Docket: 2007-763(GST)G

BETWEEN:

1072174 ONTARIO LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 1, 2008 at Toronto, Ontario.

Before: The Honourable Chief Justice D.G.H. Bowman

Appearances:

Counsel for the Appellant:	Dennis A. Wyslobicky
Counsel for the Respondent:	Gordon Bourgard

ORDER

UPON motion made by counsel for the appellant for an order to strike out paragraphs 25, 26, 28, 29, 30, 31, 33, 34, 35, 36 and 37 of the Reply to the Notice of Appeal pursuant to section 53 or, in the alternative, under paragraph 58(1)(*a*) of the *Tax Court of Canada Rules (General Procedure)*;

IT IS ORDERED that the motion is dismissed. The matter of costs is left to the determination of the trial judge.

Signed at Ottawa, Ontario, this 18th day of April 2008.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2008TCC129
Date: 20080418
Docket: 2007-763(GST)G

BETWEEN:

1072174 ONTARIO LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowman, C.J.

[1] This is a motion for an order striking out certain paragraphs of the Reply to the Notice of Appeal. The first group of impugned paragraphs are the following:

> **B. ISSUE TO BE DECIDED**
>
> 25. He accepts the Appellant's statement of the issues except that the assessment does include export sales.
>
> . . . . .
>
> **D. GROUNDS RELIED ON AND RELIEF SOUGHT**
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> 28. He submits that the Appellant could not prove that it had delivered vehicles to status Indians on a reserve and that Minister correctly reassessed the Appellant for the GST that it should have charged, collected and remitted pursuant to sections 165, 221 and 225 of the Act.
>
> 29. He submits that the Appellant was not relieved from collecting and remitting GST on the supply of vehicles by reason of s. 87 of the *Indian Act* as neither

it nor its agent, Courtesy Auto Haulage, delivered the vehicles to the Six Nations reserve.

30. He submits that claimed vehicle deliveries to a status Indian on a reserve were a sham.

31. He submits that the Appellant could not prove that it had exported vehicles or sold vehicles directly to a person who had exported the vehicle. The claimed export sales were not supplies that were zero-rated under Part V, Schedule VI of the *Excise Tax* and the Appellant was required to collect and remit GST on them.

32. He submits that the Appellant did not export a vehicle (VIN 3VW) or sell the vehicle directly to a person who exported that vehicle. The supply of the vehicle was not zero-rated under Part V, Schedule VI of the *Excise Tax Act* and the Appellant was required to collect and remit GST on it.

33. He submits that the Minister made adjustments in order to establish the correct amounts of GST and ITC's for each of the reporting periods and no posting errors were made.

34. Penalties and interest were properly assessed under s. 280 of the Act. The Appellant has failed to collect and remit amounts owing as required and was not duly diligent in ensuring that the claims that it made were proper.

35. He submits that the Appellant's liability to pay GST is not affected by the error made in the statement of net tax in the notice of reassessment.

. . . . .

37. He requests that the appeal be dismissed with costs.

[2] The grounds for the motion are:

(a) The Applicant has been reassessed for non-collection of GST on the sale of vehicles which the Applicant says were relieved from tax because they were sold and delivered to Indians on a reserve or exported. Since the Respondent pleads in paragraph 24 of the Reply that the 223 said vehicles (see paragraph 26 of the Reply and Schedule B thereto) were never purchased by the Applicant, the Applicant cannot be subject to reassessment for non-collection of GST on their sale – i.e. if there was no purchase, there can be no sale or liability to collect GST.
The paragraphs sought to be struck disclose no issue or grounds for opposing the Appeal with respect to the vehicles, because the Respondent pleads they were never purchased. The Applicant makes this motion under section 53 or, in the alternative,

under s. 58(1)(a) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), as this Honourable Court considers appropriate.

[3] The second group of paragraphs of the Reply which the appellant seeks to have struck out are:

> 26. In the alternative, the issue is whether the Appellant should be denied claimed input tax credits in the calculation of its net tax for the reporting periods at issue on its purchase and sale of 223 vehicles where the transactions were a sham.
>
> . . . . .
>
> 36. In the alternative, he submits that in its calculation of net tax for the period 1997-09-01 to 1998-12-31 the Appellant improperly claimed ITC's on vehicle purchases which must be disallowed because:
>
> a) the transactions were shams;
>
> b) the vehicles were either owned by others or already out of the country no property was available for the Appellant to acquire during a reporting period to include in the calculation of its input tax credits pursuant to subsection 169(1) of the Act;
>
> c) the vehicles were either owned by others or already out of the country any evidence the Appellant provided with respect to the purchase of those vehicles would be insufficient to enable input tax credits to be determined as required by subsection 169(4) of the Act;
>
> d) the inclusion of consideration for vehicles owned by others or already out of the country at the time of the alleged purchase by the Appellant in the calculation of input tax credits would be unreasonable in the circumstances within the meaning of subsection 170(2) of the Act.

[4] The grounds for the motion to strike these paragraphs are as follows:

> (a) The Applicant has been reassessed for non-collection of GST on the sale and export of the said 223 vehicles. Paragraphs 26 and 36 of the Reply raise for the first time the issue (and corresponding grounds and relief) that the Applicant should be denied input tax credits for GST actually paid by the Applicant on its acquisition of the vehicles because the purchases were allegedly fictitious or a sham. If allowed to stand, these paragraphs purport to assess on a completely different basis, involving different issues, transactions and parties than the reassessment which the Applicant appealed. Such an assertion is barred by s. 298(6.1) of the *Excise Tax Act*. The

> Applicant makes this motion under section 53 or, in the alternative, under s. 58(1)(a) of the Rules, as this Honourable Court considers appropriate.

[5] Finally, the appellant asks that, if the paragraphs are struck out, there be a further order striking out the rest of the Reply without leave to amend, and allowing the appeal and vacating the assessment.

[6] The Notice of Appeal asserts that the appellant sold automobiles to Indians on a reserve. Paragraph 6 of the Notice of Appeal reads as follows:

> 6. The automobiles in issue in this appeal (with the exception of one exported vehicle — see below) were sold to various individual Indians, including one Indian who was also a licensed automobile dealer. The automobiles were delivered to purchasers on the Six Nations Reserve near Brantford Ontario (the "Reserve").

This allegation is denied by the respondent.

[7] I shall try to reduce this somewhat complicated motion to manageable proportions. Essentially it is based on what the appellant asserts are internally inconsistent, mutually contradictory and self-eradicating statements in the Reply to the Notice of Appeal. It is true, the pleading in the Reply contains inconsistencies. It is however less clear that such inconsistencies entitle the appellant to have large portions of the Reply struck out and, ultimately, to obtain judgment allowing the appeal.

[8] The appellant alleges in its motion that it claimed that it sold 223 vehicles of which 178 were claimed to have been sold to status Indians and 45 were claimed to have been exported. The appellant in its Notice of Appeal and its motion has taken the position that vehicles were sold and the respondent in its Reply seems to admit that sales were made. Obviously, the assessment of GST is premised on the assumption that vehicles were sold. The assessor appears not to have questioned that sales were made but he or she was, apparently, not satisfied that the vehicles were sold to Indians or that they were delivered to a reserve or that they were exported.

[9] Up to this point the issue seems relatively clear. The appellant says it sold 178 vehicles to Indians and delivered them to a reserve and that it exported another 45 vehicles. Therefore it claims that the sales are exempt from GST or, in the case of exported vehicles, zero-rated. Counsel for the appellant draws a distinction between exported vehicles, which are zero-rated, and vehicles that have always

been located abroad and are sold to non-residents. These, he says, are simply not taxable because they are not caught by the taxing provisions of the *Excise Tax Act*. This distinction is not raised in the Notice of Appeal and is not particularly germane to this motion. Initially, the Crown appears to have accepted that vehicles were sold because it imposed GST, but it refused the exemption on the basis that it was not satisfied with the evidence provided that the vehicles were sold to Indians and delivered to a reserve or that some vehicles had been exported. This raises a clear factual justiciable issue.

[10] From this point onwards things get a little murkier. I do not think it is necessary for the purposes of this motion that I deal with the actual numbers in detail. It is obvious from the Notice of Appeal and Reply that assessment was a complex one involving many transactions and a multiplicity of calculations. Many of the assumptions on which the August 24, 2001 assessment was based were carried forward to the reassessment of November 14, 2006. The basic assumptions on which the August 24, 2001 assessment was based were contained in paragraphs 21(e) and 21(i) of the Reply. They were:

> "the Appellant had no supporting documents for its claimed export sales: …"

and

> "none of the 178 alleged sales to status Indians … could be shown as having been received by a status Indian purchaser on a reserve;"

[11] Paragraph 21 of the Reply then goes on to set out in some detail a number of evidentiary problems that the Minister of National Revenue had, such as faulty documentation, insufficient information, purported sales to Indians where the vehicle had allegedly been exported or were located outside of Canada and a number of other alleged irregularities.

[12] The reassessment of November 24, 2006 repeats the same assumptions and goes on to allege some further assumptions such as the assumption that 97 of the vehicles in question that were alleged to be sold to status Indians were either outside Canada or owned by other persons. It is alleged that some of the alleged transactions were shams.

[13] I set out below the grounds relied upon by the respondent.

D. GROUNDS RELIED ON AND RELIEF SOUGHT

28. He submits that the Appellant could not prove that it had delivered vehicles to status Indians on a reserve and that Minister correctly reassessed the Appellant for the GST that it should have charged, collected and remitted pursuant to sections 165, 221 and 225 of the Act.

29. He submits that the Appellant was not relieved from collecting and remitting GST on the supply of vehicles by reason of s. 87 of the *Indian Act* as neither it nor its agent, Courtesy Auto Haulage, delivered the vehicles to the Six Nations reserve.

30. He submits that claimed vehicle deliveries to a status Indian on a reserve were a sham.

31. He submits that the Appellant could not prove that it had exported vehicles or sold vehicles directly to a person who had exported the vehicle. The claimed export sales were not supplies that were zero-rated under Part V, Schedule VI of the *Excise Tax* and the Appellant was required to collect and remit GST on them.

32. He submits that the Appellant did not export a vehicle (VIN 3VW) or sell the vehicle directly to a person who exported that vehicle. The supply of the vehicle was not zero-rated under Part V, Schedule VI of the *Excise Tax Act* and the Appellant was required to collect and remit GST on it.

33. He submits that the Minister made adjustments in order to establish the correct amounts of GST and ITC's for each of the reporting periods and no posting errors were made.

34. Penalties and interest were properly assessed under s. 280 of the Act. The Appellant has failed to collect and remit amounts owing as required and was not duly diligent in ensuring that the claims that it made were proper.

35. He submits that the Appellant's liability to pay GST is not affected by the error made in the statement of net tax in the notice of reassessment.

36. In the alternative, he submits that in its calculation of net tax for the period 1997-09-01 to 1998-12-31 the Appellant improperly claimed ITC's on vehicle purchases which must be disallowed because:

    a) the transactions were shams;

    b) the vehicles were either owned by others or already out of the country no property was available for the Appellant to acquire during a reporting period to include in the calculation of its input tax credits pursuant to subsection 169(1) of the Act;

c) the vehicles were either owned by others or already out of the country any evidence the Appellant provided with respect to the purchase of those vehicles would be insufficient to enable input tax credits to be determined as required by subsection 169(4) of the Act;

d) the inclusion of consideration for vehicles owned by others or already out of the country at the time of the alleged purchase by the Appellant in the calculation of input tax credits would be unreasonable in the circumstances within the meaning of subsection 170(2) of the Act.

