Docket: 2013-4832(GST)G

BETWEEN:

BEMCO CONFECTIONERY AND SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 20, 2014 at Toronto, Ontario

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Robert G. Kreklewetz John Bassindale
Counsel for the Respondent:	André Leblanc

ORDER

Upon motion made by the Appellant for an Order under section 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out certain paragraphs from the Respondent's Reply without leave to amend;

Upon hearing and reading the submissions from the parties;

The motion is dismissed without costs; and

This Court orders that:

1. The Respondent is granted leave to file an Amended Reply within 30 days of this Order; and

2. The Appellant may file an Answer 30 days after the filing of the Amended Reply.

Signed at Ottawa, Canada, this 26th day of February 2015.

"B.Paris"

Paris J.

Docket: 2013-4833(GST)G

BETWEEN:

BEMCO CONFECTIONERY AND SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 20, 2014 at Toronto, Ontario

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Robert G. Kreklewetz John Bassindale
Counsel for the Respondent:	André Leblanc

ORDER

Upon motion made by the Appellant for an Order under section 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out certain paragraphs from the Respondent's Fresh as Amended Reply without leave to amend;

Upon hearing and reading the submissions from the parties;

The motion is allowed, in part, without costs; and

This Court orders that:

1. Paragraph 14(q) and paragraph 14(bb) and the word "false" in paragraph 14(y) will be struck from the Reply;

2. The Respondent is granted leave to file a Second Fresh as Amended Reply within 30 days of this Order; and

3. The Appellant may file an Answer 30 days after the filing of the Second Fresh as Amended Reply.

Signed at Ottawa, Canada, this 26th day of February 2015.

"B.Paris"

Paris J.

Docket: 2013-4834(GST)G

BETWEEN:

BEMCO CONFECTIONERY AND SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 20, 2014 at Toronto, Ontario

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Robert G. Kreklewetz John Bassindale
Counsel for the Respondent:	André Leblanc

ORDER

Upon motion made by the Appellant for an Order under section 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out certain paragraphs from the Respondent's Reply without leave to amend;

Upon hearing and reading the submissions from the parties;

The motion is dismissed without costs; and

This Court orders that:

1. The Respondent is granted leave to file an Amended Reply within 30 days of this Order; and

2. The Appellant may file an Answer 30 days after the filing of the Amended Reply.

Signed at Ottawa, Canada, this 26th day of February 2015.

"B.Paris"

Paris J.

Docket: 2013-4835(GST)G

BETWEEN:

BEMCO CONFECTIONERY AND SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 20, 2014 at Toronto, Ontario

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Robert G. Kreklewetz John Bassindale
Counsel for the Respondent:	André Leblanc

ORDER

Upon motion made by the Appellant for an Order under section 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out certain paragraphs from the Respondent's Reply without leave to amend;

Upon hearing and reading the submissions from the parties;

The motion is dismissed without costs; and

This Court orders that:

1. The Respondent is granted leave to file an Amended Reply within 30 days of this Order; and

2. The Appellant may file an Answer 30 days after the filing of the Amended Reply.

Signed at Ottawa, Canada, this 26th day of February 2015.

"B.Paris"

Paris J.

Docket: 2013-4836(GST)G

BETWEEN:

BEMCO CONFECTIONERY AND SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 20, 2014 at Toronto, Ontario

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Robert G. Kreklewetz John Bassindale
Counsel for the Respondent:	André Leblanc

ORDER

Upon motion made by the Appellant for an Order under section 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out certain paragraphs from the Respondent's Reply without leave to amend;

Upon hearing and reading the submissions from the parties;

The motion is dismissed without costs; and

This Court orders that:

1. The Respondent is granted leave to file an Amended Reply within 30 days of this Order; and

2. The Appellant may file an Answer 30 days after the filing of the Amended Reply.

Signed at Ottawa, Canada, this 26th day of February 2015.

"B.Paris"

Paris J.

Citation: 2015 TCC 48
Date: 20150226
Docket: 2013-4832(GST)G
2013-4833(GST)G
2013-4834(GST)G
2013-4835(GST)G
2013-4836(GST)G

BETWEEN:

BEMCO CONFECTIONERY AND SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Paris J.

Background

[1] The Appellant filed an identical Notice of Motion in each of these appeals seeking to have various parts of each of the Respondent's Replies to the Appellant's Notices of Appeal struck out pursuant to paragraphs 53(*a*) and (*c*) of the *Tax Court of Canada Rules* (*General Procedure*). In response to the Motions, the Respondent filed a Fresh as Amended Reply to the Notice of Appeal in appeal 2013-4833(IT)G.

[2] The Appellant then amended its Notice of Motion in respect of appeal 2013-4833(IT)G to take into account the modifications made by the Respondent in the Fresh as Amended Reply in appeal 2013-4833(IT)G.

[3] At the hearing, the parties referred only to the Fresh as Amended Reply and to the portions thereof that the Appellant asks the Court to strike. I assume that the intention of the parties is to obtain a ruling on the Fresh as Amended Reply in

appeal 2013-4833(IT)G in order to determine how the Replies in the remaining four appeals should be amended. Given this state of affairs, it appears to me that the most expeditious way of proceeding would be to decide the Motion in respect of appeal 2013-4833(IT)G on its merits, and to dismiss the Motions on the remaining appeals, while granting the Respondent leave to file Amended Replies in the four remaining appeals and granting the Appellant leave to file Answers to those Amended Replies.

Background

[4] The Appellant has carried on business as a wholesaler of tobacco products in Ontario since 1988.

[5] The appeal is one of five, brought from five separate notices of assessment issued under the *Excise Tax Act*, R.S.C. 1985, c.E-15 ("*ETA*"). The total amount in dispute is approximately $30,000,000. The assessment of one of the periods was made beyond the normal assessment period and all of the assessments included gross negligence penalties under section 285 of the *ETA*.

[6] This issue in the appeals is whether certain of the Appellant's sales of tobacco products during the relevant periods were made to Status Indians on a reserve and thereby exempt from GST by virtue of section 87 of the *Indian Act*, R.S.C. 1985, c.I-5.

[7] The Minister assessed the Appellant under the *ETA* on the basis that those sales were, in fact, made to persons or entities who were not eligible for the *Indian Act* exemption. The assessments were premised, at least in part, on the existence of a sham. The Minister believed that the Appellant misrepresented the identity of the true purchasers of its products and delivered the products to those purchasers at locations that were not on a reserve.

Applicable Legislation

[8] Paragraphs (*a*) and (*c*) of the *Rules* reads as follows:

> 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;

> . . .
>
> (c) is an abuse of the process of the Court;
>
> . . .

Test

[9] The test for striking portions of pleadings under *Rule* 53 is whether it is plain and obvious that the impugned portion of the pleading has no chance of success.

[10] With respect to striking pleadings, the Supreme Court in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, stated at paragraph 17 of that decision that:

> . . .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 for action:… 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. . .

[11] In this Court, in *Canadian Imperial Bank of Commerce v. R.*, 2011 TCC 568, Rossiter A.C.J. (as he then was) held at paragraph 19 that:

> . . .Only if the position taken in the Reply is certain to fail because it contains a radical defect should the relevant portions of the Respondent's Reply be struck. . .

Appellant's Position on the Motion

[12] The Appellant is seeking an Order striking three groups of paragraphs, in whole or in part. All of those paragraphs set out assumptions relied upon by the Minister in reassessing the Appellant.

Group 1 Paragraphs

[13] The first group is made up of paragraphs 14(a), (b), (k), (l), (m), (n), (o), (p), (q) and (z). The Appellant maintains that these paragraphs involve either irrelevant facts or highly prejudicial assumptions of "similar facts".

[14] Those paragraphs read as follows:

a) the appellant has a wholesaler's permit for the province of Ontario;

b) the appellant has not a vendor's permit to sell tobacco products to consumers in Ontario

. . .

k) the manufacturers who sold their tobacco products to the appellant authorized and permitted the resale of their tobacco products by the appellant only on the basis that the GST/HST is collected from the purchaser on every subsequent resale to wholesale accounts and retail locations (with the exception of sales of allocation cigarettes under the Ontario First Nations Cigarette Allocation System) and that such GST/HST is reported and remitted as required under the *Act*;

l) the appellant is not an authorized tobacco wholesale under the Ontario First Nations Cigarette Allocation System;

m) none of the tobacco products sold by the appellant during the period were allocation cigarettes (allocation cigarettes bear a peach-colored tear tape or stamp);

n) according to the scheme, the status Indians that the appellant claims to have sold the tobacco products to were intended to be wholesalers of tobacco products;

o) the appellant made no inquiries as to whether any of the status Indians that the appellant claims to have sold the tobacco products to were licenced by the province as tobacco wholesalers;

p) prior to June 26, 2012, none of the status Indians that the appellant claims to have sold the tobacco products to had a vendor's permit to sell tobacco products to consumers in Ontario;

q) the appellant knew that it was not authorized to sell its tobacco products to unlicenced individuals;

. . .

z) the appellant knew that the Ontario regulated special scheme for unmarked cigarettes provides a sufficient quantity of non-taxable tobacco products to status Indians for their own consumption;

. . .

[15] The Appellant's primary position is that the Group 1 Paragraphs are improperly pleaded in the assumptions because they refer (explicitly or implicitly) to alleged non-compliance by the Appellant with the Ontario *Tobacco Tax Act*, R.S.O. 1990, c. T.10 ("*TTA*") and the *Regulations* made under that *Act*.

[16] The Appellant says that these facts are irrelevant because the *TTA* has no connection to the issue on appeal, which is whether GST/HST should have been collected and remitted. This breaches the rule in *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486 which holds that the onus is only on the taxpayer to "demolish the basic fact on which the taxation rested".

[17] The irrelevance is further demonstrated by the Respondent's failure to draw any link in the Reply between the alleged *TTA* non-compliance and the grounds for relief.

[18] Given that the Court ought to strike a pleading where it is plain and obvious that it is irrelevant, the Appellant says that the Group 1 Paragraphs should be struck.

[19] Should the irrelevance argument fail, the Appellant submits that the Group 1 Paragraphs should be removed from the assumptions because they represent evidence of bad character or discreditable conduct, namely, that the Appellant breached the *TTA*. This leads to the implication that the Appellant also breached the *ETA*, which is the issue at the heart of the appeal. The Appellant argues pleadings of this type violate the rule on similar fact evidence set out by the Supreme Court in *R. v. Handy*, [2002] 2 S.C.R. 908: evidence of bad character is presumptively inadmissible when character is not an issue in the proceedings. In order to rebut the presumption of inadmissibility, the party seeking to have the evidence admitted must convince the trial judge that its probative value to a particular issue outweighs its potential prejudice.

[20] The Appellant further argues that the rule in *Johnston* does not apply to similar fact evidence; in such cases, the onus is on the Respondent to demonstrate that the evidence can be admitted. In essence, the Appellant is arguing that similar fact evidence cannot merely be pleaded as an assumption. Instead, it is *prima facie* inadmissible and the onus is on the Respondent in this case to convince the trial judge of its admissibility.

[21] As to whether the Group 1 Paragraphs truly allege discreditable conduct, the Appellant argues that the Respondent has merely disguised the allegation. Rather than saying the Appellant breached the *TTA*, the Reply simply says that the Appellant did not make any inquiries and relies on the Appellant's "knowledge" instead. This amounts to the Respondent disguising the allegation of non-compliance with the *TTA*.

Analysis

Relevance

[22] In this case I find that the Appellant has not shown that it is plain and obvious that the facts set out in the Group 1 Paragraphs are irrelevant. I accept the Respondent's submission that the assumptions in which reference is made to the *TTA* relate to the scheme alleged by the Minister to have been carried out and that the structure used by the Appellant and the Status Indians was a sham. I am not prepared to say that references to the regulatory regime governing the sale of tobacco or tobacco products in Ontario when setting out the background to the alleged scheme or sham are clearly irrelevant where the alleged scheme or sham is a central element to the assessments.

[23] With respect to the Appellant's argument that the Reply failed to draw a link between the Group 1 Paragraphs and the grounds for relief, the Appellant has offered no authority for the proposition that the Respondent must state which assumptions specifically support the sham position. I do not believe that the Respondent is required to do so. The Respondent merely needs to state the facts that were relied upon in assessing and then may ask the trial judge to use these facts to draw conclusions in favour of the position being advanced.

[24] Finally, the Appellant's concerns relating to onus have no bearing on the question of whether the impugned paragraphs are relevant or not, nor is it a matter that ought to be decided on a preliminary motion. The following comments of Bowman A.C.J. (as he then was) in *Mungovan v. The Queen* 2001 D.T.C. 691, at paragraph 10, are germane:

> Assumptions are not quite like pleadings in an ordinary lawsuit. They are more in the nature of particulars of the facts on which the Minister acted in assessing. It is essential that they be complete and truthful. The conventional wisdom is they cast an onus upon an appellant and as Mr. Mungovan observes with some considerable justification they may force him to endeavour to disprove facts that are not within

> his knowledge. Superficially this may be true, but this is a matter that can be explored on discovery. The trial judge is in a far better position than a judge hearing a preliminary motion to consider what effect should be given to these assumptions. The trial judge may consider them irrelevant. He or she might also decide to cast upon the respondent the onus of proving them.

Similar Fact Evidence

[25] In my view, the Group 1 Paragraphs, taken together, do not allege that the Appellant breached the *TTA* and therefore there is no pleading of discreditable conduct unrelated to its obligations under the *ETA*. In particular, paragraphs (o) and (p) state that the Status Indians to whom the Appellant was purportedly selling tobacco were not licensed under the *TTA* to sell to consumers and that the Appellant made no inquires whether those individuals were licensed by the province as tobacco wholesalers. To the extent any breaches of the *TTA* are alleged to have occurred, the Group 1 Paragraphs suggest that they were committed by parties other than the Appellant.

[26] Even if it were alleged that the Appellant breached the *TTA*, I see no basis for the suggestion that the Respondent is relying on such a breach to demonstrate a propensity by the Appellant for breaching the *ETA*. In any event, no such argument is found in the Reply.

[27] The Reply sets out the position of the Respondent that the commercial structures in place between the Appellant and the Indian purchasers were a sham or conduit designed to give the appearance that the *Indian Act* exemption applied. This therefore precludes any suggestion of propensity-based reasoning.

Group 2 Paragraphs

[28] The Group 2 Paragraphs consist of paragraphs (o), (p), (q), (u), (y) and (bb), which the Appellant objects to on the grounds that they contain conclusions of law or mixed fact and law. The portions of those paragraphs that the Appellant seeks to have struck are as follows:

Paragraph	Extricable Wording
14(o)	"were licenced by the province as tobacco wholesalers"
14(p)	"had a vendor's permit to sell tobacco products"

14(q)	"was not authorized to sell its tobacco products to unlicensed individuals"
14(u)	"the appellant initially mislead the CRA auditor about"
14(y)	"that the purpose of the scheme was to give the false appearance"
14(bb)	"manipulation or abuse of the purpose of the *Indian Act* tax exemption"

[29] The Appellant relies on *Canada v. Anchor Pointe Energy Ltd*, 2003 FCA 294, for the proposition that legal statements or conclusions have no place in assumptions.

Paragraphs (o), (p) and (q)

[30] The Appellant says that these paragraphs (which were also covered by the Appellant's first argument, above) include statements relating to whether the Status Indians were licensed or had proper permits. The Appellant argues that based on the *TTA*, compliance does not necessarily require a licence since there are deeming provisions that deem a retailer to be holding a permit if the retailer meets certain criteria. The Appellant therefore says it is a legal conclusion for the Minister to assume that a licence was required. The impugned assumptions should therefore be struck.

[31] The Appellant adds that even if paragraph (o) was left intact, it would still contain a question of mixed fact and law because it deals with knowledge, which contains an implicit legal question.

Analysis

[32] I am not convinced that these paragraphs, apart from paragraph (q), contain legal conclusions. Paragraph (o) states that the Appellant made no enquiries whether the Status Indian purchasers were licensed as wholesalers and (p) deals with whether the Status Indians held a permit to sell to consumers. Holding a licence and a failure to enquire whether such a licence was held are questions of fact, not legal conclusions. The presumption that the facts in these paragraphs are true would not extend to a presumption that the licences referred to were required under the *TTA*.

[33] On the other hand, paragraph (q) contains the statement that the Appellant was not authorized to sell to unlicensed individuals, which involves both fact and law, and is therefore not permissible. While paragraph (q) contains the element of the Appellant's knowledge, the question of whether the Appellant was authorized under the *TTA* requires the application of the relevant statutory provisions to the facts of the Appellant's case. The Respondent's counsel asked that all of paragraph (q) be struck if the Court agreed with the Appellant's position. Therefore, all of paragraph (q) will be struck.

Paragraphs (u), (y) and (bb)

[34] These paragraphs state that the Appellant misled the auditor and that the commercial scheme in place was designed to wrongfully take advantage of the *Indian Act* exemption.

[35] The Appellant argues that the use in paragraph (u) of the word "mislead" is no different than the case law on misrepresentations of fact. This case law says that the Minister cannot plead an assumption that there was a misrepresentation. In the same vein, the Appellant argues, "mislead" should not be allowed to remain as an assumption either.

[36] The Appellant maintains that the use in paragraph (y) of the phrase "false appearance" is merely the Respondent finding another way to plead "sham" in the assumptions. The Appellant referred to *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 which defines "sham", to show that a court cannot find a sham without first finding a false appearance. The Respondent has therefore indirectly snuck in a legal conclusion – one of "sham" – when it could not do so directly.

[37] Counsel maintained that paragraph (bb) is the clearest example of a legal conclusion because it uses the words "manipulation or abuse" but did not elaborate further on this point.

Analysis

[38] Regarding paragraph (u), the alleged act of misleading the auditor is a question of fact and does not require the application of a legal test. What a person does or knows is a fact.

[39] However, paragraph (bb) goes further than paragraph (u) and includes a statement concerning "manipulation or abuse of the purpose of the Indian Tax exemption". I agree with the Appellant that, since the purpose of a statutory provision is a matter of legal interpretation, this wording is not properly pleaded as a fact. The Respondent's counsel asked that all of paragraph (bb) be struck if the Court agreed with the Appellant's position. Therefore, all of paragraph (bb) will be struck.

[40] In paragraph (y) the use of the words "the purpose of the scheme was to give the false appearance" is not equivalent to pleading that the arrangement was a "sham" which Rip C.J. (as he then was) struck from the Minister's assumptions in the case of *Strother v. The Queen*, 2011 TCC 251. In that case, Rip C.J. (as he then was) said:

> [31] The allegations of sham, circular transactions and facades are also in issue. The test for the sham doctrine was set forth in *Snook v. London West Riding Investments, Ltd.*:[15]
>
> > . . . [Sham] means acts done or documents executed by the parties to the "sham" which are intended by them, to give to third parties or the Court, the appearance of creating between the parties, legal rights and obligations different from the actual legal rights and obligations (if any), which the parties intend to create. … for acts or documents to be a "sham", with whatever legal consequences follow from this, *all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.* …
> >
> > [Emphasis added.]
>
> [32] In this case, the facts are the actual rights and responsibilities as well as what the parties did or did not do. However, applying the facts to determine whether there was a common intention to mislead is a conclusion of mixed fact and law as it involves the applications of the facts to the legal test of sham. Again, the respondent is required to extricate the facts and mentions of sham, or façade should be deleted. With respect to this argument, some of the bracketed portions are struck while some are not as they are factual underpinnings and not conclusions.

[41] While I agree that the existence of a sham is determined by the application of a legal test to the facts of a taxpayer's situation, I respectfully disagree that the existence of an intention to mislead is a legal conclusion. Both intention and

purpose relate to a person's state of mind, which are factual matters. In *Edgington v Fitzmaurice* (1885) L.R. 29 Ch. D. 459 (CA) Bowen L.J. said that "…the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact" (see also: *Irrigation Industries Ltd. v. The Minister of National Revenue*, [1962] S.C.R. 346 at page 362).

[42] The question of whether the "appearance that the Appellant's sale of tobacco products were relieved from GST/HST" was false, though, would require an analysis of the relevant portions of the *Indian Act* and *ETA* and therefore involve a determination of law. The word "false" should be struck from paragraph (y).

Group 3 Paragraphs

[43] The third group contains paragraphs (s), (t) and (w). The wording that the Appellant objects to is as follows:

Paragraph	Extricable Wording
14(s)	"retailers not located on a reserve (the "Customers")"
14(t)	"the location of each Customer"
14(w)	"the Customer's" and "to consumers"

[44] The Appellant takes issue with the third group of paragraphs because in its view they have not been pleaded with sufficient specificity or completeness and are based on information that is only within the Minister's knowledge and which has not been shared with the Appellant.

[45] The Appellant says that assumptions must be pleaded with specificity, completeness, accuracy and honesty (*Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188 at para 29) and cannot be based on information that is only within the Minister's knowledge and is not shared with the Appellant. Fairness would require that the Appellant should not hold the onus to demolish such an assumption.

[46] The Appellant argues that in these paragraphs, the assumptions involve unnamed parties and unnamed locations, being the off-reserve retailers who were

the alleged true customers. The Respondent has not shared the identity or locations of these off-reserve retailers, and the Appellant is therefore faced with a significant challenge in attempting to demolish the assumption. Without specific and complete information on which off-reserve retailers the Minister assumes were the true customers, the Appellant does not know the case it has to meet.

Analysis

[47] With respect to the Appellant's argument concerning specificity, I would note that paragraphs (s), (t) and (u) when read together appear to indicate that the identity and location of the Appellant's customers is determinable by means of an alphanumeric code appearing on the purchase orders for the sales in issue, and that the code was used by the Appellant. This was confirmed by the Respondent's counsel at the hearing. To this extent, the paragraphs involve matters which would be within the knowledge of the Appellant. Therefore, while the customers are not named in those paragraphs, the identity of those customers and their location on or off-reserve would be known to the Appellant. For this reason, I am not prepared to find that the wording that the Appellant complains of should be struck from the Reply. I find there is sufficient precision in paragraphs (s), (t) and (w) to permit the Appellant to know the case it has to meet.

[48] Even if I had been satisfied that the wording referred to by the Appellant in paragraphs (s), (t) and (w) concerned matters outside the knowledge of the Appellant, striking that wording would not be the appropriate remedy. In such situations, it the Minister may bear the onus of proving the impugned facts, despite pleading them as assumptions relied upon by the Minister. See: *Transocean Offshore Ltd. v. Canada*, 2005 FCA 104 at para 35. This, again, would be a matter that should be left to the determination of the trial judge who would have the benefit of hearing all of the evidence.

[49] In the case of pleadings that lack specificity, this Court has also held that the appropriate course of action would be a demand for particulars rather than a motion to strike: *Kulla v. The Queen*, 2005 TCC 136 at para 15; *Kopstein v. Canada*, 2010 TCC 448 at para 64 and 65. I agree with Jorré J in *Kopstein* that

> In such a case where the complaint is a failure to include something in the pleading, it is also necessary in applying Rule 53 to consider whether the trial process is better served:

> (a) by a motion to strike and, if it is successful, in all likelihood, a motion to amend the reply which may well be successful
>
> or
>
> (b) by a demand for particulars followed by a motion for particulars, if necessary.
>
> Depending on the circumstances, sometimes the more appropriate course of action may be to demand particulars in which case a motion to strike may be dismissed.

Conclusion

[50] The motion is allowed in part in 2013-4833(GST)G, and paragraphs 14(q) and (bb) and the word "false" in paragraph (y) will be struck from the Fresh as Amended Reply. In light of this conclusion the Respondent is granted leave to file a Second Fresh as Amended Reply in appeal 2013-4833(GST)G within 30 days of this Order. The Appellant may file an Answer 30 days after the filing of the Second Fresh as Amended Reply. The motion in the four other appeals is dismissed. The Respondent is granted leave to file Amended Replies within 30 days of this Order in those appeals and the Appellant may file Answers 30 days after the filing of the Amended Replies.

Costs

[51] In light of its very limited success on its motion, the Appellant's request for solicitor-client costs is denied and no costs are awarded.

Signed at Ottawa, Canada, this 26th day of February 2015.

"B.Paris"

Paris J.

CITATION:	2015 TCC 48
COURT FILE NO.:	2013-4833(GST)G
STYLE OF CAUSE:	BEMCO CONFECTIONERY AND SALES LTD. AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 20, 2014
REASONS FOR ORDER BY:	The Honourable Justice B. Paris
DATE OF ORDER:	February 26, 2015

APPEARANCES:

Counsel for the Appellant:	Robert G. Kreklewetz John Bassindale
Counsel for the Respondent:	André Leblanc

COUNSEL OF RECORD:

For the Appellant:

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