Citation: 2008TCC61
Date: 20080130
Docket: 2007-858(GST)G

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER AND ORDER

Beaubier D.J.

[1] This motion by the Respondent was heard at Vancouver, British Columbia on January 18, 2008. It is for an order:

> 1. amending the Reply to the Amended Notice of Appeal, under sections 4, 12 and 54 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") and subsection 298(6.1) of the *Excise Tax Act*;
>
> 2. for discovery of the Appellant respecting those amendments, under sections 4 and 95 of the Rules;
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> 3. compelling responses to certain questions asked of the Appellant at discovery, in accordance with sections 4, 95, 110 and subsection 107(3) of the Rules;
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> 4. for discovery on the Appellant's undertaking responses, in accordance with sections 4 and 95 of the Rules;
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> 5. for costs, in accordance with section 110 and 147 of the Rules; and
>
> 6. for such further and other relief as this Court deems just.

[2] Respecting items 3 and 4 of the motion, the examinee for discovery of the Appellant, Brian Stonnell, (a) was not in the employ of the Appellant, Insurance Corporation of British Columbia ("ICBC"), at the times material to this appeal and (b) did not inform himself for the purposes of the discovery. ICBC is a well-known giant provincial-owned vehicle insurance corporation in British Columbia with many employees and senior officers. Many senior officers were directly involved in the subject matter of this appeal. In these circumstances, using Mr. Stonnell as the officer for this discovery is an interesting tactic.

[3] As stated in paragraphs 7 to 14, inclusive, of the Affidavit of Ms. Perillié filed by the Respondent, Mr. Stonnell was "unable" to answer questions about negotiations by ICBC leading to, or part of, a Memorandum of Understanding (Exhibit "E") signed by ICBC and ICBC refused to search records respecting various matters questioned. (Paragraphs 15 to 26, inclusive.) In argument, ICBC's counsel stated that these occurred because they all related to matters outside of the scope of the pleadings and were not considered by the Respondent at the time of reassessment.

[4] In essence, ICBC signed a Memorandum of Understanding with British Columbia's Ministry of Advanced Education and a corporate body, "Tech BC", which was going to create a new university in British Columbia at Surrey, a suburb of Vancouver. ICBC was to build and lease the facilities itself, or through its subsidiaries, to Tech BC at a development eventually called Central City Development. Tech BC backed out. The subsidiaries were "IPL" and "Mall Co.". As the result of a "Settlement Agreement" dated July 16, 2002 signed by the province of British Columbia, Tech BC, ICBC, IPL and Mall Co., (Exhibit K), Tech BC agreed to pay ICBC "Settlement Monies" ($41.1 million) for releasing Tech BC and the province of British Columbia from "all liability for the losses, damages, costs and expenses suffered by the ICBC Companies as a result of the cancellation of the participation of the Province and of Tech BC in the Central City Development;" (Paragraph 4.2). In the "Development Agreement" dated March 10, 2000 (Exhibit "H") and signed by Surrey City Centre Mall Ltd. (also described as ICBC Mall Co. - and herein as "Mall Co."), ICBC, Tech BC and the province of British Columbia, Tech BC agreed to enter into a lease with ICBC Mall Co. (Paragraph 3.1) for a term of 25 years (Paragraph 3.2). In the event of a dispute, there was an arbitration clause (Paragraph 5.3).

[5] Paragraph 2.21 of the Amended Notice of Appeal states that Tech BC "agreed to pay the Settlement Payment to ICBC or its nominee in exchange for ICBC, IPL and Mall Co. releasing Tech BC and the Province from any liabilities under, *inter alia*, the Development Agreement." Paragraph 2.21 was admitted in the Reply. Assumption 7(t) of the Reply states that "on July 22, 2002 Tech BC paid the Appellant $41.1 million (the Payment) for terminating Tech BC's right to lease the buildings under the Development Agreement;".

[6] The Respondent levied GST on the $41.1 million on the basis that the payment was made otherwise than as consideration for a supply (*Excise Tax Act*, R.S.C. 1985, c. E-13, ss. 182(1) and s. 133.).

[7] Particulars of the reassessment are not in evidence. In the Court's view, the pleadings are sufficiently broad to require Mr. Stonnell or a knowledgeable nominee to answer all of the queries put to Mr. Stonnell by Respondent's counsel. The ultimate relevancy of any such questions and answers is for the hearing judge to determine, if that should be necessary. In fact, the nomination of Mr. Stonnell and his answers and the reasons for them amount to stonewalling by the Appellant.

[8] As a result, it is ordered that the nominee of ICBC shall properly and without restriction inform himself thoroughly and (a) re-attend at ICBC's expense and answer the questions and produce the document or documents; (b) answer questions and produce documents arising therefrom; and (c) forthwith, pay the costs of the motion, the costs thrown away and (on the basis that it is now a second examination for discovery and production of documents) the costs of the examination now ordered and of production of any document or documents.

[9] Respecting items 1 and 2 of the motion, Appellant's counsel objected, on the basis that these matters would have been discovered on an audit which the Appellant did not do in this case and that the amendments are irrelevant. Therefore, the amendments should not be allowed.

[10] Exhibit QQ to the Affidavit of Agnès Perillié dated December 20, 2007 contains the Respondent's proposed Amended Reply. The proposed amendments are in paragraphs 9, 10, 11, 12, 13 and 19. They read:

> 9. The directors and officers of Mall Co. were also the directors and officers of IPL.
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> 10. The directors and officers of Mall Co. and IPL were also the directors and officers of the Appellant.
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> 11. Mall Co. funded its design, development and construction of the Project by way of advances from, and amounts owed to, IPL.
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> 12. IPL funded its advances to Mall Co. by way of advances from, and amounts owed to, the Appellant.
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> 13. Once Tech BC made the Payment:
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> a) the Appellant reduced the amount that IPL owed it by $41.1 million;
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> b) IPL reduced the amount that Mall Co. owed it, and the amount that it owed the Appellant, by $41.1 million;
>
> c) Mall Co. reduced the amount that it owed IPL by $41.1 million; and
>
> d) Mall Co. received the Payment as revenue
>
> …
>
> 19. Alternatively, under the Development Agreement Mall Co. provided Tech BC with the right to a lease and therefore agreed to the making of a taxable supply. Tech BC paid the Payment to Mall Co. within the meaning of subsection 182(1) of the Act, as Mall Co. indirectly or constructively received it. That Payment was made as a consequence of the termination the Development Agreement respecting that supply, and not as consideration for that supply. As a result, subsection 182(1) of the Act deems Tech BC to have paid GST respecting the Payment and the Appellant must remit that GST under subsections 225(1) and 228(2) of the Act.

[11] Appellant's counsel also argued that the amendments should not be allowed because the Appellant's GST return in question was filed on August 2, 2002 and it is now past the time limit in which to assess. But the assessment of ICBC is timely and the proposed amendments do not constitute a new assessment or an amendment of the existing assessment. Rather, they merely describe a form of intertwining of parties to various documents in evidence.

[12] It is noted that the amendments are not to the assumptions. Thus, it is the duty of the Respondent to prove them.

[13] In *Walsh v. The Queen*, 2007 DTC 5441 (F.C.A.), at paragraph 18, the Federal Court of Appeal set out the conditions which apply to the Respondent's motion under subsection 152(9) of the *Income Tax Act*. They are:

> 1) the Minister cannot include transactions which did not form the basis of the taxpayer's assessment;

That is not the case here; see the Reply to the Amended Notice of Appeal.

> 2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(a) and (b) which speak to the prejudice to the taxpayer;

The proposed amendments would not (a) require relevant evidence that the taxpayer is no longer able to adduce without the leave of the court, and (b) it is not necessary for the court to order that such evidence may be adduced.

> and 3) the Minister cannot use section 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, ...

Nor would this be the case, since there is no proposed amendment to change the assessment or introduce any facts or allegations that are not already contained in the Reply to the Amended Notice of Appeal.

[14] In law the question of permitting these amendments and examinations for discovery on them is whether it is just (it is); whether it would unduly delay the

hearing (since the appeal is only at the discovery stage, it would not); and whether the particulars pleaded are remote or forlorn to the cause of action (they are not).

[15] For these reasons, it is ordered that:

1. The Respondent shall serve and file an Amended Reply to the Amended Notice of Appeal within 14 days of the date of this Order.

2. The Appellant shall have 30 days after the date of filing the said Amended Reply in which to file an Answer thereto.

3. Counsel of the Respondent shall conduct discovery of a knowledgeable nominee of the Appellant respecting those amendments within 75 days after the date of filing the Amended Reply.

4. Costs respecting this order are in the cause.

Signed at Saskatoon, Saskatchewan, this 30th day of January 2008.

"D.W. Beaubier"

Beaubier D.J.

CITATION:	2008TCC61
COURT FILE NO.:	2007-858(GST)G
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REASONS FOR ORDER BY:	The Honourable D.W. Beaubier, Deputy Judge
DATE OF ORDER:	January 30, 2008

APPEARANCES:

Counsel for the Appellant:	Joel A. Nitikman
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COUNSEL OF RECORD:

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