Docket: 2015-5070(IT)G

BETWEEN:

MICHAEL DILALLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 29, 2018, at Nanaimo, British Columbia

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Geraldine Chen

ORDER

THE MOTION made by the Appellant under section 93 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") to examine a different nominee of the Respondent is dismissed with costs payable to the Respondent in accordance with the Tariff;

AND THIS COURT FURTHER ORDERS THAT the appeal shall proceed to hearing pursuant to the joint application executed by both parties and filed with the Court on March 1, 2018.

Signed at Toronto, Ontario, this 29th day of August 2018.

"R.S. Bocock"

Bocock J.

Citation: 2018 TCC 178
Date: 20180829
Docket: 2015-5070(IT)G

BETWEEN:

MICHAEL DILALLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bocock J.

I. Introduction and Grounds for Motion

[1] The underlying facts within this appeal and related motion are relatively simple. The Appellant, Mr. Dilalla, is a carpenter and the sole director and shareholder of Mickey D's Contracting Co. (the "Company"). He reported nil income on his income tax returns for the 2010, 2011 and 2012 taxation years. He did however issue "Statements of Amounts Due" to, and received payments from the Company in sums totalling $58,630.00, $41,100.00 and $72,000.00, respectively. The Appellant admits receiving such amounts, but brings his appeals to this Court asserting such payments were made under a "Non-commercial Agreement". Such agreement states that his activities were performed for the "sole purpose and intent of exercising his labour in providing a livelihood" for himself and his family. In short, he believes the amounts received were neither a source of taxable income nor dividends.

[2] Mr. Dilalla's examination for discovery of the Respondent was completed in December 2016. Thereafter, Mr. Dilalla brought a motion to compel disclosure of additionally requested documents. In an order dated March 24, 2017, Justice Valerie Miller, dismissed the Appellant's motion. On appeal, her decision was upheld by the Federal Court of Appeal on January 30, 2018: *Dilalla* v *HMQ*, 2018 FCA 28. On March 1, 2018, the parties filed a joint application for a hearing indicating that the appeal was ready to proceed to trial.

[3] In this motion, filed two months later on May 2, 2018, Mr. Dilalla seeks to examine another representative of the Respondent. He is dissatisfied with the Respondent's choice of nominee: the appeals officer who confirmed the reassessments at issue.

[4] The parties conducted examinations for discovery in writing. The Respondent chose Ms. Mona Karol as her nominee to be examined for discovery. Ms. Karol is an appeals officer with the Canada Revenue Agency (the "CRA") who was assigned to Mr. Dilalla's objection and confirmed the reassessments at issue. Mr. Dilalla served fifty-five written questions dated October 7, 2016, and the Respondent provided answers by way of affidavit, sworn by Ms. Karol on November 3, 2016. Mr. Dilalla served thirty-two follow-up questions dated November 22, 2016, and the Respondent's provided answers by way of affidavit, also sworn by Ms. Karol on December 15, 2016. Many of the questions asked were questions intended to explore the conduct of the auditor and her opinion on the law and on the Mr. Dilalla's arguments and interpretation concerning a certain authority: *Stewart* v *Canada*, 2012 SCC 46.

[5] Mr. Dilalla submits the received answers were uninformed or unsatisfactory because Ms. Karol:

> (i) erred in her interpretation of questions of law or mixed fact and law;
>
> (ii) revealed an unwillingness to review the CRA's files;
>
> (iii) was not the auditor, but instead an appeal's officer;
>
> (iv) is not the CRA witness to be called by Mr. Dilalla at the trial; and
>
> (v) revealed a misunderstanding of the questions.

[6] To correct the impugned answers, Mr. Dilalla seeks an order permitting him to examine the auditor, or the auditor's team leader, or alternatively for the Respondent to provide "a list of knowledgeable people for the Appellant to choose from". Specifically, he would prefer to re-examine the auditor, Ms. Sharon Lancaster.

[7] Moreover, Mr. Dilalla indicated his questions posed on examinations for discovery were specifically directed and phrased for response by the auditor. He

was dissatisfied the Respondent nominated the appeals officer to respond. Legally, Mr. Dilalla argues:

a) rule 93 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") states that "if the examining party is not satisfied with the "nominee…, the examining party may apply to the Court to name some other person";

b) the subjective test of Mr. Dilalla's dissatisfaction has been met: he is not satisfied that the nominee was knowledgeable or failed or refused or was unable to make herself knowledgeable; and

c) therefore, if the facts support Mr. Dilalla's belief, then the relief should be granted "as of right".

II. The Law

A. Rule 93

[8] The relevant portions of Rule 93 provide as follows:

> Who May be Examined
>
> **93(1)** A party to a proceeding may examine for discovery an adverse party once, and may examine that party more than once only with leave of the Court.
>
> **[….]**
>
> **(3)** The Crown, when it is the party to be examined, shall select a knowledgeable current or former officer, servant or employee, nominated by the Deputy Attorney General of Canada, to be examined on behalf of that party, but, if the examining party is not satisfied with that person, the examining party may apply to the Court to name some other person.
>
> **(4)** If a current or former officer, director or employee of a corporation or of the Crown has been examined, no other person may be examined without leave of the Court.
>
> **[….]**

B. The Jurisprudence

[9] Much jurisprudence exists concerning examinations for discovery. Relevant to the issues before the Court are the concepts of the duration, sufficiency, nominee's knowledge and re-attendance for discovery.

[10] A party to a proceeding has the right to examine an adverse party only once. A second discovery should only be granted in "exceptional circumstances": *Satellite Earth Station Technology Inc.* v *R.*, 1994 CarswellNat 977, [1994] 2 CTC 61 (TCC), at paragraphs 19 and 22. The right to a second examination is discretionary.

[11] The Federal Court of Appeal is clear that a special reason is required to reopen the door to discovery once an examination has been concluded, "for discovery must, at some point, come to an end": *SmithKline Beecham Animal Health Inc.* v *Canada*, 2002 FCA 229 (CanLII), at paragraph 36 where Justice Sharlow cites *McLeod Lake Indian Band* v *Chingee*, [1998] ACF 683, at paragraph 36. That is the standard for re-examination or additional examination under section 93(1) of the *Rules*.

III. Analysis

A. Timing of Motion and Effect of Joint Application

[12] After a decision was rendered by the Federal Court of Appeal concerning Mr. Dilalla's appeal of Justice Miller's Order regarding the additional documentary disclosure, an application of readiness for hearing was filed jointly on agreement of both parties. What then could cause the Court to re-open examinations at such stage?

[13] When the examinations are over, the Court will only permit re-examination in one of two circumstances. First, in an exceptional case where information was not available at the time of discovery, and with diligence, could not have been put to the deponent: Rule 93(1) and *SmithKline, supra*, at paragraph 36. The Court will also permit re-examination when new information arises out of an undertaking of a correction, or clarification of an answer that was provided during discovery: Rule 93(1) and *SmithKline, supra*, at paragraphs 36 and 37.

[14] No evidence was placed before the Court of new information, not otherwise available at the time of the initial discovery. Similarly, no additional disclosure has prompted the motion. The absence of these first two circumstances is buttressed by Mr. Dilalla's previous decision to proceed to hearing and, without explanation,

change his mind. Further, no evidence exists that new information arose after the joint application to proceed was signed and filed.

B. The Impugned Answers

[15] The answers given by the Respondent's nominee, given the lack of genuine factual issues in dispute, appear fulsome and complete. Moreover, where issues in tax appeals are questions of fact, such facts concerning a particular taxpayers' transactions are better known by the taxpayer himself than by any employee of the CRA: *Standard Mortgage Investment Corp.* v *R.*, 1999 CarswellNat 1828, [1994] 4 CTC 2869(TCC).

[16] In this particular appeal, which was also evident at the hearing of the motion, Mr. Dilalla is intent on having the Respondent produce a nominee who will engage with him in a discussion of the law and questions of mixed fact and law. In short, Mr. Dilalla is intent on prosecuting this appeal with the initial assessor of tax. This object is not correct for discovery. This Court at trial will make such decisions. The Minister's opinions and processes, with respect, will be supplanted by a trial Court with its ultimate decision.

[17] Discovery is not about witnesses, evidence or arguments for trial. Overall, the purpose of a discovery is not to obtain disclosure of the intended evidence of a particular examinee, but rather of the facts relevant to the pleadings which are within the knowledge of the other party: *Haniff*, *supra*, at paragraphs 4 and 5, citing *Champion Truck Bodies Ltd.* v *The Queen*, [1986] 3 FC 245 (FCA). The relevant facts are those related to the validity of the reassessment issued, and not the process by which it was established: *Haniff*, *supra*, at paragraph 16. The mental process of the Minister and her officials in raising the assessment is irrelevant: *Kossow* v *The Queen*, 2008 TCC 422 at paragraph 60.

[18] In conclusion, a review of the answers given by Ms. Karol and Mr. Dilalla's dissatisfaction with them is exactly related to evidentiary weight, burden of proof, sufficiency of evidence and legal conclusions. Such matters, together with Mr. Dilalla's admitted reliance on a specific interpretation of a leading legal authority, are properly the purview of a trial judge. They are not matters properly the subject of examinations for discovery, even if it were possible that Mr. Dilalla would be satisfied with future answers. He has his answers of the Minister's nominee. He does not like them. To change their present impact, he must proceed to trial.

[19] As to the actual knowledge of Ms. Karol, Mr. Dilalla seems confused by the issue of first hand experience of factual circumstances in contrast to overall familiarity. First hand knowledge is not required of a nominee under the *Rules*: *Ashton* v *R.*, 2000 CarswellNat 794, 2000 GTC 819 (TCC), at paragraph 10. Further, as stated before, as the taxpayer, he has the "best" knowledge of his affairs and certainly one better than anything the Minister can offer: *Haniff*, *supra* at paragraph 16.

[20] Further where Mr. Dilalla's lacks that knowledge, he had the onus to be proactive during the discovery process to obtain it. He cannot retroactively turn to section 93(3) and further delay the process, in order to acquire information he neglected to request during the initial process: *Bathurst Machine Shop Ltd.* v *The Queen*, 2006 TCC 378, at paragraph 4; *Blue Wave Seafood Inc.* v *R.*, 2003 CarswellNat 205, [2003] 2 CTC 2572 (TCC) at paragraph 7; *General Motors Acceptance Corp of Canada* v *R.*, 1999 CarswellNat 703, [1999] 3 CTC 2071 (TCC), at paragraph 9.

C. State of Facts Disclosed

[21] Even as a motion judge, reviewing only the divergent views of the parties gleaned from the motion submissions and joint application, this appeal appears centred on limited documentary evidence. A handful of critical documents and records, the Appellant's own financial and organizational structures and the interpretation of legal authorities related to the apparent facts and structures will be central to the outcome of the hearing.

[22] The Respondent's nominee has not shown intransigence or unfamiliarity with the reassessment. She was critically involved in it. There are no new circumstances or revelations indicating a re-examination of another nominee would assist in this matter.

[23] In summary, Mr. Dilalla now needs to take his appeal to a trial judge. The motion is denied. Costs are awarded to the Respondent in accordance with the Tariff, subject to either party's right to make submissions within 30 days.

Signed at Toronto, Ontario, this 29th day of August 2018.

"R.S. Bocock"

Bocock J.

CITATION:	2018 TCC 178
COURT FILE NO.:	2015-5070(IT)G
STYLE OF CAUSE:	MICHAEL DILALLA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Nanaimo, British Columbia
DATE OF HEARING:	June 29, 2018
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF JUDGMENT:	August 29, 2018

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Geraldine Chen

COUNSEL OF RECORD:

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Name:

Firm:

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