

BETWEEN:

CONCEPT PLASTICS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 25, 2008 and decision rendered orally from the Bench on November 28, 2008, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Gary J. McCallum

Counsel for the Respondent: Eleanor H. Thorn

ORDER

WHEREAS a motion by counsel for the Appellant was heard on November 25, 2008;

AND UPON hearing submissions of the parties;

The motion is allowed in part.

IT IS ORDERED THAT:

1. The Respondent is directed to prepare a list of documents (Full Disclosure) in accordance with Rule 82 of the *Tax Court of Canada Rules (General Procedure)* and to file and serve the list on the Appellant no later than January 15, 2009.

2. The Respondent shall answer the question on examination for discovery regarding the science advisor's curriculum vitae, and follow-up questions, no later than December 31, 2008.

All without costs.

Signed at Ottawa, Canada, this 2nd day of February 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 79
Date: 20090202
Docket: 2007-4309(IT)G

BETWEEN:

CONCEPT PLASTICS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Delivered orally from the Bench on November 28, 2008, at Toronto, Ontario
and modified for clarity and accuracy.)

Boyle J.

[1] The taxpayer has brought a motion requesting that (i) full disclosure under Rule 82 be ordered; (ii) the Crown be ordered to respond to two questions which were the subject of refusals on discovery; and (iii) that the Crown be ordered to produce a second representative for examination for discovery.

[2] The underlying appeal involves the taxpayer's entitlement to scientific research and experimental development incentives under the *Income Tax Act*. As is usual in such cases, CRA's review of the taxpayer's entitlement involves both a review by a science advisor and a review by a financial reviewer. At least one of the taxpayer's projects was rejected by CRA as not being qualified SR&ED based upon its science review.

I. Full Disclosure

[3] Rule 82 provides that full disclosure may be directed by a court on application by one of the parties. The rules and applicable legislation mandate no particular circumstances or considerations applicable where full disclosure is requested.

[4] In the decision of the former Chief Justice Bowman in *Mintzer* in 2008, it is said that the applicant must be able to demonstrate reasonable grounds to make such an order and put forward some basis for the additional production order. In *Wright* in 2005, the former Chief Justice Bowman also said quite correctly that the taxpayer's rights under access to information or privacy legislation to seek documents should not preclude Rule 82 full disclosure orders being made. He was also critical in that case of the Crown's refusal to turn over documents sought on examination that were not on their list of documents.

[5] In this case, the Crown is again refusing to provide the taxpayer with documents requested on discovery that are not on the Crown's Rule 81 partial discovery list of documents. Let me be very clear. I begin from the premise that if CRA thought something involving the taxpayer in the taxation year under appeal was worth recording and decided that the obvious place to file it was in the taxpayer's file for the very year under dispute, that document *prima facie* meets the relevance threshold applicable to pre-trial discoveries.

[6] Since the Crown refuses to accept such an approach, I am prepared to order full discovery under Rule 82. This will be completed by January 15, 2009. While I have my doubts that much of what is produced will help the taxpayer, this will best ensure the satisfactory completion of the pre-trial steps, permit the parties to satisfy themselves they know the case they have to meet, and, importantly, ensure the trial proceeds efficiently in an informed and focussed manner.

[7] I will make the observation that taxpayer's counsel has not made an access to information request in this file, nor did the taxpayer make a request for CRA documentation at the objection stage. These are relatively standard and straightforward steps that, had they been taken, may have avoided the need for the full disclosure request, or at least been useful in considering this motion in greater context.

[8] One of the Crown's positions is that the taxpayer has taken too many steps since the partial discovery lists of documents were exchanged to now be asking for full disclosure discovery. That overlooks the fact that the taxpayer's request for full disclosure largely results from the Crown's refusal on discovery to provide copies of documents not on the Crown's list.

II. The Refusals

[9] The Crown refused on discovery to confirm or deny whether the Crown had certain other documents and, if so, to produce copies. This refusal has been resolved by the Rule 82 full disclosure order and I need consider it no further.

[10] The other refusal was to answer whether the CRA science advisor had a curriculum vitae, and if so, to produce it. The Crown's position on discovery was that they need only provide it if and when they decide to call her as an expert witness at the trial.

[11] I am satisfied that this was both a proper and relevant question on discovery. The reality of litigation is that the taxpayer will need to know the Crown's position in somewhat greater detail than as framed in the reply, especially on the issue of whether research and development performed is qualifying SR&ED from a science point of view.

[12] Knowing the CRA science reviewer's qualifications will help better define the nature and scope of the taxpayer's evidence at trial on the subject and its decision of whether and which expert to call. It can certainly be expected to contribute to a better and more efficient trial. It may also, as a practical matter, be helpful for the trial judge to better understand how and why the disagreement arose and its extent. Its relevance and admissibility at trial will of course remain for the trial judge to decide.

[13] I am ordering the Crown to have its representative answer the question and any proper and relevant follow-up questions arising therefrom. In the event there is no current curriculum vitae in existence, that would include a detailed summary of the qualifications and experience that would be expected to be in a CV had one existed. This will be completed by December 31, 2008.

III. Discovery of a Second Crown Representative

[14] The taxpayer would like an order to allow for an examination for discovery of CRA's science advisor. There is absolutely no basis in this case for such an order. The taxpayer's counsel did not ask any questions relating to the scientific and technical review of the CRA representative in attendance and therefore cannot point to any failure of, or deficiency in, the CRA representative examined to inform herself and respond at the discovery or by way of undertaking.

[15] In the circumstances, no order of costs is warranted.

Signed at Ottawa, Canada, this 2nd day of February 2009.

"Patrick Boyle"

Boyle J.

CITATION: 2009 TCC 79

COURT FILE NO.: 2007-4309(IT)G

STYLE OF CAUSE: CONCEPT PLASTICS LIMITED v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 25 and 28, 2008

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF ORDER: February 2, 2009

APPEARANCES:

 Counsel for the Appellant: Gary J. McCallum

 Counsel for the Respondent: Eleanor H. Thorn

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