Docket: 2019-3754(IT)G

BETWEEN:

RICHARD QUIGLEY,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion determined by written submissions

Before: The Honourable Justice David E. Graham

Participants:

Counsel for the Appellant:	E.F. Anthony Merchant
Counsel for the Respondent:	David Silver

ORDER

THIS COURT ORDERS THAT:

1. The timetable order dated June 30, 2022 is amended to extend the deadline for the Appellant to respond to undertakings to July 7, 2023. The requirement for the Appellant to file a notice of motion requesting such amendment is waived.

2. The Respondent's motion to compel an answer to the Question Regarding Assumptions (as defined in the Notice of Motion) is dismissed on the basis that the Appellant has now answered the outstanding undertaking.

3. The Respondent's motion to compel an answer to the Question Regarding *Mariano* (as defined in the Notice of Motion) is granted.

4. On or before October 16, 2023, the Respondent may serve the Appellant with a list of what the Respondent believes are findings of fact made in *Mariano v. The Queen* (the "*Mariano* Facts").

5. If the Respondent serves a list of the *Mariano* Facts on the Appellant in accordance with paragraph 4:

   (a) On or before November 14, 2023, the Appellant shall serve the Respondent with a response in affidavit form advising whether, in respect of each *Mariano* Fact, he is aware of any differences between the facts in his appeal and that *Mariano* Fact and, if so, what those differences are.

   (b) The Appellant shall not object to answering in respect of a given *Mariano* Fact on the basis that he does not agree that the *Mariano* Fact was actually a finding of fact made by Justice Pizzitelli.

   (c) The Appellant may object to answering in respect of a given *Mariano* Fact on the basis that it is actually a finding of mixed fact and law.

   (d) If the Respondent has any follow-up questions arising from undertakings or from the Appellant's response to the *Mariano* Facts, the Respondent may serve those questions on the Appellant on or before December 14, 2023.

   (e) If the Respondent serves follow-up questions in accordance with paragraph 5(d):

      i. the Appellant shall respond to the questions on or before January 15, 2024; and

      ii. the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* on or before February 14, 2024.

   (f) If the Respondent does not serve follow-up questions in accordance with paragraph 5(d), the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the

Tax Court of Canada Rules (General Procedure) on or before January 14, 2024.

6. If the Respondent does not serve a list of the *Mariano* Facts on the Appellant in accordance with paragraph 4:

   (a) If the Respondent has any follow-up questions arising from undertakings, the Respondent may serve those questions on the Appellant on or before November 14, 2023.

   (b) If the Respondent serves follow-up questions in accordance with paragraph 6(a):

      i. the Appellant shall respond to the questions on or before December 14, 2023; and

      ii. the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* on or before January 14, 2024.

   (c) If the Respondent does not serve follow-up questions in accordance with paragraph 6(a), the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* on or before December 14, 2023.

7. Costs of the motion are awarded to the Respondent.

Signed at Ottawa, Canada, this 14th day of September 2023.

"David E. Graham"

Graham J.

Citation: 2023 TCC 138
Date: 20230914
Docket: 2019-3754(IT)G

BETWEEN:

RICHARD QUIGLEY,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Graham J.

[1] When filing his 2006 tax return, Richard Quigley claimed approximately $3,000,000 in donation tax credits in respect of gifts that he says he made through a tax shelter known as the Global Learning Gifting Initiative ("GLGI"). The Minister of National Revenue reassessed Mr. Quigley to deny those credits. He has appealed those denials.

[2] The Respondent has brought a motion to compel Mr. Quigley to answer two questions asked in the discovery process. Mr. Quigley opposes the motion.

[3] One of the Respondent's questions relates to assumptions of fact pled by the Respondent in the Reply. The other question relates to Justice Pizzitelli's decision in *Mariano v. The Queen* (2015 TCC 244).

A. Question Regarding Assumptions

[4] Mr. Quigley gave the following undertaking during his examination for discovery:[1]

> Undertake to advise if the answers given in counsel's response to Exhibit R-1 are the Appellant's position of [sic] this appeal. And for the facts that are plead as

[1] Affidavit of Gina Morgan, Exhibit D, page 30, line 23 to page 31, line 4.

> having no knowledge of, advise of any facts the Appellant is aware of to dispute such assumptions.

[5] The undertaking contains two parts. I will deal with each part separately. The first part is not in dispute but it provides background for the second part.

Undertaking to advise whether Mr. Quigley adopts counsel's answers

[6] Prior to the examination for discovery, counsel for the Respondent sent a letter to Mr. Quigley's counsel asking Mr. Quigley to advise which assumptions of fact he admitted, had no knowledge of and denied.[2] Mr. Quigley's counsel responded.[3] That response is referred to in the undertaking as discovery Exhibit R-1.

[7] At the discovery, when counsel for the Respondent asked Mr. Quigley to confirm that his counsel's answers in Exhibit R-1 were accurate, his counsel objected. I can see no reason for this objection but, in any event, after much back and forth, counsel for the parties agreed that Mr. Quigley would undertake to advise if the answers given in counsel's response to Exhibit R-1 were Mr. Quigley's position on his appeal.

[8] In Mr. Quigley's response to the undertaking, he stated that "The answers represent my answers and were made on my behalf by my counsel, but they do not represent my entire position on this appeal".[4] This satisfied the first part of the undertaking.

Facts disputing assumptions

[9] By adopting his counsel's response in Exhibit R-1, Mr. Quigley took the position that he had no knowledge of over 100 assumptions of fact.[5] The second half of the undertaking required him to advise whether he was aware of any facts to dispute those assumptions.

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2 Affidavit of Gina Morgan, Exhibit B.
3 Affidavit of Gina Morgan, Exhibit C.
4 Affidavit of Gina Morgan, Exhibit F.
5 The specific assumptions of fact are listed in paragraph 3(a) of Mr. Quigley's counsel's letter (affidavit of Gina Morgan, Exhibit C).

[10] Mr. Quigley responded to the second half of the undertaking by stating that "I am unable to dispute an assumption when I have no knowledge of the purported facts supporting an assumption." This answer is not responsive.

[11] The Respondent did not ask Mr. Quigley whether he was able to dispute the assumptions. The Respondent asked whether he was aware of any facts to dispute the assumptions. Either Mr. Quigley is aware of such facts or he is not.

[12] In Mr. Quigley's written submissions on the motion, he failed to acknowledge that he had not responded to the second half of the undertaking. However, later in those submissions, his counsel stated that "If Mr. Quigley had further knowledge, he would have provided such information and documents to [the Respondent]. He does not have such further information or documents." I will treat this statement as Mr. Quigley's response to the undertaking.

[13] This response was clearly received after the litigation timetable deadline for satisfying undertakings. In the circumstances, I will extend the deadline to the date that Mr. Quigley filed his written submissions and will waive the requirement for him to bring a motion to extend the deadline.

Unexplained question in motion

[14] In the motion, the Respondent sought an order compelling Mr. Quigley to answer the following question:

> (a) to advise what facts, if any, the appellant is aware of that dispute the assumptions of fact pled by the respondent in the Reply to the Notice of Appeal;
>
> (i) additionally, for the facts that the appellant pleads to have no knowledge of, to advise of any facts that dispute such assumptions;

[15] I have accepted that Mr. Quigley has now answered the portion of the question in subparagraph (i). I am unsure where the portion of the question in paragraph (a) comes from. It is not part of the undertaking. I cannot see it in the portions of the transcript that were provided by the Respondent. The Respondent's written

submissions do not explain where it came from. In the circumstances, I am not going to order Mr. Quigley to respond to paragraph (a).

Conclusion

[16] Based on all of the foregoing, I find that Mr. Quigley has now satisfied his undertaking.

B. Questions Regarding *Mariano*

[17] The Respondent's motion also asks that Mr. Quigley be ordered to advise what facts, if any, he is aware of that distinguish his appeal from those of the appellants in *Mariano*.

Question as phrased requires a legal analysis

[18] Mr. Quigley says that whether a fact distinguishes his appeal from *Mariano* is a legal question. He argues, in essence, that the Respondent is asking him to reach a legal conclusion as to whether the trial judge will find that his case can be distinguished from *Mariano*. He says that allowing the Respondent to ask such a question will open the floodgates to the Respondent to ask taxpayers in every appeal whether their facts can be distinguished from any number of cases. I agree. The question as phrased in the motion is not a proper question.

Original question also required a legal analysis

[19] The question in the Respondent's motion is not the actual question that Mr. Quigley objected to answering during his discovery. It is clear from the transcript of the discovery that what the Respondent was asking Mr. Quigley was not whether his appeal could be distinguished from *Mariano* but rather whether he was aware of any differences between the facts in his appeal and the facts in *Mariano*. Counsel for the Respondent asked "I'd like to know… how your appeal would be different from [Mariano]. What facts are different from the facts that were found by Justice Pizzitelli of the Tax Court?"[6]

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6 Affidavit of Gina Morgan, Exhibit E, page 126, line 25 to page 127 line 4.

[20] I do not know why the Respondent rephrased the question for the purposes of the motion. I will address the question in its original form as well.

[21] The Respondent submits that the focus of the original question was on the facts, not the legal analysis. While I agree that the original question focused on facts within Mr. Quigley's knowledge, it nonetheless required him to undertake a legal analysis in order to compare those facts to Justice Pizzitelli's findings of fact.

[22] The Respondent's original question would require Mr. Quigley to parse *Mariano* to determine what findings of fact he thinks Justice Pizzitelli made. It would require him to determine whether a given finding was a finding of fact or a finding of mixed fact and law. If the latter, it would require him to discern which findings of fact gave rise to the finding of mixed fact and law. Finally, it would require him to determine whether what appeared to be a finding of fact was, in fact, an undemolished assumption. It is inappropriate to ask Mr. Quigley to do any of these things.

Original question also vague

[23] In addition, the original question is vague. Even if Mr. Quigley performs all of the foregoing analyses, how is he to know whether his view of the findings of fact in *Mariano* is the same as the Respondent's view? He cannot possibly answer the question without knowing what the Respondent thinks Justice Pizzitelli's findings of fact were.

Questions about *Mariano* could have been permissible

[24] All of this is by no means to say that the Respondent could not have asked questions about what the Respondent believes were the findings of fact in *Mariano*.

[25] For example, at paragraph 38 of *Mariano,* Justice Pizzitelli found that "[t]here is no evidence anyone, let alone the Appellants, ever… elected to keep the Licences for themselves." If the Respondent thought that this was a relevant fact, the Respondent could have asked "Are you aware of any facts that suggest that anyone ever elected to keep their licence for themselves?" There was no need to tie the question to a finding of fact in *Mariano*.

Objection not well articulated

[26] I have reviewed the portions of the transcript dealing with the objection that counsel for Mr. Quigley raised to the original question. While counsel mentions that the question is a question of law and that Mr. Quigley does not know the facts, he does not fully explain the basis of his objection. My conclusions above are based on my considering the question, not on anything articulated by counsel during the discovery or in his submissions.

[27] Had counsel for Mr. Quigley better articulated his position, I am confident that counsel for the Respondent would have been able to rephrase his question into a series of proper questions. In the circumstances, I am going to give the Respondent a chance to do so.

Additional questions

[28] The Respondent may serve the Appellant with a list of what the Respondent considers to have been findings of fact in *Mariano* (the "*Mariano* Facts").

[29] If the Respondent serves a list of the *Mariano* Facts on Mr. Quigley, Mr. Quigley shall advise the Respondent whether, in respect of each *Mariano* Fact, he is aware of any differences between the facts in his appeal and that *Mariano* Fact and, if so, what those differences are.

Limited right to object

[30] Mr. Quigley may not object to answering in respect of a given *Mariano* Fact on the basis that he does not agree that the *Mariano* Fact was an actual finding of fact made by Justice Pizzitelli. Had Mr. Quigley's objection been better articulated during the discovery, counsel for the Respondent could easily have asked questions about what he considered to be findings of facts from *Mariano* without regard to whether they were actually findings of fact or not. The Respondent should be in no worse a position now.

[31] Mr. Quigley may, however, object to answering in respect of a given *Mariano* Fact on the basis that it is actually a finding of mixed fact and law. I trust that the Respondent will keep this in mind when preparing the *Mariano* Facts and that Mr. Quigley will not raise unreasonable objections on this point. I do not want to have to revisit this issue.

C. Costs

[32] Costs of the motion are awarded to the Respondent. The Respondent should not have had to bring the motion in order to obtain a full answer to the undertaking. Similarly, had Mr. Quigley's counsel better articulated his objection during the examination for discovery, counsel for the Respondent could easily have rephrased his questions and avoided the need to bring a motion.

Signed at Ottawa, Canada, this 14th day of September 2023.

"David E. Graham"

Graham J.

CITATION:	2023 TCC 138
COURT FILE NO.:	2019-3754(IT)G
STYLE OF CAUSE:	RICHARD QUIGLEY v. HIS MAJESTY THE KING
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	Motion determined by written submissions
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	September 14, 2023

PARTICIPANTS:

Counsel for the Appellant:	E. F. Anthony Merchant
Counsel for the Respondent:	David Silver

COUNSEL OF RECORD:

For the Appellant:

Name:	E. F. Anthony Merchant
Firm:	Merchant Law Group LLP Calgary, Albert

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada