

BETWEEN:

BRANT INVESTMENTS LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on June 12, 2025 at Vancouver, British Columbia

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: David McCormick
Alastair G. Campbell

Counsel for the Respondent: Eric Brown
Nicolas Sigouin

ORDER

The Appellant's motion to compel the Respondent to provide undertakings is dismissed.

Costs will be in the cause.

Signed this 14th day of July 2025.

“David E. Graham”

Graham J.

Citation: 2025 TCC 95
Date: 20250714
Docket: 2022-2344(IT)G

BETWEEN:

BRANT INVESTMENTS LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Graham J.

[1] During an examination for discovery of the Respondent's nominee, counsel for the Appellant asked the nominee to give two undertakings. The Respondent refused to give the undertakings. The Appellant has brought a motion to compel answers.

Background

[2] The Appellant was required to file its tax return for its year ended June 30, 2019 by December 31, 2019. The Appellant did not file it on time.

[3] In March 2021, the Minister of National Revenue issued a demand to file under subsection 150(2) of the *Income Tax Act*. The demand imposed a deadline. The Appellant filed its return, but not until after that deadline. As a result, the Minister assessed the Appellant a repeat late filing penalty under subsection 162(2). The Appellant has appealed the imposition of that penalty.

[4] The Appellant argues, among other things, that it exercised due diligence during each of the following periods:

- (a) the period between its year end and its filing due date;
- (b) the period specified in the demand to file; and
- (c) the period between those two periods (the “Interim Period”).

[5] The Interim Period includes the start of the COVID-19 pandemic. The requested undertakings relate to the pandemic. I will deal with the two undertakings separately.

Extension of Filing Deadlines and Waiver of Penalties

[6] During the early months of the pandemic, the Canada Revenue Agency made a series of announcements. The collective effect of those announcements appears to have been to extend the deadline for filing certain tax returns that would otherwise have been due to be filed between March 18 and September 30, 2020 and, provided those returns were filed within that period, to waive any late filing penalties that would otherwise have applied. For simplicity, I will refer to these announcements as the “Relief Policy” and that period of time as the “Relief Period”.

[7] While the Relief Period falls within the Interim Period, the Relief Policy did not apply to the Appellant as the Appellant’s returns were due to be filed before the Relief Period.

Undertaking Requested

[8] Counsel for the Appellant asked the Respondent’s nominee to undertake to make inquiries with the CRA and provide to the Appellant the CRA’s rationale for extending the filing deadline and waiving late filing penalties for tax returns due in the Relief Period. Counsel for the Respondent refused to give the undertaking on the basis that the question was irrelevant.

Relevance

[9] The test for relevance on discovery is whether the question might reasonably enable a party to advance its case or damage the opposing party’s case or might fairly

lead to a train of inquiry that may do either of those things (*Lehigh Cement Limited v. The Queen*¹).

[10] As set out above, the Appellant takes the position that it was duly diligent in the Interim Period. The Appellant submits that, when determining whether a taxpayer exercised due diligence, it is appropriate to consider how a reasonable taxpayer would have behaved in comparable circumstances. In particular, the Appellant emphasizes that one must compare the actions of the Appellant to the actions that a reasonable taxpayer would have taken in comparable circumstances (*Buckingham v. The Queen*²).

[11] The Appellant asserts that, in its case, the comparable circumstances in the Interim Period include the pandemic. The Appellant submits that the requested undertaking may lead to a train of inquiry that will help the Appellant to understand the effects of the pandemic on the filing of tax returns.

[12] The Respondent accepts that, for the purposes of discovery, the Appellant's diligence in the Interim Period is a relevant question.³ The Respondent does not, however, accept that the requested undertaking has any relevance to that issue. I agree.

Analysis

[13] Had the auditor or appeals officer taken the Relief Policy into consideration in assessing the Appellant or considering the Appellant's objection, the Appellant would be entitled to ask questions about it (*MP Western Properties Inc. v. The*

¹ 2011 FCA 120.

² Appellant's counsel referred to the FCA's decision in *Soper v. The Queen* (97 D.T.C. 5407). *Soper* involved a subjective-objective standard which took the taxpayer's personal characteristics into account. In *Buckingham v. The Queen* (2011 FCA 142), the FCA replaced the *Soper* standard with an objective standard. However, *Buckingham* specifically referred to the need to consider how a director would have acted "in comparable circumstances" (at para. 39). Based on the content of counsel's submissions, it seems likely that he intended to refer to *Buckingham* rather than *Soper*. Nothing turns on this. My conclusions would be the same whether counsel intends to argue *Soper* or *Buckingham* at trial.

³ At trial, the Respondent intends to argue that the Appellant's diligence in the Interim Period is irrelevant to the application of subsection 162(2).

*Queen*⁴). However, there is no suggestion that they did so. This is hardly surprising. The Relief Policy applied to taxpayers whose returns were due to be filed during the Interim Period. The Appellant's return was due two and a half months before that period.

[14] To the extent that the underlying rationale of the Relief Policy would reveal the CRA's policy reasons for excluding taxpayers whose returns became due prior to the Relief Period, those reasons are similarly irrelevant. The issue at trial will be whether the Appellant was duly diligent, not whether the Minister should have extended the Relief Policy to cover taxpayers in the Appellant's position. The Appellant understands that a waiver of interest and penalties during the Relief Period is relief that it would have to seek elsewhere.

[15] The CRA's policy rationale for instituting the Relief Policy would, at best, explain how the CRA viewed the circumstances that taxpayers who had returns due in the Relief Period found themselves in. Again, the Appellant was not one of those taxpayers.

[16] Even if the policy rationale explained how the CRA viewed the circumstances that all taxpayers found themselves in during the Relief Period, I still cannot see how it would be relevant. The conditions during the Relief Period were what they were. The CRA's understanding or interpretation of them is meaningless. *Buckingham* requires a comparison between a taxpayer's conduct and the conduct of a reasonable person in comparable circumstances. It says nothing of the CRA's view of the comparable circumstances.

[17] The Appellant appears to hope that the Relief Policy was introduced based on some sort of evidence that the CRA had gathered concerning the circumstances faced by taxpayers and that the Appellant could, through follow-up questions, seek to have that evidence produced. This sounds like the Appellant is planning a fishing expedition. As described in more detail below, the circumstances of the early months of the pandemic are widely known and unlikely to be contentious. The Appellant should not need a fishing expedition to obtain such evidence.

⁴ 2017 TCC 82, affirmed as *Madison Pacific Properties Inc. v. The Queen* (2019 FCA 19), leave to appeal dismissed (2019 CarswellNat 3243).

[18] On the basis of all of the foregoing, I will not order the Respondent to respond to the first undertaking.

Reminders and Demands to File

[19] The second undertaking that counsel for the Appellant asked the Respondent's nominee to give was to make inquiries with the CRA and advise the Appellant whether the CRA sent out any reminders to file returns (Form TX11) or demands to file returns (Form TX14) during the Relief Period.

[20] Again, the Respondent refused to provide this undertaking on the grounds that it was not relevant. I agree.

[21] The Minister did not issue either a reminder or a demand to the Appellant during the Relief Period. The Minister's decision to issue or not issue reminders or demands to others during that period says nothing about either the Appellant's due diligence or the comparable circumstances the Appellant found itself in.

[22] To the extent that the purpose of this undertaking is to understand the CRA's view of the conditions during the Relief Period, it is still irrelevant. As set out above, those conditions were what they were. The CRA's decision to either issue reminders and demands despite the conditions or to hold off issuing them because of the conditions does not change the conditions.

[23] On the basis of all of the foregoing, I will not order the Respondent to respond to the second undertaking.

Alternatives

[24] I can appreciate that the Appellant may be concerned about the difficulty of having to prove what the comparable circumstances faced by other taxpayers were in the Relief Period. I would personally be willing to take judicial notice that, during the Relief Period, the disruption caused by the onset of the pandemic would have made it considerably harder for taxpayers to prepare and file tax returns. I would also be prepared to take judicial notice that, during that period, the government warned the elderly to be particularly cautious about interactions with others, that a vaccine was not yet available and that, particularly during the first three or four months of the Relief Period, conducting one's affairs through online portals such as

Zoom was a practice that was still in its infancy. I think it would be unreasonable to expect a taxpayer to prove such commonly understood facts.

[25] I understand that the Appellant may be reluctant to simply rely on the trial judge in its appeal being prepared to take similar judicial notice. As I suggested to the parties, if the Appellant is concerned about relying on judicial notice, it may consider using a request to admit to obtain the facts that it feels it needs to rely upon to prove to the conditions faced by other taxpayers in the Relief Period. It seems unlikely to me that the Respondent would be unwilling to make reasonable admissions.

Conclusion

[26] Based on all of the foregoing, the Appellant's motion is dismissed. Costs shall be in the cause.

Signed this 14th day of July 2025.

“David E. Graham”

Graham J.

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APPEARANCES:

Counsel for the Appellant: David McCormick
Alastair G. Campbell

Counsel for the Respondent: Eric Brown
Nicolas Sigouin

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