in general schemes.

[45] The Motion to Strike is dismissed with respect to Subject Paragraph 14(u), (v), (bb), (cc), (dd), (ee), (ff), (ii), (jj), (mm), (xx), (ccc), and (iii). They remain in the reply for the meantime. Whether these subparagraphs should remain permanently in the reply is best left for the trial judge to determine. While their contents may be evidence, or even irrelevant, they do not appear at this time to have the same degree of prejudice to the appellant as the Subject Paragraphs I have chosen to strike.

3. Subsidiary Matter – leave to amend Reply

[46] Counsel for the respondent has pled under Other Material Fact at paragraph 15 of the reply that the contracts of Unioncal Trading Joint Venture meet the factual conditions to constitute a "tax shelter" pursuant to subsection 237.1(1). Further, the

respondent has already been granted an extension of time to prepare the reply and ought to have properly drafted it at that time. I shall permit the respondent to file an amended reply to the notice of appeal within 60 days provided that she does not repeat facts alleged in paragraph 15 of the reply. The appellant shall be entitled to his costs.

Appellant's Motion to Reattend

[47] The appellant also filed a Motion to Reattend, pursuant to 110(1)(*a*) of the *Rules*, for an Order directing the respondent's nominee, Mr. Larry Kuhn ("Mr. Kuhn"):

1) to reattend the examination for discovery, at the Respondent's expense;

2) to answer the list of questions enumerated in Schedule "A" to these reasons;

3) to produce a list of documents enumerated in Schedule "B" to these reasons; and

4) to answer question pertaining to the documents requested.

[48] Paragraph 110(1)(*a*) of the *Rules* read as follows:

Sanctions for Default or Misconduct by Person to be Examined	*Sanctions en cas de défaut ou d'inconduite de la personne devant être interrogée*
110. Where a person fails to attend at the time and place fixed for an examination in the notice to attend or subpoena, or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that that person is required to produce or to comply with a direction under section 108, the Court may,	**110.** Si une personne ne se présente pas à l'heure, à la date et au lieu fixés pour un interrogatoire dans l'avis de convocation ou le subpoena, ou à l'heure, à la date et au lieu convenus par les parties, ou qu'elle refuse de prêter serment ou de faire une affirmation solennelle, de répondre à une question légitime, de produire un document ou un objet qu'elle est tenue de produire ou de se conformer à une directive rendue en application de l'article 108, la Cour peut :
(*a*) where an objection to a question is held to be improper, direct or permit the person being examined to reattend at that person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer,	*a*) en cas d'objection jugée injustifiée à une question, ordonner ou permettre à la personne interrogée de se présenter à nouveau, à ses propres frais, pour répondre à la question, auquel cas elle doit répondre aussi aux autres questions légitimes qui découlent de sa réponse;

[49] The appellant's Motion to Reattend relies on the following grounds:

1. Mr. Kuhn was selected by the Respondent as its nominee for discovery.

2. During the examination for discovery of Mr. Kuhn, Mr. Kuhn refused to or was instructed not to answer the questions listed in Schedule “A” to this Notice of Motion, even though such questions relate to the matters in issue in this Appeal, are relevant to this Appeal and are proper questions.

3. During the examination for discovery of Mr. Kuhn, Mr. Kuhn refused to or was instructed not to produce the documents referred to in Schedule “B” to this Notice of Motion, even though such documents relate to matters in issue in this Appeal and are relevant to this Appeal.

4. The Respondent relied on some or all of the documents sought in Schedule “B” to this Notice of Motion according to the affidavit to Ron D.F. Whilhelm dated and filed in this appeal on June, 18, 2004 in support of the Respondent’s Motion dated June 18, 2004 to extend the time to file and serve the reply and should therefore be compelled to produce such documents to answer all proper questions relating to such documents.

[50] The appellant filed excerpts of the transcript of the examination for discovery and an affidavit in support of the Motion to Reattend. In addition to the excerpts and affidavit, the appellant has provided two Schedules outlining the questions he seeks answers to and documents he would like the respondent to produce. These schedules are found in Appendix 1 and 2 of these reasons.

[51] Counsel for the appellant submits Mr. Kuhn refused to answer proper questions and counsel for the respondent has refused to produce relevant documents.

[52] There is a vast amount of case law explaining what constitutes a proper question during examination for discovery, which has its basis under the rule for the scope of examination, pursuant to *Rule* 95, as follows:

Scope of Examination	*Portée de l'interrogatoire*
95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relating to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that,	**95.** (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions légitimes qui se rapportent à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :

(*a*) the information sought is evidence or hearsay,

a) le renseignement demandé est un élément de preuve ou du ouï-dire;

(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or

b) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;

(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined.

c) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée.

(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.

(2) Avant l'interrogatoire préalable, la personne interrogée doit faire toutes les recherches raisonnables portant sur les points en litige auprès de tous les dirigeants, préposés, agents et employés, passés ou présents, au Canada ou à l'étranger; si cela est nécessaire, la personne interrogée au préalable peut être tenue de se renseigner davantage et, à cette fin, l'interrogatoire préalable peut être ajourné.

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the proceeding including the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(3) Une partie qui interroge au préalable peut obtenir la divulgation de l'opinion et des conclusions de l'expert engagé par la partie interrogée, ou en son nom, sur une question en litige dans l'instance ainsi que ses nom et adresse. Toutefois, la partie interrogée n'est pas tenue de divulguer le renseignement demandé, ni les nom et adresse de l'expert, si :

(*a*) the findings, opinions and conclusions of the expert relating to any matter in issue in the appeal were made or formed in preparation for contemplated or pending litigation and for no other purpose, and

a) l'opinion et les conclusions de l'expert sur une question en litige dans l'instance ont été formulées uniquement en prévision d'une poursuite envisagée ou en cours;

(*b*) the party being examined undertakes not to call the expert as

b) la partie interrogée s'engage à ne pas appeler l'expert à témoigner à

a witness at the hearing.	l'audience.
(4) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the proceeding, unless the Court orders otherwise.	(4) Sauf ordonnance contraire de la Cour, une partie qui interroge au préalable peut obtenir la divulgation des noms et adresses des personnes dont on pourrait raisonnablement s'attendre à ce qu'elles aient connaissance des opérations ou des situations en litige en l'instance.

[53] When considering whether a refused question should be answered, the court has to determine 1) whether the question is relevant, which is a matter of law, and 2) whether the question is proper, which is a matter of discretion.[19] Given that the determination of a proper question is discretionary, the relevancy of the question will be a significant determination in allowing the reattendance.

[54] Proper questions must first relate to any matter in issue. Proper questions defined under the scope of examination are questions that seek evidence, constitute cross-examination and relate to the names of witnesses.

[55] Given the general purpose of an examination for discovery is to render the trial process fairer and more efficient and it is in the interest of justice that each party be well informed as to the case they must meet and the position of the opposing party, it has been the policy of this Court to adopt a liberal approach to the scope of questioning permitted on discovery.[20]

[56] In *Baxter*, *supra*, Bowman A.C.J. (as he then was) enumerated the principles pertaining to the "threshold level of relevancy" during examination for discovery:

> 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 or 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 question that he or she may consider

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[19] *Republic National Bank of New York (Canada) v. Normart Management Ltd.*, 31 O.R. (3d) 14 (Gen. Div.), [1996] O.J. No. 3371 (QL).

[20] *Montana Band v. Canada*, [2000] 1 F.C. 267 (Fed. T.D.) at para. 10, [1999] F.C.J. No. 1088 (QL); *Baxter v. The Queen*, [2005] 1 C.T.C. 2001, 2004 DTC 3497 (TCC) [*Baxter*]; *MIL (Investments) S.A. v. The Queen*, 2006 DTC 2784 (Eng.), [2006] 3 C.T.C. 2509 (TCC).

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.[21]

[57] The notion of proper questions on examination for discovery is perhaps better addressed by determining what constitutes an improper question, as under the purview of *Rule* 108. This rule reads:

Improper Conduct of Examination	*Déroulement irrégulier de l'interrogatoire*
108. (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,	**108.** (1) Un interrogatoire peut être ajourné à la demande de la personne interrogée ou d'une partie présente ou représentée à l'interrogatoire afin d'obtenir, par voie de requête, des directives quant à la poursuite de l'interrogatoire ou une ordonnance y mettant fin ou en limitant la portée, dans les cas suivants :
(*a*) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections,	*a*) le droit d'interroger est utilisé abusivement en raison d'un nombre excessif de questions injustifiées ou l'exercice de ce droit est entravé par un nombre excessif d'interruptions ou d'objections injustifiées;
(*b*) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined,	*b*) l'interrogatoire est effectué de mauvaise foi ou déraisonnablement de manière à importuner, à gêner ou à accabler la personne interrogée;
(*c*) many of the answers to the questions are evasive, unresponsive or unduly lengthy, or	*c*) de nombreuses réponses sont évasives, vagues ou indûment longues;
(*d*) there has been a neglect or improper refusal to produce a relevant document on the examination.	*d*) on a négligé ou refusé à tort de produire un document pertinent à l'interrogatoire.

[21] *Ibid. Baxter* at para. 13.

(2) Where the Court finds that,

(*a*) a person's improper conduct necessitated a motion under subsection (1), or
(*b*) a person improperly adjourned an examination under subsection (1),

the Court may direct the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the Court may fix the costs and give such other direction as is just.

(2) La Cour, si elle conclut :

a) que la conduite irrégulière d'une personne a rendu nécessaire la présentation d'une requête en application du paragraphe (1);
b) qu'une personne a obtenu l'ajournement prévu au paragraphe (1) sans raison valable,

peut lui ordonner de payer sans délai et personnellement les dépens de la requête, ceux qui ont été engagés inutilement et ceux de la poursuite de l'interrogatoire. La Cour peut fixer le montant des dépens et rendre une autre directive appropriée.

[58] Where proper questions are determined by the relevancy to the matter in issue, improper questions are considered outside the scope of examination on the grounds of them being irrelevant or because they are directed solely to the credibility of the witness. Improper questions also include questions covered by solicitor-client privilege. Under *Rule* 108, improper questions include those questions that are conducted in bad faith or in an unreasonable manner.

[59] Counsel for the respondent maintains the motion to compel should be dismissed due to solicitor-client privilege, relevancy and the fact that the questions at issue have already been answered. Furthermore, the respondent refuses to answer some questions on the grounds that the appellant is on a fishing expedition.

[60] This being said, it is my view that although I may impose other sanctions as alternatives to compelling attendance and production of documents,[22] it is in the best interest of the parties to grant the motion to compel.

[61] Therefore, the motion is granted to compel the reattendance of Mr. Khun to answer the questions in Schedule “A”, to answer all proper questions that arise from the answers and to produce documents listed in Schedule "B".

[62] Costs of the Motion to Reattend shall be in the cause.

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[22] Such as those enumerated under *Rule* 110(*b*) to (*d*).

Respondent's Motion to Reattend

[63] The respondent's Motion to Reattend seeks an Order, pursuant to 110(*a*) of the *Rules*, directing the appellant to reattend the examination for discovery at the appellant's expense and answer all questions which either the appellant refused to answer or was instructed not to answer at the examination for discovery on March 7, 8 and 9, 2006.

[64] The following are the questions that the respondent seeks the appellant to answer.

1) Question 157-158: stocks, trading, securities between 1970 and 1999. In addition to all trades with or through Gordon Feil or Global Prosperity between 1970 and 1999 – Tab E;[23]

2) Question 102-117: hard drive of computer, provide those documents which can be restored – Tab G;

3) Question 161-169: Involvement of Appellant with Gordon Feil, pertaining to the UnionCAL Trading Joint Venture regardless of date – Tab H;

4) Question 244-245: all records respecting the joint venture and the trades, up until 2002 – Tab I and D at page 9;

5) Question 132: question respecting relevant facts that occurred in 1999 (not a taxation under appeal), as they relate to 1998 transactions in issue – Tab J;

6) Question 425-426 – provide emails and addresses – Tab E;

7) Question 432-442 – provide copies of communications Appellant had with up until 2002 – Tab E.

[65] For the reasons discussed above, and given the late filing has not caused the appellant any prejudice, the respondent's motion to compel the appellant's nominee to reattend is granted. The appellant shall be entitled to costs since the respondent's motion was brought after the time period set out in previous direction of the Court.

Signed at Ottawa, Canada, this 10th day of May 2007.

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[23] Reference to tabs are tabs in the affidavit of Lynn M. Burch, dated January 11, 2007. The questions are set out in Appendix 2 to these reasons.

"Gerald J. Rip"

Rip A.C.J.

APPENDIX I – APPELLANT'S MOTION TO COMPEL

Was Mr. Stanfield ever under investigation by the Canada Revenue Agency with respect to any of the matters in issue in these appeals?	June 1, 2006; Q. 280 (pg.82)
So Mr. Fleming was involved in connection with what then?	June 1, 2006; Q. 283 (pg.83)
In your conversations with Chris Fleming that you referred to before, because you indicated you had discussions with him at times, was information passed by Chris Fleming to you regarding the Union CAL project?	May 31, 2006; Q. 93 (pg.23)
If we can go to paragraph 11, please, Mr. Kuhn, there is a reference in paragraph 11 to the Appellant's Union CAL trading joint venture claim as part of a claimed $106,372,436 of losses in 1998 involving foreign currency futures contracts trades through a brokerage firm in England by hundreds of Canadian taxpayers. Are those the same transactions that are subject of the appeal involving Mr. Stanfield?	June 1, 2006; Q. 434 (pg.141)
Why was Mr. Fleming writing to Ms. Pumple regarding Mr. Stanfield's return?	June 2, 2006; Q. 285 (pg. 286)
Now, on the second page of this document, page 629, under paragraph (b), it says, "Re: Original tax returns for investigative purposes." It says: "The original tax returns of all taxpayers who have participated in Union CAL, Westview, ERT, LFG, R.J. O'Brien or Yukon loan program in any manner are required by the Investigations Division. This includes investors, prompters (*sic*) and others who may be involved." Did that include Mr. Stanfield?	June 2, 2006; Q. 292 (pg.89)
Why did you write, "Does it concern investors that are not known to Investigations?"	June 2, 2006; Q. 299 (pg. 99)
Why did you write the comments to Chris Fleming?	June 2, 2006; Q. 313; (pg. 96-97)
Why did Chris Fleming need to know that information, Mr. Kuhn?	June 2, 2006; Q. 314 (pg. 97)
Mr. Kuhn, did Deanna Pumple regularly share information with Chris Fleming regarding the Global proposals, the Global Prosperity project and the Union CAL trading joint venture?	June 2, 2006; Q. 315 (pg. 97)
Mr. Kuhn, did you regularly share information with Chris Fleming regarding the Global proposals, the Global Prosperity project and the Union CAL trading joint ventures?	June 2, 2006; Q. 316 (pg.98)
Why did you copy Chris Fleming with the memo, what does he have to do with it?	June 2, 2006; Q. Q.338 (pg.103)
Why was the latest tax -- why was the latest investor database for the Global project located in the Investigations group?	June 2, 2006; Q. 354; (pg.107-108)

How frequently did you exchange information with Margaret Ashby, who was an investigator in the Investigations Division?	June 2, 2006; Q. 355 (Pg.108
Were these documents scanned in by Investigations as well as were the documents in tab 38?	June 8, 2006; Q. 418 (pg. 106-107)
When did you discuss that with him?	June 8, 2006; Q. 496 (pg. 129)
But going back to my question then with respect to paragraph 14 iii), is the Minister ignoring the document in paragraph 54-M for purposes of making its assumptions in paragraph iii) and strictly relying on what was on the Union CAL website with respect to commissions?	June 8, 2006; Q. 185 (pg. 45)

Schedule B – DOCUMENTS WHICH THE RESPONDENT REFUSES TO PRODUCE	
Relevant Information within the CRA	
I'm going to ask the witness to undertake to provide us with communications between the Inland Revenue and/or I'm asking the witness to undertake to provide us with communications between the Canada Revenue Agency and the Inland Revenue regarding IFX.	May 31, 2006; Q. 111 (pg.29-30)
Just with respect to the undertaking, I'm asking that that not just relate to Mr. Nakano, but that relate to all parties within the Canada Revenue Agency who were involved in the Global Prosperity project and the Union CAL project, including but not limited. . . A. His first name was Gordon. Gordon. Larry Kuhn, Cameron Tees, Mr. Leung, who was referred to here today, Mr. St. Pierre, who was referred to on the record, Bethany Spencer, Mr. Wary of the Winnipeg office, another auditor in the Winnipeg office who he referred to, David Gray, and there will be others whom I will add in the course of the day to this particular what I'll call a global undertaking for lack of a better term, Ms. Burch.	May 31, 2006; Q. 117-118 (pg.35-38)
Would you undertake to provide me with copies of the communications, written, electronic to and from the Inland Revenue regarding that subject?	June 1, 2006; Q. 150 (pg.45)
Mr. Kuhn, there's a reference to 18,000 pages of documents as of June 18th, 2004. Would you please undertake to add to the global undertaking all the names that are shown as addresses of this memorandum	June 2, 2006; Q. 433 (pg. 140)
Ms. Burch, I would like you to undertake to add to the global undertaking all the names that are shown as addressees of this memorandum.	June 2, 2006; Q. 81 (pg. 26)
Ms. Burch, I'd like you to undertake to add the names of all the persons who are shown on the memo on this page 570 to the omnibus undertaking.	June 2, 2006, Q. 151 (pg.44)
Would you undertake to provide me with all the information that Chris Fleming and the Special Investigations group has with respect to the Global Prosperity group?	June 2, 2006, Q. 190 (pg.56-57)
Now, going to page 577, it makes a reference in paragraph 36 to , "George McLean advised he had a case where he could document a complete circle of funds." Would you undertake to provide me with a copy of that document that's referred to?	June 2, 2006; Q. 201 (pg. 60-61)
Ms. Burch, in the interests of the omnibus undertaking, the names might overlap, but I'd like you to add these names to those people in the omnibus undertaking.	June 2, 2006; Q. 253 (pg. 77)
I'm asking you to undertake to provide me with all the documents that went to and from Deanna Pumple and Chris Fleming as they related to the Union CAL projects.	June 2, 2006; Q. 282 (pg.85)
I would like you to undertake, please, to provide me with all the documents that are referred to in paragraphs 2 and 3 of that memorandum from Mr. Fleming, the first paragraph beginning "Our scanning system," the second paragraph beginning "Could you arrange."	June 2, 2006; Q. 287 (pg. 87)
So would you undertake, please, to provide the first 17 pages of the 284 that are referred to in tab 40 of the Respondent's book of documents?	June 8, 2006; Q. 432 (pg. 112)

Would you undertake to provide me with a complete copy of that facsimile and it' – and it's attachments, in other words all 41 pages?	June 8, 2006; Q. 518 (pg. 134)
Would you please undertake to provide me with the banking info, which was sent by Ms. Pumple to Mr. Fleming as referred to in her facsimile coversheet dated June the 12th, 2001?	June 8, 2006; Q. 523 (pg. 135)
Would you please undertake to provide me with the "other information by mail on Friday" to which Ms. Pumple was referring to in her communication to Mr. Fleming?	June 8, 2006; Q. 530 (pg. 137)

APPENDIX 2 – RESPONDENT'S MOTION TO COMPEL

Tab E	Q. 157-158	What sort of stocks have you traded in the past? Respondent is looking for the types of trades conducted, the amounts involved, the dates, the nature of the items traded, since 1970. The types of stocks or securities traded, the markets or exchanges on which they're traded or if they're traded off market? From 1970 to present. Information regarding the broker, the brokerage firm, the clearing house for Mr. Stanfield or in any entity in which he might have an interest, i.e. joint ventures partnership, any corporation through which he traded.	7-Mar-06
Tab F	Q. 230-236	Q. 229 Can you undertake to provide his name and the last known contact number and address for those two individuals at KPMG?	7-Mar-06
		Q. 236 With respect to the Appellant claiming that he has studied the *Income Tax Act*, the Respondent requested that Mr. Stanfield explain what he means.	7-Mar-06
Tab G	Q. 102-117	Q.112 Can you undertake to provide me a breakdown of the revenue that you reported as well as the costs that you reported respecting this source of income? (statement of business activities)	8-Mar-06
		Q. 113: Could we undertake for you to advise whether the numbers reflected on the statement of business activities under sales, commissions, fees only relates to the Union CAL trading joint venture?	
		Q.115 Can you undertake to provide copies of all documents printed on that computer and all data on the hard drive as it respects the joint venture?	
		Q 117: Can you undertake then to provide the hard drive and copies of any documents that you've got that were printed out on that computer respecting the joint venture trades?	
		Q.118 The witness' evidence is that he didn't have any information on that computer relating to these trades. The Respondent claims that this is contradictory to what he reported therefore it is relevant to the issue and the Crown is seeking to explore this at discovery.	
Tab H (same as Tab K)	Q. 161-169	Q. 161 Can you describe your relationship with Gordon Feil? Business not social	8-Mar-06
		Q. 165-166 Have you been involved in any businesses with him besides the joint venture? At Anytime?	
		The Respondent states that the time goes to the gross negligent penalties (163(2) of the Act) and claims that there is case law that after the fact event can help inform and be probative on an evidentiary level of the mental element necessary for gross negligence penalties.	

		Q 168 Have you been involved in any businesses with Gordon Feil besides the joint venture? At any time?	
		Q. 169 Have you been involved in any businesses with Gordon Feil up to 2002?	
Tab I	Q. 244-245	Q. Can you undertake to search your records and provide all records involving Gordon Feil with respect to the joint venture trades and all records respecting the joint venture and the trades that you may have, which aren't contained in the parties' documents? At anytime?	8-Mar-06
Tab J	Q.132	Q.132 Turn to tab 2 - 1999 tax return (para. 20 of the Notice of Appeal).	8-Mar-06
Tab K	Q. 165-169	Q.165 Have you been involved in any businesses with him (Gordon Feil) besides the joint venture? At anytime? With respect to gross negligence.	8-Mar-06
Tab L	Q. 425-426	Q.425: Can you undertake to provide copies of all communications you had with these individuals and communications they had with you?	8-Mar-06
		Q.426 Would you undertake to provide the addresses, e-mail addresses and phone numbers of the individuals on this list to the extent that you have them?	
Tab M	Q. 432-442	Q.432: Did you have any communications with the other joint venturers before or up to and including the year 2002?	8-Mar-06
		Q 433 Did you have your contact with these individuals before the reassessments were issued? The communications Mr. Stanfield had with these individuals could go to the issue of gross negligence penalties and the Respondent wants to know whether they are produceable.	
		Q 434-435: Give me the details of those communications you had with other investors?	
Tab N	Q. 242-245	Q. 242: If we can turn to tab 4 of that exhibit, this is a letter dated September 3, 1998 to Andy Blair at Union CAL from Patrick Jenkins. Do you know what this letter respects?	9-Mar-06
		Q.245 How did you get this letter - how does it get from Union CAL to Mr. Stanfield?	

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DATE OF HEARING:	February 7, 2007
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