Docket: 2022-103(IT)G

BETWEEN:

HILLCORE FINANCIAL CORPORATION,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on November 25, 2022 at Montréal, Québec

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant:	Guy Du Pont Marie-France Dompierre Luca Teolis
Counsel for the Respondent:	Charles Camirand Yara Barrak Emilie Raby-Roussel Christopher Kitchen

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ORDER

UPON reviewing the Notice of Motion dated August 14, 2022, filed by the Appellant pursuant to sections 49 and 53 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), and other documentary material (the "Motion"), seeking an order:

i. Striking out the Respondent's Reply to the Notice of Appeal, filed on June 30, 2022 (the "Reply"), without leave to amend and allowing the appeal with costs;

ii. In the alternative, striking out the Reply without leave to amend and ordering that the allegations of facts contained in the Appellant's Notice of Appeal are presumed to be true for the purposes of the appeal, pursuant to subsection 44(2) of the Rules;

iii. In the further alternative, striking out the Reply and directing the Respondent to file a fresh Reply within 30 days of the date of the order granting the Motion and extending by a further 30 days the time within which the Appellant may file an Answer, if it deems advisable;

iv. Awarding the Appellant the costs of this Motion in any event of the cause, on such a scale as may be deemed appropriate; and

v. Granting any such further and other relief as may be deemed just.

AND UPON reviewing the affidavit of Stéfany Lemieux sworn November 22, 2022 filed by the Respondent;

AND UPON reviewing the written submissions of the parties and hearing the submissions of the parties;

THIS COURT ORDERS THAT:

1. In accordance with the attached Reasons for Order, the Motion is granted as follows:

i) the Reply is struck in its entirety;

ii) On or before June 20, 2023, the Respondent shall file and serve a fresh reply to the Notice of Appeal;

iii) On or before July 24, 2023, the Appellant may file an Answer, if it deems advisable, and in such event, the Appellant shall serve the Answer on or before that date; and

iv) Costs for this Motion shall be awarded to the Appellant, in any event of the cause. The parties shall have 20 days from the date of this Order to reach

an agreement on costs for this Motion and to so advise the Court, failing which the Appellant shall have a further 20 days to serve and file written submissions on costs and the Respondent shall have a further 20 days to serve and file a written response. Any such submissions shall not exceed ten (10) pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the applicable time limits, costs for this Motion shall be awarded to the Appellant in accordance with the Tariff.

Signed at Ottawa, Canada, this 18th day of May 2023.

"Dominique Lafleur"

Lafleur J.

Citation: 2023 TCC 71
Date: 20230518
Docket: 2022-103(IT)G

BETWEEN:

HILLCORE FINANCIAL CORPORATION,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Lafleur J.

I. THE MOTION

[1] A Notice of Motion dated August 14, 2022, was filed by the Appellant pursuant to sections 49 and 53 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), and other documentary material (the "Motion"), seeking an order:

i. Striking out the Respondent's Reply to the Notice of Appeal, filed on June 30, 2022 (the "Reply"), without leave to amend and allowing the appeal with costs;

ii. In the alternative, striking out the Reply without leave to amend and ordering that the allegations of facts contained in the Appellant's Notice of Appeal are presumed to be true for the purposes of the appeal, pursuant to subsection 44(2) of the Rules;

iii. In the further alternative, striking out the Reply and directing the Respondent to file a fresh Reply within 30 days of the date of the order granting the Motion and extending by a further 30 days the time within which the Appellant may file an Answer, if it deems advisable;

iv. Awarding the Appellant the costs of this Motion in any event of the cause, on such a scale as may be deemed appropriate; and

v. Granting any such further and other relief as may be deemed just.

[2] The Respondent filed the affidavit of Stéfany Lemieux sworn November 22, 2022.

[3] At the hearing, the Respondent made some concessions, which will be discussed below.

II. **CONCLUSION**

[4] In accordance with the following reasons, the Motion is granted as follows:

i. The Reply is struck in its entirety;

ii. On or before June 20, 2023, the Respondent shall file and serve a Fresh Reply to the Notice of Appeal;

iii. On or before July 24, 2023, the Appellant may file an Answer, if it deems advisable, and in such event, the Appellant shall serve the Answer on or before that date; and

iv. Costs for this Motion shall be awarded to the Appellant, in any event of the cause. The parties shall have 20 days from the date of this Order to reach an agreement on costs for this Motion and to so advise the Court, failing which the Appellant shall have a further 20 days to serve and file written submissions on costs and the Respondent shall have a further 20 days to serve and file a written response. Any such submissions shall not exceed ten (10) pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the applicable time limits,

costs for this Motion shall be awarded to the Appellant in accordance with the Tariff.

III. **CONTEXT**

[5] The Appellant appeals from reassessments made by the Minister of National Revenue (the "Minister") under the *Income Tax Act* (R.S.C., 1985, c.-1 (5th Supp.), (the "Act")) with respect to its taxation years which ended on December 31, 2012, December 31, 2013, December 31, 2014, December 31, 2015, December 31, 2016, and December 31, 2017.

[6] By notices dated June 20, 2020, the Minister reassessed the Appellant to add unreported income totalling $17,232,046 for the taxation year ended December 31, 2012, $15,131,666 for the taxation year ended December 31, 2013, $27,778,318 for the taxation year ended December 31, 2014, and $28,997,389 for the taxation year ended December 31, 2015, and assessed penalties under subsection 163(2) of the Act for these years. The Minister also disallowed additions to the Appellant's cumulative eligible capital account and deductions claimed by the Appellant with respect to capital cost allowance and interest expenses. The Minister, consequently, reduced non-capital loss balance and denied the Appellant's requests for loss carry forward. Further, another issue raised by the reassessments is whether the Minister was allowed to reassess the Appellant outside the normal reassessment period for the taxation years ended December 31, 2012, December 31, 2013, December 31, 2014 and December 31, 2015.

[7] The Reply contains an overview of the matter and reads as follows (pp.1-2):

> In its 2012, 2013, 2014 and 2015 taxation years the appellant sold and implemented a tax plan that enabled its customers to sell assets without paying tax on the proceeds of disposition received from the sales. The tax plan involved a series of transactions, ending with the allocation of purported losses from a sham partnership to offset the gains received from the asset sale. The appellant received a fee from its customers for the services it provided, which the appellant did not report as income. Instead of reporting the fees as income, the appellant purported to borrow money from certain corporations that it used to sell its customers' assets when implementing the tax plans. The amount of the purported loan was equal to the appellant's fee for selling and implementing the tax plan. In connection with the purported loan, the appellant issued purported promissory notes in favour of the lender. These promissory notes were shams that were created to mislead the

> Minister of National Revenue into believing that the appellant had received loan proceeds when in reality, the amounts were the appellant's unreported income earned from selling and implementing the tax plans.
>
> Additionally, in the 2012 taxation year, the appellant purchased assets from 4092325 Investment Ltd. Specifically, the appellant purchased 4092325 Investment Ltd.'s unbilled revenues as work-in-progress for significantly less than fair market value, and did not include those revenues in computing its income for the 2012 taxation year. The appellant also purchased 4092325 Investment Ltd.'s other business assets. The appellant purported to pay for these assets by issuing two purported promissory notes. These notes were shams created to fabricate tax attributes, specifically, inflated capital cost allowance and cumulative eligible capital expenditures. The appellant deducted interest purportedly payable on the sham notes.
>
> As a result of its grossly under-reported income and the deductions for interest, inflated capital cost allowance and eligible capital expenditures, the appellant claimed substantial non-capital losses in the 2012, 2013, 2014 and 2015 taxation years, to which it was not entitled. At all material times, the appellant's non-capital loss balance was nil, and accordingly the appellant was not entitled to the loss carry-forwards it claimed in the 2016 and 2017 taxation years.

[8] According to the Appellant, the promissory notes it issued created a valid creditor-debtor relationship. It then follows that the principal amount of these promissory notes should not be included in the computation of the income of the Appellant. Further, the Appellant is entitled to claim non-capital loss carry forward, interest expenses deduction, capital cost allowance and addition to its cumulative eligible capital account. Finally, penalties assessed under subsection 163(2) of the Act should be vacated.

[9] This appeal is at an early stage. There has not yet been any exchange of lists of documents or discovery examinations.

IV. **POSITIONS OF THE PARTIES**

[10] According to the Appellant, the Reply has the following defects: law disguised as assumptions of facts, improper inclusion of evidence, immaterial facts, disclosure of confidential information and is vague, repetitive, ambiguous and misleading. The numerous deficiencies undermine the parties' ability to proceed to a hearing of the appeal in a timely and orderly fashion. The Reply is also scandalous,

frivolous and vexatious and constitutes an abuse of the Court's process prohibited by section 53 of the Rules. According to the Appellant, due to the numerous defects of the Reply, the only appropriate remedy and sanction for the judicial time and Appellant's resources that are lost over this remarkably defective pleading is for this Court to strike the Reply in its entirety, without leave to amend, and to allow the Appeal.

[11] According to the Respondent, while the Reply is partially defective, the defects are not as numerous as contended by the Appellant. The Reply can be cured by amendments, and thus, the Reply should not be struck.

V. **ANALYSIS**

5.1 Applicable principles

A. *Rules of pleadings*

[12] The purpose of pleadings is "to define the issues in dispute between the parties for the purposes of production, discovery and trial" (see *Zelinski v. R* (2002) DTC 1204, [2002] 1 CTC 2422, at para 4 (aff'd 2002 FCA 330) [*Zelinski*]; see also *Beima v. The Queen*, 2016 FCA 205, at para 17 and *Husky Oil Operations Limited v. The Queen*, 2019 TCC 136 [*Husky Oil*], at para 11).

[13] Pleadings should contain a concise statement of the material facts a party relies on.

[14] As explained by this Court in *Zelinski* (paras 4 – 5):

> 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.
>
> The applicable principle is stated in *Holmsted and Watson*:
>
> > This is the rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. 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.
>
> [Emphasis added.]

[15] Pleadings should be concise. Repetition should be avoided, as pleadings should only contain material facts relied upon for a claim or defense, which provide an overview of the case (*Strother v. The Queen*, 2011 TCC 251 [*Strother*], at paras 39-40).

[16] It is also important that pleadings be balanced and that there must be a sense of fairness in the pleadings (*Canadian Imperial Bank of Commerce v. The Queen*, 2011 TCC 568 [*CIBC, TCC*], at para 38).

[17] Subsection 49(1) of the Rules provides the requirements as to what a reply should state and reads as follows:

49(1) Subject to subsection (1.1), every reply shall state	49 (1) Sous réserve du paragraphe (1.1), la réponse indique :
(a) the facts that are admitted,	a) les faits admis;
(b) the facts that are denied,	b) les faits niés;
(c) the facts of which the respondent has no knowledge and puts in issue,	c) les faits que l'intimée ne connaît pas et qu'elle n'admet pas;
(d) the findings or assumptions of fact made by the Minister when making the assessment,	d) les conclusions ou les hypothèses de fait sur lesquelles le ministre s'est fondé en établissant sa cotisation;
(e) any other material fact,	e) tout autre fait pertinent;
(f) the issues to be decided,	f) les points en litige;
(g) the statutory provisions relied on,	

(h) the reasons the respondent intends to rely on, and	g) les dispositions législatives invoquées;
(i) the relief sought.	h) les moyens sur lesquels l'intimée entend se fonder;
	i) les conclusions recherchées.

[18] The facts referred to in paragraphs 49(1)(a), (b) and (c) of the Rules are the facts set out in a particular notice of appeal (see *Husky Oil*, at para 8). When the respondent admits or denies a fact (paragraphs 49(1)(a) and (b) of the Rules), it should not add comments or other conclusion of law (*Strother*, at para 16 and *Xu v. R*, 2006 TCC 695 [*Xu*], at para 5).

[19] More recently, the Court reviewed these principles (see *Husky Oil*, at paras 20-21):

- the respondent must admit only those facts alleged by the appellant;
- the admission must stand alone without the respondent's own allegations relating to the subject;
- it is inappropriate in a reply to purport to admit certain facts when those fact were not alleged in the notice of appeal; and
- it is not permissible in the reply, when purporting to admit the particular fact, to interpret an imprecise word by substituting some other word for it.

[20] Once the respondent has denied or admitted a fact, or has stated that it had no knowledge of a fact, there are only two more statements of facts to be pleaded by the respondent: the assumptions of fact made by the Minister when making the assessment (para 49(1)(d) of the Rules) and any other material facts (para 49(1)(e) of the Rules).

[21] As stated by this Court in *Strother*:

> [15]... All these statements of fact are to be statements of material fact, not immaterial facts, not statements or principles of law and not statements mixing fact with law. Subparagraphs *f*), *g*) and *h*) of Rule 49 accord the respondent opportunity to describe the issues, state the statutory provisions in play and submit the reasons she is relying on in this appeal.

B. *Striking of a pleading*

[22] The Rules specifically provide at Section 53 for the striking out of pleadings. The Court may strike out or expunge all or part of a pleading on the ground that the pleading may prejudice or delay the fair hearing of the appeal, is scandalous, frivolous or vexatious, is an abuse of the process of the Court or discloses no reasonable grounds for appeal. Section 53 of the Rules sets out a high standard for striking out pleadings or part of pleadings. It reads as follows:

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,	53 (1) La Cour peut, de son propre chef ou à la demande d'une partie, radier un acte de procédure ou tout autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document:
(a) may prejudice or delay the fair hearing of the appeal;	(a) peut compromettre ou retarder l'instruction équitable de l'appel;
(b) is scandalous, frivolous or vexatious;	(b) est scandaleux, frivole ou vexatoire;
(c) is an abuse of the process of the Court; or	(c) constitue un recours abusif à la Cour;
(d) discloses no reasonable grounds for appeal or opposing the appeal.	(d) ne révèle aucun moyen raisonnable d'appel ou de contestation de l'appel.

[23] In *Sentinel Hill Productions (1999) Corporation v. The Queen*, 2007 TCC 742, [*Sentinel Hill*], the Court propounded the well-established principles to be applied in a motion to strike under section 53 of the Rules:

> [4] … There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>
> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>
> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> (c) A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.

[24] The test to be applied for the striking out of pleadings or parts of pleadings is whether it is plain and obvious that it discloses no reasonable claim (*Main Rehabilitation Co. v. Canada*, 2004 FCA 403, at para 3).

[25] In the context of a motion to strike a 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 (*Canadian Imperial Bank of Commerce v. R, 2013 FCA 122 [CIBC, FCA]*, at para 7).

[26] More recently, the Federal Court of Appeal in *Ereiser v. Canada*, 2013 FCA 20, reviewed those principles:

> [17] There is no dispute as to the test for striking pleadings. It was recently restated by Chief Justice McLachlin, writing for the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 17:
>
> ... A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate*

> *v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> …

[27] A pleading may prejudice or delay the fair hearing of the appeal, if it is plain and obvious that the alleged pleading is irrelevant to the issues to be resolved.

[28] It has also been held that pleadings which state irrelevant and improper facts or are so deficient in material facts that they do not raise a ground of appeal can be struck on the ground that they would prejudice the fair hearing of the appeal (*Gauthier v. R*, 2006 TCC 290). As stated in *Heron v. The Queen*, 2017 TCC 71 (aff'd in 2017 FCA 229):

> [12] When a party states that the allegation is not relevant, the "irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence."

[29] A pleading will be considered frivolous or vexatious when "it was so deficient that the defendant could not know how to answer the claim. As well, the Court would be unable to regulate or manage the proceeding" (*Simon v. Canada*, 2011 FCA 6 [*Simon*], at para 9). It should be reserved for the plainest and most egregiously senseless assertions (*Sentinel Hill*, at para 11).

[30] Pleadings may also be struck if "…they were inserted for colour, or simply as they are inflammatory" (*Mudge v. R*, 2020 TCC 77 [*Mudge*], at para 20). Furthermore, a pleading will be considered frivolous if, assuming the facts to be true, it is plain and obvious that it cannot succeed (*Canada v. Roitman*, 2006 FCA 266, at para 15).

[31] A pleading may be considered an abuse of the Court's process when it is unfair to a party or would bring the administration of justice into disrepute (*Toronto City*

v. CUPE Local 79, 2003 SCC 63, at paras 35-45). As stated by this Court in *Marine Atlantic Inc. v. R*, 2016 TCC 46:

> [47] In order for a party's conduct to amount to an abuse of process, the party must have deliberately failed to cooperate or comply with the rules or court orders causing delay and prejudice. In *Yacyshyn v. Canada*, [1999] 1 CTC 139 (FCA), the Federal Court of Appeal affirmed this Court's order to strike pleadings is based on the taxpayer's conduct, which in that case had caused "delay and prejudice" amounting to an abuse of process.

[32] However, as stated by this Court in *Promex Group Inc. v. R*, [1998] 3 C.T.C. 2128, 98 DTC 1588, it is not an abuse of the Court's process to fully disclose the basis of an assessment, regardless of the source of the information on which it is based, but it could well be an abuse of the process for the Minister to withhold facts central to the making of the assessment, or to conjure up assumptions that were not in fact made (at para 32).

C. *Remedy*

[33] Improper pleadings constitute an irregularity within the meaning of Section 7 of the Rules (reproduced in Appendix A to these Reasons) and do not render a proceeding a nullity.

[34] Where the deficiencies in a pleading are extensive, lack specificity or are vague, the proper remedy is to set the pleadings aside with leave to file a new pleading that meets the requirements set out in the Rules. As stated by this Court, it is "not about striking out poor pleadings but rather about pleadings that will materially harm the litigation process" (see *935475 Ontario Ltd v. R*, 2009 TCC 196, at para 34).

[35] The Court may grant all necessary amendment or relief to secure the just determination of the real matters in dispute. To strike a pleading without leave to amend, the defect must be incurable by amendment (see *Simon*, at para 8). Furthermore, the Federal Court determined that for a claim to be struck without leave to amend, there must not be a "scintilla" of a legitimate cause for action (*Riabko v. R*, [1999] FCJ No 1289, 173 FTR 239 [*Riabko*], at para 8).

[36] When an appellant makes a motion to strike a reply, it has the burden of showing that "it would be impossible for the Respondent to amend to support the reassessment" (see *Mont-Bruno C. C. Inc. v. R*, 2018 TCC 105, at para 29).

[37] This burden is a heavy one. As stated by this Court in *Zelinski*, "[a]mendments to pleadings should generally be permitted, so long as that can be done without causing prejudice to the opposing party that cannot be compensated by an award of costs or other terms, as the purpose of the Rules is to ensure, so far as possible, a fair trial of the real issues in dispute between the parties" (at para 4).

[38] Upon examining the motion, I will now apply these principles.

5.2 Overreaching denials and admissions

A. *Positions of the parties*

[39] According to the Appellant, the Respondent uses "overreaching denials" and "overreaching admissions" in the Reply numerous times, namely at paragraphs 4, 6, 8, 9, 10, 11 and 12 and subparagraph 7.3.

[40] Paragraphs containing the alleged overreaching denials or admissions are in the part of the Reply that shall state the facts that are admitted (para 49(1)(a) of the Rules), the facts that are denied (para 49(1)(b) of the Rules) and the facts of which the Respondent has not knowledge of and puts them at issue (para 49(1)(c) of the Rules).

[41] At the hearing, the Respondent made some concessions as described in Appendix A to the Respondent's written representations dated November 24, 2022 (Appendix A is attached to these reasons as Appendix B).

B. *Analysis*

[42] As stated by this Court in *Xu* "[a] defendant in civil litigation is permitted to admit only those facts alleged by a plaintiff. The admission should be a "stand alone" event, not clouded by the defendant's own allegations in the subject area of the admission" (at para 5).

[43] Using overreaching admissions or denials is poor and improper pleadings (*Strother*, at para 16), and as such, the Court should strike these parts of the Reply and allow the Respondent to amend the Reply.

Paragraphs 4, 6, and 11 and subparagraph 7.3 of the Reply

[44] The Respondent concedes overreaching denials and admissions at paragraphs 4, 6 and 11 and subparagraph 7.3 of the Reply. Amendments to paragraphs 4, 6 and 11 and subparagraph 7.3 of the Reply as proposed by the Respondent shall be made to the Reply.

Paragraph 4 of the Reply

[45] The Respondent concedes that paragraph 4 of the Reply constitutes an overreaching denial and proposes to amend it by deleting the second sentence containing the overreaching denial, deleting the reference to paragraph 24 of the Notice of Appeal and adding the following at the end of the first sentence: "but denies that the loans exists".

[46] Furthermore, the Respondent proposes to add subparagraph 8.1 in the Reply to deal with paragraph 24 of the Notice of Appeal, which will then read as follows:

> With respect to paragraph 24 of the Notice of Appeal, the Attorney General of Canada admits only that documents titled promissory notes were created to evidence some purported loans, but denies that the loans existed. The Attorney General of Canada has no knowledge of whether a promissory note was created for every purported loan to the Appellant and puts it in issue.

Paragraph 6 of the Reply

[47] The Respondent concedes that paragraph 6 of the Reply constitutes an overreaching denial and proposes to amend paragraph 6 by deleting the second sentence containing the overreaching denial and adding the following at the end of the first sentence: "but denies that $19,768,000 was the agreed purchase price for the acquisition" and by changing the words "purported agreed" by the word "stated".

Subparagraph 7.3 of the Reply

[48] The Respondent concedes that subparagraph 7.3 of the Reply constitutes an overreaching denial and proposes to amend subparagraph 7.3 to read as follows: "denies that the appellant paid the purchase price".

Paragraph 11 of the Reply

[49] At the hearing, the Respondent conceded that paragraph 11 of the Reply constitutes an overreaching admission, because paragraph 27 of the Notice of Appeal does not allege the Appellant claimed interest of $971,999. The Respondent proposes to remove paragraph 11 of the Reply and amend paragraph 2 of the Reply to include a denial of the facts alleged in paragraph 27 of the Reply.

Paragraphs 9 and 10 of the Reply

[50] With respect to paragraphs 9 and 10 of the Reply, for the reasons below, I find that proposed amendments by the Respondent are not sufficient to answer the defects raised by the Appellant.

Paragraph 9 of the Reply

[51] According to the Appellant, paragraph 9 of the Reply contains an overreaching denial, which reads as follows: "…the respondent denies that the appellant incurred any of the expenses related to the additions listed", which assertions were not alleged in paragraph 25 of the Notice of Appeal. I agree with the Appellant and that part of paragraph 9 has to be deleted.

[52] The Respondent concedes that paragraph 9 of the Reply constitutes an overreaching denial because paragraph 25 of the Notice of Appeal does not allege that the Appellant incurred the expenses. The Respondent conceded that an amendment should be made to paragraph 9 by deleting that part of paragraph 9 as referred to by the Appellant and adding the following: "…the Attorney General of Canada's position is that the appellant did not incur any of the expenses related to the additions listed".

[53] However, the addition proposed to be made by the Respondent at the end of paragraph 9 should not be allowed. Again, as stated in *Strother* and *Xu*, it is not proper to add comments of this sort in that part of the Reply. More specifically, in *Xu* (at para 5), this Court stated:

> A defendant in civil litigation is permitted to admit only those facts alleged by a plaintiff. The admission should be a "stand alone" event, not clouded by the defendant's own allegations in the subject area of the admission.

[54] Hence, the proposed addition at the end of paragraph 9 is not allowed.

Paragraph 10 of the Reply

[55] According to the Appellant, paragraph 10 of the Reply contains an overreaching denial, which reads as follows: "…but, for clarity, he denies that the appellant incurred those expenses", which assertions were not alleged in paragraph 26 of the Notice of Appeal. I agree with the Appellant and that part of paragraph 10 has to be deleted.

[56] The Respondent concedes that paragraph 10 of the Reply constitutes an overreaching denial because paragraph 26 of the Notice of Appeal does not allege that the Appellant incurred the expenses. The Respondent conceded that an amendment should be made to paragraph 10 by deleting that part of paragraph 10 as referred to by the Appellant and adding the following: "…but, for clarity, the Attorney General of Canada's position is that the appellant did not incur those expenses".

[57] However, the proposed addition at the end of paragraph 10 is not allowed. As indicated above, it is not proper to add comments of this sort in that part of the Reply.

Paragraphs 8 and 12 of the Reply

[58] At the hearing, the Respondent did not concede on whether paragraphs 8 or 12 contained any overreaching denials or admissions.

Paragraph 8 of the Reply

[59] The Appellant is of the view that paragraph 8 of the Reply contains an overreaching admission, because the Respondent added the following after admitting the facts stated in paragraph 21 of the Notice of Appeal: "…but for clarity adds that the promissory notes did not create a valid debtor-creditor relationships". Paragraph 21 of the Notice of Appeal reads as follows: "As part of the Acquisition, the 409 Notes were assumed by the Appellant (the "Assumption")."

[60] I find that this is improper pleading (see *Strother* and *Xu*), and accordingly, that part of paragraph 8 of the Reply should be struck.

Paragraph 12 of the Reply

[61] According to the Appellant, part of paragraph 12 of the Reply constitutes an overreaching denial as it was not alleged by the Appellant. That part of paragraph 12 reads as follows: "but for clarity, denies that there were non-capital losses available for carry forward." I agree with the Appellant.

[62] I find that that is an unnecessary comment by the Respondent which should be avoided in that part of the Reply. The corresponding paragraph of the Notice of Appeal just stated that the Appellant carried forward and deducted non-capital losses. For these reasons, that part of paragraph 12 of the Reply should be struck.

5.3 Assumptions of mixed fact and law and conclusions of law

[63] Assumptions of fact made by the Minister when making the assessment can be found at paragraph 27 of the Reply. Paragraph 27 of the Reply contains 126 subparagraphs, and some subparagraphs contain their own subparagraphs. Furthermore, Schedules A to F of the Reply are part of the assumptions of fact made by the Minister when making the assessment, being referenced within paragraph 27 of the Reply.

A. *Positions of the parties*

[64] According to the Appellant, numerous assumptions of mixed fact and law and conclusions of law contained in the part of the Reply stating the assumptions of fact

the Minister relied upon to make the assessment should be struck since only assumptions of fact should be included within that part of the Reply.

[65] At the hearing, the Respondent conceded, to some extent, that various assumptions should be amended to comply with these rules.

B. Analysis

[66] The findings or assumptions of fact made by the Minister when making the assessment are to be stated in every reply by virtue of paragraph 49(1)(d) of the Rules.

[67] In *Canada v. Anchor Pointe Energy Ltd.*, 2003 FCA 294, the Federal Court of Appeal concluded that in pleading findings or assumptions of fact, the Minister could not plead conclusions of law. Further, the Minister should only assume the factual components of a conclusion of mixed fact and law as she must extricate the factual components of a conclusion of mixed fact and law:

> [25] I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.
>
> [26] . . . The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.
>
> [Emphasis added.]

[68] More recently, the Federal Court of Appeal confirmed these principles in *CIBC, FCA*, at para 92.

[69] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 at para 35, 144 DLR (4th)1, the Supreme Court of Canada distinguished

between questions of law, questions of fact, and questions of mixed fact and law as follows:

> . . . Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. . . .
>
> [Emphasis added.]

[70] In other words, "[q]uestions of mixed fact and law involve applying a legal standard to a set of facts" (*Housen v. Nikolaisen*, 2002 SCC 33, at para 26).

Dealing at arm's length

[71] At the hearing, the Respondent conceded that subparagraphs 27.65 and 27.114 contain assumptions of mixed fact and law as to whether the parties are dealing at arm's length and proposes that subparagraph 27.114 be deleted in its entirety, and subparagraph 27.65 be amended to extract the factual elements to read as follows:

> 27.65 "Negus, directly or indirectly, controls the Abacus Group.
>
> 27.65.1 "The TargetCos were controlled by Negus or the Abacus Group at the time the loans in respect of the Abacus Promissory Notes were purported to have been made".

[72] I find that subparagraphs 27.65 and 27.114 contain assumptions of mixed fact and law and should be struck from that part of the Reply. The Reply should be amended as proposed by the Respondent.

Sham

[73] According to the Appellant, the assumptions of fact made by the Minister when making the assessment contain 104 references to the effect that documents or contracts were "sham", which is a conclusion of law. As stated by this Court in *Chad v. R*, 2021 TCC 45 [*Chad*]:

> …the factual underpinnings (such as intention to mislead) may be pleaded as facts assumed by the Minister but the mention or use of the term *sham* or the drawing of a legal conclusion that there was a sham should be pleaded elsewhere in the particular reply" (at para 42).

[74] Conclusions of law should not be part of the assumptions of facts made by the Minister when making the assessment. For example, Schedules B-1 to B-42, which are part of the assumptions of fact made by the Minister, each contain numerous references to the word "sham".

[75] At the hearing, the Respondent conceded that a finding a sham is a conclusion of law and should not be part of the assumptions of fact, and proposed to amend all assumptions, including the schedules, to strike the word "sham".

[76] I find that the word "sham" should not be part of the assumptions of fact made by the Minister when making the assessment as it is a conclusion of law. Hence, the word "sham" has to be struck from the assumptions of fact found at paragraph 27 of the Reply, including the Schedules.

Valid creditor/debtor or debtor/lender relationship

[77] According to the Appellant, subparagraphs 27.53 and 27.94 of the Reply, which deny a "valid creditor-debtor" relationship, have to be modified as that is an improper conclusion of law or mixed fact and law. The Appellant also refers to paragraph 4, subparagraph 7.3 and paragraph 8 using the same terminology.

[78] Firstly, paragraph 4, subparagraph 7.3 and paragraph 8 are not part of the assumptions of fact made by the Minister when making the assessment. Hence, the ground raised by the Appellant to strike part of these paragraphs because they contain improper conclusions of law or mixed fact and law cannot stand.

[79] As for subparagraph 27.53 of the Reply, it reads as follows: "Neither party had any intention to create a valid debtor-creditor relationship". I find that whether

someone has a specific intention is a question of fact; accordingly, I find that subparagraph 27.53 is an assumption of fact and should not be struck from that part of the Reply.

[80] However, subparagraph 27.94 of the Reply, which reads as follows: "the parties to the APEL Promissory Note #1 and APEL Promissory Note #2 did not have a debtor/lender relationship" is a conclusion of law, and thus should be struck from that part of the Reply.

Transfer of property

[81] According to the Appellant, subparagraph 27.50 is a conclusion of law. It reads as follows: "There was no transfer of property from any of the TargetCos to 409 Ltd. or the appellant in connection with the Abacus Promissory Note".

[82] I agree with the Appellant that subparagraph 27.50 is a conclusion of law, and this subparagraph should be struck from that part of the Reply.

Fair market value

[83] Subparagraphs 5.3, 27.103 and 28.23 refer to the fair market value of the work-in-progress sold by 4092325 Investments Ltd. to the Appellant. According to the Appellant, these paragraphs represent improper conclusions of law.

[84] I find that assertions as to value are a finding of fact and, thus, these subparagraphs are proper and should not be struck from the Reply.

Unreported income

[85] The Appellant puts in issue the following assumption found in subparagraph 27.28 which reads as follows: "the appellant's unreported income […] are the appellant's fees earned in course of selling and implementing the Abacus Tax Plan". According to the Appellant, this assumption is a conclusion of law or mixed fact and law.

[86] For the following reasons, I do not agree with the Appellant. That a taxpayer failed to include an amount in income is factual. I agree with the comments found in *Xu* (at paras 8 and 9) where the appellant argued that the Minister's Reply should be struck for stating that the appellant "failed to include income in the amount of…". As reasoned in that case, income is not a defined term in the Act. To allege that a taxpayer should have included an amount in income but did not is not a conclusion of law. If the Court was to strike such statements that would make drafting pleadings for this Court an arduous task.

[87] Furthermore, I also find that "…the purpose of payments, the business carried on …, the factual connection or absence of a factual connection between the two..." are also proper assumptions of fact to be made by the Minister in making the assessment (*CIBC, FCA*, at para 93). I therefore find that this subparagraph is proper and should not be struck from that part of the Reply.

Bona fide loan

[88] According to the Appellant, assumptions found in subparagraphs 27.46 and 27.93 of the Reply are conclusions of law or mixed fact and law which should not be included in the assumptions of fact made by the Minister when making the assessment.

[89] Subparagraph 27.46 reads as follows: "The purported loan agreement evidenced by the Abacus Promissory Notes were not bona fide loan."

[90] Subparagraph 27.93 of the Reply reads as follows: "APEL Promissory Note #1 and APEL Promissory Note #2 were not bona fide loans."

[91] According to the Respondent, these assumptions are proper because to determine whether someone is of good faith is a question of fact.

[92] The Respondent refers the Court to the Federal Court decision of *Sadique v. Minister of Manpower and Immigration and N. C. Beaton*, [1974] C.F. 719, where the Court stated that whether an individual is *bona fide* is a question of fact, and not a question of law (at page 723). Also, the Respondent refers to the Supreme Court of Canada's decision in *Dulac v. Nadeau*, [1953] 1 SCR 164 at page 172, 1953

CanLII 58, where the Supreme Court stated that whether an individual is of good faith is generally a question of fact.

[93] However, the impugned assumptions do not refer to the good faith of an individual, but as to whether specific documents are *bona fide*. The question as to whether a document is *bona fide* or not requires one to apply the proper legal test to a specific set of facts. Hence, it is an assumption of mixed fact and law, which should not be found in the assumptions of fact made by the Minister when making the assessment. The Respondent has to extricate the factual components of what is being assumed, and all references to whether documents are *"bona fide"* should be struck from that part of the Reply.

5.4 Repetitive, colorful and vexatious language

A. *Positions of the parties*

[94] According to the Appellant, the Reply contains excessive repetitions, which undermine the goals of conciseness and certainty in pleadings (*Strother*, at paras. 41-43).

[95] Furthermore, according to the Appellant, several statements in the Reply constitute nothing more than a colorful and vexatious commentary, which should not be allowed in pleadings, namely the terms "hiding the income", "avoid paying tax", "extracted millions" or "did not care whether the ITA was complied with".

[96] The Respondent has made concessions as described below with regard to repetitiveness, but none was made regarding the alleged use of colorful and vexatious language. According to the Respondent, it is proper to plead the factual underpinnings to support a position of sham, including facts of an intention to mislead. As such, the Reply should remain as drafted.

B. *Analysis*

Repetitiveness

[97] The Reply is very long: it consists of forty (40) pages plus eighty-five (85) pages of Schedules attached to the Reply. As mentioned above, all the Schedules are included by reference in the assumptions of fact made by the Minister when making the assessment. Pages 8 to 29 of the Reply (paragraph 27, including subparagraphs 27.1 to 27.126) state the assumptions of fact made by the Minister when making the assessment and pages 29 to 34 (paragraph 28, including subparagraphs 28.1 to 28.57) state the facts relied upon by the Minister to assess the penalties under subsection 163(2) of the Act. The issues to be decided, the statutory provisions, grounds relied on and relief sought are found at pages 34 to 40.

[98] A reply should not be struck for being lengthy, but repetitive pleadings are to be struck (*CIBC, FCA*, at para 83). The purpose of pleadings are to give an overview and the parties will have the opportunity at trial to communicate their entire version of events (*Strother*, at paras 39-43). As stated by this Court, repetition creates uncertainty and impedes the objectives of conciseness and certainty in pleadings (*Husky Oil*, at para 31).

[99] The Respondent has made the following concessions regarding repetition in the Reply, and the Reply shall be amended accordingly:

i) Remove subparagraph 28.17 and keep subparagraph 27.29;

ii) Remove subparagraph 28.22 and keep subparagraph 27.27;

iii) Remove subparagraph 28.40 and keep subparagraph 27.123; and

iv) Remove subparagraph 27.86 and modify subparagraph 27.23 to read as follows:

> 27.23 The purpose of advertising itself as being in the business of mergers and acquisitions was to
>
> > 27.23.1 deceive the Minister into believing that 409 Ltd. and the Appellant, as applicable, reported the funds received from the Abacus Tax Plans as borrowed funds, and not income; and
> >
> > 27.23.2 deceive the Minister as to the true nature of its business by suggesting the existence of a continued business for TargetCo when there was none.

[100] The Appellant has brought to the Court's attention what it sees as other repetitions in the Reply.

[101] I find that some of the impugned paragraphs are not repetitive, but others are.

[102] More specifically, I find that the following subparagraphs are repetitive: subparagraphs 27.28 and 27.43; subparagraphs 28.14, 28.20 and 28.54; subparagraphs 28.8 and 28.20; subparagraphs 27.61 and 28.6 (Negus signed many of the promissory notes); and subparagraphs 28.8 and 28.14. As stated above, repetitive pleadings should be struck. For these reasons, the Respondent shall amend the Reply to remove all the above-mentioned repetitions.

[103] Moreover, I wish to address subparagraphs 27.29 to 27.32.3, 27.33 to 27.68, 27.69 to 27.86 and Schedule C, which give explanations concerning the Abacus Tax Plan.

[104] Firstly, I will deal with Schedule C. Schedule C is referred to in subparagraphs 27.32 and 27.33 of the Reply, which read as follows:

> 27.32 " The Abacus Tax Plan, described in Schedule "C" attached, involved a series of transactions that was promoted to the Abacus Group's customers to ultimately result in …"
>
> 27.33 "The outlines of the Abacus Tax Plan, as described further in Schedule "C" involved a series of transactions that included the following steps…"

[105] Schedule C, entitled "Overview of the Abacus Tax Plan", is an outline pictographic representation of the step transactions involved in implementing an Abacus Tax Plan. It is drafted on a no-name basis and is eight (8) pages long.

[106] According to the Respondent, Schedule C sets out the Minister's assumptions of fact about the general steps in the series of transactions involved in implementing Abacus Tax Plans sold by 4092325 Investments Ltd. and the Appellant during the years under appeal. More specifically, it sets out the Minister's understanding of the steps in the transactions used to implement Abacus Tax Plans. Furthermore, according to the Respondent, the diagrams found in Schedule C do not prove the transactions.

[107] At the hearing, the Respondent argued that "…there is certainly a benefit for the judge who will have to understand all of these things to be able to be given the broad overview of the ... a picture of what is going on and there is absolutely no problem in putting that sort of aid as part of the pleadings." (Transcripts, November 25, 2022, pp.49-50).

[108] For the following reasons, I find that Schedule C shall be struck. In addition to being repetitive, Schedule C does not contain any material facts as it is drafted with generic words, and thus, it does not belong in the pleadings (Section 49 of the Rules). I agree with the Appellant that it would be impossible for the Appellant to provide any answer, if the Appellant wishes, in respect of Schedule C.

[109] With respect to subparagraphs 27.29 to 27.32.3, which give a second overview of the Abacus Tax Plan, the first overview being in the preamble to the Reply, they are allowed to remain in the Reply.

[110] Subparagraphs 27.33 to 27.68 describe the series of transactions involved in the implementation of an Abacus Tax Plan, on a step-by-step basis, and are not referring to a particular Abacus Tax Plan. Subparagraphs 27.69 to 27.81 describe the series of transactions involved in the implementation of a particular Abacus Tax Plan called the REA Abacus Tax Plan, on a step-by-step basis. The REA Abacus Tax Plan is the first Abacus Tax Plan referred to in Schedule B, listing all the Abacus Tax Plans in the years under appeal.

[111] I find that subparagraphs 27.33 to 27.68 and subparagraphs 27.69 to 27.81 are not repetitive, and hence these subparagraphs should not be struck for being repetitive, because subparagraphs 27.69 to 27.81 refer to a particular Abacus Tax Plan and subparagraphs 27.33 to 27.68 do not.

[112] I also find that subparagraphs 27.82 and 27.83 dealing with other plans are not repetitive, nor are subparagraphs 27.84, 27.85 and 27.86 of the Reply, which are allowed to remain.

[113] The Appellant alleges also that the Schedules are inherently repetitive.

[114] I find that Schedules A, D, E and F are not repetitive. Further, Schedule B, which details numerous "plans", cannot be considered repetitive. These Abacus Tax Plans are similar to each other and so on a cursory view Schedule B could be seen

as repetitive. However, as particular Abacus Tax Plans are described, there is no repetition *per se*. The description of each plan includes numbers and names unique to the transactions involved under each plan.

[115] Further, I find that the following subparagraphs are not repetitive: subparagraphs 27.48 and 27.64; subparagraphs 27.54, 27.56, 27.92, and 28.12; subparagraphs 27.21 and 27.22; subparagraphs 27.58, 27.59, 27.60 and 27.61; subparagraphs 27.46 and 27.93; subparagraphs 27.85, 28.7 and 28.19; subparagraphs 28.20 and 28.46. Therefore, these subparagraphs are allowed to remain in the Reply.

Colorful and vexatious language

[116] As stated by this Court in *CIBC, TCC*, a balance needs to be found in pleadings. Pleadings might be struck because they were inserted for colour, or simply as they are inflammatory. Regarding the words "scandalous, frivolous and vexatious", this Court found that they are "strong, emotionally charged and derogatory expressions denoting pleading that is patently and flagrantly without merit; their application should be reserved for the plainest and most egregiously senseless assertions" (see *Sentinel Hill*, at para 11).

[117] More recently, this Court stated that pleadings should be struck for being "scandalous, frivolous or vexatious" only in the most obvious of cases (see *Mudge*, at para 20).

[118] Moreover, the Federal Court of Appeal has held that words or phrases that express the Crown's disapproval or evaluate the morality of a taxpayer can be properly struck as being scandalous or prejudicial (see *CIBC, FCA*, at para 89).

[119] As stated above, this Court has held that "in the context of an alleged sham, the factual underpinnings (such as an intention to mislead) may be pleaded as facts assumed by the Minister" (see *Chad*, at para 42).

[120] I find that the use of phrases such as "hiding the income" or "avoid paying taxes" would be appropriate; these are the factual underpinnings of the sham alleged

in this appeal. Most of the assumptions the Appellant wishes to be struck as being colorful and vexatious fit into this category and should not be struck.

[121] Hence, the following subparagraphs are appropriate in that respect: title "Hiding the income" between subparagraphs 27.74.43 and 27.74.44, the use of "avoid paying tax" in subparagraphs 27.30 and 27.84, the use of the expression "hide the reality" in subparagraph 27.64, the second overview of the Abacus Tax Plan in subparagraphs 27.29 to 21.32.3 referring to the avoidance of tax, subparagraph 27.66 which refers to the funds being available through purported loans, subparagraph 27.84 which refers to the fact that the TargetCos were avoiding paying tax, and subparagraph 27.110 which provides that "One purpose of selling 409 Ltd's business to the appellant was to prevent the Minister from taking steps to collect 409 Ltd's debts", subparagraphs 27.79 to 27.81 in respect of CardioRX Partnership.

[122] However, I find that subparagraph 27.67 which states that "Funds received by Negus were used to pay for Negus' living expenses" should be struck. Furthermore, footnote 8 referred to in subparagraph 27.74.38 should also be struck since it makes reference to the word "sham" and it gives the Minister's position, which is not appropriate in that part of the Reply.

[123] In addition, I do not find that Schedule D should be struck for using colourful or vexatious language.

[124] Other paragraphs the Appellant alleges use colorful and vexatious language are found in the part of the Reply stating the facts relied on by the Minister to assess penalties under subsection 163(2) of the Act.

[125] According to the Appellant, subparagraphs 28.4 ("Negus…extracted millions.."), 28.5 ("Negus started implementing tax plans beginning in 1996"), 28.10 ("Negus is responsible for directing corporate funds to himself for his personal use and enjoyment"), 28.50 ("Negus did not care whether the ITA was complied with"), 28.51 ("Negus ordered the appellant's employees to not report the income it earned"), 28.55 ("In 2012, the appellant paid $1.3 million of Negus's personal expenses"), 28.56 ("In 2013-2015, over $11 million was directed to Negus's agent corporation Forbes &Thompson"), and 28.57 ("Negus did not report as income any of the funds received from the appellant") should be struck on that basis.

[126] As the Minister bears the burden of establishing the facts justifying the assessment of penalties under subsection 163(2) of the Act (subs. 163(3) of the Act), namely that the Appellant knowingly, or under circumstances amounting to gross negligence, has made a false statement or omission in a return or other form, statement or answer for the purposes of the Act, the Minister has to plead sufficient facts to meet its burden. I therefore find that all subparagraphs of the Reply stating the facts relied upon by the Minister to assess penalties under subsection 163(2) of the Act should remain in the Reply, as they do not meet the clear and obvious test required for striking pleadings on the basis of being colorful or vexatious.

5.5 Vagueness, immateriality and disclosure of confidential information

A. Positions of the parties

[127] According to the Appellant, the Reply is unusually lengthy, vague and convoluted and is replete with irrelevant statements of facts and law. It does not fulfill its purpose, namely to define the issues in dispute for the purposes of production, discovery and trial (*Zelinski*, at para 4). A pleading should state facts concisely in a summary form (*Husky Oil*, at para 31).

[128] Further, according to the Appellant, the Reply improperly discloses confidential information pertaining to both the Appellant and third parties, which bears no relevance to the appeal. The Appellant refers to Schedule B-12 of the Reply that contains a bank account number. Moreover, the Appellant refers to Schedules A to F that contain information which should not be disclosed as the information goes far beyond what is relevant and necessary at this stage of the appeal process for the Respondent to make its case.

[129] According to the Respondent, the Reply is not vague, ambiguous or misleading, nor does it fail to define the factual and legal issues in dispute. Further, it does not state immaterial facts. The Respondent argues that the assumptions of fact made by the Minister in making the assessment are completely, precisely and accurately stated in the Reply. All assumptions of fact contained in the Reply, including Schedules A to F, are relevant to the Respondent's position that the Appellant earned unreported income during the years under appeal, and are relevant to the Respondent's arguments related to sham. Further, the issues set out in the

Reply are substantially similar to the issues described by the Appellant in the Notice of Appeal.

[130] At the hearing, however, the Respondent conceded that the bank account number indicated in Schedule B-12 should have been redacted. Otherwise, the Respondent takes the view that the Reply and all the Schedules do not disclose irrelevant confidential information of the Appellant or third parties.

[131] Furthermore, according to the Respondent, as discoveries have not yet taken place, the Appellant is not in a position to know which assumptions of fact were or were not made by the Minister in issuing the assessment because the Appellant does not have proper evidence from a deponent in this litigation. Hence, there is no basis to strike the Reply in its entirety for any alleged failure to disclose assumptions of fact made by the Minister when making the assessment.

B. Analysis

[132] I agree with the Respondent that the case law is clear: there is a high bar for striking pleadings for being immaterial. Generally, matters of relevancy and materiality are better left to the Trial Judge who will hear the appeal and not to the Motion Judge (*Kopstein v. R*, 2010 TCC 448 [*Kopstein*], at paras 22-23; *Mudge*, at para 15; *Mungovan v. The Queen*, 55 DTC 691, [2001] 3 CTC 2779 [*Mungovan*] at para 12).

[133] More precisely, courts have held that challenges about immateriality of assumptions of fact made by the Minister when making the assessment should not be determined at an early stage but are best determined after discovery, and ultimately, are best made by the Trial Judge (*Mudge*, at para 34).

[134] The case law has also holds that third party information can be included in a pleading when it is relevant (*see Heining v. The Queen*, 2009 TCC 47; *Rémillard v. Canada (National Revenue)*, 2021 FC 644 at para 55). For that purpose, the reply must show how this information is relevant *(see Kopstein*, at para 60):

> [60] This is an opportune place to mention a different point raised by the appellant with respect to assumptions related to third parties. Where there are assumptions related to the actions of third parties, the reply must show how those

> assumptions relate to the assessment in issue.[29] This is a question of relevance. In determining whether the reply complies with this, one must look at the reply as a whole.
>
> [Emphasis added.]

[135] At this stage of the appeal process, I find that the Reply is not vague, nor ambiguous nor misleading, but rather fully discloses the basis of the assessment of the Appellant made by the Minister. Further, the Reply is not so immaterial on its face as to require a Motion Judge to strike it, without leave to amend, but, for the reasons below, for Schedules A and D.

Schedule A

[136] Schedule A entitled "Abacus Group Organization Structure in the Years Under Appeal" is an organizational chart showing the relationships between the various entities, part of the Abacus Group, of which the Appellant is part of.

[137] Subparagraphs 27.1 to 27.21 of the Reply describe the organization of the Abacus Group. Schedule A is referred to in subparagraph 27.6 of the Reply, which reads as follows:

> In the years under appeal, the appellant was a member of a group of entities ("**Abacus Group**"), which was organized as set out in **Schedule "A"**, attached.

[138] The Respondent argues that Schedule A will help the Trial Judge understand the structure of the group.

[139] I agree with the Respondent that Schedule A will help the Trial Judge understand the group structure. However, Schedule A discloses confidential information about third parties. The Chart found in Schedule A refers to individuals and to corporations other than individuals and corporations referred to in the body of the Reply. I find that the Reply does not show how that information is relevant to the assessment of the Appellant. Furthermore, the Appellant could not properly answer a diagram, should it wish to do so. For these reasons, I find that Schedule A, as drafted, should be struck; the Respondent should extricate the relevant material facts from Schedule A and include these material facts in the body of the Reply.

Schedule D

[140] The Appellant takes specific issue with Schedule D entitled "The Cardio Rx Partnership" for disclosing confidential information about third parties. The Appellant also takes issue with Schedule D as being evidence, which issue will be dealt with in the following section. Schedule D contains 87 paragraphs and is eleven (11) pages long.

[141] Schedule D is referred to in subparagraph 27.79 of the Reply, which reads as follows:

> Following steps 1-11, the REA Promissory Notes #3 held by REA against 790 Canada Ltd. was assigned to the purported Cardio RX Partnership, which was used as part of the Abacus Tax Plan, the details of which are described in Schedule "D" attached.

[142] Steps 1-11 referred to in subparagraph 27.79 are the steps involved in implementing the particular Abacus Tax Plan called the REA Abacus Tax Plan (subparagraphs 27.74 (including 27.74.1 to 27.74.49) to 27.78). The title above subparagraph 27.79 reads as follows: "Cardio RX Partnership (Steps following the REA Abacus Tax Plan)".

[143] I agree with the Appellant that Cardio RX Partnership is a third party and that Cardio RX Partnership's assessment is not the subject of the present appeal, but the Appellant's assessment is. There is generally nothing wrong in having assumptions of fact in pleadings describing the relationship between an appellant and third parties, when that relationship bears some relevance to the assessment of the appellant, and specifically, when the Minister is alleging an appellant participated in a "scheme" (see *Standfield v. R*, 2007 TCC 480, at para 44). One can argue that that is more so in the present appeal where the Minister is alleging that the Appellant sold these Abacus Tax Plans to its various clients for a fee.

[144] Here, the Minister had assumed that Cardio RX Partnership is part of Abacus Tax Plans (see subparagraph 27.79, and also subparagraphs 27.80 and 27.81). However, even if the Minister had assumed that Cardio RX Partnership is part of Abacus Tax Plans, upon examining the Reply as a whole, I find that Cardio RX Partnership is not relevant to the assessment of the Appellant. As stated in the Reply, Cardio RX Partnership is relevant for steps following the implementation of an

Abacus Tax Plan. According to the Reply, following the implementation of an Abacus Tax Plan, the corporation (referred to as TargetCo in the Reply), that sold assets (shares) and realized a capital gain on their disposition, became a partner of the Cardio RX Partnership and was allocated enough losses from that partnership to offset the capital gain. However, the Reply does not show how Cardio RX Partnership is relevant to the assessment of the Appellant. Issues described in the Reply, which are essentially the same as the issues raised in the Notice of Appeal, do not result from operations between the Appellant and Cardio RX Partnership. I also agree with the Appellant that debate about Cardio RX Partnership relates to the assessment of the TargetCos and not that of the Appellant.

[145] Furthermore, Schedule D, as worded, states clearly that "The Minister made the following assumptions of fact relative to the Cardio RX Partnership". According to para. 49(1)(d) of the Rules, that part of the Reply should indicate the assumptions of fact made by the Minister in making the assessment. Neither Schedule D nor any other part of the Reply indicate how the assumptions found in Schedule D are relevant to the assessment of the Appellant. For these reasons, Schedule D should be struck. However, subparagraphs 27.79 to 27.86 are allowed to remain.

[146] Finally, the Appellant has not brought the Court's attention to other specific violations of third-party confidential information, but merely broadly point to all of the Schedules to the Reply.

[147] I find that as there is nothing on the face of the Schedules that appears confidential, there is nothing to be struck on this ground, apart from Schedules A and D and the indication of the bank account number in Schedule B-12.

5.6 Inclusion of evidence

A. Positions of the parties

[148] According to the Appellant, Schedules B to F should be struck because they contain improper inclusion of evidence, which will be impossible for the Appellant to admit or deny, as well as arguments and conclusions of facts and law, and they provide analysis of issues. These Schedules "...include dozens of pages of "working papers", some of which reference third parties and which were created by, one can only assume, unnamed Canada Revenue Agency auditors" (Appellant's notes and

authorities dated November 23, 2022 (the "Appellant's Submissions"), at para 12). The Appellant argues that the Respondent cannot stealthily insert facts and evidence as schedules to the Reply. Any evidence the Respondent intends to put to the Court should be presented at the trial rather than improperly included in the Reply.

[149] Moreover, according to the Appellant, if the Schedules were to remain, the Appellant could not formulate a proper answer. The Appellant will be unfairly prejudiced, as it will bear the burden to rebut "all assumptions of fact" made in the Reply (see paragraph 15 of the Appellant's Submissions).

[150] Furthermore, according to the Appellant, subparagraphs 27.69 to 27.86 of the Reply should be struck for the same reasons.

[151] According to the Respondent, the Schedules to the Reply are generally not in the nature of evidence, and there is no basis for striking of the Schedules in full, without leave to amend because the defects in the Schedules can be cured by amendments. However, the Respondent concedes that parts of Schedules B-1 to B-42 do contain evidence; hence, they should be amended.

[152] At the hearing, the Respondent offered to amend Schedules B-1 to B-42 to remove what it feels were incorrectly pleaded in the assumptions of facts. The Respondent provided a representative sample of proposed draft amendments to be made to Schedules B-1 to B-42. Some of the amendments made were to remedy the inclusion of evidence.

[153] As for the other Schedules and for subparagraphs 27.69 to 27.86 of the Reply, the Respondent is of the view that no amendments are required as these Schedules and subparagraphs do not contain evidence.

B. *Analysis*

[154] Evidence does not belong in pleadings. The case law is clear: "it is not proper to refer in a pleading to evidence upon which a party intends to rely" (*Okoroze v. R*, 2012 TCC 360, at para 12). As stated by this Court, "[F]acts as to how an allegation will be proved are basically facts as to evidence and so should not be pleaded" (*Mudge*, at para 20).

[155] It can be prejudicial to an appellant when evidence is pleaded as assumptions of facts due to the onus to disprove these assumptions at trial. There is, however, no bright line to distinguish pleaded facts from pleaded evidence (*Mudge*, at para. 51).

[156] In order for a Motion Judge to strike part of a pleading as being evidence, it must be clear and obvious that the facts as alleged are evidence (*Algoma Central Corp. v. R* 2009, TCC 314, at para 23). Furthermore, one has to keep in mind that the Minister has the responsibility to set out the case they are making against a taxpayer by fully setting out the assumptions of fact made by the Minister in making the assessment.

[157] In this appeal, the Minister alleges a complicated tax scheme put in place by the Appellant for the benefit of numerous clients to allow them to sell assets without paying tax on the proceeds of disposition, in consideration for a fee, which was not reported by the Appellant as income. Instead of reporting the fees as income, the Appellant is taking the view that it had borrowed money from certain corporations, and issued promissory notes in that respect. Thus, in that regard, the assumptions of fact made by the Minister in making the assessment will be more fulsome.

[158] Furthermore, as mentioned above, other issues are raised by this appeal, namely whether unbilled revenues of 4092325 Investments Ltd. acquired by the Appellant as work-in-progress were taxable income, whether capital cost allowance and cumulative eligible capital expenditures were created, and whether interest were deductible. The Minister is also pleading sham and assessed penalties under subsection 163(2) of the Act for some taxation years.

[159] Determining whether to strike a pleading, specifically assumptions of fact made by the Minister in making the assessment, on the basis that it includes evidence involves the balancing of two factors: the first being that, in general, the Trial Judge will be in a better position to determine whether an assumption is fact or evidence and the second is that pleading evidence as assumptions puts the onus on the appellant to disprove the assumptions.

[160] With these principles in mind, I will turn now to the various Schedules attached to the Reply (except Schedule A, which was dealt with in the previous section of these Reasons for Order) and to subparagraphs 27.69 to 27.86 of the Reply.

Schedule B and Schedules B-1 to B-42

[161] Schedule B entitled "Abacus Tax Plans in the years under appeal" is a chart of 5 columns detailing the 42 Abacus Tax Plans allegedly put in place by the Appellant for the years under appeal: column 1 contains the name of the tax plan, column 2 contains the year the plan was implemented, column 3 contains the total income received from the plan, column 4 contains the amount of the purported promissory notes which are challenged by the Minister, and column 5 contains details of the plan and makes a respective reference to Schedules B-1 to B-42 that contain specific details on the various tax plans.

[162] Schedule B is referred to in the following three subparagraphs of the Reply:

i) in subparagraph 27.25 of the Reply, which reads as follows: "In the years under appeal, the Abacus Group earned income implementing Abacus Tax Plans for various customers, described further in Schedule B";

ii) in subparagraph 27.27 of the Reply. which reads as follows: "In the 2012, 2013, 2014 and 2015 taxation years, the appellant earned the following amounts of income from the Abacus Tax Plans, which it did not report, the further details of which are set out in Schedule "B", attached: ...";

iii) in subparagraph 27.83 of the Reply, which reads as follows: "Other than the minor variations such as those described in paragraph 27.82, above, there are no material differences between the REA Abacus Tax Plan described in paragraph 27.74 and the Abacus Tax Plans identified in Schedule "B", that were completed in the years under appeal."

[163] According to the Respondent, Schedule B is not evidence; it sets out the Minister's assumptions of fact in respect of the revenues the Appellant earned from its clients in the years under appeal. Whether the Appellant earned fees from its clients in the years under appeal as well as the amount of the various promissory notes created in the course of implementing the various Abacus Tax Plans are questions of fact.

[164] As mentioned above, at the hearing, the Respondent conceded that portions of Schedules B-1 to B-42 contain statements of evidence, as well as conclusions of law. The Respondent proposed to amend these schedules to delete references to the word "sham", to elements of evidence and to conclusions of law (see Appendix C to these Reasons for Order for a representative sample of amendments). As these defects can be cured by amendments, there is no reason to strike the Schedules in their entirety.

[165] As mentioned above, Schedule B is part of the assumptions of fact made by the Minister in making the assessment. I find that Schedule B can remain in the Reply without column 5 entitled "Details", which column is evidence and does not belong to pleadings.

[166] I also find that Schedules B-1 to B-42 contain various element of evidence, as well as arguments and conclusions of law or mixed facts and law and provide analyses of issues. I agree with the Appellant that these Schedules look like working papers as they give details of transactions, provide analyses of issues and conclusions of law or mixed facts and law. Being part of the assumptions of fact made by the Minister in making the assessment, it is inappropriate for these Schedules to include evidence, analyses of issues or conclusions of law or mixed fact and law. These schedules contain details of the various Abacus Tax Plans allegedly sold by the Appellant (and 4092325 Investments Ltd.) to its clients and are already listed on Schedule B. I find that Schedules B-1 to B-42 as worded shall be struck in their entirety as being evidence. Concessions made by the Respondent at the hearing are not sufficient to address the inclusion of evidence in the Schedules B-1 to B-42.

Schedule D and subparagraphs 27.69 to 27.86

[167] According to the Appellant, subparagraphs 27.69 to 27.86, together with Schedule D – The Cardio RX Partnership, are evidence, and on that basis, they should be struck from the pleadings. According to the Respondent, Schedule D is not evidence – it sets out the Minister's assumptions of fact regarding the creation of the Cardio RX Partnership and the role that the Cardio RX Partnership played in implementing Abacus Tax Plans. The Respondent argues that striking Schedule D would leave a gap in the Reply.

[168] As mentioned above, Schedule D entitled "The Cardio Rx Partnership" contains the assumptions of facts relative to Cardio Rx Partnership and is referred to in subparagraph 27.79 of the Reply. I agree with the Appellant that Schedule D is evidence, and should also be struck on that basis.

[169] Subparagraphs 27.69 to 27.81 titled "The REA Abacus Tax Plan – a representative example" describe the steps transaction involved with respect to the implementation of an Abacus Tax Plan for one particular client called the REA Abacus Tax Plan. The REA Abacus Tax Plan is the first plan listed on Schedule B. Subparagraphs 27.82 and 27.83 stated the variations from the REA Abacus Tax Plan and other Abacus Tax Plans listed in Schedule B. Subparagraphs 27.84, 27.85 and 27.86 contain other assumptions of fact.

[170] I do not agree with the Appellant that subparagraphs 27.69 to 27.86 are also evidence. I find that subparagraphs 27.69 to 27.86 should not be struck on that basis. At this stage of the appeal process, it is not clear and obvious that the facts as alleged in these subparagraphs are evidence. Furthermore, the Minister has to fully set out the case they are making against a taxpayer by fully setting out the assumptions of fact made by the Minister when making the assessment. The Trial Judge will be in a far better position to make that determination.

Schedule E

[171] Schedule E entitled "Particulars of the Assumed 409 Notes" is a chart containing 3 columns; column 1 lists the name of the specific Abacus Tax Plan, column 2 lists the name of the Note Holder(s), and column 3 lists the amount assigned to APEL. It is referred to in subparagraph 27.106, which reads as follows:

> The details of the Assumed 409 Notes that were purportedly assumed to pay the balance of the 409 Purchase Price are attached as Schedule "E".

[172] According to the Respondent, Schedule E is not evidence. Schedule E sets out the Minister's assumptions of fact in respect of purported promissory notes that were assigned to the Appellant in purported satisfaction of the purchase price for 4092325 Investments Ltd.'s assets. Whether a particular note was assigned to the Appellant is a question of fact; the name of the person who holds the promissory note is a question of fact and the stated value of the note is a question of fact.

[173] I agree with the Respondent. I find that Schedule E is not evidence. Schedule E is relevant and is allowed to remain.

Schedule F

[174] Schedule F entitled "Appellant's CCA for the years under appeal" is a chart which sets out the Capital Cost Allowance adjustments made by the Minister in the years under appeal. It is referred to in paragraph 27.111 of the Reply, which reads as follows:

> In the years under appeal, the appellant reported CCA schedules as set out in Schedule "F", attached.

[175] According to the Respondent, this Schedule is not evidence. At the hearing, the Respondent argues that it Schedule F represents the capital cost allowance as claimed by the Appellant over the years under appeal. The Respondent recognized that Schedule F is a bit tedious to read but it was decided to be done this way in order to achieve concision in the pleadings.

[176] Schedule F contains 14 columns, and refers to five different classes for depreciation. For each class, there is an indication as to the capital cost allowance reported by the Appellant for each year under appeal, and the revised amount of capital cost allowance I assumed was allowed by the Minister.

[177] The problem I have with Schedule F is the columns indicating the revised amount of capital cost allowance I assume was allowed by the Minister. This is not an assumption of fact made by the Minister in making the assessment. Hence, part of Schedule F is evidence. Accordingly, Schedule F is allowed to remain but shall be amended to remove these columns. Alternatively, the Respondent can choose to extricate the material facts assumed by the Minister in making the assessment, and insert them in the body of the Reply.

5.7 Remedy

[178] The Appellant submits that the Reply as a whole must be struck as it cannot be cured by amendment and is unanswerable. Further, the Appellant states that with the Reply as it now stands discovery would be unmanageable.

[179] I agree with the Appellant that given the extent of the deficiencies found in the Reply, the Reply cannot be cured by simple amendment. If the Reply were to stand, the scope of discoveries would be unmanageable (*Simon*, at para 49). The Reply has to be struck as, for the reasons detailed above, it will either prejudice or delay the fair hearing of the appeal, or is scandalous, frivolous and vexatious, or is an abuse of the process of this Court.

[180] However, I do not agree with the Appellant that the Reply should be struck without leave to amend and that this Court should allow the Appeal. The proper remedy is to strike the Reply and allow the Respondent to file a fresh reply that meets the requirements set out in the Rules and by this Court. I find that the Reply shows a reasonable basis for the Respondent to argue that the reassessments under appeal are correct, and thus, the Court should grant the Respondent leave to amend the Reply. As indicated above, for a claim to be struck without leave to amend, there must not be a "scintilla" of a legitimate cause for action (*Riabko,* at para 8), which is not the case in the present appeal.

Signed at Ottawa, Canada, this 18th day of May 2023.

"Dominique Lafleur"

Lafleur J.

Appendix A

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

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute, or

(b) only where and as necessary in the interests of justice, may set aside the proceeding or a step, document or direction in the proceeding in whole or in part.

7 L'inobservation des présentes règles constitue une irrégularité et n'est pas cause de nullité de l'instance ni d'une mesure prise, d'un document donné ou d'une directive rendue dans le cadre de celle-ci. La Cour peut:

a) soit autoriser les modifications ou accorder les conclusions recherchées, à des conditions appropriées, afin d'assurer une résolution équitable des véritables questions en litige;

b) soit annuler l'instance ou une mesure prise, un document donné ou une directive rendue dans le cadre de celle-ci, en tout ou en partie, seulement si cela est nécessaire dans l'intérêt de la justice.

Appendix B

Appendix "A"

Proposed Amendments to Admissions and Denials

	Paragraph in Notice of Appeal	Response in Reply	Identified Issue	Proposed Amendment
1.	[13] The loans were evidenced by way of promissory notes (the "**409 Notes**").	[4] With respect to paragraphs 13 and 24 of the Notice of Appeal, the Attorney General of Canada admits only that documents titled promissory notes were prepared to evidence some of 4092325 Investments Ltd. ("409 Ltd.") purported loans. The Attorney General of Canada denies that the documents created a valid creditor-debtor relationship and has no knowledge of and puts in issue that documents titled promissory notes were prepared to evidence every loan of 409 Ltd.	Overreaching denial	[4] With respect to paragraphs 13 ~~and 24~~ of the Notice of Appeal, the Attorney General of Canada admits only that documents titled promissory notes were prepared to evidence some of 4092325 Investments Ltd. ("409 Ltd.") purported loans, but denies that the loans existed. ~~The Attorney General of Canada denies that the documents created a valid creditor-debtor relationship and has no knowledge of and puts in issue that documents titled promissory notes were prepared to evidence every loan of 409 Ltd.~~
2.	[16] The purchase price agreed upon for the Acquisition was $19,768,000 (the "**Purchase Price**").	[6] With respect to paragraph 16 of the Notice of Appeal, the Attorney General of Canada admits only that the purported agreed price for the acquisition was $19,768,000. The Attorney General of Canada denies that any consideration was paid or had to be paid by the appellant for the acquisition, except for the amount outlined in paragraph 19 of the Notice of Appeal, which was exclusively paid for the work in progress	Overreaching denial	[6] With respect to paragraph 16 of the Notice of Appeal, the Attorney General of Canada admits only that the ~~purported agreed~~ stated price for the acquisition was $19,768,000 but denies that $19,768,000 was the agreed purchase price for the acquisition. ~~The Attorney General of Canada denies that any consideration was paid or had to be paid by the appellant for the acquisition, except for the amount outlined in paragraph 19 of the Notice of Appeal, which was exclusively paid for the work in progress.~~

3.	[17] The Appellant paid the Purchase Price by way of two promissory notes in favour of 4092325 in the amounts of $9,660,010 and $10,107,990 (being an aggregate amount of $19,380,000), each bearing interest at a rate of 10% per annum (the "**Acquisition Notes**").	7. With respect to paragraph 17 of the Notice of Appeal, the Attorney General of Canada: 7.1. admits that the appellant purported to pay the alleged purchase price by way of two documents titled promissory notes in the amounts of $9,960,010 and $10,107,990; 7.2. admits that those two purported promissory notes state that they are bearing interest; and 7.3. denies that those two purported promissory notes created a valid debtor-creditor relationship.	Overreaching denial	7. With respect to paragraph 17 of the Notice of Appeal, the Attorney General of Canada: 7.1. admits that the appellant purported to pay the alleged purchase price by way of two documents titled promissory notes in the amounts of $9,960,010 and $10,107,990; 7.2. admits that those two purported promissory notes state that they are bearing interest; and 7.3. denies that the appellant paid the purchase price. ~~that those two purported promissory notes created a valid debtor-creditor relationship.~~
4.	[24] These loans were again evidenced by way of promissory notes (the "**HFC Notes**", together with the Acquisition Notes, the "**Notes**").	[4] With respect to paragraphs 13 and 24 of the Notice of Appeal, the Attorney General of Canada admits only that documents titled promissory notes were prepared to evidence some of 4092325 Investments Ltd. ("409 Ltd.") purported loans. The Attorney General of Canada denies that the documents created a valid creditor-debtor relationship and has no knowledge of and puts in issue that documents titled promissory notes were prepared to evidence every loan of 409 Ltd.	Overreaching denial	[8.1] With respect to paragraph 24 of the Notice of Appeal, the Attorney General of Canada admits only that documents titled promissory notes were created to evidence some purported loans, but denies that the loans existed. The Attorney General of Canada has no knowledge of whether a promissory note was created for every purported loan to the Appellant and puts it in issue.

5.	[25] During the Relevant Period, the Appellant added the following amounts to its CECA: (a) $6,774,361 for its 2012 Taxation Year resulting from the Acquisition; (b) $82,500 for its 2013 Taxation Year reflecting an allocation of approximately: i) 10% of legal fees relating to tax matters; and ii) 11%-14% of licence and filing fees. (c) $33,750 for its 2014 Taxation Year reflecting an allocation of approximately: i) 10% of legal fees relating to tax matters; and ii) 11%-14% of licence and filing fees. (d) $26,250 for its 2015 Taxation Year reflecting an allocation of approximately: i) 10% of legal fees relating to tax matters; and ii) 11%-14% of licence and filing fees.	[9] With respect to paragraph 25 of the Notice of Appeal, the Attorney General of Canada admits that the appellant claimed the listed additions to its cumulative eligible capital account, however, for clarity, the respondent denies that the appellant incurred any of the expenses related to the additions listed.	Overreaching denial	[9] With respect to paragraph 25 of the Notice of Appeal, the Attorney General of Canada admits that the appellant claimed the listed additions to its cumulative eligible capital account, however, for clarity, ~~the respondent denies that the appellant incurred~~ the Attorney General of Canada's position is that the appellant did not incur any of the expenses related to the additions listed.

6.	[26] In filing its income tax returns for the Relevant Period, the Appellant duly reduced its legal and accounting expenses claimed by the amounts added to its CECA.	[10] With respect to paragraph 26 of the Notice of Appeal, the Attorney General of Canada admits that the appellant reduced its legal and accounting expenses by the amounts added to its CECA but, for clarity, he denies that the appellant incurred those expenses.	Overreaching denial	[10] With respect to paragraph 26 of the Notice of Appeal, the Attorney General of Canada admits that the appellant reduced its legal and accounting expenses by the amounts added to its CECA but, for clarity, ~~he denies~~ the Attorney General of Canada's position is that the appellant did not incur~~ed~~ those expenses.
7.	[27] In its 2013 Taxation Year, the Appellant incurred interest expenses of $971,999 (the "**Interest Expenses**") with respect to the Acquisition Notes.	[11] With respect to paragraph 27 of the Notice of Appeal, the Attorney General of Canada admits that the appellant claimed $971,999 in interest expenses in its 2013 taxation year, but denies that such expenses were effectively incurred.	Overreaching admission	Amend to remove paragraph 11 and to amend paragraph 2 of the reply to include the denial of the facts alleged in paragraph 27 of the notice of appeal.

Appendix C

Appendix "C"
Proposed Draft Amendments to Schedules B-1 through B-10 (representative sample)

Schedule B-1
REA Abacus Tax Plan

Bank Account	****-****-773	409 Ltd.
	****-****-713	REA
Opening date	13-Jul-12	
Deposit of July 18, 2012 (****-***6-773)	3,894,273	
Return of good faith funds	(1,000,000)	
Amount transferred to ****-***2-713	(2,894,273)	
Deposit of July 18, 2012 (****-***6-713)	2,894,273	Transfer from 409 Ltd.
Total income on deal	2,894,273	Note 1
Management fee reported on deal	1,447,136	8238405 Canada Ltd.
Under-reported income	1,447,137	

Promissory Notes:	**Debtor**	**Holder of debt**
$ 2,894,238.00	409 Ltd.	REA.

Note 1: This deal, known as the REA deal by the Abacus Group closed on July 5, 2012. REA was used to help implement the deal.

~~Review of the REA bank account shows that shortly~~ After the bank account was opened a deposit of $2,894,272.068 was made by 409 Ltd. The amount was income that the Abacus Group got for implementing the tax scheme for its customer. The Lawyers at Bratty & Partners LLP were directed to pay $3,894,272.88 to McMillan LLP, which is the lawyer that the Abacus group uses most often to help implement their tax scheme. McMillan LLP forwarded the funds to 409 Ltd.

The ~~sham document~~ purported promissory note dated July 5, 2012 and entitled "Demand Promissory Note (Interest Bearing)", was executed by REA and 409 Ltd. whereby 409 Ltd. purportedly borrowed $2,894,238 from REA. The purported promissory note was created to deceive the Minister into believing that 409 Ltd. had borrowed $2,894,238 from REA, when in reality, the amount was 409 Ltd.'s fee earned in connection with implementing the Abacus Tax Plan.

At the closing of the deal, 409 Ltd. promptly re-deposited the $2,894,238 into REA's bank account and this is the deposit of July 18, 2012.

The Abacus Group ~~only~~ reported $1,447,136 of what they received on the deal as income, leaving the other $1,4447,137 unreported. ~~The income that 409 Ltd. reported for 2012 was requested by the CRA and as the above indicates,~~ 409 Ltd. ~~only~~ reported 50% of the deposit as income.

The other one million dollars that was transferred to 409 Ltd. by McMillan LLP was a refund of the Abacus' group good faith deposit, therefore not part of the deal income. Various amounts of this deposit was subsequently transferred to the appellant and AVL in the form of loans.

This deal formed part of the WIP that 409 Ltd. sold to the appellant.

Schedule B-2

Compu-Quote Abacus Tax Plan

Bank Account	****-***6-773	409 Ltd.
Deposit June 1, 2012	6,568,184	Incoming Wire Payment, McMillan LLP
Return of good faith funds	(1,000,000)	
Total income on deal	5,568,184	Note 1
Management fee reported on deal	2,784,092	8189269 Canada Limited amount
Under-reported income	2,784,092	

Promissory Notes:	**Debtor**	**Holder of debt**
$ 6,568,183.81	409 Ltd.	8189269 Canada Limited

Note 1: This deal, known as the Compu Quote deal by the Abacus Group closed on May 30, 2012. The 8189269 Canada Limited corporation was used to help implement this deal.

The ~~sham document~~ purported promissory note dated June 1, 2012 and entitled "Demand Promissory Note (Interest Bearing)", was executed by 8189269 Canada Ltd. (8189269) and 409 Ltd. whereby 409 Ltd. purportedly borrowed $6,568,183.81 from 8189269. The purported promissory note was created to deceive the Minister into believing that 409 Ltd. borrowed $6,568,183.81, when in reality, the amount was 409 Ltd.'s fee earned for implementing the Compu-Quote Abacus Tax Plan.

~~Review of 409 Ltd. corporate bank account, which was the bank account used for this deal shows a deposit of~~ 409 Ltd. received an amount of $6,568,184 and ~~yet~~ the Abacus Group ~~only~~ reported 50% of the amount as income.

This purported promissory note includes the good faith amount that the Abacus Group initially fronted on the deal, which was subsequently deposited back into its bank account~~, therefore the promissory note has been inflated by a million dollars~~.

Schedule B-3

CB Holdings Abacus Tax Plan

Bank Account	****-***5-084	Account holder 1462596 Holdings ULC
Opening date	30-Jan-13	
Bank Account	****-***2-713	Account holder REA.
Deposit August 20, 2012 (****-***2-713)	1,116,240	Incoming wire payment, McMillan LLP
Deposit September 30, 2013 (****-***5-084)	16,230	Incoming wire payment, McMillan LLP
	.	
Total income on deal	1,132,470	Note 1
Management fee reported on deal	284,594	1280652 Ontario Ltd. amount
Management fee reported on deal	28,848	1367831 Ontario Ltd. amount
Management fee reported on deal	241,323	1462596 Ontario Ltd. amount
Total income reported	554,765	
Under-reported income	577,705	

Promissory Notes:	**Debtor**	**Holder of debt**
288,478	REA.	1280652 Ontario Ltd.
27,738	REA.	1367831 Ontario Ltd.
21,106	REA.	1367831 Ontario Ltd.
157,919	REA.	1462596 Ontario Ltd.
238,549	REA.	1462596 Ontario Ltd.
382,450	REA.	1280652 Ontario Ltd.

1,116,240

Note 1: This deal, known as the CB Holdings deal by the Abacus Group closed on August 16, 2012. The 1280652 Ontario Ltd, 1367831 Ontario Ltd., and the 1462596 Ontario Ltd. corporations were used to help implement this deal.

The bank account used for this deal was the REA bank account. Promissory notes and loan documents were created from the various corporations involved in this deal to REA to cover the initial $1,116,240 transfer of funds from the McMillan LLP trust account to the REA bank account (the August 20, 2012, deposit). The deposit in the CB 1462596 Holdings ULC came later ~~and the CRA did not find any promissory notes or loan documents associated with the deposit~~.

~~The sham document~~ A purported promissory note dated August 20, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 1280652 Ontario Ltd. (1280652) whereby REA purportedly borrowed $288,478 from 1280652. The purported promissory note was created to deceive the Minister into believing that REA borrowed $288,478 from 1280652, when in reality, the amount was part of 409 Ltd.'s fee earned for implementing the CB Holdings Abacus Tax Plan.

~~The sham document~~ A purported promissory note dated August 20, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 1367831 Ontario Ltd. (1367831) whereby REA purportedly borrowed $27,738 from 1367831. The purported promissory note was created to deceive the Minister into believing that REA borrowed $27,738 from 1367831, when in reality, the amount was part of 409 Ltd.'s fee earned for implementing the CB Holdings Abacus Tax Plan.

~~The sham document~~ A purported promissory note dated August 20, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 1367831 Ontario Ltd. (1367831) whereby REA purportedly borrowed $21,106 from 1367831. The purported promissory note was created to deceive the Minister into believing that REA borrowed $21,106 from 1367831, when in reality, the amount was part of 409 Ltd.'s fee earned for implementing the CB Holdings Abacus Tax Plan.

~~The sham document~~ A purported promissory note dated August 20, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 1462596 Ontario Ltd. (1462596) whereby REA purportedly borrowed $157,919 from 1462596. The purported promissory note was created to deceive the Minister into believing that REA borrowed $157,919 from 1462596, when in reality, the amount was part of 409 Ltd.'s fee earned for implementing the CB Holdings Abacus Tax Plan.

~~The sham document~~ A purported promissory note dated August 20, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 1462596 Ontario Ltd. (1462596) whereby REA purportedly borrowed $238,549 from 1462596. The purported promissory note was created to deceive the Minister into believing that REA borrowed $382,450 from 1280652, when in reality, the amount was part of 409 Ltd.'s fee earned for implementing the CB Holdings Abacus Tax Plan.

~~The sham document~~ A purported promissory note dated August 20, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 1280652 Ontario Ltd. (1280652) whereby REA purportedly borrowed $382,450 from 1280652. The purported promissory note was created to deceive the Minister into believing that REA borrowed $382,450 from 1280652, when in reality, the amount was part of 409 Ltd.'s fee earned for implementing the CB Holdings Abacus Tax Plan.

Most of the funds in the REA account ~~eventually~~ made its way to the appellant's bank account. ~~The~~ On December 30, 2016, ~~REA bank statements shows that~~ this account ~~still has~~ had $9,356.08; ~~so as of that date~~ As of December 30, 2016, the Abacus Group was ~~still~~ using this bank account to implement some of their deals.

The deal closed in 2012, however as the deposit in 2013 came from the same lawyer's trust account as it did in the 2012 year, the ~~auditor is assuming~~ Minister assumed that this 2013 deposit is part of the original deal ~~and as such, being taxed in the 2012 taxation year~~.

The funds paid to the Abacus Group was payment for the service they provided to their customer; that service being the implementation of a tax scheme. ~~As such, the full amount, not 49% of the amount should have been reported by the taxpayer as income~~

This deal formed part of the WIP that 409 Ltd. sold to the appellant.

Schedule B-4

La Cite Abacus Tax Plan

Bank Account	****-***2-713	Account holder REA.
Opening date	13-Jul-12	
Bank Account #	****-***6-773	Account holder 409 Ltd.
Deposit of September 4, 2012 ****-***2-713 bank	9,966,991	Incoming Wire Payment, Fraser Milner Casgrain
Deposit of September 4, 2012 ****-***6-773 Bank	1,000,000	Deposited into 409 Ltd. account
Return of good faith funds	(1,000,000)	
Total income on deal	9,966,991	Note 1
Management fee reported on deal	4,108,471	2329377 Ontario Inc. amount
Management fee reported on deal	725,024	2329380 Ontario Inc. amount
Total income reported on deal	4,833,495	
Under-reported income	5,133,496	

Promissory Notes:	**Debtor**	**Holder of debt**
172,500.00	7911629 Canada Ltd.	La Cite 2329380 Holdings ULC
827,500.00	7911629 Canada Ltd.	La Cite 2329377 Holdings ULC
7,572,670.01	REA	La Cite 2329377 Holdings ULC
1,020,000.00	REA	La Cite 2329377 Holdings ULC
1,194,320.51	REA	La Cite 2329380 Holdings ULC
180,000.00	REA	La Cite 2329380 Holdings ULC

10,966,990.52

Note 1: This deal, known as the La Cite deal by the Abacus Group, closed on August 27, 2012. The REA bank account was used to help implement this deal.

~~Review of the corporate bank account used for this deal shows a deposit of~~ The Abacus Group received an amount of $9,966,990.52. This amount is $1,000,000 less than the amount that the Borden Ladner Gervais LLP trust account reports as being paid to the taxpayer. The excess $1,000,000 was deposited in the 409 Ltd. bank account and represents the return of the good faith funds that the Abacus Group advanced on the deal.

The document entitled "Assignment and Assumption Agreement" dated July 5, 2013, was executed by Hillcore Cardio (Delaware) LLC and 7911629 Canada Ltd. has attached to it a schedule 1, which mentions two ~~sham~~ documents dated September 4, 2012, whereby 7911629 Canada Ltd. purportedly borrowed $172,500 from La Cite 2329380 Holdings ULC and $827,500 from La Cite 2329377 Holdings ULC.

The ~~sham document~~ purported promissory note dated September 4, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 2329377 Ontario Ltd. (2329377) whereby REA purportedly borrowed $7,572,670.01 from 2329377. The purported promissory note was created to deceive the Minister into believing that REA borrowed $7,572,670.01 from 2329377, when in reality, the amount was part of 409 Ltd.'s fee for implementing the La Cite Abacus Tax Plan.

The ~~sham document~~ purported promissory note dated September 4, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 2329377 Ontario Ltd. (2329377) whereby REA purportedly borrowed $1,020,000 from 2329377. The purported promissory note was created to deceive the Minister into believing that REA borrowed $1,020,000 from 2329377, when in reality, the amount was part of 409 Ltd.'s fee for implementing the La Cite Abacus Tax Plan.

The ~~sham document~~ purported promissory note dated September 4, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 2329380 Ontario Ltd. (2329380) whereby REA purportedly borrowed $1,194,320.51 from 2329380. The purported promissory note was created to deceive the Minister into believing that REA borrowed $1,194,320.51 from 2329380, when in reality, the amount was part of 409 Ltd.'s fee for implementing the La Cite Abacus Tax Plan.

The ~~sham document~~ purported promissory note dated September 4, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and 2329380 Ontario Ltd. (2329380) whereby REA purportedly borrowed $180,000 from 2329380. The purported promissory note was created to deceive the Minister into believing that REA borrowed $180,000 from 2329380, when in reality, the amount was part of 409 Ltd.'s fee for implementing the La Cite Abacus Tax Plan.

Only 48% of the amount was reported as income.

The parties between the promissory notes and where the $1,000,000 was deposited does not ~~even~~ match as the funds were advanced by 409 Ltd. and returns to 409 Ltd. and ~~yet~~ the debtor of all the promissory notes are REA.

This deal formed part of the WIP that 409 Ltd. sold to the appellant.

Schedule B-5

GW Sisterco Abacus Tax Plan

Bank Account	****-***2-713	Account holder REA.	
Opening date	13-Jul-12		
Deposit of September 4, 2012	2,835,451	Incoming Wire Payment, McMillan LLP	
Total income on deal	2,835,451	Note 1	
GW Sisterco Inc. income reported	917,716		GW Sisterco amount
Under-reported income	1,917,735		
Promissory Notes:		**Debtor**	**Holder of debt**
1,000,000.00		7911840 Canada Ltd.	GW Sisterco Inc.
917,716.00		REA.	GW Sisterco Inc.
917,735.00		REA.	GW Sisterco Inc.
2,835,451.00			

Note 1: This deal, known as the Goodwood and the GW Sisterco deal by the Abacus Group closed on September 4, 2012. The REA bank account was used to help implement the deal.

~~**Review of the corporate bank account used for this deal shows a deposit of**~~ The Abacus Group received fees of $2,835,451 for this deal.

A document dated July 5, 2013, entitled "Securities Purchase Agreement" was executed by 7911840 Canada Ltd. (7911840) and Hillcore Cardio (Delaware) LLC, whereas it mentions a ~~sham~~ purported promissory note dated September 10, 2012, whereby 7911840 purportedly borrowed $1,000,000 from GW Sisterco Holdings ULC.

~~A document dated July 8, 2013, entitled "Resolutions of the Sole Director of Abacus Private Equity Ltd." was executed by the appellant. It makes reference to a sham purported promissory note dated September 10, 2012, whereby REA purportedly borrowed $917,716 from GW Sisterco Inc.~~

The ~~sham~~ purported document dated September 10, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and GW Sisterco Inc. (GW) whereby REA purportedly borrowed $917,735 from GW. This purported promissory note was created to deceive the Minister into believing that that REA borrowed $917,735 from GW, when in reality, it was the fee that the 409 Ltd. earned for implementing the GW Sisterco Abacus Tax Plan.

Negus signed the purported promissory notes as the sole director of the appellant.

The amounts in the REA bank account was subsequently transferred to other Abacus related entities in the form of ~~more~~ loans ~~(The income that 409 Ltd. reported for 2012 was requested by the auditor and as the above indicates,~~ 409 Ltd. only reported 32% of the deposit as income~~)~~.

This deal formed part of the WIP that 409 Ltd. sold to the appellant.

Schedule B-6

Chaparral Abacus Tax Plan

Bank Account	****-***2-713	Account holder REA
Opening date	13-Jul-12	
Deposit of September 14, 2012	2,664,533	Incoming Wire Payment, McMillan LLP
Good faith funds returned	(1,000,000)	
Total income on deal	1,664,533	Note 1
Management fee reported on deal	832,267	Chaparral Developments Limited amount
Total income reported on deal	832,267	
Under-reported income	832,266	

Promissory Notes:	**Debtor**	**Holder of debt**
1,664,533.00	REA.	Chaparral Developments Limited

Note 1: This deal, known as the Chaparral deal by the Abacus Group closed on September 13, 2012. The Chaparral Developments Limited corporation was used to help implement this deal. The REA bank account was use for this deal. ~~Review of the REA bank account shows a deposit of~~ The Abacus Group received an amount of $2,664,533 for this deal. ~~The income that 409 Ltd. reported for 2012 was requested by the auditor and as the above indicates,~~ 409 Ltd. ~~only~~ reported 50% of the deposit as income.

A document dated September 14, 2012 and entitled "Chaparral Developments Limited (the "Corporation") Resolutions of The Sole Director", was executed by Chaparral Developments Limited (Chaparral) whereby Chaparral purportedly lends $1,000,000 to REA. ~~According to the taxpayer this represents the good faith funds advanced on the deal. The taxpayer did not provide any other documentation other than a promissory note to support the $1,000,000 good faith money, however as the amount of unreported income fee (50%) is consistent with other deals we have audited the CRA feels that the good faith advance is a valid amount~~. The $1,000,000 is the return of a $1,000,000 good faith advance.

The ~~sham document~~ purported promissory note dated September 14, 2012 and entitled "Demand Promissory Note (Non-Interest Bearing)", was executed by REA and Chaparral Developments Limited (Chaparral) whereby REA purportedly borrowed $1,664,533 from Chaparral. This purported promissory note was created to deceive the Minister into believing that REA borrowed $1,664,533 from Chaparral, when in reality, the amount was the fee that 409 Ltd. earned for implementing the Chaparral Abacus Tax Plan.

This deal formed part of the WIP that 409 Ltd. sold to the appellant.

Schedule B-7

Creditstone Abacus Tax Plan

Bank Account	****-***2-713	Account holder REA.
Opening date	13-Jul-12	
Bank Account	****-***5-025	Account holder REA.
Deposit of July 27, 2012 ****-***6-773 bank	2,547,356	Incoming Wire Payment, McMillan LLP
Return of Good Faith Funds	(1,000,000)	
Deposit of Jan 29, 2013 0004 ****-***5-025 bank	2,135	Incoming Wire Payment, McMillan LLP
Total income on deal	1,549,491	Note 1
Management fee reported on deal	773,678	TPP Warehouse Inc. amount
Total income reported on deal	773,678	
Under-reported income	775,813	

Promissory Notes:	**Debtor**	**Holder of debt**
1,561,809.00	Appellant	TPP Warehouse Inc.

Note 1: This deal, known as the Creditstone deal by the Abacus Group closed on July 26, 2012. The TPP Warehouse Inc. and 8053626 Canada Ltd. corporations were used to help implement this deal. ~~Review of corporate bank accounts used for this deal shows deposits of~~ The Abacus Group received amounts of $2,547,356 and $2,135 for this deal (~~The income that 409 Ltd. reported for 2012 was requested by the auditor and as the above indicates,~~ 409 Ltd. ~~only~~ reported 50% of the deposit as income).

~~The document dated March 7, 2013, and entitled "8052626 Canada Ltd. (the "Corporation") Resolutions of the Sole Director", was executed by 8053626 Canada Ltd. (8053626). It speaks of a non interest bearing loan in the amount of $1,000,000 that was made as of July 27, 2012, whereas 8053626 purportedly borrowed the $1,000,000 of good faith money from TPP Warehouse. It goes on to state that due to an oversight the loan was not documented. The taxpayer did not provide any other documentation other than a promissory note to support the $1,000,000 good faith money, however as the amount of unreported income (50%) is consistent with other deals we have audited, the CRA's belief is that the good faith advance is a valid amount.~~ $1,000,000 represents the return of a $1,000,000 good faith advance.

The ~~sham document~~ purported promissory note dated July 8, 2013 and entitled "Promissory Note", was executed by the appellant and TPP Warehouse ULC (TPP) whereby the appellant purportedly borrowed $1,561,809 from TPP. This purported promissory note was created to deceive the Minister into believing that the appellant borrowed $1,561,809 from TPP, when in reality, the amount was part of the fee earned by the Abacus Group for implementing the Creditstone Abacus Tax Plan.

This deal formed part of the WIP that 409 Ltd. sold to the appellant.

Schedule B-8

Tesstwo Abacus Tax Plan

Bank Account	****-***6-773	Account Holder 409 Ltd.
Deposit of Feb 7, 2012	853,480	Incoming Wire Payment, McMillan LLP
Total income on deal	853,480	Note 1
Management fee reported on deal	426,740	2313242 Ontario Inc. amount
Total income reported on deal	426,740	
Under-reported income	426,740	

Promissory Notes:		**Debtor**	**Holder of debt**
343,253.17		Appellant.	2313242 Ontario Inc.
72,495.28		Appellant.	2313242 Ontario Inc.
	415,748.45	0933623 B.C. Ltd.	2313242 Ontario Inc.

Note: On January 1, 2014, this debt is reassigned to related corporation 0933623 B.C. Ltd.

Note 1: This deal, known as the Tessler 2 deal by the Abacus Group closed on January 21, 2012. The 2313242 Ontario Inc. corporation was used to help implement this deal (~~The income that 409 Ltd. reported for 2012 was requested by the auditor and as the above indicates,~~ 409 Ltd. ~~only~~ reported 50% of the deposit as income).

The 409 Ltd. bank account was used to help implement this deal. ~~Review of the corporate bank account shows a deposit of~~ The Abacus Group received fees of $853,479.97 for this deal. ~~The $853,479.97 paid to the Abacus Group for this deal came from their lawyer's trust account (McMillan LLP).~~

A ~~sham~~ purported promissory note of at least $415,748.45 was executed for this deal. The purported promissory note was created to deceive the Minister into believing that 409 Ltd. borrowed at least $415,748.45 from 2313242 Ontario (2313242), when in reality, the amount was part of 409 Ltd.'s fee for implementing the Tesstwo Abacus Tax Plan. ~~The promissory note for this amount was not provided for the audit, however from the subsequent reassignment of debt from 409 Ltd. to the appellant it becomes obvious that the amount was recorded by 409 Ltd. as a debt owing. The initial loan document would have been the original sham document.~~ The purported debt was reassigned from 409 Ltd. to the appellant.

The subsequent ~~sham document~~ purported promissory note dated December 31, 2013, and entitled "Promissory Note", was executed by the appellant and 2313242 Ontario Inc. (2313242) whereby the appellant purportedly takes over the $343,253.17 of debt that 409 Ltd. owes to 2313242. This purported promissory note was created to deceive the Minister into believing that the appellant assumed $343,253 of 409 Ltd.'s purported debt to 2313242 Ontario, when in reality the amount had been received as part of 409 Ltd.'s fee for implementing the Tesstwo Abacus Tax Plan.

The ~~subsequent sham~~ purported promissory note document dated December 31, 2013, and entitled "Promissory Note", was executed by the appellant and 2313242 Ontario Inc. (2313242) whereby the appellant purportedly takes over the $72,495.25 of debt that 4092325 owes to 2313242. This purported promissory note was created to deceive the Minister into believing that the appellant assumed $72,495.25 of 409 Ltd.'s purported debt to 2313242 Ontario, when in reality the amount had been received as part of 409 Ltd.'s fee for implementing the Tesstwo Abacus Tax Plan.

Another ~~sham document~~ purported promissory note dated January 1, 2014, and entitled "Promissory Note", was executed by 0933623 B.C. Ltd. (0933623) and 2313242 Ontario Inc. whereby the above debts are purportedly reassigned from the appellant to 0933623. This purported promissory note was created to deceive the Minister into believing that the 0933623 assumed this purported debt, when in reality the amount had been received as part of 409 Ltd.'s fee for implementing the Tesstwo Abacus Tax Plan.

Schedule B-9

Guthrie Abacus Tax Plan

Bank account	****-***4-656	Bank account in the name of 535052 Ontario Limited
Opening date	30-Mar-12	
Bank account	****-***4-613	Bank account in the name of 1263176 Ontario Limited
Opening date	30-Mar-12	
Bank account	****-***2-597	Bank account in the name of Wonderland Farms Ltd.
Opening date	30-Mar-12	
Bank account	****-***6-773	409 Ltd.
Deposit April 12, 2012 - Acct # ****-***4-656	333,334	Incoming Wire Payment, McMillan LLP
Deposit May 8, 2012 - Acct # ****-***4-656	679,265	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit June 5, 2012 - Acct # ****-***4-656	118,505	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit August 31, 2012 - Acct #****-***4-656	8,342	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit April 12, 2012 - Acct #****-***4-613	333,334	Incoming Wire Payment, McMillan LLP
Deposit May 8, 2012 - Acct #****-***4-613	689,975	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit June 5, 2012 - Acct #****-***4-613	120,374	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit August 31, 2012 - Acct #****-***4-613	8,474	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit May 13, 2013 - Acct #****-***4-613	1,400,000	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit April 12, 2012 - Acct #****-***2-597	333,333	Incoming Wire Payment, McMillan LLP
Deposit May 8, 2012 - Acct #****-***2-597	706,860	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit June 5, 2012 - Acct #****-***2-597	123,319	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit August 31, 2012 - Acct #****-***2-597	8,681	Incoming Wire Payment, Thomson Mahoney Delorey
Deposit March 31, 2014 - Acct #****-***2-597	100	Deposit, McMillan LLP
Unidentified deposits in the three banks	62,877	
Deposit August 23 - Acct #****-***6-773	103,826	Incoming Wire Payment David Guthrie

Total cash deposits found on deal	5,030,599		
Income per transfer to McMillan LLP	5,292,365		
March 12, 2012 Good Faith Funds returned	(1,230,000)		
Income on deal	$4,062,365		
Management fee reported on deal	963,178		535052 Ontario Limited amount
Management fee reported on deal	1,083,861		1263176 Ontario Limited amount
Management fee reported on deal	692,718		Wonderland Farms Ltd. amount
Total income reported	2,739,757		
Under-reported income	1,322,608	Note 1	
Promissory Notes:		**Debtor**	**Holder of debt**
1,893,369.79		409 Ltd.	Wonderland Farms Ltd.
2,093,115.30		409 Ltd.	1263176 Ontario Ltd.
691,814.56		409 Ltd.	535052 Ontario Limited

Total: 4,678,299.65

Note 1: This deal, known as the Guthrie deal by the Abacus group, closed on March 15, 2012. The 535052 Ontario Limited, 1263176 Ontario Limited, and Wonderland Farms Ltd. corporations were used to help implement the deal.

The Abacus group used a number of bank accounts for this deal. 409 Ltd. earning income of $5,292,365 in connection with this deal. 4092325 reported 67% of the deposit as income.

On April 29, 2013 a purported promissory note was executed by Wonderland Farms Ltd. ("Wonderland") and 409 Ltd. whereby Wonderland purportedly agrees to loan $1,893,369.79 to 409 Ltd. The purported promissory note was created to deceive the Minister into believing that 409 Ltd. borrowed $1,893,369.79 from 409 Ltd., when in reality, the amount was part of 409 Ltd.'s fee for implementing the Guthrie Abacus Tax Plan.

On April 29, 2013 a purported promissory note was executed by 1263176 Ontario Ltd. ("1263176") and 409 Ltd. whereby 1263176 purportedly agrees to loan $2,093,115.30 to 4092325. The purported promissory note was created to deceive the Minister into believing that 409 Ltd. borrowed $1,893,369.79 from 1263176, when in reality, the amount was part of 409 Ltd.'s fee for implementing the Guthrie Abacus Tax Plan.

On April 29, 2013 a purported promissory note was executed by 535052 Ontario Limited ("535052") and 409 Ltd. whereby 535052 purportedly agrees to loan $691,814.56 to 409 Ltd. The purported promissory note was created to deceive the Minister into believing that 409 Ltd. borrowed $691,814.56 from 535052, when in reality, the amount was 409 Ltd.'s fee for implementing the Guthrie Abacus Tax Plan.

The good faith funds advanced by the appellant and returned to the appellant were not more than $1,230,000.

Schedule B-10

Brampton Abacus Tax Plan

Bank account	****-***6-773	Account Holder: 409 Ltd.
Deposit of March 8, 2012	1,114,038	Incoming Wire Payment, McMillan LLP
Total income on deal	1,114,038	Note 1
Management fee reported on deal	311,030	1170218 Ontario Limited amount
Management fee reported on deal	245,000	2033311 Ontario Inc. amount
Total income reported on deal	556,030	
Under-reported income	558,008	

Promissory Notes:	**Debtor**	**Holder of debt**
$67,536.35	Appellant.	2033311 Ontario Inc.
$197,933.06	Appellant.	1170218 Ontario Limited

Total: $265,469.41

Note 1: This deal is known as the Brampton deal by the Abacus Group. ~~According to Negus, this~~ This deal closed on February 29, 2012. The 1170218 Ontario Limited and the 2033311 Ontario Inc. corporations were used to help implement this deal. The 409 Ltd. bank account was used to help implement this deal. ~~Review of the corporate bank account shows a deposit of~~ The Abacus Group received fees of $1,114,037.69 for this deal (~~the income that 409 Ltd. reported for 2012 was requested by the auditor and as the above indicates,~~ 409 Ltd. ~~only~~ reported 50% of the deposit as income).

~~Sham~~ Purported promissory notes totalling at least $265,469.41 were executed for this deal. The purported promissory notes were created to deceive the Minister into believing that 409 Ltd. borrowed not less than $265,469.41, when in reality this was part of 409 Ltd.'s fee that it earned in connection with implementing the Brampton Abacus Tax Plan. ~~The original promissory note(s) for this amount was not provided for the audit, however from the subsequent reassignment of debt from 409 Ltd. to the appellant it becomes obvious that the amount was recorded by 409 Ltd. as a debt owing. This initial loan document would have been the original sham document.~~ The amount of this purported debt was reassigned from 409 Ltd. to the appellant.

The subsequent ~~sham document~~ purported promissory note is dated December 31, 2013, and entitled "Promissory Note". It was executed by 2033311 Ontario Inc. (2033311) and the appellant, whereby the appellant purportedly takes over the $67,536.35 debt that 409 Ltd. owes to 2033311. The purported promissory notes were created to deceive the Minister into believing that the appellant assumed 409 Ltd.'s purported debt of $67,536.35 to 2033311, when in reality this amount was part of 409 Ltd.'s fee that it earned in connection with implementing the Brampton Abacus Tax Plan

The subsequent ~~sham document~~ purported promissory note is dated December 31, 2013, and entitled "Promissory Note", was executed by 1170218 Ontario Inc. (1170218) and the appellant whereby the appellant purportedly takes over the $197,933.06 debt that 409 Ltd. owes 1170218. The purported promissory notes were created to deceive the Minister into believing that the appellant assumed 409 Ltd.'s purported debt of $197,933.08 to 2033311, when in reality this amount was part of 409 Ltd.'s fee that it earned in connection with implementing the Brampton Abacus Tax Plan.

CITATION:	2023 TCC 71
COURT FILE NO.:	2022-103(IT)G
STYLE OF CAUSE:	HILLCORE FINANCIAL CORPORATION v. HIS MAJESTY THE KING
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	November 25, 2022
REASONS FOR ORDER BY:	The Honourable Justice Dominique Lafleur
DATE OF ORDER:	May 18, 2023

APPEARANCES:

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