Docket: 2020-1214(GST)G

BETWEEN:

EXPRESS GOLD REFINING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard December 17, 2021 at Ottawa, Canada

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Jacques Bernier Bryan Horrigan
Counsel for the Respondent:	Marilyn Vardy Jasmine Mann Michael Ding Pallavi Gotla

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ORDER

It is Ordered pursuant to section 82 and paragraphs 91(b) and (e) of the *Tax Court of Canada Rules (General Procedure)* and in accord with the accompanying Reasons for Order, that the Respondent make and serve on the Appellant within 30 days of this Order a further List of Documents, verified by Affidavit in prescribed form, listing all documents not previously listed that are or were in the Respondent's possession, control or power, relevant to any matter in question between or among the parties in this appeal, including but not limited to:

a. all such documents that are or were part of the 81.2 GBs of documentation the Respondent collected from 131 Canada Revenue

Agency (CRA) personnel, referenced in the Reasons for Order as Scrap Gold Audits Documentation;

b. all such documents that are or were part of the CRA Integras cases #49411921, #44815431 and #34630331;

c. all such documents that are or were part of the CRA Collections diaries pertaining to any of the alleged tax carousel scheme(s) at issue.

Submissions as to costs of this motion are to be filed with the Court within 30 days of the date this Order is issued.

Signed at Halifax, Nova Scotia, this 22nd day of February 2022.

"B. Russell"

Russell J.

Citation: 2022 TCC 33
Date: 20220222
Docket: 2020-1214(GST)G

BETWEEN:

EXPRESS GOLD REFINING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Russell J.

I. Introduction:

[1] The appellant, Express Gold Refining Ltd. (EGR), has brought an interlocutory motion seeking orders that as part of pre-trial discovery the respondent Crown further list and produce documents in or formerly in that party's possession, control or power that are relevant to any matter at issue.[1]

[2] The motion pertains to EGR's appeal of twenty-six GST/HST reassessments raised July 29, 2020 under the federal *Excise Tax Act*. These reassessments are of monthly reporting periods covering from June 1, 2016 to July 31, 2018. They collectively assess EGR for almost $120 million for input tax credits (ITCs) and almost $30 million for gross negligence penalties.

II. Background:

[3] At all material times EGR, based in Toronto, has been involved in the scrap gold industry, carrying on a business of facilitating refinement of scrap gold.

[1] Appellant's notice of motion

[4] In the respondent's Reply are pleaded the asserted bases of the Minister of National Revenue (Minister) in raising the subject reassessments:

a. EGR engaged in many transactions involving one or more GST/HST "carousel schemes", involving "at least 63" of 82 purported EGR scrap gold vendors;

b. purported gold scrap transactions of EGR did not reflect industry norms as to volume and purity; and

c. EGR was aware of or wilfully blind to substantial GST/HST leakage.[2]

[5] The respondent pleads that the purported tax carousel scheme(s) involving EGR operated as follows:

> EGR was involved in what is commonly known as a "carousel scheme" in the scrap gold industry. The sole purpose of the [s]cheme was to generate the false impression of entitlement to ITCs by converting GST/HST exempt or zero-rated gold bars (pure gold) into taxable property (scrap gold) in circumstances where EGR knew or ought to have known that GST/HST collectible in respect of these alleged supplies would not be remitted to the Receiver General, but rather would be kept and distributed amongst the various participants to the [s]cheme.
>
> Participants in the [s]cheme turned pure gold bars, which are exempt or zero-rated, into scrap gold, which is taxable at 13% [Ontario], by adding base metals such as silver, zinc or copper or a small quantity of legitimate scrap gold to them (this process is called "debasing").
>
> Purported vendors sold the debased gold to EGR and purportedly charge EGR 13% GST/HST on the sales.
>
> EGR purportedly paid the vendors cash or refined pure gold (zero-rated goods) as consideration for EGR's alleged purchases of scrap gold from them.
>
> EGR's purported vendors took the pure gold, which was debased again or used the cash received from EGR to make new purchases of gold for debasing.
>
> The process of purchasing debased gold, refining it, returning it as consideration to the vendors, and debasing it again for resale was repeated many times over to create

[2] Reply, paras. 22.24, 22.33 – 22.40, 22.41, 22.42

> the false appearance of significant bona fide commercial activity occurring between EGR and the vendors, when in fact this was not the case at all.[3]

[6] In respect of EGR's above-referenced tax appeal, in late 2020 EGR and the respondent Crown agreed to conduct documentary discovery by way of section 82 of the *Tax Court of Canada Rules (General Procedure)* (Rule(s), Rule 82, etc.).

[7] Rule 82 is headed, "List of Documents (Full Disclosure)". Rule 82(1) provides that in an appeal before this Court:

> The parties may agree……that each party shall serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal.
>
> (underlining added)

[8] As noted, Rule 82 requires each party to list all documents "relevant" to any issue in the particular appeal, that are or have been in that party's possession, control or power.

[9] By March 31, 2021 EGR and the respondent had served upon each other their respective Rule 82 document lists, with listed documents then being produced. Subsequently, negotiations between the parties initiated by EGR led to the respondent on several occasions producing additional documentation.

[10] The respondent's produced documents include those that had been looked at and/or relied upon by Canada Revenue Agency (CRA) auditor, J. Bartlett.

[11] J. Bartlett was lead auditor of CRA's audit of EGR (Lead Auditor). Concurrently the Lead Auditor co-ordinated CRA audits of numerous purported scrap gold suppliers in various Canadian cities.

[12] The respondent's productions include CRA's audit file for EGR, and so-called "key documents" pertaining to the numerous co-ordinated CRA audits of purported direct and indirect suppliers of EGR in the scrap gold industry. These audits are relevant in respect of the herein carousel allegations. The respondent's term "key documents" is said to include, for each such audited supplier, the particular CRA

[3] Reply, paras. 22.14 – 22.19

auditor's position paper, audit report, penalty report, T2020 notes and interview notes.[4]

[13] The respondent Crown states that as of December 8, 2021 it, "…has produced the relevant documentation to the Appellant." Note use of the less specific term "the relevant" instead of "all relevant". The respondent submits further that its productions, "include everything that factored into the (re)assessments…for the reporting periods under appeal."[5]

[14] EGR seeks by this motion that the respondent provide a further or added-to list per Rule 82 of relevant documentation, particularly including documentation within the following three categories, possessed, etc. by CRA:

a. 81.2 gigabytes (GBs) of documentation that 131 CRA personnel who individually had worked on CRA's EGR audit and/or on CRA's audits of purported scrap gold suppliers (Scrap Gold Audits Documentation). This documentary agglomeration was identified in response to an internal CRA "litigation hold" request for documents potentially relevant to the alleged carousel scheme(s), to which request the said 131 CRA personnel individually had responded;

b. documentation in CRA Integras cases #49411921 and #44815431, pertaining to average scrap gold transaction purity levels and volumes; and also documentation in CRA Integras case #34630331 pertaining to the 2019 set of EGR reassessments for the subject periods; and

c. CRA Collections documentation respecting any of the alleged carousel scheme(s) at issue.

III. Issue:

[15] The issue is what if any documentation, including but not limited to documentation from these three categories of CRA possessed documentation, should be listed per Rule 82(1) and accordingly produced.

[4] Respondent's written representations, paras. 24, 25
[5] *Ibid*., paras. 55, 56

IV. Law:

[16] As noted, the concept of relevance drives Rule 82. The law as to scope of relevance in a pre-trial discovery context is well settled. In *CIBC v. The Queen*, 2015 TCC 280 at paras. 14-18, Rossiter, C.J. reviewed relevant jurisprudence, concluding:

> Relevancy is extremely broad and should be liberally construed. The threshold for relevancy on discovery is very low but does not allow for a fishing expedition, abusive questions, delaying tactics or completely irrelevant questions;
>
> Everything is relevant that may directly or indirectly aid the party seeking the discovery to maintain its case or combat that of its adversary. If the questions are broadly related to the issues raised, they should be answered;
>
> Discovery is limited by the pleadings to some extent; and
>
> The examining party conducting the discovery is doing so for the purposes: of supporting his or her own case; obtaining admissions; attacking the opponent's case; limiting the issues at trial; and revealing the case that he or she must meet at trial and the facts that the opponent relies upon.
>
> (underlining added)

[17] Also noted in *CIBC* (para. 14), are C. Miller J.'s statements in *HSBC Bank Canada v. The Queen*, 2010 TCC 228, "gleaned from…other recent Tax Court of Canada case authority", that:

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*, 2010 TCC 94, 2010 DTC 1085.

2. The court shall preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic or (3) clearly irrelevant": *John Fluevog Boots & Shoes v. The Queen*, 2009 TCC 345, 2009 DTC 1197.

[18] The respondent *inter alia* cites *Burlington Resources Finance Company v. The Queen*, 2015 TCC 71 at para.15 (in turn citing *The Queen v. Lehigh Cement Limited*, 2011 FCA 120 at paras. 34 – 35) for the proposition:

> Even where relevance is established, the Court retains discretion to disallow a question where, for example, responding to it would place undue hardship on the answering party, there are other means of obtaining the information sought or the question forms part of a fishing expedition.[6]

V. Analysis:

(a) Scrap Gold Audits Documentation category:

[19] As stated the Scrap Gold Audits Documentation category encompasses 81.2 GBs of documentation identified by 131 CRA personnel as being of potential relevance to issues in the herein appeal, particularly in respect of the alleged carousel scheme(s). The respondent opposes having to review this very large category of documentation for listing per Rule 82.

[20] The respondent asserts that these documents, "…are likely to have no relevance or only marginal relevance to the issues under appeal in this case (or which will duplicate information which has already been produced)…".[7]

[21] As noted, the Scrap Gold Audits Documentation, which the respondent resists listing and thus producing, specifically were identified by CRA personnel on the basis they were potentially relevant. Jurisprudence has established relevance as having a low threshold. Jurisprudence has established that on the relevancy spectrum, only documents "clearly irrelevant"[8] ought not be listed per Rule 82. As asked by EGR, how can the respondent, without review or sampling, take the position that none of this mass of documentation ought to be listed per Rule 82?

[22] References in CRA documents already produced are pointedly indicative of the Scrap Gold Audits Documentation being comprised of a significant measure of relevant documentation.

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[6] *Ibid*., para. 37
[7] *Ibid*., para. 63
[8] *John Fluevog Boots & Shoes,* para. 17 *supra*

[23] For example, in a CRA memo titled, "Express Gold Refining Ltd., May 2019 Update and Action Plan, Group Audit Approach, Aggressive GST/HST Planning"[9] is written, under the heading "Audit of Express Gold Refining":

> As stated previously this [EGR] audit relies very heavily on the audits of EGR's suppliers. In order to support denial of ITCs on these suppliers the audits of the suppliers must be well done and contain enough information and audit work to support the group position. This approach is systematic but quite time consuming.
>
> …We may not be able to deny ITCs at the EGR level if there is not enough audit evidence in the audit of the supplier.
>
> – In order to secure the position to assess EGR we need to have evidence of collusion, this is the most difficult all the evidence to obtain.
>
> – We will have to look at the audits of suppliers on a case by case basis and decide if they can be included in the audit of EGR.
>
> (underlining added)

[24] In this CRA memo also appears the statement, "104 active audits identified as likely participants in a GST/HST carousel scheme". As well, in a section titled, "Top Down Audit Approach", is written:

> We are using a top-down collaborative audit approach to complete these files. The amount of coordination is significant and relies on the flow of information in both directions. While the ultimate support of the audit position flows from EGR down to the various levels, the audits must be closed from the bottom up. Each level of the supply chain relies on the audit conclusions of their suppliers (the level below them)…
>
> Consistency in our audit position is key. Maintaining consistency requires communication between all auditors in the group. Information sharing and coordination of file closing is absolutely critical. This collaboration is the only way to ensure that our audit position is well developed and supported….
>
> (underlining added)

[9] Appellant's motion record, tab 2ZZZ

[25] Additionally, in a CRA document headed, "May 30, 2019 Scrap Gold Conference Call Notes" is stated:[10] "Current population approximately 150 files, 40 auditors, seven locations." Also, "EGR's audit relies heavily on the information obtained in, and the analysis done on the intermediary audits."

[26] These extracts from CRA memos *etc*., created in the course of CRA's extensive scrap gold audits, provide a solid basis for linking CRA's co-ordinated audits with EGR's appealed reassessments. The respondent's assumptions pointing to GST/HST carousel schemes involving EGR and at least 63 out of 82 suppliers rest on the work carried out in these co-ordinated audits of the scrap gold industry, being the basis for the subject Scrap Gold Audits Documentation.

[27] That the Scrap Gold Audits Documentation category exists at all is due to 131 CRA personnel identifying each such document as being potentially relevant in respect of the tax carousel allegations central to this litigation. It would be startling now to forego review of same for Rule 82 purposes.

[28] The quantum of this documentation presents all the more reason for review for purposes of Rule 82 listing; rather than that large quantum being construed a reason to refrain from review for Rule 82 listing purposes.

[29] The respondent submits that the principle of proportionality precludes further productions. Proportionality in this context is said to be determined by sufficiency of the productions to date, the exceptional circumstances of this litigation and the additional cost and time incurred by yet further disclosure.

[30] The referenced exceptional circumstances essentially involve the federal *Companies' Creditors Arrangement Act* (CCAA) situation, whereby a monitor appointed pursuant to the CCAA is urging the parties to move this litigation along, without delay. The respondent maintains that having to review the 81.2 GBs of Scrap Gold Audits Documentation would take much more time than would justify any usefulness of this documentation for EGR.

[31] The respondent acknowledges that EGR's appeal is,

[10] Ibid., tab 2AAAA

> …an important and complex file, which involves a substantial quantum of tax dollars. The nature of the allegations are serious - they involve allegations of non bona fide conduct on the part of [EGR], which has had the effect of depriving the Receiver General of approximately $20 million of tax revenue.[11]

[32] Here, EGR is appealing reassessments totalling millions of dollars, due in large measure to the many CRA audits, carried out in co-ordinated fashion, of purported participants in the scrap gold industry. It is hardly surprising that an auditing program so extensive would yield such a large quantity of documentation potentially fitting within Rule 82's wide parameters of relevancy.

[33] The fact that a CCAA monitor is urging the parties to proceed apace is well understandable. But respectfully, in my view that is not reason to curtail EGR's entitlement to full application of Rule 82, including in respect of the Scrap Gold Audits Documentation. At risk for EGR are millions of dollars and its business reputation, specifically due to these appealed reassessments.

[34] Over a year ago the respondent Crown and EGR committed to each other that Rule 82 would apply for purposes of pre-trial documentary discovery. Yet to date the respondent Crown has left its large cache of Scrap Gold Audits Documentation unreviewed for Rule 82 listing purposes.

[35] Review of so much documentation for Rule 82 purposes is no slight undertaking. Yet the respondent Crown presumably would have considered this in committing to application of Rule 82.

[36] Finally, in *CIBC*, above, the following comment of the Chief Justice is apt:

> As for any issue of proportionality, the principle is certainly a worthy and important one, and efforts should certainly be made to keep costs down. But proportionality is not something to be used as a shield. In considering these appeals, and particularly the issues at stake and the quantum, proportionality is not the primary focus of decisions on discovery for these appeals. Relevancy is the key driver. As I have already stated, the Respondent has shown that the process by which CIBC arrived at its decision could yield information relevant to both its own case and to its countering of CIBC's case. The same goes for information such as working papers that may ordinarily seem tangential but that in this case provide a potential window into the decision-making process and justification behind the deduction of

[11] Respondent's written submissions, para. 61

> the Settlement Amounts. Proportionality must not defeat the purposes of discovery, particularly in appeals of this magnitude.[12]
>
> (underlining added)

[37] For these reasons I do not accept the respondent Crown's proportionality submission.

[38] The respondent Crown will be ordered to review the Scrap Gold Audit Documentation for the purposes of Rule 82 listing, keeping in mind that the threshold for relevance is a low bar, and that on the spectrum of relevancy only "clearly irrelevant" documents should be considered not relevant.

(b) Integras Cases Documents category:

[39] Should documents contained in CRA's Integras Cases #44411921 and #44815431 be listed per Rule 82? EGR understands this documentation to relate to the Minister's determinations as to standard transactional gold purities and volumes. Such determinations constitute a particular element of the respondent's alleged tax carousel schemes involving EGR.

[40] That such documentation may not have been directly used in making pleaded ministerial assumptions does not render same irrelevant to any of the issues at bar. A central function of Rule 82 is to oblige a party to include in its listing relevant documentation, whether or not supportive of that party's case.

[41] As well, EGR seeks Rule 82 listing and consequential production of documentation in CRA's Integras Case #34630331, understood as containing CRA's EGR audit file relating to the first set of reassessments of EGR, raised July 22, 2019, pertaining to the same monthly periods as herein appealed. The reassessments at issue, being the second set of reassessments, were raised a year later.

[42] I concur that such documentation would be relevant, by Rule 82 standards, in respect of the appealed second set of reassessments. The respondent should review the material in these three specified Integras files for listing per Rule 82, excepting

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[12] *CIBC*, *supra*, para. 276

as to relevance only documents "clearly irrelevant"; again keeping in mind the low bar of relevancy.

(c) Collections Diaries category:

[43] Lastly, EGR seeks listing and production per Rule 82 of CRA Collections diaries referencing any of the purported carousel scheme(s) at issue.

[44] It is understood that the Lead Auditor reviewed CRA Collections diaries which record conversations and actions upon a GST/HST debt being registered, usually after an audit is completed. The Lead Auditor primarily was looking for any references re gold carousel schemes or a registrant's alleged scrap gold business. Such information was found and is said to have been summarized in a 924 page working paper CRA has produced.[13]

[45] This particularly is a question of accessing source documentation pertaining to relevant factual aspects reflected in CRA's said 924 page summary. Listing of the relevant Collections diaries per Rule 82 allows for testing as to accuracy and completeness of the CRA summary. Identification for Rule 82 purposes of course should include all relevant references in Collections diaries, whether or not consistent with the respondent's case.

VI. Conclusion:

[46] An Order will issue, reflecting the foregoing, providing for a prompt timeline for completion. Written submissions as to costs may be filed with the Court within 30 days of the issuance date of the Order.

Signed at Halifax, Nova Scotia, this 22nd day of February 2022.

"B. Russell"

Russell J.

13 *Ibid*., paras. 30, 31

CITATION:	2022 TCC 33
COURT FILE NO.:	2020-1214(GST)G
STYLE OF CAUSE:	EXPRESS GOLD REFINING LTD. AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	December 17, 2021
REASONS FOR ORDER BY:	The Honourable Justice B. Russell
DATE OF ORDER:	February 22, 2022

APPEARANCES:

Counsel for the Appellant:	Jacques Bernier Bryan Horrigan
Counsel for the Respondent:	Marilyn Vardy Jasmine Mann Michael Ding Pallavi Gotla

COUNSEL OF RECORD:

For the Appellant:

Name:	Jacques Bernier Bryan Horrigan
Firm:	Baker and McKenzie LLP

For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada