

BETWEEN:

BUHLER VERSATILE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on June 13, 2014 at Edmonton, Alberta.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant: Jeff D. Pniowsky

Counsel for the Respondent: Carla Lamash

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**ORDER**

In accordance with the attached reasons for order:

The Respondent's motion for an order, pursuant to the *Tax Court of Canada Rules (General Procedure)*, requiring the Appellant to produce five binders of documents (the "Five Binders") that the Appellant previously provided to a Canada Revenue Agency appeals officer is granted and the Appellant is ordered to produce the Five Binders.

Costs in the amount of \$2,000, payable forthwith, are awarded to the Respondent.

The parties shall, within 30 days of this Order, provide the Court with dates for the completion of the litigation steps.

Signed at Ottawa, Canada, this 18<sup>th</sup> day of November 2014.

“S. D’Arcy”

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D’Arcy J.

Citation: 2014 TCC 364  
Date: 20141118  
Docket: 2012-4373(IT)G

BETWEEN:

BUHLER VERSATILE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

D'Arcy J.

[1] The Respondent has brought a motion for an order, pursuant to sections 95 and 110 of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”), requiring the Appellant to produce five binders of documents (the “Five Binders”) that the Appellant previously provided to a Canada Revenue Agency appeals officer.

[2] The Respondent is also asking the Court to amend its order with respect to the completion of various litigation steps and to award costs to the Respondent, payable forthwith.

#### I. Facts

[3] The Minister assessed the Appellant on December 2, 2008, disallowing its claims for scientific research and experimental development (“SR&ED”) expenditures and associated investment tax credits (“ITCs”). On February 26, 2009, the Minister received the Appellant’s notice of objection to the assessment.<sup>1</sup>

[4] On October 21, 2011, the Appellant made a written submission to the appeals officer assigned to review its notice of objection (the “Appellant’s October 21, 2011 Submission”). The submission states, in part, the following:

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<sup>1</sup> Affidavit of Keith Chrystall, paragraph 2.

...

It is our intent of this letter to clarify key aspects of the SR&ED claim and provide relevant supporting documentation. Specifically, Buhler's position is:

...

In addition, we have provided:

- 3) **Technical Work Performed on Specific Projects in 2005**
- 4) **A Brief Overview of Buhler's Business**
- 5) **Conclusion**
- 6) **Relief Requested**
- 7) **Supporting Documentation (provided in a separate binder)**<sup>2</sup>

[5] The Appellant provided the supporting documentation to the CRA appeals officer in the Five Binders.<sup>3</sup>

[6] On February 27, 2012, Mr. Lorne Anderson, Assistant Director, SR&ED at the Calgary Tax Services office, wrote to Mr. Alnoor Kassam, Chief of Appeals at the Calgary Tax Services Office a memorandum, in which Mr. Anderson explained why he had concluded that the Minister's assessment should not be changed. In the memorandum, Mr. Anderson states the following with respect to the Appellant's October 21, 2011 Submission:

...

The 2011-10-21 letter also provides a general description of work done on each project and is accompanied by five binders of supporting documentation (approx. 2,000 pages total).

### **Response**

. . . The five binders of supporting information included with the NOO [Notice of Objection] consisted primarily of emails that appear to be a mass printing of Outlook folders. BVI has not referred to any of this information in the 2011-10-21 letter, has not identified the relevance of any of the information, multiple copies of many of the emails were included, and the header on most of the emails was missing; therefore, it was not always evident when the emails were sent or to/from

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<sup>2</sup> Exhibit A to the affidavit of Keith Chrystall, at page 1.

<sup>3</sup> Affidavit of Keith Chrystall, paragraph 3.

whom. *Regardless, the CRA has reviewed the supporting information in detail and evaluates it in the sections below.*<sup>4</sup>

[Emphasis added]

[7] On June 20, 2012, the CRA returned the Five Binders to the Appellant. The CRA did not retain copies of the material contained in the Five Binders. Along with the Five Binders the CRA sent a letter to the Appellant advising that the completion of the CRA's review should not be considered as permission to destroy any books or records.<sup>5</sup>

[8] The Minister confirmed the assessment on August 3, 2012. The Appellant subsequently filed this appeal.

[9] The Appellant filed its list of documents with the Court on June 20, 2013. The Appellant listed the Appellant's October 21, 2011 Submission as document number 262.<sup>6</sup>

[10] During the examination for discovery of the Appellant's representative, counsel for the Respondent asked the representative, Mr. Allan Minaker, to provide copies of the Five Binders. Counsel for the Appellant stated that the Appellant would take the request under advisement for the following reasons:

- He was not sure if “we can answer that right now”.
- He was not sure if “that encompasses litigation privilege”.
- “. . . As you know, this isn't a judicial review. For this litigation, we have included the documents we thought were relevant that advanced our case.”<sup>7</sup>

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<sup>4</sup> Affidavit of Keith Chrystall, paragraph 4; Exhibit C of the affidavit of Keith Chrystall, at pages 1 and 2 of 13.

<sup>5</sup> Affidavit of Keith Chrystall, paragraph 3; Exhibit A of the affidavit of Keith Chrystall, at page 1; Exhibit B of the affidavit of Keith Chrystall.

<sup>6</sup> Exhibit E of the affidavit of Keith Chrystall, third page.

<sup>7</sup> Exhibit E of the affidavit of Keith Chrystall, fourth and fifth pages.

[11] In its written answers to the undertakings provided during the discovery of Mr. Minaker, the Appellant refused to provide the Five Binders. It stated, “As this case is not a judicial review, all relevant documents have been provided.”<sup>8</sup>

## II. Requirement to Produce Under Subsections 85(3) and 105(1) of the Rules

[12] In my view, subsection 85(3) and paragraph 105(1)(a) of the *Rules* require the Appellant to produce the Five Binders.

[13] These provisions read as follows:

85(3) All documents listed in a party's list of documents under section 81 or under section 82 and that are not privileged, and all documents previously produced for inspection by the party shall, without notice, subpoena or direction, be taken to and produced at,

(a) the examination for discovery of the party or a person on behalf of, in place of, or in addition to the party, and

(b) the hearing of the appeal,

unless the parties otherwise agree.

105(1) Unless the parties otherwise agree, or the Court otherwise directs, the person to be examined shall bring to the examination and produce for inspection,

(a) on an examination for discovery, all documents as required by subsection 85(3) . . .

[14] The effect of subsection 85(3) and paragraph 105(1)(a) is that the Appellant was required to bring to the examination for discovery and produce for examination all documents listed on its list of documents.

[15] The Appellant's October 21, 2011 Submission is listed as document number 262 on its list of documents. As a result, it was required to produce the submission at the examination for discovery.

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<sup>8</sup> Exhibit F of the affidavit of Keith Chrystall, at page 2.

[16] The Appellant's counsel argued with respect to the document listed as document number 262 that what is being referred to is to the 21-page written submission portion of the Appellant's October 21, 2011 Submission. He argued that it does not include the supporting documentation included in the Five Binders. I do not accept that argument.

[17] The Appellant states at page 1 of its October 21, 2011 Submission that it intends to “. . . clarify key aspects of the SR&ED claim and provide *relevant supporting documentation*.” It then specifically refers to the supporting documentation that is provided in a separate binder.<sup>9</sup>

[18] In my view, the document listed as document number 262 on the Appellant's list of documents comprises the 21-page written submission and the supporting documents: i.e., the Five Binders. The written submissions together with the supporting documents compose the document. Subsections 85(3) and 105(1) of the *Rules* required the Appellant to produce the complete document, including the Five Binders, at the examination for discovery.

### III. Requirement to Produce Under Subsection 105(2) of the Rules

[19] Even if the 21-page written submission and the Five Binders were not a single document, subsection 105(2) of the *Rules* required the Appellant to produce the Five Binders within 10 days of the examination for discovery.

[20] Subsection 105(2) reads as follows:

Where a person admits, on an examination, that he or she has possession or control of or power over any other document that relates to a matter in issue in the proceeding and that is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within ten days thereafter, unless the Court directs otherwise.

[21] It is not clear to me whether the Appellant's representative admitted that the Appellant had possession or control of the Five Binders. However, a party does not avoid the application of subsection 105(2) by refusing to provide an answer when asked to produce the documents in question. The Appellant has possession of the

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<sup>9</sup> Exhibit A of the affidavit of Keith Chrystall, at page 1. The Emphasis in the excerpt quoted is mine.

Five Binders. As a result, it was required to produce them upon the request of the Respondent's counsel.

#### IV. The Appellant's Arguments

[22] I will briefly address the arguments raised by the Appellant.

[23] The Appellant argued that the Respondent's request for the Five Binders is a fishing expedition. It is not clear to me how the Appellant can make such an argument in light of the facts. The Respondent is merely requesting documents that the Appellant, on its own initiative, provided to the CRA's appeals officer in support of its appeal.

[24] Counsel for the Appellant argued that documents are not deemed relevant for the purposes of proceedings before this Court merely because they were produced to a CRA appeals officer. Counsel's argument may be correct in certain fact situations. However, documents that the Appellant provided to the CRA appeal's officer to support its claim that certain expenses constitute SR&ED expenditures are relevant, particularly when the appeals officer reviewed such documents when making her decision, a decision the Appellant appealed to this Court.

[25] The Appellant argued that the Respondent has already had disclosure and now seeks to utilize this Court as a document retrieval assistant. The Appellant appears to be confusing the Court with the CRA. The Appellant provided the documents in the course of the CRA appeal process, but it has not provided the documents in the course of this appeal. The Court will only consider documents that the parties file as evidence in this appeal.

[26] Finally, counsel for the Appellant argued that this is a *trial de novo*, not an appeal on the record. I do not understand the Appellant's argument on this point. This Court is a trial court and its decisions are based on the evidence properly before the Court and on the law. The Court's rules attempt to ensure that, on an efficient basis, each party has the opportunity to review, prior to the actual hearing, any relevant evidence that is in the possession or control of the other party.

[27] For the foregoing reasons, the motion is granted and the Appellant is ordered to produce the Five Binders.

[28] In my view, the Appellant's actions have lengthened unnecessarily the duration of these proceedings. As a result, the Respondent is awarded costs of \$2,000, payable forthwith.

[29] The parties shall, within 30 days of this Order, provide the Court with dates for the completion of the litigation steps.

Signed at Ottawa, Canada, this 18<sup>th</sup> day of November 2014.

“S. D’Arcy”

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D’Arcy J.

CITATION: 2014 TCC 364

COURT FILE NO.: 2012-4373(IT)G

STYLE OF CAUSE: BUHLER VERSATILE INC. v. THE QUEEN

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: June 13, 2014

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

DATE OF ORDER: November 18, 2014

APPEARANCES:

Counsel for the Appellant: Jeff D. Pniowsky  
Counsel for the Respondent: Carla Lamash

COUNSEL OF RECORD:

For the Appellant:

Name: Jeff D. Pniowsky

Firm: Thompson Dorfman Sweatman LLP  
Winnipeg, Manitoba

For the Respondent:

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Canada