Docket: 2006-1385(IT)G
2006-1386(IT)G

BETWEEN:

GENERAL ELECTRIC CAPITAL CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on September 22, 2008 at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Joseph M. Steiner Neil Paris
Counsel for the Respondent:	Naomi Goldstein John Grant

ORDER

Upon motion by the Respondent for an order compelling the Appellant to answer questions put to it at the examination for discovery of the Appellant's nominee, David Daubaras;

It is ordered that the Appellant answer the questions which the Court has ordered to be answered in the Reasons for Order.

Upon cross-motion by the Appellant for an order compelling the Respondent to answer questions put to it at the examination for discovery of the Respondent's nominee, Mr. Tony Pingitore;

It is ordered that the Respondent answer the questions which the Court has ordered to be answered in the Reasons for Order.

Costs shall be in the cause.

Signed at Halifax, Nova Scotia, this 15th day of December 2008.

"V.A. Miller"

V.A. Miller, J.

Citation: 2008TCC668
Date: 20081215
Docket: 2006-1385(IT)G
2006-1386-(IT)G

BETWEEN:

GENERAL ELECTRIC CAPITAL CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

V.A. Miller, J.

[1] The Respondent has brought a motion and the Appellant has cross-motioned for an Order that the opposite party provide answers to certain questions which it refused to answer or for which it provided insufficient answers at the examinations for discovery. The ground relied on in each motion is that the questions are relevant to the issues under appeal.

[2] The issue in appeal 2006-1385(IT)G is whether for the 1996 and 1997 taxation years, subsection 69(2) of the *Income Tax Act (*"the *Act")* applies, and for the 1998, 1999 and 2000 taxation years subsection 247(2) of the *Act* applies, to disallow the deduction of guarantee fees paid by the Appellant to its non-resident parent company, General Electric Capital Corporation ("GE Capital"). This issue involves the former and the current transfer pricing sections of the *Act* ("the Part I appeal").

[3] During the years in issue, GE Capital charged the Appellant a fee of 1% per annum of the principal amount of the Debt Securities outstanding during the year, in exchange for guaranteeing the Debt Securities. The Minister of National Revenue (the "Minister") reassessed the Appellant to disallow the deduction of the guarantee fees. It was the Minister's position that the value of the guarantee fee was nil. At the hearing of these appeals the question to be answered will be: "What would the

guarantee fee have been if the Appellant and GE Capital were dealing at arm's length?"

[4] The issue in appeal 2006-1386(IT)G is whether the Appellant was liable for Part XIII withholding tax in respect of the amounts paid to GE Capital as guarantee fees during the taxation years 1996 to 2000 ("the Part XIII appeal").

RESPONDENT'S MOTION

[5] The Respondent's motion was supported by the affidavit of Karen Hodges, a paralegal in the Toronto Regional office of the Department of Justice, who has worked on these files since 1996. Attached to her affidavit were exhibits which contained the questions which the Respondent says the Appellant's nominee, David Daubaras, refused or improperly answered. I will speak to the questions using the headings chosen by the Respondent.

A. Questions pertaining to the Arthur Andersen financial analysis (Schedule A attached

[6] At the audit stage, the Appellant, through its solicitors, retained the accounting firm of Arthur Andersen to support its position. Arthur Andersen prepared a Transfer Pricing Analysis ("the report") which was not accepted by the Canada Revenue Agency (CRA). The Appellant does not intend to rely on the report at the hearing of these appeals nor does it intend to call any witnesses from Arthur Andersen. It has however, included the report in its list of documents and the Respondent has the report. The Respondent has rejected the analysis in this report and does not intend to rely on it at the hearing of these appeals.

[7] The Respondent has asked the Appellant eight questions which would require it to contact Arthur Andersen, or in reality its former employees as Arthur Andersen no longer exists, to ask questions concerning its analysis and to obtain its working paper files with respect to the report. It is the Respondent's position that these materials may "reveal something that is helpful" and may lead to a train of inquiry.

[8] The Appellant refused to contact Arthur Andersen to ask the questions or to obtain the materials requested on the grounds that these materials are not relevant; they are part of an expert's opinion and as such are not a proper subject for discovery; and the Respondent is really asking for discovery of a third party.

[9] It is the Respondent's position that just because a party does not intend to rely on a document does not lead to the conclusion that the document is irrelevant. This is not a reason to deny a party's right to examine upon it. The Respondent has relied on the decisions in *Boast v. Canada*[1] and *Felesky Holdings Limited et al v. The Queen*[2] in support of its position.

[10] The decision in *Boast* deals with the right of a taxpayer to have discovery of an officer of the Crown on documents which the Crown did not intend to rely on at trial. Chief Justice Bowman, as he then was, allowed the taxpayer's motion and granted him the right to examine the officer. The facts in the present case are totally unlike those in *Boast*. Here the Respondent is attempting to examine a non-party on its opinion and She is attempting to perform this examination through the Appellant.

[11] In *Felesky Holdings* the taxpayer filed an affidavit stating that there were no documents either within or which had been within its power, possession or control relevant to any matter in issue in the action. The court found that there were documents which should have been listed in the affidavit. The fact that the documents were in the Respondent's possession or would not be relied on at trial was not a reason to not list the documents in the affidavit. This case as well, has no application to the issue in this motion.

[12] In my opinion, the position taken by the Appellant is correct. Neither party intends to rely on the report or to have witnesses from Arthur Andersen testify at the hearing of this appeal. I fail to see how Arthur Andersen's working paper files or their considerations in producing the report are relevant.

[13] The questions at count 1 and 2 are the same and seek an opinion from Arthur Andersen. The questions at counts 3, 5, 6, 7 and 9 seek to cross examine Arthur Andersen on their report. The question at count 8 requests the Appellant to obtain Arthur Andersen's working paper file. The questions and requests at counts 1, 2, 3, 5, 6, 7, 8 and 9 were properly refused by the Appellant. The Respondent is in essence attempting to conduct a discovery of Arthur Andersen through the Appellant. If She wishes to discover Arthur Andersen, the Respondent can make an application pursuant to Rule 99 of the *Tax Court of Canada Rules (General Procedure) ("Rules").*

[14] The purposes of discovery are to enable the parties to know the case they have to meet; to find out the facts on which the opposite party relies; to narrow or eliminate issues; to obtain admissions that will facilitate the proof of matters in issue and to avoid surprises at trial[3]. I am mindful that the scope of discovery is wide and

that at the discovery stage relevancy is to be construed liberally[4]. Justice Bonner, as he then was, had this to say about relevance in *Fink v. The Queen*[5],

> There was little dispute regarding the principles applicable to the resolution of issues of relevance. The law on the point is well settled. Any fact which may assist the examining party to destroy the opponent's case or to establish the position which he has taken on the issues raised by the pleadings is relevant for purposes of the discovery process.

[15] In the present case, counsel for the Respondent is seeking an opinion from Arthur Andersen and is seeking to cross examine them on their report which is opinion evidence. This is a "fishing expedition". She is seeking evidence of facts of which she has no prior knowledge[6] which she hopes will lead to a train of inquiry.

[16] The question at count 4 of exhibit A must be answered. If it exists, the engagement letter is a document that would be in the possession of the Appellant or its solicitors. The scope of section 95 of the *Rules* is broad and allows a party to ask any proper question relating to any matter in issue. The question at count 4 is a proper question as it relates to the issue between the parties. It naturally follows that since the Respondent has received the report, counsel would want to have a copy of the engagement letter.

B. **Information in the possession of third party entities (Schedule B attached)**

[17] The Appellant had Dominion Bond Ratings Service ("DBRS") and Standard & Poors ("S&P") prepare draft credit ratings that it used in its discussions with CRA at the audit stage. The Appellant does not intend to rely on these opinions at the hearing of these appeals.

[18] In its questions at Schedule B, counts 1 to 5, the Respondent has asked the Appellant to contact S&P and DBRS and ask them for any information they used to form their opinions. In counts 4 and 5 the Respondent has also asked the Appellant to contact Moody's to request any materials in its files with respect to the Appellant. Counsel for the Appellant was not sure whether there was ever a request to have Moody's prepare an opinion.

[19] The Appellant does not have to answer the questions at counts 1 to 5. The reasons that I have given in paragraphs 12, 14 and 15 above are applicable to these questions as well.

[20] The question at count 6 contains two requests. The first is "to provide all documents that were provided to S&P in conjunction with the stand-alone rating that it undertook". If these documents, or copies thereof, are in the Appellant's possession, then they should be given to the Respondent. It is my opinion that this request relates to the issue between the parties. Unlike the other requests in this Schedule, the Appellant does not have to consult with third parties nor does the request ask for the opinion of a third party nor does this request deal with opinion evidence. This is a proper request.

[21] The second request at count 6 is "to provide the information that Arthur Andersen had with respect to the Debt Rater analysis that it undertook". I do not think this is a proper question for the reasons I have given in paragraphs 12, 14 and 15 above. It need not be answered.

C. **Questions regarding financial support for GE and GE Capital subsidiaries (Schedule C attached)**

[22] Counsel for the Respondent advised that the Appellant has agreed to answer the questions at Schedule C attached.

D. **Questions pertaining to guarantee fees paid by GE companies to related GE companies (Schedule D attached)**

[23] The Appellant has agreed to answer the question at count 18 of this schedule. Counsel for the Respondent has divided the remaining questions in this schedule into two groups. There are those questions that result from paragraph 14 of the Notice of Appeal (counts 1, 2, 3, 4, 5, 6, 7 8 9, 10, 11, 12 and 13) and a second group of questions (counts 14, 15, 16, and 17) that deal with a guarantee fee charged to a GE-related company in Japan.

[24] In paragraph 14 of the Notice of Appeal the Appellant plead the following:

> 14. The Appellant issued unsecured debentures under individual offerings and as part of a Euro Medium Term Note Program which was established in 1994 (the "Euro MTN Program"). During the taxation years under review, a number of Canadian, Australian and United States companies in the GE group, including the Appellant, issued unsecured debentures under the Euro MTN Program.

The Respondent plead that She had no knowledge of and put in issue these allegations of fact.

[25] It is the Respondent's position that the questions asked with respect paragraph 14 are relevant on two bases. First, the fact that in its Notice of Appeal, the Appellant has raised the transactions between GE Capital and its subsidiaries in Australia and the United States, makes the questions relevant. Second, the Appellant did initially provide responses to questions as to whether those transactions in paragraph 14 involved guarantee fees. The Appellant did advise that a guarantee fee of 1% per annum was charged by GE Capital to the subsidiaries. As the response was not qualified, the Appellant cannot now say that the information is irrelevant.

[26] It is the Appellant's position that any answers to the Respondent's questions would not assist Her or the court with the hypothetical question that is before the court in this appeal.

[27] In my view the facts alleged in paragraph 14 have been put in issue by the Appellant. After opening the door, it cannot now say that those same facts are not relevant to the appeal. The Respondent is able to ask questions that pertain to the pleadings. I note that the answer written on Schedule D under count 1 is incorrect. The Appellant claimed privilege to all documents relating to the reason for the fees and not to the documents concerning the calculation of the rate. The questions at counts 1, 6, 7, 8, 9, 10, 11, 12 and 13 are to be answered.

[28] The questions at counts 2, 3 and 5 are overly broad and would be onerous to answer. These questions do not have to be answered.

[29] The question at count 4 is not relevant and does not have to be answered.

[30] The Respondent has not established that the questions at counts 14, 15, 16 and 17 are relevant. They do not bear a semblance of relevance to the issue raised by the pleadings in these appeals and these questions do not have to be answered.

E. **Questions pertaining to the Appellant's intended position at trial (Schedule E attached)**

[31] The Respondent advised that it was no longer proceeding with the questions at counts 1, 2, 3, 4 and 9. At the hearing of the motion, counsel for the Appellant answered the questions at counts 5, 6, 7 and 8. However, he did say that he would also give the responses in writing.

[32] In its letter dated August 29, 2008, the Appellant denied that it would necessarily be classified as a core subsidiary. The answer given to question 10 is sufficient. Question 11 is a proper question and follows from the answer given by the Appellant to question 10. It should be answered. The reasons stated in paragraph 48 below apply to this question as well.

F. **Additional questions not properly answered (Schedule F attached)**

[33] The Appellant has agreed to answer the questions at counts 1, 9, 10, 14, 17 and 20.

[34] The questions at counts 2, 3 and 4 are relevant to the issue between the parties and are to be answered.

[35] The notes requested in count 5, if they exist, are protected from disclosure by litigation privilege and do not have to be given to the Respondent.

[36] With respect to the relevancy of the documents requested under counts 6 and 19, the parties are not in agreement as to the information that is required to perform a "stand-alone analysis". The Appellant has argued that all that is required to perform a "stand-alone analysis" is to notionally sever the non-arm's length relationship between the Appellant and GE Capital. Whereas the Respondent has argued that a "stand-alone analysis" would require the elimination of all inter-company transactions.

[37] The threshold of relevancy at the discovery stage is low. In particular, as it was held in *Baxter*[7], the relevancy on discovery "must be broadly and liberally construed and wide latitude should be given". As *Baxter* cautioned, "a motions judge should not second guess the discretion of counsel by examining minutely each question".

[38] The method of calculating the appropriate arm's length price for the guarantee fees and the "stand-alone analysis" should be left to the trial judge. The relevance of the related party transaction documents would require the court to examine closely what is the required analysis under subsections 69(2) and 247(2) of the *Act*. This is an exercise that should be carried out by the trial judge and not a motions judge.

[39] The request for information about related party transactions and financial statements is not "patently irrelevant or abusive". The documents may provide information which may directly or indirectly enable the Respondent to advance Her

own case or to damage the case of the Appellant. As a result, the documents requested at counts 6 and 19 are to be provided to the Respondent.

[40] At counts 7 and 8 the Respondent has asked the Appellant to request documents from Federal Guarantee Insurance Corporation ("FGIC"), a company which had been a wholly owned GE company and whose business was to guarantee third party debt. FGIC was sold in 2003. At present, there is no relationship between the Appellant, GE Capital and FGIC. The Appellant does not have to answer the Respondent's request in counts 7 and 8.

[41] At count 11 the Respondent has requested the credit ratings of the Appellant, GE Capital and GE Capital's parent. The Appellant has given all of the documents that it had in this regard. It is my opinion that the request has been satisfied.

[42] The question at count 12 was sufficiently answered by the Appellant in its letter dated August 29, 2008.

[43] Count 13 asks a question concerning the reports written by the credit rating agencies S&P and Moody. The question at count 13 was answered at the hearing of this motion. Counsel for the Appellant stated that the Appellant was not the author of the credit rating reports; it did not know which credit support agreements the rating agencies were referring to when it made the statement that "GE Capital's AAA rating was based on GE Capital's financial strength, its relationship with GE Company and the explicit credit support agreements from GE Company"; and, the Appellant cannot say to whom, if anyone, the credit support agreements were provided. This is a sufficient answer.

[44] Counts 15 and 16 ask if the Appellant has an opinion on what S&P and Moody meant by the term "implicit support". These are proper questions and should be answered. The questions do not ask the Appellant to interpret the S&P guidelines.

[45] The question at count 18 is relevant and should be answered.

APPELLANT'S CROSS-MOTION

[46] The Appellant's cross-motion was supported by the affidavit of Teresa Azzopardi, a legal secretarial assistant at the firm of Osler, Hoskin & Harcourt LLP. Attached to her affidavit were exhibits, one of which set out the questions which the Appellant says were either not answered or not sufficiently answered. These questions are on Schedule G attached.

Question on page 448 and question 1833

[47] The Appellant has asked the Respondent to confirm whether it is the Respondent's position that the hypothetical arms-length guarantor referred to in the answer to the question on page 448 is not GE Capital. At the hearing of the motion the Respondent confirmed that the hypothetical arms-length guarantor was not GE Capital but an entity that has the same characteristics as GE Capital.

[48] As a follow up question the Appellant asked for a list of the characteristics of the hypothetical guarantor. The Appellant is entitled to ask questions to know the Respondent's position[8] and this question is to be answered. The answer does not require an expert opinion as stated by the Respondent in the written response. At the hearing counsel for the Respondent was able to list one of the characteristics.

[49] The Appellant was reassessed on the basis that the value of the guarantee fee was nil. As a result of the discovery process, the Respondent does not agree with this value for the guarantee fee. Counsel for the Respondent now says that the guarantee fees have a minimal value which she cannot specify as it is not known. The specific value will be a matter for expert evidence.

[50] The Appellant is entitled to know why the Respondent has changed its position. Question 1833 is to be answered.

Question 1326

[51] The Appellant obtained a document from the CRA pursuant to an access to information request. At the discovery, the Respondent gave an undertaking to inquire behind the document and to have her nominee inform himself about the document. The Respondent's initial response to the undertaking appears on Schedule G. At the hearing, counsel for the Respondent read into the record a further response that had been provided to the Appellant. That response was as follows:

> "The Appellant is misstating the Crown's position. As was noted in the written response to question 2037, the implicit support is "factored out" in valuing the arm's length guarantee. That is consistent with Mr. Nayak's statement that "Whether we can use implicit guarantee argument in the valuation/pricing…. My opinion is No". In both instances, the value (if any) of a third party guarantee is calculated after factoring out the implicit guarantee.

> Mr. Nayak was contacted and he confirmed this interpretation; namely that his opinion is that the implicit guarantee is not a factor in valuing the arm's length guarantee and he reiterated that the document in question represented his thoughts for an in-house brainstorming session. The only document he reviewed was the OECD guidelines and his recollection is that no minutes or other documents came out of the meeting."

This response has satisfied the undertaking. The Appellant has now asked as a follow up question that the Respondent provide all facts, information and documents relating to CRA's considerations and conclusions on the issue discussed in the document.

[52] I am not persuaded that this is a proper follow up question. There is not the appropriate connection between the answer to the undertaking and the subject matter of the question. The Respondent does not have to provide an answer to this question.

Question 2028

[53] This question has been answered.

Question 2037

[54] This question was not addressed by either party at the hearing of the motion nor is it addressed in the Appellant's Factum. I take it that the question has been sufficiently answered.

Question at page 475

[55] In response to the question at page 475, the Respondent stated that "A reasonable guarantee fee in the circumstances is the difference in value between the implicit support derived from being a member of the GE Group and the explicit guarantee specified in the Offering Memoranda. The quantum is a matter for expert evidence to be adduced at trial." The follow up questions ask the Respondent to provide the value of those variables. The Appellant asserted that this information is necessary in order for the Appellant to carry out the same analysis as the Respondent.

[56] In my view the values to be assigned to the implicit support and the explicit guarantee are opinions. This will be the subject of expert evidence at the trial. The question does not have to be answered.

Question 2049

[57] The question has been answered.

[58] Costs will be in the cause.

Signed at Halifax, Nova Scotia, this 15th day of December 2008.

"V.A. Miller"

V.A. Miller, J.

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[1] 2005 TCC 316
[2] 93 DTC 5051 (FCTD)
[3] *Aventis Pharma Inc. (formerly Hoechat Marion Roussel Canada Inc.) v. R.*, 2007 TCC 629*; Montana Band v. R.*, (1999), [2000] 1 F.C. 267 (Fed. T.D.)
[4] *Baxter v. R.*, 2004 TCC 636; *Owen Holdings Ltd. v. R.*, 97 D.T.C. 5401 (FCA) at paragraph 6
[5] [2005] 3 C.T.C. 2474 (TCC) at paragraph 13
[6] *Microsoft Corporation v. 1222010 Ontario Inc*., 2001 FCT 299 at paragraph 15
[7] *Supra* endnote 4 at paragraph 13
[8] *Sandia Mountain Holdings v. Canada*, [2005] TCC 65

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REASONS FOR ORDER BY:	The Honourable Justice Valerie Miller
DATE OF ORDER:	December 15, 2008

APPEARANCES:

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