Docket: 2016-961(GST)G

BETWEEN:

LOHAS FARM INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 4 and 5, 2018, at Toronto, Ontario and on January 22, 2019 by videoconference, at Ottawa, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	**Bobby B. Solhi** Bhuvana Sankaranarayanan
Counsel for the Respondent:	Craig Maw Tony Cheung

JUDGMENT

(This Amended Judgment is issued in substitution of the Judgment dated September 19, 2019. The modifications deal only with the names of counsel for the appellant and the law firm. There are no changes to the content of the Judgment or the Reasons for Judgment.)

The appeal from the assessments made under Part IX of the *Excise Tax Act*, notices of which are dated December 10, 2015, May 11, 2015 and May 27, 2015, for the periods of October 1, 2011 to December 31, 2011, January 1, 2012 to January 31, 2012 and March 1, 2012 to March 31, 2012 is allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- There was an agency relationship between Lohas and the buyers.

- Lohas Farm Inc. did not meet the requirements of the *ITC Regulations* with respect to the name of the recipient or the name of the duly authorized agent of the recipient for the following periods:

    - for the period ending 2011, Lohas Farm Inc. is not entitled to claim ITCs of $18,642.

    - for the period ending on January 31, 2012, Lohas Farm Inc. is not entitled to claim ITCs of $1,090.32.

    - for the period ending on March 31, 2012, Lohas Farm Inc. is not entitled to claim ITCs of $1,623.71.

The appellant is awarded costs in accordance with the Tariff. If the appellant wishes to seek costs in excess of the Tariff, it may file submissions within thirty days from the date of this judgment.

Signed at **Montreal, Quebec**, this **9th** day of **December** 2019.

"Johanne D'Auray"

D'Auray J.

Citation: 2019 TCC 197
Date: 2019**1209**
Docket: 2016-961(GST)G

BETWEEN:

LOHAS FARM INC.,

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and

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REASONS FOR JUDGMENT

D'Auray J.

I. Overview

[1] During the periods under appeal, iPhones and iPads ("iPhones")[1] were released in Canada before they were released in Hong Kong and in Taiwan.

[2] The different release dates created a demand in Canada for newly released iPhones for resale in Hong Kong and Taiwan.

[3] Mr. Liu incorporated Lohas Farm Inc. ("Lohas" or the "appellant") in 2008. Lohas' main business is blueberry farming and the export of frozen blueberries. Mr. Liu is the sole director and shareholder of Lohas.

[4] Lohas is a registrant for the purposes of the Goods and Services Tax ("GST") and Harmonized Sales Tax ("HST").

[5] At the request of a former client in Hong Kong, Lohas purchased iPhones in Canada to export to Hong Kong and Taiwan.

[6] During the periods under appeal, Lohas purchased and exported more than 3500 iPhones to Hong Kong and Taiwan. To do so, Mr. Lui asked friends and acquaintances to purchase the iPhones ("the buyers").

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[1] I will refer to iPhones only, since the number iPads involved was relatively small.

[7] Lohas did not collect and remit GST/HST on the iPhones as they were exported but did claim input tax credits ("ITCs").

[8] Lohas' position is that it was entitled to claim ITCs as an agency relationship existed between it and the buyers.

[9] The respondent's position is that the buyers were resellers, not agents. As the resellers did not charge GST on the iPhones provided to Lohas, Lohas is not entitled to claim ITCs.

[10] In addition, the respondent's position is that the information provided by Lohas did not satisfy the requirements of the *Input Tax Credit Information (GST/HST) Regulations* (*"ITC Regulations")*.

II. Questions in issue

[11] Is Lohas entitled to claim the amount of $266,233.71 as ITCs for its reporting period ending December 31, 2011, $9,282.43 for its reporting period ending January 31, 2012 and $6,320.35 for its reporting period ending March 31, 2012 pursuant to subsection 169(4) of the *Excise Tax Act ("ETA")*?

[12] To determine the answer to this question, two underlying questions must be answered:

(1) Did an agency relationship exist between Lohas and the buyers?

(2) Did Lohas provide the information required under the ITC Regulations, in order for it to claim ITCs?

III. Facts

[13] Lohas was incorporated by Mr. Liu in British Columbia in 2008. During the periods under appeal, its main activity was the operation of an organic blueberry farming business, which included the freezing and exportation of blueberries.

[14] Mr. Liu immigrated to Canada from Taiwan in 2005.

[15] Prior to immigrating to Canada, Mr. Liu had worked in the information technology ("IT") sector in Taiwan.

[16] One of Mr. Liu's previous IT clients from Hong Kong asked him if his corporation, Lohas, could buy iPhones in Canada and export them to Hong Kong.

[17] Starting in March 2011, Lohas began purchasing iPhones for export. Initially Mr. Liu, his spouse and his daughter made the purchases for Lohas.

[18] In March 2011, Mr. Liu tried to purchase ten iPhones from an Apple Store. The salesperson told him he could purchase only two iPhones at a time but that he could always come back the next day to purchase more. Mr. Liu did not question the salesperson. He did not try to buy more than two phones at a time after that.

[19] In the fourth quarter of 2011, Apple released a new model of the iPhone – the iPhone 4S. To meet customer demand, Apple placed a limit on purchases of two devices per transaction.

[20] In order to meet the increased demand for the new iPhone from the client in Hong Kong, Mr. Liu decided in October 2011 to ask friends and acquaintances to purchase iPhones. To take advantage of the different release dates, a large quantity of the new iPhones had to be purchased in a short period of time.

[21] With respect to the reporting period from October 1, 2011 to December 31, 2011, Lohas exported 3,597 iPhones to its client in Hong Kong. It reported taxable sales of $0 and claimed ITCs of $281,557.77.

[22] The Minister of National Revenue (the "Minister") disallowed ITCs of $266,233.71 for the reporting period from October 1, 2011 to December 31, 2011. No adjustment was made to the taxable sales of Lohas by the Minister.

[23] With respect to the reporting period from January 1, 2012 to January 31, 2012, Lohas exported 151 iPhones to its client in Hong Kong and Taiwan. It reported taxable sales of $0 and claimed ITCs of $11,802.43.

[24] The Minister disallowed ITC's of $10,542.43 for the reporting period from January 1, 2012 to January 31, 2012. No adjustment was made to the taxable sales of Lohas by the Minister.

[25] With respect to the reporting period from March 1, 2012 to March 31, 2012, Lohas exported 96 iPads to its clients in Hong Kong and Taiwan. It reported taxable sales of $0 and claimed ITCs of $7,659.54.

[26] The Minister disallowed ITCs of $6,989.99 for the reporting period from March 1, 2012 to March 31, 2012. No adjustment was made to the taxable sales of Lohas by the Minister.

[27] The Minister allowed ITCs for the periods in question on purchases made from retail resellers such as Best Buy and Future Shop. Some purchases made by buyers, who were registrants under the *ETA* and had valid GST numbers, were also accepted. As they are not in issue, I will not comment any further on these purchases.

IV. Analysis

[28] Before examining whether an agency relationship existed between Lohas and the buyers, I first have to consider the following preliminary issues:

(1) Who bears the burden of proof?

(2) Are the assumptions in the Reply to Notice of Appeal properly pled?

(1) *Who bears the burden of proof?*

[29] Lohas argues that the burden of proof lies on the respondent for failing to properly plead the assumptions of fact made by the Minister in her Reply to Notice of Appeal. To place this issue in context, I will examine first the general principles regarding the burden of proof.

[30] In tax appeals, as a general rule, the burden of proof rests on the taxpayer. The basic principles regarding the burden of proof are summarized by the Federal Court of Appeal in *House*:[2]

> [30] In determining the issue before us, it is important to keep in mind the Supreme Court of Canada's decision in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 (*Hickman*), where Madam Justice L'Heureux-Dubé enunciated, at paragraphs 92 to 95 of her Reasons, the principles which govern the burden of proof in taxation cases:
>
> > 1. The burden of proof in taxation cases is that of the balance of probabilities.

[2] *House v Canada*, 2011 FCA 234.

> 2. With regard to the assumptions on which the Minister relies for his assessment, the taxpayer has the initial onus to "demolish" the assumptions.
>
> 3. The taxpayer will have met his initial onus when he or she makes a prima facie case.
>
> 4. Once the taxpayer has established a prima facie case, the burden then shifts to the Minister, who must rebut the taxpayer's prima facie case by proving, on a balance of probabilities, his assumptions (…).
>
> 5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.

[31] The "assumptions" mentioned by the Federal Court of Appeal in *House* are assumptions of fact only: assumptions of law or assumptions of mixed fact and law should not be included in the recitation of the Minister's factual assumptions. As was stated by the Federal Court of Appeal in *Anchor Pointe Energy Ltd*.:[3]

> [24] Paragraph 10(z) was struck by Rip J. for an additional reason. He considered it to be a conclusion of law "that has no place among the Minister's assumed facts".
>
> [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] However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(a) involves the application of the law to the facts. Paragraph 66.1(6)(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. 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.

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[3] *Canada v Anchor Pointe Energy Ltd*., 2003 FCA 294.

[32] In *Shaughnessy*,[4] former Chief Justice Bowman made the following comments regarding the extent of the respondent's duty to plead assumptions:

> [13] […] The pleading of assumptions involves a serious obligation on the part of the Crown to set out honestly and fully the actual assumptions upon which the Minister acted in making the assessment, whether they support the assessment or not. Pleading that the Minister assumed facts that he could not have assumed is not a fulfilment of that obligation. The court and the appellant should be entitled to rely upon the accuracy and completeness of the assumptions pleaded. Sadly, this is becoming increasingly difficult. The entire system developed in our courts relating to assumptions and onus of proof is in jeopardy if the respondent does not set out the actual assumptions on which the assessment is based with complete candour, fairness and honesty.

[33] Recently in *Sarmadi*,[5] Justice Webb of the Federal Court of Appeal questioned the principles set out by Justice L'Heureux-Dubé in *Hickman Motors Ltd.* (cited in *House* above). Justice Webb stated that in tax cases, the Court, after hearing all of the evidence, has to determine whether the taxpayer has proven on a balance of probabilities that the facts assumed by the Minister are incorrect.[6] Justice Webb held that the burden does not shift to the Minister − either the taxpayer proves that the assumptions of fact made by the Minister in assessing the taxpayer are incorrect or not. Justice Webb stated as follows at paragraphs 31 and 63 of his reasons:

> [31] In my view, the taxpayer has the onus of proving, on a balance of probabilities, for any facts that are in dispute:
>
> (a) such facts as are alleged by the taxpayer in their notice of appeal; and
>
> (b) subject to certain exceptions, that such facts as assumed by the Minister in reassessing the taxpayer are not true…
>
> […]
>
> [63] Once all of the evidence is presented, the Tax Court judge should then (and only then) determine whether the taxpayer has satisfied this burden. If the taxpayer has, on the balance of probabilities, disproven the particular facts assumed by the Minister, based on all of the evidence, there is no burden to shift to the Minister to disprove what the Tax Court judge has determined that the

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4 *Shaughnessy v The Queen*, 2002 DTC 1272

5 *Sarmadi v The Queen*, 2017 FCA 131

6 With respect to the facts within the knowledge of the taxpayer.

> taxpayer has proven. Either the taxpayer has disproven the assumed facts or he, she or it has not.

[34] While agreeing in the result, the other members of the Federal Court of Appeal in *Sarmadi* took no position on the principles governing burden of proof. Justice Stratas expressly declined to express a definitive opinion on the issue stating that, before reaching a conclusion on such a fundamental issue, he preferred having the insights of commentators, the judges of the Tax Court and the assistance of counsel in a future appeal where the issue would be raised.

[35] In *Morrison*,[7] Justice Owen of this Court undertook a thorough analysis of the Supreme Court of Canada's decisions dealing with burden of proof. He held that the persuasion burden cannot shift from the taxpayer to the Minister. Justice Owen stated the following at paragraphs 94 to 97 of his reasons:

> [94] L'Heureux Dubé J. [in Hickman Motors Ltd v the Queen, [1997] 2 SCR 336] states at paragraphs 92, 93 and 94:
>
> > It is trite law that in taxation the standard of proof is the civil balance of probabilities . . . and that within balance of probabilities, **there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter.** . . . The Minister, in making assessments, proceeds on assumptions. . . . and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment . . . . The initial burden is only to "demolish" the exact assumptions made by the Minister but no more . . .
> >
> > This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case . . . .
> >
> > Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the *prima facie* case" made out by the appellant and to prove the assumptions: . . . . Hence, in the case at bar, the onus has shifted to the Minister to prove its assumptions that there are "two businesses" and "no income". [Emphasis already added]
>
> [95] L'Heureux-Dubé J. restates the principle from *Johnston* that the taxpayer is only required to demolish the precise assumptions of fact made by the Minister. L'Heureux-Dubé J. also acknowledges that the persuasive burden on the taxpayer must be met on a balance of probabilities. L'Heureux-Dubé J. goes on to state that

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7 *Morrison v The Queen*, 2018 TCC 220.

> this burden may be discharged by presenting a *prima facie* case and that the discharge of taxpayer's burden results in a persuasive burden on the Minister. L'Heureux-Dubé J.'s remarks regarding a *prima facie* case being sufficient to demolish the assumptions of fact appear to be predicated on her view that "within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus".
>
> [96] With respect, the subsequent decisions of the Supreme Court of Canada in *McDougall* and *Merck Frost* have made clear that there is only one civil standard of proof—on the balance of probabilities—and that while the evidence required to meet this standard is dependent on all the circumstances, the standard itself does not vary. Moreover, the term "*prima facie* case" is typically used to describe an evidential burden and not a persuasive burden. Paciocco and Stuesser, the authors of *The Law of Evidence* (7th ed., 2015) describe the *prima facie* case standard as follows:
>
> > The *prima facie* case standard is an important example of an "evidential burden." It is used as a screening process to see whether it is justifiable and sensible to have a case go to the trier of fact who is designated by law to give an ultimate factual decision on the matter. . . .
>
> [97] *Anderson Logging* and *Johnston* assign the persuasive burden relating to the correctness of the assessment to the taxpayer. With respect, this persuasive burden cannot be "shifted" to the Minister and there is no presumption or statutory rule that upon the taxpayer's satisfaction of the persuasive burden places a separate evidential burden or persuasive burden on the Minister.

[36] I agree with Justice Webb's comments in *Sarmadi* and Justice Owen's in *Morrison*. The persuasive burden relating to the correctness of an assessment should not shift between the taxpayer and the Minister with respect to facts that are within the knowledge of the taxpayer. As in any civil case, once the evidence is heard, the judge must make a determination as to whether, on a balance of probabilities, the taxpayer has met the burden of proof.

[37] However, given that the test set out by Justice L'Heureux-Dubé in *Hickman Motors Ltd*. is still applied by the Courts. I will apply it in this appeal. I should note that my decision would be no different had I applied the approach set out by Justice Webb in *Sarmadi* and Justice Owen in *Morrison*.

(2) *Are the assumptions of fact in the Reply to Notice of Appeal properly pled?*

[38] Lohas takes issue with some of the assumptions relied upon by the Minister in the Reply to the Notice of Appeal (the "Reply"). It argues that assumptions that are of mixed fact and law refer to facts outside its knowledge, or that were not set out in the Reply are improper. As a result, Lohas argues that the burden of proof should shift to the Minister.

[39] The respondent argues that even if some assumptions are improper and must be disregarded, the Minister's remaining assumptions of fact are sufficient to uphold the assessment. Therefore, the burden of proof is on Lohas to establish that there was an agency relationship between it and the buyers.

(i) Assumption at subparagraph 26(g) of the Reply states: *The [buyers] were not employees or agents of the appellant.*

[40] The respondent's counsel admitted at trial that the assumption at subparagraph 26(g) is an assumption of mixed fact and law, and therefore improper.

[41] I agree with the respondent's concession. However, I do not agree with Lohas that this results in the burden of proof shifting.

[42] As the respondent points out, even without the assumption at subparagraph 26(g), other assumptions made by the Minister are sufficient to uphold the assessments. More particularly, the assumptions of fact at paragraphs 26(e), 26(f), 26(h) and 26(i) of the Reply are capable of sustaining them:

> 26e) the iPhones and iPads that the Appellant exported were primarily purchased from individuals [the "Buyers"] who had purchased them from Apple;
>
> 26f) the purchase and sale contracts for the iPhones were between Apple Inc. and the [Buyers];
>
> 26h) the [Buyers] who purchased the iPhones and iPads were not registered for GST purposes;
>
> 26i) the [Buyers] did not charge the Appellant GST/HST on the sale of the iPhones and iPads.

[43] Therefore, I am of the view that Lohas retains the burden of establishing that the above assumptions of fact are incorrect. Lohas must establish that the buyers were not resellers of iPhones but acted as agents of Lohas in purchasing the iPhones.

(ii) Assumption at paragraph 26(j) of the Reply states that: *Apple Inc. was not aware that the [buyers] were purchasing the iPhones and iPads to resell them to the appellant.*

[44] Lohas argues that this assumption of fact does not benefit from a presumption of correctness since it refers to an unrelated third party, namely Apple Inc.

[45] The presumption of correctness of the Minister's factual assumptions and the resulting burden cast on the taxpayer is based on the premise that the facts are normally within the taxpayer's knowledge, since the taxpayers affairs or business are under scrutiny.[8] Assumptions of fact that are not exclusively or peculiarly within the taxpayer's knowledge may not benefit from the presumption of correctness.

[46] The assumption at paragraph 26(j), deals with the mindset of Apple's salespeople, namely whether Apple "was aware or not aware" that the buyers were purchasing iPhones to resell them to Lohas. As was pointed out in *Leung*,[9] the Minister cannot plead as an assumption a fact that the taxpayer could not reasonably be expected to either prove or disprove. Therefore, this assumption does not benefit from the presumption of correctness.

(iii) Assumptions made by the Minister, but not included in the Reply

[47] There are three components for an agency relationship to exist, namely: both the principal and the agents must consent to the relationship; the agents must have the power to bind and affect the principal's legal position and the principal must have the ability to exercise control over the agents.

[48] Based on the testimony of, Ms. MacNaughton, auditor at CRA, Lohas argues that the Minister relied on assumptions of fact in assessing Lohas that were not

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8 See *Canada v Anchor Pointe Energy Ltd*., [2008] 1 FCR 839, 2007 FCA 188, par. 35; *Orly Automobiles Inc. v Canada*, [2005] FCA 425, par. 20.

9 *R v Leung*, [1993] 2 CTC 284 (FCTD).

included in the Reply to Notice of Appeal. Lohas submits that the assumptions of fact should have included that the Minister, in assessing Lohas, took into account:

- that both Lohas and the buyers agreed to form an agency relationship, namely, the buyers agreed to buy iPhones on behalf of Lohas ("consent");

- Lohas instructed and gave directions to the buyers ("control").

[49] Ms. MacNaughton is an auditor with the Canada Revenue Agency. She was responsible for auditing Lohas for the periods ending in 2012 but not for those ending in 2011. She was the respondent's nominee at the examination for discovery and therefore had to familiarize herself with, and answer questions relating to, not only the 2012 periods, but also the 2011 ones. In her testimony, she indicated that in her view the consent and control elements were established. However, Ms. MacNaughton was of the view that an agency relationship did not exist between Lohas and the buyers because the agents were not able to affect the principal's legal position.

[50] That said, contrary to Lohas' position, I am of the view that her testimony is not determinative of the issue since the existence of the agency elements is one of law for the Court to determine.

[51] As I have already stated in these reasons, the respondent improperly pleaded in her Reply, as an assumption of fact, the conclusion that *"the Buyers were not the Appellant's employees or agents"*. I also explained that while I will not consider this particular assumption as an assumption of fact that benefits from the presumption of correctness, I found that the other assumptions of fact assumed by the Minister in her Reply, were sufficient to support the validity of the assessment. Accordingly, Lohas has the burden of establishing that there was an agency relationship between it and the buyers.

[52] Lohas also argues that it was improper for the respondent not to plead, in her Reply, assumptions of fact that favour its position that an agency relationship existed, namely that the consent and the control elements were satisfied.

[53] In tax appeals, there is no doubt that a thorough disclosure of all assumptions is to be made by the respondent. For example, in *Mungovan,*[10] former Chief Justice Bowman stated:

> [15] The respondent has an obligation to disclose all of the facts upon which the assessment was based. Conceivably some of the facts assumed are wrong or irrelevant. They should still be disclosed. I would not wish to discourage the full disclosure of facts. The mere fact that the lawyer drafting the reply may have thought an assumption was wrong, irrelevant or embarrassing to the Crown's case is no reason for failing to disclose it. Indeed, in *Bowens v. The Queen*, 94 D.T.C. 1853, aff'd 96 D.T.C. 6128, the effect of failing to plead assumptions that were central to an assessment was discussed. The Federal Court of Appeal at p. 6129 suggested that the Crown's Reply might have been struck out for failing to plead a fact that was at the basis of the assessment.

[54] Lohas argues that if the respondent had pleaded that the consent and control elements for forming an agency relationship had been met, Lohas would have benefitted from the presumption of correctness attributed to the assumptions of fact for those two elements. Lohas further argues that even though these assumptions were not pleaded in the Reply, it should benefit from the presumption of correctness on them, as they should have been pleaded. Accordingly, Lohas submits that there is a reversal of the burden of proof on consent and control and that the respondent must establish that they did not exist.

[55] A similar argument on unpleaded assumptions was made before the Federal Court of Appeal in *Bowens*[11], where the Court stated:

> The judge also took the view that the Crown had the burden of showing that the taxpayer and Trilogy were at arm's length. If we understand him correctly, this was because of the mutually contradictory but unpleaded assumptions which had been made in the reassessment process and in particular the initial assumption that the relationship was non-arm's length. <u>While we agree with the result, the reasoning is, with respect, wrong: as we made clear in *Pollock vs. The Queen*, 94 DTC 6050, unpleaded assumptions can have no effect on the burden of proof one way or the other. The reason the Crown bore the burden in this case of proving that Trilogy and the taxpayer were at arm's length is that was a fact on which the validity of the reassessment depended, and since no assumption to that effect had been pleaded the Crown did not have the benefit of any reversal of onus</u>.[12]
>
> [Emphasis Added.]

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10 *Mungovan v Canada*, [2001] TCJ No. 445.

11 *R. v Bowens*, 96 DTC 6128.

12 Id., p 6129.

[56] Unlike *Bowens*, the validity of the assessment in this appeal depends not only on whether the consent and control elements of an agency relationship existed, but also on whether the buyers had the ability to affect Lohas' legal position. In addition, as I have stated previously in my reasons, the assumptions of fact in paragraphs 26(e), 26(f), 26(h) and 26(i) of the Reply are sufficient to uphold the assessment. Therefore, I do not agree with Lohas that there is a shifting of the burden.

[57] Moreover, as stated by the Federal Court of Appeal in *Pollock*,[13] unpleaded assumptions can have no effect on the burden of proof one way or the other.

[58] However, to paraphrase former Chief Justice Bowman in *Shaughnessy*,[14] I do not wish to encourage incomplete, reserved or "dishonest" disclosures of the Crown's factual assumptions. Therefore, while the unpleaded assumptions do not affect the burden of proof, I need to keep in mind their effect on Lohas in marshalling its evidence with respect to the appeal.

[59] The respondent asked me to draw a negative inference against Lohas on the existence of the consent and control elements as it failed to call any of the buyers as witnesses. I will not do so as it would be unfair to Lohas.

[60] The respondent's witness, Ms. MacNaughton, who was the respondent's nominee at the examination for discovery, stated during discovery that, in assessing Lohas, the Minister had assumed that the consent and control elements existed. Although I have found that her view of the existence of these elements is not determinative, Lohas relied upon Ms. MacNaughton's answers in preparing its case and it would be unfair to draw an inference against it for failing to call evidence on the issues.

(3) Did an agency relationship exist?

[61] There is no dispute, for the purposes of the *ETA* that a principal is entitled to claim ITCs in respect of supplies purchased by its agents on its behalf. Therefore, if I find that there was an agency relationship between Lohas and the buyers, Lohas would be able to claim its ITCs, provided it satisfied the *ITC Regulations* regarding information.

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13 *Pollock v The Queen*, 94 DTC 6050.

14 *Shaughnessy v The Queen*, 2002 DTC 1272.

[62] Here, there is no written agreement between Lohas and the buyers. As a result, the conduct of Lohas and the buyers must be scrutinized to determine if an agency relationship existed by implied contract.

[63] The only witness who testified as to the conduct of the parties was Mr. Liu. I found him to be a credible witness.

[64] In the leading textbook on agency, *Canadian Agency Law*, *G.H.L.* Fridman[15] discusses the creation of an agency relationship by implied contract in these terms:

> As with other contracts, the agency relationship may be impliedly created by the conduct of the parties, without anything having been expressly agreed as to terms of employment, remuneration, *etc*…. The assent of the agent may be implied from the fact that he has acted intentionally on another's behalf. In general, however, it will be the assent of the principal which is more likely to be implied…. Such assent may be implied where the circumstances clearly indicate that the principal has given authority to another to act on his behalf. This may be so even if the principal did not know the true state of affairs. Mere silence will be insufficient. There must be some course of conduct to indicate the acceptance of the agency relationship. The effect of such an implication is to put the parties in the same position as if the agency had been expressly created.

[65] In *GEM Health Care Group Ltd*.[16] Justice Sommerfeldt referred to the decision of Justice Hogan in *Fourney*,[17] where the concept of an implied agency relationship was also discussed:

> [29] In *Fourney v The Queen*, Hogan J stated that "the test for finding an agency relationship in the absence of a written agreement is restrictive; it requires evidence of the necessary conduct." He quoted portions of Professor Fridman's comments in respect of implied agency, as set out in an earlier edition of the above-mentioned textbook on agency law, and stated a few principles pertaining to implied agency. Several of those principles are paraphrased as follows:
>
> > a) In the absence of a written agency agreement, a court must closely examine the conduct of the parties to determine whether there was an implied intention to create an agency relationship.

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15 GHL Fridman, *Canadian Agency Law*, 2ed, (Markahm: LexisNexis Canada Inc. 2012), p. 40-41.

16 *GEM Health Care Group Ltd v The Queen*, 2017 TCC 13.

17 *Fourney v The Queen*, 2011 TCC 520.

> b) In reviewing the conduct of the alleged principal and the alleged agent, a key consideration is to determine the level of control which the former exerted over the latter.
>
> c) The alleged principal's control over the actions of the alleged agent may be manifested in the authority given by the former to the latter. In other words, the concepts of authority and control sometimes overlap.
>
> d) Where it is alleged that a corporation is acting as the agent of its shareholders, a high threshold of evidence is needed.

[66] The views of the Canada Revenue Agency in respect of implied agency relationships are similar and are set out set out in Policy Statement P-182R:[18]

> Agency exists where one person (the principal) authorizes another person (the agent) to represent it and take certain actions on its behalf. The authority granted by the principal may be express or implied. In other words, an agency relationship may be created where one person explicitly consents to having another act on its behalf or behaves in such a way that consent is implied....
>
> While two parties may agree that one party is to act as agent with respect to transactions undertaken on behalf of the other party, the absence of such an agreement is not sufficient to conclude that an agency relationship does not exist.
>
> Although the intention of the parties is an important determinant of the nature of the relationship between the parties, case law supports the possibility that two parties may be engaged in an agency relationship without even being aware of it, provided their actions indicate that one party is acting as agent on behalf of another. In other words, agency is generally evident from the conduct of the parties.

[67] Justice Dawson of the Federal Court of Appeal in the decision of *Club Intrawest*, lists the components of an agency relationship:

> With respect to agency relationships generally, citing *Royal Securities Corporation Ltd. v. Montréal Trust Co. et al.*, [1967] 1 O.R. 137 at page 155, [1996] O.J. No. 1078 at paragraph 55; aff'd [1967] 2 O.R. 200, [1967] O.J. No. 997 (Ont. C.A.), the Tax Court correctly noted that the three generally accepted components of an agency relationship are:
>
> i. Both the principal and the agent consent to the agency relationship.

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[18] Justice Dawson in *Club Intrawest v Canada*, 2017 FCA 151, stated that the policy statement of CRA found in P-182R on Agency, although not binding upon the Court is also a useful tool to determine if one person acts as an agent for another person.

> ii. The principal grants authority to the agent allowing the agent to affect the principal's legal position.
>
> iii. The principal controls the agent's actions.

[68] I will examine each component of an agency relationship taking in account the abovementioned law on agency and the facts in this appeal.

(iv) Both the principal and the agent consent to the agency relationship.

[69] Mr. Liu personally knew the buyers he asked to purchase iPhones on behalf of Lohas. He stated that he trusted these people since they were friends or acquaintances who were part of his Buddhist Community. Many of them were students. He stated that they had visited his farm and had helped him there.

[70] When Lohas required iPhones, Mr. Liu called the buyers and asked them to purchase as many iPhones as they could. Mr. Liu stated that he could have bought the iPhones himself. However, due to Apple limiting purchases to two iPhones per transaction and the short time limit within which the iPhones had to be bought, Mr. Liu decided to ask the buyers to purchase iPhones on behalf of Lohas.

[71] The buyers trusted Mr. Liu, in the sense that they were buying expensive devices using their own credit cards or cash. Mr. Liu stated that he guaranteed the buyers that they would be reimbursed for every iPhone they purchased even if there was a decrease in the demand for iPhones from the client in Hong Kong.

[72] Mr. Liu stated that if an accident occurred which damaged the iPhones while in the possession of the buyers, he would have felt obligated to pay the buyers for the iPhones. This never occurred. Mr. Liu further stated that Lohas did not have any insurance to cover damages on the iPhones while in possession of the buyers.

[73] Mr. Liu explained that once a buyer purchased the iPhones, and he or she had a fair number of iPhones, the buyer would call Mr. Liu to let him know. Mr. Liu would schedule a meeting with the buyer. Mr. Liu chose to meet the buyer either close to an Apple store, or at the parking lot of a financial institution, either HSBC or TD Canada Trust ("TD"). Mr. Liu had asked the buyers to open an account at HSBC or at TD to facilitate the transaction, namely the transfer of money. Mr. Liu stated that Lohas started to use bank drafts in October 2011. At times, Lohas paid some buyers in cash. However, the general practice was to use bank drafts to pay for the iPhones and the commissions.

[74] Before paying a buyer, Mr. Liu would inspect each iPhone box, noting the serial number of the iPhone ("IMEI") and ensuring that the IMEI on the iPhone box matched the IMEI on the receipt. The buyers would give him the Apple store receipts as they were needed for export purposes. Mr. Liu always asked for the buyer's ID to ensure that the bank draft was issued using the buyer's legal name. Mr. Liu explained that in his community, people tend to use chosen names as opposed to their given legal names. He stated that he knew the names the buyers were commonly using were not necessarily their legal names.

[75] According to Lohas, the consent element with the buyers was crystallized when the buyers brought Mr. Liu the iPhones. Between October 2011 and the end of December 2011, 3,597 iPhones were purchased by the buyers and Mr. Liu. They were then exported by Lohas to Hong Kong and Taiwan. Lohas submitted that the testimony of Mr. Liu and the documentary evidence filed at trial were sufficient to establish that the consent element for an agency relationship was satisfied.

[76] The respondent argued that Mr. Liu's testimony was not sufficient to establish that the buyers agreed to act as agents of Lohas. The respondent submitted that it is impossible to establish the consent of both parties to an oral contract, when one party, here the buyers, has not been called as a witness. The respondent did not submit any jurisprudence on this point.

[77] The respondent noted that Mr. Liu asked the buyers to buy as many iPhones as they could. According to the respondent, while this establishes that Mr. Liu wanted to buy a large number of iPhones in a short period of time, it does not establish that the buyers consented to an agency relationship.

[78] The respondent further argued that Mr. Liu's answers on cross-examination established that the buyers were resellers and not agents of Lohas. On cross-examination, Mr. Liu admitted that he did not tell the buyers that they would be acting as agents of Lohas. Also, he was not able to say how many buyers were acting as Lohas' agents. Although, he stated that he could calculate how many agents Lohas had by reviewing its journal.

[79] In addition, the respondent noted that the commissions the buyers would receive from Lohas for purchasing iPhones were not set in advance between the parties.

[80] The respondent also pointed out that Mr. Liu testified that he did not care who bought the iPhones on behalf of Lohas. He was aware that the buyers were using their friends to buy iPhones but that did not matter to him.

[81] Finally, the respondent noted that it also did not matter to Mr. Liu if the names on the Apple store receipts were missing, fictitious or unreliable. While aware of this, Mr. Liu did not mind as long as he was provided with iPhones to export.

[82] On the basis of the above, the respondent argues, that that the buyers were buying the iPhones and reselling them to Mr. Liu and the relationship was not one of agency.

[83] Despite the respondent's argument, in my view, Lohas has established that the buyers consented to buy iPhones on its behalf. The following satisfies me on this point.

[84] Mr. Liu advised the buyers when to purchase iPhones and when to stop buying them. Mr. Liu stated when the demand was decreasing, he told the buyers to stop buying.

[85] Mr. Liu testified that Lohas had an obligation towards the buyers to pay for the iPhones that they purchased. There was a mutual understanding that Lohas would reimburse and pay a commission with respect to every iPhone purchased, even if the buyers bought more phones than the Hong Kong client required.

[86] Mr. Liu stated that if the phones had been damaged while in the possession of the buyers, Lohas would have reimbursed the buyers as he had guaranteed the buyers that they would be reimbursed for the iPhones. Counsel for Lohas argued that the buyers could have easily sued Lohas if it had refused to reimburse the buyers.

[87] It is very unlikely that the buyers would have purchased such expensive phones without an agreement that they would be reimbursed and paid a commission.

[88] While Mr. Liu stated that he did not use the word "agent" with the buyers, he also stated that the buyers knew that were buying iPhones on behalf of Lohas. Mr. Liu stated that he never asked the buyers to lie if they were asked at the Apple

store why they were buying so many iPhones. In addition, Mr. Liu stated that the buyers knew that the iPhones would be sold and exported to the Lohas client.

[89] As acknowledged in the policy P182R of the Canada Revenue Agency (the "CRA"), it is possible that two parties may be engaged in an agency relationship without being aware of it, provided their actions indicate that one party is acting as an agent on behalf of another. Therefore, even if the buyers did not know that they were buying on behalf of Lohas, which is not the case in this appeal, I could still have decided that an agency relationship existed based on the conduct of the parties.

[90] Mr. Liu stated that he may not have cared about the names on the Apple store receipts, but he cared about the people to whom he was making the payments. The bank drafts were issued to the buyers that Mr. Liu was dealing with, namely the buyers that he called for the purchase of iPhones. It was the same buyers who Mr. Liu met at HSBC or TD to pick up the iPhones and to reimburse for having purchased the iPhones. Mr. Liu also asked these buyers to open an HSBC or a TD account, so that a bank draft could be issued immediately and to facilitate the transfer of money between Lohas and the buyers. Mr. Liu also ensured that the legal names of the buyers were properly written on the bank drafts. All the bank drafts with the name of each buyer were filed in evidence by Lohas, effectively proving that the buyers had purchased the iPhones and had been paid a commission for buying the iPhones.

[91] Mr. Liu was also meticulous in the way he reported the iPhone transactions. He prepared multiple reports: Mr. Liu kept a journal for Lohas, where the name of the buyer, the cost for the iPhones, the GST/HST paid and the commissions paid to the buyers were recorded. He also took a picture of every iPhone that the buyers purchased. He ensured that the buyers were giving him all the Apple store receipts, the latter were all filed in evidence.

[92] Mr. Liu also prepared a report where he recorded on behalf of Lohas, the date of the transaction, the name of the buyer, and the amount that the bank draft issued to the buyer. The report also included the GST/HST component and the commission paid to the buyer. Each transaction in that report could be referenced to the Apple store receipts. A similar report was also prepared for the transactions paid in cash, although the report for cash transactions did not always indicate the name of the buyers.

[93] The commissions paid to the buyers were not agreed to in advance by Lohas and the buyers. Mr. Liu stated that he had never negotiated the commissions with the buyers; instead the commissions were fixed by him. He stated the commissions were based on the time that the buyers waited in line for buying the iPhones, the demand for iPhones, and the amount Lohas received for the iPhones from its client in Hong Kong. Mr. Liu stated that the commissions were never based on how many iPhones the buyers purchased. The average commission paid in the last quarter of 2011 was $12.68 per iPhone. For the two periods in 2012, the average commission was $7.29 per iPhone.

[94] In my view, the fact that the commissions were left at the discretion Mr. Liu does not affect the consent component, since the evidence showed that the buyers accepted that the commissions would vary for each transaction.

[95] The evidence also showed that some of the buyers used their friends to buy iPhones (sub agents). Again, the task of buying an iPhone is not a complex one. Mr. Liu was aware that the buyers were asking their friends and it did not matter to him, as long as the iPhones were purchased. Sub-agency is a recognized common law concept.

[96] In light of the evidence, it cannot be said that the buyers were trading on their own account. They were not resellers as argued by the respondent. In my view, both the buyers and Mr. Liu agreed that the buyers would purchase iPhones on behalf of Lohas. The latter guaranteed that it would reimburse the buyers for every iPhone that they purchased and pay a commission even if the demand for iPhones decreased. The evidence showed that the buyers purchased and delivered the iPhones to Lohas for export purposes.

[97] Although Mr. Liu was the only witness, his testimony was confirmed by the documentary evidence filed at trial. The consent element for an agency relationship was therefore satisfied.

> (ii)The principal grants authority to the agent allowing the agent to affect the principal's legal position.

[98] The respondent argued that Apple would have refused to sell to the appellant/buyers or would have cancelled any order placed by the appellant/buyers if it became aware that the appellant/buyers were purchasing the iPhones for export. Therefore, the appellant could not grant authority to the buyers allowing them to affect its legal position.

[99] In support, the respondent points to the decision of Justice Bocock in *2253787 Ontario Inc.*[19] The respondent submitted that the decision, although heard under the informal procedure, is informative given the nearly identical facts to this appeal. In *2253787 Ontario Inc.*, the appellant also mobilized a group of individuals to acquire Apple iPhones from Apple retailers for export overseas.

[100] While I recognize that that appellants in *2253787 Ontario Inc*. acquired iPhones to export overseas, the facts of the appeals depart in other ways. The appeal before me has a different Apple sales policy, and the benefit of voluminous supporting documentation.

(a) Evidence regarding the Apple store policy

[101] In *2253787 Ontario Inc.*, Justice Bocock referred to two policies: an Apple Sale and Refund Policy and a Retail Store Purchase Policy. The Sale and Refund Policy stated:

> "Canadian Sales to End-Users Only
>
> The Apple Store will only sell and ship product within the boundaries of Canada. No Shipments can be made to P.O. Box addresses outside Canada. Products purchased at the Apple Store may not be exported."
>
> "Sales to End – Users Only
>
> The Apple Store sells and ships to end-user customers only. You may not purchase for resale. Apple reserves the right to refuse or cancel your order if Apple suspects you are purchasing for resale"
>
> [Emphasis added.]

[102] The Apple policy wording is not the same as the one that Justice Bocock had before him in *2253787 Ontario Inc.* Here, the policy entered into evidence is titled the *Apple Retail Store Purchase Policy*. The wording of the policy is not as clear as it was in *2253787 Ontario Inc.* The policy states as follows:

> "Consumers Only

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19 *2253787 Ontario Inc. v R*, 2014 TCC 121.

> The Apple store sells and ships products to end-user customers only and we reserve the right to refuse or cancel your order if we suspect you're purchasing the products for resale."

[103] Further, while not expressly stated in the policy document on record, the parties agree that the Apple store policy during the relevant period limited a single customer to the purchase of two iPhones per transaction.

[104] Ms. MacNaughton testified that, when preparing the assessment, her concerns about the appellant's entitlements to ITCs for Apple iPhones flowed from restrictions in the Apple store policy. Ms. MacNaughton understood that the Apple store could only sell two phones to a customer and the phones were only for end-use services. She concluded that the buyers didn't have the ability to affect the principal's legal position because, "*if the agents explain[ed] why they were buying the phones to Apple, Apple shouldn't have sold them, so to me that meant they couldn't be agents.*"[20] Ms. MacNaughton never contacted Apple.

[105] Mr. Liu testified that, during his first visit to the Apple store, he attempted to purchase 10 iPhones in a single transaction and was informed by the sales person that he could only purchase two iPhones per day. He continued to purchase iPhones, but he did not attempt to purchase more than two iPhones per day.

[106] During the October 1, 2011 to December 31, 2011 period the appellant and the buyers purchased 3,597 iPhones. The evidence established the following:

1) Buyers were required to provide a name, contact information, and payment information when making a purchase from an Apple store. Some buyers used fictitious names and email addresses while others consistently provided accurate personal details. The payment methods used by the buyers were credit cards and cash.

2) Buyers were able to purchase between four to twelve iPhones per transaction and these transactions occurred at four different Apple Store locations in the Metro Vancouver area. In total, 136 iPhones were purchased in 31 transactions, all of which exceeded the two iPhone per transaction limit. This averages to 4.4 iPhones per transaction for this set of transactions. Approximately 3.8%

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[20] Transcript of Proceedings, 2016-6919(GST)G on October 5, 2018, vol 1, at p 66, lines 25-28 and p 67, lines 1-6. [Vol I Transcript].

of all iPhones purchased during this period (i.e. 3,597) were purchased in direct violation of the two iPhone per transaction limit.

3) Buyers were able to purchase two iPhones in a consecutive series of transactions over short periods of time. Many buyers made multiple transactions to buy four to eight iPhones on any given day. Three notable examples include:

    a) A buyer made 11 similar transactions, purchasing two 16GB iPhones each time, on December 21, 2011 at an Apple store between 4:10 pm and 6:04 pm.[21] In total, 22 iPhones were purchased by the same buyer in under two hours.

    b) A buyer made 12 distinct transactions to purchase two 16GB iPhones on December 24, 2011 at an Apple Store between 1:13 pm and 3:35 pm.[22] In total, 24 iPhones were purchased by the same buyer in less than two and a half hours. Some transactions occurred one or two minutes apart.

    c) A buyer made 17 distinct transactions to purchase two 16GB iPhones on December 14, 2011 at an Apple Store between 4:36 pm and 8:08 pm.[23] In total, 34 iPhones were purchased by the same buyer in approximately three and a half hours. Some transactions occurred four or five minutes apart.

4) Buyers also purchased iPhones in the same manner as the appellant − two iPhones per day.

[107] Mr. Liu's evidence is that the Apple policy contained a two device per day limit; however, the evidence of the buyers' purchasing patterns demonstrate that the Apple store permitted individuals to purchase more than two iPhones per

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21 Transcript of Proceedings, 2016-6919(GST)G on October 5, 2018, vol 1, at p 66, lines 25-28 and p 67, lines 1-6. *Ibid*, Vol II, Tab 4 at p 675-678, receipts W-4 to W-14.

22 *Ibid* at p 707-711, receipts X-32 to X-43.

23 *Ibid* at p 642-648, receipts U-63 to U-79.

transaction and permitted individuals to purchase a large number of iPhones without asking questions as to why so many iPhones were being purchased in a series of consecutive transactions. As discussed above, some of the transactions occurred within minutes of each other.

[108] Returning to Mr. Liu's initial visit to the Apple store, he was not told that he could not buy 10 iPhones in total. All Mr. Liu was told was that he needed to space his purchases out over the course of five days.

[109] In summary, the evidence establishes that the Apple stores collected unique information about the appellant and the buyers through their repeat purchases (i.e. names, email addresses and credit card numbers) or by witnessing the buyers' conduct at the Apple stores. Lohas' buyers were able to acquire over 3,500 iPhones in a three month period. The buyers purchased iPhones in quantities and in ways that should have raised some questions, but the Apple stores completed the sales and did not refuse to make or cancel any orders on suspicion of being for resale activity even though Apple had reserved a right to do so.

(b) Void and voidable contracts

[110] The respondent argues that if the buyers had advised Apple that they were not end users, and that they were buying on behalf of a person who would sell the phones and export them on the Asian Pacific Market, Apple would have refused to sell the phones. As a result, the second element of an agency relationship did not exist as the buyers could not affect the legal position of Lohas, since the principal could not have contracted with Apple. Therefore, the contract between Apple and the buyers/principal is void.

[111] The Federal Court of Appeal in*1524994 Ontario Ltd.*[24] concluded "that a principal can only appoint an agent to make a contract which the principal himself has the capacity to make."[25] There, the Federal Court of Appeal determined that, since the respondent clinic was not legally authorized to collect fees from the Ontario Health Insurance Plan under the *Health Insurance Act*, neither were its alleged agents.[26]

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24 *1524994 Ontario Ltd. v R*, 2007 FCA 74,

25 *Ibid* at para 18, citing *Haggstrom v Dey* (1965), 54 DLR (2d) 29 (BCCA).

26 *Ibid.*

[112] The present appeal can be distinguished from *1524994 Ontario Ltd*., as Lohas was not prohibited under statute from contracting with Apple retail stores to purchase large quantities of Apple iPhones for resale.

[113] There is a distinction between a "void contract", which is a legal nullity and a "voidable contract", which is valid until avoided.

[114] A voidable contract is one where one or more of its parties have the power, by a manifestation of an election to do so, to avoid the legal relations created by the contract; or by affirmation of the contract, to extinguish the power of avoidance.[27] A voidable contract is valid until the right of avoidance is exercised.[28] For example, if a contract is voidable for fraud (but has not been avoided), the fraudulent party acquires good title to the goods which can be transferred to an innocent purchaser for value.[29]

[115] G.H.L. Fridman in *The Law of Contract in Canada* highlights the distinction between contracts that are void *ab initio* and contracts that are voidable when discussing the effect of insanity on a person's ability to contract in British Columbia:[30]

> A contracting party may have been declared or found insane by some judicial determination prior to the making of the contract which is in question. In such event, there is authority to the effect that such a person cannot enter into any contract. Hence such a contract will be void… A person may be lacking in mental competence… without there ever having been judicial determination of this question. If such a person enters into a contract, what is its effect? ...it would seem that Canadian courts agree that the contracts of such a person are not void ab initio. They are voidable at the option of the insane person…

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27 *Ibid* at 1-110.

28 *Ibid* at p 98, 1-110.

29 *Ibid.*

30 GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto, CAN: Carswell, 2011) at p 158 [*Fridman – Contracts*]. The text is divided into two sections: Provinces other than British Columbia and British Columbia. For provinces other than British Columbia, there are authorities that establish that some contracts made by minors can be void ab initio in that they do not need avoidance nor can they be made valid by post-majority ratification, *ibid* at p 150.

[116] Mr. Fridman revisits this distinction again when discussing the effect of fraud on contracts as "a contract induced by fraud is voidable at the election of the defrauded party. It is not void ab initio; it is liable to be upset."[31]

[117] The appellant's counsel submitted an authority consistent with the principles outlined above. In *Can-Pac Energy Consultants Ltd.*[32] the British Columbia Supreme Court concluded that failure to comply with section 49 of the *Condominium Act*[33] rendered an agreement voidable at the option of the strata corporation (the principal).[34] Under section 49:

> . . . a strata council shall not, except in emergencies, authorize, without authorization by a special resolution of the strata corporation, an expenditure exceeding $500 which was not set out in the annual budget of the corporation and approved by the owners at a general meeting.[35]

[118] As a result, Justice Leggatt concluded that the building manager had authority to act as agent for the strata corporation and had bound its principal to the impugned agreement since it was not void.[36]

[119] After the agent contracted on its behalf, the strata corporation exercised its option under law to end its legal obligation for payments under the contract. At issue was whether the strata corporation was liable for amounts payable under the sales agreement up to the date the contract was avoided. Justice Leggatt held that the strata corporation was liable.[37]

[120] The Court in *Can-Pac* relied on the decision in *Hely-Hutchinson*[38] by Lord Denning and Lord Wilberforce of the English Court of Appeal to conclude that voidable contracts made by an agent are binding on the principal until avoided. The court summarized *Hely-Hutchinson* as follows:[39]

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31 *Ibid* at p 292.

32 *Can-Pac Energy Consultants Ltd. v Carriage Management Inc. and Owners, Strata Plan VR 201*, [1990] BCWLD 1850.

33 RSBC 1979, c 61 [*Condominium Act*].

34 *Can-Pac, supra* at para 19, 21 ACWS (3d) 1371.

35 *Condominium Act, supra* note 37 at s 49.

36 *Can-Pac, supra* note 38 at paras 16, 20.

37 *Ibid* at para 21.

38 *Hely-Hutchinson v Brayhead Ltd.*, [1968] 1 QB 549, [19670 3 WLR 1408, [1967] 3 All ER 98 (CA).

39 *Ibid* at para 18.

> . . . Article 99 of the defendant's memorandum and articles and s. 199 of the British Company Act required that a director disclose his interest in any contract or proposed contract which the company was intending to make. The plaintiff and [the agent] had failed to disclose to the remaining board members that the plaintiff had an interest in the second company as president and director. When the defendant was called upon to make good its commitment, its defence was that the guarantee was invalid since it was not in compliance with s. 199 and art. 99. Lord Denning held that the non-disclosure rendered the contract of guarantee voidable but not void. Lord Wilberforce held that since s. 199 did not attach any consequence to the failure to disclose, the contract was merely voidable at the company's option.

[Emphasis added.]

[121] The facts in *Can-Pac* are analogous to this appeal, except for one notable distinction: the agreement was voidable at the option of the strata corporation, but the "option under law" arose from a statutory prohibition under section 49 of the *Condominium Act*. Here, if it exists, the "option under law" is contained within the Apple store policy and not statute.

[122] Counsel for the appellant submits that there has been no allegation that the appellant created a voidable contract due to misrepresentation, duress, statute or otherwise. Regardless, even if such a contract did exist, the contract between Apple and the appellant would be binding until reneged upon by either or by both parties. There is no evidence that Apple or Lohas has sought to avoid the contracts or to enforce any rights.

[123] A court may interfere with an agreement as contrary to public policy under the doctrine of common law illegality. The principle of public policy holds that:[40]

> No subject can lawfully do that which has a tendency to be injurious to the public or against the public good which may be termed, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law.

[124] Mr. Fridman in *The Law of Contract in Canada* lists the following as categories of contracts subject to the doctrine of common law illegality: (a) contracts to commit illegal acts; (b) contracts that interfere with the administration of justice; (c) contracts injurious to the state; (d) contracts which involve or

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40 *Egerton v Brownlow* (1853), 4 HL Cas 1 at 437 (HL) *per* Lord Truro.

encourage immorality; (e) contracts affecting marriage; and (f) contracts in restraint of trade.[41]

[125] Given that the parties to, and the nature of, the retail purchase agreements in this appeal, it is clearly evident that categories (b), (c), (d) and (e) are not applicable. Nor is category (a) applicable as the purchase contract for an iPhone did not require either party to perform a tortious or criminal act.[42]

[126] As for category (f), the governing principles of the restraint of trade doctrine are succinctly set out by the Ontario Court of appeal in *Staebler Co.*[43] (in the context of employment contracts):

> 33 There is no dispute about the legal principles that apply when determining whether a restrictive covenant in an employment contract is enforceable, as those principles have long been settled…. [Dickson J.] stated the test in plain terms: such a covenant is enforceable "only if it is reasonable between the parties and with reference to the public interest".
>
> 34 This test reflects the competing principles that must be balanced when a court is called on to decide the validity of such a covenant. On the one hand, there is the "important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants". Open competition benefits both society and the affected employees. Society benefits from having greater choice and employees benefit as they have greater employment opportunities. On the other hand, however, "the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power".
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> 35 While an overly broad restraint on an individual's freedom to compete will generally be unenforceable, the courts must recognize and afford "reasonable protection to trade secrets, confidential information, and trade connections of the employer."…
>
> 36 … But how is a court to determine whether any given restrictive covenant is "reasonable"? Elsey offers a framework for making such a determination. The starting point is "an overall assessment of the clause, the agreement within which it is found, and all of the surrounding circumstances"…

[127] While the doctrine was originally developed for particular categories such as employer-employee cases and vendor-purchaser cases for the sale of a business,

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41 *Fridman Contracts, supra* note 34 at Table of Contents xi.

42 *Ibid* at p 364.

43 *Staebler Co. v Allan,* 2008 ONCA 576 at para 33-36.

Lord Wilberforce in *Fitch*[44] stated ". . . the classification must remain fluid and the categories can never be closed". As such, the courts have applied the doctrine to invalidate contracts or covenants which they regard as being in restraint of trade beyond "traditional" categories.

[128] The "restraint of trade" doctrine is a defence that can be raised when a person attempts to enforce restrictive covenants. The defence of restraint of trade is a response to an attempt to enforce restrictive covenants by a party to the contract. Practically speaking, if no party is attempting to enforce a covenant, there is no need to invoke the defence to void the contract/the particular clause. I agree with Lohas that it would be improper to apply this doctrine here.

[129] In any event, assuming the buyers purchases were in violation of Apple policy at most, this made the purchase contracts voidable and not void. It is clear from the evidence that the contracts were never avoided and remained binding on Lohas. Therefore, after having considered the evidence in respect of the Apple store policy, the purchasing patterns, the distinction between void and voidable contracts, and the doctrine of common law illegality, I am satisfied that Lohas could grant authority to the buyers allowing the agent to affect Lohas' legal position.

(iii)The principal controls the agent's actions

[130] Buying iPhones is not a complex task. Mr. Liu called the buyers when iPhones needed to be purchased and his instructions to the buyers were simply to buy as many as they could. He also called the buyers when it came time to stop buying iPhones as he believed that the demand for iPhones was decreasing.

[131] Mr. Liu stated that once he had exported iPhones, he gave the client in Hong Kong time to deal with the shipment. He stated that he had to control when to buy and also when to stop. He had to ensure for Lohas that the buyers did not buy in excess of what its client in Hong Kong required. Since Lohas guaranteed the buyers that they would be reimbursed, he had to be careful with respect to the purchase instructions he gave to the buyers.

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[44] *Fitch v Dewes*, [1921] 2 AC 158 (HL), cited with approval in *Tank Lining Corp. v Dunlop Industries Ltd*., [1982] OJ No 3602, 140 DLR (3d) 659 at 664.

[132] Mr. Liu also instructed the buyers that he had a preference for the iPhone 4S, 16 GB model over the 32GB model. However, Mr. Liu told them that they would still be reimbursed if they were to purchase the 32GB model.

[133] Mr. Liu also instructed the buyers where they would meet to be reimbursed for their purchases and paid for their commissions. Mr. Liu chose to proceed by way of bank drafts. The commissions that the buyers received were also fixed by Mr. Liu.

[134] To facilitate the transfer of the money between the buyers and Lohas, Mr. Liu asked each buyer that he dealt with to open a HSBC account or a TD account.

[135] Mr. Liu inspected each iPhone box, noting the serial number of the iPhone ("IMEI") and ensured that the IMEI on the iPhone box matched the IMEI on the receipt. Mr. Liu instructed the buyers to provide him with their receipts.

[136] In my view, in light of the evidence, Lohas has established that the control element of an agency relationship existed.

V. Documentation pursuant to 169(4) of the *ETA* and the *ITC Regulations*.

[137] Lohas argues that the assumption at paragraph 26n) of the Reply that states*: the Appellant failed to obtain and retain documentation that contained prescribed information supporting the ITCs claimed*, is a conclusion of mixed fact and law, and as such is improper as part of the Minister's assumptions of facts. Lohas also submits that the issue was not properly raised by the respondent in her Reply.

[138] The respondent argued that Lohas knew or ought to know that the issue raised in this appeal was that some of the Apple store receipts were deficient, as of the face of Apple store receipts, the name of the recipient or the duly authorized agent was missing.

[139] As formulated, the assumption constitutes a conclusion of mixed facts and law. Whether one obtained and retained documentation is a question of fact. The notion of "prescribed information" is a legal one, as it refers directly to the ETA and the *ITC Regulations*.

[140] The respondent could have extricated as factual elements the specific "prescribed information" that was missing. The Federal Court of Appeal explained this principle in *Canadian Imperial Bank of Commerce*[45] as follows:

> [92] It is now well established that the statement of factual assumptions must contain no statements of law (*Anchor Pointe* (2003) at paragraph 25), and where the assessment under appeal is based on a conclusion of mixed fact and law, the factual components must be extricated and stated as factual assumptions (*Anchor Pointe* (2003) at paragraph 26). The Crown did not observe those principles in many parts of its statement of assumptions, and the judge made no error in requiring the assumptions to be revised accordingly.
>
> [93] One example will illustrate this point. Paragraph 28.22.7 of the reply reads, "the Settlement Payments were not expenditures incurred by the appellant for the purpose of earning income from the business it carried on". That is nothing more than an uninformative paraphrase of paragraph 18(1)(a). It would be appropriate in the portion of the reply that states the Crown's legal arguments. It is not appropriate in a statement of the Minister's factual assumptions. Despite the difficulty of which the Crown complains in discerning the difference between facts and law, it seems to me that paragraph 28.22.7 of the reply could be revised without difficulty to extricate the facts and state them as factual assumptions. There are potentially a number of factual elements – the purpose of the payments, the business carried on by CIBC, the factual connection or absence of a factual connection between the two – that might have been the subject of factual assumptions made by the Minister in reaching the conclusion that the income earning purpose in paragraph 18(1)(a) was not met. If the Minister made no factual assumptions in reaching that conclusion, then no factual assumptions can be stated, but the conclusion nevertheless may be pleaded elsewhere in the reply.
>
> [94] I have not disregarded the cases cited by the Crown in which the Tax Court has permitted statements similar to those in paragraph 28.22.7 to remain in the statement of the Minister's assumptions. It may well be that in certain situations it is reasonable to allow a deficient pleading to stand if, for example, the facts are relatively simple, there is little or no debate about the applicable legal principles, or there is little risk that the other party will be prejudiced or will be obliged to waste resources. However, this is manifestly not such a case.
>
> [Emphasis added.]

[141] At trial and during the examination for discovery, Ms. MacNaughton clearly stated that there was an issue with the names of the recipient on the Apple store receipts, although the explanations that Ms. MacNaughton gave to draw her conclusions in this manner were somewhat confusing. However, it was clear on the

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45 *Canadian Imperial Bank of Commerce v Canada*, 2013 FCA 122.

face of the receipts that some of the receipts were deficient. Some receipts did not have any names, some names were fictitious and others unreadable and unreliable. In my view, this is a situation where it is reasonable to allow a deficient pleading to stand. The facts are simple and there is little or no debate about the applicable legal principles.

[142] Subparagraph 3(c)(ii) of the *ITC Regulations* requires that the name of the recipient or his or her agent be on the receipts. The relevant portion states as follows:

> **(c)** where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $150 or more,
>
> > **(ii)** the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative.
>
> [Emphasis added.]

[143] Supporting documentation is defined at section 2 of the *ITC Regulations*:

> supporting documentation means the form in which information prescribed by section 3 is contained, and includes
>
> (a) an invoice,
>
> (b) a receipt,
>
> (c) a credit-card receipt,
>
> (d) a debit note,
>
> (e) a book or ledger of account,
>
> (f) a written contract or agreement,
>
> (g) any record contained in a computerized or electronic retrieval or data storage system, and
>
> (h) any other document validly issued or signed by a registrant in respect of a supply made by the registrant in respect of which there is tax paid or payable;
>
> [Emphasis added.]

[144] Under section 123(1) of the *ETA*, an invoice includes a statement of account, a bill, and any other similar record regardless of its form or characteristics, and a cash register slip or receipt.

[145] A "record" is defined under section 123 of the *ETA*, to include an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form.

[146] Therefore, a registrant is able to use a combination of the above documentation to prove in order to claim an ITC.

[147] As I have stated earlier Lohas maintained a detailed accounting of the iPhones transactions. For the transactions where a bank draft was issued to a buyer,[46] Lohas has established the ITCs that it has claimed for the periods ending in 2011.Lohas journal of transactions referred to every purchase made by the buyers, the memo prepared by Lohas showed the name of each buyer, the iPhones purchases, the tax and the commissions paid.

[148] However, for the transactions that Lohas paid in cash for the period ending in 2011, the memo[47] prepared by Lohas did not indicate the name of the buyers. As Mr. Liu stated in his testimony, he did not pay as much attention when Lohas paid cash and did not record the name of the duly authorized buyer/agent for each transaction in the Lohas' memo. However, the memo report refers to each Apple store receipt. That said, some of the receipts do not have any names, or the name is scratched, fictitious or unreadable.

[149] For the periods ending in 2012, there are also some issues with the names of the buyers. The names of the duly authorized buyers do not always appear on the memo prepared by Lohas for the period ending on January 31, 2012.[48] For the period ending on March 31, 2012, the names of the duly authorized buyers do not appear on the memo prepared by Lohas. I was able to trace the Apple store receipts

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46 See : For periods ending in 2011, Bank drafts at Appellant's Book of Documents, Volume VI of VIII at Tab 6, 7, 8. Journal Transactions, Volume VII of VIII at Tab 13, Memo per buyer, Volume VI of VIII at Tab 16. For periods ending in 2012, Journal Transactions, Volume VIII of VIII at Tab 19, Memo per buyer for January 2102, Volume VIII of VIII at Tab 20.

47 See: Appellant's Book of Documents Volume VIII of VIII at Tab 20 p. 722.

48 See: For period ending March 31, 2012 see Volume VIII of VIII at Tab 16 p.722.

for the transactions for both periods. However the Apple store receipts for some of the transactions did not have a name or had a fictitious name.

[150] As it was stated by Justice Sexton of the Federal Court of Appeal, in *Systematix Technology Consultants Inc*.,[49] the legislation dealing with what is required in order to claim an ITC is mandatory. Justice Sexton agreed with Justice Campbell in Davis v R 2004 TCC 134, when she stated:

> Because of the very specific way in which these provisions are worded, I do not believe they can be sidestepped. They are clearly mandatory and the Appellant has simply not met the technical requirements which the *Act* and the *Regulations* place upon him as a member of a self-assessing system [emphasis already added].

[151] Accordingly, Lohas is not entitled to claim as ITCs an amount of $18,642 for the period ending in 2011, since for the cash purchases, some of the entries on the cash memo have no names, and the matching Apple store receipt does not indicate the name of the recipient or the agent of the recipient. Therefore the ITCs regulations are not met with respect to these transactions.

[152] The same applies for the two periods ending in 2012. Accordingly, for the period ending January 31, 2012, Lohas is not entitled to claim ITCs of $1,090.32 and for the period ending in March 31, 2012, Lohas is not entitled to claim ITCs of $1,623.71.

VI. Disposition

[153] The appeal is allowed and referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- There was an agency relationship between Lohas and the buyers.
- Lohas did not meet the requirements of the *ITC Regulations* with respect to the name of the recipient or the name of the duly authorized agent of the recipient for the following periods:
    - for the period ending 2011, Lohas is not entitled to claim ITCs of $18,642.

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[49] *Systematix Technology Consultants Inc. v HMQ*, 2007 FCA 226.

- for the period ending on January 31, 2012, Lohas is not entitled to claim ITCs of $1,090.32.
- for the period ending on March 31, 2012, Lohas is not entitled to claim ITCs of $1,623.71.

[154] The appellant is awarded costs in accordance with the Tariff. If the appellant wishes to seek costs in excess of the Tariff, it may file submissions, within thirty days from the date of this judgment.

Signed at **Montreal, Quebec**, this **9th** day of **December** 2019.

"Johanne D'Auray"

D'Auray J.

CITATION:	2019 TCC 197
COURT FILE NO.:	2016-961(GST)G
STYLE OF CAUSE:	LOHAS FARM INC. v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario and Ottawa, Ontario
DATE OF HEARING:	October 4 and 5, 2018 and January 22, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF **AMENDED** JUDGMENT:	**December 9, 2019**

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