



SUPREME COURT OF CANADA

CITATION: Iris Technologies Inc.
v. Canada (Attorney General),
2024 SCC 24

APPEAL HEARD: November 9,
2023

JUDGMENT RENDERED: June 28,
2024

DOCKET: 40346

BETWEEN:

Iris Technologies Inc.
Appellant

and

Attorney General of Canada
Respondent

CORAM: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

REASONS FOR JUDGMENT: Kasirer J. (Martin, Jamal and O’Bonsawin JJ. concurring)
(paras. 1 to 59)

CONCURRING REASONS: Côté J. (Karakatsanis and Rowe JJ. concurring)
(paras. 60 to 114)

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Iris Technologies Inc.

Appellant

v.

Attorney General of Canada

Respondent

Indexed as: Iris Technologies Inc. v. Canada

2024 SCC 24

File No.: 40346.

2023: November 9; 2024: June 28.

Present: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Courts — Jurisdiction — Taxation — Excise tax — GST returns — Taxpayer applying for judicial review in Federal Court and seeking declarations related to assessments disallowing input tax credits and assessing penalties — Application struck out on basis that challenge to validity of assessments was matter within exclusive jurisdiction of Tax Court of Canada — Whether application for judicial review properly struck out — Excise Tax Act, R.S.C. 1985, c. E-15, s. 302 — Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.5.

Iris Technologies Inc. filed GST returns claiming tax refunds under the *Excise Tax Act* (“*ETA*”). The Minister audited a reporting period, issued an assessment disallowing input tax credits, and assessed penalties. Iris applied for judicial review in Federal Court and sought declarations that the Minister failed to afford procedural fairness and opportunity to respond to the proposed adjustments contrary to published policy and a specific guarantee, that the assessments were made without evidentiary foundation and contrary to the findings of fact made by the Minister and that the assessments were made for the improper purpose of seeking to deprive the Federal Court of jurisdiction in a related application. The Attorney General brought a motion to strike the application for judicial review. The prothonotary dismissed the motion, holding that the application for judicial review was not bereft of any chance of success. The Federal Court dismissed the Attorney General’s appeal, but the Federal Court of Appeal allowed its subsequent appeal and struck out Iris’s application for judicial review on the basis that it was, in essence, a collateral challenge to the correctness of the assessments, a matter within the exclusive jurisdiction of the Tax Court.

Held: The appeal should be dismissed.

Per Martin, **Kasirer**, Jamal and O’Bonsawin JJ.: Notwithstanding the issuance of a tax assessment, the Federal Court has exclusive jurisdiction to conduct judicial review of discretionary decisions delegated to the Minister by Parliament, including those that directly affect liability. However, the Minister’s assessment of net tax pursuant to the *ETA* is not the exercise of a discretionary power; it is a non-

discretionary determination where the outcome, the assessment, is dictated by statute. Jurisdiction over the correctness of the assessment falls to the Tax Court under s. 302 of the *ETA*. In the instant case, two of the claims raised by Iris in its application for judicial review — those alleging procedural unfairness and a lack of an evidentiary foundation — are properly within the exclusive jurisdiction of the Tax Court as they are best characterized as attacks on the correctness of the assessment. Iris' third claim, that the Minister acted with an improper purpose, could, in some circumstances, be the basis for an application for judicial review, but should be struck because Iris did not allege facts in its application that, if taken to be true, would give any support to this claim. In addition, the declaratory relief sought by Iris should not be issued because it would have no practical effect.

A registrant under the *ETA* is required to file a return for each reporting period setting out the amount of net tax to be remitted. To the extent that input tax credits exceed the collectible amount of GST, a registrant may be entitled to receive a refund of net tax. A taxpayer who is dissatisfied with an assessment after having filed an objection can appeal the assessment to the Tax Court under s. 302 of the *ETA*. Where Parliament expressly provides for an appeal to the Tax Court, such as the express direction found in s. 302 of the *ETA*, s. 18.5 of the *Federal Courts Act* precludes an application for judicial review in the Federal Court. However, the rule in s. 18.5 of the *Federal Courts Act* that ousts the Federal Court's jurisdiction in favour of the Tax Court does not apply where the true purpose of the application is to seek practical relief against the Minister's exercise of discretion. An application for judicial review may be

brought in Federal Court if the Minister's decision is not part of the assessment and cannot be challenged before the Tax Court pursuant to its exclusive jurisdiction to decide matters pertaining to the correctness of assessments.

In *Okalta Oils Ltd. v. M.N.R.*, [1955] S.C.R. 824, the Court held that an assessment is not a discretionary act. *Okalta Oils* and subsequent cases that rely on a like definition of assessment stand for the proposition that when assessing tax due under the *ETA*, the Minister does not exercise a discretionary power. Rather, she exercises a mandatory duty imposed by statute. Fulfillment of a non-discretionary statutory responsibility cannot be an improper motive for issuing an assessment. Where the true purpose of an application is not to seek relief against the exercise of discretion but to challenge the correctness of an assessment, Parliament has ousted the Federal Court's judicial review jurisdiction.

Iris' allegation that the Minister breached procedural fairness in the audit and assessment process is grounded in the timing of the Minister's assessments and the consequential failure to provide an opportunity to respond to proposed adjustments. On appeal to the Tax Court, Iris would have the opportunity to respond. Thus, an appeal to the Tax Court is an adequate, curative remedy. Iris' allegation that the assessments were made without evidentiary foundation is precisely within the legislative mandate of the Tax Court because that court can cure evidentiary defects in the Minister's assessments through a *de novo* review. While the Federal Court would have jurisdiction to issue a declaration that the assessments were made for an improper purpose, this

claim should be struck because Iris has failed to allege facts in its application or any particular motive or conduct of the Minister that, if true, could support its allegation that the Minister acted with an improper purpose.

The Minister's assessment of Iris's net tax was not the exercise of a discretionary power. She made a non-discretionary determination where the outcome, the assessment, did not depend on the exercise of discretion and was dictated by the non-discretionary rules of the *ETA*. As well, the declarations sought by Iris will have no practical effect. They are not connected to any asserted rights. It is settled law that a declaration can only be granted if it will settle a live controversy between the parties. A claim seeking declarations that have no practical utility cannot succeed.

Per Karakatsanis, Côté and Rowe JJ.: While the issuance of assessments does not deprive the Federal Court of jurisdiction to consider the Minister's conduct *per se*, in the instant case, Iris ought to have challenged the assessments by appealing to the Tax Court. In its essential nature, Iris' application for judicial review is a collateral attack on the correctness of the assessments. In addition, the declarations sought would have no practical effect and could not have been issued. The Federal Court must strike an application for judicial review if it is so clearly improper as to be bereft of any possibility of success; read holistically, Iris' application for judicial review falls within the clearest of cases where a motion to strike will succeed.

Parliament has established the Tax Court as a specialized court for tax appeals, expressly excluding the Federal Court's jurisdiction where an appeal lies from

an assessment and is adequate and effective in giving the relief sought by a taxpayer. The proper inquiry is whether, on a holistic view, the claim's essential nature or true character is the correctness or validity of an assessment. Given that judicial review is a remedy of last resort, the Federal Court will not have jurisdiction to entertain an application for judicial review where a matter is otherwise appealable to the Tax Court. This will be the case where an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought.

The reviewing court must gain a realistic appreciation of the nature of the claim and the disputed administrative action. Determining the essential nature or true character of the claim requires the court to look beyond the words used, the facts alleged and the remedy sought to ascertain whether the pleading is a disguised attempt to reach before the Federal Court a result that would otherwise be unreachable in that court. If the pleadings, read holistically and practically, disclose a reasonable basis for pursuing the claim, the application should not be struck. Conversely, if the essential nature or true character of the claim involves a matter otherwise appealable to the Tax Court, the application for judicial review would constitute a collateral attack on the validity or correctness of the assessment. Such an application is therefore doomed to fail at a preliminary stage either because the bar in s. 18.5 of the *Federal Courts Act* applies or because an appeal to the Tax Court is an adequate and effective recourse.

It is well settled that applications for judicial review in tax matters should be struck where fatal flaws are found. Two fatal flaws arise from Iris' application for

judicial review. First, on a holistic reading, it is a collateral attack on the correctness of tax assessments. The first two declarations sought relate to flaws in the assessment process — a breach of procedural fairness and evidentiary issues — that can be remedied by an appeal to the Tax Court, and the third declaration sought relates to the motivation for issuing the assessments and is based on allegations that cannot be dissociated from the correctness of the assessments. An appeal to the Tax Court will allow the parties to present evidence and submissions on whether the assessments were correct as a matter of fact and law, including whether they are supported by the evidence and were issued by the Minister in accordance with her statutory responsibilities. A conclusion by the Tax Court that Iris is liable for the tax assessed will be dispositive of all three of Iris's allegations. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament.

Second, the declarations sought are of no practical effect. All three declarations would be purely academic and could not be granted. There is no longer any live controversy between the parties apart from the correctness of the Minister's assessments. The Federal Court cannot vary or vacate an assessment, and issuing declarations that do not vary or vacate the assessments would serve little or no purpose.

Cases Cited

By Kasirer J.

Applied: *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824; **referred to:** *Dow Chemical Canada ULC v. Canada*, 2024 SCC 23, aff'g 2022 FCA 70, [2022] 5 C.T.C. 1; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216; *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597; *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26; *Harris v. Canada*, [2000] 4 F.C. 37; *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839; *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60; *St. Benedict Catholic Secondary School Trust v. Canada*, 2022 FCA 125, [2023] 1 C.T.C. 115; *Canada v. 984274 Alberta Inc.*, 2020 FCA 125, [2020] 4 F.C.R. 384; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99.

By Côté J.

Applied: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824; **referred to:** *Dow Chemical Canada ULC v. Canada*, 2024 SCC 23; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC

49, [2009] 3 S.C.R. 286; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286; *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Abraham v. Canada (Attorney General)*, 2012 FCA 266, 440 N.R. 201; *Abou-Rached v. Canada (Attorney General)*, 2019 FC 750, 2019 D.T.C. 5069; *Ford v. Canada (Revenue Agency)*, 2022 FC 1077, 2022 D.T.C. 5103; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Walker v. Canada Customs and Revenue Agency*, 2005 FCA 393, 344 N.R. 169; *Johnson v. Minister of National Revenue*, 2015 FCA 51, 469 N.R. 326; *Libicz v. Canada (Attorney General)*, 2021 FC 693, 2021 D.T.C. 5075; *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617; *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, [2019] 4 S.C.R. 559; *Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218, 392 N.R. 200; *Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75; *Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216; *Webster v. Canada (Attorney General)*, 2003 FCA 388, 312 N.R. 235; *Newave Consulting Inc. v. Canada (National Revenue)*, 2021 FC 1203; *Chad v. Canada (National Revenue)*, 2023 FC 1481, [2024] 1 C.T.C. 63; *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336; *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26; *Harris v. Canada*, [2000] 4 F.C. 37; *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60; *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597; *Ereiser v. Minister of National Revenue*, 2013 FCA 20, 444 N.R. 64; *Johnson v. Canada*, 2015 FCA 52, 470 N.R. 183; *9162-4676 Québec Inc. v.*

Canada, 2016 FCA 112, 2017 D.T.C. 5074; *744185 Ontario Inc. v. Canada*, 2020 FCA 1, 441 D.L.R. (4th) 564; *McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4; *Minister of National Revenue v. Parsons*, [1984] 2 F.C. 331; *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99.

Statutes and Regulations Cited

Excise Tax Act, R.S.C. 1985, c. E-15, ss. 225(1), 228(1), 229(1), 238, 275, 278, 296, 299(2), (3), 301(1.1), 302.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1, 18.5.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 152(4.2), 169, 220(3.1), 247(2), (10).

Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 12.

Authors Cited

Vincent, François, and Michel Ranger. *Transfer Pricing in Canada*. Toronto: Thomson Reuters, 2018.

Sandler, Daniel, and Lisa Watzsinger, “Disputing Denied Downward Transfer-Pricing Adjustments” (2019), 67 *Can. Tax J.* 281.

APPEAL from a judgment of the Federal Court of Appeal (Stratas, Rennie and Laskin JJ.A.), **2022 FCA 101**, [2022] 1 F.C.R. 401, [2022] G.S.T.C. 39, 2022 DTC 5064, [2022] F.C.J. No. 777 (Lexis), 2022 CarswellNat 1839 (WL), setting aside a decision of McDonald J., 2021 FC 597, [2022] 1 F.C.R. 383, [2021] G.S.T.C. 42, 2021

DTC 5063, [2021] F.C.J. No. 602 (Lexis), 2021 CarswellNat 2032 (WL)., affirming a decision dismissing a motion to strike an application for judicial review. Appeal dismissed.

Leigh Somerville Taylor and Mireille Dahab, for the appellant.

Daniel Bourgeois, Christa Akey and Justine Malone, for the respondent.

The judgment of Martin, Kasirer, Jamal and O’Bonsawin JJ. was delivered
by

KASIRER J. —

I. Overview

[1] This appeal, like the appeal in *Dow Chemical Canada ULC v. Canada*, 2024 SCC 23, which was heard by the Court on the same day, highlights the shared statutory jurisdiction in tax matters of the Tax Court of Canada and the Federal Court of Canada.

[2] It brings into plain focus the divide between the exclusive jurisdiction of the Tax Court to hear “appeals” relating to the correctness of tax assessments and the exclusive jurisdiction of the Federal Court to conduct judicial review in tax matters. The appeal in this case helps explain why the appeal in *Dow* should — as the Federal

Court of Appeal held — give rise to a different outcome, based on a principled understanding of the distinct statutory foundations for the exclusive jurisdiction of these two courts established by Parliament.

[3] In the result, I agree with the conclusion of my colleague Côté J. to dismiss the taxpayer’s appeal before our Court but, with respect, my conclusion rests on different reasons.

[4] In my view, the Federal Court of Appeal’s reasoning is entirely well founded, including its statement that the Tax Court does not have jurisdiction where the true purpose of an application for judicial review is to “seek practical relief against the exercise of a discretion” by the Minister of National Revenue (2022 FCA 101, [2022] 1 F.C.R. 401, at para. 13). As Rennie J.A. observed, in the circumstance of ministerial discretion, the statutory rule ousting Federal Court jurisdiction in judicial review in favour of the Tax Court does not apply. This explains, as Rennie J.A. said for the court, why the outcome of the Federal Court of Appeal’s decision in *Canada v. Dow Chemical Canada ULC*, 2022 FCA 70, [2022] 5 C.T.C. 1 (“*Dow FCA*”), is favourable to the Federal Court’s jurisdiction where the discretionary ministerial decision under s. 247(10) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), was at the centre of the jurisdictional debate.

[5] In other words, the Federal Court of Appeal in this case confirmed its decision in the partner case of *Dow FCA* in which it recognized the exclusive jurisdiction of the Federal Court over a ministerial discretionary decision provide for

by the *ITA*. In this case, the Federal Court of Appeal recognized the exclusive jurisdiction of the Tax Court in appeals of the assessments where no such ministerial discretion was involved. Importantly, Rennie J.A. said, at para. 13 of his reasons, that the decisions of the Federal Court of Appeal in the two companion cases, with their apparently divergent outcomes, are entirely compatible.

[6] I agree with Rennie J.A.

[7] Significantly, the reasoning of the Federal Court of Appeal that I propose to endorse on this point explains, jurisprudentially, the proper contours of the dividing line between the exclusive jurisdiction of the Tax Court to review the correctness of a tax assessment by a *de novo* procedure on appeal and the jurisdiction of the Federal Court in tax matters. Notwithstanding the issuance of a tax assessment, the Federal Court has the exclusive jurisdiction to conduct judicial review over discretionary decisions delegated to the Minister by Parliament, including those that directly affect tax liability. The Minister's assessment of net tax pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), is not the exercise of a discretionary power. Instead, it is a non-discretionary determination where the outcome, the assessment, is dictated by statute. Jurisdiction over the correctness of the assessment falls to the Tax Court under s. 302 of the *ETA*.

[8] Highlighting this distinction between ministerial discretionary decisions and the tax assessment itself, which is non-discretionary, is, I think, all-important in explaining the jurisdictional debate in our Court in *Dow* and in this appeal. It further

explains why the Attorney General of Canada defended the jurisdiction of the Federal Court in *Dow*, notwithstanding the issuance of an assessment and, on the same day before this Court in this appeal, challenged the jurisdiction of the Federal Court as trenching on the exclusive jurisdiction of the Tax Court over the correctness of the taxpayer's assessment.

[9] When juxtaposed against *Dow*, as Rennie J.A. sought to do at para. 13 of his reasons, this case presents a further opportunity to confirm the view that it is Parliament's intention that jurisdiction in tax matters is shared between the two courts and that the Tax Court is not a one-stop judicial shop for resolving tax disputes.

[10] On the specifics of the Attorney General of Canada's motion to strike the application for judicial review brought by the taxpayer, I agree with the Federal Court of Appeal that two of the claims raised by the appellant, Iris Technologies Inc., in its application — those alleging procedural unfairness and a lack of an evidentiary foundation — are properly within the exclusive jurisdiction of the Tax Court. They are best characterized as attacks on the correctness of the assessment which is the proper subject matter of an appeal to the Tax Court under the express authority of the *ETA*. Since the Tax Court has exclusive jurisdiction over challenges to the correctness of assessments, the bar in s. 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 ("*FCA*"), applies to these two aspects of the application. Accordingly, the Federal Court has no jurisdiction over these aspects. This is because of an express statutory grant of jurisdiction to the Tax Court from the assessment in s. 302 of the *ETA* and not, as the

appellant proposed in *Dow*, based on an extension of the Tax Court’s jurisdiction by “necessary implication”.

[11] Iris’ third claim, that the Minister acted with an improper purpose, could, in some circumstances, be the basis for an application for judicial review. But the improper purpose claim should nevertheless be struck here because Iris did not allege facts in its application that, if taken to be true, would give any support to this claim.

[12] I further agree with the Federal Court of Appeal that the declaratory remedy sought in the application would have no practical effect and the application should also be struck on this basis.

II. Background

[13] It is useful to review, in brief compass, Iris’ notice of application for judicial review and the Attorney General’s motion to strike.

[14] Iris filed Goods and Services Tax (“GST”) returns claiming substantial tax refunds under the *ETA* for a period ending in 2020. The Minister commenced an audit of the relevant reporting periods and refused to pay the refunds claimed pending the result of the audit.

[15] The Minister then issued assessments disallowing input tax credits and assessed penalties to be paid by Iris.

[16] Following the issuance of the assessments, Iris brought an application for judicial review in Federal Court “in respect of the assessments issued by the Minister of National Revenue . . . to disallow input tax credits claimed and assess gross negligence penalties” (Notice of Application, reproduced in A.R., at p. 40). Iris sought three declarations regarding the conduct of the Minister in issuing the assessments:

- a. the Minister failed to afford procedural fairness in the audit of the applicant, failed to provide notice of or any opportunity to respond to any proposed adjustments, contrary to the Minister’s published policy thereon and the specific guarantee of the Minister’s Assistant Commissioner;
- b. the assessments were made without evidentiary foundation and contrary to the findings of fact made by the Minister as of the date thereof; and
- c. the assessments were made for the improper purpose of seeking to deprive the Federal Court of jurisdiction in the applicant’s application for relief in Court File No. T-425-20.

(A.R., at p. 40)

[17] The Attorney General brought a motion to strike Iris’ application for judicial review. In sum, the motion states that the essential character of Iris’ application is a challenge to the correctness of the assessments made by the Minister under the *ETA*. In accordance with s. 18.5 of the *FCA*, the Federal Court has no jurisdiction to review the correctness of the assessments of taxes under the *ETA*. Moreover, the declaratory relief sought by Iris would serve no practical purpose. They inevitably lead back to a contestation of the assessments. In any event, the Attorney General of Canada

says that Iris seeks declarations of fact which are not properly the subject matter of declaratory relief in the Federal Court.

III. Judicial History

[18] The prothonotary in the Federal Court dismissed the motion to strike. He recognized that an appeal of an assessment is within the exclusive jurisdiction of the Tax Court. However, in his view, the application engages administrative law principles, and “the Federal Court can exercise administrative law jurisdiction in tax matters” (para. 26, reproduced in A.R., at pp. 8-9). The prothonotary wrote that “[t]he conduct of the Minister as it relates to the issuance of the assessment, not the assessment itself, is the subject matter of the application” (para. 30). Given the administrative law jurisdiction of the Federal Court in tax matters and that the declarations sought all engage administrative law principles, the prothonotary held that the application was not bereft of any chance of success.

[19] The Attorney General of Canada’s appeal to a judge of the Federal Court was dismissed. The judge shared the view of the prothonotary that the application was “not an attack on the assessment but on the procedural fairness of the assessment” (2021 FC 597, [2022] 1 F.C.R. 383, at para. 32). As such, it is within the jurisdiction of the Federal Court. Noting that the threshold for a motion to strike is a high one, she concluded that it is not plain and obvious that the application has no chance of success.

[20] In a judgment delivered from the bench, the Federal Court of Appeal allowed the appeal.

[21] Rennie J.A. (Stratas and Laskin JJ.A. concurring) observed that in evaluating a motion to strike, courts must look beyond the administrative law language used in an application for judicial review. This is particularly so in respect of challenges to assessments under the *ETA* “where Parliament has established a specialized court and system for tax appeals, and has expressly excluded judicial review jurisdiction of the Federal Court where an appeal lies from an assessment” (para. 3, citing s. 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, and s. 18.5 of the *FCA*).

[22] Rennie J.A. considered the true essence of Iris’ application for judicial review. He concluded that “[w]hen the grounds of review cited in this application are situated in the context of the legislative mandate of the Minister under the *ETA* and the respective jurisdictions of the Tax Court and the Federal Court, . . . the notice of application is, in essence, a collateral challenge to the validity of the assessments issued under the *ETA*, a matter within the exclusive jurisdiction of the Tax Court” (para. 6). He added that the application also seeks declarations that are of no practical effect. As such, concluded Rennie J.A. for the court, the application is bereft of any possibility of success. The Attorney General of Canada’s appeal was allowed and the application was struck.

IV. Issues

[23] Iris raises two issues in support of its position that its application for judicial review should not have been struck as being without any possibility of success.

[24] First, it says that the essential character of its application challenges the conduct of the Minister on administrative law principles and thus is properly within the jurisdiction of the Federal Court. It is mistaken, says Iris, to conclude that it challenges the correctness of the assessment when, in point of fact, it seeks to challenge the conduct of the Minister and not the product of the assessment.

[25] Second, Iris says the declaratory relief it seeks is appropriate to its judicial review claim. Declaratory relief is a powerful, independent remedy available under the *FCA* that requires no coercive order. The order sought is, contrary to what the Federal Court of Appeal decided, of unquestionable utility.

V. Analysis

[26] There is no dispute on the proper test to be applied on a motion to strike in this context. A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47). It is understood to be a high threshold and will only be granted in the “clearest of cases” (*Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 10).

[27] I propose to consider Iris' application in light of its two principal arguments: (A) that the Tax Court does not have jurisdiction over the claims made in the application; and (B) that the declarations sought do have practical utility and can, therefore, be issued by the Federal Court.

A. *Does the Tax Court Have Exclusive Jurisdiction Over the Matter in Light of the Essential Nature of Iris' Application for Judicial Review?*

[28] I agree with the Attorney General of Canada that the essential nature of Iris' application is an attack on the assessment which denied the tax refunds claimed.

[29] Rennie J.A. usefully explained that the grounds of review of the application must be situated within the "legislative mandate of the Minister under the ETA and the respective jurisdictions of the Tax Court and the Federal Court" (para. 6).

[30] What is the legislative mandate of the Minister under the *ETA* as it relates the Iris' application?

[31] As a registrant under the *ETA*, Iris is required to file a return for each reporting period setting out the amount of net tax to be remitted to the government (ss. 225(1), 228(1), 238 and 278 *ETA*). To the extent that the amount of input tax credits claimed by a registrant exceeds the collectible amount of GST, a registrant may be entitled to receive a refund of net tax (ss. 225(1) and 229(1) *ETA*).

[32] Under s. 296(1), the Minister may assess net tax payable as well as interest and penalties. Liability for net tax flows from the *ETA* and not from the assessment (s. 299(2) *ETA*). The assessment does not itself give rise to tax liability, but it is deemed valid and binding unless vacated on objection or appeal (s. 299(3) *ETA*).

[33] A taxpayer like Iris who is dissatisfied with an assessment after having filed an objection with the Minister can appeal the assessment to the Tax Court (ss. 301(1.1) and 302 *ETA*).

[34] Where an express direction from Parliament provides for an appeal to the Tax Court, s. 18.5 of the *FCA* precludes an application for judicial review in the Federal Court:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

[35] In the present case, that express direction is found in s. 302 of the *ETA*:

302 Where a person files a notice of objection to an assessment and the Minister sends to the person a notice of a reassessment or an additional assessment, in respect of any matter dealt with in the notice of objection, the person may, within ninety days after the day the notice of reassessment or additional assessment was sent by the Minister,

(a) appeal therefrom to the Tax Court; or

(b) where an appeal has already been instituted in respect of the matter, amend the appeal by joining thereto an appeal in respect of the reassessment or additional assessment in such manner and on such terms as the Tax Court directs.

[36] Does the allegation that the Minister breached procedural fairness in the audit and assessment process mean that judicial review, rather than a challenge to the correctness of the assessment, is the true nature of Iris' claim?

[37] I agree with Rennie J.A. that it does not. Iris's procedural fairness claim is grounded in the timing of the Minister's assessment and the consequential failure to provide the taxpayer with an opportunity to respond to any of the Minister's proposed adjustments. Iris would have the opportunity to respond in the context of an appeal of the assessment to the Tax Court under s. 302 of the *ETA*. Given the allegations advanced here, an appeal to the Tax Court is thus an "adequate, curative remedy" (*JP Morgan*, at para. 82; see also C.A. reasons, at paras. 8-10).

[38] I further agree with Rennie J.A. that Iris' allegation that the assessments were made without evidentiary foundation is "precisely within the legislative mandate of the Tax Court" (para. 11). Here again, an appeal to the Tax Court under s. 302 of the *ETA* constitutes an adequate, curative remedy because the court can cure any evidentiary defects in the Minister's assessment as part of the appeal.

[39] What about Iris' claim that the assessments were made for an "improper purpose", specifically that of defeating Iris' application to the Federal Court for judicial review to seek relief on administrative law grounds?

[40] Iris argues that the conduct of the Minister is irrelevant to the correctness of the tax assessment. Pointing in particular to *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597, at para. 8, Iris draws a distinction between the correctness of the assessment, which is the proper province of the Tax Court, and the process by which it is established, which is susceptible of judicial review before the Federal Court. In the circumstances, the improper purpose allegation stands outside of the Tax Court's exclusive jurisdiction over the assessment itself and thus cannot be said to be bereft of possibility of success.

[41] It is true that an allegation of improper purpose can, in some circumstances, sustain an application for judicial review in tax matters. By way of example, as Stratas J.A. wrote in *JP Morgan*, the Tax Court does not have jurisdiction to set aside an assessment "on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness" (para. 83). Instead, jurisdiction to provide relief from reprehensible conduct of the Minister would fall to the Federal Court exercising its exclusive jurisdiction in judicial review under s. 18.1 of the *FCA*.

[42] However, I agree with Rennie J.A. that this allegation of improper purpose should nevertheless be struck. Iris has failed to allege facts in its application that, if true, could support its allegation that the Minister acted here with an improper purpose.

As Rennie J.A. noted, “Iris has not pointed to any particular motive or conduct of the Minister other than to say that the Minister issued the assessments to deprive the Federal Court of jurisdiction in the related Federal Court proceeding” (para. 14).

[43] In the course of deciding that Iris’ allegation that the Minister acted with an improper purpose has no basis in law, the Federal Court of Appeal provided an explanation of when a taxpayer would have a proper recourse to the Federal Court, sitting in judicial review. At paragraph 13 of his reasons, in which he refers to the Federal Court of Appeal’s decision in *Dow FCA*, Rennie J.A. explains:

The mere fact that the Minister has issued an assessment does not oust the jurisdiction of the Federal Court. Where the Tax Court does not have jurisdiction to deal with the Minister’s conduct or where the true purpose of the application is to seek practical relief against the exercise of a discretion, the bar in section 18.5 does not apply. That was the situation in *Canada (National Revenue) v. Sifto Canada Corp.*, 2014 FCA 140, [2014] 5 C.T.C. 26, where a judicial review was allowed in respect of penalties issued in a reassessment: see also *Canada v. Dow Chemical ULC*, 2022 FCA 70, [2022] 5 C.T.C. 1.

[44] This explanation, with which I agree, allows for a distinction between this appeal and that in *Dow*. As Rennie J.A. explained, the rule in s. 18.5 of the *FCA* that ousts Federal Court jurisdiction in favour of the Tax Court does not apply “where the true purpose of the application is to seek practical relief against the exercise of a discretion”. As he indicated, that was exactly the circumstance in *Dow*.

[45] In *Dow*, the taxpayer sought to challenge the denial, by the Minister, of a request to allow a downward transfer price adjustment. This discretionary authority to

grant or deny a downward transfer price adjustment is conferred on the Minister by s. 247(10) of the *ITA* and amounts to an exception to the non-discretionary default rule established under s. 247(2) (F. Vincent and M. Ranger, *Transfer Pricing in Canada* (2018), at p. 320). As it is an exception to this default rule, the Minister may make her decision under s. 247(10) before or after an assessment is issued. Sometimes, if the Minister chooses to deny a taxpayer's request for a downward adjustment, no new assessment will be issued, and the Minister's decision will simply be communicated to the taxpayer through a letter (see D. Sandler and L. Watzinger, "Disputing Denied Downward Transfer-Pricing Adjustments" (2019), 67 *Can. Tax J.* 281, at p. 285). The Federal Court of Appeal held that the challenge to that discretionary decision should be brought by judicial review in Federal Court. The Minister's decision is not part of the assessment and cannot be challenged before the Tax Court pursuant to its exclusive jurisdiction to decide matters pertaining to the correctness of the assessment under s. 169 of the *ITA*.

[46] Rennie J.A.'s exercise in drawing the distinction between the exclusive jurisdiction of the Tax Court over the appeal relating to correctness of the tax assessment in this case and the lack of jurisdiction of the Tax Court on appeal in *Dow* is instructive. I recall that he sat on the panels for both cases at the Federal Court of Appeal.

[47] In this case, the Minister's assessment of net tax pursuant to the *ETA* is not the exercise of a discretionary power. Instead, she is making a non-discretionary

determination where the outcome, the assessment, is dictated by statute and does not depend on the exercise of discretion (see in particular s. 296 *ETA*). If the Minister determines that a registrant like Iris has failed to report or remit completely the amount of net tax under the *ETA*, the Minister’s assessment is not a discretionary decision. The word “may” in s. 296(1) does not change this (see *JP Morgan*, at para. 109).

[48] In Iris’ case, the Minister has no discretion in determining tax liability because the outcome is dictated by the non-discretionary rules of the *ETA*. As Brown J. explained for the majority of this Court in a comparable context, “[n]o discretion is afforded to the Minister or the Minister’s agents: ‘They are required to follow [the Act] absolutely, just as taxpayers are also required to obey it as it stands’” (*Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, at para. 25, citing *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.), at para. 36; see also *JP Morgan*, at paras. 77-78). This echoes the long-standing precedent of this Court of *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824, which holds that an assessment is not a discretionary act:

It is the contention of the respondent that, construed as it should be, the word “assessment”, in sections 69a and 69b [of the *Income War Tax Act*, R.S.C. 1927, c. 97], means the actual amount of tax which the taxpayer is called upon to pay by the decision of the Minister, and not the method by which the assessed tax is arrived at; with the result that if no amount of tax is claimed, there being no assessment within the meaning of the sections, there is therefore no right of appeal from the decision of the Minister to the Income Tax Appeal Board.

In *Commissioners for General Purposes of Income Tax for City of London and Gibbs and Others*, [[1942] A.C. 402 (H.L.),] Viscount Simon L.C., in reference to the word “assessment” said, at page 406: —

The word “assessment” is used in our income tax code in more than one sense. Sometimes, by “assessment” is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax on it, but in another context the “assessment” may mean the actual sum in tax which the taxpayer is liable to pay on his profits.

That the latter meaning attached to the word “assessment”, under the Act as it stood before the establishment of the Income Tax Appeal Board and the enactment of Part VIIIA — wherein the above sections are to be found — in substitution to Part VIII, is made clear by the wording of section 58(1) of the latter Part, reading: —

58(1). Any person who objects to the *amount* at which he is assessed . . .

Under these provisions, there was no assessment if there was no tax claimed. Any other objection but one ultimately related to an amount claimed was lacking the object giving rise to the right of appeal from the decision of the Minister to the Board. [Underlining added; pp. 825-26.]

[49] *Okalta Oils* — like other cases that rely on a like definition of “assessment” — stands for the proposition that a tax assessment is a non-discretionary determination of the Minister as to “the actual sum in tax which the taxpayer is liable to pay” (p. 825; see also *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839, at paras. 32–33; *Canada v. Consumers’ Gas Co.*, [1987] 2 F.C. 60, at p. 67; *St. Benedict Catholic Secondary School Trust v. Canada*, 2022 FCA 125, [2023] 1 C.T.C. 115, at para. 45; *Canada v. 984274 Alberta Inc.*, 2020 FCA 125, [2020] 4 F.C.R. 384, at para. 59). When assessing tax due under the *ETA*, the Minister is not exercising a discretionary power than can be abused. Assessing tax is, for the Minister, not a discretionary decision but a mandatory duty imposed by statute, specifically by ss. 275 and 296 of the *ETA*. This very principle was recently recalled by this Court in *Collins Family Trust*, at para. 25 (see also *JP Morgan*, at paras. 77-78). Applying this same reasoning which can be traced back to *Okalta Oils*, Rennie J.A. rightly said, at para. 17

of his reasons, that the “fulfillment of [a non-discretionary] statutory responsibility cannot be an improper motive for the Minister to issue an assessment”.

[50] Judicial review to the Federal Court is available to control the Minister’s exercise of discretion conferred by statute, as was decided in *Dow FCA* by the Federal Court of Appeal in respect of the discretionary decision under s. 247(10) of the *ITA*. However, complaints about the assessment — itself non-discretionary — are addressed by an appeal to the Tax Court, exercising its exclusive jurisdiction over the correctness of the assessment. As Rennie J.A. explained at para. 13 of his reasons in this case quoted above, where the true purpose of the application is not to seek relief against the exercise of discretion but to challenge the correctness of the assessment, Parliament has ousted the Federal Court’s judicial review jurisdiction, as s. 18.5 of the *FCA* permits.

[51] Rennie J.A. helpfully cited *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184, in support of his view which makes plain the same principles. *Sifto* concerned a motion to strike an application for judicial review regarding the decision of the Minister to waive a penalty under the *ITA*. Writing for the court, Sharlow J.A. explained that some aspects of the imposition of a penalty are properly understood as going to the exclusive jurisdiction of the Tax Court over the correctness of the assessment, such as the non-discretionary question as to whether all the statutory conditions for the imposition of a penalty are met. “However, it is equally clear”, she wrote, “that the Tax Court does not have the jurisdiction to determine

whether the Minister properly exercised his or her discretion under subsection 220(3.1) of the *Income Tax Act* when deciding whether or not to waive or cancel a penalty. A challenge to such a decision can be made only by way of an application for judicial review in the Federal Court” (para. 23).

[52] To return to this case, Rennie J.A. further observed that the improper motive allegation made in the application in its specifics was bereft of success. There is no use in trying to separate the “motivation behind a decision to assess from the correctness of the assessment itself. It is a meaningless exercise, since the assessments themselves are not discretionary” (para. 17).

[53] Again, this stands in stark contrast to a challenge to a discretionary decision conferred on the Minister by statute which, as Webb J.A. explained in *Dow FCA*, is separate from the non-discretionary exercise of fixing the assessment and, as such, stands outside of the exclusive jurisdiction of the Tax Court. The position taken in the two appeals by the Federal Court of Appeal is entirely coherent and follow its precedent in *JP Morgan* to the letter. I note in passing that Stratas J.A., the author of the court’s reasons in *JP Morgan*, sat on the appeal before the Federal Court of Appeal in this case. It also mirrors what the Federal Court of Appeal wrote in a previous decision related to this dispute: “. . . the Federal Court retains jurisdiction to consider the application of administrative law principles and obligations to the exercise of discretion by the Minister in the application of the ETA” (2020 FCA 117, [2020] G.S.T.C. 25, at para. 51).

[54] In this case, only one of the declarations sought falls within the Federal Court's exclusive jurisdiction, and Iris has failed to allege facts in its application that, if true, could support that declaration issuing. The application for judicial review to the Federal Court has no prospect of success.

B. *The Declaratory Relief Sought by Iris*

[55] Lastly, I agree with Rennie J.A. that “[t]he declarations here will have no practical effect” (para. 18). The Attorney General of Canada is right to say that the declarations sought by Iris are not connected to any asserted rights.

[56] It is true, as Iris argues, that a declaration can be an appropriate remedy in taxation matters before the Federal Court. As the Federal Court of Appeal has held, “while it is true that the Federal Court cannot invalidate an assessment . . . the Federal Court may grant a declaration based on administrative law principles that the Minister acted unreasonably” (*Sifto*, at para. 25).

[57] In this case, however, Iris's notice of application discloses no basis on which to conclude the declarations sought could ever have any practical utility. The notice of application merely states that “[t]he declaration sought will have import in the Minister's ongoing actions in relation to the applicant, including the applicant's application for emergency wage subsidy” (A.R., at p. 43).

[58] It is settled law that “[a] declaration can only be granted if it will have practical utility, that is, if it will settle a ‘live controversy’ between the parties” (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11). No such live controversy was disclosed here. Rennie J.A. observed that in this instance, “[i]ssuing a declaration that does not quash or vacate the assessments would serve little or no purpose” (para. 18). He added that a declaration will not be issued “where there exists an adequate alternative remedy” (*ibid.*). Declarations with no practical effect will not issue, and a claim seeking such declarations cannot therefore succeed. This is another basis for which the Federal Court of Appeal rightly struck Iris’ application for judicial review.

VI. Disposition

[59] For the foregoing reasons, I would dismiss the appeal with costs.

The reasons of Karakatsanis, Côté et Rowe JJ. were delivered by

CÔTÉ J. —

I. Introduction

[60] This appeal and its companion case, *Dow Chemical Canada ULC v. Canada*, 2024 SCC 23, released concurrently, require our Court to carefully examine

the boundaries of the respective jurisdictions of the Federal Court of Canada and the Tax Court of Canada over tax disputes, as delineated by their enabling statutes.

[61] In this appeal, a Canadian telecommunications company, Iris Technologies Inc., brought an application for judicial review against the Minister of National Revenue (“Minister”), alleging that there had been a breach of procedural fairness during the audit and assessment process and that assessments had been issued without an evidentiary foundation and for an improper purpose. In response, the Minister moved to strike the application at a preliminary stage on the basis that it was plain and obvious that Iris could not obtain the relief it sought and that the judicial review application in this case was an attempt to circumvent the comprehensive system of tax appeals established by Parliament.

[62] It is trite law that the Federal Court must strike an application for judicial review where the application is “so clearly improper as to be bereft of any possibility of success” (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at p. 600; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184, at para. 17; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166, at para. 33). While this is a high threshold to meet, there is no doubt that if the Federal Court has no jurisdiction to entertain an application, or should not entertain it on the

facts of the case, the application will fall within the clearest of cases where a motion to strike will succeed.

[63] The present appeal turns on whether Iris's claim, which was brought as an application for judicial review, constitutes a cognizable administrative law claim or instead constitutes a collateral attack on the correctness of the assessments issued against it. In the latter situation, the application for judicial review must be struck at the preliminary stage, as it would be bereft of any possibility of success.

[64] Indeed, as I have concluded in the companion case, Parliament has established the Tax Court, a specialized court for tax appeals, expressly excluding the Federal Court's jurisdiction where an appeal lies from an assessment and where such a recourse is adequate and effective in giving the taxpayer the relief sought. In *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824, at p. 826, our Court determined that objections that were not "ultimately related to an amount claimed" as part of an assessment lacked the object giving rise to a right of appeal to the Income Tax Appeal Board — the Tax Court's predecessor. The corollary to that pronouncement is that when an objection is ultimately related to an amount claimed, there is no recourse before the Federal Court. The proper inquiry is whether, on a holistic view, the essential nature or true character of the claim goes to the correctness or validity of the assessment. Courts must be careful not to frustrate Parliament's intention that assessments be dealt with exclusively by the Tax Court pursuant to its appellate jurisdiction.

[65] My colleague is of the view that the Federal Court of Appeal, in ruling as it did in the case at bar, sought to confirm its decision in *Dow Chemical* and reconcile seemingly divergent outcomes. I respectfully disagree with this interpretation. In the present case, the Federal Court of Appeal acknowledged *Dow Chemical* in passing only as one example of a case that supported its position, without addressing it in detail. The analysis to determine whether the Tax Court or the Federal Court has jurisdiction over a claim must always proceed on the basis that Parliament intended to give precedence to the Tax Court where an appeal is available. Judicial review in the Federal Court is a remedy of last resort in this context. The contrast between my colleague's reasoning in this appeal and his reasoning in *Dow Chemical* is quite surprising. In the present appeal, my colleague is of the view that a taxpayer's challenge to the Minister's conduct in the audit and assessment process can be remedied by an appeal to the Tax Court, but in *Dow Chemical* he disagrees with this very possibility.

[66] For the reasons that follow, I agree with the Federal Court of Appeal that the appellant's claim, in its essential nature or true character, is a challenge to the correctness of the assessments. Since adequate and effective relief is available in the Tax Court, Iris's application should be struck at this preliminary stage.

II. Background

[67] Registrants under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), are responsible for collecting the goods and services tax and for filing a return for each reporting period setting out the amount of net tax to be remitted (see *Quebec (Revenue)*

v. Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 S.C.R. 286, at para. 10). In some cases, the amount of input tax credits may exceed the tax that becomes collectible on taxable supplies, such that a registrant may be entitled to receive a net tax refund (*ETA*, ss. 225(1) and 229(1)).

[68] On October 28, 2019, the Minister completed an audit of Iris and assessed it under the *ETA* for its 2017 and 2018 reporting periods. The Minister initially withheld Iris's tax refunds pending completion of the audit but subsequently agreed to release them because of the impact of the withholding on Iris's financial position. The audit did not result in any adjustments to Iris's net tax refunds.

[69] Two days later, on October 30, 2019, the Minister notified Iris of a second audit, which was to be for certain 2019 reporting periods; the audit was later expanded to include all reporting periods from January 1, 2019, to February 29, 2020. The Minister once again withheld the tax refunds. Iris requested on two occasions that the associated funds be released to allow it to maintain and uphold its business operations, but the Minister denied both requests. Following the Minister's denials, Iris sought a writ of mandamus to compel the release of the funds and filed a motion for interim relief.

[70] On April 9, 2020, prior to the hearing of the motion for interim relief, the Minister reassessed Iris for the January to August 2019 reporting periods and assessed it for the September to December 2019 reporting periods. In issuing the assessments,

the Minister disallowed input tax credits in the amount of \$98,000,000 claimed by Iris and imposed more than \$24,000,000 in gross negligence penalties, with interest.

[71] On April 17, 2020, the Federal Court dismissed the motion for interim relief as premature because the reasonable period for which refunds may be retained had not yet expired (2020 FC 532, [2020] G.S.T.C. 15). This decision was affirmed by the Federal Court of Appeal on July 8, 2020 (2020 FCA 117, [2020] G.S.T.C. 25).

[72] In response, on July 16, 2020, Iris filed an application for judicial review in the Federal Court and sought the following three declarations:

- a. the Minister failed to afford procedural fairness in the audit of [Iris], failed to provide notice of or any opportunity to respond to any proposed adjustments, contrary to the Minister's published policy thereon and the specific guarantee of the Minister's Assistant Commissioner;
- b. the assessments [of the Minister] were made without evidentiary foundation and contrary to the findings of fact made by the Minister as of the date thereof; and
- c. the assessments were made for the improper purpose of seeking to deprive the Federal Court of jurisdiction in [Iris's application] for relief in Court File No. T-425-20.

(Notice of Application, reproduced in A.R., at p. 40.)

[73] On August 11, 2020, the Minister moved to strike Iris's application at a preliminary stage on the basis that it was plain and obvious that the judicial review application constituted an attempt to circumvent the comprehensive system of tax appeals and that Iris could not obtain the relief it sought (A.R., at pp. 13-14).

III. Judicial History

[74] The prothonotary dismissed the motion to strike the application, holding that it could not be said that the application was bereft of any possibility of success.

[75] On appeal from the prothonotary's decision, the Federal Court agreed with the prothonotary that, in essence, Iris was seeking administrative law remedies (2021 FC 597, [2022] 1 F.C.R. 383). It noted that a court will strike a notice of application only where it is so clearly improper as to be bereft of any possibility of success. There was no basis for the Federal Court to intervene because the prothonotary did not err in applying the law.

[76] The Federal Court concluded that Iris's attack on the procedural fairness of the assessments fell within its jurisdiction, because the conduct of the Minister, not the issuance of the assessments themselves, is at the heart of the matter. In the Court's view, the allegations stated in the notice of application engaged administrative law principles, in respect of which the Federal Court retained jurisdiction.

[77] The Attorney General of Canada appealed the Federal Court's decision on three grounds: (1) the Federal Court failed to recognize that the true essence of Iris's application for judicial review is an attack on the validity of the assessments; (2) the Federal Court failed to recognize that the Minister had no discretion regarding the assessments of net tax under the *ETA*; and (3) the declarations sought by Iris are not cognizable administrative law remedies.

[78] The Federal Court of Appeal noted that cloaking grievances in administrative law language and remedies does not necessarily make them such (2022 FCA 101, [2022] 1 F.C.R. 401, at para. 3). Writing for a unanimous court, Rennie J.A. determined that the application for judicial review in this case essentially constitutes a collateral attack on the validity of the assessments, a matter that falls within the jurisdiction of the Tax Court. The declarations sought would be of no practical effect given that they would have no impact on the validity of the assessments. Thus, Iris's application was bereft of any possibility of success.

[79] Regarding the Federal Court's jurisdiction over the Minister's discretionary decisions, Rennie J.A. emphasized that the Minister's issuance of an assessment does not oust the jurisdiction of the Federal Court. Where the Tax Court does not have jurisdiction to deal with the Minister's conduct or where the true purpose of the application is to seek practical relief against an exercise of discretion, the bar provided for in s. 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 ("*FCA*"), does not apply.

IV. Issues

[80] The sole issue to be determined in this appeal is whether Iris's application for judicial review is bereft of any possibility of success, such that it had to be struck on a preliminary basis.

[81] The Attorney General of Canada argues that this determination must be made having regard to two questions. First, what is the essential nature of Iris's application? Second, is the declaratory relief sought by Iris appropriate to its application for judicial review?

V. Analysis

[82] It is well settled that, as Stratas J.A. wrote in *JP Morgan*, at para. 66, applications for judicial review in tax matters should be struck where any of the following obvious, fatal flaws are found:

- (1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
- (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or
- (3) the Federal Court cannot grant the relief sought.

[83] I am of the view that the Federal Court of Appeal properly intervened to strike Iris's application. There are two obvious, fatal flaws striking at the root of the Federal Court's authority to entertain this application (*JP Morgan*, at para. 47, citing *David Bull Laboratories*, at p. 600; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at para. 6 (CanLII); *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at para. 7 (CanLII); *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). This is so even if the facts pleaded are assumed to be true (*R. v. Imperial Tobacco*

Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17; see also *Wenham*, at paras. 32-33).

[84] First, on the basis of a holistic reading of Iris's application for judicial review, I find that it is a collateral attack on the correctness of the assessments. An appeal to the Tax Court is available, adequate and effective in giving Iris the relief sought with respect to its first two allegations (a breach of procedural fairness and evidentiary issues). As for Iris's third allegation of (improper purpose in making the assessments), it fails to state a cognizable administrative law claim and is in any event premature. Pursuing that claim in the Federal Court prior to doing so in the Tax Court would be premature given that such a claim could not possibly succeed in the Federal Court unless Iris had first managed to establish that the assessment was incorrect. Second, the declarations sought by Iris are of no practical effect. The Federal Court could not grant the relief sought. I therefore agree with the Federal Court of Appeal that this application was bereft of any possibility of success and had to be struck on a preliminary basis.

[85] I discuss each of these points in turn.

A. *The Claim, In Its Essential Nature or True Character, Is a Collateral Attack on the Correctness of the Assessments*

[86] As I have outlined in *Dow Chemical*, Parliament intended to give precedence to the Tax Court's jurisdiction over tax matters where a right of appeal is

expressly provided for by statute. In that case, I have concluded that s. 18.5 of the *FCA* bars the Federal Court from having jurisdiction over the Minister's exercise of discretion under s. 247(10) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"). Indeed, s. 247(2) and (10) of the *ITA* require the Minister to form an opinion as to whether a downward adjustment is appropriate when one is sought and/or established. The Minister's exercise of discretion under s. 247(10) is inextricably linked to the correctness of the resulting assessment. The scope of an appeal from a taxpayer's assessment under s. 169 of the *ITA* extends to that discretionary decision where the objection is directed at the amount of tax owing.

[87] However, nothing in the companion case should be taken to foreclose the possibility of the Federal Court having jurisdiction where the Minister's conduct or exercise of discretion is not within the scope of an appeal from an assessment to the Tax Court.

[88] It is neither necessary nor convenient to canvass the circumstances in which judicial review will be available in the Federal Court in tax matters. I agree with Stratas J.A.'s observation in *JP Morgan*, at para. 97, that a case-by-case approach is preferable. For instance, the case law has established that the exercise of the Minister's discretion under the fairness provisions, namely ss. 152(4.2) and 220(3.1) of the *ITA*, may be reviewed in the Federal Court (*Abraham v. Canada (Attorney General)*, 2012 FCA 266, 440 N.R. 201; *Abou-Rached v. Canada (Attorney General)*, 2019 FC 750, 2019 DTC 5069; *Ford v. Canada (Revenue Agency)*, 2022 FC 1077, 2022 DTC 5103).

Likewise, an application for judicial review may be filed with the Federal Court to challenge the legality of measures taken by the Minister to collect taxes allegedly due (*Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Walker v. Canada Customs and Revenue Agency*, 2005 FCA 393, 344 N.R. 169, at paras. 14-15; *Johnson v. Minister of National Revenue*, 2015 FCA 51, 469 N.R. 326, at para. 48; *Libicz v. Canada (Attorney General)*, 2021 FC 693, 2021 DTC 5075). Clearly, where the Tax Court cannot deal with the Minister’s alleged reprehensive conduct on appeal from an assessment, the Federal Court may be the appropriate forum (*JP Morgan*, at para. 83). In such cases, the bar in s. 18.5 of the *FCA* will not apply.

[89] It must be kept in mind that judicial review is a remedy of last resort where an appeal from an assessment is available in the Tax Court. As our Court stated in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, at para. 11, this avoids frustrating Parliament’s intention that assessments be dealt with exclusively by the Tax Court, a specialized court:

The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context. [Emphasis added.]

[90] Where a matter is “otherwise appealable” to the Tax Court (*Addison & Leyen*, at para. 8), the Federal Court will not have jurisdiction to entertain an

application for judicial review. This will be the case where “an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought” (*JP Morgan*, at para. 82). As a result, one way to determine whether a claim in the Federal Court is bereft of any possibility of success is to ask whether a cognizable administrative law claim could still be pursued should the taxpayer fail on appeal to the Tax Court. If no such claim could be pursued, then the application for judicial review is necessarily a collateral attack on the assessment.

[91] On a motion to strike an application, a court must always determine the essential nature or true character of the claim (see *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 25; *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, [2019] 4 S.C.R. 559, at paras. 36-37). Scrutinizing the notice of application for judicial review with this purpose in mind is especially important where an appeal from an assessment is available in the Tax Court. As Stratas J.A. wrote in *JP Morgan*, at para. 49, “[a]rmed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort.”

[92] The reviewing court must gain “a realistic appreciation” of the nature of the claim and the disputed administrative action (see *Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218, 392 N.R. 200, at para. 28). The application in question must be read “holistically and practically”, without “fastening onto matters of form”

(*JP Morgan*, at para. 50; *Sifto* at para. 25; *Wenham*, at para. 34). Determining the essential nature or true character of the claim requires the court to look beyond the words used, the facts alleged and the remedy sought to ascertain whether the statement of claim is a “disguised attempt” to reach before the Federal Court a result that would otherwise be unreachable in that court (*Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para. 16).

[93] While a “statement of claim is not to be blindly read at its face meaning” (*Roitman*, at para. 16), “genuine strategic choices should not be maligned as artful pleading” (*Windsor (City)*, at para. 27). If the pleadings, read holistically, disclose a reasonable basis for pursuing the claim, the application should not be struck (*British Columbia Investment Management Corp.*, para. 36). Conversely, if the essential nature or true character of the claim involves a matter otherwise appealable to the Tax Court, the application for judicial review would constitute a collateral attack on the validity or correctness of the assessment. Such an application is “doomed to fail” at a preliminary stage either because the bar in s. 18.5 of the *FCA* applies or because an appeal to the Tax Court is an adequate and effective recourse (*Wenham*, at para. 33).

[94] I now turn to the issue of whether Iris’s application for judicial review, read holistically, falls within the clearest of cases where a motion to strike will succeed at a preliminary stage. To reiterate, Iris sought the following relief in its pleadings:

1. A declaration that it was denied procedural fairness in the audit and assessment process, contrary to prior policy;

2. A declaration that there was no evidentiary foundation upon which the assessments could be issued under the *ETA*; and
3. A declaration that the assessments were issued for the improper purpose of depriving the Federal Court of jurisdiction to hear the administrative law grievances that Iris raised in its related application.

[95] In my view, the application was bereft of any possibility of success because it is, in its essential nature, a collateral attack on the correctness of the assessments. The first two declarations sought by Iris relate to flaws in the underlying assessment process — a breach of procedural fairness and evidentiary issues — that can be remedied by an appeal from the assessments. The third declaration sought relates to the motivation for issuing the assessments and is based on allegations which cannot be dissociated from the issue of the correctness of the assessments.

[96] I agree with the Federal Court of Appeal that the mere fact that the Minister has issued a notice of assessment does not deprive the Federal Court of jurisdiction to consider the Minister's conduct (para. 13). Again, where the Tax Court cannot deal with the Minister's alleged reprehensible conduct on appeal from an assessment, the Federal Court may be the proper forum and the bar in s. 18.5 of the *FCA* will not apply (see *JP Morgan*, at para. 83).

[97] In my respectful view, however, the situation in *Dow Chemical*, where a decision under s. 247(10) of the *ITA* is inextricably linked to the correctness of the assessment, is one where an appeal to the Tax Court would be adequate and effective in giving the taxpayer the relief sought. In such a case, the taxpayer is not seeking practical relief against the exercise of discretion, but is rather challenging the correctness of an assessment. It is an objection “ultimately related to an amount claimed” as part of the assessment (*Okalta Oils*, at p. 826).

[98] In the present case, Iris seeks declarations relating to the Minister’s conduct in respect of the timing of and evidentiary basis for the issuance of the assessments, as well as the disclosure of materials. An appeal to the Tax Court would allow the parties to discover and present documentary and oral evidence, as well as to make submissions on whether the assessments were correct as a matter of fact and law, including whether the assessments are supported by the evidence and were issued by the Minister in accordance with her statutory responsibilities. If the Tax Court concludes that Iris is liable for the tax assessed by the Minister, this would be dispositive of all three allegations. Let me explain.

[99] First, with respect to allegations of procedural unfairness, it must be kept in mind that the right of appeal provided for by the *ETA* (and the *ITA*) engages procedural rights that can cure defects in the process followed by the Minister (*JP Morgan*, at para. 82). In such a context, if an assessment is incorrect as a matter of fact and law, it is irrelevant that the assessment process was flawed. If an assessment

is correct as a matter of fact and law, it must stand even if the assessment process was flawed. As Gagné J. wrote in *Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 32, “[e]ven if the Tax Court cannot redress a procedural fairness breach, it does not follow that the Federal Court has this power. In matters of tax liability, tax is either payable or not, based on the facts and the law” (see also *Webster v. Canada (Attorney General)*, 2003 FCA 388, 312 N.R. 235, at para. 21; *Newave Consulting Inc. v. Canada (National Revenue)*, 2021 FC 1203, at para. 139 (CanLII); *Chad v. Canada (National Revenue)*, 2023 FC 1481, [2024] 1 C.T.C. 63, at para. 28).

[100] Iris alleges a breach of procedural fairness in the Minister’s failure to honour her guarantee that she would advise Iris of any proposed adjustments and would provide Iris with an opportunity to respond during the audit process (A.F., at paras. 19-20). While Iris may not have had an opportunity to respond to the proposed adjustment before the assessments were issued, it can challenge the adjustment by way of an appeal from the resulting assessments under s. 302 of the *ETA*.

[101] Second, the question of whether the evidence supports an assessment is precisely the object of a taxpayer’s recourse in the Tax Court. Under s. 302 of the *ETA*, the Tax Court is tasked with determining the taxpayer’s tax liability *de novo* on the basis of a full evidentiary record (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486, cited in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, at para. 92). Iris’s allegation that the assessments were made without evidentiary foundation and

contrary to the findings of fact made by the Minister is properly within the legislative mandate of the Tax Court and cannot be entertained by the Federal Court.

[102] Third, whether an allegation of improper purpose in issuing an assessment is a cognizable administrative law claim is a fact-specific inquiry that turns on the allegation made by the taxpayer. Indeed, such claims are not normally entertained by the Federal Court because the Minister *generally* has no discretion in the fulfillment of her statutory responsibilities (see, e.g., *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, at para. 25, citing *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.), at para. 36). This was emphasized by Stratas J.A. in *JP Morgan*, at paras. 77-78:

On occasion in the tax context, parties have alleged that the Minister abused her discretion in making an assessment. To date, all such claims have been dismissed as not being cognizable because in assessing the tax liability of a taxpayer, the Minister generally has no discretion to exercise and, indeed, no discretion to abuse. Where the facts and the law demonstrate liability for tax, the Minister must issue an assessment: *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.), at page 602 (“the Minister has a statutory duty to assess the amount of tax payable on the facts as [she] finds them in accordance with the law as he understands it”).

In this regard, as far as the assessments of a taxpayer’s own liability are concerned, the Minister does not have “any discretion whatever in the way in which [she] must apply the *Income Tax Act*” and must “follow it absolutely”: *Ludmer v. Canada*, [1995] 2 F.C. 3 (C.A.), at page 17; *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.), at paragraph 36. This Court cannot stop the Minister from carrying out this duty: *Canada Revenue Agency v. Tele-Mobile Company Partnership*, 2011 FCA 89, 2011 G.T.C. 2014, at paragraph 5 (in the context of the *Excise Tax Act*, R.S.C., 1985, c. E-15); *Ludmer*, above, at page 9.

[103] If the Tax Court determines that tax is owed, the Minister will have acted dutifully and the purpose for issuing the assessment cannot be said to be improper. There is “no utility in trying to parse or separate the motivation behind a decision to assess from the correctness of the assessment itself” (C.A. reasons, at para. 17). In any event, such a claim could not possibly succeed in the Federal Court without the taxpayer first showing that the assessment was incorrect in the Tax Court. Pursuing a claim in the Federal Court prior to an appeal to the Tax Court would necessarily be premature.

[104] In the present case, Iris alleges that the assessments were issued for the improper purpose of depriving the Federal Court of jurisdiction in a related application. I agree with Rennie J.A that such an allegation fails to point to any particular motive or conduct separate from the Minister’s duty to issue an assessment in accordance with the facts and the law under the *ETA* (para. 14). It is a collateral attack on the correctness of the assessments.

[105] It is true that a party cannot object to the process or motivation underlying the issuing of an assessment on an appeal to the Tax Court (see *Canada v. Consumers’ Gas Co.*, [1987] 2 F.C. 60 (C.A.); *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597, at paras. 6-8; *Roitman*, at para. 21; *Ereiser v. Minister of National*, 2013 FCA 20, 444 N.R. 64; *Johnson v. Canada*, 2015 FCA 52, 470 N.R. 183, at para. 4; *9162-4676 Québec Inc. v. Canada*, 2016 FCA 112, 2017 DTC 5074, at para. 2). But it is also true that such an objection will not normally succeed in the

Federal Court where an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought. This is a feature, not a bug, of the system of tax assessments and appeals established by Parliament.

[106] I reiterate that our Court has cautioned against judicial review being used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament (*Addison & Leyen*, at para. 11).

[107] In the instant case, the prothonotary erred in law by failing to consider the respective jurisdictions of the Tax Court and the Federal Court, as delineated by each court's enabling statute. This led to an incorrect determination by the prothonotary that Iris's claim, in its essential nature, is a cognizable administrative law claim (see 744185 *Ontario Inc. v. Canada*, 2020 FCA 1, 441 D.L.R. (4th) 564, at para. 49; *McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4, at para. 65 (CanLII)). The Federal Court of Appeal properly determined that the essential nature or true character of all three grounds, when situated in the context of the *ETA*, is a collateral attack on the correctness of the assessments themselves (para. 6). An assessment is a matter that falls within the exclusive jurisdiction of the Tax Court, a specialized court established specifically to deal with tax matters.

[108] I therefore conclude that, in the present case, an appeal to the Tax Court would be an adequate and effective remedy available to Iris, and, accordingly, the application was doomed to fail in the Federal Court.

B. *The Declaratory Relief Sought by Iris Is of No Practical Effect*

[109] An application is bereft of any possibility of success where it seeks a declaration that is of no practical effect. The Federal Court cannot issue declarations of the sort. I agree with the Federal Court of Appeal that all three declarations here would be purely academic and could not be granted (para. 18).

[110] There is no longer any live controversy between the parties apart from the correctness of the Minister's assessments. It goes without saying that, because of the limitation in s. 18.5 of the *FCA*, the Federal Court cannot vary or vacate an assessment itself (*Minister of National Revenue v. Parsons*, [1984] 2 F.C. 331 (C.A.); *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643, at para. 28). In the present circumstances, issuing declarations that do not vary or vacate the assessments would serve little or no purpose (see *Johnson* (2015 FCA 51), at para. 41). The only question which remains is whether or not the tax is owed as a matter of fact and law. Iris would still have to pursue an appeal to the Tax Court even if all three declarations were granted, and there is no guarantee that the assessments would be vacated or varied.

[111] Any declaration in this context would necessarily be detached from the rights of the parties or from a live controversy and could not be issued. In *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11, this Court determined that “[a] declaration can only be granted if it will have practical utility, that is, if it will settle a ‘live controversy’ between the parties”

(see also *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60).

[112] In my view, it was open to the Federal Court of Appeal to determine that the prothonotary and the Federal Court erred in fact and law by failing to find that the declarations sought were purely factual and served no practical purpose (C.A. reasons, at paras. 15-16 and 18).

VI. Conclusion

[113] While the issuance of assessments does not, *per se*, deprive the Federal Court of jurisdiction to consider the Minister's conduct I find that, in the instant case, Iris ought to have challenged the assessments by appealing to the Tax Court. The application, in its essential nature, is a collateral attack on the correctness of the assessments. In any event, the declarations sought before the Federal Court would have no practical effect and could not have been issued. I therefore conclude that the application for judicial review was bereft of any possibility of success.

[114] For these reasons, I would dismiss Iris's appeal, with costs.

Appeal dismissed with costs.

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