2014-3465(IT)G

BETWEEN:

A & D Precision Limited,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

TRANSCRIPT OF REASONS FOR JUDGMENT

Let the attached certified transcript of the Reasons for Judgment delivered orally from the Bench at Toronto, Ontario on May 5th 2016, be filed, with minor edits.

"Campbell J. Miller"
C. Miller J.

Signed at Ottawa, Ontario on June 6, 2016.

Court File No. 2014-3465 (IT) G

TAX COURT OF CANADA

BETWEEN:

A&D PRECISION LTD.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

ORAL REASONS FOR DECISION RENDERED BY THE HONOURABLE MR. JUSTICE C. MILLER Federal Judicial Centre, 180 Queen Street West, Toronto, Ontario on Thursday, May 5, 2016 at 9:02 a.m.

APPEARANCES :

Mr. Adam Gotfried
Mr. Justin Kutyan for the Appellant

Mr. Ifeanyi Nwachukwu
Mr. Christopher Kitchen for the Respondent

Also Present:

Barbara Fritz Court Registrar

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VIA Teleconference

--- Upon commencing the oral reasons for decision on Thursday, May 5, 2016, at 9:02 a.m.

THE CLERK: Recalling file number 2014-3465(IT)G between A&D Precision Ltd., Appellant, and Her Majesty the Queen, Respondent. Appearing on behalf of the Appellant, Mr. Adam Gotfried and Mr. Justin Kutyan (ph), and for the Respondent, Mr. Ifeanyi Nwachukwu and Mr. Christopher Kitchen.

JUSTICE MILLER: Thank you. Good morning, everyone. It is Justice Miller. I am prepared to give you a decision this morning with respect to this motion.

I am faced with an interlocutory motion from the Respondent that is not uncommon, seeking answers to questions refused on discovery. Yet this motion goes further because the Respondent also attempted to get answers by bringing a demand for particulars and a request to admit facts and was similarly refused. She seeks an order requiring the Appellant to respond to those as well.

The motion goes even further to then seek dismissal of the Appellant's appeal altogether based on these alleged failures. I believe it is worth repeating the Respondent's motion in part.

So the motion is for an order firstly dismissing the appeal with costs because certain paragraphs in the Notice of Appeal should be struck as they are an abuse of the court's processes, having regards to the Appellant's repeated failure to answer proper discovery questions, having regard to the Appellant's repeated refusal to properly respond to a demand for particulars, and having regard to the Appellant's refusal to properly respond to a request to admit the facts. If struck, the Notice of Appeal then discloses no reasonable grounds of appeal. Further, the Respondent argues the Appellant's repeated

failure to answer proper discovery questions also warrants such an order pursuant to rule 110(B).

In the alternative, the Respondent seeks an order directing the Appellant to reattend the examination for discovery and answer proper questions refused on discovery, granting leave to the Crown to continue the examination by way of written questions, directing the Appellant to admit or deny allegations of fact made in the Crown's request to admit facts, directing the Appellant to deliver the particulars requested in the demand, striking out or expunging all or part of the allegations of fact made in paragraphs 18, 33 and/or 34 of the appeal, removing from the Appellant's list of documents those documents the Appellant fails to identify that relate to a fact in dispute in the appeal, and that it is relying on to establish or assist in establishing any allegation of fact from the pleading, and granting leave to the Crown to file and serve her amended reply. So that is a summary form of the order that the Respondent seeks.

I advised counsel at the outset that depending on my views on the motions with respect to items 2 to 7 in the Notice of Motion, I would or would not hear the Respondent's motion seeking to dismiss the Appellant's appeal. Having heard argument on the other motions, it was unnecessary to entertain any argument on the Respondent's motion to dismiss for reasons which will soon become obvious.

This is a scientific research and experimental development or SR&ED appeal. The Appellant for many years claimed SR&ED credits in connection with projects it had been working on since the late 1990s. Indeed, there was a SR&ED audit in 2001, and claims for the SR&ED credit were not challenged, not until the 2006, 2007, and 2008 taxation years for which the Appellant was denied a SR&ED credit on several of the same projects which had previously been accepted.

The parties exchanged their list of documents. The Appellant broke its documents down on a project-by-project basis, and then within a project by activities carried on with respect to those projects. For example, with respect to the large scale precision vertical lathes project, the list showed certain activities of first development and simultaneous integration of free access, listed copies of working papers, of notes, sketches, calculations, and product summary.

The second activity was an activity of the main spindle motor and access motor under which the Appellant listed copies of large volumes of girth gear assembly and split ring gear as the main spindle motor. You get the idea, lots of documents of a highly technical nature.

The Appellant also submitted with a T661 form copies of science reports titled SR&ED expenditures by A&D Precision, covering project description, scientific and technological advances, and uncertainties and steps to resolve the uncertainties. Further, a technical representative of the Appellant was examined by the respondent for three days.

It was clear from a review of the discovery transcript that the Respondent attempted to tie the Appellant's technician down to answering questions framed in the language of the Income Tax Act. For example, was work undertaken in respect of the basic research for the advancement of scientific knowledge without a specific practical application in view? The Appellant's response was consistent that the technician had described all of the work done and explained all diagrams and worksheets, but it would have to be the experts who could and would answer those types of questions.

Also with respect to questions surrounding documents, the respondent wanted to be pointed to specific documents that shows, for example, a hypothesis of points of

systematic investigation. Again, the Appellant's answer was consistent that all the work described in the technical documents supported that, but no one document was couched in the Income Tax Act like specific language.

The Respondent then took a three-prong approach to what it interpreted to be refusals by the Appellant to disclose its case: First, to revisit examinations; second, to serve a demand for particulars; and third, a Request to Admit.

It went through all the questions, and suffice to say that the goal was the same: To get the Appellant to very specifically point out what it was relying upon to establish its qualifications of the SR&ED credit. The Appellant's position generally was, first, it had already provided everything it could in addressing that matter, and second, that it was now up to experts to analyze the work done to determine if it qualified.

I agree with the Appellant. I do not accept the Respondent's position that she does not know the case to meet. It has been explained in detail in the science report. She has also received detailed documents properly broken down by project and by activity. She has had the opportunity of three days of examining a technician on those documents. She has had several years' history of following the Appellant, this Appellant's applications as it relates to the same projects, and she's had at least three research technical advisors for the CRA review these projects.

I am satisfied the Respondent had the sufficient factual background that render all the questions she seeks answers to, under any of the three routes she has followed, to be unnecessary.

SR&ED appeals are a special type of case. They demand the assistance of experts. I accept, as pointed out by the Respondent, that it is still critical for an Appellant to provide the factual underpinnings for expert evidence to be of any use, but I see no lack of factual background in the circumstances before me. The Respondent has been given a full view of the work done, and as the Appellant has acknowledged, will be given an expert report or reports in accordance with the rules.

I see no need to go through all the questions the Respondent claims were refused and deal with them individually. I find there is simply no need for further examinations. I find likewise there is no need for an order directing the Appellant to answer any more questions from discovery. The Appellant has already done so to the best of the ability of its technician.

I conclude the documents have been provided in a useful manner and the Appellant's answer that they all be relied upon is responsive.

With respect to the demand for particulars, the Respondent admitted that this was an alternative method to get answers she felt she was unable to obtain on discovery. Again, the demand was cast in the language of the Act. For example, for each project, the Appellant was to provide particulars of the work undertaken with respect to, "any investigation conducted in a systematic fashion regarding the advancement of scientific knowledge in general without a specific practical use in mind." The Appellants have provided in considerable detail a description of the work. They have advised the Respondent an expert will provide an expert report addressing the types of questions the Respondent is looking to get from the Appellant itself. I agree wich The Appellant that this is an appropriate way of proceeding in these SR&ED cases. I do not accept that The Respondent needs answers to these types of questions from The Appellant itself. It is more appropriate to see how The Appellant's expert will address these elements of The work done. I find nothing evasive or abusive in The Appellant's explanation as to why it is

not responding to The demand for particulars.

With respect to The Request to Admit, I make The same overriding comment. The Respondent has already got The facts necessary from The Appellant without resorting to this tactic. I would further suggest that a Request to Admit is not intended to be an alternative to examinations for discovery. It is a process intended to lead to a more efficient trial. That is not how the Respondent was using this procedure. In such circumstances, I find no fault of the Appellant's blanket denial.

With respect to the Respondent's motion to have documents removed from the Appellant's list of documents, I am not prepared to rely on rule 91 to do so. The Respondent relies on the case of Louwen for the proposition the Appellant is required to identify the fact in issue for each and every document on its list of documents. That is an overly board interpretation of that case as to how it might apply to the case before me.

The Respondent suggests she has been swamped with a voluminous production which the Appellant could not or refused to tie to a fact in dispute. I don't see it that way. Documents provided were broken down by project and activity. They purportedly demonstrate the work undertaken and are, as the Appellant claims, to be relied upon in demonstrating the nature of the work qualifies for the credit. An expert will connect the dots.

I conclude the parties are at the stage to get their experts and move on. The exchange of documents and examinations have, I find, served their purpose. No further steps are required in that regard. I would suggest that once experts are retained, this is a case where a settlement conference with the experts in attendance would be of great benefit, and I encourage the parties to consider doing so.

Counsel were well aware at the hearing of my views on these type of interlocutory motions. It is particularly distressing when the parties use these motions to the point of claiming the other side is behaving so egregiously there is an abuse of process from one side or the matter should in fact be dismissed.

I recognize the Respondent indicated she thought long and hard before bringing such a claim. However, what I see as a third-party independent observer is a taxpayer with a legitimate claim to be adjudicated who has proffered all the relevant factual background, but simply not in the manner the Respondent would prefer.

It is important, I respectfully suggest, to not get so caught up in technical pretrial strategies that one loses sight of The forest for the trees. I do not suggest an Appellant can willy nilly not be forthcoming providing facts, but that, I conclude, is simply not the case before me. The facts have been provided.

The Respondent for the most part knows the case to meet, but in SR&ED cases, it is necessary to rely on experts' reports for a full handle on the application of the provisions of the Act to those facts.

The parties have indicated they will deal with the Respondent's amendment to the reply. The Appellant has also indicated they will provide English translations of any documents they will rely on at trial that are not in the English or French language. Given that, the order I give is that the Respondent's motion is dismissed. If the parties wish to make any representations with respect to costs, they are to do so within 3 0 days of this order, failing which costs are awarded to the Appellant in accordance with the court's tariff.

Thank you very much.

THE CLERK: Thank you. The hearing is concluded.

--- Whereupon the oral reasons for decision concluded at 9:16 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

Miriam Claerhout, Court Reporter

June 3, 2016

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