

Docket: 2008-331(IT)G

BETWEEN:

GEORGE TRIESTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals called for hearing on December 8, 2009 at Toronto, Ontario

Before: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: John David Buote
Counsel for the Respondent: Eleanor H. Thorn

ORDER

THIS MATTER having come on for trial on December 8, 2009, and it appearing at that time that the appellant had served and filed a Supplemental List of Documents under Rule 87 of the *Tax Court of Canada Rules (General Procedure)* on the afternoon of December 7, 2009 disclosing for the first time an additional 14 documents or bundles of documents;

AND IT APPEARING that the List of Documents filed by the Appellant in purported compliance with Rule 81 and the Status Hearing Order made by The Honourable Chief Justice Rip on September 10, 2008 disclosed only three documents;

IT IS HEREBY ORDERED THAT

1. The trial of the matter is adjourned *sine die*;

2. The respondent may conduct a further examination for discovery of the appellant, such examination to be completed not later than February 10, 2010;
3. The appellant shall, within 30 days of the date of this Order, pay to the respondent costs of the day which are hereby fixed at \$6,000.

Signed at Toronto, Ontario, this 9th day of December 2009.

“E.A. Bowie”

Bowie J.

Citation: 2009 TCC 618
Date: 20091209
Docket: 2008-331(IT)G

BETWEEN:

GEORGE TRIESTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] This matter came on for trial before me on the morning of December 8, 2009. It is not complex. The issue is one of the application of section 250 of the *Income Tax Act* and the *Canada-U.S. Income Tax Convention* in the context of a U.S. citizen who has lived and worked in Canada during the years under appeal.

[2] The Notice of Appeal was filed in January 2008, and the Reply to the Notice of Appeal in April 2008. The parties delivered Lists of Documents under *Rule 81*, disclosing those documents that might be used in evidence to assist them at trial. The appellant's List was delivered on September 10, 2008; it disclosed only three documents. A few more were disclosed when he was examined for discovery on December 2, 2008. In the summer of 2009 both counsel signed and filed a Joint Application for a trial date, certifying that the matter was then ready for trial. The trial date was fixed by an Order dated September 8, 2009.

[3] At 3:44 p.m. on December 7, 2009, the appellant's counsel filed by fax a Supplemental List of Documents. It is said on the face of the document that it "is served in compliance with Section 81", but that is patently not so. Rule 81 provides:

LIST OF DOCUMENTS (PARTIAL DISCLOSURE)

- 81(1) A party shall, within thirty days following the closing of the pleadings, file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence,
- (a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party, or
 - (b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party.
- 81(2) A list of documents to be filed under this section shall be in Form 81.
- 81(3) A party who has failed to file and serve a list of documents within the time fixed by subsection (1) may, without leave, file and serve it after that time unless,**
- (a) a notice of motion for a judgment under section 91 has been filed, or
 - (b) **an application to fix the time and place of hearing under subsection 123(1) has been filed or a date for hearing the appeal has been fixed by the Court,**
- in which case, the party may apply for leave to file and serve the list.
- (4) A party who has failed to file and serve a list of documents within the period set by a judge pursuant to subparagraph 125(5)(a)(i) may file and serve it only with leave of the Court.

(emphasis added)

[4] This Supplemental List was delivered to counsel for the respondent, along with copies of the documents listed, on the afternoon of December 7. Of the 15 items listed, 14 documents, or in some cases bundles of documents, that “might be used in evidence” by the appellant were then disclosed for the first time.

[5] At the opening of the hearing counsel for the respondent, having been taken by surprise, sought an adjournment, and costs thrown away.

[6] Clearly, the Respondent would suffer prejudice if required to go to trial under these circumstances. The documents on the Supplemental List bear dates between May 1999 and June 2009. To produce these for the first time on the eve of trial, and a year after the examination for discovery of the appellant, is no less than attempted trial by ambush, a tactic that was abolished from our courts several decades ago.

[7] The *General Procedure Rules* of this Court require that parties produce to the other party, at a minimum¹, the documents that they will be relying on at trial, within 30 days following the close of pleadings. There is a reason that production of documents precedes examinations for discovery; it is so that the parties may be questioned during the examination about the documents that they will rely on at trial to prove their case, and to disprove their opponent's case. Such disclosure enables the parties to make a realistic assessment of the relative strength of their case, and that of the other party, thereby promoting settlement and the fairness of the trial process.

[8] *Rule 87* recognizes that occasionally a document may emerge at a late point in time, and it provides for a Supplemental List to be filed when that happens.

LIST INCOMPLETE

- 87 Where, after the list of documents has been served under either section 81 or section 82, it comes to the attention of the party serving it that the list has for any reason become inaccurate or incomplete, that party shall serve **forthwith** a supplementary list specifying the inaccuracy or describing the document.

(emphasis added)

The purpose of this *Rule* is to ensure that parties comply with their continuing obligation to make complete disclosure; it is not to facilitate last minute disclosure of documents that should have been, but were not, disclosed long ago. The inclusion of the word “forthwith” in the text is not accidental.

[9] *Rule 91* provides the remedies for failure to comply with Rules 78 to 91.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

- 91 Where a person or party who is required to make discovery of documents under sections 78 to 91 fails or refuses without reasonable excuse to make a list or affidavit of documents or to disclose a document in a list or affidavit of documents or to produce a document for inspection and copying, or to comply with a judgment of the Court in relation to the production or inspection of documents, the Court may,

- (a) direct or permit the person or party to make a list or affidavit of documents, or a further list or affidavit of documents,

¹ That is to say under *Rule 81*, in contrast to *Rule 82*, which contemplates production of all relevant documents.

- (b) direct the person or party to produce a document for inspection and copying,
- (c) except where the failure or refusal is by a person who is not a party, dismiss the appeal or allow the appeal as the case may be,
- (d) direct any party or any other person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the discovery necessitated by the failure to disclose or produce, and
- (e) give such other direction as is just.

[10] In the present case, the appellant has offered no excuse for failing to include the documents enumerated in the Supplemental List in the original *Rule* 81 List, or for failing to make the Supplemental List “forthwith”. The direction that is just in the circumstances is to adjourn the trial, to order that the respondent may conduct a further examination for discovery of the appellant, if so advised, and to require the appellant to pay the costs thrown away as a result, forthwith and in any event of the cause. Those costs are fixed at \$6,000, an amount that is intended to compensate the respondent for the costs of the day, including preparation time, and for the expense of bringing a witness from Ottawa to Toronto, on a scale indicative of the Court’s disapproval of the appellant’s conduct in withholding these documents from production until the eve of trial.

Signed at Toronto, Ontario, this 9th day of December, 2009.

“E.A. Bowie”

Bowie J.

CITATION: 2009 TCC 618

COURT FILE NO.: 2008-331(IT)G

STYLE OF CAUSE: GEORGE TRIESTE and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 8, 2009

REASONS FOR ORDER BY: The Honourable Justice E.A. Bowie

DATE OF ORDER: December 9, 2009

APPEARANCES:

Counsel for the Appellant:	John David Buote
Counsel for the Respondent:	Eleanor H. Thorn

COUNSEL OF RECORD:

For the Appellant:

Name:	John David Buote
Firm:	J.D. Buote & Associates Tax

For the Respondent:

	John H. Sims, Q.C.
	Deputy Attorney General of Canada
	Ottawa, Canada