Docket: 2016-1152(IT)G

BETWEEN:

MONT-BRUNO C.C. INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion under Rules 53(c) and 53(d) of the *Tax Court of Canada Rules (General Procedure)* heard on September 7, 2017 at Montreal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Guy Du Pont, Ad. E Matthias Heilke Dov Whitman
Counsel for the Respondent:	Simon Petit

ORDER

The Appellant's motion pursuant to Rules 53(c) and 53(d) of the *Tax Court of Canada Rules (General Procedure)* to strike the Further Amended Reply filed by the Respondent on May 23, 2017 is dismissed in accordance with the attached Reasons for Order. Costs of the motion are awarded to the Respondent on a party and party basis.

This Court also orders that all timelines for the prosecution of the Appellant's appeal that are necessary for the final disposition of this motion have been extended.

Signed at Toronto, Ontario, this 4th day of June 2018.

"Réal Favreau"

Favreau J.

Citation: 2018 TCC 105
Date: 20180827
Docket: 2016-1152(IT)G

BETWEEN:

MONT-BRUNO C.C. INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Favreau J.

[1] This is a motion brought by the Appellant pursuant to Rules 53(c) and 53(d) of the *Tax Court of Canada Rules (General Procedure*), SOR/90-688a (the "TCC Rules") to strike the Respondent's Further Amended Reply filed on May 23, 2017 as an abuse of process or for not disclosing reasonable grounds for opposing the appeal.

I. FACTS

[2] The Appellant is a non-profit organization which operates a golf course. In 2006, the Appellant realized a $1,742,500 gain on the disposition of a parcel of land which was a vacant wooded area segregated from the golf course by a municipal road (the "Parcel of Land"). The Appellant reported this disposition and the gain on its 2006 T1044 Non-Profit Organization Information Return (the "T1044"), but not on its T3 Trust Income Tax and Information Return (the "T3"). The Minister of National Revenue (the "Minister") reassessed the Appellant on May 13, 2015 for not reporting the disposition and gain on its T3.

[3] The Appellant did not report the disposition in its T3 because it believed that the gain on the disposition of the Parcel of Land was exempt from taxation because the Parcel of Land was used exclusively and directly for providing dining, recreational or sporting facilities to its members, as required to fit the exemption

under subparagraph 149(5)(e)(ii) of the *Income Tax Act*, RSC 1985 c. 1 (5th Supp) as amended, (the "*ITA*").

[4] The Appellant filed a Notice of Objection to the assessment on August 6, 2015. The Minister admitted that, although the Appellant did not report the gain on the Parcel of Land in its T3, the Appellant did report the gain in the following documents submitted to the Canada Revenue Agency (the "CRA"): 1) its T2 return, at Annex 1, line 113, 2) its T2 return, at Annex 6, lines 220-250, 3) T1044, at line 103, and 4) its audited financial statements.

[5] The Minister's reassessment of the Appellant on May 13, 2015 was made after the normal reassessment period set out in subsection 152(3) of the *ITA* and thus would be statute-barred unless the Minister could satisfy subsection 152(4) of the *ITA*. To satisfy subsection 152(4) of the *ITA*, the Minister had to show that the Appellant made a misrepresentation in its 2006 return by not reporting the gain on its T3, and that this misrepresentation was attributable to carelessness, neglect or wilful default. In the Reply to the Appellant's Notice of Appeal, the Respondent had to set out, in the assumptions of fact made in determining the Appellant's misrepresentation, facts on the basis of which the Court could conclude that the Appellant made a misrepresentation.

[6] The Respondent sent the Appellant a Reply on June 17, 2016 in which she attempted to do so. The Respondent then sent an Amended Reply on June 29, 2016. The Appellant successfully challenged the Amended Reply in a motion to strike it for not setting out facts to allow the Tax Court of Canada (the "Court") to conclude that the Appellant made a misrepresentation. As per of Order of Paris J., dated March 21, 2017, the Amended Reply was struck in its entirety with leave to amend.

[7] The Respondent then sent a Further Amended Reply to the Appellant on May 23, 2017 that is at issue in this matter. This matter concerns whether the Further Amended Reply resolves the deficiencies of the past replies in not setting out facts on the basis of which the Court could conclude that the Appellant made a misrepresentation.

[8] The parties agree that the site of the golf course is made up of "the golf course, the club house and accessory buildings, along with access paths and roads throughout, and that the remaining portion is an uncultivated wooded area". The

parties agree that the "uncultivated wooded area" is the Parcel of Land separated from the rest of the golf course by a municipal road.

II. FACTS IN DISPUTE

[9] The Respondent denies the following facts from the Appellant's Notice of Appeal:

- The Respondent denies the size of the site (the "site" or the "land") on which the Appellant operates the golf course and the number of acres over which the site extends. The Appellant stated in its Notice of Appeal that the site extends over 339 acres.

- The Respondent denies that the Parcel of Land serves as a buffer between the golf course and surrounding properties. The Respondent admits that a buffer between the golf course and neighboring properties can be beneficial but denies that the Parcel of Land serves this purpose. The Respondent admits that in the 1970s the Parcel of Land was expropriated for construction of a municipal road and that, as a result, the Parcel of Land was severed from the land on which the golf course is built, but remained the property of the Appellant. The Respondent denies, however, that the Parcel of Land continued to form part of the natural buffer of the uncultivated wooded land surrounding the golf course now that a municipal road separates the two.

- The Respondent denies that the composition of the Parcel of Land was part of the original golf course design, and is typical of prestigious golf clubs or that the presence of significant surrounding wooded areas is essential. The Respondent denies that the purpose of the configuration of the Parcel of Land is to have a buffer between the golf games and neighboring properties (in order to prevent accidents caused by stray golf balls or facilitate a quiet environment for the golf course). The Respondent denies that this composition of the Parcel of Land has helped the Appellant to remain an upscale golf course.

- The Respondent denies that the Parcel of Land was not meant for any other use than providing a recreation and golfing facility for its

members and that only its members had any right of access to it. The Respondent denies that the Parcel of Land was used by the Appellant exclusively for, and directly in the course of, providing dining, recreational or sporting facilities for its members.

- The Respondent denies that the Minister reassessed the Appellant nearly six years after the initial assessment. However, since the initial assessment was on July 25, 2007 and the reassessment was dated May 13, 2015 in fact, the reassessment occurred 8 years after the initial assessment.

III. TIMELINE

[10] The following is a timeline of events relating to this matter:

Date	Event
July 25, 2007	The Minister initially assessed the Appellant's T3 in its 2006 tax return.
May 13, 2015	The Minister reassessed the Appellant's 2006 tax return and denied the tax exemption under subparagraph 149(5)(e)(ii) of the *ITA* on the $871,250 taxable capital gain arising on the disposition of the Parcel of Land.
August 6, 2015	The Appellant filed a Notice of Objection challenging the Minister's reassessment.
March 8, 2016	The Minister confirmed the reassessment in his Notice of Confirmation.
March 30, 2016	The Appellant filed a Notice of Appeal objecting to the reassessment. In the Notice of Appeal, the Appellant submitted that the reassessment was made after the normal reassessment period. As a result, in the Reply to the Notice of Appeal, the Respondent was required to show that she had a basis under subsection 152(4) of the *ITA* (specifically the basis that the Appellant made a misrepresentation) to proceed with the reassessment

	even after the normal reassessment period.
June 17, 2016	The Respondent filed a Reply to the Notice of Appeal.
June 29, 2016	The Respondent filed an Amended Reply.
July 22, 2016	The Appellant brought a Motion to Strike the Amended Reply without leave to amend on the basis that it did not set out facts that would allow the Court to conclude that the Appellant made a misrepresentation in its T3 return, and that thus, per paragraph 53(1)(d) of the TCC Rules, it disclosed no reasonable grounds for appeal or opposing the appeal.
March 21, 2017	In response to the Appellant's Motion to Strike the Amended Reply, Paris J. ordered that it be struck in its entirety with leave to amend per paragraph 53(1)(d) of the TCC Rules on the basis that it disclosed no reasonable grounds for opposing the appeal. Paris J. decided that any factual components stated in the Notice of Appeal should not be presumed to be true for the purposes of this application, and that the rest of reply did not set out facts for the Court to conclude that there was a misrepresentation by the Appellant in its 2006 tax return. Paris J. also awarded costs to the Appellant on a party and party basis. The order by Justice Paris states in paragraph 3 that the Respondent had 60 days from the date of that order to file a further amended reply to the notice of appeal. The Respondent filed the Further Amended Reply on May 23, 2017, such that it was more than 60 days after Paris J.'s order on March 21, 2017. However, in its Notice of Motion to Strike the Further Amended Reply, the Appellant did indicate that its motion is also for an order "(c) extending all timelines for the prosecution of this Appeal necessary for the final disposition of this motion".

May 23, 2017	The Respondent filed a Further Amended Reply.
May 30, 2017	The Appellant filed a Notice of Motion to Strike the Further Amended Reply.
September 7, 2017	The Motion to Strike the Further Amended Reply was heard.

IV. ISSUE TO BE DECIDED

[11] The issue is whether the Further Amended Reply resolves the deficiencies of the past replies in not setting out facts relevant to determining whether the Appellant made a misrepresentation.

[12] In its motion to strike, the Appellant submitted that the Further Amended Reply should be struck under TCC Rules 53(1)(c) as an "abuse of process of the Court" or (d) as it "discloses no reasonable grounds for appeal or opposing the appeal" by seeking to re-litigate an issue which had already been decided in Paris J.'s decision and reasons in striking the Amended Reply on March 21, 2017. Paris J. had struck the Amended Reply for not pleading facts which would allow the Court to conclude that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default in its 2006 tax return. The issue is whether the Further Amended Reply rectified this mistake.

V. POSITION OF THE PARTIES

[13] The Appellant believes that the Further Amended Reply should be struck under the TCC Rules without leave to amend because it does not solve the deficiencies of the Amended Reply.

[14] The Respondent believes that the Further Amended Reply should not be struck because it does solve the deficiencies of the Amended Reply.

VI. THE LAW

[15] The statutory provisions that are relevant for this matter are reproduced below:

Tax Court of Canada Rules (General Procedure) (SOR/90-688a)

TCC Rules – Striking out a Pleading or Other Document

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

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

(b) is scandalous, frivolous or vexatious;

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

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

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

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

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

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

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

Income Tax Act, RSC 1985, c. 1 (5th Supp)

Reassessment after Normal Reassessment Period

152 (3.1) For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

(a) if at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends four years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year; and

(b) in any other case, the period that ends three years after the earlier of the day of sending of a notice of an original assessment under this Part in

respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year.

(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

Exemptions – Exception: Investment Income of Certain Clubs

149 (1) No tax is payable under this Part on the taxable income of a person for a period when that person was

[…]

(l) Non-profit organizations – a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member of shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada;

149 (5) Notwithstanding subsections (1) and (2), where a club, society or association was for any period, a club, society or association described in paragraph (1)(l) the main purpose of which was to provide dining, recreational or sporting facilities for its members (in this subsection referred to as the "club"), a trust is deemed to have been created on the later of the commencement of the period and the end of 1971 and to have continued in existence throughout the period, and, throughout that period, the following rules apply:

> **(a)** the property of the club shall be deemed to be the property of the trust;
>
> **(b)** where the club is a corporation, the corporation shall be deemed to be the trustee having control of the trust property;
>
> **(c)** where the club is not a corporation, the officers of the club shall be deemed to be the trustees having control of the trust property;
>
> **(d)** tax under this Part is payable by the trust on its taxable income for each taxation year;
>
> **(e)** the income and taxable income of the trust for each taxation year shall be computed on the assumption that it had no incomes or losses other than
>
> > **(i)** incomes and losses from property, and
> >
> > **(ii)** taxable capital gains and allowable capital losses from dispositions of property, other than property used exclusively for and directly in the course of providing the dining, recreational or sporting facilities provided by it for its members;
>
> […]

VII. APPLICATION OF THE LAW TO THE CASE

[16] Based on the law, I come to the conclusion that the Further Amended Reply should not be struck for the reasons outlined below.

