Docket: 2008-54(IT)G

BETWEEN:

DEAN JONES,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Motions heard on July 16, 2010 at Toronto, Ontario,
and by way of videoconference on July 30, 2010, at Ottawa, Ontario.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Mauro Marchioni Brent Pearce
Counsel for the respondent:	Bobby Sood

ORDER

Upon motions made by the appellant and the respondent;

In accordance with the attached reasons, it is ordered that:

1. Both parties shall prepare a list pursuant to Rule 82 of the *Tax Court of Canada Rules (General Procedure)* that shall be limited to the following category of documents:

   (a) to the extent that they have not already been produced under Rule 81, any documents, including the auditor's report and the appeals report for the appellant's 2001 taxation year, that may be found in files relating to the 2000 or 2001 taxation year of the appellant, Prolessons or 145:

(i) relevant to the assumptions of fact set out in paragraph 8 of the reply to notice of appeal, other than paragraph 8c), or
(ii) relevant to the allegations in paragraph 9 or 10 of the reply;

(b) for greater certainty, this does not include documents related to any investigation, examination or audit of Prolessons or 145, including those relating to any investigation, examination or audit:

- of the tax shelter(s) or
- for GST purposes,

except where the particular document contains information relevant to (a)(i) or (ii).

2. The parties shall prepare and serve their respective Rule 82 lists, and provide the opposing party with copies of the listed documents no later than February 21, 2012.

3. The respondent shall re-attend examination for discovery and (i) answer all proper questions relating to any new document produced by either party as a result of the lists ordered in paragraph 1 above, (ii) produce, if such exists, any document responding to what was numbered refusal 13, as set out in paragraphs 49 to 52 of the reasons, and (iii) respond to all proper questions relating to any such document produced as a result of (ii).

4. The appellant shall re-attend examination for discovery and (i) answer or complete his answers with respect to items A1 to A14, B11, B14, B15 and B17, as set out in paragraphs 64 to 85 of the reasons, (ii) answer any proper questions arising out of those answers and (iii) answer all proper questions relating to any new document produced by either party as a result of the lists ordered in paragraph 1 above.

5. Any further discoveries shall be completed no later than April 25, 2012.

6. The parties shall communicate with the hearings coordinator in writing no later than May 25, 2012 to advise the Court whether the case will settle, whether a settlement conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall 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)* by said date.

Costs are left to the trial judge.

Signed at Ottawa, Ontario, this 14th day of December 2011.

"Gaston Jorré"

Jorré J.

Citation: 2011 TCC 563
Date: 20111222
Docket: 2008-54(IT)G

BETWEEN:

DEAN JONES,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

AMENDED REASONS FOR ORDER

Jorré J.

THE MOTIONS

[1] Both parties have brought motions. The hearing took about a day spread over two hearing days.

[2] The appellant seeks an order:

(a) directing the Respondent to make full disclosure under Rule 82;
(b) directing the Respondent to answer certain questions that they refused or failed to answer at their examination for discovery as set out in Exhibit "A" to the Affidavit of Brent Pearce attached hereto;
(c) directing the Respondent to re-attend at its own expense a continuation of the examination for discovery to answer all proper questions that the Respondent previously refused or failed to answer, and to also answer any proper questions arising from those answers;
[(d)] directing the Respondent to pay forthwith the costs of this motion, costs thrown away and the costs of the continuation of the examination for discovery.

[3] The respondent seeks:

1. An Order pursuant to sections 110(b) and subsection 125(7) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"),

a) dismissing the appeal of the appellant.

2. In the alternative, an Order pursuant to section 110 of the *Rules*,

a) directing the appellant to answer the unsatisfied undertakings given during his examination for discovery held on February 18, 2010, as set out in Schedule "A" hereto;
b) directing the appellant to answer certain questions that he refused or failed to answer at his examination for discovery, including questions taken under advisement, as set out in Schedule "B" hereto;
c) directing the appellant to reattend at his own expense for a continuation of the examination for discovery to answer all proper questions that the appellant previously refused or failed to answer, to answer any questions that arise from the answers on undertakings, and to also answer any proper questions arising from those answers; and
d) directing that the appellant pay forthwith the costs of the motion in any event of the cause, any costs thrown away, and the costs of any continuation of the examination.

3. Such further relief as counsel advises and this Court deems just.

GENERAL NATURE OF THE APPEAL

[4] The Minister of National Revenue (Minister) reassessed the appellant to add an amount of $200,000 to the appellant's income for the 2001 taxation year and also assessed gross negligence penalties pursuant to subsection 163(2) of the *Income Tax Act* in respect of the added income.

[5] According to the pleadings:

(a) the Minister assessed on the basis that:

(i) the appellant, a chartered accountant, owns 2.68 units out of the 5 units of a limited partnership called Prolessons 1, a registered tax shelter;
(ii) the general partner of Prolessons is 1451958 Ontario Inc. (hereinafter "145");
(iii) the appellant is the sole director and sole shareholder of 145;
(iv) the appellant prepared and filed the 2001 T2 return of 145;
(v) the appellant controlled Prolessons and 145;
(vi) Prolessons paid 145 a general partner fee in the amount of $200,000 in 2001;

(vii) the appellant directed 145 to direct the payment to himself, which direction 145 complied with, and the appellant received a payment of $200,000;
(viii) the said payment was income to the appellant in 2001; and
(ix) the appellant did not report the amount in his tax return.

(b) The Minister also alleges that:

(i) the appellant prepared the partnership financial statements of Prolessons;
(ii) in 2000, Prolessons paid 145 a general partner fee in the amount of $250,000 which was directed to the appellant; and
(iii) the appellant reported the $250,000 as other income in his 2000 tax return.

(c) The appellant alleges that:

(i) he never received directly or indirectly any such amount of $200,000 from 145 and he has no information with respect to such sum being paid; and
(ii) the reassessment in issue is beyond the applicable limitation period under section 152 of the *Income Tax Act*.

[6] There appears to be agreement that 145 in its statement of income and retained earnings for the year ended December 31, 2001 shows, for the 2001 year, a revenue of $200,000 from Prolessons, operating costs of $1,050 and, under the heading "Cost of Sales", expenses of $200,000 for subcontractors.

[7] The respondent's position is that this $200,000 amount was income to the appellant. The appellant's position is that this $200,000 amount was for the services of lawyers and accountants.[1, 2]

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[1] See the portions of the discovery transcript that were read at pages 152, 153 and 156 of the transcript of July 16, 2010, the first day of the motions hearing. I note that counsel for the appellant asserted at the motions hearing that 145 had no bank account; see page 128 of the same transcript.

[2] I note that in the issues to be decided section of the notice of appeal the appellant says that one of the issues to be decided is:

> Did the Minister err in re-assessing Dean Jones based on improper and/or insufficient information and as a result of the Respondent's attempt to affect the Appellant personally as a result of other outstanding issues that the Respondent feels exist in respect of the Appellant;

In the notice of appeal there are no factual allegations of improper motives. I note that the role of this Court in an appeal from an assessment is to determine the facts relating to liability for tax and then apply the law to determine the relevant tax. Process and motivation are not normally pertinent to the determination of tax liability.

[8] It is also worth noting that at an earlier stage there was an investigation of the tax shelter and search warrants were executed.[3] The appellant claims not all seized documents were returned. The Crown claims everything was returned.

GENERAL COMMENT

[9] The critical question seems relatively straightforward: Did the appellant earn the $200,000 in income in issue, income reflected in the subcontractor expense of $200,000 shown by 145 in its statement of income and retained earnings for the year ended December 31, 2001?

[10] Given that, given that the appellant says that the subcontractors who provided the services giving rise to the $200,000 in expenditures shown by 145 in its statement of income were accounting and law firms, one wonders if it would not have been possible for the parties to have avoided these motions.[4] Having said that, I turn to the motions.

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[3] Both parties made a number of assertions that went beyond the contents of the pleadings, the one affidavit and the discovery transcripts. To the extent that these were basically consistent and were not objected to, I have accepted these for the purposes of the motions. In addition, the following were tendered without affidavit but were unopposed and implicitly accepted: (i) letter of June 14, 2010 from counsel for the respondent to counsel for the appellant, (ii) letter of June 29, 2010 from counsel for the respondent to counsel for the appellant, (iii) letter of May 7, 2010 from counsel for the respondent to counsel for the appellant, (iv) 15-page schedule (hand numbered) prepared by the respondent setting out the undertakings at the discovery of the appellant and the response of the appellant grouped by undertakings the appellant says he has responded to (pages 1 to 5), undertakings under advisement (pages 6 to 8) and refusals (pages 9 to 11), (v) letter of July 29, 2010 from counsel for the appellant to counsel for the respondent and (vi) 145's statement of income and retained earnings for the year ended December 31, 2001; I have accepted these documents for the purpose of the motions. As to the transcripts, see below in footnote 13.

[4] Indeed it seems to me that the parties are potentially close to that. For example, counsel for the appellant stated at page 118 of the transcript on the first day of hearing during argument of the appellant's motion:

> If their whole case is what my friend suggested is namely the government assumed that the subcontractor expense laid out in 145's statement was monies paid to Mr. Jones, I'm happy to go to trial tomorrow morning. I just want to make sure that that's the extent of their position, and that's why I'm asking for these documents. I'm thinking to myself there's got to be something out there because there's nothing direct. There's no bank account, there's no cheque, there's no money transfer, there's no evidence to contradict Jones who says I never got any money.

(Counsel for the appellant made a similar statement at page 36 of the transcript.)

The statement at page 118 was made not that long after counsel for the respondent stated at pages 111 and 112:

> So everything has been supplied to begin with; but in any event, Your Honour, this is not a complex matter. This is a very straightforward matter. It is whether or not $200,000 was paid to Mr. Jones in 2001.
>
> Now, for sure, the respondent does not have a smoking gun. We do not have a cancelled cheque from the numbered company issuing the payment to Mr. Jones. If we had it, it would have been disclosed, but we don't have that. We're not going to be surprising the appellant at trial with some conclusive or determinative piece of evidence on that point. The respondent has already supplied all the documentary evidence that it relies upon in support of its reassessment of this $200,000 amount.

I should note that at other points counsel for the appellant also stated that he sought to use discovery to obtain documents that might be of assistance to his case.

APPELLANT'S MOTION FOR FULL LIST

Principles Regarding Rule 82

[11] The basic principles are set out by Bowman C.J. in *Mintzer v. The Queen*:[5]

> 14 . . . In this court making an order for full disclosure under Rule 82 is not unusual if the party seeking the order can demonstrate reasonable grounds for such an order. There should however be some basis for putting the other party to the expense and trouble of assembling a large number of documents. . . .

However, the Court may impose terms where appropriate to balance the benefits of full discovery with the need to contain discovery within reasonable bounds.[6]

Application to this Case

[12] Applying those principles to this case, considering all the circumstances, including that while the Crown states that it has returned everything that was seized, it is possible that the Crown may still have relevant documents, or copies thereof, that for one reason or another the appellant does not possess or no longer possesses and which may assist the appellant in his case.

[13] Accordingly, there will be an order for the production of a Rule 82 list. It will be on terms, however.

[14] First, given the nature of the dispute I have described and the fact that in many ways the actual issue seems to be relatively narrow, the order shall be limited[7] to the following category of documents relevant to the dispute:

(a) to the extent that they have not already been produced under Rule 81, any documents, including the auditor's report and the appeals report for the appellant's 2001 taxation year, that may be found in files relating to the 2000 or 2001 taxation year of the appellant, Prolessons or 145:

    (i) relevant to the assumptions of fact set out in paragraph 8 of the reply to notice of appeal, other than paragraph 8c), or

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[5] 2008 TCC 72.
[6] See, for example, paragraphs 13 to 15 of *Fletcher Challenge Investments Inc. v. The Queen*, 98 DTC 1721.
[7] As in *Fletcher*.

(ii) relevant to the allegations in paragraph 9 or 10 of the reply;

(b) for greater certainty, this does not include documents related to any investigation, examination or audit of Prolessons or 145, including those relating to any investigation, examination or audit:

- of the tax shelter(s) or
- for GST purposes,

except where the particular document contains information relevant to (a)(i) or (ii).

Thus, to take a simple example, if in documents relating to the tax shelter investigation there are documents about, or receipts for, the $200,000 shown as an expense to subcontractors by 145 in 2001, that would be relevant.

[15] Secondly, the respondent took the position that if there were such an order it should be applied to both parties. The appellant was agreeable to that.[8] Accordingly, both sides shall be subject to such an order.

APPELLANT'S MOTION TO COMPEL ANSWERS

Principles Regarding Scope of Discovery

[16] In *HSBC Bank Canada v. The Queen*,[9] C. Miller J. reviews the relevant principles set out by V. Miller J. in *Kossow v. The Queen*[10] and adds a few additional comments:

> Law
>
> 13 Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R.*:
>
> 1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50:

[8] Transcript of July 16, 2010, pages 48 and 49.
[9] 2010 TCC 228.
[10] 2008 TCC 422.

a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;

b) A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;

c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;

d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp. v. Imperial Oil Ltd.*

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen*.

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: *SmithKline Beecham Animal Health Inc. v. R.*

5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents: *SmithKline Beecham Animal Health Inc. v. The Queen*.

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada Ltd. v. R.*

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on

a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v. R.*

8. Under the Rules a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. R.*

9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada*.

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen*.

14 The following additional principles can be gleaned from some other recent Tax Court of Canada case authority:

1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": *Teelucksingh v. The Queen*.

2. The court should preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant": *John Fluevog Boots & Shoes Ltd. v. The Queen*.

15 Finally in the recent decision of *4145356 Canada Limited v. The Queen* I concluded:

(a) Documents that lead to an assessment are relevant;

(b) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request;

(c) Files reviewed by a person to prepare for an examination for discovery are *prima facie* relevant; and

(d) The fact that a party has not agreed to full disclosure under section 82 of the Rules does not prevent a request for documents that may seem like a one-way full disclosure.

16 So, there has been a great deal written by myself, my colleagues and former colleagues on this question of the scope of discovery. These comments are all helpful guides to ensure some consistency on how litigation in this Court is to

> proceed. Yet it is an art and not a science, and it would be counterproductive to dwell on each and every principle as though applying a formula. Rather, it must always be borne in mind what the Parties and the Court are trying to achieve with examinations for discovery; that is, a level of disclosure so that each side can proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet. . . .
>
> [Footnotes omitted.]

Preliminary Objections of the Respondent to the Appellant's Motion to Compel Answers

[17] The respondent made two preliminary objections to the appellant's motion.

First Objection

[18] First, she took the position that the affidavit of Mr. Pearce in support of the appellant's motion should be struck out because the appellant failed to make Mr. Pearce available for cross-examination prior to the hearing of the motion.

[19] This request was made in writing twice by letters of June 14, 2010 and June 29, 2010.

[20] One reason motivating the motion was the failure of the affidavit to include the correspondence of May 7, 2010 from the respondent containing further responses to the discovery questions in issue.

[21] With respect to the first preliminary objection, counsel for the appellant stated that he had not received the letters of June 14 and 29.[11]

[22] He further took the position that, in essence, there was little to cross-examine in the affidavit and, also, that he would be willing to have paragraph 4 of the affidavit struck.

[23] Rule 74 of the *Tax Court of Canada Rules (General Procedure)* gives a right to cross-examine on an affidavit. It states:

> A deponent whose affidavit has been filed may be cross-examined on it by a party who is adverse in interest on the motion, and the evidence adduced may be used at the hearing of the motion.

[11] Transcript of July 16, 2010, pages 11 and 12; as I understood counsel, this might have been a result of internal issues. See also pages 52 and 53 of the transcript.

[24] While I agree that there is not much to cross-examine on in the affidavit, and I am not sure that it would have served much purpose, the rule does provide for cross-examination and the respondent should have been able to cross-examine before the hearing. It is not for one party to decide if the other should examine its affiant.

[25] The respondent sought to have the affidavit struck and the appellant offered to have paragraph 4 struck.[12]

[26] As a practical matter, the question is academic insofar as, in the circumstances, the affidavit adds nothing to the issues raised by the motions.[13] Consequently, it is unnecessary to deal with this.[14]

Second Objection

[27] Secondly, it was the respondent's position that the appellant's motion with respect to refusals was now moot due to answers provided by the respondent in correspondence dated May 7, 2010. The respondent contended that the answers in the May 7, 2010 correspondence were a full answer to the refusals which were the subject of the motion.

[28] Several of those answers were given after first stating an objection for the purpose of Rule 107(2).

[29] I will deal with this objection at the same time as I deal with the refusals.

APPELLANT'S MOTION WITH RESPECT TO REFUSALS BY THE RESPONDENT

[30] At the hearing the appellant only pursued his motion with respect to refusals to answer in respect of the refusals listed below. I have used the refusal numbering from the list that is at Tab A of the appellant's motion materials.[15]

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[12] The respondent also contended that the appellant's affidavit in support of the motion, sworn on June 10, 2010, should have included the letter of May 7, 2010 from counsel for the respondent to counsel for the appellant. I agree.

[13] As I noted in footnote 3 above, a great deal of information was brought before the Court unopposed. Between that information, the transcripts of the two examinations for discovery — which no one disputed the authenticity of — and the pleadings, there is more than adequate material to deal with the appellant's motion, as well as the respondent's. I note that the respondent's motion did not have an affidavit in support.

[14] However, the failure to make the affiant available for cross-examination is a relevant matter for consideration when costs are ultimately dealt with.

[15] At the hearing there was some confusion regarding the numbering. In the transcript references are sometimes to the appellant's numbering and sometimes to the respondent's numbering in her letter of May 7, 2010 which is slightly

[31] I will deal with the remaining refusals in turn.

Refusal 4

[32] The question was whether the respondent had a general investigative file for the appellant not just limited to the 2001 assessment.

[33] In her May 7, 2010 letter the respondent objected to the relevance of the question for the purposes of Rule 107(2) and then answered that Mr. White did have files relating to the appellant.

[34] I agree with the respondent that this answers the question.

Refusal 5

[35] The question was whether the respondent had disclosed all the documents in her investigative file to the appellant.

[36] Again, in her letter of May 7, 2010 the respondent objects for the purposes of Rule 107(2) and then proceeds to answer that all the documents relating to the 2001 reassessment were disclosed to the appellant's counsel as a result of disclosure in the earlier criminal proceedings.

[37] That answers the question.

[38] The discussion of refusal 8 below is also relevant to this.

Refusal 8

[39] This question seeks the production of all the documents in the files relating to the investigation of a number of other entities including 145, Brant Group Limited or Hadrian Management Limited.

[40] In essence, the respondent gives the same answer as for refusal 5.

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different. For the remaining refusals by the respondent in dispute, the respondent's numbering for any question is one number higher than the appellant's. Thus, to take the first refusal that was debated, the appellant numbered it as refusal 4 and the respondent numbered it as refusal 5.

[41] First, I would note that nothing in the pleadings suggests that the activities of Brant Group Limited or Hadrian Management Limited are in any way relevant to the amount assessed to the appellant.

[42] Secondly, this question and the previous question in substance raise the same question as that raised by the part of a motion seeking a full list.

[43] The two questions deserve the same answer as the request for a full list. The same principles apply.

[44] The discovery threshold is low but it must not be what is referred to as a "fishing expedition" but might also be described as discovery of areas which have little likelihood of producing information that may assist a party.

[45] Given that my order with respect to a full list on terms will bring out those documents which should be produced, to the extent that they are not already in the respondent's Rule 81 list, there is no point in ordering a further answer to these questions. However, see as well the discussion of further examination below.

Refusal 10

[46] The question here was whether, aside from the documents already produced in the appeal, there were any other documents provided to the appellant prior to the delivery of the notice of appeal.

[47] The respondent again objected for the purposes of Rule 107(2) and then answered that to the best of her knowledge the schedule produced at Tab 8 of the respondent's documents was the only attachment to the proposal letter dated July 17, 2006; the respondent further relied on the same response as for refusal 5.

[48] I am satisfied that this responds to the question. I would add that since process is not normally an issue in an appeal, I fail to see the relevance of this question.[16]

Refusal 13

[49] In this case the question was that the **respondent** produce the documents that indicate that everything that was seized in December 2005 was returned.[17]

[16] I use the word "normally" because there are circumstances where process may be relevant in a very specific and limited context. Where it is alleged that an assessment is statute barred, for example, the date of the assessment will, of course, be relevant.

[50] The respondent's position is that this is not relevant to any fact in issue and the appeal.

[51] I have difficulty in seeing how such a document could be relevant at trial. However, if there is a receipt or similar document which contains a description or inventory of what was returned, then it is possible that it might describe a document that could be relevant to the issues.

[52] Accordingly, I will order that, if there exists a receipt, a note to file or any similar document regarding the return of the seized documents, that document shall be produced.

Ruling on the Relevance of the Answers to the Above Refusals (Apart from Refusal 13)

[53] At the hearing there was a debate about whether I should rule on the relevance of these answers given that Rule 107(2) states the ruling shall be obtained from the Court before the evidence objected to shall be used at the hearing.

[54] Rule 107(2) says that a ruling shall be obtained from the Court before the evidence is used at trial but leaves open when that should occur.

[55] While it is not immediately apparent to me how these answers, in themselves, will assist in determining any of the facts relevant to the appeal, a ruling on relevance for the purpose of the hearing is best left to the trial judge.

Further Examination Sought by the Appellant

[56] The appellant seeks further examination in respect of the above refusals.

[57] Given that the core of what he seeks are additional documents and given that, if there are any additional documents to which he is entitled they will arise as a result of my order with respect to a full list, I will not order further discovery specifically in respect of any of the above questions but the appellant will be entitled to further

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[17] Although the question was framed as if the witness had already said that there were such documents, it is not apparent to me in the immediately preceding passages of the transcript that it was established that there was any such document. Accordingly, I view the question as a request to produce any document indicating that everything seized was returned, should such a document, or documents, exist(s).

discovery in respect of any new documents produced by either party, as a result of my Rule 82 orders.

[58] Further, with respect to refusal 13, if it turns out that such a document, or documents, exist(s), then, if the document(s) make(s) a reference to a document relevant to the issues in this appeal as set out in paragraph 14(a) above, the appellant may have further examination in relation to that.

RESPONDENT'S MOTION SEEKING DISMISSAL OF THE APPEAL

[59] Nothing in the circumstances here would make it appropriate to dismiss the appeal.

RESPONDENT'S MOTION TO COMPEL ANSWERS

[60] With respect to the respondent's motion to compel answers, I will be referring to the numbering found in schedules A and B at Tab 1 of the respondent's motion record.[18]

[61] The first group of questions listed as A1 to A14 relates to what the respondent says are unanswered undertakings.

[62] Undertaking A1 asked who prepared the financial statements for 145 for the year ended December 31, 2001 and further asked for any documents in support of that answer. By way of background it is important to note that at the discovery the appellant answered that the statements were either prepared by him, Mohamed or someone in his office.

[63] The appellant's answer is to the effect that no evidence was located to determine who prepared the documents but that an absolute determination was impossible because the Canada Revenue Agency had not returned all documents seized.

[64] The answer implies that the appellant was unable to determine any more precisely who prepared the statements that he previously stated at discovery. If that is the case the respondent is entitled to have that clearly stated. If not, that should be clear as well. Accordingly, the appellant should provide a further answer to A1.

[18] Again the transcript of this is at times difficult to follow because the appellant, in responding to the undertakings and refusals during the respondent's discovery of the appellant, created the 15-page schedule that is numbered differently.

[65] With respect to A2, the appellant agreed to answer the question.[19]

[66] As to A3, it is clear on the face of the response in the appellant's schedule that it has not yet been answered; the appellant did not disagree. The appellant should get on with answering it.[20]

[67] Similarly, the appellant agreed that A4 had not been answered.[21] It should be answered and the appellant has indeed given a partial answer in the July 29, 2010 letter from his counsel prior to the second hearing day. The appellant should complete the answer.

[68] With respect to A5 the appellant stated at discovery that he did not know when the return of 145 was filed. The undertaking was to search his records and advise as to his position as to the date upon which the return for 145 was filed. The appellant's answer is that it cannot be determined because of the way the software operates.

[69] While it may well be implicit that the appellant found no other documents enabling him to determine a date, if that is the case, that should be said explicitly.

[70] With respect to A6, while I agree with the appellant that there is an answer, I am not convinced that it is complete. When I look at both pages 58 and 59 of the transcript, the context suggests that the question includes any documentary evidence. The answer should be completed to include any documentary evidence if it exists or to state that it does not exist.

[71] With respect to A7, it is clear on the face of the appellant's schedule that it had not yet been responded to. The appellant should finish his search and answer the undertaking.

[72] With respect to A8, the appellant agreed on the first day of the hearing that it had not been answered. The appellant gave an answer in the July 29, 2010 letter from his counsel. Although it may be intended to be implicit in the answer, the appellant should confirm, if that is the case, that he found no records.

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[19] Transcript of July 16, 2010, page 160.
[20] I trust that has happened since the hearing. I point out the availability of Rule 86.
[21] Transcript of July 16, 2010, page 179.

[73] With respect to A9, since the appellant agreed to continue to look for a copy of the general partnership agreement, he should do so and supply a copy.[22] Given the appellant's rights, it would be surprising if, as a limited partner and as the owner of the general partner, he were unable to do so.[23]

[74] With respect to A10 and A11, again on the face of the appellant's schedule these two undertakings have not yet been answered. They should be answered.

[75] However, with respect to A11, I accept the appellant's point that the question should be restricted in time and only apply to bank accounts in 2000 and 2001.[24] The appellant has answered for 2001 in the July 29, 2010 letter from his counsel; the year 2000 remains to be answered.

[76] With respect to A12, the appellant's answer was incomplete; the appellant stated in his schedule that the information was not returned by the Canada Revenue Agency following the seizure. That is fine as far as it goes. However, it was incomplete; the undertaking was to supply the financial statements to the extent the appellant was in possession of them. The appellant did not disagree.

[77] In the letter of July 29, 2010 from his counsel, the appellant answered that he could not find any financial statement for years after 2001. The answer still needs to be completed for years prior to 2001.

[78] Undertakings A13 and A14 have not been answered and should be answered.[25]

[79] I now turn to the respondent's schedule B. By the beginning of the second day on which this was heard, there were only four items in schedule B in dispute.

[80] The first is B11. At the hearing the appellant agreed to respond and advise that he either admitted or denied the facts alleged in paragraph 10 of the notice of appeal.

[81] The second and third were B14 and B15: a request for the general ledgers or books showing the credits and debits of Prolessons and a request for copies of the bank statements for the 2001 taxation year of Prolessons.

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[22] *Ibid.*, page 188.

[23] See the *Limited Partnerships Act*, R.S.O. 1990, c. L.16, as amended, section 8 (preamble) and paragraph 10(*a*), as well as the *Partnerships Act*, R.S.O. 1990, c. P.5, as amended, section 24, rule 9. The Canada Revenue Agency may well have a copy and, if it does, it will be produced under my Rule 82 order.

[24] I include 2000 because the reply to the notice of appeal alleges a payment to the appellant in 2000.

[25] The obligation to answer an undertaking does not take away from the continuing obligation of a party to advise of any additional information in respect of the undertaking that it learns of after it gives its answer pursuant to Rule 98.

[82] The appellant's schedule said that he refused to answer this on the basis that he has no control or authority over this information. At the hearing the appellant said he would be willing to ask Prolessons but could not compel them.

[83] In view of the appellant being owner of 145, the general partner of Prolessons, and in view of his also being a limited partner owning units, I am completely unable to understand the basis for the **appellant**'s position. The appellant controls 145 which has a statutory right to inspect and copy the information; as a limited partner he also has the same statutory rights.[26] The appellant will be ordered to respond.

[84] The last remaining disputed item is B17. In this case the appellant's response in his counsel's letter of July 29, 2010 was that he would seek any such documentation but that to date he had not found anything.

[85] That is not a complete answer and the appellant shall complete his search and finish his answer.[27]

Further Examination Sought by the Respondent

[86] The respondent will be entitled to further discovery (i) in respect of questions arising out of any new documents produced by either party as a result of my Rule 82 orders, and (ii) in respect of the questions from schedules A and B as described above.

CONCLUSION

Timing

[87] The parties shall prepare and serve their respective Rule 82 lists, and provide the opposing party with copies of the listed documents no later than February 21, 2012.

[88] Any further discoveries in accordance with this order shall be completed no later than April 25, 2012.

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[26] See the opening paragraph of section 8 and paragraphs 10(*a*) and (*b*) of the *Limited Partnerships Act*, as well section 24, rule 9, of the *Partnerships Act*.

[27] I note that there may be a certain overlap between some documents to be produced as a result of this portion of the order and some documents that may be produced as a result of the Rule 82 list.

[89] The parties shall communicate with the hearings coordinator in writing no later than May 25, 2012 to advise the Court whether the case will settle, whether a settlement conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall 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)* by said date.

[90] For these reasons an order will be issued accordingly.

[91] I will leave the question of costs to the trial judge.

These amended reasons for order are issued in substitution for the reasons for order signed on December 14, 2011.

Signed at Ottawa, Ontario, this 22nd day of December 2011.

"Gaston Jorré"

Jorré J.

CITATION:	2011 TCC 563
COURT FILE NO.:	2008-54(IT)G
STYLE OF CAUSE:	DEAN JONES v. HER MAJESTY THE QUEEN
PLACES OF HEARING:	Toronto, Ontario Ottawa, Ontario (videoconference)
DATES OF HEARING:	July 16, 2010 July 30, 2010
REASONS FOR ORDER BY:	The Honourable Justice Gaston Jorré
DATE OF ORDER:	December 14, 2011
DATE OF REASONS FOR ORDER:	December 14, 2011
DATE OF AMENDED REASONS FOR ORDER:	December 22, 2011

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