

Dockets: 2007-2125(IT)G, 2007-2126(GST)G

BETWEEN:

DONNA HEINIG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on December 11, 2008 at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: Franklyn Cappell

Counsel for the Respondent: Bobby Sood, Paolo Torchetti

ORDER

The Appellant's Motion is resolved as follows:

1. The Appellant's request for an order that the Respondent produce all of the documents listed in Schedule "A" of the List of Documents (Full Disclosure) of the Respondent in the income tax appeal 2007-2125(IT)G (and a Declaration that production of a listed document which has been in whole or in part edited, revised, or obscured does not constitute production of that document) is denied.
2. The Appellant's request for an Order that the Respondent produce for inspection all of the documents in the List of Documents (Full Disclosure) of the Respondent in the goods and services tax appeal 2007-2126(GST)G (and a

Declaration that production of a listed document which has been in whole or in part edited, revised, or obscured does not constitute production of that document) is denied.

3. The Appellant's request for an Order declaring that none of the documents listed in Schedule "B" (privilege claimed) of the List of Documents (Full Disclosure) of the Respondent in the income tax appeal 2007-2125(IT)G is privileged, and that all of those documents must be produced for inspection is denied.
4. Tara Le is directed to attend for cross-examination on her affidavits filed in relation to the lists of documents filed on behalf of the Respondent at a time and place as agreed upon by counsel for the Respondent and counsel for the Appellant (and failing such agreement at a time and place as directed by counsel for the Appellant provided that counsel for the Appellant provides at least 10 days notice of such time and place).
5. The Appellant is directed to attend for cross-examination on her affidavit filed in relation to her list of documents filed in this matter at a time and place as agreed upon by counsel for the Respondent and counsel for the Appellant (and failing such agreement at a time and place as directed by counsel for the Respondent provided that counsel for the Respondent provides at least 10 days notice of such time and place).
6. The two bound collections of documents that were submitted by counsel for the Respondent at the hearing of the Motion shall be sent to counsel for the Appellant.
7. To allow time for the parties to resolve the issue of whether any additional documents should be disclosed, the Order dated February 21, 2008 is amended, in part, to read as follows:
 - (a) The examinations for discovery shall be completed by June 30, 2009;
 - (b) Undertakings given at the examinations for discovery shall be satisfied by July 31, 2009; and
 - (c) The parties shall communicate in writing with the Hearings Coordinator by August 31, 2009 to advise the Court whether the case

will settle, whether a pre-hearing conference would be beneficial or whether a hearing date should be set. In the latter event, the parties may file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)*.

The costs of this motion shall be in the cause.

Signed at Toronto, Ontario this 29th day of January 2009.

“Wyman W. Webb”

Webb J.

Citation: 2009TCC47

Date: 20090129

Dockets: 2007-2125(IT)G, 2007-2126(GST)G

BETWEEN:

DONNA HEINIG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Webb J.

[1] The Appellant made a motion in which the following were requested:

1. an Order that the Respondent produce all of the documents listed in Schedule “A” of the List of Documents (Full Disclosure) of the Respondent in the income tax appeal 2007-2125(IT)G (and a Declaration that production of a listed document which has been in whole or in part edited, revised, or obscured does not constitute production of that document);
2. an Order that the Respondent produce for inspection all of the documents in the List of Documents (Full Disclosure) of the Respondent in the goods and services tax appeal 2007–2126(GST)G (and a Declaration that production of a listed document which has been in whole or in part edited, revised, or obscured does not constitute production of that document);
3. an Order declaring that none of the documents listed in Schedule “B” (privileged claimed) of the List of Documents (Full Disclosure) of the Respondent in the income tax appeal 2007-2125(IT)G is privileged, and that all of those documents must be produced for inspection;
4. an Order that Tara Le, the affiant in respect of the List of Documents (Full Disclosure) in both the income tax appeal 2007–2125(IT)G and the goods and services tax appeal 2007–2126(GST)G be cross-examined on her Affidavits of Documents in those matters;

5. an Order revising the previous Orders of the Court regarding the schedule of steps in these appeals; and
6. such further or other order as counsel may advise or which the Court may regard as just.

[2] The Appellant was reassessed under the *Income Tax Act* (the “*ITA*”) and the *Excise Tax Act* (the “*ETA*”) in relation to certain payments that the Respondent is alleging that the Appellant had received from the operator of a massage parlour business in Mississauga in 2000, 2001, 2002 and 2003. Penalties were also assessed under subsection 163(2) of the *ITA* and section 280 of the *ETA*.

[3] Earl Heinig, the husband of the Appellant, in his affidavit that was filed in relation to this motion, stated that the Appellant was reassessed on the basis that the income derived from the operation of the massage parlour business was included in the Appellant’s income. It is the position of the Appellant that the Appellant held the licence for the business but did not operate the business and simply received regular payments from the operator because the Appellant held the license to operate a massage parlour business.

[4] However, it seems clear from the Replies that were filed in these matters that the Appellant was reassessed to include in her income the payments that the Respondent is alleging that Heather Mailow (operating as Mailow Enterprises) made to the Appellant during the years under appeal. There is nothing in either Reply to suggest that the Appellant was reassessed to include in her income the alleged income from the operation of the business. Therefore it appears that the dispute in this case is related to the amount of the payments that Heather Mailow was making to the Appellant during the years in question.

[5] It would appear that the following are the amounts that the Appellant reported that she had received from Heather Mailow and the amounts that the Respondent states that the Appellant received from Heather Mailow:

<u>Year</u>	<u>Payments (According to the Appellant)</u>	<u>Payments (According to the Respondent)</u>	<u>Difference</u>
2000	\$ 87,300	\$224,299	\$136,999
2001	\$ 88,500	\$224,299	\$135,799
2002	\$103,775	\$228,972	\$125,197
2003	\$120,000	\$209,625	\$ 89,625

[6] There is a significant difference between the amounts that the Appellant is claiming that she received from Heather Mailow and the amounts that the Respondent is alleging that the Appellant had received.

[7] It is the position of the Appellant that the Respondent has not provided copies of all relevant documents listed in Schedule “A” to the Lists of Documents as the Respondent had obscured certain information contained in the documents that were provided to the Appellant. As well, the Respondent is claiming privilege in relation to several documents that are in the possession of the Respondent and these documents are listed in Schedule “B” to the List of Documents filed in relation to the *ITA* appeal. The privilege claimed is that the documents contain confidential third-party taxpayer information.

[8] Section 241 of the *ITA* and section 295 of the *ETA* provide restrictions on the release of taxpayer information. Each statute contains an exception in respect of any legal proceedings related to the administration or enforcement of that particular Act. Subsection 241 (3) of the *ITA* provides as follows:

(3) Subsections (1) and (2) do not apply in respect of

...

(b) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

[9] The Federal Court of Appeal in *Minister of National Revenue v. Huron Steel Fabricators (London) Limited and Herman Fratschko* 73 DTC 5347 confirmed that the tax returns of a third party that had been relied upon by the Minister in assessing the taxpayer in that case were to be disclosed to the taxpayer. Associate Chief Justice Jerome (as he then was) of the Federal Court Trial Division in *Oro Del Norte, S.A. v. The Queen*, [1990] 2 C.T.C. 67, 35 F.T.R. 107, 90 DTC 6373 dealt with a request by a taxpayer for an order requiring the Respondent to produce documents and provide information in relation to third parties. He stated as follows:

8 **A taxpayer must therefore be permitted access to all documents which are relevant to or relied upon by the Minister of National Revenue in reassessing a return.** Counsel for the defendant concedes that the broad test of relevancy expounded by McEachern, C.J. in *Boxer and Boxer Holdings Ltd. v. Reesor et al.*, (1983) 43 B.C.L.R. 352, 35 C.P.C. 68, and adopted by Urie, J. in *Everest & Jennings Canadian Ltd. v. Invacare Corporation*, [1984] 1 F.C. 856 (F.C.A.) applies:

It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.

In order to determine whether the plaintiff has satisfied this relevancy test regard must be had to the essence of its appeal from the defendant's reassessment of the income tax return.

(emphasis added)

[10] It seems to me that the reference to all documents does not necessarily mean that an entire document should be disclosed to an appellant if only part of that document is relevant to the appeal and another part contains confidential third party information that is not relevant to the appeal. In my opinion it would not be appropriate for the entire document to be disclosed if these parts could be severed. Only the relevant part will be required to be disclosed if the relevant part can be severed from the irrelevant part without rendering the relevant part incomprehensible. If the irrelevant part that contains confidential third party information cannot be severed from the relevant part without rendering the relevant part incomprehensible, then the entire document would have to be disclosed.

[11] The Respondent had provided to the Appellant copies of the documents listed in Schedule "A" of each List of Documents in which the social insurance numbers of Heather Mailow and other third parties and the income of Heather Mailow were obscured. Counsel for the Appellant rejected these documents and is seeking an order that the entire contents of the documents be disclosed. However I do not accept that the social insurance number of Heather Mailow or of any other third party is relevant to the matters in dispute. The dispute in this case is the amount of payments that Heather Mailow made to the Appellant. Whatever Heather Mailow's or any other third party's social insurance number might be is not relevant in relation to the determination of the amounts that Heather Mailow paid to the Appellant. Obscuring the social insurance numbers of Heather Mailow and the other third parties did not render the remaining document incomprehensible. Therefore in my opinion it was appropriate for the Respondent to obscure the social insurance number for Heather Mailow or any other third party.

[12] With respect to the alleged income of Heather Mailow from the massage parlour business, in my opinion, this information is relevant to the proceedings. The amount that the Respondent is alleging that Heather Mailow paid to the Appellant is

a significant amount ranging from \$209,625 to \$228,972 per year. For three of the years the amount that the Respondent is alleging was paid by Heather Mailow is more than double the amount the Appellant alleges was paid. It seems to me that the income that the massage parlour business was generating (or was allegedly generating) is a relevant factor in determining whether or not these payments were made as alleged. Therefore in my opinion the income of Heather Mailow should not have been obscured from the documents. In this particular case this is a moot point because, while the income was obscured in one document, it was not obscured in another and therefore the Appellant was provided with the income of Heather Mailow as determined by the Respondent.

[13] Therefore, the Appellant cannot succeed with respect to the first two matters of the motion as the Respondent did produce satisfactory copies of the documents. Since counsel for the Respondent filed the two bound collections of documents that had been sent by counsel for the Respondent to counsel for the Appellant (and which were returned), these two volumes will be sent to the counsel for the Appellant.

[14] The next part of the motion relates to a request for the Respondent to provide full copies of all documents listed in Schedule "B" of the Respondent's List of Documents filed in relation to the *ITA* appeal. There are more than 60 documents included in this schedule. Although the number of documents based on the list of documents in this schedule is 43, the document numbered 25 includes a description of eight documents and the document number 39 includes a description of 15 documents.

[15] In this particular appeal the issue relates to the amount of the payments that were made by Heather Mailow to the Appellant. Counsel for the Appellant indicated that all of the payments were made in cash in an envelope delivered by a courier. Therefore, it is not clear what documents would support the position of the Appellant or the Respondent. There would be no cancelled cheques and presumably no receipts.

[16] Section 88 of the *Tax Court of Canada Rules (General Procedure)* (the “*Rules*”) provides as follows:

88. Where the Court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the Court may,

(a) order cross-examination on the affidavit of documents,

(b) order service of a further and better affidavit of documents,

(c) order the disclosure or production for inspection of the document or a part of the document, if it is not privileged, and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

[17] This section applies if the Court is satisfied that a claim of privilege **may** have been improperly made. In this particular case, one of the documents listed in Schedule “B” to the List of Documents filed in the *ITA* appeal (document 26) is described as follows:

Copy of letter to Macille Poon, CRA from John Agostinelli re: Donna Heinig...

[18] Since the description indicates that the letter relates to the Appellant, it is not clear why this document (in whole or in part) is not relevant to this proceeding. For some reason, the Respondent is claiming that this letter contains confidential, third party information and should not be disclosed. However without seeing the letter it is not possible to determine whether the claim of privilege has been properly made for the entire document.

[19] None of the documents that are listed in Schedule “B” to the List of Documents filed in relation to the *ITA* appeal were presented to the Court. There is only a brief description of the documents in the list of documents. In this case, it seems to me that the claim of privilege may have been improperly made. However, without examining the documents it is impossible to say for certain whether the claim has been improperly made. In my opinion it is not, however, appropriate for the Appellant to have access to all the documents listed in this Schedule “B” without knowing the contents of the documents. As a result, in my opinion, it is not appropriate to grant the order as requested by the Appellant for full disclosure of all the documents listed in this Schedule “B”.

[20] However, section 88 of the *Rules* provides different alternatives. The first alternative listed is that the Court may order cross-examination on the affidavit of documents. This is also one of the requests made by the Appellant. It seems to me that this is the appropriate step to take at this time. Once the Appellant has cross-examined Tara Le on her affidavits, the Appellant may be in a better position to know which of the documents in Schedule “B” may contain relevant information or may have been relied upon by the Respondent. If the matter is not resolved to the satisfaction of the parties following examination by Tara Le and there are still documents that the Appellant is claiming may contain relevant information or information that was relied upon by the Respondent and which the Respondent is still refusing to disclose, in my opinion, the Appellant would then be entitled to make a Motion to have such documents inspected by the Court for the purpose of determining the validity of the claim of privilege and determining if such documents should be disclosed in whole or in part.

[21] Counsel for the Respondent had also requested that he be entitled to cross-examine the Appellant in relation to her affidavit sent with her List of Documents. Subsection 82 (6) of the *Rules* provides as follows:

82(6) The Court may direct a party to attend and be cross-examined on an affidavit delivered under this section.

[22] In my opinion it is appropriate in this case to provide such a direction.

[23] As a result:

- (a) The Appellant’s request for the order described in paragraph 1 (1) is denied;
- (b) The Appellant’s request for the order described in paragraph 1 (2) is denied;
- (c) The Appellant’s request for the order described in paragraph 1 (3) is denied;
- (d) Tara Le is directed to attend for cross-examination on her affidavits filed in relation to the lists of documents filed on behalf of the Respondent at a time and place as agreed upon by counsel for the Respondent and counsel for the Appellant (and failing such

agreement at a time and place as directed by counsel for the Appellant provided that counsel for the Appellant provides at least 10 days notice of such time and place);

- (e) The Appellant is directed to attend for cross-examination on her affidavit filed in relation to her list of documents filed in this matter at a time and place as agreed upon by counsel for the Respondent and counsel for the Appellant (and failing such agreement at a time and place as directed by counsel for the Respondent provided that counsel for the Respondent provides at least 10 days notice of such time and place); and
- (f) The two bound collections of documents that were submitted by counsel for the Respondent at the hearing of the Motion will be sent to counsel for the Appellant.

[24] The Appellant had also requested an order revising the previous orders regarding the schedule of steps in the appeals. To allow time for the parties to resolve the issue of whether any additional documents should be disclosed, the Order dated February 21, 2008 is amended, in part, to read as follows:

- (a) The examinations for discovery shall be completed by June 30, 2009;
- (b) Undertakings given at the examinations for discovery shall be satisfied by July 31, 2009; and
- (c) The parties shall communicate in writing with the Hearings Coordinator by August 31, 2009 to advise the Court whether the case will settle, whether a pre-hearing conference would be beneficial or whether a hearing date should be set. In the latter event, the parties may file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)*.

[25] The costs of this motion shall be in the cause.

Signed at Toronto, Ontario, this 29th day of January 2009.

“Wyman W. Webb”

Webb J.

CITATION: 2009TCC47
COURT FILE NO.: 2007-2125(IT)G
STYLE OF CAUSE: DONNA HEINIG AND THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: December 11, 2008
REASONS FOR ORDER BY: The Honourable Justice Wyman W. Webb
DATE OF ORDER: January 29, 2009

APPEARANCES:

Counsel for the Appellant: Franklyn Cappell
Counsel for the Respondent: Bobby Sood, Paolo Torchetti

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