Docket: 2016-367(IT)G

BETWEEN:

TOTAL ENERGY SERVICES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 16, 2017, at Vancouver, British Columbia

By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant:	Curtis R. Steward
Counsel for the Respondent:	Perry Derksen
	Robert Carvalho

ORDER

UPON Motion by the Appellant pursuant to Rules 95, 105(2), 107(3) and 110 of the *Tax Court of Canada Rules (General Procedure)* to compel the Respondent to:

(i) answer the questions identified in Schedule A to the Appellant's Motion and produce unredacted copies of any documents related thereto;

(ii) re-attend and answer all proper follow-up questions;

(iii) pay costs of the motion as ordered by the Court;

AND UPON hearing from the parties;

IT IS ORDERED THAT:

a) the Applicant's Motion is dismissed; and

b) costs in respect of this Motion shall be payable by the Appellant to the Respondent in any event of the cause.

Signed at Ottawa, Canada, this 9th day of May 2019.

"Henry A. Visser"

Visser J.

Citation: 2019 TCC 112
Date: 20190509
Docket: 2016-367(IT)G

BETWEEN:

TOTAL ENERGY SERVICES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Visser J.

OVERVIEW

[1] Total Energy Services Inc. ("TESI") is a body corporate and is the ultimate successor of the conversion of the Total Energy Services Trust from a trust to a corporation, which occurred on May 20, 2009, pursuant to a plan of arrangement (the "Conversion Transactions"). The conversion was effectively necessitated by the October 31, 2006, announcement by the Minister of Finance of a new distribution tax for specified investment flow through trusts ("SIFTs"), later accompanied by legislation to allow conversions of a SIFT on a tax-deferred basis to a corporation (the "SIFT Conversion Rules"). As a result of the Conversion Transactions and certain other transactions (the "CCAA Transactions") undertaken pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") with respect to Xillix Technologies Corp. (which was renamed Biomerge Industries Ltd.), TESI utilized certain tax attributes (relating to capital and non-capital losses, ITCs and SR&ED expenditures of Xillix) in its December 31, 2010 and December 31, 2011 taxation years.

[2] By Notices of Reassessment (the "Reassessments") issued by the Minister of National Revenue (the "Minister") pursuant to the *Income Tax Act* (the "*Act*")[1] on

[1] R.S.C., 1985, c.1 (5th Supp.), as amended. All statutory references herein are to the *Act* unless specified otherwise.

August 27, 2015, the Minister disallowed certain non-capital losses, net capital losses and SR&ED expenditures claimed by the Appellant in its 2010 and 2011 taxation years[2] on the basis that the general anti-avoidance rule (the "GAAR") set out in section 245 of the *Act* applied to the CCAA Transactions and the Conversion Transactions. In this respect, the Minister alleged that the CCAA Transactions and the Conversion Transactions were structured in a manner to circumvent subsections 111(4), 111(5), 37(6.1) and 127(9.1) and the general policy of the *Act* regarding tax attribute trading and to defeat the underlying policy of the SIFT Conversion Rules, including subsections 85.1(8), 107(3) and 107(3.1). The Appellant has appealed the Reassessments to this Court on the basis that the GAAR did not apply and that the Reassessments were issued outside of the normal reassessment period. In respect of the application of the GAAR, the Appellant argues, *inter alia*, that the introduction of paragraph 256(7)(c.1)[3] two years after the Conversion Transactions reflects a change in policy under the *Act* regarding tax attribute trading in the context of the SIFT Conversion Rules, and that therefore the GAAR should not apply in the circumstances of the underlying appeals in this case.

[3] In the course of pre-trial proceedings relating to this Appeal, the Appellant brought this motion (the "Motion") pursuant to Rules 95, 105(2), 107(3) and 110 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") to compel the Respondent to:

i) answer the questions identified in Schedule A to the Appellant's Motion and produce unredacted copies of any documents related thereto;
ii) re-attend and answer all proper follow-up questions;
iii) pay costs of the motion as ordered by the Court.

[4] Schedule A to the Motion sets out 18 requests for the production of specified documents.[4] Many of the documents requested by the Appellant pursuant to this Motion relate to documents which were also requested in *Superior Plus Corp. v. R.*, 2015 TCC 132 (*Superior #1*), affirmed 2015 FCA 241, *Superior Plus Corp. v. R.*, 2016 TCC 217 (*Superior #2*), and *MP Western Properties Inc. v. The Queen*,

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2 Those relating to Xillix's tax attributes which were acquired by TESI pursuant to the Conversion Transactions and the CCAA Transactions.

3 Paragraph 256(7)(c.1) deems an acquisition of control in specified circumstances.

4 I will refer to each such request as a "Refused Document" by reference to the number set out in the left hand column in Schedule A to the Motion (e.g., Refused Document 1 through Refused Document 18).

2017 TCC 82, affirmed *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19. In this respect, I note that Refused Documents 3 and 6 through 18 all relate to documents which were at issue in the aforementioned *Superior Plus* and *MP Western* cases.

[5] At the hearing of this Motion, the Appellant conceded to the objections made by the Respondent in relation to Refused Document 1. The Appellant also conceded to Refused Document 4 if the refusal relates to a settlement with named taxpayers and to Refused Document 5 if it relates to another taxpayer.

LAW AND ANALYSIS

[6] In *MP Western*, Justice Miller summarized the principles applicable to an examination for discovery, and in particular in the context of a GAAR case as follows:[5]

> General Principles of Discovery
>
> 19. There is considerable jurisprudence with respect to the principles applicable to an examination for discovery: *Kossow v. R.*, 2008 TCC 422 (T.C.C. [General Procedure]) at paragraph 60; *HSBC Bank Canada v. R.*, 2010 TCC 228 (T.C.C. [General Procedure]) at paragraph 13; *Teelucksingh v. R.*, 2010 TCC 94 (T.C.C. [General Procedure]) at paragraph 15.
>
> 20. While these principles serve as guidelines, the analysis does not simply end with the application of a general principle. There is "no magic formula". Whether, as here, a particular document ought to be produced at discovery is largely a fact-based inquiry that must be assessed on a case-by-case basis: *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.) at paragraphs 24 and 25.
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> 21. The Appellants' request for disclosure is supported by the following general principles:
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> a) Relevancy on discovery ought to be "broadly and liberally construed and wide latitude should be given": *Baxter v. R.*, 2004 TCC 636 (T.C.C. [General Procedure]) at paragraph 13.
>
> b) Relevancy at discovery is a lower threshold than that at trial: *4145356 Canada Ltd. v. R.*, 2010 TCC 613 (T.C.C. [General Procedure]). In fact, Rule 90 of the Rules expressly provides that the production of a document at discovery is not an admission of its relevance or admissibility.

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[5] 2017 TCC 82, at paragraphs 19 – 32.

c) All documents relied on or reviewed by the Minister in making his assessment must be disclosed to the taxpayer: *Amp of Canada Ltd. v. R.*, [1987] 1 C.T.C. 256 (Fed. T.D.) .

d) Documents that lead to an assessment are relevant: *HSBC v. The Queen*, (*supra*) at paragraph 15.

e) 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: *HSBC* (*supra*) at paragraph 15.

f) The examining party is entitled to have 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. R.*, 2010 TCC 94 (T.C.C. [General Procedure]) at paragraph 15.

22. Whereas, the Respondent's refusal to disclose the documents is supported by the following general principles:

a) An indiscriminate request for the production of documents in the hope of uncovering helpful information or the hope of it leading to a train of inquiry is not permitted: *Harris v. R.*, 2001 D.T.C. 5322 (Fed. T.D.) at paragraph 45; *Fluevog* (*supra*) at paragraph 18.

b) Earlier drafts of a final position paper do not have to be disclosed. The mental process of the Minister or his officials in raising the assessments is not relevant: *Rezek* (*supra*) at paragraph 16.

c) A party is entitled to know the position of the other party with respect to an issue of law, but it is not entitled to have access to either the legal research or the reasoning by which that position is arrived at: *Teelucksingh* (*supra*) at paragraph 15.

d) Even where relevance is established, the Court has a residual discretion to disallow the production of documents. This principle was described in *Lehigh* (*supra*) at paragraph 35 as follows:

> The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v.*

Wellcome Foundation Ltd., 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

23. Maneuvering through these competing principles in the context of these motions present special challenges due to the unique nature of a GAAR assessment.

Documentary Discovery in a GAAR Appeal

24. The starting point of any analysis concerning the relevancy of a document for the purposes of discovery requires an examination of the allegations of facts and the issues raised in the pleadings: *SmithKline Beecham Animal Health Inc. v. R.*, 2002 FCA 229 (Fed. C.A.).

25. The Notices of Appeal define two issues:

a) Whether the Appellants acquired "control" within the meaning of subsections 111(4) and (5) of the Act; and,

b) Whether the GAAR applied to the 1998 transactions and the 2006 transactions.

26. The Respondent addressed these issues in the Replies and she pled the Policy underlying the relevant provisions.

27. In the pleadings for Western and 107, the Appellants did not raise an issue with respect to the Policy behind subsections 111(4) and (5). They did not file an Answer to the Respondent's pleadings. However, Madison did question the Policy behind subsections 111(4) and (5) in its Notice of Appeal.

28. Most recently, in *Superior Plus No.1*, Hogan J. dealt with a very similar refusals motion in the context of a GAAR assessment where the policy behind the various Streaming Rules was at issue. In that case, Hogan J ordered the disclosure of all refused documents that either were prepared in the context of the taxpayer's audit or were considered by the CRA officials who had charge of the audit or who were consulted during the audit: *SuperiorPlus No.1* at paragraph 19.

29. In a GAAR case, documents, not specific to the taxpayer but relating to the policy of the Act, may be ordered to be disclosed in certain circumstances. In *Lehigh* (*supra*), the circumstances were that the Crown disclosed a memorandum which dealt with the development of the general policy concerning the section in issue in that appeal. The Crown was ordered to disclose all memoranda that were made subsequent to the disclosed memorandum. This decision was affirmed by the Federal Court of Appeal — *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.).

30. In *Superior Plus* (*supra*), the Federal Court of Appeal referred to its decision in *Lehigh* as follows:

> As was held by this Court in *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 (F.C.A.) [*Lehigh*] in like circumstances, information pertaining to the policy of the Act, even where it is not taxpayer specific, can be relevant on discovery. We accept that an important consideration in that case was that the Crown had itself established the relevance of the documents sought by disclosing an internal policy memorandum on the subject (Lehigh at para. 41). However, relevance in the present case is no less established by the Tax Court judge's finding that the refused documents were either prepared in the context of the audit of Superior Plus or considered by officials who were involved in the audit (Reasons at para. 19). We can see no basis for distinguishing *Lehigh*. As always, the trial judge will be the ultimate arbiter of information garnered at the discovery stage.
>
> (emphasis added by Miller J.)

31. In this appeal, there was evidence in the Western Motion that the auditor had considered one of the Refused Documents. I will speak to this document in paragraph 35 of my Reasons.

32. In tax appeals, the mental process of the Minister and her officials are normally not relevant and the Respondent may not be compelled to produce draft documents: *Rezek* (*supra*) paragraph 16. However, the issue in *Rezek* was not a GAAR assessment. It is my view that in a GAAR appeal, draft documents prepared in the context of a taxpayer's audit or considered by officials involved in or consulted during the audit and assessment of the taxpayer should be disclosed. They inform the Minister's mental process leading up to an assessment. They may also inform the Minister's understanding of the policy at issue. As Hogan J stated, these documents in the end may or may not be relevant or admissible at trial, but they can certainly lead to a train of inquiry that meets the lower threshold of disclosure in discovery: *Superior Plus No.1* at paragraph 35.

[emphasis added]

[7] As previously noted, the decision of Miller J. in *MP Western* was upheld by the Federal Court of Appeal.[6] In doing so, however, Gleason J.A. noted the following at paragraph 20 with respect to section 241 of the *Act*:

> With respect to the error alleged to flow from reliance on section 241 of the ITA, as noted, as I read the reasons of the Tax Court, it did not refuse production based

6 2019 FCA 19.

> on section 241 of the ITA but rather principally because it concluded that the disputed documents were not relevant. It merely referred to section 241 of the ITA as an additional reason for refusing the requested disclosure. Although I do not necessarily endorse the Tax Court's reasoning on the applicability of section 241 of the ITA, because I believe that the Tax Court did not make a reviewable error in finding that the disputed documents were not relevant, it is not necessary to address the section 241 issue further.

[8] At paragraph 25, Gleason J. also endorsed Miller J.'s summary of the applicable principles as follows:

> Here, the Tax Court accurately set out the applicable legal principles governing disclosure in paragraphs 21 and 22 of its Reasons, cited above. Thus, the question for this Court is whether the Tax Court committed a palpable and overriding error in applying those principles to the disputed documents.

[9] At paragraphs 27 to 29, Gleason J. also distinguished *Lehigh* and noted the limited relevance of the documents at issue as follows:

> The Tax Court did not make such an error. Contrary to what the appellants assert, the present case is not on all fours with *Lehigh*. There, unlike here, the Minister determined that a memo somewhat like CRA's March 8, 2004 memo to the Department of Finance was a document which it was required to disclose and so produced it. As the respondent rightly notes, the reasoning of both the Tax Court and of this Court was premised at least in part on the Minister's concession that the memo in that case was a producible document. In the absence of a similar concession in the instant case, I cannot conclude that the Tax Court erred in reaching a different conclusion from that reached in *Lehigh*.
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> 28 I also note that, in any event, the documents in issue are of limited relevance and likely inadmissible at trial as, under the GAAR analysis, the question of the policy in the ITA that the taxpayer is alleged to have avoided is ultimately a question of law. The Supreme Court of Canada noted in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at para. 44, the "textual, contextual and purposive interpretation of specific provisions of the Income Tax Act" for the purpose of discerning their underlying policy is "essentially a question of law". Thus, while it may well be incumbent on the Minister to set out the disputed policy in the Minister's pleadings as a matter of fairness, as was held in *Birchcliff Energy Ltd. v. R.* (2012), [2013] 3 C.T.C. 2169, [2012] T.C.J. No. 354 (T.C.C. [General Procedure]) (per C. Miller J.), cited with approval in *Superior Plus Corp. v. R.*, 2015 TCC 132 (T.C.C. [General Procedure]) at paras. 20-21, it does not follow that evidence on the policy will be admissible at trial as matters of law are for a court to determine.

> 29 Given the limited relevance of the disputed documents and the differences between this case and *Lehigh*, I would not interfere with the Tax Court's orders.
>
> [emphasis added]

[10] In this case, the Appellant's Notice of Appeal essentially raises two issues, namely (i) the applicability of the GAAR to the CCAA Transactions and the Conversion Transactions and (ii) whether the Reassessments were issued outside the normal reassessment period. All of the Refused Documents at issue in this Motion relate to the GAAR issue. The Respondent addressed these issues in her Reply and she pleaded the Policy underlying the relevant provisions, including at paragraph 12 of her Reply where she pleaded the following:

> In determining the appellant's tax liability for the 2010 and 2011 taxation years, the Minister considered:
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> a) that the general policy of the Act is to prohibit the transfer of losses between arm's length parties, subject to certain expenses and permissive exceptions, and that subsection 111(5) (and also the related provisions in respect of the Tax Attributes under subsections 111(4), 37(6.1) and 127(9.1) of the Act) is an anti-avoidance provision designed to prevent arm's length loss trading from an unrelated business;
>
> b) that the purpose of the SIFT legislation proposing a distribution tax was to restore the balance and fairness to the federal tax system by effecting income tax neutrality on business profits earned by corporations and income trusts; and
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> c) the Minister assumed that the Conversion Rules for SIFTs, including under subsections 85.1(8), 107(3) and (3.1) of the Act, were designed to ensure that income trusts could reorganize as corporations without facing an additional tax burden at the time of conversion, but were not meant to facilitate loss trading between unrelated parties.

[11] It is clear therefore, that the GAAR is at issue in the underlying appeal in this case, and that the Minister has pleaded the policies relied on in applying the GAAR to the Appellant in issuing the Reassessments.

[12] In summary, the Appellant argued that it is entitled to production of the Refused Documents in order to probe whether they are relevant to establishing the general policy behind the provisions under examination and whether the addition of paragraph 256(7)(c.1) to the *Act* constitutes a clarification or a change in such policy. The Appellant also argues that there is no bright line test, and that in light

of the similarities between this case and the *Superior Plus* cases, the Appellant should be entitled to the same disclosure as *Superior Plus*, even if the documents were not in the Minister's audit file or considered by the auditor in this case.[7]

[13] The Respondent refused production of the Refused Documents on the basis that they are not relevant to the underlying appeal. In this respect, the Respondent argues that, based on the decisions in *Superior Plus* and *MP Western*,[8] "the demarcation line for establishing relevance of documents at discovery was whether the documents were either prepared directly in the context of the audit of the taxpayer or were considered by CRA officials who were charged with the audit of the taxpayer or who were consulted regarding the application of the GAAR".[9] In addition, the Respondent relied on section 241 (in respect of other taxpayer's information), and also argued that the request to provide any correspondence between the CRA and the Department of Finance in relation with the issues under appeal was overly broad and abusive.

[14] As noted by Miller J. in *MP Western*,[10] there is "no magic formula [and whether], as here, a particular document ought to be produced at discovery is largely a fact-based inquiry that must be assessed on a case-by-case basis: *Lehigh* …". In addition, as noted in the *Lehigh*, *Superior Plus* and *MP Western* cases discussed above, a document may be relevant in the context of a GAAR appeal if it is disclosed to the taxpayer (as in *Lehigh*) or because it was "either prepared directly in the context of the audit of the Appellant or [was] considered by CRA officials who were charged with the audit of the Appellant or who were consulted regarding the application of the GAAR."[11]

[15] I disagree with the Respondent, however, that the above case law establishes a fixed demarcation line with respect to disclosure in a GAAR appeal. There may be other instances where relevance may be established in the context of a particular GAAR appeal. However, the mere fact that some of the Refused Documents were ordered disclosed by this Court to another taxpayer in the context of that other taxpayer's appeal of a GAAR reassessment does not establish sufficient relevance

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7 In this case, the Appellant became aware of the Refused Documents through knowledge of the *Superior Plus* decisions.

8 I note that the decision of the FCA in *MP Western* (cited as *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19) was released after the hearing of this Motion.

9 Respondent's Written Submissions, at paragraph 7.

10 At paragraph 20.

11 *Superior #1*, at paragraph 19.

in the context of this Appeal to require production of a Refused Document that would otherwise not be required to be disclosed at discovery.

[16] Before addressing each Refused Document individually below, I will make some overall observations about the Refused Documents. As previously noted, the majority of the Refused Documents[12] which the Appellant seeks production of in this case are the same as the ones that were dealt with by Justice Hogan in *Superior #1*. With the exception of Refused Documents 11 and 12 in this case (which correspond with *Superior #1* documents 17 and 16, respectively), the production of unredacted copies of the overlapping Refused Documents was ordered by Justice Hogan in *Superior #1* (subject to exceptions specified by Justice Hogan in that case).[13] As previously noted, that decision was upheld by the Federal Court of Appeal.[14]

[17] In *Superior #1*, Justice Hogan ordered the disclosure of documents that were prepared or considered in the context of the taxpayer's audit where the CRA had applied the GAAR in similar circumstances because they could lead to a train of inquiry that may directly or indirectly advance the taxpayer's case or damage that of the Minister. In *Superior #2*, Justice Hogan explained that he considered that the documents were relevant in that case because they could assist the appellant in establishing that the Minister had not relied solely on the alleged policy to assess the taxpayer.

[18] Nevertheless, production of documents at discovery must be decided on a case-by-case basis (*Lehigh*) and the fact that production was ordered in *Superior #1* does not necessarily mean that the same conclusion should be reached in this instance. Thus, although many of the Refused Documents that are at issue in this Motion are the same as the ones which were ordered to be disclosed in *Superior #1*, it is my view that they are not necessarily relevant in the context of this Appeal.

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12 Refused Documents 3 and 6 to 18 of this Motion relate to *Superior #1* Refused Documents 4 to 10, 16, 17, and 19 to 23. I also note that Refused Document 3 overlaps substantially with Refused Documents 6-18, except that Refused Document 3 includes a request for *Superior #1* Document 7.

13 The production of Refused Document 11 (*Superior #1* Document 17) was also refused in *MP Western Properties v The Queen*, 2017 TCC 82, at paragraph 35, upheld by the FCA in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19.

14 *Superior Plus Corp. v R*, 2015 FCA 241.

[19] The Appellant's connexion to the Refused Documents in this case is not the same as in *Superior #1*. In particular, the Appellant became aware of Refused Documents 3 and 6 to 18 by reviewing this Court's decision in *Superior #1*. Unlike *Lehigh* and *Superior #1*, however, there is no evidence in this case that any of the Refused Documents were disclosed by the Minister to the Appellant or that they were examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*.

[20] In this case, there is no evidence that any of the Refused Documents have any connexion with the Appellant's audit. As such, it is my view that they could not help the Appellant determine what policy was applied by the Minister or lead to a train of inquiry which could help it advance its case.

[21] Although it was also submitted that some documents that were not used in a taxpayer's audit were ordered to be produced in *Lehigh*, I note that the Minister had admitted their relevance in *Lehigh*. Such is not the case here.

[22] Because of my conclusions regarding the relevancy of the Refused Documents, it is not necessary to discuss whether section 241 of the *Act* also prevents the disclosure of any of the Refused Documents.

[23] In addition to the Refused Documents which overlap with the documents at issue in *Superior #1*, the Appellant seeks to compel the production of any correspondence in relation with the modification of the *Act* or proposed changes which discuss the acquisition of control roles where units of a SIFT trust are exchanged for shares in a corporation (Refused Document 2). This request is very broad and would be difficult to satisfy because it is not limited to particular employees or time periods. There is also no evidence that any of the requested correspondence was used in the Appellant's audit. In my view, this request is a "fishing expedition of vague and far-reaching scope", and is similar to ones that were refused in *MP Western Properties*.[15]

[24] I will now apply the aforementioned discovery principles to each of the Refused Documents at issue in this Motion.

Refused Document 1: To provide any documents or information with respect to the GAAR Committee's approval of application of the GAAR to similar

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15 *MP Western Properties v The Queen*, 2017 TCC 82, at paragraphs 35 and 36.

arrangements that's referred to in the August 26, 2015 letter from Hercules Karasavidis.

> **Objection:** This is any overly broad omnibus request relating to documents and information pertaining to other taxpayers. There is no evidence that the documents or information requested was prepared in the context of the audit of the Appellant or were considered by CRA officials who had charge of the audit or were consulted during the audit. The request is irrelevant having regard to the demarcation line and amounts to a fishing expedition. The request also seeks taxpayer information protected under s. 241.
>
> **Concession:** The Appellant conceded that this request is too broad.
>
> **Decision:** There is no evidence that any of the requested documents were prepared in the context of the audit of the Appellant or considered by officials during the audit of the Appellant. The request is overly broad and would be an onerous task to satisfy and amounts to a fishing expedition of vague and far-reaching scope. The request is denied.

Refused Document 2: To provide any correspondence, documents, and emails between the CRA and the Department of Finance of the Government of Canada with respect to changes to the *Act* or proposed changes which discuss the acquisition of control rules where units of SIFT trust are exchanged for shares in a corporation.

> **Objection:** This is any overly broad omnibus request relating to documents and information pertaining to other taxpayers. There is no evidence that the documents or information requested was prepared in the context of the audit of the Appellant or were considered by CRA officials who had charge of the audit or were consulted during the audit. The request is irrelevant having regard to the demarcation line and amounts to a fishing expedition. The request also seeks taxpayer information protected under s. 241. A similar omnibus type request was denied in *MP Western* – see for example, Request #6 at p. 16. See also, for example, *Superior #1* re Refused Documents 16 and 17 at p. 21 and *MP Western* re Document 18 at p. 11.
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> **Decision:** There is no evidence that any of the requested documents were prepared in the context of the audit of the Appellant or considered by officials during the audit of the Appellant. The request is overly broad and

would be an onerous task to satisfy and amounts to a fishing expedition of vague and far-reaching scope. The request is denied.

Refused Document 3: To provide a copy of each of the highlighted documents in Exhibit A-4.

Note: Exhibit A-4 is a copy of part of Justice Hogan's decision in *Superior #1*. The highlighted documents include *Superior # 1* documents 4-10, 16, 17 and 19-23. This request overlaps with Refused Documents 6-18 below, except that it also refers to *Superior #1* document 7: "Email dated February 24, 2012 from Dan Rivet to Theresa Murphy and Mark Symes and attached email regarding loss trading". I will only deal with this one requested document here and will address each of the other documents individually below.

Objection: This request overlaps with Motion Requests #3 and 6 to 18. There is no overlap respecting *Superior #1* Refused Document 7. There is no evidence the auditor had regard to or was ever in possession of any of the documents at issue in *Superior #1*. None of the documents being requested deal with the Appellant, nor were they created in the course of the audit of the Appellant. Simply put, there is no evidence that the documents or information requested was prepared in the context of the audit of the Appellant or were considered by the CRA officials who had charge of the audit or were consulted during that audit. The request is irrelevant. The request also seeks taxpayer information protected under s. 241, and information that is subject to solicitor-client privilege or settlement privilege. With respect to Superior Refused Document 7, the document concerns another taxpayer. For reasons stated above, it is irrelevant and contains information relating to other taxpayers that is protected under s. 241; see Sealed Document #3 (SP RD 7).

Decision: Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 4: To provide a copy of the memo that is referred to in the December 5, 2014 email from Helen Little to Hercules Karasavidis [i.e., the November 18, 2014 memo from headquarters ATP].

Objection: The email in the audit file dated December 5, 2014 from Helen Little to Hercules Karasavidis (Exhibit A-7 at the discovery) is not in the Appellant's motion record. The follow-up Transcript is clear that document concerns settlement (p. 75). The Appellant is seeking a headquarters memo referred to in the email that relates to settlement. The memo is subject to settlement privilege and contains unrelated taxpayer information that is protected under s. 241; see Sealed Document #4.

Concession: The Appellant conceded that this document is protected by settlement privilege.

Decision: This document is subject to settlement privilege. The request is denied.

Refused Document 5: To provide a copy of the approval referred to in the memo dated January 6, 2015 [marked as Exhibit A-10] where it is stated "The GAAR Committee already approved the application of the GAAR to the SIFT Conversion scheme" (follow-up transcript, p. 86)

Note: It would appear that this request overlaps with *Superior #1* document 25.

Objection: The document referred to and marked as Exhibit A-10 (i.e., the memo dated January 6, 2015) is not in the Appellant's affidavit. In any event, the document, namely the minutes of the GAAR Committee, relates to another taxpayer. There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or was considered during that audit. The document is irrelevant and contains information protected by s. 241; see Sealed Document #5.

Concession: The Appellant conceded that this request should be denied if the document relates to another taxpayer.

Decision: This document relates to another taxpayer. The request is denied in accordance with the Appellant's concession. In addition, I note that, unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in

the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is also denied on this basis.

Refused Document 6: To provide a copy of *Superior #1* Refused Document #23, a copy of an email from Shawn Porter to Davine Roach, Robert Duong, Kerry Harnish, and Grant Nash (undated), and attached email chain regarding "The Application of the GAAR relating to loss trading in the context of SIFT conversions" (Follow-up Transcript, p. 87).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant and also contains information relating to other taxpayers that is protected under s. 241. The document also contains information that is subject to solicitor-client privilege (p. 0034) and settlement privilege (p. 0033); see Sealed Document #6.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 7: To provide a copy of *Superior #1* Refused Document #22, a copy of an email from Annemarie Humenuk to Grant Nash dated March 4, 2012, and attached chain of emails regarding the "Application of the GAAR relating to loss trading in the context of SIFT conversions" (Follow-up Transcript, p. 88-89).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant and also contains information relating to other taxpayers that is protected under s. 241. The document also contains information that is subject to solicitor-client privilege (p. 0017); see Sealed Document #7.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it

was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 8: To provide a copy of *Superior #1* Refused Document #21, a copy of an email from Shawn Porter to Annemarie Humenuk dated December 21, 2011, and attached chain of emails regarding "Draft Email for CRA on GAAR issues relating [to] loss trading in the context of SIFT conversions". (Follow-up Transcript, p. 89).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant and also contains information relating to other taxpayers that is protected under s. 241. The document also contains information that is subject to solicitor-client privilege (pp. 002, 003, 004 and 005); see Sealed Document #8.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 9: To provide a copy of *Superior #1* Refused Document #20, a copy of an email from Ted Cook to Gerard Lalonde dated March 5, 2010 and attached chain of emails regarding "Trust Conversions" (Follow-up Transcript, p. 90-91).

Objection: There is no evidence that the document was considered by the auditor or CRA officials consulted with respect to the audit of the Appellant. The document is irrelevant; see Sealed Document #9.

Decision: Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 10: To provide a copy of *Superior #1* Refused Document #19, a copy of an email from Alexander Johnston to Venetia Putureanu dated July 28, 2011, and attached chain of emails regarding "Questions relating to paragraphs 256(7)(c.1), (f) and (g)" (Follow-up Transcript, p. 91-92).

> **Objection:** There is no evidence that the document was considered by the auditor or CRA officials consulted with respect to the audit of the Appellant. The document is irrelevant. Page 00240 also contains information relating to another taxpayer; see Sealed Document #10.
>
> **Decision:** Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 11: To provide a copy of *Superior #1* Refused Document #17, a copy of a letter to Gerard Lalonde from Richard Montroy dated February 18, 2008, regarding "Subsection 111(5) of the *Income Tax Act*" (Follow-up Transcript, p. 92).

> **Objection:** There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241. In addition, the same document was found not to be relevant in *Superior #1* (at p. 21) and in *MP Western* (at p. 11 re document 18); see Sealed Document #11.
>
> **Decision:** This document relates to other taxpayers. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 12: To provide a copy of *Superior #1* Refused Document #16, a copy of an email from Gilles Pelletier to Jean-Marc Miszaniec dated July 28, 2010 and attached chain of emails regarding "Tax loss Trading" (Follow-up Transcript, p.93).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241. In addition, the same document was found not to be relevant in *Superior #1* (at p. 21); see Sealed Document #12.

Decision: This document relates to other taxpayers. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 13: To provide a copy of *Superior #1* Refused Document #10, a copy of an email dated February 22, 2012 from Mark Symes to Phil Jolie et al. and attached email regarding "GAAR Committee Meeting" (Follow-up Transcript, p. 94).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241; see Sealed Document #13.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 14: To provide a copy of *Superior #1* Refused Document #9, a copy of a memorandum to the GAAR Committee from the ATP dated September 2, 2011 (Follow-up Transcript, p. 94-95).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The

document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241; see Sealed Document #14.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 15: To provide a copy of *Superior #1* Refused Document #8, a copy of a memorandum to the GAAR Committee from the ATP dated February 8, 2011 (Follow-up Transcript, p. 95-96).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241; see Sealed Document #15.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 16: To provide a copy of *Superior #1* Refused Document #6, a copy of an email from Dan Rivet to Salimah Jina in response to her question regarding whether the amendment to subsection 256(7) introduced in 2010 (i.e., 256(7)(c.1)) is a clarification or a change in policy (Follow-up Transcript, p. 96-97).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241. In addition, the first page in the second paragraph contains information that is subject to solicitor privilege; see Sealed Document #16.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 17: To provide a copy of *Superior #1* Refused Document #5, a copy of an email from Salimah Jina to Dan Rivet in which she asks whether he looked at the question whether the amendment to subsection 256(7) introduced in 2010 (i.e., 256(7)(c.1)) is a clarification or a change in policy (Follow-up Transcript, p. 97-98).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241; see Sealed Document #17.

Decision: This document relates to another taxpayer. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

Refused Document 18: To provide a copy of *Superior #1* Refused Document #4, a copy of an email dated December 18, 2008 from Wayne Adams to Brian Ernewein (Follow-up Transcript, p. 98-99).

Objection: There is no evidence that the document was prepared in the context of the audit of the Appellant or was considered by the CRA officials who had charge of the audit or were consulted during that audit. The document is irrelevant. The document also contains information relating to other taxpayers that is protected under s. 241 (p. 0134); see Sealed Document #18.

Decision: This document relates to other taxpayers. Unlike in *Superior #1* and *Lehigh*, as discussed above, there is no evidence in this case that this Refused Document was disclosed by the Minister to the Appellant or that it

was examined, prepared or considered by the Minister in the context of the Appellant's audit. In my view, this distinguishes this case from *Lehigh* and *Superior #1*. The request is denied.

CONCLUSION

[25] Based on all of the foregoing, the Appellant's Motion is dismissed in accordance with the above reasons. Costs in respect of this Motion shall be payable by the Appellant to the Respondent in any event of the cause.

Signed at Ottawa, Canada, this 9th day of May 2019.

"Henry A. Visser"

Visser J.

CITATION:	2019 TCC 112
COURT FILE NO.:	2016-367(IT)G
STYLE OF CAUSE:	TOTAL ENERGY SERVICES INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 16, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Henry A. Visser
DATE OF JUDGMENT:	May 9, 2019

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