Docket: 2016-2542(IT)G

BETWEEN:

SCOTT HERON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 8, 2017 at Hamilton, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	John H Loukidelis
Counsel for the Respondent:	Meaghan Mahadeo

ORDER

UPON motion made by the appellant for an Order pursuant to section 53 of the *Tax Court of Canada Rules (General Procedure)* to strike part of the Respondent's Reply to Notice of Appeal, dated September 13, 2016;

AND having heard what was alleged and argued by the parties;

IT IS ORDERED THAT:

The motion made by the appellant to strike certain paragraphs of the Respondent's Reply is allowed.

Subparagraphs 17(b), 18(h) and (i) of the Reply are struck.

The appellant is not entitled to any further relief.

Without costs.

Signed at Montreal, Quebec, this 3rd day of May 2017.

"Johanne D'Auray"

D'Auray J.

Citation: 2017 TCC 71
Date: 20170503
Docket: 2016-2542(IT)G

BETWEEN:

SCOTT HERON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

I. OVERVIEW

[1] The appellant filed a motion on October 14, 2016, requesting this Court to strike certain paragraphs of the Reply to Notice of Appeal ("Reply"), filed by the respondent, that relate to his criminal conduct in respect of a business that he carried on and in which income was earned.

[2] The appellant is arguing that his criminal conduct is irrelevant in determining his liability for tax or in determining whether gross negligence penalties under subsection 163(2) of the *Income Tax Act* ("*Act*") should have been levied by the Minister of National Revenue (the "Minister").

[3] The position of the appellant is that some of the allegations set out in the Reply are vexatious, may prejudice or delay the fair hearing of the appeal, or disclose no reasonable grounds for opposing the appeal.

[4] The appellant is asking the Court to strike the underlined paragraphs of the Reply, namely:

> [16] In determining the Appellant's tax liability for the 2010 and 2011 taxation years, the Minister made the following assumptions of fact:
>
> (a) the facts stated and admitted above;

(b) the Appellant was a police officer with the Niagara Regional Police Service;

(c) the Appellant was in the business of reselling cheese and other food products (the "products") to restaurants in southern Ontario (the "business");

(d) the Appellant was charged with conspiracy to commit an indictable offence – smuggled goods and breach of trust;

(e) the Appellant was also charged with four counts under the Customs Act;

(f) the charges identified in subparagraphs 16d) and 16e) related to the smuggling of the products into Canada;

[…]

[17] The Minister now relies on the following additional facts:

(a) the Appellant was tried and convicted on three charges under the *Customs Act* and one breach of trust charge in relation to the smuggling of the products; and

(b) the Appellant was sentenced to four months in jail.

[18] In determining that the Appellant was liable to a penalty pursuant to subsection 163(2) of *the Income Tax Act* (the "*Act*"), the Minister relied on the following facts:

(a) the assumptions stated in paragraph 16;

[…]

(g) given the illegal source of the income, the Appellant knowingly did not report the income from the business;

(h) given the Appellant's employment, it would not have been in his best interest to admit his illegal activity;

(i) had he reported the income from the resale of the products there could have been duties imposed by the Canada Border Services Agency which would have undermined the profitability of the business;

II. FACTS

[5] During the 2010 and 2011 taxation years, the appellant carried on a business of purchasing and importing cheese and other products from the United States and reselling them to restaurants in Canada (the "business").

[6] The appellant did not report any income from his business activities for his 2010 and 2011 taxations years.

[7] On April 8, 2013, a Notice of Reassessment was issued whereby the Minister included in the appellant's income the amounts of $23,916 for his 2010 taxation year and $84,216 for his 2011 taxation year as unreported income from a business. The Minister also levied penalties pursuant to subsection 163(2) of the *Act*.

[8] The appellant admits that he operated a business in his 2010 and 2011 taxation years. However, he contests the quantum of the amounts included in his income and the penalties levied pursuant to subsection 163(2) of the *Act*.

III. ANALYSIS

[9] The relevant provision in this motion is section 53 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"), in particular subsection 53(1), of the *Rules*, which states:

> **53. Striking out a Pleading or other Document – (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).
>
> […]

[10] In *Gramiak v HMQ*,[1] the Chief Justice of this Court, Justice Rossiter, set out the test for motions to strike, referring to the decision of Chief Justice Bowman (as he then was), in *Sentinel Hill Productions*. Chief Justice Rossiter stated as follows:

> [30] 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) Corp. v. R.*, 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 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.

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[1] 2013 TCC 383 [*Gramiak*], upheld by 2015 FCA 40.

> (d) Rule 53 and not Rule 58, is the appropriate rule on a motion to strike.

[31] Chief Justice McLachlin wrote for the Supreme Court in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.):

> 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.

Further:

> …The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding.

[Emphasis in the original.]

[11] In addition, in a motion to strike, the burden rests with the party attacking the pleading or portions thereof to show that it is clear and obvious that the pleading is scandalous, frivolous or vexatious, or that it is otherwise an abuse of the process of the Court.[2]

[12] 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."[3]

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2 General *Motors of Canada Ltd v R*, 2006 TCC 184, 2006 GTC 233, at para 21 [*General Motors*], citing Justice Bonner in *Morris v Canada*, 93 DTC 316, at page 317.

3 Ibid.

[13] On the question of relevancy, in *Niagara Helicopters*,[4] Chief Justice Bowman opined that whether an allegation is relevant is usually best decided by the judge who will preside the trial. He stated as follows:

> [8] […] It is inappropriate on a preliminary motion for a motions judge, who has heard no evidence, to decide that an allegation is irrelevant thereby depriving a party of the opportunity of putting the matter before the judge who presides the trial and letting him or her put such weight on it as may be appropriate.

[14] From these decisions, it is quite clear that the test to strike an allegation in a pleading is a stringent one.

[15] The appellant is asking the Court to strike the following assumptions of fact at paragraph 16 of the Reply:

> [16] In determining the Appellant's tax liability for the 2010 and 2011 taxation years, the Minister made the following assumptions of fact:
>
> > d) the Appellant was charged with conspiracy to commit an indictable offence smuggled goods and breach of trust;
> >
> > e) the Appellant was also charged with four counts under the *Customs Act*;
> >
> > f) the charges identified in subparagraphs 16d) and 16e) related to the smuggling of the products into Canada;

[16] The appellant argues that since he is only contesting the quantum of the amounts to be included in his income as business, the facts taken into account by the Minister dealing with his criminal conduct are irrelevant and should be struck.

[17] The appellant also argues that he does not object to the respondent making allegations relating to the conduct of the business as opposed to the legal consequences of the business. In the appellant's view, the assumptions of fact dealing with his criminal conduct are vexatious and may prejudice or delay the fair hearing of the appeal or they disclose no reasonable ground for opposing the appeal. He also argues that prior convictions may be relevant for cases dealing with estoppel, but the issue of estoppel was not raised by the respondent in this appeal.

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4 *Niagara Helicopters Ltd v Canada*, 2003 TCC 4, 2003 DTC 513.

[18] I do not agree with the appellant. In tax appeals, the role of the assumptions of fact in a Reply is to inform the taxpayer of the factual basis upon which he or she has been assessed by the Minister. Justice Bowman in *Holm v Canada*,[5] stated that the assumptions "are supposed to be a full and honest disclosure of the facts upon which the Minister relied in making the assessment."[6] Justice Bowman also stated in *Mungovan v The Queen*, in tax cases:[7]

> 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.[8]

[Emphasis added.]

[19] In my view, the assumptions of fact made by the Minister in subparagraphs 16(d), (e) and (f) are a complete and truthful disclosure of the facts on which the Minister has relied in assessing the appellant. In addition, the Minister did not know at the time she assessed that the appellant would only put into question the quantum of the amounts. In any event, these assumptions of fact at paragraph 16 of the Reply are not only relevant for the income inclusion, but also for the penalty levied under subsection 163(2) of the *Act*. This is clear from subparagraph 18(a) of the Reply, where it is stated that the facts at paragraph 16 of the Reply were taken into account by the Minister in assessing the penalty under subsection 163(2) of the *Act*.

[20] Subsection 163(2) of the *Act* states that the Minister may levy penalties when a taxpayer in filing his income tax return, knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of, a false statement or omission in his tax return. The burden of proving that the Minister correctly assessed penalties under subsection 163(2) of the *Act*, rests with the respondent.

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5 *Holm v Canada*, [2003] DTC 755, [2002] TCJ No 641 [*Holm*].

6 *Holm*, at para 9. Justice Bowman's comments in *Holm* were quoted and approved by Justice Létourneau of the Federal Court of Appeal in *Anchor Pointe Energy Ltd v Canada*, 2007 FCA 188, at para 27.

7 *Mungovan v Canada*, 2001 TCC 568, [2001] 3 CTC 2779 [*Mungovan*].

8 *Mungovan*, at para 10.

[21] The appellant quoted the decision of *Simard v R.*[9] In *Simard*, the respondent pleaded as additional facts the criminality of the taxpayer in her Reply to Notice of Appeal:

> [2] Paragraph 76 of the reply read as follows:
>
> 76. The Deputy Attorney General relies on the following additional facts:
>
> a) in April 2014, as a result of an investigation of the XXX Tax Shelter by the Royal Canadian Mounted Police ("RCMP"), principals and representatives of XXX and ABC (…) were charged with the following offences in relation to their activities in connection with the XXX Tax Shelter:
>
> • fraud over $5,000.00 contrary to paragraph 380(1)(*a*) of the *Ciminal Code* [*sic*];
>
> • conspiracy to commit fraud over $5,000.00 contrary to paragraph 465(1)(*c*) of the *Criminal Code*;
>
> • laundering proceeds of crime contrary to subsection 462.31(1) of the *Ciminal Code* [*sic*]; and
>
> • commission of an offence for the benefit for a criminal organization contrary to section 467.12 of the *Criminal Code*.
>
> [3] The charges listed in Bullets 2 and 3 were not in fact laid against the individuals and representatives of XXX.

[22] Justice Rip (as he then was) stated in *Simard* that the additional facts pleaded by the respondent at paragraph 76 of her Reply to Notice of Appeal were scandalous and an abuse of the process of the Court under *Rules* 53(1)(b) and (c), and would potentially prejudice or delay the fair hearing of the trial under *Rule* 53(1)(a). However, he indicated in his reasons that if a person were found guilty of the alleged charges, at that point, the respondent may consider amending her Reply to include these additional facts. Specifically, he stated:

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9 *Simard v R,* 2015 TCC 2, 2015 CarswellNat 8, at paras 12 and 15 [*Simard*].

> To allege in a pleading that a person is charged with a criminal offence, but the charge has not been proven serves no legitimate purpose. If, prior to the hearing of this appeal, the individuals are found guilty of the charges, then the respondent may consider amending her reply accordingly.

[Emphasis added.]

[23] By making such statement, Justice Rip was therefore of the view that such facts could be relevant where a taxpayer is convicted, which is the situation in this motion. It is also interesting to note that Justice Rip was dealing with additional facts and not facts taken into account by the Minister at the time of the assessment.

[24] In *MacIver v The Queen*,[10] Justice Hershfield (as he then was) stated that the criminality of the taxpayer is relevant for purposes of the penalty under subsection 163(2) of the *Act*. He stated the following at paragraph 3 of his reasons:

> […] On this basis that part of the Appellant's first motion that seeks to strike paragraphs relating to his criminal prosecution must fail unless the Respondent is successful in these proceedings on its motion to apply issue estoppel so as to make the impugned provisions in the Reply redundant. Similarly, paragraphs referring to wilful default, fraud and making false statements cannot be impugned as frivolous or vexatious or as tending to embarrass or delay since they are material assertions in respect of penalties assessed under the reassessments as well as being material in respect of the Respondent's issue estoppel motion and, potentially, time limitations. Accordingly, the Appellant's motion to strike from the Reply cannot be granted.

[Footnotes removed.]

[25] I am therefore of the view that the assumptions of fact in subparagraphs 16(d), (e) and (f) of the Reply should not be struck. They do not prejudice or delay the fair hearing of the appeal, they are not scandalous, frivolous or vexatious, and are not an abuse of the process of this Court. On the contrary, these assumptions of facts have a reasonable prospect of success in defending the inclusion of the amounts in the appellant's income and the penalties levied by the Minister under subsection 163(2) of the *Act*.

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[10] 2005 TCC 250, [2005] 2 CTC 2772, aff'd by 2006 FCA 73.

[26] The appellant is also requesting that the additional facts pleaded by the Respondent in her Reply at paragraph 17 be struck:

> [17] The Minister now relies on the following additional facts:
>
> > (a) the Appellant was tried and convicted on three charges under the *Customs Act* and one breach of trust charge in relation to the smuggling of the products; and
> >
> > (b) the Appellant was sentenced to four months in jail.

[27] I am of the view that subparagraph 17(a) of the Reply is relevant for the purposes of the penalty levied pursuant to 163(2) of the *Act* for the same reasons that I mentioned in my reasons when I was dealing with paragraph 16 of the Reply.

[28] However, I am of the view that subparagraph 17(b) should be struck since this allegation has no reasonable prospect of successfully defending the validity of the assessment with respect to the penalty.

[29] The appellant is also requesting that I strike the following facts relied upon by the Minister in assessing the penalty under subsection 163(2) of the *Act*.

> [18] In determining that the Appellant was liable to a penalty pursuant to subsection 163(2) of the *Income Tax Act* (the "Act"), the Minister relied on the following facts:
>
> > (g) given the illegal source of the income, the Appellant knowingly did not report the income from the business;
> >
> > (h) given the Appellant's employment, it would not have been in his best interest to admit his illegal activity;
> >
> > (i) had he reported the income from the resale of the products there could have been duties imposed by the Canada Border Services Agency which would have undermined the profitability of the business;

[30] The appellant is arguing that these allegations of facts are irrelevant for the test under subsection 163(2) of the *Act*, namely that he knowingly made a false statement in filing his income tax return. Rather, the appellant is of the view that these allegations speculate about the appellant's motives for not reporting profits from the business and such motives are irrelevant.

[31] I do not agree with the appellant with respect to subparagraph 18(g) of the Reply – the allegation of fact is relevant for the purposes of subsection 163(2) of the *Act*. It cannot be said that it is plain and obvious that the allegation discloses no reasonable cause of action.

[32] However, I am of the view that subparagraphs 18(h) and (i) of the Reply should be struck. Subparagraphs 18(h) and 18(i) are not facts, they are hypothetical and argumentative. In addition, they are not relevant for the purposes of the penalty pursuant to subsection 163(2) of the *Act*.

IV. CONCLUSION

[33] The motion made by the appellant to strike certain paragraphs of the Respondent's Reply is allowed.

[34] Subparagraphs 17(b), 18(h) and (i) of the Reply are struck.

[35] The appellant is not entitled to any further relief.

[36] Without costs.

Signed at Montreal, Quebec, this 3rd day of May 2017.

"Johanne D'Auray"

D'Auray J.

CITATION:	2017 TCC 71
COURT FILE NO.:	2016-2542(IT)G
STYLE OF CAUSE:	SCOTT HERON v THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	February 8, 2017
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	May 3, 2017

APPEARANCES:

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