Docket: 2017-2735(GST)G

BETWEEN:

HER MAJESTY THE QUEEN,

Applicant/Respondent,

and

METROBEC INC.,

Respondent/Appellant,

AND BETWEEN:

METROBEC INC.,

Applicant/Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[ENGLISH TRANSLATION]

Motions heard on March 12, 2018, at Montréal, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Michel Beauchamp Kim Belair
Counsel for the Respondent:	Antoine Lamarre

ORDER

UPON motion by the applicant/respondent filed on December 8, 2017, seeking:

1. An order under section 53 of the *Tax Court of Canada Rules (General Procedure)* (the Rules) to strike out paragraphs 7, 32, 34, 35, 48, 49, 50, 51, 52, 53, 54, 60, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 93, 94, 96, 99, 100, 101, 103, 105, 106, 107, 108, and 109 from the notice of appeal;

2. An order under section 12 of the Rules, authorizing the respondent to file a reply to the notice of appeal to the Registry within 30 days following issuance of the order sought under paragraph 1 or, alternatively, of an order dismissing this motion;

AND UPON the affidavit of Nicolas Cornelius Ammerlaan;

AND UPON motion by the applicant/appellant filed on January 12, 2018, and the amended motion filed on January 15, 2018, as well as the re-amended motion filed on February 21, 2018, seeking:

1. An order against the respondent precluding it from filing a reply given its failure to file its reply within the time limit set out in subsection 44(1) of the Rules;

2. An order indicating that the allegations of fact in the notice of appeal are presumed to be true for the purposes of the appeal pursuant to subsection 44(2) of the Rules;

3. An assessment of costs against the respondent;

4. In the alternative, an order against the respondent requiring it to send to the appellant, at the same time as its reply, an unredacted copy of the audit report of Metrobec Inc., and a copy of all audit reports of suppliers alleged in its reply and, more generally, a copy of all alleged documents.

AND UPON the affidavit of Caroline Desrosiers;

AND after hearing the submissions of the parties;

The applicant's/respondent's motion is allowed in accordance with the attached reasons for order.

The claims set out in paragraphs 1, 2 and 3 of the applicant's/appellant's re-amended notice of motion are dismissed.

The applicant/appellant must file an amended notice of appeal in accordance with the reasons attached hereto for order within 30 days of the date of this order.

The applicant/respondent must file a reply to the amended notice of appeal within 30 days of service of the amended notice of appeal by the applicant/appellant.

A teleconference will be organized by the Court following the filing of the amended notice of appeal and the reply to the amended notice of appeal to address the applicant's/appellant's claim in paragraph 4 of the re-amended motion.

Costs in the cause.

Signed at Ottawa, Canada, this 22nd day of June 2018.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 7th day of November 2018.

François Brunet, Revisor

Citation: 2018 TCC 115
Date: 20180622
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METROBEC INC.,

Applicant/Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[ENGLISH TRANSLATION]

REASONS FOR ORDER

D'Auray J.

I. BACKGROUND

[1] Each party filed a motion before this Court.

[2] The reasons for order address the two motions. To avoid confusing the parties and to facilitate the reading of these reasons, I will refer to Metrobec Inc. as the appellant and Her Majesty the Queen as the respondent.

[3] First, the respondent filed a motion to strike certain paragraphs from the appellant's notice of appeal under section 53 of the *Tax Court of Canada Rules*

(General Procedure) (the Rules). In its motion, the respondent is also seeking an extension of time for filing a reply to the notice of appeal under section 12 of the Rules.

[4] Second, the appellant filed a motion asking the Court to preclude the filing of the reply to the notice of appeal because, according to the appellant, the respondent did not meet the deadline for filing a motion. As a result, the appellant is seeking under section 44 of the Rules to have all of the facts alleged in the notice of appeal deemed to be true, and to have costs awarded in its favour under section 147 of the Rules.

[5] In the alternative, should I allow the respondent to file its motion to strike and a reply to the notice of appeal, the appellant is asking that the respondent be required to provide the appellant with an unredacted copy of its audit reports and the audit reports of suppliers alleged in the reply to the notice of appeal and a copy of all documents alleged in the reply to the notice of appeal.

[6] At the hearing, I commenced with the respondent's motion. The respondent's motion largely resolves the motion filed by the appellant. However, at the hearing I did not address the appellant's alternative request. The parties agreed to await my order before proceeding with the appellant's alternative request.

