

Docket: 2009-600(IT)G
2009-601(GST)G

BETWEEN:

KANNIAPPA (KEN) REDDY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 17, 2010, at Vancouver, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Timothy W. Clarke

Counsel for the Respondent: Bruce Senkpiel

ORDER

UPON motion by the Appellant for an Order compelling the Respondent's witness on discovery, Annie Siu, the Canada Revenue Agency appeals officer that considered the Appellant's income tax and GST objections and confirmed the assessments, to answer questions 208, 211, 247 and 257 from the transcript of her discovery (attached to the affidavit of Riley Burr dated November 10, as Exhibit E), to which counsel objected, and for costs of this motion, in any event of the cause;

AND UPON reading the materials filed;

AND UPON hearing counsel for the parties;

IT IS ORDERED THAT:

1. The motion is dismissed.
2. The Appellant shall pay to the Respondent costs of the motion forthwith, and in any event on the cause which costs are fixed at \$550, inclusive of disbursements and H.S.T. to be paid within 30 days of the date of this Order.

Signed at Ottawa, Canada, this 11th day of March, 2011.

“E.A. Bowie”

Bowie J.

Citation: 2011 TCC 161
Date: 20110311
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2009-601(GST)G

BETWEEN:

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Appellant,

and

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Respondent.

REASONS FOR ORDER

Bowie J.

[1] The appellant brings this motion seeking an order requiring that the respondent's nominee to be examined for discovery under *Rule 93* answer the following questions:

- 208 Can you point to the documents that have been produced by counsel that demonstrate what your assumptions of fact are?
- 211 Okay. Can you read through the T401 Report and point to me – tell me which are your assumptions of fact in that R401 Report?
- 247 Okay. Once again, the exhibit – tab 57 of the Respondent's book, Volume 1, contains the T401 Report.

My question for the witness is to, please, go through the T401 Report and identify for me the assumptions – all of the assumption that are set out in the T401 Report that she made in confirming the assessment?

- 257 Yes. Can you point to the assumptions of fact that you made in confirming the GST reassessment in this T401?

[2] This is the context in which the dispute arises. The appellant has been reassessed for the taxation years 2000, 2002 and 2003 to include approximately \$357,000 to his income for those years, and for associated interest and penalties. He was also assessed under the *Excise Tax Act*, Part IX, for approximately \$32,000 in unpaid goods and services tax together with interest and penalties in respect of the same three years. The assessments were confirmed following the Appellant's objections, and he has appealed. The income tax and goods and services tax appeals have been consolidated, and on April 29, 2010 counsel for the Appellant examined Annie Siu, the Deputy Attorney General's nominee, in respect of the income tax and the GST appeals. Ms. Siu is the appeals officer of the Canada Revenue Agency who considered the assessments following the objections, and confirmed them all.

[3] Paragraph 7 of the Reply to the Notice of Appeal delivered by the respondent in the income tax appeals recites 7 assumption of fact said to have been made by the Minister of National Revenue in the course of determining the appellant's liability for tax. Paragraph 8 of the GST Reply pleads 33 assumptions some, but not all, of which are duplicative of those pleaded in the income tax appeals. A few of these assumptions appear to offend the rule in *Canada v. Anchor Point Energy Limited*¹ in that they involve mixed statements of fact and law, but that is not in issue here.

[4] The question in this motion comes down to whether the questions, as formulated, are fair. The respondent does not dispute that the appellant is entitled to question the witness as to whether each of the assumptions pleaded was actually made by a representative of the Minister in the course of either assessing or confirming those assessments. If the appellant can establish in respect of any of them that they were not, then he is relieved of the burden of disproving those. During the discussion between counsel that is part of the record, counsel for the respondent offered by way of undertaking to provide a written response to the questions as framed by counsel for the appellant. This offer was refused. Counsel for the appellant insisted that he was entitled to have the witness go through the documents to identify each assumption of fact and where they were recorded, either in the reports on objection, or elsewhere in the documents produced.

¹ 2003 FCA 294.

[5] Rules 95(1), 107 and 108 are directed to the conduct of an examination for discovery:

95(1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant 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

- (a) the information sought is evidence or hearsay,
- (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or
- (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

107(1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the Court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the Court.

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,

- (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,
- (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,
- (c) many of the answers to the questions are evasive, unresponsive or unduly lengthy, or
- (d) there has been a neglect or improper refusal to produce a relevant document on the examination.

(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.

[6] In the present case, it is the form of the question that is objectionable. Counsel is, of course, entitled to examine the deponent as to each assumption of fact that has been pleaded. However, it is counsel's job, not the deponent's, to go through the document to ascertain whether the assumptions are to be found recorded there. The examination is not a memory test for the deponent to pass or fail depending on how well she has memorized the 37 assumptions that are pleaded.

[7] Compound questions are not permitted,² because they are unfair to the person being examined. Here counsel is trying to require the examinee to deal with 37, and in the GST cases, 33 questions rolled into one. He is, of course, free to ask about each assumption pleaded whether it was in fact made, and by whom, and if it was recorded in a document at the time, and if so where; but that is four questions concerning each of the many assumptions, and they must be asked *seriatim*, not in the form of one compound question.

[8] As the examination had not been completed when the present motion was brought, re-attendance is not an issue. Counsel may put the questions, in proper form, at the continuation.

[9] The one matter upon which counsel were agreed on the hearing of the motion was costs. They each argued that they should have costs of the motion forthwith in any event of the cause. In my view, that is the proper costs order upon resolution of most interlocutory disputes, unless special circumstances dictate otherwise. The motion is therefore dismissed, with costs, which I fix at \$550 to be paid by the appellant within 30 days of the date of this Order.

² *In re Stratosphere Corporation Securities Litigation*, 182 F.R.D. 614; 1998 U.S. Dis. Lexis 14658 (U.S. District Court).

[10] Before leaving this matter, I feel bound to make the further observation that the protracted arguments that took place during the examination in this case were totally inappropriate. Counsel who finds a question objectionable under the *Rules* “... shall state *briefly* the reason for the objection ...”.³ If both counsel agree to have a discussion of the objection off the record then they are free to do so; otherwise, examining counsel should simply move on to the next question. In the present case, counsel for the respondent, in an ill-advised attempt to be helpful, repeatedly suggested alternative ways to avoid the impasse, even offering an undertaking to have the deponent furnish the answer to the compound question in writing at a later date. This quickly led to ill-tempered bickering which served no useful purpose and was quite beyond the pale. It is this kind of conduct that undermines the civility that ought to be a hallmark of relations among members of the bar.

Signed at Ottawa, Canada, this 11th day of March, 2011.

“E.A. Bowie”

Bowie J.

³ *Rule 107(1)* – emphasis added.

CITATION: 2011 TCC 161

COURT FILE NO.: 2009-600(IT)G and 2009-601(GST)G

STYLE OF CAUSE: KANNIAPPA (KEN) REDDY and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 17, 2010

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

DATE OF ORDER: March 11, 2011

APPEARANCES:

Counsel for the Appellant:	Timothy W. Clarke
Counsel for the Respondent:	Bruce Senkpiel

COUNSEL OF RECORD:

For the Appellant:

Name:	Timothy W. Clarke
Firm:	Bull Howser & Tupper

For the Respondent:

Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada
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