37. He requests that the appeal be dismissed with costs.

[14] What it boils down to is that the Crown appears to be saying to the appellant "Yes, we accepted your allegation that you sold the vehicles. If we had not we would not have assessed you GST. What we do not accept is that the sales were exempt because we are not satisfied you sold the vehicles to Indians on a reserve or that they were zero-rated because you exported them. And, by the way, in respect of the vehicles on which we taxed you, we gave you ITCs. Now, on reflection, we are not so sure you really owned some of the vehicles and so, in the alternative, we think you should not get the ITCs we gave you." To this, the appellant replies "Well, if you do not think we owned the vehicles it follows that we could not have sold them so what makes you think you can tax us on these non-existent transactions?" To this, the Crown's rejoinder is "Well, you said you sold them and you are stuck with that assertion unless you can disprove it. Our argument that perhaps you should not have been given the ITCs was just an alternative and it arises from the seemingly inconsistent and confusing documentation you have put forward. You cannot blame us for a situation that is largely of your own making."

[15] In this imaginary dialogue between the parties I have tried to set out what is the essence of the problem. What it attempts to do is to illustrate in a simple and graphic way the complexity of the issues raised in this litigation.

[16] I agree with Mr. Wyslobicky that there are inconsistencies in the Crown's pleading of assumptions. In one paragraph the respondent says essentially that GST was assessed because sales were made and ITCs were allowed, but that no exemption was allowed because section 87 of the *Indian Act* was not complied with. In another paragraph the Crown pleads that some of the transactions were shams or that some of the vehicles were outside of Canada when they were purportedly sold to Indians on reserves. These are inconsistencies. It is theoretically possible, I suppose, that the assessor or assessors can make

inconsistent assumptions. This may well relieve the appellant of the traditional onus. The Crown can assert facts that are inconsistent with assumptions if it is prepared to accept the onus.

[17] Moreover, Mr. Wyslobicky contends that the Minister cannot, outside the time limit for reassessing, argue that the appellant should not have been allowed the ITCs in the first place. This may be true but it is not something that can be readily dealt with on motion to strike under Rule 53 or Rule 58. It should be dealt with at trial.

[18] There have been many cases in this court and the Federal Court of Appeal about what the respondent can plead in support of an assessment and what she cannot. They are not all readily reconcilable. I do not think that any useful purpose would be served by yet another lengthy analysis of the jurisprudence on practice and procedure in this court. Some of the cases were decided by me, and they have had mixed success in the Federal Court of Appeal. Virtually all of the cases are contained in the appellant's or the respondent's books of authorities. I rely on those authorities that support the view that a court should be reluctant to strike out pleadings except in the clearest and most obvious of cases.

[19] If I follow the rule, as I must, that I can look only at the pleadings and not go beyond them I see confusion on both sides. The Crown alleges facts and assumptions that are inconsistent both with the claims asserted by the appellant and with the assertion of liability for GST and the allowance of ITCs. I do not think it is possible for me at this stage to excise from the confused mishmash of contradictory assertions on both sides just what ought to be deleted and should remain. One thing is certain: it would not be appropriate for me to strike out so much from the Reply that an allowance of the appeal and a vacating of the assessment could automatically follow. I agree that the Reply contains inconsistencies but then the Crown's position itself seems to build on the appellant's alleged inconsistencies. The appellant's attempt to make capital of the Crown's perceived inconsistencies creates a procedural anomaly that can, in my view, best be sorted out by a trial judge who hears all of the evidence. The assessments give rise to a clear justiciable issue: the assertion of sales to Indians on reserves or exports, a resulting claim to be relieved of tax on those transactions and a denial by the Minister of that claim. These are issues that can fairly be put before a trial judge for determination. I do not see how the taxpayer can be relieved of the obligation of proving its case or can have the assessment vacated just because the Minister has come up with some new ideas in the Reply that may be inconsistent with the basis on which the assessment was made. Whether the inconsistency

changes where the onus of proof lies or whether the assertion that some transactions were shams amounts to an attempt to raise a new assessment is not something that can be dealt with in a motion to strike. It requires a trial. I do not think that a motion to strike is the way to resolve these problems.

[20] Let us be clear on one thing. Income tax litigation takes place in the real world against a background of hard practical reality. It is not an exercise in which the game becomes an end in itself. For cases to be decided on the basis of an artificial regime created by pleadings and divorced from reality removes the enquiry from one relating to objective fact to a realm of artificiality in which the essential commerciality on which taxation is based becomes irrelevant.

[21] The pleadings of both parties cry out for a demand for particulars and for a searching and detailed examination for discovery. By the time they go to trial, if ever, the parties should have a reasonable idea of what was sold, to whom and where. I am mindful of the wise counsel found in *Odgers on High Court Pleading and Practice*, Twenty-Third Edition, at pages 183-4:

> But what is a pleader to do when he is confronted by some flagrantly bad bit of pleading in flat violation of the rules? Even then, the best thing he can do, as a rule, is to leave it alone. But there are exceptions. As Bowen L.J. said in *Knowles* v. *Roberts*, "It seems to me that the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right." His opponent's remedy in such a case is to apply to the master at chambers for an order that the whole or any part of a pleading be struck out or amended under Order 18, r. 19(1), or for an order for particulars under rule 12(3).
>
> But be careful how you advise any such application. You may materially increase the costs of the action, and yet reap no compensating advantage for your client, even though you succeed. You should also be careful which of these alternatives you adopt. If your opponent has omitted a material allegation, the proper course is to apply under Order 18, r. 19(1); if, however, he has pleaded a material allegation with insufficient particularity, the appropriate remedy is to apply for particulars.
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> In a personal injury action, if the Plaintiff fails to serve a medical report and a schedule of special damages with the Statement of Claim the Defendant may apply to stay the action until those documents have been provided.

(1) Striking out or Amending your Opponent's Pleading

> Your attack may be directed at the whole of your opponent's pleading or upon certain objectionable portions of it; the objective may be to expose the entire action or the defence to it as a sham, or one which cannot possibly succeed in law, and to obtain judgment accordingly; or it may be to force your opponent to amend the whole or some part of an embarrassing pleading under pain of having it struck out if he does not.

[22] One or other or both of the parties may wish to consider amending their pleadings to clarify precisely what is in issue.[1] In particular I find, from reading the Reply, that the Crown's position is confusing. Again, the comments of *Odgers* at page 150 are helpful:

> Perhaps the best test is this: after you have drafted your pleading, banish your instructions from your mind for a moment, and imagine yourself a stranger coming fresh to the matter. Would your draft, read by itself, convey to his mind a clear conception of your client's case? If not, you must make your draft more definite: and this object will often be best attained by omitting half of it. Length does not conduce to perspicuity. Half a dozen neat, short sentences, each clear in itself, will tell your story best.

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[1] It is somewhat less than edifying to find the respondent in paragraph 25 of the Reply stating that the respondent accepts the appellant's statement of the issues and the appellant moving to strike that paragraph out.

[23] The motion is dismissed. The matter of costs is left to the determination of the trial judge.

Signed at Ottawa, Canada, this 18th day of April 2008.

"D.G.H. Bowman"

Bowman, C.J.

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COURT FILE NO.:	2007-763(GST)G
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 1, 2008
REASONS FOR ORDER BY:	The Honourable D.G.H. Bowman, Chief Justice
DATE OF ORDER AND REASONS FOR ORDER:	April 18, 2008

APPEARANCES:

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Counsel for the Respondent:	Gordon Bourgard

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