

Federal Court of Appeal



Cour d'appel fédérale

Date: 20251017

Docket: A-259-23

Citation: 2025 FCA 186

**CORAM: BOIVIN J.A.
WOODS J.A.
BIRINGER J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

LBL HOLDINGS LIMITED

Respondent

Heard at Toronto, Ontario, on May 29, 2024.

Judgment delivered at Ottawa, Ontario, on October 17, 2025.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**BOIVIN J.A.
BIRINGER J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The Crown brings this appeal from a decision of the Tax Court of Canada (*per* Visser J.) for reasons cited as 2023 TCC 130 (Reasons). The Tax Court allowed an appeal by LBL Holdings Limited (LBL or Lumsden) and vacated reassessments issued to it under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA).

[2] For the reasons below, I would dismiss this appeal.

I. The reassessments

[3] During a 14-month period in 1999 and 2000, LBL (formerly known as Lumsden Brothers Limited) sold almost \$98 million worth of tobacco products (Products) without charging goods and services tax (GST). LBL took the position that it had no obligation to collect GST on these sales because the Products were sold to persons (Roberta MacNaughton and some family members (together, the MacNaughtons)) who were exempt from tax pursuant to the statutory exemption from taxation for “personal property of an Indian or a band situated on a reserve” (*Indian Act*, R.S.C. 1985, c. I-5 at s. 87(1)(b), herein “the s. 87 exemption”).

[4] The Minister of National Revenue (Minister) issued reassessments to LBL for failing to collect and remit GST on these sales on the basis that the buyers were not the MacNaughtons, and were not status Indians, but were persons purported to be the MacNaughtons’ customers (Customers) to whom the Products were resold. In response to LBL’s argument that the reassessments were statute barred, the Minister took the position that the reassessments were not statute barred because LBL had made a misrepresentation in its returns due to neglect, carelessness or wilful default (ETA, s. 298(4)). The aggregate amount assessed, including interest and penalties, was \$13,590,213.

[5] For clarity, in these reasons I use the term “status Indian” to refer to a person who is an “Indian” as that term is used in the s. 87 exemption. In addition, I have tried to simplify the

reasons by largely excluding reference to Ms. MacNaughton's family members. Ms. MacNaughton was the central family member in this arrangement. Accordingly, I have assumed that a conclusion with respect to Ms. MacNaughton would also apply to the other MacNaughtons.

II. Facts

[6] The brief facts below consist of most of the relevant findings of fact made by the Tax Court.

[7] The central findings are reproduced below from paragraph 143 of the Reasons:

- (a) The MacNaughtons, starting with [Ms. MacNaughton's mother], carried on a retail and trading business on the Reserve [Six Nations Reserve] for many years starting in the 1960s;
- (b) Roberta MacNaughton, carrying on business as Nickel and Dime and as Grandview Variety, carried on a retail and trading business since approximately 1995 on the Reserve;
- (c) The MacNaughtons [sic], including Roberta MacNaughton, retail and trading business included the purchase and sale of tobacco products, including cigarettes, loose tobacco and cigars;

- (d) The [Canada Revenue Agency] was aware that there was, at the relevant times, a widely held view amongst Indians in Canada that their trading activities were exempt from GST;
- (e) The MacNaughtons, including Roberta MacNaughton, intended and orally agreed to purchase the [Products] from Lumsden for resale on the Reserve;
- (f) Lumsden intended and orally agreed to sell the [Products] to the MacNaughtons on the Reserve;
- (g) Lumsden and the MacNaughtons entered into legally binding oral agreements for the purchase and sale of the [Products] on the Reserve;
- (h) The Tobacco Products were sold and delivered by Lumsden to the MacNaughtons on the Reserve;
- (i) Lumsden looked to the MacNaughtons to pay the consideration for the [Products];
and
- (j) Lumsden had no legal relationship with the MacNaughton's customers, including Roberta MacNaughton's customers, and those customers had no legal obligation to pay Lumsden for the [Products].

[8] At paragraph 144 of the Reasons, the Tax Court noted that Ms. MacNaughton and the former Lumsden employees who testified considered Ms. MacNaughton, and not her Customers, to be Lumsden's client and the person liable to pay for the Products. The Court also found that the documentary evidence largely supported this view.

[9] At paragraphs 146 and 147, the Tax Court noted that the sale of Products from Lumsden to Ms. MacNaughton often resulted in a resale to the Customers almost simultaneously. The Court found that this was common in the wholesale and retail industries and described the sales as being "in essence flash sales, which are common types of sales."

III. Tax Court decision

[10] The issues before the Tax Court, as raised by the parties, were described by the Court in relevant part as follows (Reasons at para. 6):

- Was the Minister permitted to reassess beyond the regular reassessing period on the basis that LBL had made a misrepresentation due to neglect, carelessness or wilful default?
- Was LBL required to charge and collect GST on its sale of Products? In this respect, the issue is whether Ms. MacNaughton was a recipient, as defined in subsection 123(1) of the ETA. (Emphasis added.)

- Does a penalty under s. 280(1)(a) of the ETA apply? This involves a determination as to whether LBL acted with due diligence.
- Does a penalty under s. 285 of the ETA apply? This involves determining whether LBL acted “knowingly” or “under circumstances amounting to gross negligence.”

[11] The Crown’s main theory of the case before the Tax Court was that this arrangement was a sham. LBL knowingly participated in a scheme which was designed to give the false appearance that a status Indian purchased the Products in order to avoid the collection and remittance of GST on a sale to Customers who were not status Indians.

[12] The Tax Court made no express finding on sham. Instead, the Court found that LBL had no obligation to collect or remit tax because Ms. MacNaughton was a “recipient” as that term is defined in the ETA. The Court reasoned that if Ms. MacNaughton were a recipient, the Products were supplied to her on a reserve and the s. 87 exemption would apply. (Reasons at paras. 140 - 142). Having decided that GST did not apply to the sale of the Products, the Tax Court did not render a decision on the other issues, on the basis of mootness (Reasons at para. 151).

[13] The Court also considered the Crown’s submission that the sales were not “normal.” The Court concluded that it “generally would not matter if the supplies were ‘abnormal’ or even ‘illegal’” (Reasons at para. 148).

[14] Finally, the Court considered the Crown's allegation that there was GST leakage somewhere within the supply chain for the Products. The Court simply concluded that this was not the issue to be decided (Reasons at para. 150).

IV. Analysis

A. *Introduction*

[15] In this Court, the Crown submits that the Tax Court's decision was tainted by three errors. First, the Court erred in determining the relevant contract of sale and the proper parties to the sales. Second, the Court failed to properly consider and apply the s. 87 exemption. Finally, the Court failed to decide and provide reasons on key issues.

[16] By way of background, a central issue raised by the parties in the Tax Court was whether Ms. MacNaughton was a recipient of the Products, as that term is defined in s. 123(1) of the ETA. This turns on whether Ms. MacNaughton was liable to pay the consideration for the Products. Notably, the stated issues did not include the s. 87 exemption.

[17] In this Court, the panel asked counsel for LBL to explain how a finding on liability to pay satisfies the s. 87 exemption, which requires that the Products become personal property of Ms. MacNaughton. Counsel submitted that the issue of ownership of the Products, which I assume to mean for the purpose of the s. 87 exemption, is a new issue that should not be raised for the first

time on appeal, and in any event the Tax Court did make factual findings that Ms. MacNaughton had become the owner of the Products for a brief period of time.

[18] The importance of the term “recipient” in this appeal never became clear. In order to simplify the reasons, I have concluded that it is sufficient for the purpose of this appeal to consider whether the Tax Court erred in finding that the Products were sold and delivered to Ms. MacNaughton. Quite simply, the “owner” and the “recipient” are bound to be one and the same person in this case. Neither of the parties suggested or implied otherwise. Based on the submissions of LBL’s counsel, it appears that the issue of the “recipient” was likely relevant to other issues in the Tax Court, such as the statute bar or penalty issues. A focus on “owner” instead of “recipient” is sufficient to dispose of this appeal and it narrows the issues significantly.

[19] As for the standard of review, the Tax Court judgment is subject to appellate standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33. Determinations of fact and mixed fact and law are entitled to a high degree of deference and attract the palpable and overriding error standard of review. In order to find a palpable and overriding error, the error must be obvious and determinative of the outcome of the case (*Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33). Determinations of law (including extricable legal questions) are subject to correctness review.

B. *Did the Tax Court err in concluding that the Products were sold and delivered to Ms. MacNaughton?*

[20] The Crown submits the Tax Court erred in finding that it was Ms. MacNaughton, and not the Customers, who purchased the Products and was liable to pay the consideration. The Crown suggests that the Court put too much weight on the subjective view of the witnesses to determine that Ms. MacNaughton was liable for the consideration, and instead the Tax Court should have relied more on the conduct of the parties reflected in the purchase orders, invoices, payment of the consideration and delivery of the goods. The Crown submits that these considerations demonstrate that LBL sold the Products directly to the Customers.

[21] This issue is primarily one of fact and is subject to the palpable and overriding error standard of review. I have concluded that the Tax Court did not make a palpable and overriding error in concluding that the Products were sold and delivered by LBL to Ms. MacNaughton.

[22] In particular, the Tax Court did not make a palpable and overriding error when it concluded that:

- The witnesses, including several former LBL employees, considered that Ms. MacNaughton was LBL's client;
- The documentary evidence was largely supportive of that view; and
- The sale and immediate resale to Customers is a common type of sale.

[23] With respect to the witnesses' testimony, the Crown submits that it was given too much weight. However, the Tax Court was in the best position to assess this evidence. The Tax Court found that all the witnesses testified in a forthright and straightforward manner, and I am not aware of any reason to doubt the witnesses' detailed testimony that they considered Ms. MacNaughton to be LBL's client.

[24] As for the documentation, the Crown submits that the purchase orders and invoices suggest that LBL's clients were the Customers. In this regard, the Crown notes that the purchase orders were on standard LBL forms and were faxed by the Customers to Ms. MacNaughton. The Crown suggested that Ms. MacNaughton added delivery instructions to the forms and then forwarded them by fax to LBL. The Crown also mentions that the purchase orders and invoices referenced the Customers by way of alphanumeric identifiers. Through this code system, the orders were separately packaged and invoiced for each of the Customers.

[25] This description is accurate as far as it goes, but it fails to mention an important detail in the purchase orders that supports LBL's position. In addition to specifying delivery instructions, most batches of purchase orders identified Ms. MacNaughton as being LBL's customer through her customer number.

[26] Another detail that is missing from the Crown's description concerns the invoices. They list Ms. MacNaughton, by her trade name and customer number, as the purchaser.

[27] Finally, the Crown submits that LBL knew that the Customers were paying the same amount that it invoiced. However, the evidence showed that the consideration paid by Ms. MacNaughton to LBL was less than the invoice price due to a per carton discount provided to her. The method of invoicing is not inconsistent with LBL's position.

[28] Accordingly, the Tax Court did not make a palpable and overriding error in concluding that the documentation largely supports that Ms. MacNaughton was the purchaser of the Products.

[29] The Crown also submits that the payment and delivery mechanics support its position. The Crown notes that payments were made in cash by Customers directly to LBL before the Products were released. Similarly, the delivery was made by transfer from LBL's trucks directly to the Customers' vans.

[30] As a point of clarification, the cash was not directly handed over to an LBL employee throughout the period at issue. For the majority of this period, the cash was dropped into a night deposit box or drop chute and was picked up and counted by an LBL employee. In addition, for a few months in this period, the cash was picked up and counted by Ms. MacNaughton before it was turned over to LBL. (Submissions of the Crown; Reasons at para. 33).

[31] The payment and delivery mechanics are simply the means by which the contracts of sale are completed. The mechanics, as far as the record reveals, are consistent with LBL's position.

[32] Accordingly, I conclude that the Tax Court did not make a palpable and overriding error in concluding that LBL sold and delivered the Products to Ms. MacNaughton and that she immediately resold them to the Customers.

C. *Did the Tax Court fail to properly consider and apply the s. 87 exemption?*

[33] The finding that the Products were sold and delivered to Ms. MacNaughton on a reserve is sufficient to address the Crown's argument that the s. 87 exemption does not apply because the Products were sold directly to Customers. It is not necessary to discuss this further.

D. *Sufficiency of reasons*

[34] The Crown submits that the Tax Court made an error by failing to decide, or failing to provide sufficient reasons, on key issues. It submits that these are errors of law.

[35] In determining the sufficiency of reasons, this Court has stated that courts do not need to address every last issue or set out the obvious. Instead, "[t]he main concern is whether the reasons, short as they may be, are intelligible or capable of being made out and permit meaningful appellate review" (*Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 143). As stated by McLachlin C.J., "[t]he foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded" (*R. v. R.E.M.*, 2008 SCC 51 at para. 17).

[36] Many of the issues concerning sufficiency of reasons become moot in light of the conclusion on the main issue. However, I would briefly comment on three of the Crown's other submissions.

[37] The Crown submits that the Tax Court erred by not considering its sham argument, which was a central argument in the Tax Court. The Crown suggests that LBL attempted to deceive the tax authorities by giving a false impression that LBL sold the Products to Ms. MacNaughton when in fact LBL sold the Products to Customers.

[38] It was not necessary for the Court to explicitly address the sham argument because the Court's reasons on this issue are easily made out from the Reasons and the evidence.

Importantly, the judge found that: (1) The witnesses were credible when they stated that they considered Ms. MacNaughton to be LBL's client. The witnesses included former employees of LBL who were knowledgeable of the background and details of the arrangement with Ms. MacNaughton; (2) The documentation supported LBL's position; and (3) LBL had no legal relationship with the Customers. Since the Tax Court found that LBL intended to sell Products to Ms. MacNaughton and not to Customers, the Tax Court implicitly rejected the Crown's sham argument. There was no need for the Tax Court to explicitly address sham.

[39] The Crown also submits that the Tax Court erred in not providing sufficient reasons for finding that whether the transactions were abnormal had no relevance. The Tax Court stated that this was "largely irrelevant" because the only issue to be decided was whether

Ms. MacNaughton is a recipient (Reasons at para. 148). The Tax Court's reasons on this issue are brief, but they are intelligible and can be made out. They are sufficient.

[40] Finally, the Crown submits that the Tax Court should have addressed its argument that LBL did not obtain sufficient legal and accounting advice, especially since the transactions had "glaring red flags." The Crown submitted at the Tax Court that LBL "made no genuine effort to ensure compliance" with the ETA. It was not necessary for the Tax Court to consider this argument in light of its conclusion that LBL did actually comply with the ETA.

[41] Accordingly, I conclude that the Tax Court did not err by failing to decide and provide sufficient reasons for all relevant issues.

V. Conclusion and proposed disposition

[42] I conclude that there is no basis to interfere with the decision of the Tax Court and would dismiss the appeal. As for costs, in accordance with the agreement of the parties I would award the respondent costs in a lump sum amount of \$35,168.00 inclusive of disbursements but exclusive of taxes.

"Judith Woods"

J.A.

"I agree.

Richard Boivin J.A."

"I agree.

Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-259-23
STYLE OF CAUSE:	HIS MAJESTY THE KING v. LBL HOLDINGS LIMITED
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 29, 2024
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	BOIVIN J.A. BIRINGER J.A.
DATED:	OCTOBER 17, 2025

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