



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-024

Transnat Express Inc.

v.

Minister of National Revenue

*Decision and reasons issued
Friday, January 17, 2014*

TABLE OF CONTENTS

DECISION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 STATUTORY FRAMEWORK..... 1

ISSUES..... 4

 TRIBUNAL ANALYSIS 5

 Period Covered by the Application 5

 Diesel Fuel Used for Reefers 5

 Transnat Failed to Provide Proof in Support of its Application 5

 Receipts Issued to V. Boutin..... 6

DECISION 7

IN THE MATTER OF an appeal heard on September 19, 2013, pursuant to section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue, dated May 13, 2009, with respect to a notice of objection pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

TRANSNAT EXPRESS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION

The appeal is allowed in part.

Serge Fréchette
Serge Fréchette
Presiding Member

Stephen A. Leach
Stephen A. Leach
Member

Ann Penner
Ann Penner
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 19, 2013

Tribunal Members: Serge Fréchette, Presiding Member
Stephen A. Leach, Member
Ann Penner, Member

Counsel for the Tribunal: Eric Wildhaber
Carrie Vanderveen
Anca Petrescu (student-at-law)

Manager, Registrar Programs and Services: Michel Parent

Registrar Officer: Haley Raynor

PARTICIPANTS:

Appellant	Counsel/Representative
Transnat Express Inc.	Michael Kaylor
Respondent	Counsel/Representative
Minister of National Revenue	André LeBlanc

WITNESSES:

Jean-Robert Fontaine Fleet Manager V. Boutin Express Inc.	Marc Binette Director Finance and Administration V. Boutin Express Inc.
Louis Gravel Excise Tax Auditor Canada Revenue Agency	

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
15th Floor
333 Laurier Avenue West
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed pursuant to section 81.19 of the *Excise Tax Act*¹ by Transnat Express Inc. (Transnat) from a decision made by the Minister of National Revenue (the Minister) on May 13, 2009, with respect to a notice of objection pursuant to section 81.17.
2. Transnat is a trucking company that purchases diesel fuel to, among other things, generate electricity to heat or cool the cabs behind the driver's seat while drivers are resting or sleeping (i.e. for hostelling purposes) and to provide refrigeration for containers (reefers).
3. Pursuant to paragraph 68.01(1)(b) of the *Act*, Transnat applied for a payment equal to the amount of tax purportedly paid on diesel fuel used to generate electricity for purposes *other than* primarily in the operation of a vehicle (the application), i.e. to generate electricity to heat or cool drivers' cabs and to provide refrigeration for containers. The Minister denied Transnat's claims because it failed to provide supporting documentation.² The Minister is now prepared to accept certain claims with supporting documentation for the period from January 1 to March 31, 2004, regarding diesel fuel used for hostelling purposes.
4. The Tribunal held a public hearing on September 19, 2013, and heard testimony from Mr. Jean-Robert Fontaine, Fleet Manager, and Mr. Marc Binette, Director of Finance and Administration, both with V. Boutin Express Inc., and Mr. Louis Gravel, Excise Tax Auditor, Canada Revenue Agency.

STATUTORY FRAMEWORK

5. Subsection 23(1) of the *Act* provides for the imposition of an excise tax in certain circumstances. It provides as follows:

23.(1) Subject to subsection (6) to (8), whenever goods mentioned in Schedule I are imported or manufactured or produced in Canada and delivered to a purchaser of those goods, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this or any other law, an excise tax in respect of the goods at the applicable rate set out in the applicable section of that Schedule

23.(1) Sous réserve des paragraphes (6) à (8), lorsque les marchandises énumérées à l'annexe I sont importées au Canada, ou y sont fabriquées ou produites, puis livrées à leur acheteur, il est imposé, prélevé et perçu, outre les autres droits et taxes exigibles en vertu de la présente loi ou de toute autre loi, une taxe d'accise sur ces marchandises, calculée selon le taux applicable figurant à l'article concerné de cette annexe. [...]

6. Section 9.1 of Schedule I to the *Act* lists diesel fuel and sets out the applicable rate of tax for such fuel at \$0.04 per litre.

1. R.S.C., 1985, c. E-15 [*Act*].
2. Exhibit AP-2009-024-01, Vol. 1.

7. Subsection 2(1) of the *Act* indicates that “diesel fuel” does not include fuel oil that is used as heating oil. It provides as follows:

“diesel fuel” includes any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel oil that is intended for use and is actually used as heating oil.	« combustible diesel » S’entend notamment de toute huile combustible qui peut être utilisée dans les moteurs à combustion interne de type allumage par compression, à l’exception de toute huile combustible destinée à être utilisée et utilisée de fait comme huile à chauffage.
--	--

8. Notwithstanding subsection 23(1) of the *Act*, paragraph 23(8)(c) indicates that excise tax is not payable in certain cases. It provides as follows:

(8) The tax imposed under subsection (1) is <i>not</i> payable in the case of ... (c) diesel fuel for use in the generation of electricity, except where the electricity so generated is used primarily in the operation of a vehicle.	(8) La taxe imposée en vertu du paragraphe (1) <i>n’est pas</i> exigible : [...] c) dans le cas de combustible diesel devant servir à la production d’électricité, sauf lorsque l’électricité ainsi produite est principalement utilisée pour faire fonctionner un véhicule.
--	--

[Emphasis added]

9. Sections 68 and 69 of the *Act* allow certain persons, purchasers and vendors to apply for payments in respect of taxes that have been paid. There are specific conditions that must be met before payments are made. Paragraph 68.01(1)(b) indicates that, when excise tax has been paid in respect of diesel fuel, the Minister may pay an amount equal to the amount of excise tax paid to a purchaser who uses the diesel fuel to generate electricity that is not used primarily in the operation of a vehicle. It provides as follows:

68.01(1) If tax under this Act has been paid in respect of diesel fuel, the Minister may pay an amount equal to the amount of that tax (a) in the case where a vendor delivers the diesel fuel to a purchaser (i) to the vendor, if the vendor applies for the payment, the purchaser certifies that the diesel fuel is for use exclusively as heating oil and the vendor reasonably believes that the purchaser will use it exclusively as heating oil, (ii) to the purchaser, if the purchaser applies for the payment, the purchaser uses the diesel fuel as heating oil and no application in respect of the diesel fuel can be made by the vendor under subparagraph (i); or (b) to a purchaser who applies for the payment and who uses the diesel fuel to generate electricity, except if the electricity so generated is used primarily in the operation of a vehicle.	68.01(1) Le ministre peut verser aux personnes ci-après qui en font la demande une somme égale au montant de toute taxe prévue par la présente loi qui a été payée relativement à du combustible diesel : a) dans le cas où le combustible est livré à l’acheteur par le vendeur : (i) le vendeur, si l’acheteur atteste que le combustible est destiné à être utilisé exclusivement comme huile de chauffage et si le vendeur est fondé à croire que l’acheteur l’utilisera exclusivement à ce titre, (ii) l’acheteur, s’il utilise le combustible comme huile de chauffage et qu’aucune demande relative au combustible ne peut être faite par le vendeur visé au sous-alinéa (i); b) dans le cas où le combustible est utilisé par l’acheteur pour produire de l’électricité, cet acheteur, sauf si l’électricité ainsi produite est principalement utilisée pour faire fonctionner un véhicule.
--	---

[Emphasis added]

10. Paragraph 68.01(3)(b) of the *Act* specifies the timing for requesting such a payment. It provides as follows:

(3) No payment shall be made under this section unless	(3) Les versements prévus au présent article ne sont effectués que si, selon le cas :
...	[...]
(b) the purchaser described in subparagraph (1)(a)(ii), paragraph (1)(b) or subsection (2) applies for it within <i>two years</i> after the purchase.	b) l'acheteur visé au sous-alinéa (1)a)(ii), à l'alinéa (1)b) ou au paragraphe (2) en fait la demande dans les <i>deux ans</i> suivant l'achat.

[Emphasis added]

11. In addition, subsection 68.01(4) of the *Act* indicates that the Minister must be satisfied that all the conditions for payment are met before any payment can be made. It provides as follows:

(4) The Minister is not required to make a payment under this section unless the Minister is satisfied that all the conditions for the payment have been met.	(4) Le ministre n'est pas tenu de faire un versement prévu au présent article tant qu'il n'est pas convaincu que les conditions du versement sont réunies.
---	--

12. Subsection 81.17(1) of the *Act* provides that any person who has made an application under any of sections 68 to 69 and who objects to the determination of the Minister may object to the determination within 90 days. It provides as follows:

81.17(1) Any person who has made an application under any of sections 68 to 69 and who objects to the determination of the Minister respecting the application may, within ninety days after the day on which the notice of determination is sent to that person, serve on the Minister a notice of objection in the prescribed form setting out the reasons for the objection and all relevant facts on which that person relies.	81.17(1) Toute personne qui a fait une demande en vertu de l'un des articles 68 à 69 et qui s'oppose à la détermination du ministre concernant la demande peut, dans un délai de quatre-vingt-dix jours suivant la date d'envoi de l'avis de détermination, signifier au ministre un avis d'opposition en la forme prescrite, énonçant les raisons de son opposition et tous les faits pertinents sur lesquels il se fonde.
--	---

13. As noted above, section 81.19 of the *Act* allows any person who has served a notice of objection under section 81.17, other than a notice in respect of Part I, to file an appeal of the assessment or determination with the Tribunal within ninety days after the day on which the notice of decision on the objection is sent to that person.

14. Subsection 98(1) of the *Act* requires that every person who makes an application under sections 68 to 70 keep records that will enable the amount of payment that may be made to that person to be determined. The person is required to keep those records for a period of six years from the end of the calendar year in respect of which those records and books of account are kept (section 98[2]) or until any objection or appeal has been fully disposed of by appeal or otherwise (section 98[2.1]). Subsection 98(1) provides as follows:

98.(1) Every person who
 (a) is required, by or pursuant to this Act, to pay or collect taxes or other sums or to affix or cancel stamps, or
 (b) makes an application under any of sections 68 to 70,

shall keep records and books of account in English or French at that person's place of business in Canada in such form and containing such information as will enable the amount of taxes or other sums that should have been paid or collected, the amount of stamps that should have been affixed or cancelled or the amount, if any, of any drawback, payment or deduction that has been made or that may be made to or by that person, to be determined.

(2) Every person required by subsection (1) to keep records and books of account shall retain those records and books of account and every account and voucher necessary to verify the information contained therein until the expiration of six years from the end of the calendar year in respect of which those records and books of account are kept or until written permission for their prior disposal is given by the Minister.

...

(2.1) Notwithstanding subsection (2), where a person required by subsection (1) to keep records and books of account serves a notice of objection under section 81.15 or 81.17 or is a party to an appeal under this Part, he shall retain those records and books of account and every account and voucher necessary to verify the information therein until the objection or appeal has been finally disposed of by appeal or otherwise.

98.(1) Quiconque :

a) est tenu par la présente loi, ou conformément à celle-ci, de payer ou de percevoir des taxes ou autres sommes ou d'apposer ou oblitérer des timbres;

b) présente une demande en vertu de l'un ou l'autre des articles 68 à 70,

doit tenir des registres et livres de comptes, en anglais ou en français, à son établissement au Canada selon la forme et renfermant les renseignements qui permettent de déterminer le montant des taxes et les autres sommes qui auraient dû être payées ou perçues, le montant des timbres qui auraient dû être apposés ou oblitérés ou le montant éventuel de tout drawback accordé, de tout paiement effectué ou de toute déduction accordée par lui ou à lui, ou susceptible de l'être.

(2) Quiconque est requis, aux termes du paragraphe (1), de tenir des registres et livres de compte doit conserver tous les registres et livres de compte de ce genre, ainsi que tout compte et toute pièce justificative nécessaires à la vérification des renseignements y contenus, pendant six ans suivant la fin de l'année civile à l'égard de laquelle les documents en cause ont été tenus sauf autorisation écrite du ministre de s'en départir avant la fin de cette période

[...]

(2.1) Nonobstant le paragraphe (2), lorsqu'une personne requise par le paragraphe (1) de tenir des registres et livres de comptes signifie un avis d'opposition en vertu de l'article 81.15 ou 81.17 ou est partie à un appel aux termes de la présente partie, elle doit conserver ces registres et livres de comptes ainsi que chaque compte et pièce justificative nécessaires à la vérification des renseignements qui y sont contenus jusqu'à ce que l'opposition ou l'appel aient été définitivement tranchés, par voie d'appel ou autrement.

ISSUES

15. The parties have agreed that 4.69 percent is the percentage of diesel fuel usage that qualifies for a payment under paragraphs 23(8)(c) and 68.01(b) of the *Act*.

16. The remaining issues in dispute between the parties are the following: the period covered by Transnat's application; whether diesel fuel used for refrigeration purposes qualifies for a payment under the *Act*; whether Transnat provided sufficient supporting documentation for its application; and whether receipts showing purchases of diesel fuel by V. Boutin Express Inc. (V. Boutin) were in fact purchased and used by Transnat for qualified purposes.

TRIBUNAL ANALYSIS

Period Covered by the Application

17. Paragraph 68.01(3)(b) of the *Act* specifies that a purchaser must apply for payment within two years after the purchase. Notwithstanding the fact that Transnat's application was for a two-year period beginning on April 1, 2002, and ending on March 31, 2004, because it did not file its application until August 9, 2004, it contends that its application should be allowed to cover the two-year period beginning on August 9, 2002, and ending on August 9, 2004. The Tribunal heard no valid argument from Transnat to support this contention.³ On the basis of the application filed by Transnat and on the operation of the two-year statutory time frame of paragraph 68.01(3)(b), the Tribunal finds that the only claims eligible for payment are those made for the period between August 9, 2002, and March 31, 2004.

Diesel Fuel Used for Reefers

18. The burden of proof in this appeal lies with Transnat. It provided no written argument in support of its claim in respect of diesel fuel used for reefers. Its oral argument on the matter was short.⁴ The little oral evidence that was presented on the matter appeared to contradict Transnat's position.⁵ As such, the Tribunal finds that Transnat failed to provide a basis upon which diesel fuel used for reefers qualifies for a payment under the *Act*.⁶ Accordingly, claims for diesel fuel used for reefers are denied.

Transnat Failed to Provide Proof in Support of its Application

19. Subsection 98(1) of the *Act* requires that every person who makes an application under sections 68 to 70 keep records that will enable the amount of payment that may be made to that person to be

3. Transnat argued that *Erin Michaels MFG. Inc. v. M.N.R.* (10 January 1997), AP-94-330 (CITT) [*Erin Michaels*] supported its position. See *Transcript of Public Hearing*, 19 September 2013, at 114. The Tribunal finds that *Erin Michaels* clearly applies only to a period for which a valid application has been filed; it stated, in *Erin Michaels* at 5, as follows: "... an intention to limit an applicant to the amount for which it *applied* ..." [emphasis added]. Transnat's application explicitly covered a period ending on March 31, 2004. The Tribunal finds that the date on which Transnat filed its application, that is, August 9, 2004, cannot be viewed as having amended the date that appears on the face of that application.

4. *Transcript of Public Hearing*, 19 September 2013, at 80-81. Argument made by the Minister has satisfied the Tribunal that Transnat insufficiently addressed claims regarding reefers. See *Transcript of Public Hearing*, 19 September 2013, at 106-107.

5. Contrast the statements made by M. Binette, *Transcript of Public Hearing*, 19 September 2013, at 35-38, and argument, *Transcript of Public Hearing*, 19 September 2013, at 80-81.

6. The *Act* provides for a payment when diesel fuel has been used for the purposes of generating electricity other than for the purposes of operating a motor vehicle. It was not disputed by the parties that any diesel fuel used for hostelling purposes had generated electricity. The Tribunal was presented with no evidence, however, to establish that reefers function by way of electricity generated by diesel fuel, rather than by direct combustion of that fuel.

determined. However, the evidence establishes that Transnat destroyed all but a small portion of receipts for its purchases of diesel fuel during the period covered by its application.⁷

20. Transnat attempted to remedy the destruction of the receipts by tendering evidence of *International Fuel Tax Agreement (IFTA)* reports and oral testimony in order to establish the necessary relationship between the purchases for which the claims are made and the period covered by its application for a refund of the taxes paid on those purchases.

21. *IFTA* reports are made under *IFTA*, which “. . . is an agreement among the 10 provinces in Canada and 48 states in the United States that simplifies the reporting by interjurisdictional carriers (IICs) of motor fuel use taxes. The Agreement allows IICs, operating qualified motor vehicle(s), to report and pay taxes owing to all jurisdictions to a single base jurisdiction.”⁸

22. The Minister’s argument is that *IFTA* reports are akin to income tax declarations devoid of any supporting documentation and that only receipts of purchases constitute records required by subsection 98(1) of the *Act* which can be independently verified. The Minister also pointed to the fact that there were considerable gaps between the invoices that were provided by Transnat for the period from January 1 to March 31, 2004, and the corresponding *IFTA* reports for that period.⁹

23. The Tribunal agrees with the Minister’s position that *IFTA* reports are insufficient records for the purposes of subsection 98(1) of the *Act*. Paragraph 98(1)(b) requires that “[e]very person who . . . makes an application under . . . [section 68.01] . . . shall keep records . . . as will enable . . . the amount, if any, . . . of any . . . payment . . . that may be made to . . . that person, to be determined.” As admitted by Transnat, supporting records for the period from August 9, 2002, to December 31, 2003, have been destroyed.¹⁰ That was in violation of Transnat’s obligation under the *Act*.¹¹ The *IFTA* reports on the record for which supporting records were indeed provided have been shown to be unreliable.¹² In that context, the testimony provided by Transnat has failed as a substitute for the record-keeping requirements of the *Act*.

24. Accordingly, based on the application filed by Transnat, the only claims eligible for payment are those made for the period from January 1 to March 31, 2004, for which Transnat has met the record-keeping requirements of the *Act*, as already verified by the Minister.¹³

Receipts Issued to V. Boutin

25. Witnesses for Transnat testified that invoices issued to V. Boutin and included in Transnat’s application relate to diesel fuel purchased and used by Transnat for qualified purposes and that the Minister should make further attempts to verify these claims.¹⁴ The Tribunal finds that this testimony warrants further inquiry by the Minister.

7. *Transcript of Public Hearing*, 19 September 2013, at 39-42.

8. Exhibit AP-2009-024-51 at 27, Vol. 1.

9. *Transcript of Public Hearing*, 19 September 2013, at 108-109.

10. *Ibid.* at 39-42.

11. Subsections 98(2) and (2.1) of the *Act*.

12. *Transcript of Public Hearing*, 19 September 2013, at 108-109.

13. Exhibit AP-2009-024-88A, Vol. 1.

14. *Transcript of Public Hearing*, 19 September 2013, at 28-32, 35, 60-61.

DECISION

26. The Tribunal finds the following:
- The claims by Transnat for purchases of diesel fuel used for refrigeration are denied.
 - The claims by Transnat for purchases of diesel fuel without supporting documentation are denied.
 - The Tribunal confirms the agreement between the parties that 4.69 percent is the percentage of diesel fuel usage that qualifies for a payment under paragraphs 23(8)(c), and 68.01(b) of the *Act*.
 - The claims by Transnat for purchases of diesel fuel not used for refrigeration for the period from January 1 to March 31, 2004, and supported by receipts issued to Transnat, are allowed.
 - The claims by Transnat for purchases of diesel fuel not used for refrigeration for the period from January 1 to March 31, 2004, and supported by receipts issued to V. Boutin, are referred back to the Minister for a determination of whether these claims relate to diesel fuel ultimately purchased and used by Transnat in a manner that qualifies for a payment under paragraphs 23(8)(c) and 68.01(b) of the *Act*.
27. For the foregoing reasons, the appeal is allowed in part.

Serge Fréchette
Serge Fréchette
Presiding Member

Stephen A. Leach
Stephen A. Leach
Member

Ann Penner
Ann Penner
Member