Docket: 2012-4371(GST)G

BETWEEN:

LBL HOLDINGS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 10, 2015, at Ottawa, Canada.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	David D. Robertson Amy Walsh
Counsel for the Respondent:	André LeBlanc Craig Maw

ORDER

The Appellant's motion is granted in part. The following portions of the Fresh Reply are struck:

(a) the phrase "as far as the facts relate to Roberta MacNaughton" in paragraph 1;

(b) the words "18 as far as the allegations of fact relate to individuals other than Roberta MacNaughton," in paragraph 3;

(c) paragraph 7;

(d) paragraph 8;

(e) paragraph 9;

(f) all of the words in the preamble to paragraph 12 other than the phrase "the Minister relied on the following facts:";

(g) paragraph 12(k);

(h) paragraph 12(l); and

(i) paragraph 20.

The Respondent shall have leave to amend paragraphs 7, 8 and 9 of the Fresh Reply in accordance with these Reasons for Judgment by filing an Amended Fresh Reply.

The Respondent shall serve and file its Amended Fresh Reply within 30 days of the date of these Reasons for Judgment.

If the Appellant wishes to serve and file an Amended Amended Notice of Appeal to deal with the drafting problems in paragraphs 7, 8 and 9 it shall do so within 30 days of the Respondent filing the Amended Fresh Reply.

If the Respondent wishes to serve and file an Amended Amended Fresh Reply to respond to any changes made to paragraphs 7, 8 and 9 in the Amended Amended Notice of Appeal it shall do so within 30 days of the Appellant filing the Amended Amended Notice of Appeal.

Costs are awarded to the Appellant payable forthwith. The parties shall have 30 days to either advise the Court that they have reached a settlement as to the issue of costs on this Motion or to submit to the Court their written representations with respect to costs.

Signed at Ottawa, Canada, this 14th day of May 2015.

"David E. Graham"

Graham J.

Citation: 2015 TCC 115
Date: 20150514
Docket: 2012-4371(GST)G

BETWEEN:

LBL HOLDINGS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] During the period from January 1, 1999 to February 29, 2000, LBL Holdings Limited owned a wholesale grocery and dry goods business selling goods to retailers in Ontario. Those goods included tobacco products.

[2] The Minister of National Revenue took the position that LBL participated in a scheme that gave the false appearance that certain tobacco products were sold to status Indians on a reserve and thus exempt from GST when those products were, in fact, being sold by LBL to persons who were not status Indians. As a result, the Minister determined that LBL underreported its GST by failing to report the GST that should have been collected on those sales. The Minister reassessed LBL for GST, penalties and interest of over $13.5 million. LBL appealed that reassessment and the Respondent filed a Reply.

[3] The parties agree that the periods in question are statute barred unless the Respondent can show that LBL made a misrepresentation of fact attributable to neglect, carelessness or wilful default.

[4] In September 2014, I heard a motion brought by LBL under subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)* ("*Rules*") to strike the Reply on the basis that it disclosed no reasonable grounds for opposing the appeal. The Respondent had not pled any facts in the Reply but rather had relied solely on assumptions of fact. The Minister may not rely upon assumptions of fact when

reassessing a statute barred period. Therefore I granted LBL's motion and struck the entire Reply with leave to amend.

[5] The Respondent filed a Fresh Reply. LBL has now brought a further motion under subsection 53(1) of the *Rules* to strike various portions of the Fresh Reply.

LBL's Theory of the Case

[6] Roberta MacNaughton is a status Indian registered under the *Indian Act*. Ms. MacNaughton is a resident of the Six Nations of Grand River Territory which is a reserve within the meaning of section 87 of the *Indian Act*. Ms. MacNaughton operates the Grandview Variety store on the reserve.

[7] LBL takes the position that Ms. MacNaughton and members of her immediate family purchased the tobacco products from LBL and then subsequently sold those tobacco products to various third parties. My understanding is that these third parties were wholesalers or retailers who were not status Indians and who operated their businesses off the reserve ("Third Party Purchasers"). Since the MacNaughtons were status Indians and the sales from LBL to the MacNaughtons occurred on a reserve, LBL submits that no GST was collectible.

Respondent's Theory of the Case

[8] The Respondent alleges that LBL participated in a scheme that gave the appearance that LBL was selling tobacco products to Ms. MacNaughton and members of her immediate family when LBL was, in fact, selling those products directly to the Third Party Purchasers.

[9] The Respondent alleges that the scheme worked as follows:

a. Each Third Party Purchaser would be given an identifying alphanumeric code.

b. A Third Party Purchaser who wanted to purchase tobacco products from LBL would fax its order to Ms. MacNaughton using LBL's standard order form. Ms. MacNaughton would then re-fax that form to LBL without alteration.

c. LBL would package its tobacco products in as many packages as there were orders received and would identify the alphanumeric code

of the Third Party Purchaser who had ordered the products on the package.

d. The number of invoices issued by LBL for a given delivery would be equal to the number of Third Party Purchasers involved.

e. The transfer of the tobacco products would occur on the reserve.

f. The tobacco products would be transferred directly from LBL's delivery vehicle to the Third Party Purchasers' vehicles.

g. The transfers would not occur until LBL was satisfied that it had received cash payments from the Third Party Purchasers.

h. If there were any shortages, the Third Party Purchasers would deal directly with LBL. Any returned goods would be returned by the Third Party Purchasers directly to LBL and LBL would provide them with credit notes.

i. The MacNaughtons were compensated for their involvement in the scheme through volume rebates that LBL gave to Ms. MacNaughton on purchases of goods that she made from LBL for her own store.

[10] The Respondent says that, using this alleged scheme, LBL sold over $97.7 million in tobacco products in a 14 month period to persons who were not status Indians and failed to collect GST on those sales.

Analysis

[11] LBL is seeking to strike different aspects of the Fresh Reply. I have listed the relevant paragraphs of the Fresh Reply in an order that makes the analysis easier to follow rather than in their numerical order.

Paragraph 8:

[12] Paragraph 77 of the Notice of Appeal states:

> Also in or before February 2000, the CRA began auditing, investigating, and making inquiries regarding the sales of tobacco products made by the Appellant to the MacNaughtons.

[13] Paragraph 8 of the Fresh Reply states:

> With respect to paragraph 77 of the Amended Notice of Appeal, he states that the audit relevant to this appeal started in May 2002 but otherwise has no knowledge of any other allegations of facts stated in these paragraphs. He further states that these other allegations are not relevant to this appeal.

[14] Paragraph 77 is not drafted in an ideal manner. It contains both a presumption and a statement of fact and is thus difficult to respond to. The presumption is that LBL was selling tobacco products to the MacNaughtons. The statement of fact relates to when the Minister took certain actions in respect of that presumption. While the presumption is not expressly denied in paragraph 8, it is obvious from the balance of the Fresh Reply that the Respondent denies it and the Respondent clarified that fact in her submissions. Since the Respondent denies that these sales occurred, it is therefore difficult for the Respondent to either admit or deny when the Minister began taking actions in respect of those sales.

[15] At the same time, the manner in which the Respondent dealt with paragraph 77 is not satisfactory either. Paragraph 8 fails to clarify whether the Respondent agrees with the underlying presumption or not. As a result, it is difficult to know exactly what it is that the Respondent claims to have no knowledge of or what it is that the Respondent feels is irrelevant.

[16] If I were to simply strike paragraph 8, then, by virtue of subsection 49(2) of the *Rules*, the Respondent would be deemed to have admitted that LBL sold the tobacco products to the MacNaughtons. I am unwilling to allow LBL to benefit from its complex drafting in this manner. However, I am also unwilling to let the Respondent's vague response stand. Accordingly, I will strike paragraph 8 but I will give the Respondent leave to file an Amended Fresh Reply with a new paragraph 8. In filing an Amended Fresh Reply the Respondent may simply deny paragraph 77 on the basis that it contains a presumption that the Respondent disputes[1].

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[1] I am aware that I previously ordered that the Respondent would not be given further leave to amend the Fresh Reply. The history of this matter is as follows. The Respondent filed a Reply. LBL brought a motion to strike. At the hearing of the motion to strike, the Respondent tendered a draft amended reply that the Respondent intended to file. The vast majority of the argument at the hearing focused on the adequacy of that draft. Ultimately, I struck the original Reply and the Respondent chose not to file the draft amended reply. I felt that the Respondent had now had two chances to get it right: one when she filed the Reply and one when she tendered the draft amended reply. Accordingly, when I granted leave for the Respondent to file a third version (i.e. the Fresh Reply), I ordered that the Respondent would not be given further leave to amend. My intention in making that

[17] If, after the Respondent has filed its Amended Fresh Reply, LBL wishes to file an Amended Amended Notice of Appeal to correct paragraph 77 it may do so and the Respondent may accordingly file an Amended Amended Fresh Reply responding to that paragraph.

[18] I do not, however, want this matter to sit in an endless series of amendments and motions to strike pleadings. Accordingly I would like to provide the following guidance to the Respondent in the event that LBL files an Amended Amended Notice of Appeal:

(a) Relevance in general: If the Respondent has a problem with the relevance of a fact pled in the Amended Amended Notice of Appeal, the Respondent should bring a motion to strike that paragraph, not simply plead that it is irrelevant.

(b) Relevance of particular facts: It appears that the Respondent feels that the timing of when the CRA began various activities is irrelevant. At first glance, that seems reasonable. The Minister's knowledge of what may have been occurring and any associated delay in reassessing LBL would normally have nothing to do with whether LBL made a misrepresentation attributable to neglect, carelessness or wilful default. However, my understanding is that LBL intends to argue, in part, that the nature of its relationship with the MacNaughtons is something upon which reasonable people could disagree. A delay in assessing in the face of knowledge of what was occurring could be indicative of the fact that the Minister was having some difficulty deciding who should bear the tax. I therefore consider the timing of when the CRA began the activities described in paragraph 77 to be relevant.

(c) Knowledge: The timing of the start of the various activities described in paragraph 77 is entirely within the Minister's knowledge. The Minister cannot claim that she has no knowledge of these facts.

Paragraph 7:

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order was to prevent the Respondent from having a fourth opportunity to make material amendments to the Reply, not to prevent her from making minor amendments to ensure the Fresh Reply was legible.

[19] Paragraphs 75 and 76(a) of the Notice of Appeal state:

> 75. The Canada Revenue Agency ("CRA") first became aware that the Appellant was selling tobacco products to the MacNaughtons without charging or collecting GST in or before February 2000.
>
> 76. The CRA was also concurrently aware that:
>
> (a). None of the MacNaughtons were:
>
> i. Registered for GST purposes;
>
> ii. Charging or collecting GST on any of the sales of tobacco products they made to their customers (be they Indians or otherwise) or on any other of the revenues they earned; or
>
> iii. Filing GST returns;

[20] Paragraph 7 of the Fresh Reply states:

> With respect to paragraphs 75 and 76(a) of the Amended Notice of Appeal, he denies the allegations of fact stated in these paragraphs as far as they relate to the CRA officer who conducted the audit for the Periods and otherwise has no knowledge of any other allegations of facts stated in these paragraphs. He further states that these other allegations are not relevant to this appeal.

[21] I will deal with each portion of the Amended Notice of Appeal separately.

(a) Paragraph 75: Like paragraph 77, paragraph 75 is not drafted in an ideal manner as it contains both a presumption and a statement of fact. Similarly, the manner in which the Respondent dealt with paragraph 75 is not satisfactory either. It fails to clarify whether the Respondent agrees with the underlying presumption or not. As a result, it is difficult to know exactly what it is that the Respondent claims to have no knowledge of or what it is that the Respondent feels is irrelevant.

(b) Paragraph 76(a): The Respondent asserts that paragraph 76(a) is irrelevant. I disagree. How the MacNaughtons were dealing with their GST obligations is potentially indicative of how they viewed their relationship with both LBL and the Third Party Purchasers. The Respondent also claims to have no knowledge of the facts in paragraph 76(a). This response is ridiculous. The facts in this paragraph are entirely within the Minister's knowledge. The

> paragraph refers to what the Minister was "aware" of at a certain time. Either the Minister was aware of these facts or she was not. The Minister cannot claim that she has no knowledge of her own knowledge.

[22] The fact that paragraph 7 deals with two separate paragraphs of the Amended Notice of Appeal and the fact that paragraph 75 combines a presumption with a statement of fact makes it very difficult for me to correct paragraph 7 by simply striking out words. Accordingly, I will strike paragraph 7 but I will give the Respondent leave to file an Amended Fresh Reply with a new paragraph 7. In that new paragraph 7, the Respondent may simply deny paragraph 75 on the basis that it contains a presumption that the Respondent disputes. The new paragraph 7 shall not cover paragraph 76(a). Pursuant to section 49(2) of the *Rules* the Respondent will be deemed to admit the facts in paragraph 76(a).

[23] If, after the Respondent has filed her Amended Fresh Reply, LBL wishes to file an Amended Amended Notice of Appeal to correct paragraph 75 it may do so and the Respondent may accordingly file an Amended Amended Fresh Reply responding to that paragraph.

[24] Again, I do not want this matter to sit in an endless series of amendments and motions to strike pleadings. The points I raised at paragraph 18 above are equally applicable to paragraphs 75 and 7.

Paragraph 9:

[25] Paragraph 91 of the Amended Notice of Appeal states:

> At no time has the CRA or the Respondent:
>
> a. Assessed any of the MacNaughtons for failure to charge, collect or pay GST in respect of any of the tobacco products purchased from the Appellant during the Assessed Period and sold by them to non-Indian purchasers;
>
> b. Assessed any of the MacNaughtons' customers for failure to pay GST in respect of any of the tobacco products they purchased from the MacNaughtons' [*sic*] during the Assessed Period;
>
> c. Assessed any of the MacNaughtons for failure to charge, collect or pay GST in respect of any of the volume rebates paid by the Appellant; or

> d. Taken any enforcement action against any of the MacNaughtons or their customers for GST purposes in relation to any of the tobacco products for which the Appellant has been reassessed.

[26] Paragraph 9 of the Fresh Reply states:

> With respect to paragraph 91 of the Amended Notice of Appeal, he states that the facts stated in that paragraph are not relevant to this appeal and are considered confidential information under the *Excise Tax Act*. To avoid the application of s. 49(2) of the [*Rules*], the respondent pleads no knowledge of the facts stated in paragraph 91 of the Amended Notice of Appeal.

[27] The Respondent, in essence, refused to respond to paragraph 91 on the basis that it was irrelevant and that it would require the Minister to disclose confidential information. These two issues are intertwined.

[28] The information that LBL seeks to have the Respondent admit or deny clearly involves the private tax information of a number of other taxpayers. Section 295 of the *Excise Tax Act* prevents the Minister from disclosing confidential information about taxpayers. However, paragraph 295(4)(*b*) provides an exception to that rule for disclosures in the course of legal proceedings relating to the administration or enforcement of the Act. This does not, however, mean that there is no limit on the confidential information that the Minister may disclose in the context of litigation. While paragraph 295(4)(*b*) does not state so explicitly, it is fair to conclude that the exception is subject to the qualification that the information disclosed must be relevant to the litigation in question. The Minister has a duty to Canadians not to disclose confidential information unnecessarily. Accordingly, if the Minister believes that she would otherwise be required to disclose irrelevant confidential information she should bring a motion to strike the relevant portion of the notice of appeal.

[29] Rather than put the parties through the process of having the Respondent bring a separate motion to strike, I will simply state that, subject to the qualifications below regarding paragraphs 91(a) and (b), I find the facts stated in paragraph 91 to be relevant to the appeal. Ironically, I find them to be relevant because, if true, they may actually help the Respondent's case by showing that the Minister acted in a manner that is consistent with her view that LBL sold the tobacco products to the Third Party Purchasers thus suggesting that there never was any question in her mind as to who should have charged GST.

[30] Having set aside the questions of relevance and confidentiality, the Respondent now needs an opportunity to properly plead. Unfortunately, as with

paragraphs 75 and 77, paragraphs 91(a) and (b) are not drafted in an ideal manner as they contain both a presumption and a statement of fact. Thus, it will be difficult for the Respondent to plead to them.

[31] Accordingly, I will strike paragraph 9 but I will give the Respondent leave to file an Amended Fresh Reply with a new paragraph 9. In filing an Amended Fresh Reply the Respondent may simply deny paragraphs 91(a) and (b) on the basis that they contain a presumption that the Respondent disputes.

[32] If, after the Respondent has filed its Amended Fresh Reply, LBL wishes to file an Amended Amended Notice of Appeal to correct paragraphs 91(a) and (b) it may do so and the Respondent may accordingly file an Amended Amended Fresh Reply responding to those paragraphs.

Paragraph 12 (preamble):

[33] The preamble to paragraph 12 of the Fresh Reply reads:

> During the Periods, the appellant participated in a scheme that gave the false appearance that the [tobacco products] were sold to status Indians. The appellant falsely reported in its GST returns for the Periods that no GST was collectible on the sales of the [tobacco products]. In determining that this misrepresentation was attributable to the appellant's neglect, carelessness and wilful default, the Minister relied on the following facts:

[34] This preamble appears in the section of the Fresh Reply titled "Statement of Facts". However, it is clearly a conclusion reached by the Respondent based on the facts that follow rather than a statement of facts. Accordingly, I will strike all of the words other than "the Minister relied on the following facts:"

Paragraph 12(d):

[35] Paragraph 12(d) of the Fresh Reply states:

> during the Periods, the appellant sold tobacco products (the "Tobacco Products") to persons who were not status Indians … in exchange for payments made by the [Third Party Purchasers] to the appellant (the "transactions");

[36] LBL submits that this paragraph is a conclusion of mixed fact and law. LBL says that the key issue in the Appeal is who the "recipient" of the tobacco products was within the meaning of that term under the Act. LBL argues that paragraph

12(d) merely asserts the conclusion that the Respondent would like the Court to reach.

[37] I note that LBL appears to be applying a considerable double standard to what it considers to be statements of mixed fact and law. LBL states in paragraphs 27, 57, 58 and 60 of the Amended Notice of Appeal that the MacNaughtons "acquired" the tobacco products from LBL and in paragraphs 26, 27, 47, 58, 59, 61 and 68 that the MacNaughtons "purchased" those products. I fail to see the distinction that would cause a statement that the tobacco products were "acquired" or "purchased" by the MacNaughtons to be a statement of fact yet would cause the statement that the tobacco products were "sold" to the Third Party Purchasers to be a statement of mixed fact and law. Furthermore, in paragraphs 36, 38 and 71 of the Amended Notice of Appeal, LBL refers to its "supplies" or "supplying" of tobacco products to the MacNaughtons and in paragraphs 72 and 73 LBL states that it stopped "selling" tobacco products to the MacNaughtons. Again, how is it a statement of fact when LBL says it supplied or sold the tobacco products to the MacNaughtons but a statement of mixed fact and law when the Respondent says LBL sold them to the Third Party Purchasers?

[38] Despite LBL's double standard, I agree that whether a sale occurred would be a question of mixed fact and law if the issue is whether ownership transferred from LBL to the MacNaughtons. LBL would like to characterize the Appeal as being a debate over whether ownership transferred to the MacNaughtons when the tobacco products were delivered to the reserve. It would like the debate to focus on offer, acceptance, consideration, delivery, risk, payment and the terms of what it says are its contractual relationship with the MacNaughtons. I can understand this desire. If that were the issue, then LBL would be in a very strong position. In order to open a statute barred year, a taxpayer must have made a misrepresentation of fact, not a misrepresentation of mixed fact and law. A difference of opinion as to whether the steps that LBL took successfully transferred ownership of the tobacco products to the MacNaughtons would therefore be insufficient to open up the periods in question.

[39] However, my understanding is that this is not how the Respondent is now framing the debate. Over the course of the two motions on this matter, the Respondent appears to have slowly moved from a shotgun approach to a much more refined position. As I understand it, the Respondent is now simply arguing that LBL sold the tobacco products directly to the Third Party Purchasers and that the MacNaughtons were merely window dressing designed to hide the true nature of the transaction. The parties agree that the tobacco products started with LBL and

ended up being owned by the Third Party Purchasers. The Respondent is not making a technical argument that some element necessary to transfer ownership to the MacNaughtons along the way was missing. To put it bluntly, the Respondent is simply saying that LBL and the MacNaughtons are lying when they say that LBL sold the tobacco products to the MacNaughtons who then sold them to the Third Party Purchasers. The Respondent is saying that the MacNaughtons' sole role was to give the false impression that they bought and re-sold the tobacco products. The Respondent's position does not require a legal analysis of whether ownership transferred to the MacNaughtons on the way to the Third Party Purchasers. There is no question of mixed fact and law to be determined. It is purely a matter of credibility. The Respondent is arguing that LBL knew that LBL did not sell the tobacco products to the MacNaughtons, knew that the MacNaughtons did not sell the tobacco products to the Third Party Purchasers, knew that LBL sold the tobacco products directly to the Third Party Purchasers and knew that the MacNaughtons had no role in the transactions other than assisting LBL by creating the false impression that they were buying the tobacco products. The Respondent asserts that these are the misrepresentations of fact that allow the Minister to open the otherwise statute barred periods.

[40] The trial judge will either find that LBL and the MacNaughtons are telling the truth or not. If the trial judge finds that LBL knew it was selling directly to the Third Party Purchasers and used the MacNaughtons to disguise that fact, then he or she could find that the periods in question are not statute barred.

[41] Based on all of the foregoing, I see no reason to strike paragraph 12(d).

Paragraph 18:

[42] Paragraph 18 of the Fresh Reply is a portion of the Respondent's argument. It reads:

> The appellant's alleged sales to a status Indian were merely a sham, designed to conceal the true identity of the recipients of the appellant's supplies of the Tobacco Products. The appellant knowingly participated in a scheme, the purpose of which was to falsely create the appearance to the Minister that the appellant was making tax-relieved sales to status Indians, when in fact this was not the case at all.

[43] LBL argues that the Respondent should have to plead "material facts setting out how, when, where [and] any other details as to when and how the MacNaughtons and [LBL] formed this purported common intention to mislead".

LBL submits that without those details, there is an insufficient factual basis to support paragraph 18. I disagree. It is not necessary for the Respondent to prove how, when or where any scheme was hatched. It is sufficient to show that the scheme existed. In my view, the Respondent has pled sufficient facts on which, if they were found to be true, a trial judge could potentially reach the conclusion set out in paragraph 18. I see no reason to strike it.

Paragraph 12(k):

[44] Paragraph 12(k) of the Fresh Reply reads:

> the MacNaughtons were not wholesalers of the Tobacco Products but merely a conduit or a vehicle through which the appellant supplied the Tobacco Products to the [Third Party Purchasers] and at times received payment for those supplies from the [Third Party Purchasers];

[45] This is a conclusion, not a statement of fact. Accordingly, I will strike it.

[46] I note that at the hearing, LBL's counsel suggested that concluding that something is a "conduit or a vehicle" was a conclusion of mixed fact and law. I disagree. I am unaware of any legal test that one would have to reach to find someone to be a conduit or a vehicle. My decision to strike paragraph 12(k) was not influenced by this argument.

Paragraph 19:

[47] Paragraph 19 essentially repeats paragraph 12(k) but does so in the portion of the Fresh Reply titled "Statutory Provisions, Grounds Relied On, and Relief Sought". This is an appropriate place for a conclusion.

[48] In my view, the Respondent has pled sufficient facts on which, if they were found to be true, a trial judge could potentially reach the conclusion set out in paragraph 19. I see no reason to strike it.

Paragraph 12(l):

[49] Paragraph 12(l) of the Fresh Reply states:

> in the alternative, the MacNaughtons agreed to act as agents or trustees of the appellant and of the [Third Party Purchasers] in respect of the transactions;

[50] This paragraph should be struck for a number of different reasons. Firstly, I fail to see how one can plead a statement of fact in the alternative. Either a fact is true or it is not. There may be alternative legal conclusions arising from a given set of facts but there cannot be alternative facts.

[51] Secondly, the Respondent clearly has no evidentiary foundation for this assertion. If she did she would not be unsure whether it was an agreement to be an agent or an agreement to be a trustee nor would she be unsure whether the agreement was between the MacNaughtons and LBL or the MacNaughtons and the Third Party Purchasers. She would also have been able to respond to LBL's demands for particulars. The Respondent appears to be hoping to use the discovery process to engage in a fishing expedition on this point.

[52] Finally, given that the Respondent has no evidence of the existence of an agreement, what the Respondent is really pleading is that the MacNaughtons were agents or trustees. Whether someone is an agent or a trustee is a question of mixed fact and law and thus should not be pled as a fact.

[53] The Respondent did not raise any serious challenge to the above points in her oral submissions. Based on all of the foregoing, I will strike paragraph 12(l).

Paragraph 20:

[54] Paragraph 20 is the portion of the Respondent's argument dealing with the trustee and agency arguments. Paragraph 12(l) of the Fresh Reply was the only alleged assertion of fact that could have directly supported paragraph 20. Since I have struck paragraph 12(l), I will also strike paragraph 20.

Paragraph 12(j):

[55] Paragraph 12(j) of the Fresh Reply reads:

> the appellant knew or should have known that the MacNaughtons were not licenced by the Province of Ontario as tobacco wholesalers;

[56] LBL takes the position that paragraph 12(j) should be struck because the MacNaughtons were not required to be licensed by the province as tobacco wholesalers and thus the paragraph is misleading. The Respondent takes the position that the MacNaughtons were required to be licensed and thus that the paragraph is relevant. In essence, LBL would like me, on a motion to strike, to determine the question of mixed fact and law of whether the MacNaughtons were

required to be registered or not. I am unwilling to do so. That determination is best left of the trial judge. Even if LBL is correct and the MacNaughtons were not required to be registered, I fail to see what harm LBL would suffer by leaving this paragraph in the Fresh Reply and waiting for the issue to be determined at trial. The paragraph's existence is unlikely to lead to any significant grounds of inquiry on examination for discovery that would not be present in any event. Furthermore, the trial judge is unlikely to be misled by the paragraph since LBL will raise the issue during the trial.

Paragraph 12(y):

[57] Paragraph 12(y) of the Fresh Reply states:

> the appellant knowingly participated in the scheme, the purpose of which was to give the false appearance that a status Indian was involved in the transactions as a tobacco products wholesaler with a view to avoiding the collection and remittance of GST; and

[58] LBL had a number of objections to this paragraph. LBL objects to everything in the paragraph following the word "scheme". LBL argues that one cannot conclude what the purpose was without first determining that the tobacco products were not sold to the MacNaughtons and that that determination requires one to reach a conclusion of mixed fact and law. I disagree for the reasons set out in my discussion of paragraph 12(d) above.

[59] Based on all of the foregoing, I see no reason to strike paragraph 12(y).

[60] That said, I think this is a good point to discuss a concern that I have with the term "scheme". The term "scheme" is defined in paragraph 12(g) which reads:

> the appellant represented that status Indians, namely [the MacNaughtons], purchased the Tobacco Products from the appellant and that the [Third Party Purchasers] purchased the Tobacco Products from the MacNaughtons (the "scheme");

[61] Paragraph 12(g) is poorly drafted. It is unclear exactly what part of paragraph 12(g) involves a scheme. Presumably it cannot have been LBL selling the tobacco products to the MacNaughtons who then sold them to the Third Party Purchasers since the Respondent takes the position that that did not happen. How could something that did not happen ever be a scheme? It is also hard to see how the making of a representation, even a false one, could be a scheme.

[62] At the hearing, LBL indicated that it had no objection to the phrase "the appellant knowingly participated in the scheme" in paragraph 12(y) because LBL understands the defined term "scheme" to describe LBL selling the tobacco products to the MacNaughtons who then sold them to the Third Party Purchasers which is exactly what LBL says happened.

[63] I anticipate the meaning of the term "scheme" becoming a point of contention between the parties as they move forward into examinations for discovery and I therefore think it is worthwhile for me to clarify something at this point. Despite the poor drafting, it is clear to me in the context of the entire Fresh Reply as a whole that the Respondent was intending to define the "scheme" as being LBL's characterizing the MacNaughtons as purchasers of the tobacco products rather than as conduits or vehicles. The parties shall treat that as being the meaning of the term "scheme" for the purpose of conducting examinations for discovery.

Paragraphs 23 and 24:

[64] Paragraph 23 sets out why the Respondent says it is able to assess the periods in question despite their being statute barred. Paragraph 24 sets out why the Respondent says gross negligence penalties should be upheld. I have dealt with a number of LBL's objections to these paragraphs through some of the paragraphs that I have already struck. LBL's remaining objection to these paragraphs is rooted in its objection to paragraph 12(d). Its position is that, without paragraph 12(d), the Respondent did not have a sufficient factual basis to show that LBL had made a misrepresentation let alone that it was grossly negligent. Having found that paragraph 12(d) stands, there is no reason to strike paragraphs 23 or 24. I note however that, even if I had struck paragraph 12(d), I would still have found that the remaining facts as pled would have been sufficient that, if they were found to be true, a trial judge could potentially reach the conclusion set out in paragraphs 23 and 24.

Concessions

[65] During the hearing of the Motion, the Respondent conceded that the words "as far as the facts relate to Roberta MacNaughton" should be struck from paragraph 1 of the Fresh Reply.

[66] Issues involving paragraph 3 of the Fresh Reply were also resolved by the parties during the hearing of the Motion. LBL had originally sought to strike the

reference to paragraph 85 of the Notice of Appeal in paragraph 3 of the Fresh Reply. LBL withdrew its opposition to that reference. The Respondent conceded that the words "18 as far as the allegations of fact relate to individuals other than Roberta MacNaughton," should be struck from paragraph 3 of the Fresh Reply.

Summary

[67] Based on all of the foregoing, LBL's motion is granted in part. The following portions of the Fresh Reply are struck:

(a) the phrase "as far as the facts relate to Roberta MacNaughton" in paragraph 1;

(b) the words "18 as far as the allegations of fact relate to individuals other than Roberta MacNaughton," in paragraph 3;

(c) paragraph 7;

(d) paragraph 8;

(e) paragraph 9;

(f) all of the words in the preamble to paragraph 12 other than the phrase "the Minister relied on the following facts:";

(g) paragraph 12(k);

(h) paragraph 12(l); and

(i) paragraph 20.

[68] The Respondent shall have leave to amend paragraphs 7, 8 and 9 of the Fresh Reply in accordance with these Reasons for Judgment by filing an Amended Fresh Reply.

Process and Timing

[69] The Respondent shall serve and file its Amended Fresh Reply within 30 days of the date of these Reasons for Judgment.

[70] If LBL wishes to serve and file an Amended Amended Notice of Appeal to deal with the drafting problems in paragraphs 7, 8 and 9 it shall do so within 30 days of the Respondent filing the Amended Fresh Reply.

[71] If the Respondent wishes to serve and file an Amended Amended Fresh Reply to respond to any changes made to paragraphs 7, 8 and 9 in the Amended Amended Notice of Appeal it shall do so within 30 days of LBL filing the Amended Amended Notice of Appeal.

Costs

[72] The results in this Motion are mixed. Both parties share the blame for their pleadings being drafted in a less than ideal manner. In my view, the parties should have been able to resolve their differences on paragraphs 1, 3, 7, 8 and 9 and the preamble to paragraph 12 on their own. The Respondent was successful in defending her primary position but the need for that defence arose in the first place from the fact that the Respondent took vague and conflicting positions and stubbornly refused to commit herself until sometime in the middle of the second hearing when it became apparent to her which way the wind was blowing. Based on all of the foregoing, I award costs to LBL.

[73] The parties shall have 30 days to either advise the Court that they have reached a settlement as to the issue of costs on this Motion or to submit to the Court their written representations with respect to costs. In trying to reach a settlement, the parties may wish to bear in mind that I feel that appropriate costs would be an amount significantly greater than the tariff but significantly less than substantial indemnity.

Signed at Ottawa, Canada, this 14th day of May 2015.

"David E. Graham"

Graham J.

CITATION:	2015 TCC 115
COURT FILE NO.:	2012-4371(GST)G
STYLE OF CAUSE:	LBL HOLDINGS LIMITED
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	February 10, 2015
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	May 14, 2015

APPEARANCES:

Counsel for the Appellant:	David D. Robertson Amy Walsh
Counsel for the Respondent:	André LeBlanc Craig Maw

COUNSEL OF RECORD:

For the Appellant:

Name:	David D. Robertson Amy Walsh
Firm:	Couzin Taylor LLP Calgary, Alberta

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada