2012 TCC 408
Court File Nos. 2010-3936(IT)G
2011-463(IT)G

TAX COURT OF CANADA

BETWEEN:

TERASEN INTERNATIONAL INC.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

* * * * *

TELECONFERENCE PROCEEDINGS AT MOTION BEFORE THE HONOURABLE MR. JUSTICE GASTON JORRÉ

held in the Courts Administration Service, Room 6048,
Federal Judicial Centre, 180 Queen Street West, Toronto, Ontario,
on Monday, October 1, 2012 at 1:10 p.m.

AMENDED REASONS FOR ORDER

1. THE REGISTRAR: The teleconference is now open. . . .

2. The Court calls File No. 2010-3936(IT)G and 2011-463(IT)G between Terasen International Inc. and Her Majesty the Queen. Court is now resumed.

3. JUSTICE JORRÉ: Thank you. I will now give my reasons for order in respect of the Respondent's motions to amend its replies to notice of appeal in these two matters.

4. I first wish to thank counsel for their very thorough examination of the issues in argument at the hearing a week ago.

5. At the end of the hearing, I forgot to thank the Registrar for making himself

available so he could sit until ten minutes before 7:00 and complete the hearing. Indeed because of certain things he has to do after the end of a hearing, he was there for some time after. Consequently, for the record, I wish to thank our Registrar last Monday.

6. As I indicated to you at the end of the last hearing, because the matter is already set for hearing on November 19 and is estimated to last for five days, I recognize the need for a rapid decision, and I indicated the only way I could do that was by doing so verbally.

7. Finally, I would note the following: One of the appeals deals with Part 1 assessments whereas the other deals with Part 13 assessments. The underlying facts appear in large measure to be the same. Both parties were agreed that for the purposes of the motion, nothing turns on the differences between the two appeals. Accordingly, I have focused on one of the appeals, the appeal in relation to the Part 1 assessments.

8. It is useful to begin by examining the nature of the cases revealed by the Notice of Appeal and the Reply to Notice of Appeal. The Appellant is part of the Terasen group of companies, formerly BC Gas. The main business of the group is the distribution of natural gas. It has a number of other businesses.

9. Over time, the group has developed significant expertise in natural gas transmission and distribution and decided that it should sell on the world market its expertise in the form of consulting services. In the late 1990s, the group decided to extend its international business by also entering into engineering procurement and construction contracts.

10. Eventually the Appellant became interested in an engineering procurement and construction contract for a gas distribution project in the Emirate of Sharjah in the United Arab Emirates. It submitted a joint bid with a local company in the Emirate, S.S. Lootah, to the Sharjah Electricity and Water Authority. Without entering into the precise timing or sequence of events set out in the pleading, one can say that subsequently the Sharjah Electricity and Water Authority signed a nonbinding letter of intent saying that it intended to accept the tender.

11. A company, BVICo, was incorporated in the British Virgin Islands. A Canadian trust was established with the Appellant as the sole beneficiary of that trust, and all the shares of BVICo were held by the trust.

12. In addition, BVICo entered into a joint venture agreement with S.S. Lootah. The two joint venture partners agreed that the profits were to be split evenly between them. The joint venture eventually entered into a binding contract with the Sharjah Electricity and Water Authority.

13. Prior to the date on which the joint venture entered into the binding contract with the Sharjah Electricity and Water Authority, BVICo entered into a subcontract, the inter-entity services agreement, with the Appellant. Under the subcontract, the Appellant billed BVICo for the services it provided it, at cost plus a percentage markup.

14. Later, the joint venture was also successful in being awarded contracts for subsequent phases in the Sharjah Gas Project.

15. I would also note that the Appellant entered into a parent company guarantee in favour of the Sharjah Electricity and Water Authority, under which it would indemnify the Authority for any default that BVICo under the contract between the joint venture and the Sharjah Electricity and Water Authority.

16. It is not disputed that BVICo and the Appellant did not deal with each other at arm's length. The description I have given above is based on what is not contested in the Notice of Appeal and Reply to Notice of Appeal.

17. The Reply to Notice of Appeal in paragraphs 25(a) to (ggg) set out numerous facts assumed by the Minister in reassessing. I do not propose to read them all given the time that it would take, although all of these assumptions in their totality are important in respect of this motion.

18. It is worth noting, however, that among these assumed facts, there are: dealings between the Appellant and S.S. Lootah in the initial stages of providing a tender to the Sharjah Electricity and Water Authority prior to the existence of BVICo; the negotiation between the Appellant and Lootah of the terms of the joint venture entered into between Lootah and BVICo; the Appellant's expenditure of tender development costs for which it was not reimbursed and certain other staff costs of the Appellant in relation to the Sharjah project for which it was never reimbursed.

19. Continuing with some of the assumed facts: that BVICo was only a flow-through entity with only one employee, a controller; BVI merely converted

the Appellant's invoices from Canadian dollars to U.S. dollars before issuing the invoice on its own letterhead; that all the substantial risks were borne by the Appellant in its parent corporation; that certain losses were indeed incurred and absorbed by the Appellant.

20. Based on the Reply, it appears that what the reassessment did was to increase the Appellant's income in the years in question by an amount that resulted in the Appellant including in its income BVICo's entire 50 per cent share of the joint venture profits from the Sharjah project. See subparagraph 25(ggg) of the Reply.

21. In the Reply, the Minister has pleaded that it was justified in including the added amounts in the Appellant's income on the basis of a transfer pricing adjustment made pursuant to paragraphs (2)(a) and (c) of section 247.

22. The proposed amendments add in certain allegations of further facts as well as references to additional provisions of the *Income Tax Act*, and additional grounds relied on.

23. In essence, there are two aspects to the changes: First, the Minister would invoke paragraphs (b) and (d) of subsection (2) of section 247 in addition to paragraphs (a) and (c). Secondly, the Minister seeks to invoke the doctrine of sham with respect to BVICo.

24. The Minister has of course the onus to prove any further facts alleged that were not assumed.

25. I note, however, that in some measure, some of these further facts alleged appear to be, in effect, in the nature of inferences of fact that might arise at the end of the trial if the Court finds that the facts are indeed those as set out in the assumed facts of the Minister.

26. The Appellant opposes the proposed amendments.

27. Based on the affidavit of Mr. Gagnon, the Appellant says that the process has been a very long one; that the years in question are the 1999, 2001, and 2002 taxation years, which were assessed in 2007 and 2008 as a result of an audit that began in 2002; that the Appellant objected in October 2007 and March 2008; that as of December 23, 2010, when the Part 1 appeal was filed, the Minister has made no decision in respect of the notices of objection; that the Appellant is keen to get

the matter resolved rapidly; that the Appellant is of the view that they would require discovery on the newly-raised issues and would need an adjournment if the amendments are allowed; further, that the additional issues would make it necessary for the Appellant to obtain and present additional evidence in the form of documents and witnesses, some of which are in the United Arab Emirates and which may or may not be available and that Mr. Guy Gagnon estimates that it would take six to nine months to obtain and review the necessary documentation.

28. In cross-examination, it was established that Mr. Gagnon had not yet made any inquiries about this additional evidence but that his testimony was based on his experience and judgment including his experience of the time it would likely take in dealing with entities in the UAE.

29. I also note, and there is no dispute about this between the parties, that in order to get a faster hearing date, even though the parties were initially going to have the matter heard in Montreal, the parties agreed to ask for a hearing in Toronto; that the joint application was made before the completion of the discovery process; that the discovery process was completed on July 6, 2012 with the Appellant providing its last undertakings; and that on July 31, 2012, the Respondent sought the Appellant's consent to the proposed amendments, which consent was refused.

30. I should note that neither party felt that there was a distinction to be made for the purposes of this motion between the proposed amendments relating to paragraphs (b) and (d) of subsection (2) of section 247 of the *Income Tax Act* and the proposed amendments raising the doctrine of sham.

31. I am satisfied on the basis of what is before me that if the motion is granted, then the Appellant may well seek to adduce additional evidence that it might not otherwise adduce. I am also satisfied that the Appellant would need an adjournment to seek and examine such evidence.

32. While I am satisfied that paragraph (b) of subsection 247(2) does raise somewhat different issues from paragraph (a) of the same subsection, and in some senses they are quite different, it is also true that to some extent it is a question of coming at the same matter from a different perspective.

33. It would appear that under either approach, the majority, indeed perhaps the vast majority of the relevant facts, are the same facts. Under either approach, the Minister's argument is that the profits of BVICo should be taxed in the hands of the

Appellant.

34. While the tax years in issue date back some time, the earliest being the 1999 year assessed in August 2007, and I note 2001 and 2002 were assessed in 2008, it is worth remembering that Parliament specifically legislated an extended six-year period for reassessments in respect to transactions between taxpayers and non-resident persons with whom they do not deal at arm's length.

35. The appeals of themselves before this Court had been moving at a reasonable pace considering the nature of the issues. The Part 1 Notice of Appeal was filed at the end of December 2010, and the Part 13 Notice of Appeal was filed in mid-February 2011.

36. With respect to Rule 54 of the General Procedure Rules, the parties cite a number of cases. The General Rule is well set out in this passage from paragraph 10 of the decision of the Federal Court of Appeal in *Canderel Limited v. The Queen*, [1994] 1 F.C. 3:

> The general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

37. In *Canderel*, the amendment was sought on the fifth or sixth day of trial; it was refused. The Appellant says, simply put, that this would be fundamentally unfair because after all this time, it would have to defend against radical new allegations requiring additional evidence and further delay.

38. I do not agree. While there would be delay and indeed additional costs, those costs could be compensated for. I do not see the delay in this case as causing the kind of injustice that would prevent an amendment. I agree that the right to amend is not open-ended. There is a balance to be maintained, and there are limits to the right to amend. Neither the time this matter has taken so far in court nor a delay of possibly six to nine months if an adjournment is granted nor the nature of the amendments are such as to take this matter beyond those limits. However, here in terms of Rule 54, I think the appropriate approach is that adopted by Mr. Justice Bowie in *Loewen v. The Queen*, 2007 TCC 703. See in particular paragraphs 25 and 26.

39. I would briefly point out that the situation here is different from that in a number of cases cited by the Appellant.

40. In Mr. Justice Campbell Miller's decision in *Walsh v. The Queen*, I would note that no amendment was sought. *Walsh* is reported at 2008 TCC 282.

41. As I understand it, by the opening of the trial, the Minister had abandoned entirely the basis of the assessment and took the position that the Appellant had to prove the fair market value that it used even though the Minister made no assumption with respect to fair market value and it had simply pleaded that it had no knowledge of the Appellant's assertions in its pleading of fair market value of the shares. Justice Miller agreed with the Appellant that the fair market value of the shares was simply not put in issue by the pleadings.

42. The Appellant also relied on the Federal Court decision of *Apotex Inc. v. Shire Canada Inc.*, 2011 FC 1159, affirming the decision of the Prothonotary in 2011 FC 436. *Apotex* in turn relied on the Federal Court decision of *Montana Band v. Canada*, 2002 FCT 583, which was affirmed by the Federal Court of Appeal at 2002 FCA 331.

43. I would first note that the decision in *Montana Band*, where leave was denied in May 2002 in a matter where the trial was scheduled to begin in September, involves circumstances simply not comparable to the circumstances here. When one examines the May 22, 2002 decision of Mr. Justice Hugessen, one discovers that the trial was expected to last for six months, that the matter involved nine lawsuits and three actions, and based on the Federal Court docket numbers, it would appear that they were filed in 1985, 1997, and 1997 respectively.

44. Indeed, it was an extremely long trial. When one looks at the final trial decision of Madam Justice Hansen, one discovers on the page that is found immediately after the end of the judgment that the actual trial lasted nine to ten months.

45. In *Apotex*, while the situation is quite different from *Montana*, we find that the Applicant, *Shire*, had brought previous motions to amend its pleadings, that it would radically change the nature of the pleadings by, as I understand it, bringing a counterclaim. See paragraphs 18 to 21 of the decision of Mr. Justice Near. Justice Near also stated at paragraph 22:

> In addition, it is evident that the proposed amendments will cause significant delays in the expeditious trial of the matter, an objective pursued by Apotex since

> the commencement of proceedings. As Apotex asserts, it will cast the matter back to the pleadings phase. Apotex has also provided persuasive evidence of delays measured in years currently plaguing section 8 proceedings when an infringement allegation is included.

46. Again, that is not the situation here.

47. Turning now to subsection (9) of section 152 of the *Income Tax Act*, what is the impact of that provision? Both parties have invoked it in their favour. The provision reads:

> The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

48. This was enacted in response to the decision of the Supreme Court of Canada in *Continental Bank*, [1998] 4 C.T.C. 77, which held that the Minister was restricted in his argument to the basis of the assessment relied on within the limitation period for reassessing. See the decision of Justice Bastarache at paragraphs 8 to 14.

49. Subsection 9 is permissive and not restrictive. On its face, it shows a clear intention to expand the arguments that may be made by the Minister in support of an assessment in comparison with what the Supreme Court held in *Continental Bank*.

50. The Appellant cites the Department of Finance technical notes to the effect that the new argument cannot be advanced to the prejudice of the right of the taxpayer to introduce relevant evidence; I agree. Here, such prejudice can be removed by an adjournment giving the Appellant time to bring such evidence.

51. The Appellant also cited paragraph 18 of the decision of the Federal Court of Appeal in the case of the *Estate of Walsh v. The Queen*, 2007 FCA 222. Paragraph 18 reads:

> The following conditions apply when the Minister seeks to rely on subsection 152(9) of the Act: (1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment; (2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(a) and (b), which speak to the prejudice to the taxpayer; and (3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in

> subsection 152(4) of the Act, or to collect tax exceeding the amount in the assessment under appeal.

52. The Appellant says that the amendments introduced new transactions contrary to the first restriction set out in *Walsh*. The Appellant says that the assessment made under paragraph (a) of subsection (2) of 247 of the *Income Tax Act* includes one single transaction between the Appellant in BVI, whereas paragraph (b) in sham bring in a series of transactions involving not only the Appellant and BVI but others as well.

53. Even if the first restriction in *Walsh* is to be understood this way, a point to which I shall come back, I have difficulty with this approach.

54. The assessment pursuant to paragraph (a) relates to the allocation of income between the Appellant and BVI. In reaching the determination, the basis of the Minister's assessment apply in paragraph (a) took into account a number of transactions involving the Appellant, BVI, S.S. Lootah, and the Sharjah Electricity and Water Authority. All of those transactions, set out at length in the assumptions, form part of the facts assumed in the assessment.

55. Now with respect to the proposed amendment, the Minister wishes to rely on paragraph (b), again in relation to the allocation of income between the Appellant and BVICo, and again the Minister will be relying on those same various transactions that I just alluded to in relation to (a). I do not see how this is contrary to the first rule in *Walsh*.

56. In addition, I am not convinced that the word "transaction" as it is used in that rule is meant to be understood in such a technical sense. Four paragraphs prior to paragraph 18, in paragraph 14, the Court of Appeal says:

> As phrased by Justice Rothstein in *Anchor Pointe Energy Ltd. v. The Queen*, . . . 2003 FCA 294, at paragraph 40, the Minister is not introducing a new transaction.

57. If one turns to Justice Rothstein's decision in *Anchor Pointe* at paragraph 39, one sees that he says that the case is unlike *Pedwell* where the Minister sought to take into account different transactions.

58. When one goes to the *Pedwell* case, one sees that the different transactions were in relation to three different lots. The taxpayer was assessed in respect to the first lot but not the second and the third. At the trial, the assessment was upheld in part

on the basis that the taxpayer should be taxed in relation to the second and the third lots but not the first.

59. It seems to me that this is rather different from the situation here where we are talking about the same profits of BVICo and whether and to what extent they should be taxed in the hands of the Appellant.

60. With respect to the second condition in *Walsh*, prejudice, I think I have already dealt with that.

61. The third rule is that section 152(9) cannot be used to reopen statute-barred years. The Appellant argues that, in effect, this is what the proposed amendments would do because the transactions in question would include transactions in 1998, which is not under appeal and which became statute-barred long ago.

62. I have difficulty with this submission for the simple reason that there is no question of 1998 being reopened. The proposed amendments to replies are simply in relation to the assessments before the Court. There is no question of increasing the amount of tax assessed in 1998.

63. Accordingly, for these reasons the **Respondent** will be allowed to amend its replies in both actions on terms. The terms are, first, that the existing hearing date shall be adjourned in order to give the Appellant sufficient time to seek out any additional evidence that it needs; secondly, a case management judge will be appointed to deal, *inter alia*, with making such orders as are appropriate with respect to amending lists of documents and further discovery.

64. With respect to costs, the appropriate principle is that the Appellant should have its incremental costs that are reasonably resulting from the amendments. Put another way, it should have its costs which would not otherwise have been incurred in the absence of the amendments.

65. At this point, it does not appear that we are yet in a situation where there are lost costs, or lost costs of any significance.

66. It is clear that those costs include the costs of this motion.

67. However, what are the incremental costs caused by the amendment apart from this motion is something that will be much easier to determine with hindsight

by the trial judge at the end of the matter than to determine in advance. For example, it is impossible to know in advance whether the trial would be longer than it would otherwise be because of these amendments. That of course should be more readily determinable once the trial is over.

68. Accordingly, with the exception of costs on this motion, I will leave costs to the trial judge. As far as this motion is concerned, the Appellant shall have its costs on a solicitor-client scale.

69. Finally, one minor matter, I noted that the Respondent indicated, and I am satisfied, that there was a typo in the draft replies and that the reference to the date of December 7, 1998 should in fact read, "December 7, 1997".

70. I will be signing the order this afternoon sometime. Thank you.

71. THE REGISTRAR: Thank you, parties. The telephone conference has now concluded.

This amended edited transcript of reasons for order is issued in substitution for the edited transcript of reasons for order issued on December 14, 2012.

CITATION:	2012 TCC 408
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