Docket: 2018-3248(IT)G

BETWEEN:

GRAHAM F. MUDGE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on October 4, 2019 at Ottawa, Canada

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Martin Gentile
Counsel for the Respondent:	Shane Aikat
	Stephen Ji

AMENDED ORDER

The motion is allowed but only to the extent of striking the word "domiciled" in subparagraphs 18.61 (one occurrence) and **18.63** (two occurrences) in the Amended Reply that has been or is to be filed. Costs of this motion in the fixed amount of $1,250 are to be paid by the Appellant to the Respondent within 30 days of the issuance date of this Order.

This Amended Order is issued in substitution for the Order dated July 30, 2020.

Signed at Halifax, Nova Scotia, this **10th** day of **August** 2020.

"B. Russell"

Russell J.

Citation: 2020TCC77
Date: 2020**0810**
Docket: 2018-3248(IT)G

BETWEEN:

GRAHAM F. MUDGE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Russell J.

[1] The issuance of the herein Order and Reasons for Order has been delayed by the closure of this Court for several months due to the Covid-19 pandemic.

[2] The Appellant, Graham Mudge has brought an interlocutory motion per subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)* (*Rules*, Rule), in respect of his appeal of a reassessment raised under the federal *Income Tax Act* (ITA) respecting his 2008 taxation year. He seeks an order striking portions of the Respondent's Reply pleadings. In advance of the return of this motion the Respondent submitted to the Appellant a proposed Amended Reply reflecting various pleading changes prompted by the bringing of this motion. Accordingly, the proposed Amended Reply rather than the filed Reply is the pleading addressed herein in the consideration of this motion.

[3] The text of the proposed Amended Reply is attached as Appendix **"**A**"** to these Reasons for Order, and will be further referred to below.

[4] Rule 53(1) provides:

> 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 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.

[5] The issue in the Appellant's underlying ITA appeal is the deductibility per subsection 118.1(3) of the ITA of a charitable donation he claims he made in 2008 to the Canadian Humanitarian Trust (CHT) donation program.

[6] In the proposed Amended Reply the Respondent has pleaded 131 assumptions said to have been made by the Minister of National Revenue (Minister) in raising the appealed reassessment. The Appellant's Notice of Motion provides as grounds for striking out portions of the original Reply (and now the proposed Amended Reply) that those portions variously, "may prejudice or delay the fair hearing of the appeal; are scandalous, frivolous or vexatious; are repetitive; are conclusions of mixed fact and law; are conclusions of law; are irrelevant; relate to taxation years that are not in issue in the appeal; contain evidence by which the facts are to be proved."

[7] The underlying appeal is at an early stage. There have not yet been exchanges of lists of documents or discovery examinations. A demand for particulars was issued August 2, 2019 by the Respondent; responded to by the Appellant September 3 and September 16, 2019 by particularizing portions of the Reply that the Appellant considers reflect pleading deficiencies.

[8] Prior to addressing specifically the proposed Amended Reply, I will note certain well-established legal principles governing pleadings.

[9] 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. 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. (*Zelenski v. The Queen*, 2002 DTC 1204 (TCC), para. 4; aff'd 2002 DTC 7395 (FCA))

[10] 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 rules relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of 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. (*Holmsted* and *Watson*, Ontario Civil Procedure, Vol. 3, pp. 25/20 and 25/21, cited in *Zelenski*, *supra*, para. 5)

[11] Material facts are the facts that must be pleaded in a pleading, being the facts, "necessary for the purpose of formulating a complete cause of action". (*Globtek Inc. v. The Queen*, 2005 TCC 727, para.5, citing *Bruce v. Odhams Press Ltd.*, [1936] 1 K.B. 697 at 712 (C.A.))

[12] Also in *Globtek* (*supra*, para.8), Bowie J. of this Court referenced the burden of litigation costs caused by the pleading of immaterial facts.

[13] In *Foss v. Her Majesty*, 2007 TCC 201, paras 8 to 11, Bowie, J. further focused on the pleading of immaterial facts, writing that properly, only facts material to the appealed (re)assessment should be pleaded as ministerial assumptions.

[14] The general test for striking out pleadings, in the context of a motion to strike the Crow n's reply in an income tax appeal, is that the motion will be granted only if it is plain and obvious, assuming the facts as pleaded in the reply to be true, that the reply fails to state a reasonable basis for concluding that the reassessment under appeal is correct. (*CIBC v. Her Majesty*, 2013 FCA 122, para. 7.)

[15] 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. (*Sentinel Hill Productions v. Her Majesty*, 2007 TCC 742, Bowman, CJ, para. 4.)

[16] It is well established that the statement of factual assumptions must contain no statements of law . . . and where the assessment under appeal is based on a conclusion of mixed fact and law, the factual components must be extricated and stated as factual assumptions. (*CIBC*, *supra*, para. 92.)

[17] Under Rule 53(1)(c) pleadings can be struck as an abuse of process without leave to amend. As well, pleadings can be struck as vexatious under Rule 53(1)(b). Vexatious is broadly synonymous with the concept of abuse of process, and so cases striking out a pleading as vexatious may also be helpful in determining whether to strike out a pleading as an abuse of process...[and]...a pleading which

fails to sufficiently reveal the facts on which a claim is based to make it possible to answer or for the court to regulate the proceeding is vexatious.

[18] Similarly the Federal Court of Appeal (FCA) stated in *Merchant Law Group v. Canada Revenue Agency*, 2010 CarswellNat 3175 (FCA), that a claim which contains bare assertions or conclusions without material facts on which to base them should be struck as vexatious. Pleadings may be struck as an abuse of process for similar reasons. (*Mount Bruno C.C. Inc. v. Her Majesty*, 2018 TCC 105, para. 19.)

[19] Principles for application of Rule 53 include - fairness may require that no onus be placed on the taxpayer to rebut a specific factual assumption made by the Respondent; pleadings must contain material facts that clearly and concisely define the issues before the Court. Facts which are relevant but not material rarely should be pleaded. (*CIBC v. Her Majesty*, 2011 TCC 568, para. 41, *per* Rossiter, ACJ as he then was).

[20] Questions of relevance generally should be left for the trial judge, in the context of all evidence at trial. Facts as to how an allegation will be proved are basically facts as to evidence and so should not be pleaded. As allegations of fraud and dishonesty are so serious, particulars are particularly required. Scandalous pleadings are pleadings which are offensive, do not relate to issues and are abusive or prejudicial. Also, pleadings might be struck because they were inserted for colour, or simply as they are inflammatory. Frivolous claims are pleaded claims with negligible importance and claims that are vexatious generally are usually malicious and have no cause. Pleadings should be struck for being scandalous, frivolous or vexatious only in the most obvious of cases. Abuse of process pertains to prejudicial misuse of procedure and/or the bringing of the administration of justice into disrepute. (*CIBC, supra* (TCC), paras. 41, 42).

[21] Facts or perceived facts which are within the particular knowledge of the Respondent [the Crown], that are "paraded as assumptions" in the Reply, but are beyond the knowledge of the Appellant and which are not easily or practically deniable by the Appellant without extraordinary effort and expenditure, should not be deemed to be facts simply because they are not specifically negated by the Appellant's evidence. Assumptions of fact in such circumstances cannot displace the need of the Respondent to produce evidence to substantiate or support same, to counter or affect the Appellant's factual presentation. (*Transocean Offshore v. Her*

Majesty, 2005 FCA 104, para. 34, referencing Bell, J from *Radash Trading v. Her Majesty*, 2004 TCC 446, para. 31).

[22] In *Kossow v. The Queen*, 2009 FCA 83 (para. 21), the FCA adopted language of Bowman, ACJ TCC as he then was that it is essential that pleaded assumptions be complete and truthful. 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 not within the knowledge of the appellant. The trial judge may consider them irrelevant or decide to cast upon the respondent the onus of proving them.

[23] Further in *Kossow* (paras. 21 to 23), the FCA adopted language of Bowman, CJ of this Court, in *Gould v. The Queen*, 2005 TCC 566, as follows:

> [21] . . . A central component in [a prior] assessment which disallowed the charitable donations is the existence of a 'scheme' in which it is alleged that the appellant participated and which enabled the participants to obtain what the Crown sees as artificial or inflated charitable tax credits. It of necessity involved third parties and if the existence of a scheme is essential to the Crown's case it should be able to plead and prove all of the components of the scheme. To say, as the appellant does, that [two certain judicial decisions] preclude any reference to third party transactions unless the appellant knows of or is privy to those transactions goes too far. If the existence of a scheme is germane to the disallowance it cannot be ignored whether or not the Minister assumed that the appellant knew about or was a party to the third party transactions that, according to the Reply, were an integral part of the scheme. If any of the facts assumed are truly within only the Crown's knowledge the Crown probably has the onus of proving them although this is ultimately for the trial judge to decide.
>
> Ministerial assumptions of fact should be pleaded in the Crown's Reply, which "should set out fully [the Minister's] position. [The Crown] should plead honestly and comprehensively the assumptions upon which the assessment is based...The essential and important function that pleadings serve in litigation is a practical one of providing information about the party's case." (*Gould v. Her Majesty*, 2005 TCC 566 at para. 12, per Bowman, C.J.) As well, Rule 49(1)(d) provides that the Reply pleading, "shall state . . . the findings or assumptions of fact made by the Minister when making the assessment . . ."

[24] In this motion the parties' positions may be summarized. The Appellant argues that the Respondent's obligation to completely plead ministerial assumptions must be kept within the bounds of principles of proper pleading, including conciseness, materiality and the overriding principle of fairness. That is,

assumptions that are offensive, immaterial and irrelevant or conclusions of law ought not be pleaded. In particular, there may be situations where fairness requires that no onus be put on a taxpayer to rebut a specific factual assumption made by the Crown (Respondent). An example may be a fact that is exclusively or peculiarly within the knowledge of the Crown, and further cannot easily or practicably be denied by the taxpayer without extraordinary effort and expenditure. Such assumptions would not displace the need for the Crown to produce evidence to substantiate or support that which may be relevant to respond to the taxpayer's factual presentation.

[25] The Appellant further contends that the proposed Amended Reply includes many legal conclusions or statements of mixed fact and law, reflects excessive repetition, includes irrelevant or immaterial assumptions of fact and other assumptions "fraught with evidence in disguise", and includes pleadings that are "vexatious, frivolous, scandalous or an abuse [of] process". As well, portions of the pleading may prejudice or delay a fair hearing.

[26] The Respondent defends its proposed Amended Reply, noting that it is essential that assumptions be pleaded completely and truthfully. Pleadings should be struck only in the plainest and most obvious cases. Further, assertions of ownership, possession, acquisition, etc. are in context factual, not legal. Also, the complexity of the CHT program requires a proportional factual description, as distinguished from pleading evidence. Additionally, pleading assumptions regarding third parties is proper. Finally, the language of the Crown's pleadings is descriptive as opposed to being inflammatory, scandalous, vexatious or otherwise prejudicial.

[27] Keeping in mind the foregoing principles pertinent for Rule 53 strike motions, I now address the contested pleadings in the proposed Amended Reply, the text of which, as noted above, is attached hereto as Appendix "A". And, the complete listing of portions of the proposed Amended Reply that the Appellant seeks to strike plus in each case the Appellant's stated reasons for same is found in Appendix "A" of the Appellant's Written Submissions.

[28] The Appellant seeks that paragraph 1 of the proposed Amended Reply be struck due to many alleged failings - "immaterial or irrelevant, evidence, assumptions of this parties, repetitive, mixed fact and law, vexatious, scandalous or frivolous, an abuse of process, prejudice or delay fair hearing". The Appellant has

cited in large part this same or a similar litany of complaints in support of most of its many strike requests.

[29] I do not find the use of the verb "abuse" in paragraph 1 of the proposed Amended Reply sufficiently offensive or capable of improperly influencing a trial judge - *i.e.*, "vexatious, scandalous or frivolous" - to resort to striking it out per Rule 53. I find the phrase "registered tax shelter" not offensive - after all "tax shelter" is a defined term in the ITA itself which statute as well provides for registration of tax shelters. The other language in paragraph 1 may be pointed but not to the extent that any of it need be struck.

[30] In paragraph 2, the Appellant seeks that the phrase "fictitious cash donation" be struck. For the same reason as expressed immediately above, I do not find that phrase sufficiently offensive that it need be struck. Portions of a pleading should be struck, particularly at the motion stage, only where the language is strikingly or startlingly objectionable.

[31] The Appellant seeks that the phrase "tax shelter" be struck from the heading which appears as part of paragraph 18, immediately preceding subparagraph 18.1. The heading reads, "Overview of the Canadian Humanitarian Trust tax shelter". For the same reasons as expressed above, I decline to do so.

[32] The Appellant seeks that the phrase "Tax Shelter" in subparagraph 18.1, as part of the phrase, "Canadian Humanitarian Tax Shelter (#TS069310)" be struck. Again I decline to do so, for reasons expressed above regarding paragraph 1. I note, on the basis of undue repetition, the Respondent's excising of the two subsequent references to "tax shelter" (lower case) appearing in the latter part of the one sentence comprising subparagraph 18.1. The phrases appeared in the Reply and the excising is evident in subparagraph 18.1 of the proposed Amended Reply.

[33] The Appellant seeks that all of subparagraph 18.3 be struck, including particularly the phrase, "a thinly veiled scheme designed to enrich various parties". I do not find that phrase sufficiently aggressive or offensive (or overly colourful) to require that it be struck in whole or part due to risk that if left it would improperly influence the judicial mind. I note and have no issue with the Respondent's proposed amendments to this subparagraph of the proposed Amended Reply.

[34] The Appellant seeks that all of subparagraphs 18.3 through 18.10 be struck. The reasons are similar to those expressed above, if slightly more focused -

"immaterial or irrelevant, evidence, assumptions of third parties, frivolous, an abuse of process, prejudice or delay fair hearing". In oral submissions, Appellant's counsel focused particularly on subparagraphs 18.7 to 18.10, asserting that these expressed assumptions were outside the Appellant's knowledge, and are immaterial. Following *Kossow*, *supra*, I do not find these reasons sufficient to strike language at this early stage in the appeal. Per the FCA it is for the discovery examination process and ultimately the trial judge to determine what might be struck out on the basis of immateriality and/or whether the onus of proof should be shifted from the taxpayer Appellant in respect of any factual assumption of the Minister found to be beyond the Appellant's knowledge and any reasonable ability for the Appellant to inform himself with respect thereto in advance of trial.

[35] The Respondent has resolved the Appellant's complaint re subparagraph. 18.15 that the term "tax shelter" appears in the heading and that this has become repetitive, by removing that phrase. I have no issue with that.

[36] The Appellant seeks that all of subparagraphs 18.15 through 18.20 be struck. The submitted reasons are similar to those expressed above - "immaterial or irrelevant, evidence, assumptions of third parties, frivolous, an abuse of process, prejudice or delay fair hearing". I do not see these elements in these subparagraphs, apart from the fact that some of the assumptions may be as to facts that are immaterial. As above, that is not a proper basis for striking pleadings at this motions judge stage. The matter should be left for the trial judge.

[37] In oral submissions the Appellant expressed opposition to use of the term "tax benefit" in subparagraph 18.14 of the proposed Amended Reply, on the basis that it is a legal conclusion. This claim is not included in the written list of items to be struck. This contested pleading of subparagraph 18.14, being another ministerial assumption, reads - "The appellant entered into the CHT program primarily to secure for himself a tax benefit in excess of the initial cash payment he made and not to make a charitable gift to a registered Canadian charity." I do not have difficulty with use of the term "tax benefit" in this context, focusing on the Appellant's intention rather than upon any specific legal aspects of a tax benefit per 118.1(3) of the ITA.

[38] Regarding subparagraph 18.21 the Appellant seeks the striking of all text including particularly the use twice of the phrase "tax shelter". The Respondent has agreed to remove those two references, presumably on the basis of repetition. As

usual, virtually all of the usual reasons for striking were cited. There was little in the way of oral submissions at the hearing about this.

[39] The Appellant seeks that subparagraphs 18.22 through 18.24 be struck, again with most or all of the several grounds for doing so being cited. The Respondent has in response deleted most of subparagraph 18.22, having been twice as long as the two following subparagraphs. In oral submissions the Appellant focused on the word "controlled" in subparagraph 18.23,within the phrase, "...funds contributed by a participant were controlled by the promoters at all times". The submission was that this was a statement of mixed fact and law and also it reflected the actions of third parties. I do not consider it obvious that "controlled" is unremittingly a term of law as used in this context, as opposed to a term of general layperson usage.

[40] The Appellant seeks that the ministerial assumption pleaded at subparagraph 18.25 be struck, again citing all the various bases for so doing, but more particularly in oral submissions arguing that the provision pleads the assumption of an immaterial fact and the Appellant has no knowledge of that pleaded fact. Again this is answered by *Kossow*, whereby these are issues to be left to discovery examination and ultimately the trial judge, including as to any shifting of onus of proof.

[41] The Appellant seeks that the ministerial assumption pleaded in subparagraph 18.26 be struck, particularly on the basis it pleads actions of third parties, of which he has no knowledge. The relevant text is, "...each participant retained Sommer's Business Law Firm...as his or her trust lawyer and to act on their behalf to facilitate the transactions that allegedly occurred as a result of their participation in the CHT..." The Appellant says he has no knowledge as to what "each participant" did, he just knows what he did. As stated above, this is a matter for discovery examination and ultimately the trial judge. The references to "power of attorney" later in this draft provision are objected to by the Appellant on the basis of reflecting "mixed fact and law". In context, the references do not trouble me, they are reasonably understandable to taxpersons and are cited primarily to convey the relevant factual circumstances. In any event I do not find it obvious that this language should be struck, particularly in my role as motions judge. The trial judge would be in a much better position to know, from context of the evidence adduced before her/him, whether legal intricacies of a right of power of an attorney are at issue. It does not appear to me albeit at the early stage of this appeal that that is likely.

[42] The Appellant seeks that the ministerial assumption pleaded in subparagraphs 18.27 to 18.30 be struck, yet again citing as reasons virtually the full gamut of claims - "immaterial or irrelevant, evidence, assumptions of theirs parties, frivolous, an abuse of process, prejudice or delay fair hearing". There is no text for either of subparagraphs 18.27 and 18.29. The text of subparagraph 18.28 is unobjectionable. The Appellant specifically opposes subparagraph 18.30, asserting it pleads evidence in referring to donation payments. The questioned text reads: "The dollar value of the pharmaceuticals and the alleged distribution of pharmaceuticals from the CHT Trusts was in proportion to the initial cash payment from the participant, and was consistent with the marketing materials" I disagree with the Appellant. I find here no obvious instance of pleading evidence as opposed to fully stating the case the Appellant has to meet.

[43] The Appellant opposes subparagraph 18.31 of the proposed Amended Reply on the basis it pleads mixed fact and law. The questioned wording reads, in relevant part, "The initial cash payments were akin to fees paid to gain access to the CHT program..." The Appellant says that the legal issue here is what are "fees"? I disagree with the Appellant; I find here no concern of sufficient significance to require striking out a portion of these pleadings.

[44] The Appellant opposes subparagraphs 18.32 through 18.34 of the proposed Amended Reply which plead as another ministerial assumption (subparagraph 18.33) that "[e]very participant who applied was accepted as a beneficiary of a CHT trust save and except (possibly) those who cancelled their initial cash payment"; and also (subparagraph 18.34) that participants had three options with respect to pharmaceuticals allegedly distributed. The Appellant states he has no knowledge of any of this, and that this is information sourced from third parties. Again, given the *Kossow* decision of the FCA, this is an inadequate basis to strike such pleaded assumptions at this pre-discovery examination stage.

[45] The Appellant similarly opposes subparagraphs 18.35 and 18.36 of the proposed Amended Reply. Subparagraph 18.35 reads, again as a ministerial assumption: "All participants in the 2008 CHT program chose to sell the pharmaceuticals and gift the proceeds to a charity." Subparagraph 18.36 reads, as another ministerial assumption: "In 2008 there were no charities or other infrastructure in place to donate the pharmaceuticals to a charity outright." My finding re these subparagraphs is a repeat of my comments in the immediately preceding paragraph.

[46] Subparagraphs 18.37 and 18.38 are objected to by the Appellant, as expressed in oral submissions, basically on the assertions that they plead immaterial facts and matters beyond the Appellant's knowledge. Yet again the *Kossow* decision applies, establishing these grounds as not a basis for striking pleadings at this early stage in the appeal. Also subparagraph 18.38 refers to entities entering into a "contract", which the Appellant submits represents the pleading of evidence. I disagree, on the basis that at this early stage at least the "contract" reference appears to be in a general context, without apparent focus on legal elements of a contract. It is not obvious that this portion of the pleading should be struck, at least at this early stage.

[47] It appears that the Respondent's further revisions to subparagraphs 18.40 and 18.41 now render those provisions acceptable to the Appellant.

[48] The Appellant objects to subparagraphs 18.42 through 18.54 on virtually all of the usual bases, and in oral submissions on the more selective bases that they plead immaterial facts as assumptions and the pleaded facts are beyond the knowledge of the Appellant. As noted before, these are matters for a trial judge to determine - per *Kossow*. As elsewhere, the Respondent's several proposed revisions to the proposed Amended Reply, put forward in light of the bringing of this motion are noted. The term "shell company" in subparagraph 18.45 is not, in my view, plainly and obviously pleading law; noting that it is a not infrequently heard colloquialism that is part of the layperson's lexicon. As thought necessary, discovery examination can probe further any intended specific meaning.

[49] Subparagraph 18.55 is principally objected to on the basis of the therein phrases, "make it appear" and "to create the appearance". I do not view this rather tame phraseology as at all amounting to vexation, scandal or frivolity let alone an abuse of process, prejudice or cause for delay of a fair hearing. If this language colours the pleaded facts, as orally submitted by the Appellant, the resulting colour is nothing more than a tepid beige. These comments pertain as well to subparagraphs 18.56 and 18.57, which were dealt with by the Appellant in oral submissions together with subparagraph 18.55.

[50] Subparagraphs 18.58 through 18.70 are objected to essentially on the conjoined bases of immateriality, and knowledge not held by the Appellant. I cite *Kossow* as the basis for me, being the pre-discovery examination motions judge as distinguished from, in due course, the trial judge, not striking these pleadings on these bases, nor addressing onus of proof issues. However, I would agree that

usage of the word "domiciled" in subparagraphs 18.61 (once) and 18.63 (twice) unduly mixes findings of fact and law in those two subparagraphs' assumptions. I accordingly strike that word in each of the three noted places, which in subparagraph 18.61 leaves the phrase "an entity…in" and in subparagraph 18.63 leaves (twice) the phrase, "which was…in".

[51] Subparagraphs 18.71 and 18.72 are attacked as reflecting actions of a third party, of which the Appellant claims to know nothing. Per *Kossow* that is insufficient to strike at this early pre-discovery stage. The Appellant submits orally that subparagraph 18.71 reflects evidence not fact. That, to me, is not obvious. It seems rather that the subject pleaded language constitutes a factual assertion regarding certain "wire transfers and other transactions" of or on the part of the Appellant. The pleaded factual assumption is that such transactions were, "simply the participants' initial cash payments moving around in circles through various entities and being re-characterized and re-counted". That such transactions were assumed to have been "re-characterized" is to me not a statement of evidence - *i.e.*, how a factual assertion would be proved - but rather is a factual assertion in and of itself. In any event it is said there is no bright line distinguishing pleaded facts from pleaded evidence.

[52] In each of subparagraphs 18.73 and 18.74 the Appellant wishes struck all text and alternatively the phrase "to create the appearance". Again the Appellant's written submissions unhelpfully assert the full panoply of reasons - "repetitive, mixed fact and law, immaterial or irrelevant, evidence, assumptions of third parties, vexatious, scandalous or frivolous, an abuse of process, prejudice or delay fair hearing". In oral submissions, the Appellant urged that sham is claimed by the words "create the appearance" and that these pleadings reflect third party actions, are immaterial and an abuse of process. In my view sham has not been claimed where, as here, it has not been explicitly pleaded. Otherwise, again, *Kossow* discourages striking pleadings at this pre-discovery stage.

[53] The Appellant next attacks subparagraphs 18.75 through 18.118 of the proposed Amended Reply, orally citing for the most part third party actions and immaterial facts. *Kossow* provides that these claims should not prompt striking pleadings which rather should be addressed post-discovery examinations and/or by the trial judge. I add that the reference in subparagraph 18.75 to CHT program participating charities entering "into specific agreements" is not tantamount to pleading evidence as orally asserted by the Appellant. The reference to "agreements" as evidence is too general or generic. Is the further pleading that the

participating charities "had no control" of allegedly received funds, a statement of mixed fact and law as orally asserted by the Appellant? In my view that statement - *i.e.*, the participating charities "had no control" of allegedly received funds – is basically a statement of fact rather than of mixed fact and law. It is not apparent how, as supposedly a mixed statement of fact and law, a statement of law could be extricated from this statement of fact. Lastly, as a motions judge I would not strike unless it was obvious (which it is not) that striking would be appropriate.

[54] The Appellant in written submissions objects to subparagraphs 18.119 (heading) and then 18.126 through 18.128 on slightly differing collective bases, but in oral submissions the Appellant appears accepting of these provisions, replete with changes the Respondent had in the meantime put forth.

[55] The Appellant asserts that subparagraph 18.131 is immaterial and, "more opinion than fact". As noted numerous times already, asserted immateriality of ministerial assumptions does not justify striking at the motions judge stage. It is for the trial judge to ultimately sort out what is material and what is not. And as to "more opinion than fact", whether the pleaded fact as to the primary reason the Appellant entered into the CHT program is based on an opinion is not indicated. However, we do know it is a pleaded assumption of the Minister. I see here no basis for striking any pleaded language. The Appellant also takes issue with use of the terms "inflated donation tax receipt" and "tax shelter" (which latter term the Respondent subsequently removed). I do not find the term "inflated donation tax receipt" particularly vexing. The term accurately and succinctly conveys the thrust of the entire proposed Amended Reply, albeit in language slightly more colourful than what the Appellant might prefer. At this early stage of the appeal I will strike no language from the subparagraph 18.131 pleading in the proposed Amended Reply.

[56] The Appellant objects to use of the term "tax shelter" in subparagraph 19(a). The term has mostly been excised by the Respondent so that it is not being continuously repeated. As stated the term can be found in the ITA. I do not feel compelled to strike it here.

[57] The Appellant's final objection pertains to paragraph 22 of the proposed Amended Reply. In written submissions the Appellant's only objection was use of the term "tax shelter" in subparagraph 22(a). I decline to strike for the same reasons as set out immediately above regarding subparagraph 19(a).

[58] I order that the motion be allowed but only to the extent of striking the word "domiciled" in subparagraphs 18.61 (one occurrence) and **18.63** (two occurrences). Costs of this motion in the fixed amount of $1,250 are ordered to be paid by the Appellant to the Respondent within 30 days of the issuance date of the Order in this matter.

This Amended Reasons for Order is issued in substitution for the Reasons for Order dated July 30, 2020.

Signed at Halifax, Nova Scotia, this **10th** day of **August** 2020.

"B. Russell"

Russell J.

Appendix "A"

2018-3248(IT)G

TAX COURT OF CANADA

BETWEEN:

GRAHAM MUDGE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AMENDED REPLY

In reply to the appellant's Fresh as Amended Notice of Appeal with respect to the 2008 taxation year under the *Income Tax Act* (the "*Act*"), the Attorney General of Canada ("AGC") says:

OVERVIEW

1. The Canadian Humanitarian Trust ("CHT") was a registered tax shelter that was designed, marketed and executed to abuse Canada's charitable donation receipt and tax credit system. The arrangement operated to enrich the people who ran it, the people who promoted it, and the taxpayers who participated in it. The appellant participated in CHT with the expectation of a profit. In 2008, he made a cash payment of $10,199 and received a charitable donation receipt in the amount of $50,559.

2. The Minister of National Revenue reassessed the appellant to allow the charitable donation tax credit for $10,139 of his cash payment but denied the fictitious cash donation over and above that amount. The sole issue in dispute in this appeal is whether the appellant is entitled to claim a tax credit in respect of the alleged donation over and above what he actually paid to participate in the program.

A. STATEMENT OF FACTS

3. The AGC admits the facts stated in paragraph 7 of the Fresh as Amended Notice of Appeal.

4. The AGC denies the facts alleged in paragraph 12 of the Fresh as Amended Notice of Appeal.

5. With respect to paragraph 6, the AGC denies the statement that "upon request by the parties, the Tax Court ordered that the general procedure apply to the appeal." More specifically, the AGC states that the appellant requested to revoke his election for the informal procedure to apply to his appeal for the 2008 taxation year and the AGC did not oppose the appellant's request.

6. With respect to paragraph 8, the AGC:

   a) admits that in 2008 the appellant participated in the CHT donation program; and

   b) denies that the appellant made a cash donation of $50,559 to the Escarpment Biosphere Foundation ("EBF").

7. With respect to paragraph 9, the AGC states that EBF's status as a registered charity was revoked effective February 11, 2012 for its participation in the CHT program.

8. With respect to paragraph 10, the AGC:

   a) denies the facts alleged in subparagraphs (a), (b) and (d);

b) denies the facts alleged in subparagraph (c), and more specifically, states that the appellant made a pledge to make a cash gift to EBF in the amount of $10,199; and

c) with respect to subparagraph (e), admits that the appellant wrote a cheque in the amount of $10,199 to Sommer's, which was held in trust for the appellant. The AGC denies that the amount of $10,199 was ultimately donated to EBF.

9. With respect to paragraph 11, the AGC has no knowledge of what the appellant's understanding was of the CHT Program and puts it in issue. The AGC denies the underlying facts set out in paragraph 11.

10. With respect to paragraph 13, the AGC:

a) admits that EBF issued a tax receipt in the amount of $50,559;

b) denies that the appellant made a donation of $50,559 in the 2008 taxation year; and

c) says whether EBF accepted the alleged donation from the appellant is a question of mixed fact and law and not a fact to admit or deny. The AGC specifically denies that EBF received a $50,559 donation from the appellant or from anyone else on the appellant's behalf.

11. With respect to paragraph 14, the AGC denies the facts as stated by the appellant. More specifically, the AGC states:

a) the appellant claimed a deduction from tax payable for 2008 in respect of his *purported* cash donation of $50,559 to EBF; and

b) the appellant did not make a cash donation to EBF in the amount of $50,559.

12. The AGC says that the remainder of the Fresh as Amended Notice of Appeal is advanced primarily by way of legal argument. To the extent that there are any facts alleged incidentally therein, the AGC denies them.

13. In 2008, the appellant participated in the CHT ~~tax shelter~~donation program whereby, after an outlay of $10,199, he was issued a charitable gift receipt of $50,559. $60 of the $10,199 cash outlay was a payment of related legal fees.

14. In filing his 2008 return, the appellant included the amount of $50,559 in the calculation of his *total charitable gifts* under s. 118.1 of the *Act*.

15. By notice dated December 28, 2011, the Minister of National Revenue (the "Minister") reassessed the appellant's 2008 taxation year by excluding the amount of $50,559 in the calculation of *total charitable gifts* under s. 118.1 of the *Act*.

16. By notice dated February 29, 2012, the appellant objected to the reassessment.

17. By notice dated May 16, 2014, the Minister reassessed the appellant's 2008 taxation year by allowing $10,139 of his cash payment in the calculation of his *total charitable gifts* for the purpose of computing the charitable donation tax credit.

18. In determining the appellant's tax liability for the 2008 taxation year, the Minister made the following assumptions of fact:

Overview of the Canadian Humanitarian Trust tax shelter

18.1 The Canadian Humanitarian Trust Tax Shelter (#TS069310) was a gifting arrangement ~~tax shelter~~program (the "CHT ~~tax shelter~~program");

18.2 The stated purpose of the CHT arrangement was to provide support for recognized Canadian charitable organizations and to assist in the international relief of poverty by offering humanitarian aid in the form of medicines and medical diagnostics products (the "pharmaceuticals");

18.3 ~~In reality~~Instead, the CHT ~~tax shelter~~program was a thinly veiled scheme designed to enrich various parties, including the participants such as the appellant, the promoters and other parties who took part in the CHT ~~tax shelter~~program;

18.4 The CHT program ~~tax shelter~~ evolved from the Canadian Gift Initiatives ("CGI") program ~~tax shelter~~ which operated in 2003 only;

18.5 Mr. Stephen Rosen and Mr. Leonard Bellam created the CHT ~~tax shelter~~program in 2004, as a result of the then proposed changes to the Income Tax Act, and it operated in different iterations from 2004 until 2008;

18.6 CHT 2008 was promoted on the basis that:

a) a participant would make a cash contribution to a Canadian registered charity (the "initial cash payment");

~~b) the participant would retain a lawyer and establish an account for charitable purposes;~~

~~c)~~b) the participant would apply to become a beneficiary of a Canadian Trust and a successful applicant would receive a distribution of the pharmaceuticals from the Trust;

~~d)~~c) ~~the~~ a lawyer would arrange for the sale of the participant's pharmaceuticals;

~~e) the participant would then instruct the~~ further, the lawyer would arrange for the donation of the participant's initial cash payment and ~~the to direct the~~ proceeds from the sale of the pharmaceuticals ~~into the participant's account along with the initial cash payment (the "inflated cash contribution");~~

f)d) all of the funds that remained in the account (the inflated cash contribution) would then be donated to a registered Canadian charity ("combined contribution");

g)e) the participant would then receive a tax receipt for the inflated cashcombined contribution;

h)f) the charitable donation receipt would be approximately four times the participant's initial cash payment and would result in net returns of 48% to 110% in a few months; and

i)g) for Ontario residents, an initial cash payment of $11,500 could result in over $19,000 in tax credits and a net gain of approximately $7,700;

18.7 Every participant who participated in CHT did so with the understanding and expectation that their initial cash payment would result in a net return of 48% to 110% from the charitable donation tax credits;

18.8 The CHT tax shelterprogram raised approximately $67 million in initial cash payments between 2007 and 2008;

18.9 Approximately 3,325 people participated in the CHT tax shelterprogram in 2008. These participants made initial cash payments of approximately $23.5 million;

18.10 Approximately $108 million of inflated charitable donation receipts related to the CHT tax shelterprogram were issued in 2008;

18.11 The appellant was one of the participants who was issued an inflateda charitable donation receipt in 2008;

18.12 The appellant made an initial cash payment of $10,199 to Sommer's Law Firm in trust, and received an inflateda charitable donation receipt in the amount of $50,559 from EBF approximately 6 months later;

18.13 The appellant claimed $21,535 in federal and provincial tax credits flowing from his participation in CHT in 2008;

18.14 The appellant entered into the CHT ~~tax shelter~~program primarily to secure for himself a tax benefit in excess of the initial cash payment he made and not to make a charitable gift to a registered Canadian charity;

General structure and organization of the CHT ~~tax shelter~~Program

18.15 World Health Initiatives Inc. ("WHI") was the promoter of the CHT ~~tax shelter~~program;

18.16 Stephen Rosen was the sole director and president of WHI since 2004 and was the directing mind of WHI;

18.17 Until 2007, Back Office Systems Limited ("Back Office") was a service provider for the CHT ~~tax shelter~~program which involved general administration duties, including the issuing of tax receipts on behalf of the charities involved;

18.18 Matthew Rosen, Stephen Rosen's son, was the sole shareholder and president of Back Office Systems Limited;

18.19 In 2008, Back Office Systems (2008) Limited took over the role of the service provider for the above-mentioned general administration duties;

18.20 Leonard (Lenny) Karmiol was the sole shareholder and president of Back Office Systems (2008) Limited;

18.21 Canadian Donations (2005) Ltd ("CDL 2005") was responsible for the marketing of the CHT ~~tax shelter~~program for WHI which included providing seminars directed at recruiting participants to the CHT ~~tax shelter~~program;

~~18.22~~ CDL 2005 and its predecessor Canadian Donations Limited occupied this role from 2003 with the CGI arrangement until the completion of the CHT program in 2008;

~~18.23~~18.22Marketing services were provided by way of commissioned sales agents and public seminars held across Canada ~~in one of two ways: (1) CDL 2005 arranged for a number of commissioned sales agents to market the program across Canada (many of the individuals in the sales force was connected to the financial services industry); and (2) through public seminars held across Canada~~;

~~18.24~~18.23The CHT program was structured in such a way that all of the funds contributed by a participant were controlled by the promoters at all times;

~~18.25~~18.24All transactions relating to the CHT arrangement were pre-arranged, required no input or involvement of the participants other than the initial cash payment and the execution of certain paperwork;

CHT participation process

~~18.26~~18.25Participants were enticed to participate by either independent sales agents, who received a commission of up to 32% of a participant's cash payment, or by attending seminars that were advertised in the local community;

~~18.27~~18.26To take part in the CHT ~~tax shelter~~program, each participant retained Sommer's Business Law Firm ("Sommer's") as his or her trust lawyer and to act on their behalf to facilitate the transactions that allegedly occurred as a result of their participation in the CHT~~, by executing an~~

~~Acknowledgement and Limited Power of Attorney~~ (the "power of attorney");

~~18.28~~ The power of attorney gave Sommer's the ability to act on behalf of the participant to facilitate the transactions that allegedly occurred as a result of participating in CHT;

18.27

~~18.29At the same time as signing the power of attorney, the participants would also sign the following documents:~~

~~a) an Application to be Designated as a Beneficiary of a Canadian Trust (the "application");~~
~~b)a cheque to "Sommer's in Trust" attached to his or her application (for the initial cash payment);~~
~~c)a Declaration of Intention (the "declaration");~~
~~d)a Pledge of Cash (the "pledge");~~
~~e)an Acknowledgement of Applicant (the "acknowledgement"), and~~
~~f) an Agreement of Purchase and Sale and Transfer of Medicines and Diagnostics (the "sales agreement");~~

~~*The application*~~

18.28 A participant would ~~indicate on the application~~apply for a certain ~~the~~ ~~the dollar~~ value of pharmaceuticals he or she wished to have distributed to him or her from the trust;

~~18.30~~

~~18.31~~ The participant would include ~~the cheque to Sommer's in Trust~~an initial cash payment with the application;

18.29

~~18.32~~18.30The dollar value of the pharmaceuticals and the alleged distribution of pharmaceuticals from the CHT Trusts was in proportion to the initial cash

payment from the participant, and was consistent with the marketing materials;

~~18.33~~18.31 The initial cash payments were akin to fees paid to gain access to the CHT ~~tax shelter~~ program which would result in inflated charitable donation receipts;

~~18.34~~18.32 The trusts had not been settled at the time the participant (including the appellant) applied to become a beneficiary of the trust;

18.33 Every participant who applied was accepted as a beneficiary of a CHT trust save and except (possibly) those who cancelled their initial cash payment;

~~18.35~~

~~18.36 Sommer's would open a file for each participant and the initial cash payment would be deposited to the trust account and recorded as the "initial funds";~~

~~***The declaration***~~

~~18.37~~18.34 ~~The declaration presented participants~~ Participants were nominally presented with three options with respect to the pharmaceuticals that would allegedly be distributed to successful CHT applicants: (i) selling the pharmaceuticals and gifting the proceeds of sale to a charity; (ii) gifting the pharmaceuticals to a charity outright; or (iii) retaining the pharmaceuticals;

~~18.38~~18.35 All participants in the 2008 CHT ~~tax shelter~~program chose to sell the pharmaceuticals and gift the proceeds to a charity ~~pursuant to the first option~~;

~~18.39~~18.36 In 2008, there were no charities or other infrastructure in place to donate the pharmaceuticals to a charity outright~~, as contemplated by the second option~~;

~~18.40 The third option of retaining the pharmaceuticals was so impracticable that in effect it was not an option at all;~~

~~18.41~~18.37 If the participant were to choose an option other than gifting the proceeds of sale of the pharmaceuticals they would have to discharge a lien, arrange for storage and transportation, and ensure compliance with strict legal and regulatory requirements;

~~*The pledge*~~

~~18.42 In the pledge, the~~Each participant ~~instructed that~~pledged the ~~inflated cash~~combined contribution, that is, the combination of his or her initial cash payment plus any proceeds of sale of the pharmaceuticals to be distributed to him or her, ~~was to be directed~~ to one of the participating charities;

~~18.43~~18.38 Participants could only pledge the ~~inflated cash~~combined contribution to charities that had entered into a contract with WHI (for the appellant this was EBF) and could not make a donation to a charity of their choice;

~~*The acknowledgment*~~

~~18.44 By signing the Acknowledgment, the participant acknowledged that:~~

~~a) CRA had not evaluated or endorsed the tax benefits the participant expected to receive by participating in CHT;~~

~~b) the participant was aware CRA had issued letters to previous participants in CHT proposing to deny the tax benefits they had claimed;~~

~~c) the participant was aware CRA had issued a Taxpayer alert warning against participation in tax shelter gifting arrangements;~~

d) it was likely CRA would assess or reassess the participant to deny some or all of the tax benefits that the participant expected to receive by participating in CHT; and

e) the promoter had established a legal defence fund in the event CRA denied any portion of the tax credits claimed by the participant;

The sales agreement

18.4518.39By signing the sales agreement theEach participant agreed to sell the pharmaceuticals that were allegedly distributed (or going to be distributed) to him from the CHT Trust;

Trusts and the alleged distribution of pharmaceuticals to CHT participants

18.4618.40In 2008, the CHT tax shelterprogram was comprised of five (5) Canadian Humanitarian Trusts ("CHT Trusts");

18.4718.41CET Fiduciary Services Ltd., an Ontario corporation, was the trustee of the CHT Trusts (the "Trustee") and was a corporation resident in Ontario;

18.48 The sole shareholder and director of the Trustee was Mr. Chaim Finkel;

18.4918.42The CHT Trusts were purportedly settled by Crunin Investments Limited ("Crunin"), a corporation resident in the a British Virgin Islands corporation;

18.5018.43Mr. David Feldman was the president of Crunin. He had been involved in the CHT tax shelterprogram since 2004;

18.5118.44The promoters claimed that Crunin acquired the pharmaceuticals in bulk from a Cypriot company, called KP Innovispharm Ltd. ("KPI");

~~18.52 KPI was an International Business Company ("IBC"). In Cyprus, IBC companies are covered by the law of confidentiality, and may use nominee shareholders to hold the shares in trust for the beneficial owners;~~

~~18.53~~18.45 KPI was a shell company operated by a Cypriot law firm, Polakis Sarris & Co. (the "Cypriot Law Firm") who also operated Summatco Holdings Co. Ltd (defined ~~at para. 18.100~~below);

~~18.54~~18.46 The promoters claimed that Crunin secured the purchase of the pharmaceuticals from KPI by way of a promissory note, the amount of which represented the lien on the pharmaceuticals;

~~18.55~~18.47 The promoters claimed that Crunin settled the pharmaceuticals onto the CHT Trusts;

~~18.56~~18.48 KPI never had any pharmaceuticals to sell to Crunin;

~~18.57~~18.49 Crunin never ~~obtained ownership of the~~acquired any pharmaceuticals from KPI;

~~18.58~~18.50 Crunin never obtained possession of the pharmaceuticals from KPI;

~~18.59~~18.51 Crunin could not and did not settle any pharmaceuticals on any of the CHT Trusts;

~~18.60~~18.52 As a result, the CHT Trusts did not have any pharmaceuticals to distribute to participants who allegedly became beneficiaries of the CHT Trusts;

~~18.61~~18.53 Participants in CHT (or their representatives) never received a distribution of pharmaceuticals from the CHT Trusts;

~~18.62~~18.54 Participants in CHT did not have any pharmaceuticals to sell;

The Cycle of Cash

~~18.63~~18.55 The architects of CHT designed and implemented the program to make it appear that the participants donated more cash than they actually did (described as the first series of transactions below) and to create the appearance that approximately $88.6 million of pharmaceuticals were purchased and distributed by EBF when those pharmaceuticals were actually worth less than $704,000 (described as the second series of transactions below);

~~18.64~~18.56 The only funds that were ever part of CHT were the initial cash payments made by participants;

~~18.65~~18.57 As more people participated over time and made their initial cash payments, their funds were cycled and recycled through various entities creating the illusion needed to support the inflated charitable donation receipts (the "cycle of cash");

(i) Alleged sale of pharmaceuticals distributed by CHT Trusts (the first series)

~~18.66~~18.58 Subsequent to the alleged distribution of pharmaceuticals from the CHT to the participants, Sommer's purportedly sold them on behalf of the participants to a US non-governmental organization called Medical Education Training and Development Inc. ("METAD");

~~18.67 In 2007 and 2008, METAD's address and phone number was listed as the same as the home address of their listed contact person, Barbara G Johnson also known as Bobbi Johnson, who was also an employee of MedPharm LLC (defined at para. 18.108) in the US;~~

~~18.68~~18.59 At the end of 2006, METAD had revenue of less than $100,000 and assets of less than $100,000;

~~18.69~~18.60The promoters claimed that approximately $84 million of cash was paid to Sommer's in 2008 by the International Children's Charitable Trust (the "ICC Trust") on behalf of METAD to complete the purchase of the pharmaceuticals allegedly distributed by the CHT Trusts to the participants;

~~18.70~~18.61The ICC Trust was an entity domiciled in the British Virgin Islands;;

~~18.71~~18.62The ICC Trust purportedly directed two entities in the Caribbean to wire funds to Sommer's to complete the transactions with METAD;

~~18.72~~18.63The first entity was called Colorado Springs Limited ("Colorado Springs") which was domiciled in St. Vincent and the Grenadines. The second was called the International Children's Foundation (the "Foundation") which was domiciled in St. Kitts and Nevis;

~~18.73~~18.64Despite their locations, both entities had bank accounts located in Switzerland and used these banks to wire funds to Sommer's;

~~18.74~~18.65In 2008, Colorado Springs wired funds to Sommer's ~~nine times~~ totalling approximately $70 million and the Foundation sent approximately $14 million to Sommer's ~~via in three separate wire transfers~~ (the "alleged proceeds of sale");

~~18.75~~18.66Sommer's would record the receipt of the participants' initial cash payments and add the alleged proceeds of sale to METAD to the participants' trust accounts;

~~18.76~~18.67From this combined fund, Sommer's kept his nominal fee of $60 for each account and transferred the balance to the charity escrow accounts held by Collateral Fiscal Services Inc. ("Collateral");

~~18.77~~18.68In 2008, Collateral operated bank accounts in an escrow capacity for all of the charities involved;

~~18.78~~18.69A service provider, Jakima Management Inc. ("Jakima") would then issue a charitable donation receipt on behalf of the designated cash charity (or EBF, in the case of Mr. Mudge) to a participant in the amount of the ~~inflated cash~~combined contribution less the legal fees of Sommer's.

~~18.79~~18.70The only actual money involved in CHT was the initial cash payments made by the participants;

~~18.80~~18.71The wire transfers and other transactions that allegedly support the alleged proceeds of sale were simply the participants' initial cash payments moving around in circles through various entities and being re-characterized and re-counted;

~~18.81~~18.72There were never any proceeds of sale of pharmaceuticals to support the ~~inflated cash~~combined contributions resulting from this first series of transactions;

(ii) Alleged purchase and sale of additional pharmaceuticals by EBF (the second series)

~~18.82~~18.73The second series of transactions was designed to create the appearance that EBF used the ~~inflated cash~~combined contributions to purchase approximately $88.6 million of pharmaceuticals that were actually worth no more than $704,000;

~~18.83~~18.74The second series of transactions overlapped with the first series of transactions to help create the appearance of ~~the inflated~~ the alleged proceeds of sale to METAD;

~~18.84~~18.75All charities involved in the CHT ~~tax shelter~~program had to agree to and enter into specific agreements governing the flow of funds – they had no control over the funds they allegedly received;

~~18.85~~18.76The charities involved in the 2008 CHT arrangement were either cash-receipting charities (the "cash charities") or distributing charities that

allegedly purchased and distributed additional pharmaceuticals (the "distributing charities");

~~18.86~~18.77In the case of the appellant, EBF was both a cash charity and a distributing charity;

~~18.87~~18.78Under agreements with WHI, each of the cash charities kept only 0.25% of the cash deposited into the charities trust accounts for their own use;

~~18.88~~18.791% of the cash was sent to WHI as a service fee;

~~18.89~~18.80The remaining 98.75% was immediately transferred to EBF, the sole distributing charity in the 2008 CHT program;

~~18.90~~18.81EBF had a separate agreement with WHI;

a) EBF also only retained 0.25% of the cash for its own use;

b) EBF ~~was obligated to~~would send 13.5% of the cash to WHI as a service fee for fundraising services including the solicitation of donors, administration and record keeping;

c) EBF would have to use the remaining 86.25% of the funds to purchase a separate group of pharmaceuticals;

~~18.91~~18.82EBF entered into a bulk purchase agreement with Aventor Limited ("Aventor") on November 19, 2008;

~~18.92~~18.83Aventor was incorporated on May 22, 2007 and was domiciled in Tortola, British Virgin Islands;

~~18.93~~18.84Aventor's President was David Feldman (also the president of Crunin, the purported settlor of the CHT Trusts);

~~18.94~~18.85The bulk purchase agreement contractually obliged EBF to acquire all of its pharmaceutical products from Aventor for the predetermined price of approximately $88.6 million;

~~18.95~~18.86EBF was required to enter into this agreement as a precondition to participating in the CHT ~~tax shelter~~donation program;

~~18.96~~18.87Aventor never ~~owned~~ acquired the pharmaceuticals it allegedly sold to EBF;

~~18.97~~18.88The pharmaceuticals contemplated by the bulk purchase agreement were allegedly valued at approximately $88.6 million;

~~18.98~~18.89Aventor issued invoices to EBF dated December 1, 2008 for the $88.6 million;

~~18.99~~18.90The actual value of these pharmaceuticals was no more than $704,000 and as low as $176,000;

~~18.100~~18.91On December 5, 2008, Aventor instructed EBF that all payments due to Aventor should be sent to a company called Summatco Holdings Co. Ltd. ("Summatco"). This was allegedly done because Summatco allegedly sold the pharmaceuticals to Aventor;

~~18.101~~18.92Summatco never owned the pharmaceuticals it allegedly sold to Aventor (and that Aventor allegedly sold to EBF);

~~18.102~~18.93Summatco was a shell company located in Cyprus and was represented by the Cypriot Law Firm, which also operated KPI;

~~18.103~~18.94The shareholder of Summatco was a Panamanian company called Leemo Enterprises Limited ("Leemo");

~~18.104~~18.95Leemo was another shell company operated by the Cypriot Law Firm;

~~18.105~~18.96From December 11, 2008 to June 15, 2009 inclusive, EBF sent fourteen (14) wire transfers to Summatco totaling approximately $92.8 million, rather than the $88.6 million invoiced amount from the bulk purchase agreement. This increased amount allegedly resulted from price changes and missed discount deadlines;

~~18.106~~18.97Summatco then forwarded the funds to Leemo, which then forwarded the funds to Colorado Springs and the Foundation;

~~18.107~~18.98The funds received by Colorado Springs and the Foundation would then be recycled back to Sommer's in Canada and would be characterized as payments on behalf of METAD by the ICC Trust to purchase pharmaceuticals allegedly sold as part of the first series of transactions ~~(this is how the second series of transactions intersects with the first series in the cycle of cash)~~;

Valuation of any pharmaceuticals that existed in CHT

~~18.108~~18.99MedPharm LLC ("MedPharm") was behind the purchase and shipments of any pharmaceuticals that actually existed and were used in the 2008 CHT program;

~~18.109~~18.100MedPharm was a generic drug distributor (privately held) located in Alexandria, Virginia. ~~Its owner and President was Mr. Andrew Koval;~~

~~18.110~~18.101MedPharm played a central role in the CHT program, especially in the activities occurring outside Canada;

~~18.111~~18.102MedPharm had been involved in ~~Canadian tax shelter schemes since it sold pharmaceuticals at inflated values to~~ the CGI ~~tax shelter~~donation program in 2003;

~~18.112~~18.103MedPharm, encouraged sales of their products to charities by focusing on the benefits of charities using a valuation method known as Average Wholesale Pricing ("AWP") ~~in their books and records~~;

~~18.113~~18.104The AWP valuation method resulted in pharmaceuticals being valued at amounts far exceeding the actual purchase price;

~~18.114~~18.105The pharmaceuticals claimed to have been purchased by EBF from Aventor had a mark-up of up to 52,000% over the price that MedPharm paid to acquire them from the manufacturers;

~~18.115~~18.106Mebendazole and Nitezole were the only two pharmaceuticals purportedly purchased by EBF from Aventor;

~~18.116~~18.107EBF claimed to have placed orders for Mebendazole for amounts allegedly exceeding $70 million and another $36.3 million for Nitezole;

~~18.117~~18.108MedPharm purchased Mebendazole from manufacturers for less than 2 cents a pill, yet EBF claimed to have purchased Mebendazole from Aventor for as much as $9.76 per pill;

~~18.118~~18.109Nitezole was a drug created by MedPharm and manufactured by other companies under contract to MedPharm;

~~18.119~~18.110Nitezole had a value of about 3 cents per pill, yet EBF claimed to have paid as much as $12.12 per pill;

~~18.120~~18.111The combined fair market value of the pharmaceuticals allegedly distributed by the CHT Trusts in the first series of transactions and allegedly purchased by EBF in the second series of transaction was between $555,000 and $3.5 million;

~~18.121~~18.112The alleged proceeds of sale of the first set of pharmaceuticals allegedly distributed from the CHT Trusts to the participants and the purchase price of the second set of pharmaceuticals allegedly purchased by EBF were artificially inflated to allow the program to provide a profitable return to the participants;

To the extent the pharmaceuticals existed

~~18.122~~18.113The pharmaceuticals were never physically transferred or imported to Canada;

~~18.123~~18.114~~It was highly unlikely that the pharmaceuticals were eligible for import into Canada~~;

~~18.124~~18.115Many of the pharmaceuticals were formulated according to their intended market ~~and likely would not meet Canadian standards~~;

~~18.125~~18.116EBF purportedly arranged for third party aid organizations in developing countries to distribute the pharmaceuticals it allegedly purchased;

~~18.126~~18.117EBF did not use the pharmaceuticals it allegedly purchased in its own programs;

~~18.127~~18.118The distribution of pharmaceuticals was never part of the core operations of EBF, or any of the cash or distributing charities involved in CHT;

The appellant's participation in the 2008 CHT ~~tax shelter~~Program

~~18.128~~18.119On August 11, 2008, the appellant applied to become a beneficiary of a Canadian trust as part of the CHT ~~tax shelter~~program and to have pharmaceutical units, stated to be valued at no less than $47,000, distributed to him;

~~18.129~~18.120On August 11, 2008, iIn support of his application, the appellant made an initial cash payment of $10,199.00 to Sommer's in Trust ~~by a cheque dated August 11, 2008~~;

~~18.130~~18.121On August 11, 2008, the appellant signed a Declaration of Intention and opted to sell any pharmaceuticals that may be distributed to him and to gift the proceeds of sale to a charity;

~~18.131~~18.122On August 11, 2008, the appellant signed an Agreement of Purchase and Sale and Transfer of Medicines and Diagnostics whereby he signed on as the purported vendor of the pharmaceuticals;

~~18.132~~18.123On August 11, 2008, the appellant signed a Pledge of Cash to EBF in the amount of $10,199;

~~18.133~~18.124The appellant later amended the Pledge of Cash to indicate that he pledged to make a cash gift in the amount of $50,559;

~~18.134~~18.125The appellant received a charitable donation receipt from EBF for a cash gift in the amount of $50,559;

~~18.135~~18.126The appellant never received a distribution of pharmaceuticals from the CHT Trusts;

~~18.136~~18.127The appellant did not have any pharmaceuticals that he could sell or instruct Sommer's to sell on his behalf;

~~18.137~~18.128The appellant did not make a cash gift of $50,559 (or any amount greater than $10,139) to EBF;

~~18.138~~18.129The fair market value of the pharmaceuticals allegedly distributed to the appellant and/or sold on his behalf (as shown on the appellant's Schedule of World Health Organization Essential Medicines) was not more than $378;

~~18.139~~18.130The appellant claimed federal and provincial tax credits of $21,535 from his participation in CHT in 2008; and

~~18.140~~18.131 The appellant entered into the CHT ~~tax shelter~~program primarily to enrich himself by way of an inflated donation tax receipt and not to make a charitable gift to a registered Canadian charity.

B. OTHER MATERIAL FACTS

19. The AGC also relies on the following additional material facts:

a) The Minister revoked the charitable registration of EBF on February 11, 2012 as a result of its participation in the CHT tax shelter; and

b) The Minister revoked the charitable registration of all of the cash charities involved in CHT in 2008.

C. ISSUES TO BE DECIDED

20. The issues in this appeal are as follows:

a) whether the appellant made a cash gift of $50,559 to EBF within the meaning of s. 118.1 of the *Act*;

b) notwithstanding issue (a), whether the transfer of property qualifies as a gift pursuant to s. 248(30) of the *Act*, and if so, what was the eligible amount of the gift pursuant to ss. 248(31), (32) and (35) of the *Act*; and

c) whether the charitable gift receipt given to the appellant by EBF contained all of the correct prescribed information pursuant to sections 3500 and 3501 of the *Income Tax Regulations*.

D. STATUTORY PROVISIONS RELIED ON

21. The AGC relies on sections 3, 69, 118.1, 149.1 and 237.1, and subsections 152(9), 248(1), 248(30), 248(31), 248(32), 248(33) and 248(35) of the *Act* and sections 3500 and 3501 of the *Income Tax Regulations*.

E. GROUNDS RELIED ON AND RELIEF SOUGHT

22. In computing his charitable donation tax credit under s. 118.1 of the *Act* in his 2008 taxation year, the appellant is not entitled to include, in computing his *total charitable gifts*, the amount of $50,559 because the appellant did not make a cash gift of $50,559 to EBF within the meaning of the *Act*. More specifically:

    a) the appellant lacked the donative intent to make the gift to EBF. The appellant knew or expected that he would profit or be enriched by his participation in the CHT tax shelter;

    b) the appellant did not have legal title or possession to any pharmaceuticals allegedly distributed to him. He did not have any pharmaceuticals that could be sold and he did not receive any proceeds of sale to donate;

    c) even if the appellant did acquire legal title to the pharmaceuticals, he (nor anyone on his behalf) did not sell them for more than their fair market value of $378; and

    d) there was not a sufficient act of delivery or transfer of property to EBF.

23. In the alternative, the transfer of the property does not qualify as a gift because the advantage to the appellant exceeded 80% of the fair market value of the transferred property pursuant to s. 248(30) of the *Act*.

24. In the further alternative, the eligible amount of the gift is nil because the appellant received an advantage in excess of the fair market value of the gift pursuant to s. 248(31) and (32) of the *Act*.

25. In the further alternative, pursuant to s. 248(35) of the *Act*, for the purpose of computing the eligible amount of the gift, the deemed fair market value of the appellant's gift is nil, being the lessor of the fair market value of the pharmaceuticals and the cost of the pharmaceuticals to the appellant immediately before the gift was made (nil).

26. In the further alternative, the appellant's charitable donation receipt from EBF does not include the correct prescribed information pursuant to ss. 3500 and 3501 of the *Regulations*. More specifically, s. 3501(1)(h)(i) requires that the amount of the cash gift to be listed on the charitable donation receipt and 3501(6) deems a receipt to be spoiled if the amount of the cash gift is incorrect. The amount of the cash gift on the appellant's receipt from EBF is incorrectly entered as $50,559 when his actual cash donation was (at most) $10,199. Accordingly, the appellant's "donation" cannot be included in his total charitable gifts pursuant to s. 118.1 of the *Act*.

27. The AGC requests that the appeal be dismissed with costs.

DATED at the City of Ottawa, Ontario, October ~~January 8th~~, 2019.

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Tax Law Services Section
99 Bank Street, 11th Floor
Ottawa (Ontario) K1A 0H8
Fax: 613-941-2293

Per: ~~Ryan Gellings~~Shubir (Shane) Aikat / Stephen Ji
Tel: 613-670-643~~172~~ / 6479

Solicitor for the Respondent

TO: The Registrar
The Tax Court of Canada
200 Kent Street, 4th Floor
Ottawa, Ontario
K1A 0M1

TO: Martin Gentile & Kelly Ng
KPMG Law LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 4600
Toronto, ON
M5H 2S5

CITATION:	2020 TCC 77
COURT FILE NO.:	2018-3248(IT)G
STYLE OF CAUSE:	GRAHAM F. MUDGE AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	October 4, 2019
AMENDED REASONS FOR ORDER BY:	The Honourable Justice B. Russell
AMENDED DATE OF ORDER:	**August 10**, 2020

APPEARANCES:

Counsel for the Appellant:	Martin Gentile
Counsel for the Respondent:	Shane Aikat Stephen Ji

COUNSEL OF RECORD:

For the Appellant:

Name:	Martin Gentile
Firm:	KPMG Law LLP

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada