

Federal Court



Cour fédérale

Date: 20151030

Docket: T-1018-15

Citation: 2015 FC 1234

Ottawa, Ontario, October 30, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

**AMDOCS CANADIAN MANAGED SERVICES
INC.**

Respondent

ORDER AND REASONS

I. INTRODUCTION

[1] This is an application made pursuant to s 231.7 of the *Income Tax Act*, RSC 1985, c 1 [ITA] for an order requiring the Respondent, Amdocs Canadian Managed Services Inc [ACMS], to provide the Applicant, or her officers, any access, assistance, information and documents sought pursuant to s 231.1 of the ITA.

II. BACKGROUND

[2] ACMS is incorporated under the *Canada Business Corporations Act*, RSC, 1985, c C-44, and is a member of the Amdocs Group of companies, which provides software and related services to over 250 communication, media and entertainment services providers in over 80 countries. ACMS provides IT services to telecommunication companies, which include recording revenue, billing and tracking, the integration of software platforms and the updating of software.

[3] ACMS is under audit for its 2011 and 2012 taxation years. The audit commenced in November 2013, and is being conducted by the Canada Revenue Agency [CRA] in order to determine if ACMS has complied with its duties and obligations under the *ITA*, and has properly reported its income from all sources and properly claimed amounts as deductions.

[4] The CRA is attempting to carry out three audits: a transfer pricing audit [TPA]; a domestic audit [Domestic Audit]; and a foreign accrual property income [FAPI] audit.

A. *Transfer Pricing Audit*

[5] The period for issuing a notice of reassessment to ACMS for the 2011 taxation year, with respect to the TPA audit, expires in March 2016. The period for issuing a notice of reassessment for the 2012 taxation year expires in March 2017.

[6] The TPA is being conducted in order to determine if ACMS carried out its cross-border transactions, involving non-resident corporations, in accordance with the arm's length principle. In the event that the transactions did not occur at an arm's length price, ACMS may be subject to certain penalties, a transfer pricing adjustment, as well as a corresponding assessment of tax.

[7] In March 2014, the CRA issued sixteen queries to obtain documents with respect to the TPA. As of the date of this application, ACMS has not provided a satisfactory response to three of the queries (IM1-2, IM1-10 and IM1-12), offering several explanations, including that the information is not available, the CRA is not entitled to it, or that ACMS will not be providing it.

[8] Query IM1-2 requested a detailed functional chart for each of the Amdocs Group entities involved in intercompany transactions with ACMS.

[9] Query IM1-10 asked for financial statements and detailed working papers containing the details of cost pools and all entities the cost was allocated to, from Amdocs Management Limited.

[10] Query IM1-12 required detailed financial statements for Amdocs Inc and detailed working papers to support back office charges.

B. *Domestic Audit*

[11] Six queries related to the Domestic Audit were issued on January 26, 2015, March 4, 2015 and April 16, 2015. These have been fulfilled by ACMS to the satisfaction of the Applicant and are no longer at issue in this matter.

C. *FAPI Audit*

[12] Three queries related to the FAPI audit were issued by the CRA on July 18, 2014. These have been fulfilled by ACMS to the satisfaction of the Applicant and are no longer at issue in this matter.

III. ISSUE

[13] The Applicant has raised only one issue in this proceeding: whether the Minister is entitled, under s 231.7 of the *ITA*, to compel ACMS to provide responses to the outstanding queries – IM1-2, IM1-10 and IM1-12 – and provide the books, records and documents sought.

IV. STATUTORY PROVISIONS

[14] The following provisions of the *ITA* are applicable in this proceeding:

Inspections

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

Enquêtes

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux enseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

[...]

[...]

Compliance order

Ordonnance

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

(b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

V. ARGUMENTS

A. *Applicant*

(1) Subsection 231.7(1) Requirements

[15] The Applicant submits that the three conditions under s 231.7(1) of the *ITA* have been satisfied, and it is therefore appropriate for the Court to order ACMS to provide responses to the outstanding queries by providing the requested books, records and documents.

[16] First, ACMS is a person required under s 231.1(1) of the *ITA* to provide access, assistance, information or documents. The queries were issued to ACMS during 2014 and 2015 by the CRA for the purposes of s 231.1(1), in connection with an audit of ACMS' 2011 and 2012 taxation years (more specifically, with respect to the TPA).

[17] Second, ACMS has failed to comply with the Minister's request for books, records and documents. ACMS has had from March 2014 to comply and respond to the queries, which is a reasonable period of time. It is not up to ACMS to determine whether an audit is needed; that discretion lies with the Minister.

[18] Third, the information and documents are not protected by solicitor-client privilege.

[19] As a result, the Applicant requests relief by way of an order pursuant to s 231.7 of the *ITA* that ACMS provide Mr. Morris Zambon, or another authorized CRA officer, with the books,

records and documents requested under s 231.1(1)(a) within fourteen days of the Court's order; an order that the Minister is authorized to effect service of the order on ACMS by personal service as per Rule 130 of the *Federal Courts Rules*, SOR/98-106; costs of the application and any further relief that the Court deems appropriate.

(2) Outstanding Matters of Compliance

[20] ACMS provided responses to the outstanding queries on two separate occasions in July and August, 2015. The Applicant has conceded that these replies provided sufficient compliance with the queries issues as part of the Domestic Audit and the FAPI audit.

[21] The Applicant continues to contend, however, that there has not been sufficient compliance with respect to the queries issued as part of the TPA.

[22] CRA Officer Morris Zambon has indicated by affidavit that the following queries remain outstanding as of August 27, 2015, and continue to be pursued in this application:

- IM1-2, which requests a functional organization chart for the Amdocs Group and to which ACMS has not provided the requested documents;
- IM1-10, which requests Amdocs Management Ltd's working papers, to which ACMS has provided incomplete and only summary information, without the detailed working papers and back-up documents;
- IM1-12, which requests Amdocs Inc's working papers and to which ACMS has not provided the requested documents.

[23] IM1-2 requests a functional organization chart for each relevant organization within the Amdocs Group, which should include the names and titles of senior employees, their

departments and a description of their duties. The chart provided by ACMS to date does not provide the required information. ACMS has been informed of this deficiency by way of letter dated August 27, 2015.

[24] As regards IM1-10, ACMS has provided only summary information and not the requested detailed working papers, back-up documents and other supporting information. The response remains, therefore, incomplete.

[25] In regards to IM1-12, ACMS has not provided the detailed working papers to support the back office charges that were allocated to ACMS which are required by the Applicant.

[26] The CRA has indicated that it plans to reassess ACMS for its 2011 and 2012 taxation years, based on the information available to it, on or before the relevant statute-barred dates. This is not the CRA's ideal course of action, as it prefers to reassess taxpayers on the basis of complete information and documents, but it will do so in order to protect its assessing positions.

B. *ACMS*

[27] ACMS says that it has exerted significant effort and complied with all requests for information that are the subject of this application. While the documents requested were not within ACMS' possession, power or control, it nevertheless took all reasonable steps to obtain the information and provide it to the CRA.

(1) Subsection 231.7(1) Requirements

[28] ACMS submits that in regards to the conditions that must be met before the Court can order ACMS to provide the requested books, records and documents under s 231.1, the test set out at s 231.7(1)(b) is relevant. ACMS says it has provided the information sought by the Minister. As a result, the test, which the jurisprudence indicates must be “clearly met,” has not been fulfilled for the issuance of an order under s 237.1: *Canada (Minister of National Revenue) v Chamandy*, 2014 FC 354 at paras 35 and 41 [*Chamandy*]; *Canada (Minister of National Revenue) v Lee*, 2015 FC 634 at para 25 [*Lee*].

[29] ACMS says that the documents provided to the CRA are sufficiently detailed and fully compliant with the arm’s length standard. Specifically, as identified in the affidavits of Michael Buchheit, the information that has been submitted to the CRA relating to the queries that the Applicant considers to be outstanding includes the following:

IM1-2

- A functional organization chart of the Amdocs Group involved in transactions with ACMS, prepared by Amdocs Management Ltd that provides the names and positions of senior management in the Amdocs Group of entities relevant to ACMS, and the functions of each department, sent by email on August 5, 2015;
- A revised functional organization chart, prepared by Amdocs Management Ltd in response to the CRA’s request for a more specific chart, identifying the names and titles of all principal employees of the legal entities in the Amdocs Group, involved in intercompany transactions with ACMS, sent on August 26, 2015. Also included was an explanation that two of the requested entities were not included as one is not a separate legal entity (Amdocs Development, Guernsey) and one has had very minor dealings with ACMS (Amdocs UK Ltd);

IM1-10

- Documents, requested from Amdocs Management Ltd, which contained a detailed analysis of the management fees charged by Amdocs Management Ltd and the method of inter-corporate allocations of these expenses among the entities of the Amdocs Group, sent by email on July 17, 2015;
- An explanation of the content of these documents was provided during a telephone conference on July 31, 2015;

IM1-12

- Documents, provided upon request by Amdocs Inc., including detailed working papers to support back office charges made to ACMS, sent by email on July 24, 2015;
- Financial statements for Amdocs Inc.'s September 30, 2012 taxation year, sent by email August 27, 2015. Financial statements have therefore been provided for taxation years ended September 30, 2010, September 30, 2011 and September 30, 2012.

[30] ACMS submits that the Applicant has not met its burden to prove that ACMS has not already provided the requested documents.

[31] In the alternative, ACMS submits that what has been provided to the CRA to date is sufficient for it to complete its assessment and that the Court ought not to exercise its discretion to issue the compliance order.

[32] ACMS says that if the CRA requires clarification of the above documents, it may make further inquiries, but argues that no basis exists for this Court to make a s 231.7 order requiring the production of further documents. ACMS argues that it is not reasonable for the Applicant to seek a compliance order against ACMS when it has not provided ACMS with information that the CRA has acknowledged is required in order for ACMS to comply with the queries.

(2) ACMS ought not to be ordered to comply when it cannot possibly do so

[33] ACMS submits that it is unable to provide any additional documents and information in response to queries IM1-2, IM1-10 and IM1-12. These queries seek documents that, if they exist, are located outside Canada. ACMS states that neither s 231.1 nor s 231.7 impose on a taxpayer the obligation to obtain documents that are not in a taxpayer's possession, power or control, and does not require a Canadian resident taxpayer to obtain documents from a non-resident corporation or foreign entity that it does not control.

[34] Subsection 231.1 (1)(d) requires a taxpayer to provide "all reasonable assistance" in relation to the enforcement of s 231.1. However, s 231.5(2) provides that, in part, every person shall, unless unable, do everything the person is required to do under s 231. An exception is explicitly provided for what a taxpayer is unable to do.

[35] ACMS submits that the situation at hand is not unlike that addressed by the Federal Court in *Canada (National Revenue) v Dropsy*, 2009 FC 820 [*Dropsy*], wherein Mr. Dropsy was found not guilty of contempt of court for failing to produce materials requested by the CRA as they were not in his possession or control, but he had done everything possible to obtain them. While *Dropsy* addressed a show cause hearing after the issuance of a compliance order, it is submitted that it is appropriate in this application to not make the order requested as the effect will place ACMS in the same position as Mr. Dropsy. Like Mr. Dropsy, ACMS argues that it is "faced involuntarily with the impossibility to comply with an order issued by this Court": *Dropsy*, above, at para 29.

[36] In the event that the Court is satisfied that the Applicant has “clearly met” its burden to prove that ACMS was required under s 231.1 to provide the documents sought by the Applicant, then ACMS submits that the Court ought to exercise its discretion not to issue the order.

[37] ACMS says that it has made diligent efforts to obtain the information requested by the CRA, and has produced what has been provided by affiliated non-resident entities. It cannot be made to produce that which is not under its possession, power or control, as per s 231.1 of the *ITA*. Furthermore, it cannot be compelled to create new documents that are not already in existence.

(3) Costs

[38] ACMS submits that Mr. Buchheit received an email on July 31, 2015 from Julia Huang of the CRA, who indicated that the CRA was to confer with Mr. Buchheit on August 4, 2015 with respect to transfer pricing. Ms. Huang indicated that she was unable to talk on August 4th, but would be working toward issuing a detailed query in the coming week to enable ACMS to comply with the CRA’s request. ACMS submits that it has not received any such further query.

[39] ACMS submits that the application should be dismissed. In terms of costs, ACMS requests an order awarding it fixed costs of \$5,000.00. ACMS’ counsel advised that ACMS was awaiting a clarification query from the CRA that the CRA had indicated was required to enable ACMS to respond to the queries. Counsel for ACMS proposed that this hearing be deferred until ACMS had been given fair opportunity to consider and respond to the forthcoming clarification query. Prematurely proceeding with this application has caused ACMS to incur unnecessary

costs, and it is argued that the Applicant ought to suffer consequences in the nature of costs as a result.

(4) Additional Production

[40] In the event that the Court allows the application, ACMS submits that it should be provided thirty days to comply with the order to provide any outstanding documents or information.

VI. ANALYSIS

A. *General Situation*

[41] As of the date of hearing this application the outstanding queries of concern between the parties are as follows:

- a) Query IM1-2 issued March 24, 2014 – Functional Organization Chart;
- b) Query IM1-12 issued March 24, 2014 – Amdocs Inc’s Financial Statements and Working Papers; and
- c) Query IM1-10 issued March 24, 2014 - Amdocs Management Ltd’s Financial Statements and Working Papers.

[42] All three outstanding queries are related to the TPA whose purpose is to determine whether ACMS has carried out its trans-border transactions involving related non-resident corporations in accordance with the arm’s length principle during 2011 and 2012.

B. *The Impasse*

[43] Since the queries were issued, considerable discussion has taken place between the parties and ACMS has (sometime slowly and sometimes reluctantly) made attempts to comply, but there remain outstanding areas that need to be dealt with under this application.

C. *IMI-2*

[44] The CRA is still seeking a detailed functional organization chart for each of the Amdocs Group corporations that are involved in intercompany transactions with ACMS.

[45] ACMS has taken the position that it does not have ownership, possession or control of a functional organization chart of the Amdocs Group of corporations that are involved in intercompany transactions with ACMS. However, ACMS requested of Amdocs Ltd that it provide such a chart and, on August 5, 2015, ACMS provided the chart it has been able to obtain to the relevant officers at the CRA. ACMS says that this chart, of which a revised version was sent on August 26, 2015, is sufficient to allow the CRA to begin its TPA because it includes the names and positions of senior managers in the Amdocs Group of those entities that are relevant to ACMS, as well as the functions of the departments involved.

[46] The CRA says that the chart provided by ACMS is not properly responsive because the CRA requires a chart for each relevant company within the Amdocs Group which will show, for each company, the President, CEO, each of the departments and what they do, and the names of senior employees. Bearing in mind the purpose of the TPA – to discover whether amounts

charged to ACMS are reasonable and at arm's length – the Applicant says that the chart provided by ACMS does not allow the CRA to undertake the relevant inquiries and begin its analysis.

[47] In his Supplemental Affidavit of August 28, 2015, Mr. Buchheit (the Tax Director of Amdocs Inc) explains the situation from the perspective of ACMS:

IM1-2

10. With respect to Query IM1-2, by letter dated August 7, 2015 from Frank Chan/Julia Huang, the CRA requested a complete functional organizational chart for each company in the Amdocs Group involved in intercompany transactions with ACMS.

11. The Chan/Huang Letter identified the following eight entities (collectively, the “Amdocs Group”) as having cross-border transactions with ACMS:

Amdocs Software Systems Ltd., of Ireland

Amdocs Development Limited, of Cyprus

Amdocs Inc., of USA

Amdocs UK Ltd., of UK

Canadian Directory Technology Ltd., of USA

Amdocs (Brazil) LTDA, of Brazil

Amdocs Champaign Inc., of USA

Amdocs Development, Guernsey

12. I am advised by Amdocs Inc. that a functional organization chart of the type required by the CRA does not exist.

13. ACMS also does not have such a chart in its power, possession, or control.

14. However, in an effort to satisfy the request by the CRA, Amdocs Management Ltd. created the functional organization attached hereto as **Exhibit “A”**.

15. I understand and believe that the CRA is requesting a functional organization chart for the purposes of conducting interviews with Amdocs Group employees in the course of its audit. I believe that the information provided in Exhibit "A" provides the information required by the CRA to commence a meaningful interview process with the Amdocs Group as the functional organization chart contains the names and titles of all the principal employees of the legal entities within the Amdocs Group who were involved in intercompany transactions with ACMS during the relevant taxation years. In particular, Exhibit "A" identifies the names and titles of the principal employees of each of the entities described above except Amdocs Development, Guernsey and Amdocs UK Ltd.

16. On Wednesday, August 26, 2015, at 11:26 am, I emailed to Mr. Zambon the functional organization chart attached hereto as **Exhibit "A"**.

17. On August 27, 2015, Frank Chan and Julia Huang at the CRA sent me a letter indicating that the functional organization chart that I sent to Mr. Zambon was deficient. The letter requested a chart that included all departments by function within the entity, the name and title of the person in charge of each department, the name and title of key employees with the department, the number of employees in the department, a description of the functions of the department and a description of the roles and responsibility of the key employees in the department. A copy of the letter sent to me is attached hereto as **Exhibit "B"**.

18. I am advised by Amdocs Limited that a functional organization chart of this description does not exist and, as such, is not in the power, possession or control of ACMS.

19. In addition, it would be virtually impossible to prepare a chart of the description requested. Amdocs Group has an organizational structure that does not always follow a corporate legal structure. Amdocs Group is a matrix organization in which reporting lines can be across entities, depending upon the particular business function. There are no departments such as in a pyramid-like structure in each legal entity. Therefore, any organizational chart would not necessarily follow legal entities.

20. The chart prepared at **Exhibit "A"** was prepared in recognition of the Amdocs Group structure described above. The organizational chart identifies division presidents, vice presidents, directors and heads of business units in the different entities that have executive decision making authority relating to Amdocs

Group Canadian customers. It also identifies the specific individuals involved with specific Canadian accounts (for example, Bell Canada and Rogers). None of the individuals identified in the organization chart are based in Canada. I believe that this organization chart will assist the CRA in identifying the people with information that may be relevant to the taxable years under audit.

21. On Friday, August 28, 2015 at 11:38 am, I sent an email explaining the corporate structure of the Amdocs Group to Mr. Zambon. A copy of the email is attached hereto as **Exhibit "C"**.

22. In addition to the above, two matters require noting. First, as I have explained to Mr. Zambon, Amdocs Development, Guernsey is not a legal entity but part of Amdocs Development Limited, of Cyprus. Second, I understand that information was not provided in respect of Amdocs UK Ltd because it had a charge of only \$1,669 to ACMS in 2011 and \$2,355 in 2012.

[48] The CRA's response to this is that Mr. Buchheit is suggesting that some type of chart is available, even if it is not what the CRA requires, and that it just does not make sense that a large international group of companies can function without an organizational chart that informs everyone of what everyone else is doing and who reports to whom.

[49] There is no reason to question the good faith of Mr. Buchheit in this affidavit. He has not been cross-examined on it. The Applicant is asking the Court to infer from paras 12-13 and paras 17-18 that ACMS can access and provide an existing organizational chart. However, the Applicant has not requested *any* chart that may exist; the Applicant has requested a chart that contains the information set out in the letter of August 27, 2015 by Mr. Frank Chan and Ms. Julia Huang. ACMS has made reasonable efforts to locate such a chart but it does not exist. If the Applicant wants *any* organizational chart that exists, then it should simply ask for it.

[50] What the Applicant is looking for is outlined in detail in the letter of Mr. Chan and Ms.

Huang of the CRA, dated August 27, 2015:

This letter concerns the Canada Revenue Agency's request IM1-2 for "a **detailed** functional organization chart for EACH of the Amdocs group corporations involved in the intercompany transactions with ACMS" and further described in our correspondence dated August 7, 2015 as follow:

ACMS to provide a complete functional organization chart for each company in the Amdocs Group involved in intercompany transactions with ACMS. Note, per the T106s filed, the following companies (number 1 to 7) in the Amdocs Group had cross-border transactions with ACMS. Per the trial balance, the company in number 8 below had transactions with ACMS:

1. Amdocs Software Systems Ltd, of Ireland
2. Amdocs Development Limited, of Cyprus
3. Amdocs Inc., of USA
4. Amdocs UK Ltd. Of UK
5. Canadian Directory Technology Ltd., of USA
6. Amdocs (Brazil) LTDA, of Brazil
7. Amdocs Champaign Inc. of USA
8. Amdocs Development Guernsey

Submitted to-date

We have reviewed the Organization chart submitted on August 26, 2015 which, in a nutshell, is a global organization chart for the Amdocs group of companies, inserted with a description about the operation of the respective entity and the name of a staff in each entity.

CRA comment on the submission:

The above document is deficient in that did not contain information that forms a proper functional organization chart.

CRA's request outstanding

Investopedia defines an Organizational Chart as follow:

A diagram that outlines the internal structure of a company. An organizational chart is the most common visual depiction of how an organization is structured. It outlines the roles, responsibilities and relationships between individuals within an organization.

As such, a **detailed** functional organization chart of each entity should, at the minimum, display all departments by function/s within the entity, the name and title of the person in charge of each department, name and title of key employees within the department, the number of employees in the department, a description of the function/s of the department and a description of the roles and responsibility of the key employees in the department.

[emphasis in original]

[51] Mr. Buchheit tells us that “a functional organization chart of this description does not exist and, as such, is not in the power, possession or control of ACMS.”

[52] It would seem from the evidence before me that the CRA has requested something quite specific that ACMS cannot provide. The CRA says that the Amdocs Group must have some kind of organization chart, otherwise it would not be able to function. However, as I understand the request as outlined in the letter of Mr. Chan and Ms. Huang cited above, the CRA is not requesting *any* organization chart that might be available; it has requested an organization chart compiled in a particular way and containing specific information. This is what ACMS says cannot be provided because it doesn't exist.

[53] It is not clear whether the CRA is also requesting that ACMS *create* a chart in the required form if one does not already exist. However, if the CRA is requesting the creation of such a chart, it has not made that clear in this application or provided the grounds or authority that would allow the Court to order that such a chart be created. As noted above, I have no reasons to doubt Mr. Buchheit when he says that such a chart does not exist. He was not cross-

examined on his affidavit to find out why it does not exist and whether there is any other organizational chart in existence that could be provided.

D. *IMI-12*

[54] A similar issue arises with regard to Query IM1-12, although the scope is much narrower. It appears from the record that ACMS has now provided the financial statements for Amdocs Inc's taxation years ending September 30, 2010, September 30, 2011 and September 30, 2012, as well as some information relating to back office costs. This leaves the request for additional working papers to support the back office charges that were allocated to ACMS.

[55] In his Supplemental Affidavit of August 28, 2015, Mr. Buchheit addresses this issue as follows:

33. ACMS does not have working papers relating to the back office charges allocated to ACMS in its possession, power or control. However, the working papers that have been provided to the CRA identify the services being provided by Amdocs Inc, and the percentage of the staff's time being spent on ACMS activities. The percentage of time was then multiplied by the payroll, benefits, and facility cost.

[56] The information that has been provided comes from Amdocs Inc and it reads as follows:

You have requested that we provide details as to fees which we had charged you for back office services during the period between April 2010 to March 2012. Accordingly, we would like to clarify as follows:

1. The undersigned, Amdocs Inc, a US based company, provided back office administrative services for Amdocs Canadian Managed services Inc. ("ACMS") to support the activities of ACMS ("Services").

2. The Services were required and essential for the ongoing business activities of ACMS. The Services were provided by Amdocs Inc directly.

3. As detailed in the Agreement, since ACMS does not employ back office personnel, the services provided consist of back office and administrative services including accounting, accounts payable, payroll, treasury, tax, travel, immigration, purchasing, real estates, facilities, IT, and HR services. These services represent the basic services required for ACMS to function administratively. These services do not include the type of management and higher level services provided by Amdocs Management Ltd. Amdocs Inc, and the rest of the US group companies also consume the higher value services of Amdocs Management Ltd.

4. As consideration for the performance of the Services, we have charged ACMS the cost being incurred to perform the services.

5. The apportionment of the cost was based on allocating the amount of time the various administrative personnel spend on ACMS activities. The percentages were determined by asking managers to complete a time allocation of their employees regular activities. The result was then used to allocate the appropriate cost. See the attached Annex A for the resulting time allocation.

The charge is then calculated by accumulating the individuals annual compensation amounts with the benefits and facilities cost for the various employees. This step is performed by the payroll group, which then provides the totals for charge. See Annex B.

[errors in original]

[57] The CRA complains that this information is deficient in that it explains the allocation of back office costs, but not how they are calculated. Annex A and Annex B to the July 22, 2015 letter show that the total cost for back office charges before allocation is \$7,565,619.87 of which \$1,583,686.34 is allocated to ACMS for a monthly charge of \$130,000.00. However, there is nothing in this information to show what the actual services are and how much is allocated for each service. As a consequence, it is not possible to review the back office charges for arm's length purposes.

[58] Mr. Buchheit is clear, and I have no reason to doubt him, that “ACMS does not have working papers relating to back office charges in its possession, power or control.” It also seems to me that ACMS has made reasonable efforts to obtain what it can to address this aspect of IM1-12.

E. *IM1-10*

[59] A similar problem arises in relation to Query IM1-10. In this case, we are dealing with the management fees charged by Amdocs Management Ltd to ACMS. The approach used is set out in a letter of July 10, 2015 from Amdocs Management Ltd:

Re: Details as per Charges for Services Pursuant to an Agreement dated July 2, 2003 (the “Agreement”)

You have requested that we provide details as to fees which we had charged you for various services rendered during the period between April 2010 and March 2012 (the “**Term**”). Accordingly, we would like to clarify as follows:

1. The undersigned, Amdocs Management Limited (“**AML**”) is a UK based company which operates through its UK headquarters as well as through a branch located in Israel.
2. During the Term, AML provided various professional services to Amdocs Canadian Managed Services Inc. (“**ACMS**”), to support the activities of ACMS (“**Services**”).
3. The Services were required and essential for the ongoing business activities of ACMS. The Services were provided by AML directly and/or through contractors engaged by AML as required for the provision of the Services. Furthermore, AML maintained senior management, sales and marketing leadership, corporate finance, business development, legal and administrative staff in the U.K. and Israel throughout the Term, to provide the Services to various Amdocs Group affiliates, including ACMS.
4. As detailed in the Agreement, the Services consist mainly of the following:

- a. *Finance services* - Assistance with complex accounting and finance issues including revenue recognition, financial policies, and financial reporting issues.
- b. *Human resources services* - Assistance with the formation of HR policies, compensation benchmarks, employee recruitment and employee benefit assistance.
- c. *Marketing and Business Development services*- development of group-level, as well as localized, business strategies and preparation of marketing plans and materials for use in the local market.
- d. *Legal services* - Assistance with various legal issues including preparation and negotiation of customer and vendor contracts.
- e. *Mergers & Acquisitions related services* - overall assistance with respect to mergers, acquisitions and restructuring.
- f. *Tax Support services* - Planning and consulting services with respect to taxation.

5. As consideration for the performance of the Services we have charged ACMS, as well as all other relevant Amdocs group companies utilizing the Services a fee generally calculated as reimbursement of AML's operating expenses plus a mark-up of 7.5% (cost + 7.5%). It should be noted that third party services charged to us have been on-charged to group companies at cost, i.e. with no mark-up, therefore, the actual mark-up on our noted costs is effectively less than 7.5%. Furthermore, our charges have not covered all of our operating expenses (for example, expenses relating to equity based compensation have not been included in the cost base). [emphasis in original]

6. Considering that AML provides similar services to other affiliates in the Amdocs Group of companies, AML allocates its costs to the various group companies as detailed hereunder, such that each group company acquiring services is only apportioned its pro-rata portion of the costs.

7. Apportionment of the costs has been effected based on the application of a separate and appropriate allocation key to each group, or "pool" of costs, depending upon the nature of the cost.

8. During the Term, the respective allocation keys are calculated annually based on the Amdocs Group (year-end September 30th)

results and the respective financial factors affecting the specific pool of costs. Once the relevant financial factors are identified, the pro-rata portion attributed to ACMS (and each of the other group companies) is calculated by dividing the financial factors at the ACMS stand-alone level by the overall financial factors of the Amdocs Group as a whole.

Attached as **Annex A** is an explanation of the mechanism of allocation.

Please note that there are several factors used in the calculations which should be taken into account when reconciling the charges with amounts recorded on ACMS's statutory financial statements, notably:

a. The fiscal year end of Amdocs Limited (the group parent company) as well as that of AML, is September 30, whereas the fiscal year end of ACMS is March 31.

b. Amdocs Limited prepares its financial statements in accordance with US GAAP. In order to place all group companies on equal grounds (so as to compare "apples to apples"), the allocation keys are applied on the basis of the separate entity's financial statements as adjusted for US GAAP, i.e. the "reporting packages" used for consolidation purposes, rather than the local statutory financial statements.

c. The functional currency of Amdocs Limited, as well as of that of AML, is the US Dollar. Such currency is used for consolidation purposes and is also the billing currency for the charges made by AML to ACMS and other group affiliates. On the other hand, ACMS's local statutory reporting is based on its local currency (CAD).

9. At your request, we have summarized in **Annex B** the respective charges made to ACMS and the total charges made by AML to all other Amdocs Group entities during the Term.

Please note that invoices are issued on a monthly basis based on true up for prior months. Accordingly, there are timing differences when looking at a specific invoiced period.

[60] Mr. Buchheit's final word on this situation in his Supplemental Affidavit of August 28,

2015 is as follows:

23. With respect to Query IM1-10, as set out in paragraphs 15-17 to the First Affidavit, by email dated July 17, 2015, I provided Mr. Zambon with the documents attached as Exhibit "D" to my First Affidavit in response to this Query.

24. As described in paragraph 17 of my First Affidavit, on July 31, 2015, I participated in a telephone conference with Mr. Zambon in which I explained that Exhibit "D" contained a detailed analysis of the management fees charged by Amdocs Management Limited and the method of allocation of these expenses among the members of the Amdocs Group.

25. ACMS does not have in its possession, power or control any other working papers, back-up documents or other information related to the management fees charged by Amdocs Management Limited.

26. I am advised by Amdocs Management Limited that, other than the working papers already provided, and working papers that provide only the breakdown of management fees between other Amdocs group entities acquiring services from Amdocs Management Limited, no other working papers exist relating to the management fees charged to it by Amdocs Management Limited to the Amdocs Group.

27. I am advised that Amdocs Management Limited's management fees are based on a "cost-plus" arrangement in which its expenses as shown on its financial statements (less that cost of equity-based compensation) are allocated to the other members of the Amdocs Group.

28. I believe that the complete basis of the allocation has been provided in Exhibit "D" to my First Affidavit.

29. Finally, I believe that the documents provided by ACMS to the CRA are sufficiently detailed and fully support compliance with the arm's length standard.

[61] The CRA's complaint is that the information provided, including the data from the spreadsheets that are attached to the Amdocs Management Ltd letter of July 10, 2015, does not reveal what goes into the sums that ACMS is paying. All that we have is summary documentation without the working papers, back-up documents and any other information

required to ascertain whether the amounts being charged and paid are proper expenses, or whether ACMS is just paying what it is told to pay without any verification.

[62] In any event, we know from Mr. Buchheit that ACMS does not have in its possession, power or control any further documentation in the form of other working papers, back-up documents or other information related to management fees charged by Amdocs Management Ltd to ACMS, and that Amdocs Management Ltd has also advised that it has nothing else to produce beyond what has already been provided to deal with this issue. There is no reason to doubt Mr. Buchheit and no reason to believe that ACMS has not made reasonable efforts to obtain the information requested in IM1-10.

F. *The Law*

[63] This is a summary application pursuant to s 231.7 of the *ITA* requesting an order that ACMS provide the documentation requested by the Minister pursuant to s 231.1 of the *ITA*.

[64] As Justice MacTavish recently pointed out in *Chamandy*, above, there are three (3) conditions that need to be satisfied by the Minister before this Court will exercise its discretion to grant a compliance order under s 231.7 of the *ITA*:

[27] First, the Court must be satisfied that the person against whom the order is sought “was required under section 231.1 or 231.2 to provide the access, assistance, information or document” sought by the Minister: paragraph 231.7(1)(a).

[28] Second, the Court must be satisfied that although the person was required to provide the information or documents sought by the Minister, he or she did not do so: paragraph 231.7(1)(a).

[29] Finally, the Court must be satisfied that the information or document sought “is not protected from disclosure by solicitor-client privilege” (as defined in the Act): paragraph 231.7(1)(b).

...

[35] There are potentially serious consequences that can flow from the failure to obey a compliance order, including fines and/or imprisonment. In light of this, the Court indicated *in SML Operations* that it would not exercise its discretion to order the production of the documents sought by the Minister unless it was satisfied that the statutory conditions of section 231.7 of the *ITA* had been “clearly met”: at para. 15.

See also *Lee*, above at paras 24-25.

[65] It is clear on the record before me that the documentation requested is not protected by privilege.

G. *Did ACMS Provide the Documentation Sought By the Minister?*

[66] ACMS argues that the Minister has failed to “clearly meet” her burden to show that ACMS has not already provided the documents requested by the Minister or, in the alternative, that the documents provided to date are sufficient to allow the CRA to complete the TPA.

[67] In effect, ACMS is asking the Court to decide that the Minister already has what is required to complete the TPA. However, as the Minister indicates, and as Justice Campbell recently pointed out in *Canada (National Revenue) v BP Canada Energy Company*, 2015 FC 714 at para 23, it is for the Minister to determine both the scope of the audit and the

documentation required to complete the audit. It is not for ACMS to determine what the Minister needs to conduct an audit.

[68] In *Saipem Luxembourg SA v Canada (Customs and Revenue Agency)*, 2005 FCA 218, at paras 33-36, the Federal Court of Appeal makes the following clear:

[33] The Agency justifies the breadth of the notice of requirement on the basis that it requires production of all of Saipem's documents in order to conduct an audit for the purpose of verifying information submitted by Saipem. This position is well summarized at paragraph 29 of the Agency's Memorandum of Fact and Law:

In the present case the Minister seeks information in order to carry out a general audit of the Appellant's affairs for 1999 and 2000 with a view to determining its Canadian tax liability, if any. As stated in *McKinlay*, one of the purposes of an audit is to verify information. The fact that information has been provided by the taxpayer or is possibly available from another source is irrelevant. It is the CCRA's interest in verifying the Appellant's tax liability that compels the production of the Appellant's books and records. All of the Appellant's books and records are relevant to an audit even if some of them only serve to verify, after being examined, that they have no impact on its Canadian tax liability.

[34] The issue before the reviewing Court is not the reasonableness of the Agency's intention to conduct an audit, but the reasonableness of the notice of requirement in light of the Agency's determination that an audit is required. Saipem's argument that the Agency could have obtained the documents it seeks by issuing a notice of requirement with respect to specific classes of documents seeks to question the reasonableness of conducting an audit. In the absence of some evidence of bad faith or other improper motive, the appropriateness of an audit is outside the mandate of the Court under subsection 231.6(5).

[35] The question therefore is whether the Agency's intention to conduct an audit of Saipem supports the need for a notice of requirement in respect of the whole of Saipem's corporate records.

A “somewhat probing examination” leads to an inquiry as to whether one can truly conduct an audit solely on the basis of material provided by the person being audited, without the possibility of verification that no further records exist. In practice, the issue seldom arises as I have no doubt that most businesses confronted with a notice of requirement of the sort in issue here, accept the Agency’s offer to treat their consent to an on-site audit as sufficient compliance with the notice of requirement. But the reasonableness of the notice of requirement is to be assessed according to its terms, not according to some alternate method of compliance.

[36] It is the Agency’s prerogative as to whether it will conduct an audit, and what form that audit will take. Given that the records in question are, by definition, maintained outside Canada, the Agency can do little more to gain access to the records than issue the notice of requirement which it issued here. If the result is an audit which does not meet the Agency’s usual standards, it is nonetheless the best audit the Agency can conduct in the circumstances. As a result, I conclude that the Agency’s determination to conduct an audit supports the scope of the notice of requirement served upon Saipem by the Minister.

[69] Further, the Supreme Court of Canada makes clear, by affirming two Exchequer Court decisions, *Provincial Paper, Limited v Minister of National Revenue*, [1955] Ex CR 33, [1954] CTC 367 and *Western Leaseholds Limited v Minister of National Revenue*, [1958] Ex CR 277, [1958] CTC 257, in *Western Minerals Ltd v Minister of National Revenue*, [1962] SCR 592 at p 596 that:

The conclusions reached in the first of those two cases and applied in the second are accurately stated in the head-note as follows:

Held: That it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide.

2. That there is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for

the Minister to decide how he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation he should make, if any, is for him to decide.

3. That the Minister may properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

I am in agreement with these propositions.

[70] On the record before me, the Minister may have asked for additional details as the discussions and exchanges with ACMS progressed, but this is entirely within the Minister's prerogative and is consistent with the case law cited above. Any audit remains a work in progress until it is completed and the Minister is entitled to request further documentation from time to time. In addition, as already discussed above and as set out in the affidavits of CRA Officer Morris Zambon, the Large File Case Manager with the Income Tax Audit Division involved in this case, the information provided does not allow the CRA to satisfy itself on the arm's length issues that are the focus of the TPA. Consequently, I am of the view that the Minister has established that ACMS has not provided the documentation sought by the Minister and has not fully complied with IM1-2, IM1-10 or IM1-12.

H. *Is ACMS Required Under s 231.1 to Provide the Documents Sought by the Minister?*

[71] In my view, this is the only real issue before me in this case. As I discussed above, the parties have been working towards full production but have reached an impasse because ACMS does not have the documents requested and has been unable to secure them from other entities within the Amdocs Group. The documentation in question may exist, but there is no evidence that it does. Hence, this case raises the issue of what ACMS is legally obliged to do in this situation.

[72] First of all, I have no reason to doubt Mr. Buchheit's evidence that:

- a) As regards IM1-2 and the functional organization chart that "ACMS does not have such a chart in its power, possession and control" and that he has been "advised by Amdocs Inc. that such a functional organization chart of the type required by the CRA does not exist";
- b) As regards IM1-10 that "ACMS does not have in its possession, power or control any other papers, back-up documents or other information related to the management fees charged by Amdocs Management Ltd" and that he has been advised by

Amdocs Management Limited that, other than the working papers already provided, and working papers that provide only the breakdown of management fees between other Amdocs group entities acquiring services from Amdocs Management Limited, no other working papers exist relating to the management fees charged to it by Amdocs Management to the Amdocs Group;

- c) As regards IM1-12 that "ACMS does not have working papers relating to the back office charges allocated to ACMS in its possession, power or control."

[73] If the CRA is interested in seeing *any* functional organization chart that may exist for the Amdocs Group, then this should be requested. IM1-2 was a request for a chart that contained particular information, and it would appear that a chart in that specified form, on the evidence before me, does not exist. It would also appear on the evidence before me that the documentation

requested under IM1-10 and IM1-12 does not exist and/or is not available to ACMS. It may be that under s 230(1) of the *ITA* this is documentation that should exist and for which ACMS should have kept adequate records

In such a form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

However, this application has been made in accordance with ss 231.7 and 231.1 of the *ITA*. So the issue for the Court is whether it should exercise its discretion under s 231.7 to order production of documents that are not in the possession, power or control of ACMS and which may not even exist. The Minister has not raised s 231.6 in this application. If the documents sought by the Minister in this case do exist, then they must, on the evidence before me, exist outside of Canada. However, it has not been established that they exist at all, at least in the form sought by the Minister. Should the Minister conclude that the documents could exist outside of Canada, then the Minister is at liberty to invoke s 231.6 of the *ITA*.

[74] Nor has the Minister asked the Court to order ACMS to create documentation that does not exist, even if this were a possible remedy available under s 231.7. The Minister has the power under s 230(3) of the *ITA* to specify what books and records ACMS should keep in order to fulfil its obligations under s 230(1) of the *ITA*, but that is not an issue before me. The Minister is at liberty to exercise this power hereafter.

[75] So the Court is left with a situation where, under s 231.7(1)(d), ACMS was required to provide access to the information sought under s 231.1, but, on the record before me, that information is not in the possession of ACMS and ACMS has no power to acquire it, even if

such information exists elsewhere. The *ITA* does not contemplate the creation of records where they do not exist. That which does not exist cannot be produced. The exception carved out in s 231.5(2) applies here as ACMS is simply unable to do everything required of it under s 231.

[76] Subsection 231.5(2) of the *ITA* compels ACMS to do everything that the person is required to do “under subsection (1) or sections 231.1 to 231.4,” “unless [ACMS] is unable to do so.” I conclude on the evidence before me that ACMS has made reasonable efforts to acquire the documentation at issue, but is unable to provide the balance of the documentation and information requested by the Minister under IM1-2, IM1-10 and IM1-12. For this reason, there is no point in ordering ACMS to do something it cannot do and I decline to exercise my discretion under s 231.7(1) to grant the Minister the relief sought in this application.

ORDER

THIS COURT ORDERS that

1. The Minister's application for a compliance order is dismissed with costs to the Respondent.

"James Russell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1018-15

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v AMDOCS
CANADIAN MANAGED SERVICES INC.

PLACE OF HEARING: TORONTO, ONTARIO

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ORDER AND REASONS: RUSSELL J.

DATED: OCTOBER 30, 2015

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