A. Basis for Striking out Further Amended Reply

[17] As established in the following cases, the test for striking out a pleading is difficult to meet and the threshold to strike is high:

- in *Hunt v. Carey Canada,* [1990] 2 SCR 959, the Supreme Court of Canada stated at page 980 that "only if the action is certain to fail because it contains a radical defect…should the relevant portions of a plaintiff's statement of claim be struck out.";
- in *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263 at paragraph 15, the Supreme Court of Canada stated that "The test is a stringent one";

- in *Canadian Imperial Bank of Commerce v. R*, 2013 FCA 122 at paragraph 7, the Federal Court of Appeal stated that "in the context of a motion to strike the Crown's reply in an income tax appeal, the motion will be granted only if it is plain and obvious, assuming the facts as pleaded in the reply are true, that the reply fails to state a reasonable basis for concluding that the reassessment under appeal is correct".;

- in *Dyson v. AG*, [1911] 1 KB 410 at paragraphs 418-419, the Court indicated that "this power of arresting an action and deciding it without a trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure…our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad".

[18] In his order to strike the Amended Reply, Paris J. stated that "for a pleading to be struck without leave to amend, the defect in the pleading must be one that is not curable by amendment". Under the TCC Rules, pleadings can be struck without leave to amend under Rule 53(1)(c) as an abuse of process, as was done in *Toronto (City) v. CUPE*, [2003] 3 SCR 77, which characterized the pleadings as an attempt to relitigate a claim that the court had already determined.

[19] Pleadings can also be struck as vexatious under TCC 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 (see *Wilson v. Revenue Canada*, 2007 DTC 5081 (FC)). As confirmed in *Murray v. Canada*, 1978, 21 NR 230 (FCA), 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 proceedings is vexatious. Similarly, the Federal Court of Appeal 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.

[20] Under the TCC Rules, pleadings can be struck without leave to amend under Rule 53(1)(d) as disclosing no reasonable grounds for appeal or opposing appeal, as was done in the following cases:

- in *Cudmore v. The Queen*, 2010 DTC 3610, the Court stated that a reply should not be struck in its entirety unless it is so clearly futile that the positions advanced have no chance of succeeding.;

- in *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263, at paragraph 15, the Supreme Court of Canada indicated that "…the question that must then be determined is whether it is 'plain and obvious' that the action must fail.";

- in *R. v. Imperial Tobacco Canada*, [2011] 3 SCR 45 at paragraphs 17-23, the Supreme Court of Canada reiterated the principle that "a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action…The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial….the judge…cannot consider what evidence adduced in the future might or might not show…[the claim has] no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.";

- in *French v. Canada*, 2016 FCA 64 at paragraphs 25-26, the Federal Court of Appeal stated that the test is "whether it is plain and obvious that the argument has no reasonable prospect of success".;

- in *Hunt v. Carey Canada*, [1990] 2 SCR 959 at page 980, the Supreme Court of Canada stated that "It is enough that the plaintiff has some chance of success".

[21] In his order, Paris J. struck the Amended Reply for not pleading facts which would allow the Court to conclude that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default in its 2006 tax return. The matter turns on whether the Further Amended Reply solves this defect. More specifically, Paris J. struck the Amended Reply for pleading mixed fact and law in

the assumptions of fact based on which the Respondent believed the Court could conclude that the Appellant made a misrepresentation. The following cases establish that it is impermissible for the Crown to plead mixed fact and law in its assumptions of fact:

- in *Canadian Imperial Bank of Commerce v. R*, 2013 FCA 122 at paragraph 92, the Federal Court of Appeal affirmed that "It is now well established that the statement of factual assumptions must contain no statements of law".;

- in his order striking the Amended Reply, Paris J. stated that improperly pleaded assumptions of fact will not be presumed to be true. As stated in *R. v. Imperial Tobacco Canada*, [2011] 3 SCR 45, at paragraph 23, "The facts pleaded are taken as true." "The *facts* pleaded" means that it is the facts which are taken as true in the assumptions of fact, not pleadings of law or mixed fact and law.;

- in *Health Quest Inc. v. The Queen*, [2014] GSTC 89 (TCC), the Tax Court of Canada stated that the Minister can only make assumptions of fact, not assumptions of mixed fact and law. The Court stated that a question of fact is about what actually took place between the parties while a question of mixed fact and law is about whether the facts satisfy the legal test. An assumption of mixed fact and law represents the Minister's opinion on the applicability of the law to the facts or states the answer to the question the Court has to decide. There is no onus on an appellant to demolish an invalid assumption and, where the Minister has not set out any proper assumptions of fact, the onus reverts to the Minister to establish the correctness of the statement.;

- in *Weyerhaeuser Co v. R*, 2007 DTC 392 (TCC), the Tax Court of Canada stated that pleading assumptions which were to a greater or lesser extent statements of the respondent's view of the law, and which contained much of what the court had to decide, should have been struck out and were ignored.;

- in *Ver v. R*, 1995 CarswellNat 2093 (TCC), the Tax Court of Canada mentioned that a bald assertion that the Minister assumed a

misrepresentation is inappropriate where the Minister must prove a misrepresentation.;

- finally, in *Anchor Pointe Energy Ltd v. R*, 2003 FCA 294 at paragraph 26, the Federal Court of appeal stated that the Minister must set out "factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed".

[22] Paris J. found that the Amended Reply pleaded assumptions of mixed fact and law in the following two specific places: at paragraph 13(b) and at paragraph 12(h) of the Amended Reply.

[23] The Appellant submitted that the Respondent did not rectify these two instances of pleadings mixed fact and law, and that the Further Amended Reply thus does not solve the defects of the Amended Reply and should be struck under the TCC Rules on this basis. Based on the pleadings and case law and for the reasons that follow, I come to the conclusion that the Respondent rectified her mistakes from both paragraphs 13(b) and 12(h), such that the Further Amended Reply should not be struck.

B. Pleading of Mixed Fact and Law in Paragraph 13(b) of the Amended Reply

[24] In striking the Amended Reply, Paris J. noted at paragraph 26 that a sentence in paragraph 13(b) of the Amended Reply stated that the directors of Mont-Bruno "knew or ought to have known that the appellant's filing position was incorrect". Paris J. found that this sentence should be struck, reasoning that, "The reference to 'filing position' is problematic, since a filing position might be comprised of representations of both fact and law. A filing position might be incorrect in law or in fact or both. As a result, the Amended Reply does not make clear what factual component or components of the filing position the Minister allege the directors knew to be false when the T3 was filed".

[25] Based on Paris J.'s reasoning, rectification of this issue in paragraph 13(b) of the Amended Reply required that the Further Amended Reply "make clear what factual component or components of the filing position the Minister alleges the directors knew to be false when the T3 was filed". In the Further Amended Reply,

the Respondent rectified the issue in paragraph 13(b) by removing specific mention of the Appellant's filing position and cutting that statement from the pleadings. In regards to the Appellant's knowledge of its filing position, the Further Amended Reply stated the following in the assumptions of fact:

- at paragraph 13(b): "The members of the Appellant's Board of Directors are sophisticated and experienced business people with knowledge of tax matters. At all material times, the members of the Appellant's Board of Directors knew or ought to have known the facts stated at paragraphs 12(g) to (m)". Compared to the Amended Reply, paragraphs 12(g) to (m) of the Further Amended Reply also added the following facts: "(h) The Parcel of Land was a vacant wooded area segregated from the golf course by a municipal road, rue des Hirondelles, (i) The golf course was further segregated from rue des Hirondelles by a chain link fence, (j) The Appellant did not organize any activities on the Parcel of Land, (k) The Appellant did not develop or otherwise transform the Parcel of Land to accommodate activities of any type, (l), The Appellant's members did not access the Parcel of Land in the course of club activities, (m) The Appellant reported the gains as tax exempt in its 2006 Non-Profit Organization Information Return".;

- at paragraph 13(d): "According to a resolution of the Appellant's board of directors dated April 7, 2005, it was agreed that a professional opinion concerning the potential tax liability from the sale of the Parcel of Land should be obtained as soon as possible. No such opinion was obtained.";

- at paragraph 13(e): "In 1982, the Appellant sold a similar parcel of land and reported the resulting gain as a taxable capital gain in its T3 Return for the year as required by the *Income Tax Act*. The parcel of land sold in 1982 was also wooded land separated from the golf course by a residential street and was zoned as residential."

(1) <u>Factual Basis for Misrepresentation</u>

[26] The Respondent considers that the Appellant's misrepresentation was in reporting the gain on disposition of land as tax exempt in its tax return and failing to report the gain as a taxable capital gain.

[27] In its Notice of Motion to strike the Further Amended Reply, the Appellant states at paragraph 3(a) that the Respondent did not plead enough facts to support finding a misrepresentation because the facts pleaded do not enable the Court to conclude that the Appellant "misrepresented the use of the Parcel in treating the gain as tax exempt when filing its T3 return". The Appellant's point in this statement turns on the meaning of a misrepresentation under subsection 152(4) or the *ITA*.

[28] The Appellant submitted that it did not conceal the gain since it was reported in the following documents submitted to the CRA: 1) its T2 return, at Annex 1, line 113, 2) its T2 return, at Annex 6, lines 220-250, 3) T1044, at line 103, and 4) its audited financial statements. The Appellant submitted that it **took the position that** the gain **was** exempt and so did not report it in its T3 return.

[29] As stated in *Ridge Run Developments Inc. v. R*, 2007 TCC 68 at paragraph 73, a misrepresentation under subsection 152(4)(a)(i) of the *ITA* does not include a "misrepresentation of the interpretation of the law". In that case, the misinterpretation was in the taxpayer's misunderstanding of what counted as a non-capital loss carried forward from a previous tax year. As a result of his misunderstanding, the taxpayer incorrectly assumed that he was entitled to claim it in his tax return. In *Gestion Fortier v. R*, 2013 TCC 337 at paragraph 16, the Tax Court of Canada made the following statement: "In *Savard v. The Queen*, the Tax Court of Canada stated that taxpayers have the right to disagree with the Minister in their interpretation of the Act, without this necessarily being considered a misrepresentation… In this case, there was enough information to justify the interpretation adopted by the Appellant".

[30] The Appellant alleges that its **filing position** is the reason why it reported the gain in its T1044, which is the form for exempt activities, rather than reporting it in the T3, which is the form for reporting taxable income. In the Appellant's view, the proper characterization of disclosed facts cannot be considered a misrepresentation, citing *Ver v. R*, cited above. At paragraph 17 of that case, the Court stated that:

> The respondent's criticism of the reporting of the loss is based upon certain propositions of law or mixed law and fact that the amounts were 'not laid out for the purpose of gaining or producing income' that there was 'no reasonable expectation of profit' and that the expenses were 'personal or living expenses'. These points might be arguable in support of the merits of the assessments and they might form a basis for disallowance of some of the expenses, but matters of judgement such as allocation of expenses between business and personal are one thing that the Minister ought to pick up in the normal assessment process and within the three years that are given him."

[31] The Appellant suggests that because it did not conceal the gain on the land, it did not make any misrepresentation about the gain, and thus the Respondent's facts pleaded about a misrepresentation disclose no reasonable grounds for appeal or opposing the appeal under TCC Rule 53(1)(d). The Appellant stated that "there is nothing in the Reply which…would show that the Respondent was misled in any way by Mont-Bruno's reporting" and "there is nothing in the Reply which would lead to a finding that the MNR did not have available the information necessary to consider Mont-Bruno's filing position within the normal reassessment period".

[32] The reasoning in *Ver* v. *R*, cited above, supports the Appellant's view on this point. At paragraph 17 of that case, the Court effectively found no misrepresentation:

> "A misrepresentation within the meaning of s. 152(4)(a)(i) means a misrepresentation of fact…There is no evidence and no suggestion that any of the figures in the statement of income and expense were falsified, that the goods were not bought and sold in the amounts disclosed or that the amounts claimed as expenses were not in fact incurred…matters of judgement such as allocation of expenses between business and personal are one thing that the Minister ought to pick up in the normal assessment process and within the three years that are given him. They are not the subject of misrepresentation within the meaning of subparagraph 152(4)(a)(i)…It has not been established that the taxpayers suppressed any material facts. The purpose of the provision permitting the Minister to reopen statute-barred years is to allow a review of returns to be made beyond the normal reassessment period where facts have been deliberately or negligently omitted, suppressed or misstated. That is not the case here".

[33] Similarly, the Appellant cited *Inwest Investments v. R*, 2015 BCSC 1375 at paragraphs 141-143, for the point that "There is also no suggestion that the CRA was misled as to Wesbild's filing position by reason of the 2002 return. There is no suggestion that Wesbild failed to disclose to the CRA all that it was required to

disclose… Simply, the filing position in the 2002 Return was certainly a representation, but it was not a misrepresentation of any kind."

[34] In *Gestion Fortier v. R*, cited above, the Tax Court of Canada made the following statement at paragraph 16:

> [In] *Regina Shoppers Mall Limited v. The Queen*, a Federal Court decision. The central issue in that case was whether the taxpayer should have included the profit of the sale of a lot in its income tax return as a capital gain or as income. The taxpayer had included it as a capital gain, and the Minister found that there was a misrepresentation that allowed him to assess after the normal period. Addy J., at paragraph 10 of the decision, explained that when a taxpayer files an income tax return on what he believes to be the proper method, after thoughtful, deliberate and careful assessment, there can be no misrepresentation. This position was accepted by the Federal Court of Appeal at paragraph 7 of its decision. Moreover, at paragraph 15 of his judgement, Addy J. explained that the act does not impose on taxpayers the duty to report in a manner which the Minister prefers. If the taxpayer carefully considers his position and does not attempt to deceive the Minister, there is no misrepresentation.

[35] In *Petric v. R*, 2006 TCC 306, the Tax Court of Canada made the following statement at paragraph 40:

> Although fair market value is ultimately a question of fact to be resolved by the trier of fact, it is mostly a question of opinion answered by analysing different methodological approaches. Certainly the Minister is entitled to disagree with a taxpayer's view of fair market value and can reassess, within the limitation period, on the basis of his own evaluation. However, where the issue is whether the Minister should be allowed the benefit of an exception to the application of the limitation period, it must be shown that the taxpayer made a misrepresentation in filing his or its tax return. In the case at bar, I am of the view that unless it can be said that the appellants' view of fair market value was so unreasonable that it could not have been honestly held, there was no real misstatement.

[36] However, in *Dalphond v. R*, 2009 FCA 121 at paragraph 5, the Federal Court of Appeal stated that claiming a deduction for which a taxpayer is not entitled counts as a misrepresentation. This supports the Respondent's view that the Appellant incorrectly assumed that it is entitled to tax relief or claimed an exemption to which one is not entitled is a misrepresentation under subsection 152(4) of the *ITA*. Based on this principle the Respondent has plead facts to allow this Court to conclude that the Appellant made a misrepresentation, and thus the

Further Amended Reply should not be struck for failing to disclose reasonable grounds.

[37] According to the case law, misrepresentations include an incorrect statement (see *Minister of National Revenue v. Foot*, [1964] CTC 317, 64 DTC 5196) or error, (see *Minister of National Revenue v. Taylor*, [1961] CTC 211, 61 DTC 1139) such as an incorrect amount resulting from an erroneous calculation "material to the purposes of the return and to any future reassessment", (see *Nesbitt v. R*, 96 DTC 6588 (FCA)) made when filing the tax return, (see *Vine Estate v. R*, 2015 FCA 125, [2015] 5 CTC 47) whether innocent or fraudulent (see *Minister of National Revenue v. Taylor*, [1961] CTC 211, 61 DTC 1139) or made in good faith (see *Jet Metal Products Ltd v. Minister of National Revenue*, [1979] CTC 2738, 79 DTC 624). As per *Ridge Run Developments Inc. v. R*, 2007 TCC 68 at paragraph 96, 2007 DTC 734, "[e]ven an innocent misrepresentation is attributable to neglect", and thus can be the basis of a reassessment under subsection 152(4) of the *ITA*.

[38] As recently as 2016, in *Robertson v. R*, 2016 FCA 303 at paragraphs 1 to 5, the Federal Court of Appeal decided that "the Appellant's failure to report $102,600 and $508,658 of stock option benefits from private companies in the United States in the 2006 and 2007 tax years was a misrepresentation attributable to neglect, carelessness" even if the Appellant had a "firm belief at the time that these benefits were not taxable in Canada because they were generated in the United States" and the error was "an honest and inadvertent lack of attention".

(2) Factual Basis for Concluding that Misrepresentation was Attributable to Carelessness, Neglect, or Wilful Default

[39] The Respondent's statements in paragraphs 13(b), (d), and (e) of the Further Amended Reply suggest a potential basis for proving that the Appellant's misrepresentation was due to wilful default or neglect and carelessness, and in particular the latter two grounds, in line with the Respondent's written submissions in paragraph 23 that the Appellant "failed to exercise reasonable care", as required to disprove subsection 152(4) of the *ITA*.

[40] Specifically, the Respondent's pleading of facts relating to the business experience of the Appellant's directors and their failure to seek professional opinions on the tax consequences of the disposition of the land are facts on the

basis of which the Court can conclude that the misrepresentation was attributable to neglect. As per the reasoning in *Dalphond*, cited above, the taxpayer's failure to inquire about the status of a corporation relating to a capital gain deduction that he claimed demonstrated that his misrepresentation in claiming the deduction was attributable to neglect. This counters the Appellant's submission in its Notice of Motion that the Further Amended Reply should be struck for not pleading facts which would allow the Court to conclude that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default.

(3) Pleading of Mixed Fact and Law in Paragraph 12(h) of the Amended Reply

[41] In striking the Amended Reply, Paris J. noted that a sentence in paragraph 12(h) of the Amended Reply stated that "The Parcel of Land was never used exclusively for and directly in the course of providing dining, recreational or sporting facilities for its members." Paris J. stated that this sentence was an improper pleading of mixed fact and law and thus could not be taken into account or assumed to be true because it only paraphrased the language of subparagraph 149(5)(e)(ii) of the *ITA*. Based on Paris J.'s reasoning, rectification of this issue in paragraph 12(h) of the Amended Reply required that the Respondent plead facts which could allow the Court to conclude that "The Parcel of Land was never used exclusively for and directly in the course of providing dining, recreational or sporting facilities for its members."

[42] In her written submissions in response to the Appellant's motion to strike the Further Amended Reply, the Respondent stated that paragraph 12(h) of the Amended Reply was replaced with the following facts in paragraph 12 of the Further Amended Reply "(h) The Parcel of Land was a vacant wooded area segregated from the golf course by a municipal road, rue des Hirondelles, (i) The golf course was further segregated from rue des Hirondelles by a chain link fence, (j) The Appellant did not organize any activities on the Parcel of Land, (k) The Appellant did not develop or otherwise transform the Parcel of Land to accommodate activities of any type, (l), The Appellant's members did not access the Parcel of Land in the course of club activities." All these facts can support the conclusion that "The Parcel of Land was never used exclusively for and directly in the course of providing dining, recreational or sporting facilities for its members" and do not simply paraphrase subparagraph 149(5)(e)(ii) of the *ITA.* In my opinion, the issue with paragraph 12(h) has been rectified in the Further Amended Reply.

[43] For all these reasons, the motion is dismissed. Costs of the motion are awarded to the Respondent on a party and party basis.

[44] This Court also orders that all timelines for the prosecution of the Appellant's appeal that are necessary for the final disposition of this motion have been extended.

Signed at Ottawa, Canada, this 27th day of August 2018.

"Réal Favreau"

Favreau J.

CITATION:	2018 TCC 105
COURT FILE NO.:	2016-1152(IT)G
STYLE OF CAUSE:	MONT-BRUNO C.C. INC. AND THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 7, 2017
REASONS FOR ORDER BY:	The Honourable Justice Réal Favreau
DATE OF ORDER:	June 4, 2018
DATE OF AMENDED REASONS FOR ORDER:	August 27, 2018

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