

Docket: 2015-2662(IT)G

BETWEEN:

PASQUALE PALETTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 20, 2017 and April 5, 2017
at Vancouver, British Columbia

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant: Justin Kutyan
Adam Gotfried

Counsel for the Respondent: Robert Carvalho
Lisa McDonald

ORDER

UPON motion made by counsel for the Appellant seeking an order requiring the Respondent to:

- (a) provide, within 30 days of the date of my order, answers to the questions on examination for discovery which answers were refused or to which unresponsive answers were provided;
- (b) reattend examinations for discovery within 30 days from the date on which the above-referenced questions are answered; and

- (c) pay the costs of this motion.

AND UPON reading the affidavits filed and hearing the oral submissions made by and for the parties, and upon reading the written submissions filed by counsel for the parties;

NOW THEREFORE, for the reasons set out in the attached reasons for order, the motion is allowed, in part, and the Court orders as follows:

- (a) Within 30 days of the date of this order, the Respondent is to answer questions and produce documents in accordance with the attached reasons for order;
- (b) Within 90 days of the date on which the Respondent answers the questions and produces the documents, the Respondent's nominee is to reattend and answer all proper follow-up questions;
- (c) The Appellant is awarded costs of \$10,000 plus disbursements; and
- (d) The Court received a file containing an unredacted copy of one of the documents for the purpose of its review. As this motion has now been determined, this document shall be sealed in the Court's file.

Signed at Ottawa, Canada, this 23rd day of November 2017.

“S. D’Arcy”

D'Arcy J.

Citation: 2017 TCC 233
Date: 20171123
Docket: 2015-2662(IT)G

BETWEEN:

PASQUALE PALETTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Arcy J.

[1] These reasons address a motion brought by the Appellant for an order requiring the Respondent:

- to provide, within 30 days of the date of my order, answers to the questions on examination for discovery for which answers were refused or to which unresponsive answers were provided; and
- to reattend examinations for discovery within 30 days from the date on which the above-mentioned questions are answered.

[2] The questions at issue are those set out in Schedule 1 to the Appellant's Further Amended Notice of Motion.

[3] The Appellant's appeal relates to the Minister's denial of approximately \$55 million of non-capital losses that the Appellant claimed in his income tax returns for the taxation years between 2000 and 2006. The Appellant claimed the losses in respect of foreign currency trading activities (the "Trading Transactions").

[4] The Appellant had previously brought a motion pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*. In his reasons for his order dismissing the Appellant's motion, my colleague Justice Owen stated the following with respect to the issues before the Court:

[3] The Notice of Appeal, the Amended Reply and the Answer filed by the parties (collectively, the “pleadings”) suggest a complex appeal in which a number of significant issues will have to be addressed by the trial judge, including:

1. Whether under subparagraph 152(4)(a)(i) of the *Income Tax Act* (the “ITA”) the Minister of National Revenue (the “Minister”) was entitled to issue the reassessments of the Taxation Years (the “Reassessments”) outside the “normal reassessment period” as defined in paragraph 152(3.1)(b) of the ITA. I will refer to this issue as the “statute-barred issue”.
2. If the Minister was entitled to issue the Reassessments outside the normal reassessment period, whether the Reassessments should be sustained, vacated or sent back to the Minister for reconsideration and reassessment on some specified basis. I will refer to this as the “reassessment issue”. In light of the pleadings, as a minimum, this question will require the Court to address:
 - (a) Whether the Trading Transactions were a sham and, if so, the effect of the sham in the circumstances.
 - (b) If the Trading Transactions were not a sham:
 - (i) Whether the Trading Transactions were legally effective.
 - (ii) Whether the losses reported by the Appellant in each of his 2000 through 2006 taxation years (the “Loss Years”) as being from the Trading Transactions (collectively, the “Losses”) were incurred by the Appellant.
 - (iii) Whether the Trading Transactions were commercial transactions.
 - (iv) Whether the Trading Transactions constituted a source of income for the Appellant.
 - (v) Whether the Losses were realized by the Appellant.
 - (c) If the Trading Transactions were not a sham, whether they gave rise to the income reported by the Appellant for his 2007 taxation year.

- (d) Whether penalties assessed against the Appellant under subsection 163(2) of the ITA should be sustained, varied or vacated.¹

[5] As Justice Owen noted in his reasons, the Appellant bears the onus described in *House v. The Queen*² with respect to whether the Minister assessed the correct amount of income tax for each of the taxation years at issue. The Minister bears the onus with respect to the statute-barred issue and with respect to the penalties assessed under subsection 163(2) of the *Income Tax Act* (the “Act”).

I. Summary of Facts

[6] The Appellant’s Motion Record contains an affidavit of Wajiha Kahn sworn on February 8, 2017 (the “Kahn Affidavit”). In addition, the Appellant filed an affidavit of Jena McCaustlin sworn on February 15, 2017 (the “First McCaustlin Affidavit”) and an affidavit sworn by Ms. McCaustlin on March 24, 2017 (the “Second McCaustlin Affidavit”).

[7] The Respondent filed an affidavit sworn by Olinda Samuel on February 16, 2017 (the “Samuel Affidavit”).

[8] The four affidavits that counsel for the Appellant and counsel for the Respondent provided in respect of the Respondent’s undertakings given at discovery and the matters the Respondent took under advisement contain the following written responses:

- The Khan Affidavit contains a letter from counsel for the Respondent dated September 14, 2016, which contains answers to the discovery undertakings of the Respondent and matters taken under advisement at the examination for discovery (the “Respondent’s September 14, 2016 letter”).³
- The Samuel Affidavit contains two letters from counsel for the Respondent providing additional answers to the Respondent’s undertakings and the matters she took under advisement. The first letter, also contained in the First McCaustlin Affidavit, is dated February 8, 2017 (the “Respondent’s

¹ *Paletta v. The Queen*, 2016 TCC 171.

² 2011 FCA 234.

³ Appellant’s Motion Record (“Motion Record”), pages 68-78.

February 8, 2017 letter”)⁴ and the second letter is dated February 15, 2017 (the “Respondent’s February 15, 2017 letter”).⁵

- The Second McCaustlin Affidavit contains a letter from counsel for the Respondent dated March 16, 2017 providing additional answers to the Respondent’s undertakings and the matters she took under advisement (the “Respondent’s March 16, 2017 letter”).⁶

[9] The Appellant’s Motion Record also contains the following relevant documents:

- Portions of the transcript from the discovery of the Respondent’s nominee, Ms. Marie Andrews, the Canada Revenue Agency (“CRA”) auditor who conducted the audit of the Appellant.⁷
- Excerpts from a 151-page position paper prepared by Ms. Andrews entitled “Paletta Group, Re: Forex Trading Losses” (the “Position Paper”).⁸ The complete position paper is marked as Exhibit No. 3 on the examination of Ms. Andrews.⁹
- Portions of Ms. Andrews’ audit report (the “Audit Report”), which is marked as Exhibit No. 5 on the examination of Ms. Andrews.¹⁰
- Numerous memorandums entitled “Memo for File”, which contain numerous entries made by Ms. Andrews between August 2008 and November 2013 (the “Memorandums to File”).¹¹ The Memorandums to File are marked as Exhibit No. 7 on the examination of Ms. Andrews.