[7] Therefore, I will address the motion to extend the time limit and to preclude. Subsequently, I will address the motion to strike paragraphs from the notice of appeal.

II. FACTS

[8] On June 22, 2017, the appellant filed a notice of appeal to this Court.

[9] On July 13, 2017, the notice of appeal was served on the respondent.

[10] On September 8, 2017, the respondent sought the appellant's consent to extend the time limit for filing a reply to the notice of appeal to December 1, 2017.

[11] On September 11, 2017, the appellant agreed to the extension.

[12] On November 29, 2017, the respondent asked the appellant for another extension of the time limit for filing a reply to the notice of appeal, to December 8, 2017.

[13] On November 30, 2017, the appellant once again agreed to the extension.

[14] On December 8, 2017, the respondent filed a motion with this Court to strike certain paragraphs from the notice of appeal and to extend the time limit for filing a reply to the notice of appeal.

[15] On February 21, 2018, the appellant filed a re-amended motion with this Court to preclude the filing of the reply to the notice of appeal. The appellant also sought that costs be awarded against the respondent.

[16] The issue to be determined by the judge who will be presiding the hearing is whether in the context of false invoices, the appellant can claim input tax credits in the computation of its net tax. The presiding judge must also determine whether the Minister could make an out-of-time assessment and whether the Minister correctly applied the penalties under section 285 of the *Excise Tax Act* (the ETA).

A. MOTION TO EXTEND TIME LIMIT AND MOTION TO PRECLUDE

(1) Applicable legislation

[17] The relevant provisions of the Rules are as follows:

> 9. The Court may, where and as necessary in the interests of justice, dispense with compliance with any rule at any time.
>
> 12 (1) The Court may extend or abridge any time prescribed by these rules or a direction, on such terms as are just.
>
> (2) A motion for a direction extending time may be made before or after the expiration of the time prescribed.
>
> (3) A time prescribed by these rules for filing, serving or delivering a document may be extended or abridged by consent in writing.
>
> 44 (1) A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless

(a) the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or

(b) the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.

(2) If a reply is not filed within an applicable period specified under subsection (1), the allegations of fact contained in the notice of appeal are presumed to be true for purposes of the appeal.

(3) A reply shall be served

(a) within five days after the 60-day period prescribed under subsection (1);

(b) within the time specified in a consent given by the appellant under subsection (1); or

(c) within the time specified in an extension of time granted by the Court under subsection (1).

(4) Subsection 12(3) has no application to this section and the presumption in subsection (2) is a rebuttable presumption.

147 (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.

(2) Costs may be awarded to or against the Crown.

(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,

(a) the result of the proceeding,

(b) the amounts in issue,

(c) the importance of the issues,

(d) any offer of settlement made in writing,

(e) the volume of work,

(f) the complexity of the issues,

(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,

(i) whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(i.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the proceeding, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute; and

(j) any other matter relevant to the question of costs.

. . .

(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding,

(b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or

(c) to award all or part of the costs on a solicitor and client basis.

. . .

III. POSITIONS OF THE PARTIES

[18] The appellant submits that its notice of appeal contains nothing that could have caused prejudice to the respondent or that would prevent it from filing a reply to the notice of appeal within the 60-day deadline, even without the motion to strike having been heard. The appellant argues that the respondent has no valid reason for filing its reply to the notice of appeal after the time limit.

[19] The appellant submits that it never agreed to extend the time for filing a motion to strike allegations. The appellant says it agreed on two occasions to the respondent filing its reply to the notice of appeal, the first time for December 1, 2017, and the second for December 8, 2017. If the appellant had known that on December 8, 2017, the respondent would file a motion to strike certain paragraphs from its notice of appeal, it submits that it would have refused the requests to extend the time for the respondent to file a reply to the notice of appeal. The appellant says it did not agree to a motion to strike being filed out of time. It thus argues that the respondent's motion is inadmissible because it was filed out of time.

[20] Consequently, the appellant is asking to have the respondent precluded from filing a reply to the notice of appeal for failing to file its reply by December 8, 2017, and to have the allegations of fact set out in the notice of appeal be presumed to be true.

[21] The appellant is also asking the Court to order the respondent to pay the costs because the respondent delayed, needlessly prolonging the duration of the proceedings without the appellant's or the Court's consent, and apparently abused the good faith of counsel for the appellant with deceptive pretexts.

[22] The respondent submits that it is fair and equitable and in the interests of justice to grant it an extension to file a reply to the notice of appeal. Counsel for the respondent argues that he did not act in bad faith. When he began preparing the reply to the notice of appeal, he noticed allegations that were superfluous or irrelevant to the notice of appeal, and the number of these superfluous or irrelevant allegations was too great for him to overlook.

IV. LEGAL ANALYSIS

[23] To determine whether the Court should grant an extension of the time limit within the meaning of section 12 of the Rules, several decisions of our Court[1] are based on the following test propounded by the Federal Court of Appeal in *Hennelly*[2]:

> The proper test is whether the applicant has demonstrated
>
> 1. a continuing intention to pursue his or her application;
>
> 2. that the application has some merit;
>
> 3. that no prejudice to the respondent arises from the delay; and
>
> 4. that a reasonable explanation for the delay exists.

[24] In *Larkman*, Justice Stratas explains these criteria as follows[3]:

> These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra*, at pages 277–278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. (See, generally, *Grewal*, at pages 278–279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1).

[Emphasis added.]

[25] If I apply the test in *Hennelly* and the principles set out in *Larkman* to the facts in this case[4], I firstly note that the facts show a clear intent by the respondent

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1 *Cobuzzi v. The Queen,* 2017 TCC 27, paragraph 31; *Nicholls v. The Queen*, 2011 TCC 40, paragraph 19; *Telus Communications (Edmonton) Inc. v. The Queen,* 2003 TCC 853, paragraph 13.

2 *Canada (Attorney General)* v *Hennelly*, [1999] FCJ No. 846, paragraph 3.

3 *Canada (Attorney General) v. Larkman*, 2012 FCA 204, paragraph 62.

to pursue the appeal and file a reply to the notice of appeal. The respondent's repeated requests to obtain the appellant's consent to extend the time indubitably proves this.

[26] Second, the notice of appeal shows that the Minister denied certain input tax credits because the registrants' GST numbers displayed on certain invoices were invalid or expired. Therefore, the Minister's assessment is not without merit.

[27] Third, the appellant submits that its notice of appeal contains nothing that could prejudice the respondent. The test for extending the time is not intended to determine whether the notice of appeal as written could cause prejudice to the respondent. The test is intended to determine whether the appellant suffered prejudice as a result of the delay or would suffer prejudice if I were to grant the requested extension.

[28] At the hearing, the appellant has made no showing of such prejudice. On the contrary, the appellant agreed to the requests to extend the time for filing a reply to the notice of appeal. Moreover, the simple loss of the benefit of not having to refute the Minister's arguments is not sufficient prejudice to preclude the granting of an extension of time. Otherwise, the Court would never be able to extend the time on a request made after the time expired, which would be contrary to the *Rules* that allow such an extension of time[5].

[29] Fourth, counsel for the respondent explained to the Court that the delay in addressing this case was caused by the heavy workload resulting from the strike of Government of Quebec lawyers. It would be nonsensical to conclude that the explanation for the delay is unreasonable when it is the result of the exercise of a fundamental and constitutional right[6].

[30] The strike began on October 24, 2016, and ended on March 1, 2017. In September-November 2017, when the requests to extend the time were made, as

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4 *Cobuzzi v. The Queen,* 2017 TCC 27, paragraphs 36–37. Justice Jorré concludes that the request, pursuant to the first two criteria in *Hennelly*, is the request to extend the time. I disagree with him because such an interpretation leads us to a circular argument. Indeed, the four criteria are intended to determine whether the request to extend the time is well-founded. I find that, in the context of an assessment, the "request" is the reply to the notice of appeal or the willingness to litigate the dispute, on its merits.

5 *Telus Communications (Edmonton) Inc. v. The Queen*, 2003 TCC 853, paragraph 26.

6 *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

mentioned by counsel for the respondent, there was catch-up work to be done on these files. At the time of the requests to extend the time, counsel for the respondent had not begun working on the reply to the notice of appeal. Once he began preparing the reply to the notice of appeal, he noticed that certain paragraphs were irrelevant and that a motion to strike certain allegations was necessary. I am of the view that the respondent's explanation to justify the delay is plausible and reasonable.

[31] Therefore, the four criteria in *Hennelly* are met. I am also of the view that precluding the respondent from filing a reply to the notice of appeal would harm the proper process of the appeal hearing[7]. The assessment at issue is not without merit. In the circumstances of this case, that is, false invoices, it is in the interests of justice for the respondent's position to be presented in a reply to the notice of appeal.

[32] Consequently, the respondent's motion to request an extension of the time for filing a reply to the notice of appeal is allowed.

[33] The appellant is also asking the Court to declare that all of the facts set out in the notice of appeal are presumed to be true under section 44 of the Rules. Indeed, subsection 44(2) of the Rules can give rise to a rebuttable presumption of truth of these allegations under subsection 44(4) of the Rules.

[34] However, since I have already determined that allowing an extension of the time for filing a reply was in the interests of justice, subsection 44(2) of the Rules can no longer apply in view of paragraph 44(1)(*b*). Indeed, in *Interior Savings Credit Union*, Justice Noël (as he then was) of the Federal Court of Appeal stated the following[8]:

> As was noted by Paris J. in *Telus Communications (Edmonton) Inc. v. R. (No. 2),* [2003] G.S.T.C. 183-1 (at paragraphs 5 and 6):
>
> > The reference in subsection 44(2) to "an applicable period specified under subsection (1)" relates to any one of three periods, namely: within 60 days after the service of the Reply, within the period specified in a consent given by the Appellant, or within the period allowed by the Court for the filing of the Reply.

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[7] *Cobuzzi v. The Queen,* 2017 TCC 27, paragraph 48.

[8] *Canada v. Interior Savings Credit Union*, 2007 FCA 151, paragraphs 37 and 38.

> This means that subsection 44(2) only applies if a Reply is filed outside the sixty-day period and the Appellant does not consent or where there is no order of the court extending that period. Given my order extending the time period for filing a Reply, subsection 44(2) does not apply.

I agree with Paris J.'s reading of subsection 44(2). Given that in this case, Little J. did extend the period within which the Reply could be filed, there was no basis for the issuance of an order that the allegations of fact in the Notice of Appeal be presumed to be true.

[Emphasis added.]

[35] Furthermore, the appellant submits that the filing of the respondent's motion to strike is out of time since it never agreed to extend the time for filing a motion to strike allegations. This position is unfounded. On the one hand, subsection 12(2) and paragraph 44(1)(*b*) of the Rules do provide that a motion to strike and to extend the time for filing a reply to the notice of appeal may be filed after the time limit expires. On the other hand, there is no time limit within which a motion to strike must be filed, with the exception of section 8 of the Rules. That section will be discussed in the following section.

V. MOTION TO STRIKE PARAGRAPHS FROM THE NOTICE OF APPEAL

A. RELEVANT PROVISIONS

[36] The relevant provisions of the Rules are as follows:

7. A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or direction in a proceeding a nullity, and the Court,

> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute, or
>
> (b) only where and as necessary in the interests of justice, may set aside the proceeding or a step, document or direction in the proceeding in whole or in part.

8 A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,

(a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity, except with leave of the Court.

21 (1) Every proceeding to which the general procedure in the Act applies shall be instituted by filing an originating document in the Registry

(a) in Form 21(1)(a) in the case of an appeal from an assessment under the Income Tax Act, the Petroleum and Gas Revenue Tax Act, the Excise Tax Act, the Customs Act, the Air Travellers Security Charge Act, the Excise Act, 2001 or the Softwood Lumber Products Export Charge Act, 2006; . . .

48 Every notice of appeal shall be in Form 21(1)(a), (d), (e) or (f).

53 (1) The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document

(a) may prejudice or delay the fair hearing of the appeal;

(b) is scandalous, frivolous or vexatious;

(c) is an abuse of the process of the Court; or

(d) discloses no reasonable grounds for appeal or opposing the appeal.

(2) No evidence is admissible on an application under paragraph (1)(d).

(3) On application by the respondent, the Court may quash an appeal if

(a) the Court has no jurisdiction over the subject matter of the appeal;

(b) a condition precedent to instituting an appeal has not been met; or

(c) the appellant is without legal capacity to commence or continue the proceeding.

FORM 21(1)(a)

. . .

(c) Relate the material facts relied on,

(d) Specify the issues to be decided,

(e) Refer to the statutory provisions relied on,

(f) Set forth the reasons the appellant intends to rely on,

(g) Indicate the relief sought, and

(h) Date of notice.

. . .

VI. POSITIONS OF THE PARTIES

[37] The respondent submits that the Court should remove the following from the notice of appeal:

a) paragraphs 7, 32, 34, 35, 48, 49, 50, 51, 52, 53, 54, 60, 68, 70, 71 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 93, 94, 96, 99, 100, 101, 103, 105, 106, 107, 108 and 109, because they do not follow Form 21(1)(a) of the Rules. It submits that certain allegations are not material facts and that all of the facts must be found in a section entitled “Facts”;

b) paragraphs 32, 34, 35, 48, 49, 50, 51, 52, 53, 54, 70, 71, 88, 89, 93, 94, 96, 99, 100, 101, 105, 106 and 107, because they are argumentative or interpretive in nature and disclose no facts despite being listed in the “Statements of Facts” section. According to the respondent, these are legal conclusions with no probative value;

c) paragraphs 7, 54, 60, 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84 and 85, because they disclose no reasonable grounds for appeal;

d) paragraphs 60, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86 and 106, because they are irrelevant given that they refer to the Minister’s conduct in making the assessment, whereas the issue consists of determining whether the net tax amount reported in the assessment is consistent with the ETA;

e) paragraphs 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 101, 103, 108 and 109, because they are irrelevant given that they refer to a presumed duty to provide information of the Minister,

> whereas the issue consists of determining whether the net tax amount reported in the assessment is consistent with the ETA.

[38] Firstly, the appellant contends that the respondent cannot file its motion to strike without leave of the Court under section 8 of the Rules given that the motion is being filed after the expiration of a reasonable time frame within which the respondent reasonably should have obtained knowledge of the irregularities.

[39] The appellant also submits that the allegations in its notice of appeal are generally material facts or, at least, are not plainly or obviously irrelevant facts. According to the appellant, it would thus be more appropriate to defer the matter of relevance to the trial judge.

[40] According to the appellant, certain allegations in the notice of appeal are of the same nature as the facts the respondent alleges in its reply to the notice of appeal. The appellant points out that it was limited to interpreting the respondent's position because the respondent did not provide all of the relevant information.

[41] The appellant also submits that certain allegations in the notice of appeal are relevant and serve to contextualize the dispute. To this effect, the appellant contends that certain allegations are intended to determine whether the Minister could make an assessment for a statute-barred year, to determine the merit of the penalties set out in section 285 of the ETA and to establish costs. It also argues that the insertion of an allegation into the wrong section of the notice of appeal should not be fatal, considering the principle of substance over form.

VII. LEGAL ANALYSIS

A. Admissibility of the motion

[42] Section 8 of the Rules provides that a motion to attack a document for irregularity shall not be made by a party except with leave of the Court under the following two circumstances:

> (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or
>
> (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

[43] It is clear in this case that the respondent has not taken any further step in the proceeding after obtaining knowledge of the irregularity. Therefore, I must determine whether the respondent filed its motion within a reasonable time pursuant to paragraph 8(*a*) of the Rules. If that is the case, the respondent did not need to apply for leave of the Court to file its motion to strike.

[44] In *Kossow*, the Federal Court of Appeal concluded that the trial judge had not erred in the exercise of his discretion by dismissing the motion to strike filed two and a half years after knowledge of irregularities was obtained[9].

[45] In *Gould v. The Queen*, Chief Judge Bowman (as he then was) stated that the applicant had moved with the requisite dispatch by filing his motion within a period of about a month[10]. He then explained the relevance of the exercise of discretion as follows[11]:

> Counsel for the appellant is put in a dilemma by the rule. He quite properly moved against the Reply with the requisite despatch. Had he delayed doing so he might have been met with the defence of the fresh step rule in section 8. Yet I cannot escape the view that if there is merit in the objections to this somewhat overwhelming reply the attack at this stage is premature and could perhaps be made, if at all, more appropriately at a later stage in the proceedings. It is for this reason that the rule gives the Court a discretion to permit a party to move against a pleading at a later stage in the proceedings.

[46] In *Sandia Mountains*, Justice Miller ruled that a time period of 14 months between the filing of the disputed pleading and the filing of the motion to strike was too long to be granted leave of the Court[12].

[47] In *Hawkes*[13], Justice Strayer, for the Federal Court of Appeal majority, ruled that the trial judge had not exercised his discretion erroneously by allowing a motion the respondent filed one year after the reply to the notice of appeal.

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9 *Kossow v. Canada,* 2009 FCA 83, paragraphs 16 to 18. (Leave to appeal to the SCC refused: [2014] SCCA No. 85.)

10 *Gould v. The Queen*, 2005 TCC 556, paragraphs 2 and 25. (According to the Record of the Court, the motion was filed on May 13, 2005).

11 Id., paragraph 25.

12 *Sandia Mountain Holdings Inc. v. The Queen*, 2005 TCC 136, paragraphs 4, 5 and 6.

13 *Hawkes v. The Queen*, [1996] FCJ No. 1694, paragraph 5.

[48] In the light of those decisions, I am of the opinion that the respondent filed its motion to strike certain paragraphs from the notice of appeal within a reasonable time frame. Indeed, the respondent filed the motion to strike within the time limit granted to file the reply to the notice of appeal, that is, within five months of the notice of appeal being served.

[49] Consequently, in this case, the respondent was not required to apply for leave of the Court to file a motion to strike. However, even if I were incorrect, I would exercise my discretion to allow the motion to strike given the circumstances of this case.

B. Striking out of allegations

[50] I consider it relevant to review the applicable principles before commencing my analysis on the paragraphs the respondent is moving to strike.

[51] In *Imperial Tobacco*, the Supreme Court of Canada stated the following concerning the applicable test for striking out pleadings for want of a cause of action[14]:

> The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r.19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at paragraph 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at page 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> . . .
>
> The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[Emphasis added.]

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[14] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, paragraphs 17 to 21.

[52] In *Gramiak* v *The Queen*, where the taxpayer cited section 53 of the *Rules* to have certain passages struck from the respondent's reply, Chief Judge Rossiter cites the following remarks of Chief Judge Bowman (as he then was)[15]:

> The plain and obvious test has been longstanding and widely accepted in Canadian jurisprudence as the test for motions to strike. In *Sentinel Hill Productions (1999) Corporation, Robert Strother v. the Queen*, 2007 TCC 742, Bowman, C.J., provided a useful overview of the principles that govern the application of Rule 53:
>
>> [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>>
>>> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, at page 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>>>
>>> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>>>
>>> (c) A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.
>>>
>>> (d) Rule 53 and not Rule 58, is the appropriate rule on a motion to strike.

[53] The correct forum must also be addressed. The Court cannot grant remedies that are outside its jurisdiction. On this subject, in *Canada (National Revenue)* v *JP*

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[15] *Gramiak v. The Queen*, 2013 TCC 383, para 30. (Decision affirmed in *Gramiak*v *The Queen*, 2015 FCA 40).

Morgan Asset Management (Canada) Inc., Stratas J. of the Federal Court of Appeal stated the following[16]:

> The Tax Court does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness: *Ereiser v. Canada*, 2013 FCA 20, at paragraph 38; *Roitman*, supra at paragraph 21; *Main Rehabilitation Co. Ltd.*, supra at paragraph 6; *Bolton v. Canada*, [1996] F.C.J. No. 820 (C.A.) (QL); *Ginsberg v. Canada*, [1996] 3 F.C. 334 (C.A.); *Burrows [page593] v. The Queen*, 2005 TCC 761; *Hardtke v. The Queen*, 2005 TCC 263. If an assessment is correct on the facts and the law, the taxpayer is liable for the tax.

[54] A fact supporting a grounds of appeal for which the Court does not have jurisdiction raises the same question of relevance. The allegations in a pleading must be material facts. In *Beima*, the Federal Court of Appeal cites with approval the comments of Justice Bowie on this issue[17]:

> In *Zelinski v. The Queen*, [2001] T.C.J. No. 774, 2001 CanLII 406, Bowie J. noted that:
>
>> 4 The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. <u>Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought</u>. Amendments to pleadings should generally be permitted, so long as that can be done without causing prejudice to the opposing party that cannot be compensated by an award of costs or other terms, as the purpose of the Rules is to ensure, so far as possible, a fair trial of the real issues in dispute between the parties.
>>
>> 5 The applicable principle is stated in [Holmsted and Watson Ontario Civil Procedure, Vol. 3, pages 25-20 to 25-21]:
>
> This is the rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. <u>The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of</u>

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16 *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, para 83.

17 *Beima v. Canada*, 2016 FCA 205, paragraph 17.

> law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

[Emphasis added.]

[55] Furthermore, as stated by the Court in *Heron v. The Queen*[18], an allegation in a pleading shall be deemed irrelevant only if, at first glance, there is no question that the allegation is irrelevant; if there is doubt, it would be wiser not to strike out the allegation:

> When a party states that the allegation is not relevant, the "irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence."

[56] Furthermore, according to the Federal Court of Appeal, it is essential that pleadings contain "material facts", as opposed to allegations of fact that are not sufficiently specific or mere conclusory statements of law, or the pleadings would fail to perform their role in identifying the issues[19]. Therefore, conclusory statements of law are not "material facts"[20].

[57] Moreover, section 48 of the Rules requires a taxpayer who wishes to file an appeal to follow strictly Form 21(1)(a). In *Kondur*, Justice Miller states the following[21]:

> Section 48 of the Rules requires that the notice of appeal be in Form 21(1)(a) which, in turn, requires that the notice of appeal relate the material facts relied on; specify the issues to be decided; refer to the statutory provisions relied on; set forth the reasons the appellant intends to rely on; and indicate the relief sought. These requirements are mandatory. . . .
>
> It is a mandatory requirement of pleading in the General Procedure that the notice of appeal or any amended version of it contain all of the specifications of Form 21(1)(a): *Okoroze v The Queen*, 2012 TCC 360. This is not just a formality. The purpose of these requirements is to ensure that the issues are properly defined for discovery and trial so that the Respondent will know what arguments she must meet: *Bibby v The Queen*, 2009 TCC 588.

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18 *Heron v. The Queen*, 2017 TCC 71, paragraph 12, affirmed by *Heron v. The Queen*, 2017 FCA 229.

19 *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, para 17.

20 *Simon v.The Queen*, 2011 FCA 6, paragraph 9.

21 *Kondur v. The Queen*, 2015 TCC 318, paragraphs 17 to 19.

[Emphasis added.]

[58] In the opinion of Chief Judge Rip (as he then was), respecting the structure of a pleading set out in the Rules is also important[22]:

> The respondent argues that Rule 49 merely sets out what must be included and does not establish a specific structure. In other words, so long as the requirements of Rule 49 are met, it is possible to intersperse conclusions of law with the facts throughout. To accept the respondent's argument would lead to incoherent, repetitious pleadings as difficult and frustrating as the ones faced with under this motion.

[Emphasis added.]

[59] For example, a legal argument must be clearly identified as such by stating it in the appropriate section[23].

[60] In the light of these principles, I will analyze and render my decision on each of the paragraphs in the notice of appeal the respondent is moving to strike.

[61] *Paragraph 7*: It must be struck out, because it does not present material facts, and the Court does not have jurisdiction to rule on the Minister's conduct.

[62] *Paragraph 32*: It must stand. This is a factual allegation. The allegation does not contain plainly or obviously irrelevant facts. It would be wiser to let the trial judge rule on its relevance. In addition, this allegation may be relevant to the reopening of the statute-barred year and the gross negligence penalty.

[63] *Paragraph 34*: The references to the "QST" must be struck out, because the Court does not have jurisdiction over the QST. In addition, the word "properly" must be struck out. The Court will decide whether the appellant properly paid the correct amount of GST. The rest of the paragraph must stand because it is a factual allegation.

[64] *Paragraph 35*: It must be struck out. It does not contain facts that will assist the judge in determining whether the assessment is correct in fact and in law, but is rather a semblance of a legal conclusion.

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22 *Strother v. The Queen*, 2011 TCC 251, paragraph 20.
23 *O'Dwyer v. The Queen*, 2012 TCC 261, paragraph 38.

[65] *Paragraph 48*: This paragraph must stand; it has a sufficient basis in fact.

[66] *Paragraphs 49 to 51*: These paragraphs must be struck out. They do not contain facts, but rather arguments. They set out legal conclusions. In addition, some of these paragraphs assume what the respondent's position would be. They are very poorly written. If the appellant wishes to amend these paragraphs to support facts, it may do so, but as is these paragraphs cannot stand.

[67] *Paragraph 52*: It must be struck out. This paragraph addresses the QST. This Court has no jurisdiction over the QST.

[68] *Paragraphs 53 and 54*: As they now stand, these paragraphs must be struck out. These paragraphs are argumentative. That being said, the appellant may amend these paragraphs to plead material facts, without presenting its perception of the respondent's position. It goes without saying that the reference to the QST in this paragraph must be struck out; the Court has no jurisdiction over the QST.

[69] *Paragraph 60*: It must be struck out; the alleged facts are not relevant to the dispute.

[70] *Paragraph 68*: It must stand, because it is a factual allegation about input tax credits claimed by the appellant and granted by the respondent. Therefore, it does not contain plainly or obviously irrelevant facts. It would be wiser to let the trial judge rule on its relevance.

[71] *Paragraphs 70 and 71*: These paragraphs contain allegations by the appellant about the respondent's conduct. As drafted, they must be struck out. However, the appellant may amend these paragraphs to support facts and avoid arguments.

[72] *Paragraphs 72 and 73*: In these paragraphs, the appellant alleges what the respondent's position would be, on the basis of the audit report. As drafted, these paragraphs must be struck out, but the appellant may modify them to support facts surrounding the transactions.

[73] *Paragraphs 74 to 86*: They must be struck out because they set out facts that are irrelevant to the issue in dispute. The Court has no jurisdiction to rule on the Minister's conduct or to require the Minister to provide documents to the appellant.

[74] *Paragraphs 87 and 88*: As drafted, these paragraphs must be struck out. These paragraphs are argumentative, and the appellant alleges what the respondent's position would be. However, the appellant may modify them to support facts surrounding the transactions.

[75] *Paragraph 89*: It must be struck out because it is argumentative and interpretive.

[76] *Paragraphs 93 and 94*: They must be struck out because they are argumentative and interpretive and are a matter of evidence.

[77] *Paragraph 96*: Except for the words "there is no way", the first part of the sentence up to and including the word "suppliers" must stand because it does not contain plainly or obviously irrelevant facts. The second part of the sentence beginning with "therefore" must be struck out because it is argumentative or a conclusion of law.

[78] *Paragraph 99*: It must stand because it is an allegation of fact.

[79] *Paragraph 100*: It must stand because it is an allegation of fact. It does not contain plainly or obviously irrelevant facts considering the reopening of the statute-barred year and the application of penalties. It would be wiser to let the trial judge rule on its relevance. However, the reference to the QST must be struck out; the Court has no jurisdiction over the QST.

[80] *Paragraphs 101 and 103*: These paragraphs must be struck out. In these paragraphs, the appellant criticizes the Minister for failing to provide it with evidence and the facts on which the Minister relied to make an assessment out of time and impose penalties under section 285 of the ETA. The Minister's "duty to inform" is not within this Court's jurisdiction.

[81] *Paragraph 105*: As drafted, it is a conclusion of law. The paragraph may stand, but the words "properly" and "rightly" must be struck out so that the paragraph is not argumentative. In addition, the reference to the QST must be struck out; the Court has no jurisdiction over the QST.

[82] *Paragraph 106*: It must be struck out because it is a conclusion of law. Moreover, the first part of the paragraph about diligence is redundant.

[83] *Paragraph 107*: This paragraph is in the wrong section of the notice of appeal. It should be in the “Arguments” section. If the appellant considers it necessary, it can add this paragraph to the “Arguments” section of the notice of appeal. Therefore, this paragraph must be struck out from the “Facts” section of the notice of appeal.

[84] *Paragraphs 108 and 109*: These paragraphs must be struck out because they concern the issues and the Minister’s “duty to inform”.

VIII. CONCLUSION

[85] The respondent’s motion is allowed in accordance with the above reasons for order. The claims set out in paragraphs 1, 2 and 3 of the appellant’s re-amended motion are therefore dismissed.

[86] The appellant must file an amended notice of appeal in accordance with the reasons for this order within 30 days of the date of this order.

[87] The respondent must file a reply to the amended notice of appeal within 30 days of service of the amended notice of appeal by the appellant.

[88] A teleconference will be organized by the Court following the filing of the amended notice of appeal and the reply to the amended notice of appeal to address the appellant’s claim in paragraph 4 of the re-amended motion.

[89] Costs in the cause.

Signed at Ottawa, Canada, this 22nd day of June 2018.

“Johanne D’Auray”

D’Auray J.

Translation certified true
on this 7th day of November 2018.

François Brunet, Revisor

CITATION:	2018 TCC 115
COURT FILE NO.:	2017-2735(GST)G
STYLE OF CAUSE:	METROBEC INC. v. THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 12, 2018
REASONS FOR ORDER BY:	The Honourable Justice Johanne D’Auray
DATED:	June 22, 2018

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