Docket: 2018-1491(IT)G

BETWEEN:

DAVID JACOB SLOAN,

Appellant,
(Moving Party)

and

HIS MAJESTY THE KING,

Respondent.

Motion in writing filed on January 12, 2022

Before: The Honourable Justice Monica Biringer

Parties:

For the Appellant: The Appellant himself

Counsel for the Respondent: Andrea Jackett

ORDER

WHEREAS the Appellant brought a motion to compel the Respondent to answer undertakings and other questions arising from the oral examination for discovery;

AND UPON reviewing the affidavit evidence and the written submissions of the self-represented Appellant and those of counsel for the Respondent;

AND IN ACCORDANCE with the attached Reasons for Order, it is ordered that:

1. the motion is allowed with respect to Item #17 only; and

2. costs are awarded to the Respondent in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Toronto, Ontario, this 19th day of October 2022.

"Monica Biringer"

Biringer J.

Citation: 2022 TCC 121
Date: 20221019
Docket: 2018-1491(IT)G

BETWEEN:

DAVID JACOB SLOAN,

Appellant,
(Moving Party)

and

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Respondent.

REASONS FOR ORDER

Biringer J.

I. BACKGROUND TO THE MOTION

[1] At issue in the appeal are disallowed claims for partnership losses and carrying charges claimed by the Appellant in connection with the purchase of a one-half unit in a limited partnership tax shelter: Horseshoe Limited Partnership (**"Horseshoe LP"**). Horseshoe LP has interests in two other partnerships that, according to the Respondent, "purportedly operated" internet gaming operations in the Ukraine and Antigua. The appeal concerns the Appellant's 2006, 2007 and 2008 taxation years.

[2] The Appellant's examination for discovery of the Respondent's nominee took place virtually on May 28, 2021. It lasted approximately two hours. The Respondent's nominee was Mr. Anton Plas, who was the Canada Revenue Agency's (**"CRA"**) auditor for Horseshoe LP.

[3] On July 9, 2021, the Respondent sent answers to undertakings to the Appellant (**"Answers to Undertakings"**). On July 14, 2021, the Appellant wrote to the Respondent alleging, among other things, that the answers were incomplete. On August 6, 2021, the Respondent replied to the Appellant and provided further documents that were referred to in the Answers to Undertakings (**"Respondent's**

August 6 Letter"). On August 16, 2021, the Appellant wrote to the Respondent and reiterated the allegations in his letter of July 14, 2021.

[4] On January 12, 2022, the Appellant served the Respondent with the motion. The motion record did not include written submissions. On January 31, 2022 the Respondent filed written representations in response to the motion record and on February 16, 2022 the Appellant filed written submissions.

II. **THE MOTION**

[5] The Appellant brings a motion to compel Mr. Anton Plas, the nominee of the Respondent, to (1) "provide answers to questions which were refused to be answered by him" in the course of his examination for discovery; and (2) "provide answers to questions properly arising out of answers to undertakings given by him" at the examination for discovery.

[6] The Appellant relies on the "*Rules of the Tax Court of Canada* relating to examinations for discovery" but does not cite specific Rules.

[7] The Appellant submitted the transcript from the examination for discovery of Mr. Plas and an affidavit of the Appellant (**"Sloan Affidavit"**). The Appellant in his affidavit states that answers to undertakings given by Mr. Plas on his examination for discovery were provided by the Respondent on July 9, 2021 and August 6, 2021, that as a result of those answers, the Appellant had further questions which he set out in letters to the Respondent dated July 14, 2021 and August 16, 2021, and that no further responses from the Respondent were received and his further questions remain unanswered.

III. **THE RULES AND GENERAL PRINCIPLES APPLICABLE TO ORAL DISCOVERY**

A. ***The Rules***

[8] The sections of the *Tax Court of Canada Rules (General Procedure)* (**"Rules"**) relevant to this motion include section 92 and subsections 93(1) and 95(1), which state:

> **92** An examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the Court.
>
> **93(1)** A party to a proceeding may examine for discovery an adverse party once, and may examine that party more than once only with leave of the Court.
>
> **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 . . . 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.

B. ***Oral Examination for Discovery***

[9] Section 92 of the Rules provides for examinations for discovery either by oral examination or, at the option of the examining party, by written questions. In this matter, oral examination for discovery was chosen.

[10] Justice Owen recently reviewed the important governing principles regarding the scope of oral discovery in *Contractor v. The Queen* 2021 TCC at paras 17-33 as follows:

> [17] The purposes of oral discovery are recited by the Federal Court of Appeal in *R. v. Lehigh Cement Ltd.*:
>
> (a) to enable the examining party to know the case he has to meet;
>
> (b) to procure admissions to enable one to dispense with formal proof;
>
> (c) to procure admissions which may destroy an opponent's case;
>
> (d) to facilitate settlement; pre-trial procedure and trial;

(e) to eliminate or narrow issues; and

(f) to avoid surprise at trial.

[18] These purposes are informative but do not directly address the permissible scope of oral discovery under the Rules, which is rooted in the words of subsection 95(1) viewed the in light of the principle of proportionality.[7]

[19] To be permissible under subsection 95(1), a question must satisfy two conditions: the question must be proper and the question must be relevant to any matter in issue in the proceeding. To ensure a coherent application of these conditions elsewhere in the discovery Rules, where the term "proper question" is used[8] the term should be read as a reference to a question that is both proper and relevant.[9]

[20] In *Lehigh*, the Federal Court of Appeal described the scope of permissible discovery under the Rules as follows:

> The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles.[10]

[21] The Court in *Lehigh* explains the Tax Court of Canada's ("Tax Court") discretion to disallow questions even though they meet the "relevant to" condition in subsection 95(1):

> Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. . . . The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope".[11]

[22] I would add that the Tax Court's discretion to disallow questions that are relevant but not proper may also be exercised if the question is materially ambiguous, vague, imprecise, misleading, scandalous (e.g., defamatory) or vexatious (e.g., harassing); or seeks privileged information, seeks the work product of counsel, seeks the disclosure of evidence rather than fact or seeks an opinion (i.e., inference from facts) rather than fact.

[23] With respect to the "relevant to a matter in issue in the proceedings" requirement, in *Teelucksingh v. R.*,[12] the Tax Court states:

> Examination for discovery is an examination as to the information and belief of the other party as to facts that are relevant to the matters in issue, as defined by the pleadings.[13]

[24] When reviewing the pleadings for this purpose, the pleadings should be construed with fair latitude[14] and due regard should be had to the substantive law.[15]

[25] The questions on oral examination for discovery must be relevant to the matters in issue between the party being examined[16] and the party examining. The core issue between any appellant and the respondent in an income tax appeal under subsection 169(1) of the ITA is the correctness of the assessment or reassessment that is being appealed[17] and therefore as a general proposition it is the facts directly or indirectly[18] relevant to that core issue that may be explored in an oral examination for discovery.

[26] With respect to the degree of connection that is required by the phrase "relevant to any matter in issue in the proceeding",[19] in *Lehigh* the Federal Court of Appeal states at paragraph 34:

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

[27] Recently, in *Madison Pacific Properties Inc. v. R.*,[20] the Federal Court of Appeal confirmed the approach in *Lehigh*:

> In *Lehigh*, this Court held that the Tax Court had applied the correct legal test for disclosure in a case such as this, which defines relevance on discovery as requiring that the disputed question or production request give rise to a reasonable likelihood that it might lead to a train of inquiry that may advance a party's case or damage that of its opponent. . . .[21]

[28] Discovery does not permit fishing expeditions. More precisely, questions that constitute a fishing expedition are not proper questions either because they are overly broad and/or an abuse of the discovery process or because they have no connection to the matters in issue in the proceeding, or both.[22] The facts and circumstances will determine the appropriate determination.[23]

[29] The matters in issue in a proceeding may include a law or policy. In *R. v. CHR Investment Corporation*,[24] the Federal Court of Appeal stated in paragraphs 25 and 31 that subsection 95(1) permitted questions to ascertain the opposing party's legal position and that the person being examined would be obliged to answer the questions.[25]

[30] In *Madison*, the Federal Court of Appeal observed that documents identifying a purported policy in the ITA were of limited relevance and were likely inadmissible at the hearing of the appeal because "the question of the policy in the ITA that the taxpayer is alleged to have avoided is ultimately a question of law".[26]

[31] Based on *CHR* and *Madison*, examination for discovery may be used to ascertain the fact of a particular legal position that is relevant to any matter in issue in the proceeding, but any statement of that position in the examination has no bearing on the question of whether the legal position is in law correct or applicable.

[32] In many cases, it will be reasonably clear whether a question meets or does not meet the conditions in subsection 95(1) (i.e., whether a question is a proper question). However, where there is doubt, consistent with the purposes of discovery recited in *Lehigh*, it is generally better to err on the side of allowing the question. The trial judge can then determine whether information (if any) elicited from the question is admissible at the hearing of the appeal.

[33] Several cases have provided helpful guidance regarding specific issues that arise in respect of examinations for discovery. For example, in paragraph 18 of *Cherevaty v. R.*,[27] the Federal Court of Appeal adopts the following propositions:

> In *HSBC Bank Canada v. Her Majesty the Queen*, 2010 TCC 228, [2010] T.C.J. No. 146, C. Miller J. summarized the principles that had been applied by that Court in relation to discovery examinations:
>
> > **13** Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R* [2008 D.T.C. 4408]:
> >
> > 1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50 [of *Kossow*]:
> >
> > a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;

b) A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;

c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;

d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] F.C.J. No. 1564.

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen*, [2005] T.C.J. No. 28.

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: *SmithKline Beecham Animal Health Inc. v. R.*, [2002] F.C.J. No. 837.

5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents: *SmithKline Beecham Animal Health Inc. v. The Queen*.

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada Ltd., v. R.*, [1987] F.C.J. No. 149.

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v. R.*, [2002] T.C.J. No. 689.

8. Under the *Rules* a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary

of the evidence of its witnesses or possible witnesses: *Loewen v. R.*, [2006] T.C.J. No. 384.

9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada*, [2000] O.J. No. 1431.

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen*.

IV. **THE PARTIES' POSITIONS**

[11] The Appellant's position is that all answers sought: (A) are relevant to the issues framed by the Notice of Appeal and the Answers to Undertakings; (B) have not been answered previously; and (C) relate to the theory of the Respondent concerning the facts relied upon, which the Appellant is entitled to know. The Appellant also argues that his questions are not vague and have arisen from answers to other questions now being asked.

[12] The Respondent's position is that the Appellant's questions are not proper questions within the scope of sections 93 and 95 of the Rules. The Respondent says that the questions are not relevant for discovery as they do not address the correctness of the reassessments at issue, seek third party information and seek the Respondent's theory of the case and how he intends to prove it.

[13] The parties' more detailed submissions are set out in connection with the specific questions below.

V. **ANALYSIS**

[14] The Appellant, in bringing this motion, must establish why the questions in his motion are relevant and proper for discovery, but in many instances he fails to do so. The Appellant's written submissions are limited, despite being filed after the Respondent's detailed written submissions.

[15] For ease of reference, the items below are numbered as they appear in the Notice of Motion and are dealt with in that order.

Item #1: Question 2 of the Discovery Transcript

Question at issue:

Q2 Mr. Sloan: *How old are you, sir?*

Position of the Appellant: No position was provided.

Position of the Respondent: The question is not relevant and bordering abusive.[1]

Analysis: The age of the Canada Revenue Agency auditor is not relevant to the correctness of the assessment.

Decision: The Respondent is not required to answer this question.

Item #2: Question 35 of the Discovery Transcript

Question at issue:

Q35 Mr. Sloan: *Can you produce them* [referring to the materials received in respect of the interview of the Ukrainian tax authorities], *sir?*

Position of the Appellant: No position was provided. The Appellant asks two further questions: "(a) Where did Mr. Partridge or Mr. Liberatore obtain the information contained in the memorandum, and (b) what exactly is blacked out and why?"

Position of the Respondent: A complete answer was provided.[2]

Analysis: The Respondent has provided a complete answer to Q35. The Respondent produced requested documents in the Answers to Undertakings at Tab A, as reiterated in the Respondent's August 6 Letter.

As for the first further question, the Appellant appears to refer to the information contained in the memorandum and questions sent by the CRA to the Ukrainian tax authorities,[3] asking *where* the CRA obtained the information that was included.

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[1] Respondent's Written Representations at paras 11, 12, 13, 14 and 15.

[2] Respondent's Written Representations at para 21.

[3] The document with the title "Canada Revenue Agency Memorandum" at Tab A of the Answers to Undertakings dated July 9, 2021 is from John Liberatore and David Partridge.

Questions relating to CRA process are not part of a proper train of inquiry as they do not go to the correctness of the assessment but rather the process by which it was made.[4] The validity of the assessment rests on whether the Minister properly applied the provisions of the *Income Tax Act* to the facts, not where or how the Minister obtained certain information.

On the second further question, counsel for the Respondent explained that the redacted information in the material produced is in respect of third-party taxpayer information, relying on section 241 of the *Income Tax Act* for the redaction.

Section 241 of the *Income Tax Act* generally prohibits disclosure of third party information, subject to certain narrowly prescribed exceptions. The main exceptions are in subsection 241(3) (which refers to any legal proceedings relating to the administration and enforcement of the *Income Tax Act*) and in paragraph 241(4)(a) (which requires that the particular information can reasonably be regarded as necessary for the purposes of the administration or enforcement of the *Income Tax Act*).

The scope of these exceptions has been discussed in several cases[5] which confirm that the prohibition against disclosure does not apply - and disclosure will be ordered - if the information is relevant to the proceeding. Relevance is established if there is evidence that the third party information was relied on by the CRA in assessing the taxpayer. Absent any indication of relevance, seeking information about an unrelated taxpayer is prohibited.

The Appellant has not raised any grounds to avail himself of one of the narrow exceptions to precluded disclosure in section 241 of the *Income Tax Act*.

Decision: The Respondent is not required to answer these questions.

Item #3

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[4] *Haniff v. The Queen*, 2010 TCC 380 at para 16; *Dilalla v. The Queen*, 2018 TCC 178 (*Dilalla*) at para 17, aff'd by the Federal Court of Appeal.

[5] *Scott v. The Queen*, 2017 TCC 224 para 56, referring to *Tor Can Waste Management Inc. v. The Queen*, 2015 TCC 15, which refers to the decision in *9005-6342 Quebec Inc. v. The Queen*, 2010 TCC 463, see also *Coopers Park Real Estate Development Corp. v. The Queen*, 2022 TCC 82.

Question at issue:

What is Part A of the answers provided?

Position of the Appellant: No position was provided.

Position of the Respondent: A complete answer was provided and is a new question that was not asked during examination for discovery or any of the Appellant's letters.[6]

Analysis: The Appellant's question appears to relate to documents produced by the Respondent in the Answers to Undertakings. As stated in the Answers to Undertakings and repeated in the Respondent's August 6 Letter, these include "the memorandum and questions which CRA sent (pages 1-8), and the answers, including translation, provided." The Part A questions and answers relate to "AVAT-Finance Ltd.". The Respondent has provided a complete answer.

Decision: The Respondent is not required to answer the question.

Item #4

Question at issue:

What is blacked out on page 5 of the answers provided?

Position of the Appellant: No position was provided.

Position of the Respondent: Seeks to obtain third-party taxpayer information, contrary to section 241 of the *Income Tax Act* and is a new question that was not asked during examination for discovery or any of the Appellant's letters.[7]

Analysis: The Respondent's Answers to Undertakings explain that the redacted information relates to third-party taxpayer information. This is repeated in the Respondent's August 6 letter. The Appellant has not raised any grounds to avail himself of one of the narrow exceptions to precluded disclosure in section 241 of the *Income Tax Act*.

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[6] Respondent's Written Representations at paras 21, 25 and 26.

[7] Respondent's Written Representations at paras 16, 17, 18, 20, 25 and 26.

Decision: The Respondent is not required to answer the question.

Item #5

Question at issue:

Why were these questions asked of the Ukrainian authorities?

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters.[8]

Analysis: The Appellant has received a complete answer. The Canada Revenue Agency Memorandum at Tab A of the Answers to Undertakings states why the CRA asks the questions.

In any event, questions that go to the "mental process" of the Minister or CRA officials are not relevant for discovery.[9] Why particular questions were or were not asked by the CRA of another tax authority is not relevant to the Appellant's liability to pay tax owed under the *Income Tax Act*.

Decision: The Respondent is not required to answer the question.

Item #6

Question at issue:

Why did Mr. Plas ask the Ukrainian authorities if the contracts were valid and legally binding? Wasn't that the job or duty of the CRA to determine that, and secondly under the laws of which country, Ukraine or Canada, would be looked to for the answer?

Position of the Appellant: No position was provided.

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[8] Respondent's Written Representations at paras 25 and 26.

[9] *Contractor* at para 33, *Dilalla* at para 17. *Kossow v. R*, 2008 TCC 422 at para 54.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters, or it is a question for which an answer has already been provided.[10]

Analysis: The first question asks why the CRA[11] asked the Ukrainian authorities whether the contracts at issue were valid and legally binding. The question relates to the mental process of the Minister's agents and is not relevant to the correctness of the assessment before the Court.

The second question asks whether it is the CRA's job to look into the validity of the contracts and which jurisdiction's laws are applicable. This question relates to the CRA process and not the correctness of the assessment. The validity of the assessment rests on whether the Minister properly applied the provisions of the *Income Tax Act* to the facts, not "whose job" it was to determine if certain contracts were legally binding.

Decision: The Respondent is not required to answer the questions.

Item #7

Question at issue:

How did Mr. Plas expect these people to have the answers to these queries?

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters, or for which an answer has already been provided.[12]

Analysis: The question relates to the mental process of the auditor, Mr. Plas, and is not relevant to the correctness of the assessment before the Court.

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[10] Respondent's Written Representations at paras 25 and 26.

[11] The Appellant asks why Mr. Plas asked the Ukrainian tax authorities certain questions. However, the Canada Revenue Agency Memorandum is from John Liberatore and David Partridge. It is assumed that the Appellant meant the CRA and not Mr. Plas.

[12] Respondent's Written Representations at paras 25 and 26.

Decision: The Respondent is not required to answer the question.

Item #8

Question at issue:

Same issues and questions involving the entity Euro Vision which is referred to in Part B of the answers.

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters, or for which an answer has already been provided.[13]

Analysis: It is not at all clear what the "same issues and questions" are. The question is vague and imprecise and therefore not a proper question.

Decision: The Respondent is not required to answer the question.

Item #9

Question at issue:

Why did Mr. Plas ask the Ukranian authorities to verify the information about the invoices?

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters, or for which an answer has already been provided.[14]

Analysis: The question relates to the mental process of the auditor, Mr. Plas, and is not relevant to the correctness of the assessment before the Court.

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[13] Respondent's Written Representations at paras 25 and 26.

[14] Respondent's Written Representations at paras 25 and 26.

Decision: The Respondent is not required to answer the question.

Item #10

Question at issue:

Para. 10: Re: Alexander Martynov. This information gives rise to a myriad of questions concerning what has been provided. Did Mr. Plas attempt to get more information about Mr. Martynov, or did he ever attempt to contact Mr. Martynov or confront him directly, as he did with Mr. Crawley and Mr. Twerdun?

Position of the Appellant: No position was provided.

Position of the Respondent: This question is too vague and unspecific to determine the allegation made by the Appellant and is a new question that was not asked during examination for discovery or any of the Appellant's letters.[15]

Analysis: This question relates to the CRA process and not the correctness of the assessment. The validity of the assessment rests on whether the Minister properly applied the provisions of the *Income Tax Act* to the facts, not who the auditor, Mr. Plas, attempted to contact or whether he attempted to obtain more information.

Decision: The Respondent is not required to answer the question.

Item #11

Question at issue:

Part D. Same issue re: the information provided. Were there any further answers obtained or questions asked of the Ukrainian authorities?

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters, or it is a question for which an answer has already been provided.[16]

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[15] Respondent's Written Representations at paras 9, 25 and 26.

[16] Respondent's Written Representations at paras 25 and 26.

Analysis: The Appellant's question appears to relate to Part D of the Canada Revenue Agency Memorandum to the Ukrainian tax authorities and responses ("Big Tree Europa Inc." or "Big Tree Marketing Europa Inc."). The Respondent provided the Appellant with a complete answer. The Respondent's August 6 Letter provides:

> Question 35 referred to the materials received from the Ukrainian tax authorities. Those documents were provided at Tab A of the answers provided on July 9, 2021. They included the memorandum and questions which CRA sent (pages 1-8), and the answers, including translation, provided. The documents were provided in their entirety and in the form received by the CRA. No pages were left out nor were the documents edited. [...]

Decision: The Respondent is not required to answer the question.

Item #12

Question at issue:

Re: the Ukraine documents. The Appellant is entitled, based on the Undertaking itself, to all the information the CRA had, including translations. If the CRA did not obtain translations, why not? If it did, please produce same.

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or in any of the Appellant's letters, or it is a question for which an answer has already been provided.[17]

Analysis: The Respondent provided the Appellant with a complete answer. See Item #11, above.

Decision: The Respondent is not required to answer the question.

Item #13: Question 41 of the Discovery Transcript

Question at issue:

[17] Respondent's Written Representations at paras 25 and 26.

Q41 Mr. Sloan: *All right, sir. Would you agree with me that there is no evidence in any of the material that I was assured...*

Ms. Jackett: *Don't answer that, Anton. We're not answering questions about evidence. You can ask him questions about what he looked at and what he considered, but it's improper to ask us how – for our evidence on certain points.*

Mr. Sloan: *I don't understand that questions – that statement, you're saying that you don't have to tell me what evidence you had.*

Position of the Appellant: The Appellant was cut off mid-question, which was not proper. The Appellant is entitled to the facts relied upon by the Respondent and from whom that will be obtained.[18]

Position of the Respondent: The question seeks to know the Respondent's theory of the case and how he intends to prove his case. This is improper.[19]

Analysis: There is no doubt that a party is entitled, on discovery to obtain the facts relied on by the other party. Fact-gathering lies at the heart of the discovery process. However, a critical distinction, drawn repeatedly by this Court, is between "properly" asking a witness on discovery what facts there are to support an allegation and "improperly" asking what evidence a witness has to support an allegation.

The Federal Court of Appeal in *Cherevaty v. R.*, 2016 FCA 71, cited with approval an often-cited excerpt of Justice Campbell Miller's decision in *HSBC Bank Canada v. R.*, 2010 TCC 228 which referred to the decision in *Sandia Mountain Holdings Inc*.[20] In *HSBC Bank Canada*, *supra*, Miller J. wrote:

> 13 Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R* [2008 D.T.C. 4408]:
>
> ...

[18] Notice of Motion of the Appellant at page 2.

[19] Respondent's Written Representations at paras 22 and 23.

[20] *Cherevaty v. R*, 2016 FCA 71 at para 18.

> 3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen*, [2005] T.C.J. No. 28."[21]

In *Sandia Mountain Holdings Inc. v. The Queen*, Justice Campbell Miller refers to the comments made by Justice Hugessen of the Federal Court in paragraph 19 of *Montana Band v. R* [2000] 1 FC 267 [*Montana Band*]:

> (iii) Justice Hugessen made a distinction in Montana between improperly asking what evidence a witness has to support an allegation, and properly asking what facts were within the witness's knowledge to underlie a particular allegation. This is a fine distinction. One approach goes to getting the witness to determine what proof is required, which would not be proper. The other approach of asking for facts underlying an allegation is limited solely to fact-gathering and is proper. Semantics may play too significant a role in making this distinction, yet the distinction is real: questions aimed at getting a witness to confirm that certain facts are proof of certain allegations are out; questions arrived at getting the witness to divulge relevant facts in connection with an allegation are in.
>
> ...
>
> [Emphasis added.]

This well-established principle needs to be reconciled with paragraph 95(1)(a) of the Rules, which provides that, on discovery, "no question may be objected to on the ground that (a) the information sought is evidence or hearsay".

Paragraph 95(1)(a) of the Rules, when read in light of these cases, must be taken to preclude an objection on discovery when the fact revealed might also be evidence. For example, if a discovery nominee is asked what facts underlie the allegation that X loaned funds to Y, and, specifically if there is a loan document, the existence of a loan agreement must be revealed even though that loan agreement may ultimately be relied on at trial as evidence of the loan from X to Y. Stated differently, the specific information sought (the loan agreement) is (potentially) evidence, but

[21] See also *Contractor* at para 33.

consistent with the purpose and scope of discovery, the question as to whether there is a loan document cannot be refused.

In contrast, I do not read paragraph 95(1)(a) as denying the right to object to an open-ended question where the discovery nominee is, for example, asked what evidence he or she has or intends to rely on at trial to establish that X loaned funds to Y. There is an important distinction between seeking specific information which might be evidence and seeking evidence, writ large. Consistent with the limitations on the scope of discovery, "reliance" questions which ask for evidence to be relied on at trial are improper. As Justice Hugessen of the Federal Court stated in *Montana Band* (*supra*) at paragraph 24:

> The jurisprudence is divided as to "compendious" or "reliance" questions; in *Can-Air Services Ltd. v. British Aviation Insurance Co.*, it was said to be improper to ask a witness what evidence he had in support of an allegation or how it was to be proved at trial. Such reliance questions do not ask for facts that the witness knows or can learn but rather require the witness to play the part of a lawyer and to select which facts can be relied on to prove a given allegation.
>
> [Emphasis added.]

Here, Mr. Sloan was interrupted before he could ask the full question and so, in any event, the Respondent would be hard-pressed to answer this half question. However, the gist of the question was to seek confirmation that the Respondent had "no evidence" on a particular issue. Seeking confirmation of no evidence goes well beyond fact-gathering, straying into the realm of proof and also asks the nominee for an opinion. This is not a proper question for discovery.

Decision: The Respondent is not required to answer the question.

Item #14: Question 49 of the Discovery Transcript

Question at issue:

The context is discussion of the letter written by Mr. Plas to the Appellant on January 29, 2010 and why the assumption of liability agreement signed by the Appellant was "perplexing"to Mr. Plas.

Q49 Mr. Sloan*: Surely you have notes, sir, that confirm something in the material that was perplexing to you.*

Mr. Plas: *Well, sir, I mean, you, from what I understand, assumed the debts of a third party in the amount of $56,000 at December 31, 2005. So – but you didn't have to put up any, you didn't have to put up any collateral, any security, and my questions is how is that not unusual*.

Position of the Appellant: The assumption of debts of a third-party, would you not agree that it was not unusual for the Appellant to provide the promise to pay without security? The question was not answered during examination.

Position of the Respondent: Complete answer was provided.[22]

Analysis: Mr. Plas provided a complete answer as to what he found perplexing/unusual.

Decision: The Respondent is not required to answer the question.

Item #14: Question 50 of the Discovery Transcript

Question at issue:

Q50 Mr. Sloan: *If I suggest to you, sir, that I had – I want to be accurate – a 32-year history of acting for Mr. Sniderman in litigation matters in representing him, in going to his wedding and to his house and in having a very strong relationship, why would you say that that was perplexing that I –*

Ms. Jackett: *Objection –*

Mr. Sloan: - *that I would be able to pursue –*

Ms. Jackett: - *that's a hypothetical. We're not answering – we're talking about what happened, not what might have happened.*

[22] Respondent's Written Representations at para 21.

Position of the Appellant: The assumption of debts of a third-party, would you not agree that it was not unusual for the Appellant to provide the promise to pay without security? The question was not answered during examination.[23]

Position of the Respondent: The question is speculative and irrelevant to the correctness of the assessment.[24]

Analysis: The Appellant's question asked Mr. Plas what was perplexing in the transactions at hand given the Appellant's relationship with Mr. Sniderman. Mr. Plas identified what was perplexing to him and in so doing, provided a complete answer. The question put to Mr. Plas about how his conclusions might have been different had he been aware of certain information calls for speculation and is not a proper question.[25]

Decision: The Respondent is not required to answer the question.

Item #15

Question at issue:

The question was not answered; specifically, why was it not possible for the Appellant to assume the debts of a third party without putting up any security?

Position of the Appellant: No position was provided.

Position of the Respondent: Too vague and unspecific to determine the allegation made by the Appellant.[26]

Analysis: The Appellant does not appear to have asked this question at discovery. Mr. Plas answered what was perplexing to him about the assumption of liability but did not say or suggest it was "not possible" for the Appellant to assume the liability of a third party without security. This question, like Item #14 calls for speculation and seeks an opinion from the nominee. It is not a proper question.

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[23] Notice of Motion of the Appellant at page 2.

[24] Respondent's Written Representations at paras 22 and 24.

[25] *LBL Holdings Limited v. The* Queen, 2018 TCC 63.

[26] Respondent's Written Representations at para 9.

Decision: The Respondent is not required to answer the question.

Item #16

Question at issue:

In view of Mr. Crawley's comments in his letter to Mr. Sniderman dated July 12, 2010, which appears to change the position of the CRA with regard to Mr. Crawley's evidence, does this not change or impact Mr. Plas' evidence?

Position of the Appellant: No position was provided.

Position of the Respondent: The question relates to a document that was in the Appellant's possession during the examination for discovery and is a new question that was not asked during examination for discovery or any of the Appellant's letters.[27]

Analysis: In this question, the loose references to a change in the CRA's position and Mr. Plas's evidence are entirely unclear. On this basis, this is an improper question. The question appears to relate to the mental process of the auditor, Mr. Plas, and is thus not relevant to the correctness of the assessment before the Court. Whether a certain letter caused the position of the CRA to change is not relevant to the Appellant's liability to tax under the *Income Tax Act*.[28]

Decision: The Respondent is not required to answer the question.

Item #17

Question at issue:

With respect to the handwritten notes of Mr. Plas, these are not legible. Please provide the exact words as if Mr. Plas is reading them.

Position of the Appellant: No additional position was provided.

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[27] Respondent's Written Representations at paras 25 and 26.

[28] *Canada (Minister of National Revenue v. Riendeau* [1991] FCA No. 559 at para 4.

Position of the Respondent: The question is too vague and unspecific to determine the allegation made by the Appellant.[29]

Analysis: The handwritten notes of Mr. Plas on the Peter Crawley Interview document produced in the Answers to Undertakings are not legible. Documents produced should be legible.

Decision: The Respondent must provide a transcription of the notes which is legible.

Item #18

Question at issue:

Re: the Blacked out portion at Tab 15. What are all these tabs?

Position of the Appellant: No position provided.

Position of the Respondent: Too vague and unspecific to determine the allegation made by the Appellant.[30]

Analysis: The Appellant's question appears to refer to Item 20 on the Peter Crawley Interview document supplied in Answers to Undertakings (Tab B) and the reference therein to "*Tab 15*" followed by a blacked out section. In the Answers to Undertakings, the Respondent states that the redaction is in respect of third party taxpayer information. The Appellant has not raised any grounds to avail himself of one of the narrow exceptions to precluded disclosure in section 241 of the *Income Tax Act.*

Decision: The Respondent is not required to answer the question.

Item #19

Question at issue:

Re: Page 4 of the letter from counsel dated August 6, 2021 which question(s) does counsel say are improper?

[29] Respondent's Written Representations at para 9.

[30] Respondent's Written Representations at para 9.

Position of the Appellant: No position was provided.

Position of the Respondent: This is a new question that was not asked during examination for discovery or any of the Appellant's letters, or for which an answer has already been provided.[31]

Analysis: This is a question aimed at counsel for the Respondent and is not an examination for discovery question for the nominee. The questions to which counsel for the Respondent objects are in the Appellant's letter of July 14, 2021, to which the Respondent's August 6 Letter is responsive. As such, the Appellant has received a complete answer.

Decision: The Respondent is not required to answer the question.

Item #20: Question 86 of the Discovery Transcript

Question at issue:

Preceding discussion is about notes of Ukranian tax authorities who interviewed people at Euro Vision; notes taken in Ukranian and translated into English.

Q86 Mr. Sloan: *All right. And you have those, and Ms. Jackett is going to determine whether I can get a copy of that material, if it doesn't violate some protocol; correct?*

Ms. Jackett: *That's right.*

Mr. Sloan: *Okay.*

Mr. Jackett: *It's not a protocol, it's legislation.*

Mr. Sloan: *All right. Well, it's not legislation that I have been privy to, so I don't understand how you can say it's legislation, but I'll leave that.*

Position of the Appellant: The question regarding the translation was not answered.[32]

[31] Respondent's Written Representations at paras 25 and 26.

[32] Notice of Motion of the Appellant at page 2.

Position of the Respondent: A complete answer was provided.[33]

Analysis: The material was provided to the Appellant in Answers to Undertakings and confirmed in the Respondent's August 6 Letter: "The CRA did not obtain any further translation of the documents beyond what was received." As such, the Appellant has received a complete answer.

Decision: The Respondent is not required to answer the question.

Item #21: Question 90 of the Discovery Transcript

Question at issue:

Q90 Mr. Sloan: *How do you know that your translating services are accurate or logical?*

Ms. Jackett: *Well, objection. What's the foundation for this? You know, this isn't part of the pleadings, you're not – I mean, on what basis are you calling into question the translation?*

Mr. Sloan: *It is part of the pleadings. I've indicated that there is no basis for the conclusions. I'm being now told that the basis for the conclusions are in the hands of other people in a different language. And how do I know that I can rely on those – on the accuracy of that translation? It's right centre – and I made that clear, that it's front and centre as the problem in this case, is I don't know how you can prove, and I say that – I scream that out in a number of letters that how can you prove what you're saying.*

Ms. Jackett: *Well –*

Mr. Sloan: *It won't stand up to the investigation in a court of law.*

Ms. Jackett: *Mr. Plas isn't here to answer questions about the integrity of any translation that was conducted. He told you the source of his information and what he relied on, that's all he can speak to.*

[33] Respondent's Written Representations at para 21.

Mr. Sloan: *But how can I as the taxpayer be satisfied that the information that Mr.Plas was dealing with in order to come to his conclusions was accurate?*

Ms. Jackett: *Well, I have given – I have taken it under advisement that – your request for the documents. If we produce those documents to you, you can satisfy yourself that they were translated properly.*

Position of the Appellant: This is not a proper answer. The Appellant is entitled to know what the CRA relied on in coming to its conclusion. This means the Appellant is entitled to see the translation that Mr. Plas or anyone else at CRA had before them.[34]

Position of the Respondent: The question is speculative and irrelevant to the correctness of the assessment.[35]

Analysis: The translation was provided to the Appellant in the Answers to Undertakings and confirmed in the Respondent's August 6 Letter; see the answer to Items #11 and 12, above. Accordingly, the Appellant has received a complete answer to this part of the question. The integrity of the translation is not a proper question for the nominee. If the Appellant wishes to adduce evidence as to any inaccuracies in the translation, he can do so at trial.

Decision: The Respondent is not required to answer the question.

Item #22: Question 93 of the Discovery Transcript

Question at issue:

Q93 Sloan: Would you agree with me that the Minister's case is relying on Mr. Crawley's accuracy and information?

Plas: Well –

Jackett: We're – I'm going to object to that because we're veering into how the Minister intends to prove his case, and that's not a proper question on examination for discovery. Mr. Plas has already told you the source of information that he relied

[34] Notice of Motion of the Appellant at page 3.

[35] Respondent's Written Representations at paras 22 and 24.

on in coming to the conclusions that he did. And as far as I'm concerned, that's as far as the questioning can go.

Sloan: I disagree with your statement, Ms. Jackett, about you don't have to tell me the facts, unless we made that statement before and you've alluded to it.

Jackett: No, that's not what I said. I said we don't have to tell you how we're going to prove our case, what evidence we're going to call. Mr. Plas is here to answer questions – factual questions on what he did when he was auditing the tax shelter and the investors that participated in the tax shelter.

Position of the Appellant: This is a proper discovery question.[36]

Position of the Respondent: This question seeks to know the Respondent's theory of the case and how he intends to prove his case. This is improper.[37]

Analysis: Immediately prior to this exchange, Mr. Plas referred to the minutes of his meeting with Mr. Crawley (which were produced by the Respondent in Answers to Undertakings). In asking whether the Crown relies on Mr. Crawley's "accuracy and information", the Appellant seeks to determine how the Crown intends to prove her case. As this Court has previously stated, "Discovery is not about witnesses, evidence or arguments at trial."[38] Whether the Respondent will rely on Mr. Crawley's information is a matter to be determined at trial; it is not a proper question for discovery.

Decision: The Respondent is not required to answer the question.

Item #23: Question 96 of the Discovery Transcript

Question at issue:

The context is questions 94 and 95 to Mr. Plas regarding facts on which he relies in support of an assumption.

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[36] Notice of Motion of the Appellant at page 3.

[37] Respondent's Written Representations at paras 22 and 23.

[38] *Dilalla* at para 17; *Montana Band* at para 24; *Ahamed v. Canada*, 2020 FCA 213 (*Ahamed*) at para 43.

A 95 Mr. Plas: *Okay, I'm sorry. So now we're looking at, we assume that there was no bona fide loan arrangements between you* [the Appellant] *and FactorCorp., is that what you're* --

Q 96, Mr. Sloan: *Yes, sir*.

Mr. Plas: *So that would be on the basis of my communications with Mark Twerdun, who was the president of FactorCorp. It was based upon email communications which we obtained between Peter Crawley and Mark Twerdun from November of – they were issued between November of 2006 and November of 2007, there was a series of emails which we questioned Mark Twerdun on. And, also, based on our examination of attending KPMG, the receivers of FactorCorp, going through their financial information. And, also, looking at – because the funds were to have been deposited into Opal's bank account – Opal being the company that Mr. Sniderman used to disburse expenses relating to these limited partnerships – all indications were that there were no monies that were deposited. And we also – so in addition, we also interviewed Mr. Richard Sniderman, on more than one occasion, we also sent him correspondence, and at no time did we receive any clarification as to what happened. So I think, based on all of that, there was no evidence, not one bit of evidence that indicated that these monies every came into the bank accounts of Opal.*

Position of the Appellant: This answer seems to be based on communications with Mark Twerdun. Is there some reliance on emails between Mr. Twerdun and Mr. Crawley in the time frame between November, 2006 and November, 2007 and if so, what are they?[39]

Position of the Respondent: A complete answer was provided.[40]

Analysis: The content of the emails exchanged between Mr. Crawley and Mr. Twerdun was provided in the Respondent's August 6 Letter. Mr. Plas's answer on discovery – that there was no indication of money deposited - and the content of the emails provided constitute a complete answer to the Appellant's question.

Decision: The Respondent is not required to answer the question.

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[39] Notice of Motion of the Appellant at page 3.

[40] Respondent's Written Representations at para 21.

Item #24: Question 132 of the Discovery Transcript

Question at issue:

Q132 Mr. Sloan: *Now, Mr. Plas, I make some strong allegations in that letter to Mr. Plummer [Appeals Officer]. Were you aware of my position at that point in time or any time thereafter or was it out of your hands?*

Mr. Plas: *I have no involvement with how Appeals dealt with the matter and any communications that they would have had or specifically between you and them, I had no involvement.*

Mr. Sloan: *All right. Well, can you tell me, counsel, if anyone at the CRA reviewed that letter and my specific statements at the bottom of page 2, page 197 of your material, with the questions that I asked and whether there was any review of that?*

...

Ms. Jackett: *How is that relevant to the correctness of the assessment?*

Mr. Sloan: *It's very relevant, it goes to how I'm being treated by the CRA*.

Position of the Appellant: This is a refusal to answer a question. The Appellant states that he has a number of further questions that require answers.[41]

Position of the Respondent: Whether correspondence was received and replied to during the audit and objections stages is irrelevant to the correctness of the assessment at issue.[42]

Analysis: This question relates to the CRA process and not to the correctness of the assessment. The validity of the assessment rests on whether the Minister properly applied the provisions of the *Income Tax Act* to the facts, not on whether an appeals officer at the CRA was aware of the Appellant's submissions.

[41] Notice of Motion of the Appellant at page 3.

[42] Respondent's Written Representations at paras 11, 12, 13, 14 and 15.

Decision: The Respondent is not required to answer the question.

Item #25: Question 134 of the Discovery Transcript

Question at issue:

The context is Mr. Plas's answer to Q133 where he refers to the CRA proposal letter and the CRA's position that the expenses that were allegedly claimed by the Gold Star Limited Partnerships, which originated in the Ukraine, did not occur and therefore the losses did not exist. *"So was there an e-gaming business? We could see some expenses that indicated that there was, perhaps some activity going on, but there were no losses."*

Mr. Sloan, *Q134: No, that's your conclusion that there were no losses. I'm asking was it not an e-gaming business which legitimised the investment and the losses?*

Ms. Jackett: *That's a legal question and it's not appropriate for this witness to answer.*

Mr. Sloan: *Thank you. I'd like the Minister's position in respect of that question.*

Ms. Jackett: *Our position is as set out in the Reply to the Notice of Appeal.*

Position of the Appellant: This was a refusal; the question was not answered. Counsel for the Respondent stated that the answer is set out in the Reply, but the Appellant is entitled to the Respondent's specific position on that issue.[43]

Position of the Respondent: A complete answer was provided.[44]

Analysis: Paragraphs 10 to 12 of the Reply provide the Respondent's position on why the appellant is not entitled to deduct the Loss Amounts (as defined), including (in paragraph 10(a)) on the basis that Horseshoe LP was not a partnership in law because it did not carry on business in common with a view to profit. Mr. Plas's answer on discovery and the Respondent's position in the Reply provide a complete answer, and they confirm the Respondent's legal position.

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[43] Notice of Motion of the Appellant at page 3.

[44] Respondent's Written Representations at para 21.

To the extent that the question seeks the Respondent's legal argument, the reasoning by which the legal position was developed or how the Respondent intends to substantiate its legal position at trial, it is not a proper question.[45]

Decision: The Respondent is not required to answer the question.

Item #26

Question at issue:

Page 52 – The solicitor for the CRA refused to answer the issues as set out in the letter of July 19, 2017. The Appellant is therefore entitled to the Respondent's position on these issues.

Position of the Appellant: No position was provided.

Position of the Respondent: The question is too vague and unspecific to determine the allegation made by the Appellant.[46]

Analysis: This question relates to the CRA process and not to the correctness of the assessment. The validity of the assessment rests on whether the Minister properly applied the provisions of the *Income Tax Act* to the facts, not on whether the CRA responded to the Appellant's letter of July 19, 2017.

Decision: The Respondent is not required to answer the question.

Item #27: Question 148 of the Discovery Transcript

Question at issue:

The context is a discussion about Mr. Kirton – who Mr. Plas describes as being a sales agent for a number of businesses that Mr. Sniderman was involved in prior to the four limited partnerships that were the subject of the audit and subsequent thereto and the "falling out" between Mr. Kirton and Mr. Sniderman.

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[45] *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19 at para 27, *Ahamed* at paras 42-43, *Canada v. CHR Investment Corp.* 2021 FCA 68 at para 39, *MPWestern Properties Inc. v. The Queen*, 2017 TCC 82 at para 22, citing *Teelucksingh v R*, 2010 TCC 94 at para 15.

[46] Respondent's Written Representations at para 9.

Q148 Mr. Sloan: *I'm talking about an actual lawsuit that was entered into against each other?*

Mr. Plas: *I'm not aware of the legal activities between the parties*.

Mr. Sloan: *All right. So let's go back to Ms. Jackett's response to my letter of August 16th*.

Ms. Jackett: *Well, as I said, it's clear that it was received by the Appeals division. To the extent that there was a direct response to it, I'm not aware at this time. However, if it – allegations about a third party that didn't have anything to do with the assessment against you, I would expect that, no, Mr. Plummer would not respond to that.*

Mr. Sloan: *Okay, you come to that conclusion, counsel. I'm just wondering what – I made a suggestion that this should be an open forum meeting, and I asked about what happened to other taxpayers – let me ask that now, what happened to other taxpayers in relation to this?*

Ms. Jackett: *We're not answering that. Section 241 of the Income Tax Act prohibits any disclosure of taxpayer information of any other third parties.*

Position of the Appellant: The Appellant is entitled to the Respondent's position.[47]

Position of the Respondent: The question seeks to obtain third-party taxpayer information, contrary to section 241 *Income Tax Act*.[48]

Analysis: The question seeks third party information and section 241 of the *Income Tax Act* generally prohibits disclosure. The Appellant has not raised any grounds to avail himself of one of the narrow exceptions to precluded disclosure in section 241 of the *Income Tax Act*.

Decision: The Respondent is not required to answer the question.

Item #27: Question 149 of the Discovery Transcript

[47] Notice of Motion of the Appellant at page 3.

[48] Respondent's Written Representations at paras 16, 17, 18, 19 and 20.

Question at issue:

Q149 Mr. Sloan: *Would you agree with me, Mr. Plas, that there was no response to this letter – or to the request that I made in that letter?*

Position of the Appellant: The Appellant is entitled to the Respondent's position.[49]

Position of the Respondent: Whether a correspondence was received and replied to during the audit and objections stages is irrelevant to the correctness of the assessment at issue.[50]

Analysis: This question relates to the CRA process and not to the correctness of the assessment. The validity of the assessment rests on whether the Minister properly applied the provisions of the *Income Tax Act* to the facts, not on whether the CRA responded to the Appellant's letter at the audit or objection stage.

Decision: The Respondent is not required to answer the question.

Item #27: Question 150 of the Discovery Transcript

Question at issue:

Q150 Mr. Sloan: *Then the next two tabs, tab 36, which is page 205, my letter of October 26th, and tab 37, being my letter of October 27th. Again, can you confirm that no reply whatsoever was made to either of those letters?*

Position of the Appellant: The Appellant is entitled to the Respondent's position.[51]

Position of the Respondent: Whether a correspondence was received and replied to during the audit and objections stages is irrelevant to the correctness of the assessment at issue.[52]

Analysis: This question relates to the CRA process and not the correctness of the assessment. The validity of the assessment rests on whether the Minister properly

[49] Notice of Motion of the Appellant at page 3.

[50] Respondent's Written Representations at paras 11, 12, 13, 14 and 15.

[51] Notice of Motion of the Appellant at page 3.

[52] Respondent's Written Representations at paras 11, 12, 13, 14 and 15.

applied the provisions of the *Income Tax Act* to the facts, not whether the CRA responded to the Appellant's letters at the audit or objection stage.

Decision: The Respondent is not required to answer the question.

Item #28: Question 158 of the Discovery Transcript

Question at issue:

The context is that Mr. Plas informs the Appellant that the CRA had not attempted to examine or talk with Mr. Martynov. Mr. Plas indicated that it was the Ukrainian tax authorities that interviewed Mr. Martynov.

Q158 Mr. Sloan: *And, again, we go to your notes on that, and I'll see those, maybe*.

Mr. Plas: *That is correct.*

Ms. Jackett: *That's right*.

Position of the Appellant: This was an undertaking. The notes were not provided.[53]

Position of the Respondent: A complete answer was provided.[54]

Analysis: The material from the Ukrainian tax authorities was provided to the Appellant in the Answers to Undertakings and was confirmed in the Respondent's August 6 Letter. Part C of that material concerns Mr. Martynov. Accordingly, the Appellant has received a complete answer.

Decision: The Respondent is not required to answer the question.

Item #29: Question 191 of the Discovery Transcript

Question at issue:

Q191 Mr. Sloan: *Looking for the Reply. I was doing do well. I apologize, I thought I had it. Do need it. Found it.*

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[53] Notice of Motion of the Appellant at page 3.

[54] Respondent's Written Representations at para 21.

Looking at your Reply, Ms. Jackett, I may have the evidence already, but I'm entitled to ask this question, looking at item "t" on page 5 of your Reply, upon what facts does the Minister rely in support of the allegation that Euro Vision did not have a business relationship with Gold Star Group, Opal or Horseshoe Limited Partnership?

Position of the Appellant: The Appellant is entitled to the facts which support the proposition that Eurovision did not have a business relationship with Gold Star Group, Opal, or Horseshoe Limited Partnership based on information provided by Eurovision to the Ukrainian tax authorities. That information was not provided to the Appellant and perhaps not even to Mr. Plas. Please provide this.[55]

Position of the Respondent: A complete answer was provided.[56]

Analysis: The material from the Ukrainian tax authorities was provided to the Appellant in Answers to Undertakings and was confirmed in the Respondent's August 6 Letter. Part B of that material concerns Euro Vision Commerce. Accordingly, the Appellant has received a complete answer.

Decision: The Respondent is not required to answer the question.

VI. **CONCLUSION AND COSTS**

[16] Both parties sought costs on the motion. The Respondent has been almost entirely successful in this motion, in many instances because a complete answer had already been provided to the Appellant. I award costs of this motion to the Respondent in accordance with Tariff B of the Rules.

Signed at Toronto, Canada, this 19th day of October 2022.

"Monica Biringer"

Biringer J.

[55] Notice of Motion of the Appellant at page 3.

[56] Respondent's Written Representations at para 21.

CITATION:	2022 TCC 121
COURT FILE NO.:	2018-1491(IT)G
STYLE OF CAUSE:	DAVID JACOB SLOAN v. HIS MAJESTY THE KING
PLACE OF HEARING:	Motion in writing
DATE OF HEARING:	Motion in writing
REASONS FOR ORDER BY:	The Honourable Justice Monica Biringer
DATE OF ORDER:	October 19, 2022

PARTIES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Andrea Jackett

COUNSEL OF RECORD:

For the Appellant:

Name:	Not applicable
Firm:	Not applicable
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada