

Federal Court



Cour fédérale

Date: 20210819

Docket: T-784-20

Citation: 2021 FC 851

Ottawa, Ontario, August 19, 2021

PRESENT: Madam Justice Walker

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

DAVID RANDALL MILLER

Respondent

ORDER AND REASONS

[1] This Order and Reasons addresses a summary application by the Minister of National Revenue pursuant to subsection 231.7(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA). The Minister seeks a compliance order requiring the Respondent, Mr. David Miller, to provide certain documents, records and information (the Disputed Items) to an authorized officer of the Canada Revenue Agency (CRA) as part of an ongoing audit of Mr. Miller's 2007-2016 taxation years. The Disputed Items are a subset of documents and information (the Items)

requested by the CRA in a series of demand and follow-up letters from the CRA and the Department of Justice (DOJ) to Mr. Miller in reliance on subsection 231.1(1) of the ITA.

[2] As I explain in greater detail below, I will grant in part the Minister's request for a compliance order.

I. Background

[3] Mr. Miller is a businessman who, over many years, has engaged in consulting work for clients and companies looking to raise funds to access the Canadian public markets. One important client was a company based and operating in Europe, Casala Limited (Casala). Mr. Miller received payment for his services from Casala via accounts maintained in a Luxembourg bank. Other clients paid Mr. Miller's professional fees by depositing the funds owing in trust with two Canadian law firms for onward payment to him.

[4] In 2016, the CRA began an audit of Mr. Miller's personal income tax returns for the 2007-2015 taxation years and subsequently extended the audit to include the 2016 taxation year (the Audit).

[5] Through 2017 and early 2018, the CRA auditor assigned to the Audit, Mr. James Green, engaged Mr. Miller in a series of requests for documents and information. Mr. Green and Mr. Miller also met in-person in January 2018. Following the meeting, Mr. Green summarized the outstanding requests in a February 2018 letter to Mr. Miller. In April 2018, Mr. Green sent a second letter to Mr. Miller regarding the remaining required information and setting a deadline

of May 15, 2018 for Mr. Miller's response. In his affidavit dated September 16, 2020 (the First Affidavit), Mr. Green states that he did receive documents and information from Mr. Miller but that much of the requested material was not provided.

[6] In December 2018, the CRA, DOJ and Mr. Miller began an exchange of demand letters and partial responses that are the focal point of this application (collectively, the Demand Correspondence):

Demand Letter: An initial demand letter from the CRA dated December 13, 2018 that referred to Mr. Green's receipt of a number of documents and submissions from Mr. Miller but identified (a) outstanding items from their prior correspondence; and (b) additional requests for documents and information in respect of the years under audit. The Demand Letter set out 22 distinct Items, some of which contained enumerated sub-items. The Demand Letter was issued pursuant to subsection 231.1(1) of the ITA and requested a response by January 21, 2019.

Follow-Up Letter: A follow-up demand letter from the CRA dated May 1, 2019 that acknowledged receipt of one Item from the Demand Letter, stated that all other 21 Items from the Demand Letter remained outstanding, and requested additional information relating to Mr. Miller's 2016 gross professional income. The Follow-Up Letter required Mr. Miller to provide the outstanding documents and information by May 31, 2019 and informed him that failure to do so may result in the CRA seeking a compliance order under section 231.7 of the ITA.

DOJ Letter: A letter from the DOJ representing the Minister dated February 26, 2020 that informed Mr. Miller of the DOJ's involvement in the Audit and listed the outstanding requests from the Demand and Follow-Up Letters. Mr. Miller was asked to send the missing documents and information to the DOJ by March 30, 2020. The DOJ Letter also informed Mr. Miller that the DOJ had instructions to seek a section 231.7 compliance order from this Court should he not comply with the CRA's demand letters.

KPMG Response: Following an exchange of emails between DOJ counsel and Mr. Miller's representative from KPMG discussing deadline extensions due to COVID-19, KPMG sent the DOJ a progress update dated May 12, 2020. KPMG stated that Mr. Miller did not

have access to certain of the requested documents but that they and Mr. Miller had attempted to provide a full response for each requested Item in an attachment to the KPMG Response. KPMG indicated that they would provide additional information once the COVID-19 situation was more stable.

Second DOJ Letter: A second DOJ letter dated June 8, 2020 refining the list of outstanding Items and suggesting that KPMG and Mr. Miller focus their efforts on Items 15, 16, 17 and 18 of the Demand Letter. The DOJ included additional context for the documents and information required by the CRA and asked that KPMG send the outstanding Items by July 8, 2020. Again, DOJ counsel referred to the CRA's instructions to apply for a compliance order in the event the outstanding Items were not forthcoming.

Second KPMG Response: A second response from KPMG dated July 8, 2020 reiterating the impact of the COVID-19 pandemic on Mr. Miller's ability to obtain most of the outstanding Items. The Second KPMG Response included further details regarding Items 15-18 and Mr. Miller's continuing efforts to obtain the Disputed Items.

[7] I will set out the documents, records and information described in the Disputed Items, as refined by the parties in the Demand Correspondence, in the analysis section of this Order and Reasons.

[8] Although KPMG indicated in the Second KPMG Response that Mr. Miller was in the process of obtaining documents and information (Items 1, 9-10, 13-14, 16-19, 21), Mr. Green states in his First Affidavit that the CRA had not received any additional documentation as of September 16, 2020 and that the Second KPMG Response did not include the explanations requested in the Second DOJ Letter. In the CRA's view, Mr. Miller continued to be unresponsive to its demands and, as a result, the CRA instructed the DOJ to proceed with this application.

II. Procedural history of this application

[9] On July 17, 2020, the Minister filed a Notice of Summary Application requesting that the Court issue a compliance order pursuant to subsection 231.7(1) of the ITA. In late September 2020, the Minister filed an Amended Notice of Summary Application making minor amendments to her application with the consent of Mr. Miller.

[10] On December 15, 2020, the Minister filed an informal request to further amend her Notice of Summary Application to narrow the issues for the Court and to particularize the relief sought. The Minister included with her request an amended Application Record and supplemental affidavit from Mr. Green dated November 20, 2020. Again, the request was made with the consent of Mr. Miller. The Court granted the Minister's request by Order dated December 18, 2020. The Minister's further Amended Notice of Summary Application and amended Application Record were filed the same day. The Minister's amended draft Order made reference to Items 15-18 from the Demand Letter and the CRA's request for details of Mr. Miller's 2016 gross professional income from the Follow-Up Letter.

[11] Finally, the Minister filed a letter with the Court on February 2, 2021 correcting her position regarding the taxation years for which information regarding the Luxembourg banking documents is requested and explaining her analysis of the six-year retention period for such documents set out in paragraph 230(4)(b) of the ITA.

III. The parties' positions

[12] The Minister submits that Mr. Miller has failed to produce the documents, records and information that are the Disputed Items contrary to subsection 231.1(1) of the ITA and that she is entitled to a compliance order pursuant to subsection 231.7(1). The Minister maintains that each requested Item is within her subsection 231(1) authority and that Mr. Miller has to date either produced no documentation in respect of the Disputed Items or furnished only incomplete or vague responses to the CRA's requests for information.

[13] Mr. Miller disagrees and challenges the scope of the requests made by the Minister. He argues that the Minister has disregarded the Federal Court of Appeal (FCA) decision in *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 (*Cameco*). Mr. Miller also submits that he has complied with the Minister's requests to the best of his ability and has advised the CRA that some documents are unavailable due to their age or to access issues. Mr. Miller emphasizes the serious consequences that result from a taxpayer's failure to comply with a section 231.7 compliance order and argues that this is not a case in which the Court should exercise its discretion to grant the Minister's application and issue the requested order.

IV. Subsection 231.7(1) of the ITA

[14] The issue before the Court is whether the Minister has satisfied the conditions necessary for the issuance of a compliance order requiring Mr. Miller to produce the Disputed Items. The parties disagree as to: (a) whether the Disputed Items are within the scope of the Minister's authority to request pursuant to subsection 231.1(1) of the ITA; and (b) if so, whether Mr. Miller has complied with the Minister's requests by providing the Disputed Items.

[15] Subsection 231.7(1) of the ITA reads as follows:

<p>231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that</p> <p>(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and</p> <p>(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).</p>	<p>231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :</p> <p>a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;</p> <p>b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.</p>
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[16] To succeed in this application, the Minister must satisfy the Court that:

1. Mr. Miller, the person against whom the compliance order is sought, is required under section 231.1 of the ITA to provide the Disputed Items. In other words, the Disputed Items must fall within the purview of the section;
2. Although Mr. Miller is required to provide the Disputed Items, he has not done so within a reasonable period of time; and
3. The Disputed Items are not protected from disclosure by solicitor-client privilege.

[17] The parties agree that the Minister bears the burden of establishing that she has met the conditions precedent to the issuance of a compliance order. They disagree on the nature and

sufficiency of the evidence required to satisfy those conditions and I will return to this issue in my analysis of each of the Disputed Items.

[18] I find that Mr. Miller has been given a reasonable amount of time to produce the Disputed Items. The Demand and Follow-Up Letters date from 2018 and 2019 and the last of the Demand Correspondence, the Second KPMG Response, is dated July 8, 2020. The CRA and DOJ have also agreed to understandable COVID-19 related delays requested by Mr. Miller. In the Second DOJ Letter, DOJ counsel asked KPMG for details regarding COVID-related access issues but received no reply.

[19] Mr. Miller makes no argument regarding the third condition of subsection 231.7(1) and I find no evidence to suggest any of the Disputed Items, including the trust accounts (ledgers) of Fogler, Rubinoff LLP and Blaney McMurtry LLP, are protected by solicitor-client privilege.

V. Subsection 231.1(1) of the ITA and *Cameco*

[20] In order to determine whether the Minister's application should succeed, it is first necessary to set out the parameters of her authority to request documents and information from Mr. Miller in reliance on subsection 231.1(1) of the ITA.

[21] Subsection 231.1(1) reads as follows:

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

and for those purposes the authorized person may

à ces fins, la personne autorisée peut :

(c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

c) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person

d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

[22] As stated in the preamble to the subsection, a request made by the Minister pursuant to subsection 231.1(1) must relate to the administration or enforcement of the ITA, a requirement that is not in dispute between the parties. Rather, the parties focus their submissions on the scope of the documentation and information the Minister has requested in the Disputed Items.

[23] Paragraph 231.1(1)(a) describes the documents and information the Minister may inspect, audit or examine:

1. The books and records of a taxpayer; and
2. Any document of the taxpayer or of any other person that relates or may relate to:
 - (a) the information that is or should be in the books or records of the taxpayer;
or
 - (b) any amount payable by the taxpayer under the ITA.

[24] The Minister submits that paragraph 231.1(1)(a) not only permits her to access a taxpayer's books and records but also permits her to request written information relating to such books and records. The Minister states that her powers under the paragraph are very broad and

that her ability to request information includes information within the objective and subjective knowledge of the taxpayer (*BP Canada Energy Company v Canada (National Revenue)*, 2017 FCA 61 at para 64 (*BP Canada*)).

[25] Mr. Miller's submissions rely on the FCA's 2019 decision in *Cameco* which he submits reflects a more narrow interpretation of subsection 231.1(1). He argues that the Minister has misused her subsection 231.1(1) power in this case. Her reliance on the subsection without resort to any of sections 231.2, 231.4 and 231.6 improperly broadens the 231.1(1) power and ignores the procedural safeguards of those other sections. Mr. Miller states that the Minister is seeking to overturn the *Cameco* decision without so stating.

The FCA's guidance in Cameco

[26] The question addressed by the FCA in *Cameco* was whether the Minister's authority under paragraph 231.1(1)(a) of the ITA enables her to require employees of a corporation to attend interviews and to answers questions posed by CRA auditors. The FCA answered the question with a resounding "no", concluding that the Minister's power to inspect, audit or examine the books and records of a taxpayer does not permit the Minister to compel oral interviews of a taxpayer or its employees concerning the taxpayer's tax liability (*Cameco* at para 12).

[27] The Minister has not requested an oral interview of Mr. Miller in this case but has requested information or additional information from Mr. Miller regarding certain Disputed

Items. The FCA's decision in *Cameco* sets out a number of general principles relevant to my consideration of these particular requests.

[28] Justice Rennie, writing for the majority in *Cameco*, analyzed the text, context, purpose and legislative history of subsection 231.1(1). He concluded that the focus of the powers in paragraphs 231.1(1)(a) and (b) is the Minister's access to "information that is documented, or ought to be documented, in the books and records of the taxpayer" (*Cameco* at para 15). The provision facilitates the Minister's access to that information (*Cameco* at para 27). For this purpose, paragraphs (c) and (d) of the subsection enable performance of the powers granted in paragraphs (a) and (b) by allowing access to the taxpayer's property or business where books and records are or should be kept and by requiring the taxpayer or any other person on the premises to provide reasonable assistance and to answer all proper questions relating to the administration or enforcement of the ITA (*Cameco* at paras 20-21).

[29] The disposition of *Cameco*'s appeal turned on the scope of the Minister's power in paragraph 231.1(1)(a). The extent to which paragraph 231.1(1)(d) serves as an independent power to compel attendance and answer questions was not argued (*Cameco* at para 21).

However, the FCA's description of the assistance and information the Minister may request in the context of a paragraph 231.1(1)(a) requirement figures in Mr. Miller's submissions. The FCA moderated its emphasis on the Minister's access to the books and records of a taxpayer with reference to paragraph 231.1(1)(d) (*Cameco* at para 13):

[13] ... If records, of any sort, are the object of the auditor's interest, Parliament has made clear that questions may be asked, and the assistance of the Court sought, to compel answers as to the taxpayer's knowledge of their provenance and location.

[30] Justice Rennie drew a distinction between a taxpayer's obligation to facilitate a CRA auditor's access to documents and information that explain what the taxpayer did and questions directed to helping the auditor understand the facts, assumptions and considerations the taxpayer relied on when preparing its tax returns (*Cameco* at para 22). The FCA stated that, "[i]ndependent verification through an audit is different than compelling answers to questions" (*Cameco* at para 25).

[31] Mr. Miller emphasizes the FCA's references to the provenance, location and maintenance of books and records and argues that the *Cameco* decision limits the Minister's ability to ask questions in reliance on subsection 231.1(1) to information relating to those concepts. I do not agree. Mr. Miller's position ignores two elements of Justice Rennie's decision. First, Justice Rennie emphasizes the importance of the words used by Parliament in the subsection. Subsection 231.1(1) protects the Minister's ability to conduct an audit by ensuring her access to both (1) a taxpayer's books and records; and (2) information that ought to be documented in the taxpayer's books and records. Mr. Miller submits that the *Cameco* decision establishes that the subsection is really about what a taxpayer has in its books and records and not what should be there but I do not find this submission persuasive. I agree with the Minister that the words "or should be" in subsection 231.1(1) cannot be ignored. If the information should be in Mr. Miller's books and records, the Minister must be able to gain access to that information in reliance on the subsection.

[32] Second, Justice Rennie’s reference to the provenance and location of a taxpayer’s books and records is a reflection, at least in part, of his concern regarding the scope of the Minister’s intended oral questions (*Cameco* at para 14):

[14] What the Minister sought from Cameco, as evidenced by letters received from CRA auditors, were oral answers to oral questions related to “the fact situation which existed during the 2008-2010 period” and the “development of [a] functional analysis” of a non-arm’s length transaction between Cameco and its foreign subsidiary. It follows that the Minister’s request for compliance order under section 231.7 was not in respect of documents, records or information as to the location of those documents and the manner in which they were maintained, but to facilitate her understanding of Cameco’s potential tax liability.

[33] In this case, the Minister’s application for a compliance order to obtain the Disputed Items is premised on the argument that Mr. Miller has failed to provide information and documents that should be contained in his books and records. In contrast, there is no suggestion in Justice Rennie’s decision that the information sought by the Minister by way of oral interview should have been set out in Cameco’s books and records.

VI. Analysis of Disputed Items

1. Item 15(1): Copies of contract between Mr. Miller and Casala for the audit period.
2. Item 15(2): Invoices provided to Casala outlining the services provided for the audit period.

[34] The Minister requested Items 15(1) and (2) in the Demand Letter. In response, Mr. Miller first stated that he had no contract with Casala but, in the KPMG Response, stated that the work he undertook for Casala was provided “through contracts”.

[35] In the Second DOJ Letter, the Minister reasserted and clarified her request for the contract and invoices outlining Mr. Miller's dealings with Casala:

What we require: All information and documents with respect to your dealings with Casala Limited including, but not limited to, all the points identified in item 15 (including contracts). [...] Please include details of where the amounts received have been included in income for tax purposes.

Should any of the documents requested not exist, please include a clear statement to that effect. We take the position that these are documents that ought to have been produced in the normal course of business and will require a full and detailed explanation if this is not the case.

[Emphasis in original]

[36] Mr. Miller reiterated in the Second KPMG Response that there is no written contract for services between himself (or his corporation, Adrea) and Casala. He stated that there was an agreement but no formal contract that could be forwarded to the Minister. In his oral submissions, Mr. Miller informed the Court that there are no written invoices for the amounts he received from Casala and that, should I issue the requested compliance order, the answer will be the same.

[37] I find that the Minister's requests for contracts and invoices outlining Mr. Miller's provision of services to Casala are within the scope of paragraph 231.1(1)(a). A taxpayer can be expected to maintain contracts and invoices regarding the source, terms and conditions, and quantum of income derived from its business. Such information is or should be documented in the taxpayer's books or records.

[38] Mr. Miller has responded to the Minister's request for any and all contracts with Casala by stating that no formal written contract exists. He argues that he has complied with the Minister's request for "copies" of contracts and I agree.

[39] Mr. Miller's response regarding the existence of invoices outlining his work for Casala is not as clear. It appears from the record that Mr. Miller himself has not furnished the Minister with a statement that no written invoices, in any form, exist. His counsel's statement in oral submissions to this effect does not constitute evidence on which the Court may rely. Therefore, I find that the Minister's outstanding request for any and all invoices from Mr. Miller or Adrea in respect of work performed for Casala is properly the subject matter of a compliance order.

[40] The remaining question is whether the Minister can require Mr. Miller to provide information regarding the terms and conditions of his business dealings with Casala in the absence of a written contract and invoices.

[41] The Minister submits that, if no written contract or invoices exist between Mr. Miller and Casala setting out the terms and conditions of the business relationship, services rendered and amounts invoiced, Mr. Miller is required to provide information regarding those aspects of the relationship. She relies on subsection 231.1(1) and the requests made in the Demand and Follow-Up Letters, as modified by the exchanges between Mr. Miller, KPMG and the DOJ in the subsequent Demand Correspondence. The Minister argues that the information in question ought to have been documented in Mr. Miller's books and records.

[42] Mr. Miller submits that he has complied with the Minister's requests in Items 15(1) and 15(2) to the best of his ability. He states that no written documentation exists that responds to the requests and the Minister has not and cannot request a description of the information that would have been included in those documents were they in written form.

[43] I agree with Mr. Miller that the Minister may only seek a compliance order in respect of information and/or documents she has requested of him. In this case, in respect of the terms and conditions of his business with Casala and the amounts he derived from that business relationship, I find that the Minister has made such a request. Reading the Minister's Item 15 request in its entirety and not piecemeal by sub-item, it is apparent that the Minister requested documents and information regarding the business relationship, including copies of written contracts, invoices outlining the services provided, a detailed schedule outlining location of the services and "compensation received from" Casala, method of payment, and other descriptive aspects of the relationship. Mr. Miller argues that the Minister should have requested clarification of outstanding items before proceeding with this application but she has done so through DOJ counsel in the excerpt from the Second DOJ Letter set forth above.

[44] The requests made by the Minister in Items 15(1) and (2), as clarified and explained in the Second DOJ Letter, relate to information that Mr. Miller ought to have documented in his records. The requests do not stray into the problematic type of questions identified in *Cameco* and *BP Canada* (*Cameco* at para 22). The Minister is not attempting to compel Mr. Miller to reveal his "soft spots" (*BP Canada* at para 82). She has requested information to establish the parameters of the business relationship. I do not find Mr. Miller's insistence on the words of the

initial demand for written contracts and any invoices, to the exclusion of the remaining requests and Demand Correspondence, persuasive. He is under no misapprehension as to the information the Minister has requested. A request for the information that would have been included in any written contract and issued invoices is the Minister's mechanism to ensure her access to basic information necessary for the Audit. Other than delay, there is no reason to require the Minister to issue another demand letter or to resort to section 232.2 of the ITA to obtain the information requested.

[45] In summary, I find that Mr. Miller has been asked for and has failed to provide information regarding the terms and conditions of his oral contract with Casala and invoices provided to Casala for the audit period. As a secondary matter, it appears that no written invoices outlining the services rendered by him exist but Mr. Miller has yet to confirm that fact. This outstanding information is properly the subject matter for the compliance order.

3. Item 15(3): Detailed schedule outlining the location that the services were performed and compensation received from Casala for the audit period.

[46] My findings regarding Item 15(3) parallel in large part those in the preceding section. There is overlap between the request made by the Minister in Items 15(1) and 15(2) for information regarding Mr. Miller's contractual relationship with Casala and her request for a detailed schedule of the amounts received from Casala.

[47] Mr. Miller's response to Item 15(3) in the KPMG Response was that he believed he was paid by Casala via two wire transfers each in the amount of approximately €20,000 and via the amounts discussed in Item 18 which were paid to his lawyer and forwarded to him. He addresses

Adrea's business revenue for 2014-2016 in the Second KPMG Response but does not include information specific to Casala. Mr. Miller argues that he has sufficiently responded to the Item 15(3) request and resists the provision of a schedule of all amounts received.

[48] I find that the Minister's request falls within the scope of paragraph 231.1(1)(a) as it is a request for information that is or should be in Mr. Miller's books or records and relates to an amount payable by him under the ITA. This information is a critical element of the Minister's ability to effectively pursue the Audit. I find Mr. Miller's responses to date are incomplete and equivocal and conclude that the Minister's request for a detailed schedule of compensation paid by Casala will be included in the compliance order.

[49] In arriving at my finding, I do not suggest that Mr. Miller was required to respond to the Minister by way of affidavit. I agree with him that such a requirement would be inconsistent with the 1986 removal from subsection 231.1(1) of the obligation to give answers under oath or by statutory declaration and the introduction of the Minister's powers of inquiry under section 231.4 of the ITA (*Cameco* at paras 32-33). Nevertheless, Mr. Miller was and is required to respond to the Minister's request for information that ought to have been included in his books and records. If he is unable to accurately indicate all amounts in a detailed schedule, it is open to him to indicate where amounts are unknown and the reasons for any equivocation or lack of detail. It will then be up to the Minister to determine whether she is satisfied that Mr. Miller has used reasonable efforts to comply with the request.

[50] I note that the issue of the efforts or care Mr. Miller must exercise in responding to the Minister's demands is expressed by the parties differently. The Minister refers to a base level of care while Mr. Miller refers to reasonable efforts. Regardless of the words used, a taxpayer is required to make reasonable efforts to accurately respond to requests for documents and information that are within the scope of subsection 231.1(1). The extent of those required efforts will vary in each case but a taxpayer's response must take into account the words of the subsection that extend to information that should have been documented in its books and records.

4. Item 15(4): Method of payment for services performed for Casala.

[51] The Minister requested information regarding the method of payment for services rendered to Casala. Mr. Miller responded that:

He believes he was paid by wire transfer into one of his accounts in Euro's of around 20,000 euro's two times, as well as those identified in Item Number 18 below which [were] paid to the lawyer then to him.

[52] Item 18 makes reference to three electronic funds transfers from Casala to Fogler, Rubinoff LLP in trust for Mr. Miller.

[53] I find that that the Minister's request is within the scope of paragraph 231.1(1)(a) as it is a request for information that is or should be in Mr. Miller's books or records and relates to an amount payable by him under the ITA. While I agree with the Minister that Mr. Miller's response is not categorical, the information the Minister seeks in this Item will be apparent or determinable from either Mr. Miller's required description of invoices (Item 15(2)) or detailed schedule of compensation received (Item 15(3)). The Minister will be able to assess whether Mr.

Miller's response to this Item 15(4) in the KPMG Response is consistent with his Items 15(2) and (3) information. Therefore, I conclude that a distinct requirement for this Item 15(4) will not be included in the compliance order sought by the Minister.

5. Item 15(5): Description outlining how Mr. Miller became involved with Casala (e.g., how Mr. Miller met the contact person and how the business relationship developed).

[54] The Minister requested a narrative regarding the development of Mr. Miller's relationship with Casala. I agree with Mr. Miller that he described his work with Casala in the KPMG Response and that, in any event, he is not required to provide this narrative under subsection 231.1(1). A description of the development of Mr. Miller's business relationship is not information that is or should be in his books and records, nor is it obvious that such a description may relate to any amount payable by him under the ITA. I conclude that this Item will not be included in the compliance order sought by the Minister.

6. Item 16: Documentation relating to the Luxembourg bank accounts.

[55] In Item 16, the Minister identified two accounts in a Luxembourg bank in Mr. Miller's name. She requested documentation in respect of the accounts, including opening documentation, the date each account was opened, income in the accounts, the source of the amounts in the accounts, bank statements for 2012-2016, and closing documentation if the accounts had been closed. The request was confirmed in the Second DOJ Letter, accompanied by a request for an accounting of all funds deposited into and disbursements from the accounts.

[56] Mr. Miller explained in the KPMG Response that the Luxembourg bank accounts were opened to receive funds from Casala as it preferred to make payments in Euros to a European bank account. The accounts were closed in 2016. In the Second KPMG Response, Mr. Miller acknowledged that the bank would likely provide a copy of the requested information. The issue, as of July 8, 2020, was that he believed he would have to travel to Luxembourg to obtain the documents and was unable to do so due to the COVID-19 pandemic. Mr. Miller stated that he was attempting to contact someone at the bank for the information but had been unsuccessful to date.

[57] I find that the Minister's request is within the scope of paragraph 231.1(1)(a). It is a request for information that is or should be in Mr. Miller's books or records and relates to amount(s) payable by him under the ITA. The request is factual in nature and is directed to ascertaining the amount of Mr. Miller's business income from Casala. It does not seek Mr. Miller's soft spots or an understanding of the assumptions and considerations made in preparing his tax returns (*Cameco* at para 22).

[58] Mr. Miller submits that he has responded to the Minister by stating that he does not have the required documents, thereby fulfilling his obligation to respond under subsection 231.1(1) and the limitations established by *Cameco*. Mr. Miller did not provide this response. In the Second KPMG Response, he stated:

As you mentioned, the banks in Luxembourg are likely to give copies of required banking information, however, Mr. Miller believes he will need to go [to] the bank personally to get this information and he is unable to travel overseas to Luxembourg at this time due to COVID. Mr. Miller is in the process of trying to

get hold of someone at the bank for this information, but to date has been unsuccessful.

[59] The Minister reasonably expected a response once Mr. Miller had contacted a bank representative. Mr. Miller has not responded and argues, in reliance on *Cameco*, that he is not required to seek any documents he does not have in his possession. I do not agree that the *Cameco* decision establishes that a taxpayer discharges their obligation to satisfy a request that is otherwise within the scope of subsection 231.1(1) with a response that they simply do not have those documents in their possession. As stated above, a taxpayer is required to exercise reasonable efforts to obtain and provide to the Minister information and documentation that should be in its books and records.

[60] Mr. Miller argues that he cannot be required to travel to Luxembourg to obtain the Item 16 documentation and I agree. It does not follow that the Minister is precluded from requiring Mr. Miller to pursue the Luxembourg bank and attempt to access the documentation electronically from Canada (*eBay Canada Ltd. v Canada (National Revenue)*, 2008 FCA 348 at para 48).

[61] Mr. Miller appears to submit that the Minister is seeking documents beyond the retention period set out in subsection 230(4) of the ITA. However, Mr. Miller has not identified the records he believes predate the retention period. He has not stated that he once had possession of the documents requested and destroyed them, nor has he indicated that the Luxembourg bank has destroyed the records in question.

[62] The initial demand for the Luxembourg account documents was made in December 2018 and substantial portions of the banking documentation requested fall within the subsection 230(4) period, including those created in 2012. I find that Mr. Miller has not made a compelling argument based on subsection 230(4) and has not addressed the Minister's reliance on *Tower v Minister of National Revenue*, 2003 FCA 307, [2004] 1 FCR 183 (at para 32).

[63] Mr. Miller indicated to the Minister that he would undertake reasonable efforts through the Luxembourg bank to obtain the requested information. He has not done so. I find that the Minister has satisfied the conditions necessary for a compliance order requiring Mr. Miller to obtain and provide the information and documents listed in Item 16 of the Demand Letter, subject to receipt from the Luxembourg bank of a statement that all or part of the requested documents are not available or are only available if Mr. Miller personally attends at the bank in Luxembourg. In such event, Mr. Miller will be required to provide an explanation and supporting documentation regarding the bank's response. In addition and regardless of the availability of the Luxembourg documents, I find that Mr. Miller is required to provide an accounting of all amounts deposited into the Luxembourg accounts and the source of the amounts deposited as information that ought to be documented in his own books and records.

7. Item 17: Detailed description of the purpose of each amount listed in Item 17 (a series of payments from Fogler, Rubinoff LLP and Blaney McMurtry LLP), including supporting documentation.

[64] In the Demand Letter, the Minister identified a number of deposits made to Mr. Miller's Canadian bank accounts from Fogler, Rubinoff LLP and Blaney McMurtry LLP, and requested "a detailed description of the purpose of each of these amounts including supporting

documentation”. Mr. Miller explained in the KPMG Response that payment for his services were often made to a law firm and forwarded to him. He stated that a payment could result from a successful financing or stock placement on the public markets, or from his performance of other advisory services. Mr. Miller identified the most likely source of the listed payments.

[65] In the Second DOJ Letter, the Minister characterized Mr. Miller’s answer as vague and potentially inconsistent with his answers to other items. The Minister requested that Mr. Miller obtain a copy of the trust accounts from each of the law firms. Mr. Miller was also asked for details of where the listed amounts were included in his income for tax purposes.

[66] In the Second KPMG Response, Mr. Miller indicated that the amounts in question were earned from consulting services and that he believed all deposits had been included in either his personal or Adrea’s tax filings. The Response then stated:

Mr. Miller is still not able to provide the exact source of each deposit from the trust ledgers you sent in previous correspondence and is currently in the process of trying to obtain the details of Trust Ledgers from both Fogler Rubinoff and Blaney McMurtry.

[67] The Minister submits that Mr. Miller’s responses to this Item are non-committal and that she has received no supporting documentation. In her view, the information requested is routine and should have been included in Mr. Miller’s books and records. The Minister notes that she has received no follow-up since the Second KPMG Response.

[68] Mr. Miller argues that he has complied with the Minister’s Item 17 request and should not be required to furnish more certainty. He takes the position that the Minister is not entitled to

force him to obtain and/or provide the documentation requested once he has said he does not have it. If the Minister wishes to force him to provide better answers, there is a process in place under section 231.4 of the ITA.

[69] I find that the Minister's request falls within the scope of paragraph 231.1(1)(a) as it is a request for information that is or should be in his books or records. The amounts in question relate to Mr. Miller's business income and liability for tax. The question before me is whether Mr. Miller has responded to Item 17.

[70] Mr. Miller undertook to the Minister to attempt to obtain supporting documentation regarding the amounts listed in Item 17 from the law firms. He ceased such attempts in reliance on the *Cameco* decision. I find that the Minister makes no error in arguing that Mr. Miller has not complied with her request for supporting documentation.

[71] With regards to the detailed description requested of the purpose of each of the amounts, Mr. Miller stated in the KPMG Response that the amounts reflected payment for services rendered in respect of a successful financing, stock placement or other advisory services. I find no material shortcoming in this response.

[72] The request in the Second DOJ Letter for details of where the listed amounts were included in Mr. Miller's income for tax purposes is problematic. First, the request was not made by the Minister in the Demand or Follow-Up Letter. Second, a list of where specific amounts were included in income by a taxpayer is not information that ought necessarily be documented

in its books and records. I find that Mr. Miller is not required to comply with this supplemental request.

[73] Mr. Miller could not indicate with certainty the entity making the payments to the law firm and stated only that the payments are “most likely” from one identified client. Mr. Miller argues that he cannot be forced by compliance order to provide a response he cannot make with certainty. The Minister agrees but argues that Mr. Miller is required to evidence a base level of care in attempting to respond to her request.

[74] The Minister is entitled to expect a taxpayer to exercise care or reasonable efforts in attempting to comply with a request made within the scope of subsection 231.1(1) of the ITA. In my opinion, the required level of care includes reasonable attempts to obtain missing information from third parties, bearing in mind that the supporting documents requested contain information that ought typically to be in a taxpayer’s own books and records.

[75] In this case, Mr. Miller stated in July 2020 that he would make efforts to obtain details of the trust ledgers from Fogler, Rubinoff and Blaney McMurtry. The documentation requested by the Minister would establish the identity of the client(s) who made the payments, information that Mr. Miller is unable to provide without supporting documentation. Should Mr. Miller’s attempts to obtain the information prove unsuccessful, he will then be in a position to respond to the Minister, provide the information he does have and demonstrate why he is unable to fully comply with the request made.

[76] As a result, I will include in the compliance order a requirement that Mr. Miller request and obtain copies of the trust ledgers from Fogler, Rubinoff and Blaney McMurtry containing the Item 17 information and inform the Minister of the outcome(s) of his requests for the ledgers if unsuccessful.

8. Item 18: Detailed description of three amounts listed in Item 18, the purpose for which the amounts were deposited for Mr. Miller in trust and the disposition of the three amounts.

[77] The Minister requested a description of three amounts deposited for Mr. Miller in trust with Fogler, Rubinoff LLP and, in the Second DOJ Letter, added a request for a copy of the trust accounts from Fogler, Rubinoff LLP (in reliance on the request made in respect of Item 17). She submits that Mr. Miller has not provided a reasonable response because his explanation of these amounts is based only on his belief and he has not provided copies of the trust accounts.

[78] In the KPMG Response, Mr. Miller explained that each of the amounts represented earnings from income described in Item 15 (e.g. amounts paid by Casala). In the Second KPMG Response, he stated that he hoped “to have information available to satisfy you in the not too distant future”. In this application, Mr. Miller submits that he has complied with the Minister’s request by providing a description of each of the three amounts, including their source, nature and the purpose for which they were received. Mr. Miller also submits that the request was not properly made because it is in fact a request about his tax liability and that a request for documentation was never made.

[79] I am not persuaded by Mr. Miller's second submission and find that the Minister's request is within the scope of paragraph 231.1(1)(a) as it is a request for information that is or should be in Mr. Miller's books or records. I do not agree that it is a request for information to facilitate the Minister's understanding of Mr. Miller's potential tax liability (*Cameco* at para 14). The description requested of Mr. Miller is qualitatively different from the questions noted with concern by the FCA.

[80] I find, however, that Mr. Miller has responded to the Minister's request for a description of the three amounts that were received in trust by Fogler, Rubinoff. The KPMG Response contains a table that sets out the date, source, recipient, amount, purpose and explanation of each of the three amounts. The remaining question is whether Mr. Miller should be required, as part of a compliance order, to pursue his requests to the law firm for copies of their trust accounts. I find that the Minister has not established that her request for this supporting documentation would reveal information that Mr. Miller has not already provided. In contrast to Item 17, Mr. Miller's response to Item 18 includes the identity of the source of the three payments, that being Casala. While it may be generally helpful to the Minister to obtain a copy of the Fogler, Rubinoff trust accounts to confirm the amounts were paid to Mr. Miller, she has identified no substantive deficiency in Mr. Miller's response to Item 18. Mr. Miller has discharged his obligation to exercise care in responding to the Minister's request and I find no reason to enforce his undertaking to obtain the trust ledgers from Fogler, Rubinoff in a compliance order.

9. Item from the CRA's Follow-Up Letter: Details of Mr. Miller's gross professional income (Line 164) for the 2016 taxation year.

[81] The Minister made this request in the May 1, 2019 Follow-Up Letter following receipt of Mr. Miller's tax return for the 2016 taxation year. Mr. Miller informed the DOJ in the Second KPMG Response that he had reached out to the accounting firm that prepared his 2016 personal tax return to obtain a breakdown of his gross professional income for the year but that their response had been slowed due to COVID-19.

[82] I find that the Minister's request is within the scope of paragraph 231.1(1)(a). It is a request for information that is or should be in Mr. Miller's books or records. I agree with the Minister that the requested breakdown is information that should be contained in Mr. Miller's records as it was necessary for the preparation of his tax return. Mr. Miller has not contested that the information exists, rather he has not received a response from his accountant. I am not persuaded by Mr. Miller's argument that the Minister is required to pursue recourse under section 231.2 to obtain this information.

[83] I find that the Minister is entitled to require Mr. Miller to pursue his inquiries with his accountant. The information requested is within Mr. Miller's control. It is not the property of a law firm or of his accountant as he would have supplied the information to his accountant to enable the preparation of the 2016 tax return.

VII. Conclusion

[84] The Minister's application is granted in part and a compliance order in respect of certain of the Disputed Items from the Demand Correspondence, as modified in accordance with these reasons, will be granted.

[85] The Minister requested costs in the amount of \$1,750.00 all inclusive in respect of the application. I have considered the Minister's request and the factors set out in Rule 400(3) in light of the mixed result in this application and will award costs to the Minister in the amount of \$1,250.00.

ORDER in T-784-20

THIS COURT ORDERS that:

1. The Respondent, Mr. David Randall Miller (Mr. Miller) provide to Mr. James Green, a Canada Revenue Agency (CRA) auditor and authorized person for the purposes of section 231.1 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (or another authorized person who may be assigned carriage of this matter), the following outstanding information and documentation from the demand letter of the CRA dated December 13, 2018 (Demand Letter) and the follow-up CRA demand letter dated May 1, 2019 (Follow-Up Letter) within 45 days from the date of this Order:
 - a) Items 15(1), 15(2) and 15(3) from the Demand Letter:
 - i) a response to the request for invoices provided to Casala Limited (Casala) outlining services provided for the audit period;
 - ii) information regarding the terms and conditions of Mr. Miller's oral contract(s) with Casala and the invoices submitted to Casala for the audit period; and
 - iii) a detailed schedule of the compensation received from Casala for the audit period.

- b) Item 16 from the Demand Letter and clarification in the Second DOJ Letter:
 - i) the information and documents listed in Item 16, subject to receipt from the Luxembourg bank of a statement that all or part of the requested documents is or are not available or are only available if Mr. Miller personally attends at the bank in Luxembourg. In such event, Mr. Miller is ordered to provide an explanation and supporting documentation regarding the bank's response; and
 - ii) an accounting of all funds deposited into the Luxembourg accounts and the source(s) of the deposited funds.
- c) Item 17 from the Demand Letter: a copy of the trust ledgers of Fogler, Rubinoff LLP and Blaney McMurtry LLP evidencing the Item 17 information, subject to the condition that if either or both firms refuse Mr. Miller's request, Mr. Miller is required to so inform the Minister and provide written correspondence in this regard from the law firm(s).
- d) The Follow-Up Letter: details of gross professional income, as reported on line 164 of Mr. Miller's 2016 tax return.

2. The Applicant, the Minister of National Revenue (the Minister), is authorized to effect service of this Order on Mr. Miller, pursuant to Rule 139 of the *Federal Courts Rules*, SOR/98-106.
3. Costs in the amount of \$1,250.00 are awarded to the Minister.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-784-20

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v DAVID
RANDALL MILLER

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 9, 2021

ORDER AND REASONS: WALKER J.

DATED: AUGUST 19, 2021

APPEARANCES:

Montano Cabezas

FOR THE APPLICANT

Thang Trieu
Daniel Hickey

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Ottawa, Ontario

FOR THE APPLICANT

KPMG Law LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENT