

Docket: 2005-4451(IT)G

BETWEEN:

BERNHARD SCHIESSER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 11, 2009, at Victoria, British Columbia, and by way of a conference call on September 24, 2009, at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant:	D. Laurence Armstrong
Counsel for the respondent:	Ron D. F. Wilhelm Robert Carvalho (for September 24, 2009 only)
Counsel for Feil & Co., Mr. Feil and Mr. Pomponio:	Emily Boyle

ORDER

UPON motion made by the appellant for an order pursuant to Rule 99 of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON hearing submissions of the parties and of counsel for the third parties;

The appellant's motion is allowed.

IT IS ORDERED THAT:

- a) the taxpayer has the right to discover each of Mr. Feil and Mr. Pomponio on the matters relating to the issues of
 - (i) the qualified investment status of the shares of Avtel Financial Corporation;
 - (ii) the fair market value of such shares;
 - (iii) the roles of other persons involved with Avtel Financial Corporation, its affiliates, or its shares in respect of the share sale; and
 - (iv) the use, application and tracing of the funds from Mr. Schiesser's RRSP used to purchase the shares.
- b) Mr. Feil and Mr. Pomponio will make themselves available for discovery within 30 days of the date hereof and will satisfy any undertakings within 15 days of the discovery in which they are given;
- c) the taxpayer will pay the reasonable attendance costs of Mr. Feil and Mr. Pomponio at the discovery, reasonable counsel fees for their counsel's preparation and participation in the discovery process, and all other costs of the discoveries;
- d) the taxpayer will pay the reasonable counsel fees of counsel for Mr. Feil and Mr. Pomponio on this motion.

Signed at Ottawa, Canada, this 14th day of October 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 513
Date: 20091014
Docket: 2005-4451(IT)G

BETWEEN:

BERNHARD SCHIESSER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] The appellant in this appeal has brought a motion under Rule 99 of the *Tax Court of Canada Rules (General Procedure)* to have two non-parties discovered. The respondent supports the motion. The third parties oppose it.

[2] The hearing of this appeal is scheduled for two weeks in December 2009. The case as pleaded by the Crown involves what is commonly called an RRSP strip. The term used in the Crown's reply is an RRSP liberation scheme. The two third parties are Certified General Accountants, Mr. Feil and Mr. Pomponio. These two accountants, through their respective professional corporations, carry on a joint accounting practice under the name Feil & Co.

[3] While this is not formally a so-called test case, the taxpayer's counsel represents a further approximately 90 taxpayers pursuing tax appeals in respect of the same or similar investments purchased by their RRSPs.

[4] In each of these cases Mr. Feil or Mr. Pomponio signed the Feil & Co. certification in respect of the shares' "qualified investment" status under the *Income Tax Act* (the "Act"). Specifically, those Feil & Co. certifications contain the firm's opinion that the shares are qualified investments as well as a statement of belief that the price paid for the shares by the RRSP is equal to the shares' fair market value.

Whether or not an investment is a qualified investment as defined in the *Act* depends upon a number of specific factual tests. Mr. Scheisser's RRSP invested in shares of Avtel Financial Corporation. Mr. Pomponio signed the certification in respect of that particular investment on Feil & Co. letterhead. Mr. Feil has also signed certificates on Feil & Co. letterhead in respect of Avtel Financial Corporation in connection with RRSP investments by other investors.

[5] In its reply the respondent Crown is specifically challenging the qualified investment status of the shares purchased by Mr. Schiesser's RRSP when they were acquired, and the fair market value of those shares at that time. Both the qualified investment status of the shares and their fair market value involve factual issues that will be relevant and material to the determination that will be required of this Court in deciding the taxpayer's appeal in this case.

[6] An action has been commenced in the Supreme Court of British Columbia by the investor group, of which Mr. Schiesser is a member, against the two accountants, their firm, and two lawyers. This has been at the endorsed writ stage for several years. A statement of claim has not yet been filed by agreement between the plaintiffs' and the defendants' lawyers and, to date, with the written concurrence of the accountants.

[7] Apparently the parties agree that the civil action should await the disposition of the tax appeals before this Court since, if the investors are successful in their tax appeals, there will have been significantly lesser damages, if any, resulting from any wrongful actions of the defendant accountants and lawyers. I agree that this is an eminently sensible approach for the parties to seek to maintain. Indeed, counsel for the accountants did not suggest that discovery in the civil action could provide an alternative method for the taxpayer to obtain the information sought relating to the shares' qualified investment status or their fair market value for purposes of this tax appeal.

[8] Under the rules applicable to British Columbia civil actions, the plaintiffs' right to discover the accountants cannot be exercised until pleadings are closed. This cannot happen before the commencement of the tax appeal in this Court.

[9] Several affidavits were filed by the appellant and the third parties. It is apparent from these that recollections differ. No one sought to cross-examine any of the affiants.

[10] There is evidence that Mr. Schiesser's counsel did seek to contact Mr. Feil of Feil & Co. by telephone in connection with the actions of the Canada Revenue Agency (the "CRA") against the investors. The telephone message left for Mr. Feil went unanswered. This initial attempt was some time ago and preceded the commencement of the civil action against the accountants. Since that time Mr. Schiesser had not attempted to contact Mr. Feil, Mr. Pomponio or the lawyer who communicated with his counsel regarding the civil action against the accountants until after bringing this motion.

[11] There is evidence that, since bringing this motion, Mr. Schiesser's counsel has on two occasions requested meetings with Mr. Feil, through his counsel, to seek some of the information. Specifically, one of Mr. Armstrong's affidavits indicates he offered to withdraw this motion if Mr. Feil would agree on a without prejudice basis to meet and answer questions, unsworn and unrecorded, limited to the shares' qualified investment status and fair market value as set out in the certificates. The evidence is that no reply has been made to these requests.

[12] The state of the evidence in this matter is disappointing. The sworn affidavits of two counsel contradict each other, including as to whether Mr. Armstrong did recently make the requests just referred to. In any event, while it is possible that the accountants may be willing to provide some explanations, responses and documents at this stage, counsel for the accountants clearly did not have any instructions in this regard at the hearing of the motion. I am of the opinion that it is reasonable to assume that, given the civil proceeding pending against them by the investors, their possible voluntary cooperation would not approach the level of fact-finding, information discovery and document discovery that will be available to the appellant if he is able to examine them for discovery *viva voce* under the Rules of this Court.

[13] While the taxpayer has not asked Mr. Pomponio directly if he would provide information, I am satisfied that Mr. Feil's position is that of Feil & Co. of which Mr. Pomponio is the other member.

[14] There is evidence that the respondent has asked Mr. Feil of Feil & Co. to meet to discuss and answer questions relating to the factual issues in Mr. Schiesser's tax appeal in this Court. Mr. Feil refused that request but did agree to receive written questions. The questions were asked in May of this year. He has replied to some of those questions but, as of the hearing of this motion, he had not yet replied at all to some of the questions. Mr. Feil agreed to provide some documents to the respondent but, as of the hearing of this motion, he had yet to provide any documents at all. Given the respondent's position on this motion and its submissions, I assume the

respondent has been providing the information contained in Mr. Feil's answers to the taxpayer's counsel. I assume the accountants are making a similar assumption.

[15] Ms. Boyle, the accountants' counsel on this motion, expressly confirmed that there is no suggestion on her part that the taxpayer is seeking to discover the accountants in this tax appeal for an improper purpose such as getting early discovery for purposes of pursuing the investors' civil action. This motion is not a collateral approach to advance the British Columbia civil action.

[16] The accountants' counsel acknowledged that this motion was not part of a fishing expedition by the appellant, nor an attempt to nail down the potential evidence of Mr. Feil or Mr. Pomponio at this stage, nor was it being brought for any other ulterior motive.

[17] The accountants' counsel did not take the position that any unfairness would result to the accountants if the taxpayer's motion is granted.

[18] The taxpayer has offered to pay the accountants' reasonable attendance expenses if an order for discovery is made, as well as their reasonable counsel fees for preparing for and attending to the discoveries.

[19] The opposition of the accountants to this motion is grounded solely on the basis that the taxpayer cannot show that he has been unable to obtain the information sought on discovery from the accountants. They do not suggest it could be obtained by the taxpayer from the respondent. The accountants' counsel points out that the taxpayer has not made reasonable, recent attempts to obtain the information sought from Mr. Feil and has never sought to ask Mr. Pomponio personally for any information.

[20] It is her position that, in such circumstances, Rule 99(2)(a) has not been complied with and, for that reason alone, orders for discovery should not be issued because the motion is premature. When asked by the Court if she was in a position to confirm that Mr. Feil and Mr. Pomponio were willing to receive and reply to either written or oral questions, or to provide documents in their possession, her reply was that she did not have any instructions.

[21] The respondent's position is that it supports the taxpayer's motion. Given the responses received from Mr. Feil of Feil & Co. to the respondent's written questions to date, his failure to address some of the questions in his written reply and the fact that no documents have yet been received, the Crown believes the information sought

would best be received only if an oral examination for discovery proceeds. The Crown believes that, in these circumstances, an oral discovery can be expected to be more productive, more efficient, and provide greater ease for follow-up. I share these views of the respondent. In my opinion, an oral discovery will best obtain the information sought in these proceedings in a manner that can be expected to be efficient, to minimize the risk of any request to delay the trial, and to allow for the information provided to be tested for its completeness and accuracy.

[22] It is clear that most of the requirements of Rule 99 have been met. However, non-party discoveries are an extraordinary procedure that should, subject to the possible application of Rule 9, only be granted if all of the requirements are met. Even then such orders remain discretionary.

[23] I am satisfied that each of Mr. Feil and Mr. Pomponio has information relevant to the material issues in Mr. Schiesser's tax appeal, being the fair market value of the shares and the facts needed to determine the shares' qualified investment status. Similarly, I believe that, because of their professional involvement with the share investments and their certifications in respect of the shares, they have information that is relevant to the respondent's position in this appeal that the share investments were in essence an unsuccessful tax avoidance scheme. Further, I believe that, for the same reasons, they each have information relevant to what happened to the money invested by the taxpayer's RRSP in the shares in question, as well as information relevant to the roles of other persons involved with the share sale, with the company and with the proceeds. Each of these is a material issue in this appeal as well.

[24] I am satisfied that it would be unfair to the taxpayer to conduct the hearing of his tax appeal in this Court without having been given the opportunity to discover each of Mr. Feil and Mr. Pomponio. They have each signed Feil & Co. certifications in respect of Avtel Financial Corporation. If Mr. Schiesser is unsuccessful in demonstrating in his appeal that the shares purchased by his RRSP were qualified investments and that the price paid was the shares' fair market value, he will be responsible for the adverse tax consequences. However, in making the investment decision he relied upon the Feil & Co. review, opinion, belief and certification regarding the underlying facts relating to the company and its shares. To deny Mr. Schiesser access to the underlying information in the minds and hands of those who assembled it and reviewed it, for the purpose of him and other similarly situated investors relying on it, would be manifestly unfair. (That is not to say the taxpayer should necessarily expect an adjournment of the December trial date if his opportunity for discovery is not, for whatever reason, as fruitful as he may hope. That

would be a separate matter for another day and subject to further and different considerations.)

[25] There is no suggestion that permitting discoveries on a reasonable timetable will unduly delay the commencement of the trial set down for December. A schedule requiring the accountants to attend for discovery within the next 30 days and requiring that undertakings be satisfied within a further 15 days need not necessarily delay the trial at all.

[26] The taxpayer has agreed to pay the reasonable attendance and counsel costs of the discovery so there is no unreasonable expense to be borne by the accountants.

[27] As already stated, the accountants have not suggested any unfairness would result.

[28] Thus, the only remaining requirement is that I be satisfied that the taxpayer “has been unable” to obtain the information from the Crown or from the accountants. I am satisfied on the facts of this case that this final requirement is also met for the following reasons:

- a) there is evidence that taxpayer’s counsel contacted Mr. Feil of Feil & Co. to seek information relating to the issues in question and those calls went unreturned;
- b) there is evidence that taxpayer’s counsel again sought such information more recently from Mr. Feil of Feil & Co. via his counsel and that those requests went unanswered;
- c) Mr. Feil of Feil & Co. refused the respondent’s request for oral questions, has yet to respond at all to some of the written questions, and has yet to produce any of the documents he agreed he would;
- d) at the hearing of the motion the accountants’ counsel was unable to say if either of the accountants would consider written questions from the taxpayer if asked;
- e) the accountants are being sued by the investors and it is therefore reasonable to assume their current limited cooperation with the parties to the tax appeal will not improve;

- f) this trial is set for December and, at the current pace, the respondent will not have much of the sought information to share with the taxpayer sufficiently before the trial to make further investigations or to use it in preparing for the trial, if it is received before the trial at all; and
- g) I accept that Mr. Feil's failure to return the taxpayer's telephone calls and Mr. Feil's position regarding the respondent's request for information are the actions of Feil & Co. and therefore extend to Mr. Pomponio.

[29] The evidence of Mr. Armstrong's initial attempt to contact Feil & Co. for information is sufficient notwithstanding that it may have pre-dated Mr. Schiesser becoming his client or identifying himself as a member of the group of investors in the civil action. While Rule 99 requires that the taxpayer has been unable to obtain the information from the person sought to be examined, I am satisfied that this requirement was met in the circumstances of this case with respect to Mr. Schiesser once he identified himself to Mr. Armstrong as a member of the investor group for purposes of the British Columbia group action and retained Mr. Armstrong to act on his income tax appeal. Rule 99 should not be interpreted and applied so strictly as to defy common sense and the realities of the day-to-day business and professional worlds. In any event, the evidence of Mr. Armstrong's more recent attempts clearly satisfies the requirements of Rule 99.

[30] I am allowing the taxpayer's motion and ordering that:

- a) the taxpayer has the right to discover each of Mr. Feil and Mr. Pomponio on matters relating to the issues of
 - (i) the qualified investment status of the shares of Avtel Financial Corporation;
 - (ii) the fair market value of such shares;
 - (iii) the roles of other persons involved with Avtel Financial Corporation, its affiliates, or its shares in respect of the share sale; and
 - (iv) the use, application and tracing of the funds from Mr. Schiesser's RRSP used to purchase the shares.
- b) Mr. Feil and Mr. Pomponio will make themselves available for discovery within 30 days of the date hereof and will satisfy any undertakings within 15 days of the discovery in which they are given;
- c) the taxpayer will pay the reasonable attendance costs of Mr. Feil and Mr. Pomponio at the discovery, reasonable counsel fees for their

counsel's preparation and participation in the discovery process, and all other costs of the discoveries;

- d) the taxpayer will pay the reasonable counsel fees of counsel for Mr. Feil and Mr. Pomponio on this motion.

[31] If any issues arise relating to compliance with the terms of this order, I may be approached in writing via the Registry of the Court.

Signed at Ottawa, Canada, this 14th day of October 2009.

"Patrick Boyle"

Boyle J.

CITATION: 2009 TCC 513

COURT FILE NO.: 2005-4451(IT)G

STYLE OF CAUSE: BERNHARD SCHIESSER v. HER
MAJESTY THE QUEEN

PLACES OF HEARING: Victoria, British Columbia
Ottawa, Canada

DATES OF HEARING: September 11 & 24, 2009

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF ORDER: October 14, 2009

APPEARANCES:

Counsel for the appellant: D. Laurence Armstrong

Counsel for the respondent: Ron D. F. Wilhelm
Robert Carvalho (for September 24, 2009
only)

Counsel for Feil & Co.,
Mr. Feil and Mr. Pomponio: Emily Boyle

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