⁴ Samuel Affidavit, Exhibit A.

⁵ Samuel Affidavit, Exhibit B.

⁶ Second McCaustlin Affidavit, pages 11-360.

⁷ Motion Record, pages 87-154.

⁸ The Minister, in addition to assessing the Appellant, assessed Tender Choice Foods Inc., a company apparently controlled by the Appellant. In an order dated January 28, 2016, my colleague Justice Pizzitelli ordered that the Appellant’s appeal shall be a lead case and stated that Tender Choice Foods Inc. agreed to be bound by the decision in the Appellant’s appeal.

⁹ Motion Record, pages 155-164.

¹⁰ Motion Record, pages 166-170.

¹¹ Motion Record, pages 181-201.

- A document prepared by Ms. Andrews entitled “Paletta Group Audit Plan” (the “Audit Plan”), which is marked as Exhibit No. 8 on the examination of Ms. Andrews.

[10] The pleadings refer to a number of persons and corporations who were involved (or purported to be involved) in the Trading Transactions, including the following:

- The Appellant’s son, Angelo Paletta
- Tim Hodgins and John Hodgins
- David Lewis of Affinity Financial Group Inc.
- Brokerages that Tim and John Hodgins represented at various times during the relevant periods: Union Cal Limited (“UCAL”), IFX Securities (“IFX”) and ODL Securities Ltd. (“ODL”).

II. The Law

[11] The law with respect to discovery principles is well settled. My colleague Justice Campbell provided the following summary of the core discovery principles in her reasons for judgment in *Burlington Resources Finance Co. v. The Queen*:¹²

[11] Caselaw is clear and abundant. The core of discovery principles is that its scope should be wide, with relevancy construed liberally, without, however, allowing it to enter the realm of a fishing expedition. These basic principles are essential because the purpose of discovery is to enable parties to know the case they have to meet at trial, to know the facts upon which the opposing party relies, to narrow or eliminate issues, to obtain admissions that will facilitate the proof of matters in issue and, finally, to avoid surprise at trial (*General Electric Capital Canada Inc. v The Queen*, 2008 TCC 668, 2009 DTC 1186, at para 14). This is all with a view to making the hearing of an appeal streamlined and to ensure that the parties are focussed on the appropriate issues.

[12] After reviewing Justice Campbell’s decision and numerous other decisions of this Court and the Federal Court of Appeal, Chief Justice Rossiter, in *Canadian Imperial Bank of Commerce v. The Queen*,¹³ provided the following summary of points stated in the numerous decisions:

¹² 2015 TCC 71, 2015 DTC 1100, at paragraph 11.

¹³ 2015 TCC 280, at paragraph 18 (the *CIBC Motion*).

[18] The above principles governing discovery thus reveal the following salient points:

- Relevancy is extremely broad and should be liberally construed. The threshold for relevancy on discovery is very low but does not allow for a fishing expedition, abusive questions, delaying tactics or completely irrelevant questions;
- Everything is relevant that may directly or indirectly aid the party seeking the discovery to maintain its case or combat that of its adversary. If the questions are broadly related to the issues raised, they should be answered;
- Discovery is limited by the pleadings to some extent; and
- The examining party conducting the discovery is doing so for the purposes of: supporting his or her own case; obtaining admissions; attacking the opponent's case; limiting the issues at trial; and revealing the case that he or she must meet at trial and the facts that the opponent relies upon.

[13] A principle that has been enunciated by this Court on numerous occasions is that one must always remember that a motions judge is in a very different position from the trial judge, who hears the entire case and is better placed to judge whether something is or is not relevant.

[14] One issue raised in this motion is the disclosure of third party information. As my colleague Justice Jorré noted in *Dominion Nickel Investments v. The Queen*,¹⁴ paragraph 241(3)(b) of the Act allows for such disclosure. Justice Jorré explained the application of paragraph 241(3)(b) as follows:

...

[26] In section 241 of the *Act*, Parliament has clearly expressed a strong policy protecting privacy in income tax matters. However, paragraph 241(3)(b) clearly allows for the production of evidence in “any legal proceedings relating to the administration or enforcement of” the *Act*.

[27] Accordingly, while the privacy of tax information is, of course, an important consideration, section 241 has no direct application here.

[28] The general rule is that, where a document is relevant, it will have to be produced in its entirety. However, parts of it may be redacted where the part is “clearly irrelevant”.

¹⁴ 2015 TCC 14, 2015 DTC 1069, at paragraphs 26-28 and 32-33.

...

[32] In considering privacy interests, it is important to keep in mind that there is now a strong implied undertaking established in Canada that information obtained on discovery may only be used for the purpose of the action in the course of which it was obtained. Except to the extent that the information becomes public in the course of trial, the undertaking survives after the end of the action.

[33] This undertaking inherently limits the further disclosure of the information and helps protect privacy interests of others.

III. Requested Answers or Documents

[15] The Appellant grouped the questions (and documents) at issue into the following five categories:

- a. Request for disclosure of the complete report by RSD Solutions (the “RSD Report”);
- b. Requests for copies of various CRA working papers, position papers and proposal letters from other CRA tax services offices (“TSOs”) that were reviewed and relied on by Ms. Andrews, the CRA auditor who audited the Appellant;
- c. Requests for copies of instructions given by CRA headquarters and of communications with the CRA commissioner’s office;
- d. Requests for information obtained by the CRA pertaining to Timothy Hodgins, UCAL, IFX or ODL, who the CRA or the Respondent alleges are parties to the sham; and
- e. Requests for information on negotiations between the Minister and other taxpayers which may have resulted in inconsistent assessing positions being taken by the Minister.

[16] I will follow the Appellant’s categories when considering the discovery questions at issue.

IV. First Category: Request for disclosure of the complete “RSD Report”

[17] In the following question, the Appellant is asking for a complete copy of a report prepared for the CRA by a third party consultant:

Question 171

[Question] Counsel, we would like a copy of the RSD report. I understand that it was not provided previously, but given that she did rely on it, we would like a copy of the report.

[Answer (counsel for the Respondent)] I'm going to take it under advisement to the extent you can establish how much she relied on it, whether anything in addition to what she put in her position paper. We'll take it under advisement for now.¹⁵

[18] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide a copy of the RSD Report stating the following: "The RSD Report will not be produced. The Respondent will not be relying on the RSD expert report and gives an undertaking to that effect. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."¹⁶

[19] Subsequently, in the Respondent's February 8, 2017 letter, counsel for the Respondent provided what he referred to as a redacted copy of the RSD Report.¹⁷ The copy supplied is not a redacted copy of the RSD Report. It is an incomplete copy of the document. It is missing pages 5 to 13, all but the first page of Appendix IV, and pages 1 and 2 of Appendix V.

[20] Counsel for the Respondent argued that the Respondent is only required to produce the incomplete copy of the RSD Report, since Ms. Andrews only attached those particular portions of the RSD Report to the Position Paper.

[21] Counsel for the Respondent provided the Court with a complete copy of the RSD Report, to allow me to see exactly what is missing from the incomplete copy provided to the Appellant. The Respondent is not claiming privilege with respect to the missing portions of the report.

[22] Counsel for the Respondent's argument is similar to the argument he made with respect to other questions and documents: the Respondent should only be required to produce documents, or, in the case of the RSD Report, parts of a document that Ms. Andrews reviewed and considered relevant for establishing her

¹⁵ Motion Record, pages 102-103.

¹⁶ Motion Record, page 76.

¹⁷ Samuel Affidavit, Exhibit A.

assessing position. In other words, I should let Ms. Andrews be the gatekeeper with respect to the documents that should be provided to the Court. I do not accept this argument; it has no basis in law.

[23] It is for the Court, not Ms. Andrews, to decide whether a document is relevant. The Appellant is entitled to all documents that are relevant with respect to issues raised in the pleadings, both those that support the Respondent's case and those that damage her case. Further, once the Court determines that a document is relevant, the Respondent must produce the complete document. It is a basic rule of evidence that, if a party has a complete document, the party must produce the entire document not selected portions of the document. Certain portions of the document, which are clearly irrelevant, may be redacted to protect the privacy of a third party taxpayer.

[24] Mr. Tim Hum, a CRA headquarters employee appears to have brought the report to Ms. Andrews' attention. The Respondent stated, in her reply to an undertaking, that Mr. Hum was Ms. Andrews' contact at CRA headquarters during the audit of the Appellant.¹⁸ He stated the following in a May 31, 2013 email to Ms. Andrews:

Also, we discussed the RSD report as a group earlier today. You should read and understand the entire report (body of report and appendices). Auditors can leverage off of the report and what David Leblanc (Edmonton Team Leader) will reflect in the updated Edmonton position paper guideline. However, please note that you need to demonstrate that the trading pattern and anomalies (for your specific file) are similar to what RSD reviewed. (3 samples).

[25] Ms. Andrews followed Mr. Hum's directions. She obtained a copy of the RSD Report from CRA headquarters.¹⁹ She noted in a June 2013 memo to file:

Copy of full RSD report obtained from HQ ATP – 54 pages including the appendices. Review indicated that it was excellent and would definitely provide additional support for audit's arguments.

Continuing to work on position paper [the Position Paper] – nearing completion. Material from RSD report to be incorporated as applicable per direction from HQ ATP.²⁰

¹⁸ Samuel Affidavit, Tab B, page 4.

¹⁹ Motion Record, Page 113.

[26] The Position Paper formed the technical basis for the Audit Report.²¹ Ms. Andrews attached portions of the RSD Report as an exhibit to the Position Paper.²² She acknowledged during discovery that she relied on the RSD Report when developing the concept of a normal trading instruction with respect to foreign currency trading.²³

[27] The document is clearly relevant. As noted in the executive summary, the purpose of the report is to review various over-the-counter foreign currency transactions undertaken by several Canadian partnerships “to assist the CRA in determining whether or not the transactions had the attributes of legitimate transactions and occurred under normal industry/commercial practice or were solely for the purpose of generating losses that were offset against income by the partners of the partnerships.”²⁴ The report specifically mentions ODL.

[28] The missing portion of the RSD Report, from page 5 to page 13, contains the author’s review of three samples of “trading patterns and how losses were created”. These three examples form the factual basis for the RSD Report. As Mr. Hum noted in his May 31, 2013 email to Ms. Andrews, she needed to demonstrate that the trading patterns and anomalies for the Appellant are similar to the three samples reviewed in the RSD Report.

[29] The Respondent will produce the complete RSD Report. The Respondent may redact the name of any taxpayer under audit (including employees of the taxpayer) that appears on pages 5 to 13 and in Appendix I. However, each name shall be replaced by a specific letter, to allow the reader to follow the complex fact situation. For example, if there is a reference to Joe Smith and he is a taxpayer that was under audit, then all references to Joe Smith in the document shall be redacted and replaced by the letter A. If there is a reference to another taxpayer under audit, for example Jane Smith, then all references to Jane Smith shall be redacted and replaced by the letter B.

²⁰ Motion Record, page 199.

²¹ Motion Record, page 168.

²² Motion Record, page 159.

²³ Motion Record, pages 100-102.

²⁴ Samuel Affidavit, Tab A, Exhibit 3, page 1 of the report.

[30] The Appellant included two other questions in this grouping: questions 183 and 337. I will deal with these two questions in subsequent sections of my reasons.

V. Second Category: Requests for copies of various CRA working papers, position papers and proposal letters from other CRA tax services offices (“TSOs”) that were reviewed and relied on by Ms. Andrews, the CRA auditor who audited the Appellant

[31] This category covers the Appellant’s requests for position papers prepared by CRA officials located in other CRA offices. The Appellant asserts that these CRA offices provided the position papers at issue to Ms. Andrews to assist her with her audit of the Appellant.

[32] The Respondent argues that she should not be required to produce the position papers because Ms. Andrews did not rely on the position papers in question.

[33] The category contains four groups of questions: questions 326-330, 784-785, 823-826 and 887-890. The first group of questions, 326-330, concerns a position paper prepared by an unidentified CRA officer; the three remaining groups of questions relate to position papers prepared by CRA officials located in the Edmonton, Vancouver and London CRA offices respectively. I will now set out each of the questions and the Respondent’s written reply to any undertaking provided or her reply given as a result of taking the question under advisement.

A. Questions 326-330

[Question] Was any of this document part and parcel of a template?

[Answer] Not inasmuch. I mean, I did look at another working paper, but it wasn’t a template per se.

[Question] And did you cut and paste or use any of the information part and parcel in that template?

[Answer] It wasn’t a template, but I’m thinking that you’ve probably seen it.

[Question] No, I’ve never seen it.

[Answer] Okay, regardless, but it wasn’t a template. It was just something that I’d seen, I liked a bit of the wording.

[Question] Do you still have it?

[Answer] No.

[Question] Is it possible that we could get a copy of what you're referring to? You didn't say it was a template, but a position paper you've seen.

[Answer] It wasn't given to me to use, it was just something that I had seen and read along the way.

[Answer (counsel for the Respondent)] I'll take it under advisement.²⁵

[34] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide the information requested in questions 326-330. He stated: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers and any legal research done by Ms. Andrews is irrelevant and will not be produced."²⁶

B. Questions 784-785

[Question] Did you review what David Leblanc provided as the Edmonton position paper guideline?

[Answer] Well, he said we could leverage off of that. I had access to it. I can't remember if I actually really looked at it. I may have, but I probably did it very quickly.

[Question] I'm assuming the guideline is very non-taxpayer specific because it is a guideline, but in any event, counsel, I would like a copy of this Edmonton position paper guideline.

[Answer (counsel for the Respondent)] We'll take that under advisement.²⁷

C. Questions 823-826

[Question] January 2013, no specific time, "Obtained lengthy FX position paper (with appendices) that had recently been completed by Vancouver TSO – to be used as basic template for Paletta group."

²⁵ Motion Record, page 112.

²⁶ Motion Record, page 76.

²⁷ Motion Record, page 131.

[Answer] That's more my comment to myself. I mean, they gave it to me and I was using it as one of my reference points here. That's probably why you see some of that wording picked up.

[Question] And that's probably the reason why I was asking if there was a template being done.

[Answer] Not in a formal sense, no. Like it wasn't given to me, you must use this as a template. It was me using it because it was a good position paper and thinking it was valuable.

[Question] I'm not sure if this particular document is different from another undertaking that we asked because at the time you said there was not a template document, but I'm going to ask specifically if you could produce or identify this basic template of the FX position paper that was provided to you in January 2013.

[Answer] Well, again, that's my wording that it's a basic template. That wasn't headquarters' direction, just to be clear.

[Question] And that's fine, even if it is headquarters' direction, it doesn't make a difference. My point is that there is a document here obtained from Vancouver TSO that was provided to you.

[Answer] Yes.

[Answer – (counsel for the Respondent)] We're going to take that under advisement.²⁸

D. Questions 887-890

[Question] But in November 2009, you definitely looked at a position paper and proposal letter by the London TSO. Who from the London TSO?

[Answer] I can't recall.

[Question] Was the position paper and proposal dealing with transactions with ODL, IFX, or Union CAL?

[Answer] I can't recall. I mean, I just know there was, obviously, there was one and I briefly looked at it.

²⁸ Motion Record, pages 135-136.

[Question] Can you look into your records and confirm whether it had to do with trading transactions dealing with IFX, Union CAL, or ODL, and [if] Mr. Tim Hodgins [was] involved in those tradings?

[Answer (counsel for the Respondent)] We'll take that under advisement.

[Question] And, if so, we would like a copy of that produced, please.

[Answer (counsel for the Respondent)] Again, we'll take that under advisement.²⁹

[35] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide the information requested in questions 784-785, 823-826 and 887-890 (both questions). For each question he stated, "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."³⁰

[36] The CRA conducted audits of other taxpayers involved in transactions similar to the Trading Transactions, which also involved Tim and John Hodgins, UCAL, IFX and ODL.³¹ These audits were part of a project co-ordinated by officials located in CRA's Ottawa headquarters.³²

[37] It is clear from the Appellant's Motion Record that Ms. Andrews, in the course of her audit of the Appellant, had significant interaction with officials at CRA headquarters in Ottawa and with CRA auditors at other local CRA offices.

[38] Ms. Andrews states the following in the introduction to the Position Paper:

This paper discusses and details the Canada Revenue Agency's (CRA or Agency) position on the foreign currency straddle strategy and the timing losses that arise from the strategy. This Position Paper has as its basis, information obtained from a review of foreign currency losses as they pertain to these specific files and *from the Agency's review of a number of taxpayers that have claimed foreign currency losses arising from transactions with UCAL, IFX and ODL.*³³

²⁹ Motion Record, pages 145-146.

³⁰ Motion Record, pages 77-78.

³¹ Motion Record, Tab 6, pages 94-98.

³² Motion Record, Tab 6, page 97, questions 114 and 115. See also Motion Record, pages 169-170.

³³ Motion Record, page 156.

[Emphasis added.]

[39] The Position Paper contains a summary of the activities of ODL. It also contains numerous references to specific business activities of Tim and John Hodgins, UCAL, IFX and ODL. Footnotes 8, 11, 14, 15, 16, 18 and 19 to the Position Paper state that a significant portion of this information is based on “general information gathered in similar audits conducted by the Vancouver TSO”.³⁴

[40] In the Audit Report, Ms. Andrews specifically refers to the involvement of CRA Headquarters and the Vancouver CRA office. She notes the following:

The complex issues addressed in this audit were similar to those being simultaneously addressed in numerous other audits across the country, so consultation with contacts in head office ATP was ongoing.

...

Extensive consultation with ATP HQ was conducted during the course of the audit in order to determine audit’s final assessing positions. *The final Position Paper in fact relies heavily on HQ sanctioned positions developed by the Vancouver TSO in connection with a similar type of audit.*³⁵

[Emphasis added.]

[41] It is clear that the CRA was conducting simultaneous audits, in various CRA offices, of different taxpayers involved in transactions very similar to the transactions engaged in by the Appellant. CRA headquarters officials provided direction to the various auditors in an attempt to ensure consistency in the various assessments. In addition, auditors in various CRA offices shared information, and their work, with auditors in other CRA offices, including with Ms. Andrews. This can be seen from the following quotation in the Audit Plan under the heading “Status - Update November, 2010”:

Steve Shalaby (HQ) provided information on a court case that might be of assistance in preparing proposals affecting the early Union CAL years. Certain ODL assessments already issued by London TSO also available – could be useful for comparison to the situation with our three taxpayers. General position paper still being worked on for the

³⁴ Motion Record, pages 160-163.

³⁵ Motion Record, pages 169-170.

ODL years by Ed Eng in Vancouver – audit therefore to hold off until consistent positions finally available for all brokerages.³⁶

[42] The Audit Plan and the Memorandums to File, which are documents prepared by Ms. Andrews, contain numerous references to information made available to her by other CRA offices.

[43] The following are examples of such references in the Audit Plan:

- Under the heading “Work Completed as of October, 2009”:

[Liaison] with CRA contacts in Vancouver and Ottawa regarding issues such as the degree to which these taxpayers were likely to fit within the framework of the B.C. project.³⁷

- Under the heading “Additional Work Completed to November, 2009”:

Review of a Position Paper and Proposal Letter issued in connection with a similar type of audit recently completed by the London TSO.³⁸

- Under the heading “Next Steps – December, 2009”:

Review Position Paper issued in connection with the Vancouver project (once this becomes available).

Determine possible assessing positions in light of the approaches chosen by Vancouver and London (and perhaps other TSO’s if any additional audits of a similar nature also come to our attention).³⁹

- Under the heading “Status Update – January, 2013”:

Final draft Position Paper template received from Ed Eng in Vancouver – assessing positions fully clarified. Work begun to prepare detailed Position Paper for the Paletta group using Ed Eng’s approach as a template.⁴⁰

³⁶ Motion Record, page 206.

³⁷ Motion Record, page 204.

³⁸ Motion Record, page 205.

³⁹ Motion Record, page 205.

⁴⁰ Motion Record, page 206.

[44] Similar references to Mr. Eng and his position paper are contained in the Memorandums to File.⁴¹

[45] I previously referred to the email of CRA headquarters official Tim Hum which suggests that Ms. Andrews should “leverage off of” a position paper prepared by an official in the Edmonton CRA office. Ms. Andrews noted in her reply to counsel’s question that she had access to the position paper and may have reviewed it very quickly.

[46] In my view, the Respondent is required to produce the documents requested by the Appellant in the group of questions 326-330, 784-785 and 823-826. With respect the group of questions 887-890, the Respondent will answer the question whether the position paper and proposal letter prepared by the London CRA office “had to do with trading transactions dealing with” IFX, UCAL, or ODL and whether Mr. Tim Hodgins was involved in those transactions. If the paper and letter deal with any of these parties, the Respondent will produce the position paper and proposal letter.

[47] Ms. Andrews was provided with each of the documents in this category in an attempt to ensure that the CRA assessed in a “consistent manner”. The documents clearly relate to the issues raised in the Appellant’s assessments.

[48] Further, Ms. Andrews, to varying degrees, reviewed each of the papers. The question of whether or not she relied on them when developing her assessing position is not a deciding factor. The Appellant is entitled to information that supports the Respondent’s position and to information that may damage her position.

[49] I wish to note that, contrary to what is argued by counsel for the Respondent, it is clear from the record that Ms. Andrews relied upon the information contained in position papers prepared by other CRA offices when assessing the Appellant.

[50] Any taxpayer’s name that appears in any of these documents shall be redacted in the same manner as the names are redacted in the RSD Report.

E. Question 183

[Question] Did the Vancouver TSO rely on that expert report?

⁴¹ Motion Record, page 198.

[Answer (Ms. Andrews)] I have no idea.

[Question] Can you find out?

[Answer (Ms. Andrews)] – I don't know. Could we find out?

[Answer (counsel for the Respondent)] No, I'm not going to give that undertaking. I don't think it's relevant.

[51] As I just noted, Ms. Andrews indicates in her Audit Report that when drafting the paper she relied heavily on positions developed by the Vancouver TSO. Further, the Respondent will be producing a copy of the Vancouver Position Paper. As a result, the information requested in question 183 is relevant; the Respondent will answer the question.

VI. Third Category: Requests for copies of instructions given by CRA headquarters, and communications with the CRA commissioner's office

[52] The Appellant emphasized that in a case such as the present one, where the audit of the Appellant is part of a project audit co-ordinated by officials at the CRA's headquarters, the Court must consider the documents relied upon by such headquarters officials in formulating directions sent to CRA auditors in the CRA's various local offices, including the CRA auditor who audited the Appellant. Counsel for the Appellant argued that the courts must look at information relied upon by the Minister, not just the auditor of the Appellant.

[53] There are two groups of questions in this category. The first group is set out below:

A. Questions 786-787

[Question] Thank you. We already spoke about the RSD report, but I'd like you to ask Mr. Hum what he meant by the last sentence, in particular, what he meant by, "you need to demonstrate that the trading pattern and anomalies . . . are similar". What trading pattern and what anomalies is he speaking to or referring to?

[Answer] In my understanding, he would be – I would have to look at what was in the RSD report again, it's been quite a while since I read it, but he was saying that I needed to demonstrate certain patterns and anomalies, which I did already demonstrate, that were also discussed in the report.

[Question] I would like you to ask him as an undertaking to see what was his view of the patterns and anomalies. What are the patterns and what are the anomalies is he specifically referring to in that sentence?

[Answer (counsel for the Respondent)] We'll take it under advisement.

[54] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide the information requested in questions 786-787 stating: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."⁴²

[55] In the first instance, the Respondent's answer is nonsensical. Mr. Hum was not an auditor. He was one of the CRA headquarters officials who co-ordinated the audit of a number of taxpayers, including the audit of the Appellant, with respect to foreign exchange trading. The requested information relates to specific instructions Mr. Hum provided to Ms. Andrews regarding the use of the RSD Report when auditing the Appellant. It does not relate to an audit of another taxpayer.

[56] The Respondent, in her written argument, argued that the question has been answered, since the Respondent produced information with respect to anomalies identified by Ms. Andrews. However, this is not the question. The Appellant is asking for the trading patterns and anomalies that Mr. Hum was referring to when providing his instructions to Ms. Andrews with respect to the audit of the Appellant. The information is relevant and the Respondent will answer the question.

[57] I will now turn to the second group of questions.

B. Questions 845-848

[Question] And, counsel, again, it's going to be in our list of Exhibit 6, and you received final approval October 28, 2013. I just got a sticky here from my colleague which says we did not include the commissioner in the list. I'm not going to ask for the commissioner himself, I highly doubt the commissioner was involved, but the commissioner's office must have been involved and all I'm going to ask about this particular transaction itself if they have communications going back and forth. That would be sufficient for our purposes.

⁴² Motion Record, page 77.

[Answer] It was just an unusual audit with, you know, with statute barred years and so many years being assessed and it's so big.

[Question] And you're waiting for their approval, though, to issue the assessments?

[Answer] Yes, I never - yes, I waited for them to approve it.

[Question] So if the commissioner had said no, you would not have gone forward?

[Answer] Correct.

[Question] Again, the communications going back and forth with the commissioner's office, we would like that as well?

[Answer (counsel for the Respondent)] Yes.

[58] Even though counsel for the Respondent agreed during discovery to provide the requested information, he stated the following in the Respondent's September 14, 2016 letter: "Ms. Caines did not have any communications with the commissioner's office."⁴³ In the Respondent's February 15, 2017 letter, the Respondent identified Ms. Caines as "the auditor assigned to the audits in the early stages prior to Ms. Andrews taking over as the auditor."⁴⁴ I have no idea why the Respondent felt that the action of an auditor who was only involved in the early stages of the audit is relevant to the production of the requested communications.

[59] Counsel for the Respondent took a different approach in his March 16, 2017 letter, where he stated the following:

In Ms. Andrew's answer to Q. 843, she stated that she thought Vic Djurdjevic was the person who was communicating with the commissioner. As we advised in our letter of February 15, 2017, it appears Mr. Djurdjevic no longer works at CRA and we cannot confirm whether he has a file associated with this matter. However, we are making best efforts to locate and produce documents, if any exist, of Mr. Djurdjevic communicating with the commissioner's office".

[60] In her written argument, the Respondent states that no documents have been located to date.

⁴³ Motion Record, page 75.

⁴⁴ Samuel Affidavit, Tab B, page 3.

[61] As I previously discussed, the record shows that CRA headquarters was extensively involved with the audit of the Appellant. Further, the record clearly shows that approval was required and received from the Commissioner's office. Ms. Andrews made the following entries in a Memo For File:

- [September 2013] Position paper substantially complete and ready to assess. Request to proceed submitted to and received from HQ ATP. . .
- [October 2013] Position paper complete. Closure temporarily on hold pending final approval from the Commissioner's office. . .
- [October 28, 2013] Final approval to proceed received from Commissioner's office.⁴⁵

[62] I do not understand why the Respondent has not produced the communications between the Hamilton CRA office and the Commissioner's office. I have a difficult time accepting that both the Hamilton TSO and the Commissioner's office lost their copies of such communications.

[63] Counsel for the Respondent, during his oral argument, informed the Court that the Respondent would provide the requested information. However, I wish to make it clear that the Court is ordering the Respondent to answer the question and provide the "communications going back and forth with the commissioner's office".

[64] The Appellant included question 337 in his first category of questions. It is more appropriate to address it with the other questions relating to CRA headquarters.

C. Question 337

[Question] Can you go and endeavour and ask the people at head office that you were speaking to whether they relied on that report in creating their position?

[Answer (counsel for the Respondent)] We'll take that under advisement.

[65] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide the requested information. He stated: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or

⁴⁵ Memo For File, Examination of Ms. Andrews, Exhibit 7, Motion Record, page 199.

Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced.”⁴⁶

[66] In light of the extensive involvement of CRA headquarters staff in the audit of the Appellant, the Respondent will answer the question.

VII. Fourth Category: Requests for information obtained by the CRA pertaining to Timothy Hodgins, UCAL, IFX or ODL, who the CRA or the Respondent alleges are parties to the sham

A. Question 116

[Question] And they did gather quite a bit of information. Again, the information I’m looking for, and I’ll just pose it to your counsel, is that we understand that there have been audits or investigations of third parties and that formulated the view of the Minister at the time of raising the assessment, either directly through her or indirectly through using some of that information. So we would like to have copies or production of what information they received from ODL, Union CAL, IFX, Tim Hodgins, John Hodgins, whether there are audits or investigations of them, and any information they had of these currency straddles or the structure of the straddles. That would be the first part and we would like the Attorney General to produce that.

[Answer (counsel for the Respondent)] I’ll take it under advisement, but whatever Ms. Andrews says today, I think, essentially is that anything she relied on is in the position paper. To the extent there is information collected, for instance, about Tim Hodgins, she didn’t rely on it and I think it’s safe to say we’re not going to be producing that, but I’ll take the request you just made under advisement.⁴⁷

[67] In the Respondent’s September 14, 2016 letter, counsel for the Respondent stated: “Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced.”⁴⁸

[68] The Respondent subsequently changed her position. Counsel for the Respondent states in the Respondent’s February 8, 2017 letter: “We enclose the

⁴⁶ Motion Record, page 76.

⁴⁷ Motion Record, pages 97-98.

⁴⁸ Motion Record, page 75.

documents that respond to this request.”⁴⁹ Further, counsel stated in the Respondent’s March 16, 2017 letter: “Additional information and documents concerning this request is found in the documents of Deborah Chisholm. We are making best efforts to locate and produce documents, if any exist, of Ed Eng as referred to in Ms. Chisholm’s emails.”⁵⁰

[69] The Appellant argues that the documents attached to the Respondent’s February 8, 2017 letter and the Respondent’s March 16, 2017 letter are not the requested information. Counsel for the Appellant argues that many of the documents pertain to the Appellant or related corporations.

[70] The Respondent states in her written argument that there are no further documents.

[71] I have already noted that Ms. Andrews did not conduct her audit in isolation; rather she took instructions from officials at CRA headquarters, who clearly provided direction and she reviewed her work. In addition, Ms. Andrews relied heavily on positions developed by the Vancouver TSO and she reviewed position papers prepared by the Edmonton and London TSOs.

[72] Information that CRA headquarters officials either provided to Ms. Andrews or used when reviewing her work is relevant. Similarly, information that the Vancouver TSO used when providing advice to Ms. Andrews is also relevant.

[73] The Respondent will confirm in writing to the Appellant that there are no further documents in the possession of the CRA with respect to the Appellant’s question stating that he “would like to have copies or production of what information they [the CRA] received from ODL, Union CAL, IFX, Tim Hodgins, John Hodgins, whether there are audits or investigations of them, and any information they had of these currency straddles or the structure of the straddles.”

[74] The Respondent will also answer the question whether the CRA conducted audits or investigations of ODL, UCAL, IFX, Tim Hodgins and John Hodgins.

B. Question 119

⁴⁹ Samuel Affidavit (unnumbered), Exhibit A.

⁵⁰ Second McCaustlin Affidavit, page 12.

[Question] Again, counsel, my concern is I don't want any surprises of any information coming from any of these audits or investigations that took place of other third parties to [affect] my client. So we would like any documents or any notes from those meetings that relate to our particular taxpayer or any of the parties to the alleged sham, that we get that information.

[Answer (counsel for the Respondent)] And on the same basis we'll take that under advisement.⁵¹

[75] In the Respondent's September 14, 2016 letter, counsel for the Respondent stated: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."⁵²

[76] In his written argument, counsel for the Respondent acknowledges that different CRA auditors gathered information on Tim Hodgins and the various brokerages, such as UCAL and IFX. However, he argues that "unless referred to in her [Ms. Andrews'] Position Paper or she admitted during the examination that she relied on particular information, the remainder of the information possessed by the CRA is irrelevant to the assessments at issue."

[77] The Respondent's argument is based on the incorrect assumption that Ms. Andrews worked on the audit of the Appellant without the help of other CRA officials. I have already discussed her reliance on other CRA officials, particularly CRA headquarters officials and officials in the CRA's TSOs. A memorandum from a Ms. Deborah Chisholm to Ms. Andrews provides a further example of the help Ms. Andrews received from other CRA offices. At the time, Ms. Chisholm was an auditor in the Tax Avoidance Section of the Vancouver TSO. In the memorandum, Ms. Chisholm provides instructions to Ms. Andrews on trading transactions involving UCAL and IFX.⁵³

[78] The Respondent will provide the requested information with respect to the Appellant and any parties to the alleged sham that was obtained by the CRA offices that assisted Ms. Andrews in her audit, namely CRA headquarters and the CRA offices in Vancouver, Edmonton and London.

⁵¹ Motion Record, page 98.

⁵² Motion Record, page 76.

⁵³ Second McCaustlin Affidavit, page 23.

C. Question 125

[Question] I'm going to add, counsel, besides ODL, regarding with other tax authorities, if the Minister or the Attorney General has any information from other tax authorities, not just for ODL but also for IFX and Union CAL, and they will be relying on that information as well, to produce that information.

[Answer (counsel for the Respondent)] I can tell you an answer to that. If we have any further documents we intend to rely on we're going to have to file a supplementary list. Both sides have to do that kind of thing, but I can tell you my understanding from Ms. Andrews is that anything she relied on is in the current productions. But, again, I'll take our [*sic*] request under advisement.⁵⁴

[79] In the Respondent's September 14, 2016 letter, counsel for the Respondent stated: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."⁵⁵

[80] The Appellant's question is narrow, he asks for information that the Respondent will be relying upon to prove her case. Counsel for the Respondent states that the Respondent will file a supplemental list of documents if she intends to rely upon documents that were not in her list of documents. This is a sufficient answer to the question. Regardless, because of my direction with respect to question 119, the Respondent is required to produce any information regarding the Appellant or any party to the alleged sham that was obtained from other tax authorities by the CRA offices referred to.

D. Questions 426-430

[Question] Did you access the responses, and it seems like many responses, from the aggressive tax planning department in Vancouver regarding the ODL Securities?

[Answer] I had access to what's in here, what was given to me.

[Question] So any of these footnotes, anything mentioned, you had access to those things?

⁵⁴ Motion Record, page 99.

⁵⁵ Motion Record, page 76.

[Answer] I had access to the information that I referenced and I know that that's where it came from, that it was related to that, and that's as far as that goes.

[Question] So you had only questions 30 and 31?

[Answer] I'd have to go back through and see exactly. I would think I probably had other questions and these seemed perhaps the most relevant to include here. They are probably in other documentation and form part of the audit, to the extent that I've got them.

[Question] I want you to go check your records. . .

[Answer] Okay.

[Question] . . . and see which questions you have that ODL answered and I want you to produce the responses.

[Answer (counsel for the Respondent)] Yes, we'll do that.⁵⁶

[81] In the Respondent's September 14, 2016 letter, counsel for the Respondent stated: "At this point, we have not been able to determine what, if any, questions ODL answered (in addition to those referred to in the Position Paper which has been marked as Exhibit 3 to Ms. Andrews' examination) nor have we located any documents containing the ODL responses. We will continue to search for and make best efforts to find any further answers reviewed by Ms. Andrews and provide same if they exist."⁵⁷

[82] Counsel for the Respondent then informed the Appellant that the Respondent could not locate copies of the requested information. Specifically, in the Respondent's February 8, 2017 letter, counsel for the Respondent stated: "We confirm that we have searched and made best efforts to find copies of any questions ODL was asked to answer. We are unable to locate copies of any questions that ODL was asked to answer or any responses received from ODL."⁵⁸

[83] Counsel provided a different response in the Respondent's March 16, 2017 letter when he stated: "Additional information and documents concerning this request is [*sic*] found in the documents of Deborah Chisholm. We are making best

⁵⁶ Motion Record, pages 118-119.

⁵⁷ Motion Record, page 69.

⁵⁸ Samuel Affidavit (unnumbered), Exhibit A.

efforts to locate and produce documents, if any exist, of Ed Eng as referred to in Ms. Chisholm's emails."⁵⁹

[84] As I indicated during the hearing, I am troubled by the Respondent's responses to this series of questions. Counsel for the Respondent stated during discovery that the Respondent will produce the information. Then, counsel stated that the Respondent was unable to locate copies of any questions that ODL was asked or any responses received from ODL. However, a month later the Respondent produces documents and informs the Appellant that the Respondent is looking for additional information.

[85] During the hearing, counsel for the Respondent informed the Court that the Respondent still does not know "which of the questions and answers Ms. Andrews had in her possession. When we determine that, the appellants [*sic*] will get that."

[86] It is not clear to me how there can be no documents and then, suddenly, a month later, documents are produced. Further, I am left with the impression that there are additional documents, however the Respondent cannot locate them, which is surprising considering the extremely large amounts at stake in this appeal and, I assume, other appeals involving ODL, UCAL and IFX.

[87] The Respondent will produce all the requested documents. Specifically, the CRA will produce all responses provided by ODL that Ms. Andrews had either physical or electronic access to in respect of questions asked by the aggressive tax-planning department in Vancouver, regardless of where such documents are currently physically located.

E. Questions 431-433

[Question] Thank you. And, Ms. Andrews, if you have any questions and answers in your records from UCAL and IFX, the other brokerages. . .

[Answer] I don't believe so, but we'll check.

[Question] . . . Please check.

[Answer (counsel for the Respondent)] We'll do that.

[Question] And, if you do, please produce them.⁶⁰

⁵⁹ Second McCaustlin Affidavit, page 12.

[88] In the Respondent's September 14, 2016 letter, counsel for the Respondent stated: "At this point, we have not been able to determine what, if any, questions UCAL and IFX answered that were reviewed by Ms. Andrews nor have we located any documents containing UCAL and IFX responses. We will continue to search for and make best efforts to find and provide same if they exist."

[89] The Respondent provided a similar response in her February 8, 2017 letter in which counsel for the Respondent stated: "We confirm that we have searched and made best efforts to find copies of any questions UCAL or IFX were asked to answer. We were unable to locate copies of any questions that . . . UCAL or IFX were asked to answer or any responses received from same."⁶¹

[90] As with the previous questions, counsel for the Respondent provided a different answer in the Respondent's March 16, 2017 letter, in which counsel stated: "Additional information and documents concerning this request is [*sic*] found in the documents of Deborah Chisholm. We are making best efforts to locate and produce documents, if any exist, of Ed Eng as referred to in Ms. Chisholm's emails."⁶²

[91] Again, as with the previous group of questions, the Respondent will produce all responses provided by UCAL and/or IFX that Ms. Andrews had either physical or electronic access to in respect of questions asked by the aggressive tax-planning department in Vancouver, regardless of where such documents are currently physically located.

F. Question 477

[Question] Thank you. We're going to get back to that, but let's continue on. Counsel, I'm not sure if you'll provide the refusal on this, I'm assuming it's going to be a refusal because I think I asked one question similar to it, but I want to make it clear on the record just in case. In regards to, aside from the information given by the Appellant, if the Minister or the Attorney General received any information from anyone else that indicated that the Appellant entered into a sham transaction, that is whether they audited or investigated other parties (including but not limited to Tim Hodgins, John Hodgins, Union CAL, IFX, ODL, RBC bank or any other banks, Affinity Financial, Taggart Galt, David Lewis,

⁶⁰ Motion Record, page 119.

⁶¹ Samuel Affidavit (unnumbered), Exhibit A.

⁶² Second McCaustlin Affidavit, page 12.

Andrew[?] Henwick[?], Richard Knight, anyone from Taylor Leibow, Stephen Wiseman, Michael Moore, anyone else) if they received any information from those other third parties that provide information as to there was a sham, the contracts were legally ineffective, anything to support that particular position, we would like copies of that information.

[Answer (Counsel for the Respondent)] I'm going to take it under advisement.⁶³

[92] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide the information requested in question 477. He stated: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods Inc. or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."⁶⁴

G. Questions 635-638

[Question] I'm not speaking about Tim Hodgins, I'm asking about the actual brokerages, the other counterparty to the transaction. What information, knowledge, belief do you have that the brokerages received any benefits from this transaction?

[Answer] I don't think they did receive any benefit, the brokerages themselves didn't receive a benefit.

[Question] And you never communicated to any of the brokerages, correct?

[Answer] No.

[Question] Has the Minister communicated to any of the brokerages?

[Answer] I don't know.

[Question] Can you look into that?

[Answer (counsel for the Respondent)] I think she just said she hasn't looked into it with respect to any of these particular trades and I don't think anyone else would have looked at it with respect to these particular trades.

[Question] Any trades dealing with

⁶³ Motion Record, page 122.

⁶⁴ Motion Record, page 77.

[Answer (counsel for the Respondent)] No, we're not going to go into whether the brokerage actually benefitted from trades undertaken by someone else other than the Appellant in these particular years. No, we're not going to do that.⁶⁵

H. Questions 916-917

[Question] Thank you. Could you ask Mr. Eng as well whether he was the individual that went to London, U.K., and attended a meeting with ODL Securities?

[Answer (counsel for the Respondent)] We'll take that under advisement.

[Question] Thank you, counsel, and we'll have some follow-up questions on that, obviously, if there are any notes from the meetings, any findings, correspondence, conclusions made based upon those meetings, to produce those as well?

[Answer (counsel for the Respondent)] We'll take that under advisement, yes.⁶⁶

[93] In the Respondent's September 14, 2016 letter, counsel for the Respondent refused to provide the information requested in questions 916-917. He stated: "Refused. Any information relating to the audit of the Appellant, Tender Choice Foods or Paletta International Corporation has been produced. Information collected relating to the audit of other taxpayers is irrelevant and will not be produced."⁶⁷

[94] The information requested in these three series of questions is relevant in light of the extensive direction provided by CRA headquarters officials to Ms. Andrews with respect to her conduct of the audit and given the control the CRA headquarters officials exercised over the audit. The Respondent will produce the information requested in questions 477, 635-638 and 916-917.

VIII. Fifth Category: Requests for information on negotiations between the Minister and other taxpayers which may have resulted in inconsistent assessing positions being taken by the Minister

This category is comprised of the following two sets of questions:

A. Questions 928-932

⁶⁵ Motion Record, pages 124-125.

⁶⁶ Motion Record, pages 148-149.

⁶⁷ Motion Record, page 78.

[Question] “Negotiations with Deloitte & Touche taxpayers (the Vancouver Project) currently in process – HQ involved at a high level (Francois Ranger, Director of ATP).” Do you know anything about this negotiation?

[Answer] Sorry, which point is this?

[Question] The next point afterwards.

[Answer] Is this July?

[Question] November, the fifth paragraph.

[Answer] Sorry, yes, I only knew about that sort of in a general sense. I was not privy to the actual details of it.

[Question] “Audit further advised to hold off pending results of these discussions in order that we can ultimately propose in a consistent manner.”

[Answer] Correct.

[Question] What were the results of that negotiation?

[Answer (counsel for the Respondent)] We’re not going to answer that question.⁶⁸

B. Question 937

[Question] Counsel, I’m going to ask for an undertaking. I want the Attorney General to ask Mr. Francois Ranger, director of ATP, what were the results of his negotiations, were there any settlements to these negotiations, were there any facts, conclusions, or information that the Minister knew or has known post these assessments that dealt with these negotiations that reflect the currency straddles that Tim Hodgins was involved in with IFX, Union CAL, or ODL?

[Answer (counsel for the Respondent)] We’ll refuse that.⁶⁹

[95] I agree with the Respondent that the requested information is subject to settlement privilege. The Respondent is not required to produce the requested information.

IX. Conclusion

⁶⁸ Motion Record, pages 150-151.

⁶⁹ Motion Record, page 152.

[96] In the *CIBC motion*⁷⁰ Chief Justice Rossiter concluded his reasons at as follows:

[362]. . . This particular motion seems in large part to be the result of obstruction by CIBC when it comes to the discovery process. Discovery is about allowing both sides to fully prepare for trial and identify all relevant facts and issues. Full and open discovery promotes settlement and proper and efficient trials. Discovery is not about curtailing information production – it is about production of relevant information.

[363] The parties would be better served if they forged ahead and engaged in proper discovery, which would allow them to truly arrive at the facts and issues that are relevant to these appeals. I for one do not believe that obstruction is the proper way to litigate, and there are certainly consequences to that strategy that the Court should and will consider.

[97] In the current appeal, it is the Respondent who is obstructing the discovery process. As the Chief Justice noted, there are consequences for such obstruction. In the current motion, the consequence is costs. I will award the Appellant costs of \$10,000 plus disbursements.

Signed at Ottawa, Canada, this 23rd day of November 2017.

“S. D’Arcy”

D’Arcy J.

⁷⁰ *Supra*, Footnote 13, at paragraphs 362-363.

CITATION: 2017 TCC 233

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STYLE OF CAUSE: PASQUALE PALETTA v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 20, 2017 and April 5, 2017

REASONS FOR ORDER BY: The Honourable Justice Steven K. D'Arcy

DATE OF ORDER: November 23, 2017

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