Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-054

United Independent Energy Group Inc.

v.

Minister of National Revenue

Decision and reasons issued
Friday, July 13, 2012

Canada

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IN THE MATTER OF an appeal heard on June 26, 2012, 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 October 3, 2011, with respect to a notice of objection served pursuant to section 81.15 of the *Excise Tax Act.*

BETWEEN

UNITED INDEPENDENT ENERGY GROUP INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 26, 2012
Tribunal Members:	Diane Vincent, Presiding Member Serge Fréchette, Member Pasquale Michaele Saroli, Member
Counsel for the Tribunal:	Alain Xatruch
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representatives**
United Independent Energy Group Inc.	Earl Rosebush Donna Rosebush Derek Rosebush
Respondent	**Counsel/Representative**
Minister of National Revenue	April Tate

WITNESSES:

Earl Rosebush President United Independent Energy Group Inc.	Donna Rosebush
Derek Rosebush Operations Manager United Independent Energy Group Inc.	Brenda Lalonde Excise/GST Auditor Canada Revenue Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by United Independent Energy Group Inc. (United) with the Canadian International Trade Tribunal (the Tribunal) pursuant to section 81.19 of the *Excise Tax Act*[1] from an assessment of the Minister of National Revenue (the Minister), dated September 13, 2010, that imposed excise tax on fuel that United purchased as heating oil but subsequently sold as diesel fuel.

2. The issues in this appeal are whether the Minister properly assessed United for failing to remit excise tax on fuel that it purchased for a tax-exempt purpose but subsequently sold for a taxable purpose, whether United can be considered a "licensed wholesaler" within the meaning assigned to that expression by section 42 of the *Act* and whether the Tribunal can order the Minister to waive or cancel interest and penalties that have been assessed under the *Act*.

PROCEDURAL HISTORY

3. In July 2010, an auditor of the Canada Revenue Agency (CRA) conducted an audit of United's purchases and sales of fuel during the period from April 1, 2008, to March 31, 2010 (the relevant period), to determine whether fuel purchased as heating oil (i.e. a tax-exempt purpose) from manufacturers or producers had subsequently been sold as diesel fuel (i.e. a taxable purpose).[2] The results of the audit demonstrated that, during the relevant period, 1,185,867 litres of fuel had been purchased as heating oil but then sold as diesel fuel.

4. On September 13, 2010, the Minister issued a notice of assessment in the amount of $47,434.68 for the excise tax that United failed to remit on the aforementioned 1,185,867 litres of diverted fuel. The notice of assessment also included amounts of $3,617.35 in interest and $1,649.74 in penalties, for a total of $52,701.77.

5. United subsequently objected to the assessment by serving on the Minister a notice of objection pursuant to section 81.15 of the *Act*. It also applied for taxpayer relief pursuant to section 88.[3] On August 15, 2011, the CRA advised United that its application for taxpayer relief would be reviewed after the Minister had disposed of its objection and all appeal rights had expired.

6. On October 3, 2011, the Minister issued a notice of decision,[4] which rejected United's objection and confirmed the assessment.

7. On December 23, 2011, United appealed the assessment to the Tribunal pursuant to section 81.19 of the *Act*.

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1. R.S.C. 1985, c. E-15 [*Act*].
2. The CRA refers to this type of audit as a "fuel diversion analysis".
3. United claims that it applied for taxpayer relief pursuant to section 281.1 of the *Act*. However, that provision pertains to the waiving or cancelling of interest and penalties related to the payment of the goods and services tax (GST). According to the Minister, United actually applied for taxpayer relief pursuant to section 88.
4. The actual notice issued to United by the CRA was titled "notice of confirmation". However, as the *Act* refers to this type of notice as a "notice of decision", the Tribunal will use this term in its reasons.

8. On June 26, 2012, the Tribunal held a public hearing in Ottawa, Ontario. Messrs. Earl Rosebush, President of United, and Derek Rosebush, Operations Manager at United, as well as Ms. Donna Rosebush appeared as witnesses for United.[5] Ms. Brenda Lalonde, Excise/GST Auditor at the CRA, who audited United's purchases and sales of fuel during the relevant period, appeared as a witness for the Minister.

RELEVANT LEGISLATIVE PROVISIONS

Excise Tax Payable by Importers, Manufacturers and Producers

9. Subsection 23(1) of the *Act* provides for the imposition of excise tax in respect of the goods mentioned in Schedule I that are imported or are manufactured or produced in Canada and delivered to a purchaser. Subsection 23(2) specifies by whom and when the tax is payable. These provisions provide as follows:

> **23.** (1) Subject to subsection (6) to (8), whenever goods mentioned in Schedule I are imported or are 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, computed, if that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be.
>
> (2) Where goods are imported, the excise tax imposed by subsection (1) shall be paid in accordance with the provisions of the *Customs Act* by the importer, owner or other person liable to pay duties under that Act, and where goods are manufactured or produced and sold in Canada, the excise tax shall be payable by the manufacturer or producer at the time of delivery of the goods to the purchaser thereof.

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

11. However, subsection 2(1) of the *Act* indicates that diesel fuel does not include fuel oil that is to be 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.

12. Thus, in instances where diesel fuel, including any fuel oil, other than that which is intended for use and is actually used as heating oil, is manufactured or produced and sold in Canada, excise tax is payable at a rate of $0.04 per litre by the manufacturer or producer at the time the fuel is delivered to the purchaser.

Excise Tax Payable by Licensed Wholesalers

13. Subsection 23(4) of the *Act* provides for the imposition of excise tax on the sale by a licensed wholesaler of the goods mentioned in Schedule I. It provides as follows:

> (4) Whenever goods mentioned in Schedule I are sold by a licensed wholesaler or are retained for the licensed wholesaler's own use or for rental by the licensed wholesaler to others, there shall be imposed, levied and collected, in addition to any other duty or tax payable under this Act or any other Act or law, an excise tax in respect of those goods at the applicable rate set out in the applicable section in that Schedule, computed, where that rate is specified as a percentage, on the duty paid

5. United operates as Earl Rosebush Fuels. See *Transcript of Public Hearing*, 26 June 2012, at 7.

> value or the price at which the goods were purchased by the licensed wholesaler, as the case may be, payable by the licensed wholesaler at the time the goods are delivered to the purchaser or so retained for use or rental.

14. However, subsection 23(6) of the *Act* provides that excise tax imposed by subsection 23(1) is not payable when the goods mentioned in Schedule I are purchased or imported by a licensed wholesaler for resale by the licensed wholesaler.[6] It provides as follows:

> (6) The tax imposed by subsection (1) is not payable in the case of goods mentioned in Schedule I that are purchased or imported by a licensed wholesaler for resale by him.

15. Thus, in instances where diesel fuel, including any fuel oil, other than that which is intended for use and is actually used as heating oil, is sold by a licensed wholesaler, excise tax is payable at a rate of $0.04 per litre by the licensed wholesaler at the time the fuel is delivered to the purchaser. However, in such circumstances, no excise tax would have been payable by the manufacturer or producer of the fuel at the time it was delivered to the licensed wholesaler.

16. As for the term "licensed wholesaler", subsection 22(1) of the *Act* provides that, in Part III (i.e. the part of the *Act* under which the Minister claims it assessed United), it has the meaning assigned to it by section 42. Section 42 defines a "licensed wholesaler" as follows: ". . . any wholesaler, jobber or other dealer licensed under [Part VI of the *Act*]."

17. Subsection 55(1) of the *Act* provides that a wholesaler may be granted a licence if it applies therefor and meets certain conditions. It provides as follows:

> **55.** (1) A *bona fide* wholesaler or jobber may be granted a licence but, if a wholesaler was not in possession of a licence on September 1, 1938, no licence shall be issued to him unless he is engaged exclusively or mainly in the purchase and sale of lumber or unless fifty per cent of his sales for the three months immediately preceding his application were exempt from the sales tax under this Act.

Measurement of Fuel Volume

18. The *Act* provides two methods for measuring the volume of fuel that is imported or sold for the purposes of determining the tax imposed under subsections 23(1) and (4)—the "temperature compensated method" and the "uncompensated method". These methods are defined at subsection 23.01(1), which provides as follows:

> "temperature compensated method" means the method involving the measurement of the volume of fuel in litres that are corrected to the reference temperature of 15 degrees Celsius in accordance with the requirements imposed by or under the *Weights and Measures Act*.
>
> "uncompensated method" means the method involving the measurement of the volume of fuel in litres that are not corrected to a reference temperature.

19. Subsection 23.01(2) of the *Act* provides that, for the purposes of determining the tax imposed under subsection 23(1), the volume of fuel is measured in accordance with whichever method is used by the manufacturer or producer to establish the amount of fuel sold to the purchaser, or by the importer to establish the amount of fuel imported. Subsection 23.01(3) similarly provides that, for the purposes of determining the tax imposed under subsection 23(4), the volume of fuel is measured in accordance with whichever method is used by the licensed wholesaler to establish the amount of fuel sold to the purchaser.

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6. This provision is presumably intended to prevent having excise tax paid on the same goods more than once.

Excise Tax Payable on Diverted Fuel

20. Subsection 23(9.1) of the *Act* provides for the imposition of excise tax in respect of certain fuels that have been purchased for a tax-exempt purpose but subsequently diverted to a taxable sale or use. It provides as follows:

> (9.1) Where fuel other than aviation gasoline has been purchased or imported for a use for which the tax imposed under this Part on diesel fuel or aviation fuel is not payable and the purchaser or importer sells or appropriates the fuel for a purpose for which the fuel could not have been purchased or imported without payment of the tax at the time he purchased or imported it, the tax imposed under this Part on diesel fuel or aviation fuel shall be payable by the person who sells or appropriates the fuel
>
> (*a*) where the fuel is sold, at the time of delivery to the purchaser; and
>
> (*b*) where the fuel is appropriated, at the time of that appropriation.

21. Thus, in instances where fuel is purchased as heating oil (i.e. a tax-exempt purpose),[7] but subsequently sold as diesel fuel (i.e. a taxable purpose), excise tax is payable at a rate of $0.04 per litre by the person who sells the fuel at the time the fuel is delivered to the purchaser.

Assessments, Objections and Appeals

22. Subsection 81.1(1) of the *Act* provides the Minister with the authority to assess a person for any tax, penalty, interest or other sum payable by that person under the *Act*. It provides as follows:

> **81.1** (1) The Minister may, in respect of any matter, assess a person for any tax, penalty, interest or other sum payable by that person under this Act and may, notwithstanding any previous assessment covering, in whole or in part, the same matter, make such additional assessments as the circumstances require.

23. However, subsection 88(1) of the *Act* allows the Minister to waive or cancel interest or penalties that have been assessed. It provides as follows:

> **88.** (1) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel any amount otherwise payable to the Receiver General under this Act that is interest or a penalty on an amount that is required to be paid by the person under this Act in respect of the reporting period.

24. Subsection 81.15(1) of the *Act* provides that any person who has been assessed may object to the assessment. It provides as follows:

> **81.15** (1) Any person who has been assessed, otherwise than pursuant to subsection (4) or 81.38(1), and who objects to the assessment may, within ninety days after the day on which the notice of assessment is sent to him, 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.

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7. As the definition of "diesel fuel" found at subsection 2(1) of the *Act* specifically excludes fuel oil that is *intended for use* and is *actually used* as heating oil, no excise tax is payable by a person who sells such fuel. However, the Tribunal notes that, in *W.O. Stinson & Son Ltd. v. Canada (Minister of National Revenue)*, 2005 FC 1427 (CanLII) [*W.O. Stinson*], the Federal Court stated, at para. 28, that "[t]he two-step test . . . in the definition of 'diesel fuel' . . . would be absurd if it were to be applied simultaneously . . . since manufacturers and importers would practically always be unable to verify that the goods in issue are actually used for the intended purpose by consumers." It therefore stated, at para. 28, that ". . . manufacturers and importers can rely on *prima facie* indications of 'intended use' of resellers and distributors . . . to meet the 'intended use' test and not include the $0.04 excise tax per litre sold."

25. Finally, section 81.19 of the *Act* provides that any person who receives a decision regarding an objection to an assessment may appeal the assessment to the Tribunal. It provides as follows:

> **81.19** Any person who has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, may, within ninety days after the day on which the notice of decision on the objection is sent to him, appeal the assessment or determination to the Tribunal.

26. However, subsections 81.12(1) and (3) of the *Act* provide that liability under the *Act* is not affected by an incorrect or incomplete assessment and that an assessment may not be vacated or varied on an appeal by reason only of irregularities. They provide as follows:

> **81.12** (1) Liability under this Act for any tax, penalty, interest or other sum is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.
>
> . . .
>
> (3) No assessment shall be vacated or varied on an appeal by reason only of an irregularity, informality, error, defect or omission on the part of any person in the observance of any directory provision of this Act.

POSITIONS OF PARTIES

United

27. United submitted that the notice of assessment that it received did not make reference to the section of the *Act* under which the assessment was made. It submitted that the only time that it was advised as to the section of the *Act* under which it was assessed was in the notice of decision confirming the assessment, which made reference to subsection 50(8) of the *Act*. It therefore submitted that, if the assessment was in fact made under another section of the *Act*, as the Minister claims, the assessment should not be considered to be valid and should be vacated.

28. United submitted that, since, in its view, section 50 of the *Act* pertains to licensed wholesalers, it must be taken to have been deemed a licensed wholesaler by the Minister for purposes of the assessment. It therefore submitted that it would only be fair for it to also be considered a licensed wholesaler for periods prior to the relevant period, during which it claims it was put at a disadvantage and lost an estimated $246,000 in uncollectable excise tax as a result of not being considered a licensed wholesaler.

29. United submitted that it had requested to be considered a licensed wholesaler on several occasions but was denied the privilege. It explained that, when it purchased diesel fuel from manufacturers or producers, the volume of fuel was measured using temperature-compensated pumps (i.e. corrected to 15 degrees Celsius) and excise tax was collected and paid by the manufacturers or producers on this volume. However, since it did not itself have temperature-compensated pumps at that time, the volume of diesel fuel sold to its customers was lower,[8] which meant that it could not recover all of the excise tax which had been included in the price that it paid the manufacturers or producers for the fuel.

8. At the hearing, Mr. Derek Rosebush explained that, because the average temperature in Canada is 6 degrees Celsius, chances were that, on any given day, the volume of fuel sold through uncompensated pumps was lower than the volume that was corrected to a reference temperature of 15 degrees Celsius. See *Transcript of Public Hearing*, 26 June 2012, at 16.

30. United submitted that, had it been considered a licensed wholesaler for periods prior to the relevant period, excise tax would not have been collected by manufacturers or producers on the diesel fuel that it purchased from them and that it would instead have collected excise tax on the basis of the actual volume of fuel sold to its customers through its own pumps.

31. Accordingly, United submitted that it should be reimbursed an amount of $246,000 to account for the excise tax that was included in the price of diesel fuel that it purchased from manufacturers or producers on a temperature-compensated basis, but that it could not fully recover when it sold that same fuel to its customers on an uncompensated basis.

32. United also submitted that, in light of the fact that its previous requests to be considered a licensed wholesaler were denied, the retroactive aspect of the assessment was particularly unfair. It therefore requested that the interest and penalties assessed against it be waived or cancelled.

Minister

33. The Minister submitted that the assessment was made pursuant to subsection 23(9.1) of the *Act* and that it was not incorrect. The Minister submitted that, according to subsection 81.12(1), even if there was something incorrect on the face of the assessment, this would not have invalidated the assessment. In this regard, the Minister noted that subsection 81.13(1), which sets out what information must be contained in a notice of assessment, does not require the assessing provision (i.e. the section of the *Act*) to be stated.

34. The Minister also submitted that the reference to subsection 50(8) of the *Act*, and any other errors or omissions in the notice of decision, are inconsequential, as section 81.19 clearly states that it is the assessment, and not the notice of decision, that is appealed to the Tribunal.

35. The Minister submitted that the assessment, which was made pursuant to subsection 23(9.1) of the *Act*, pertains to the diversion of fuel by United. Relying on decisions of the Federal Court and the Federal Court of Appeal,[9] the Minister submitted that subsection 23(9.1) contemplates a situation where fuel is purchased for a tax-exempt purpose and is then sold for a taxable purpose, with the person who diverted the fuel being responsible for the payment of excise tax.

36. The Minister submitted that United admitted that 1,185,867 litres of fuel were purchased as heating oil (i.e. a tax-exempt purpose) and then sold as diesel fuel (i.e. a taxable purpose). The Minister therefore submitted that the assessment is correct and must be upheld.

37. The Minister also took the view that United was never considered, and would not have qualified to be considered, a licensed wholesaler during the relevant period, as it was in fact a retailer and did not meet the requirements of section 55 of the *Act*. In this regard, the Minister submitted that the testimony given at the hearing confirms that the requirements of section 55 were not met and that, in any event, even if United had been considered a licensed wholesaler, it still would have had to remit excise tax on fuel sold for a taxable purpose pursuant to subsection 23(4).

38. As for United's arguments regarding the fact that it did not have temperature-compensated pumps, the Minister submitted that they had no merit, as United admitted that it had such pumps during the relevant period.

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9. *W.O. Stinson*; *Pétroles Dupont Inc. v. Canada*, 2010 FC 72 (CanLII); *Pétroles Dupont Inc. v. Canada*, 2011 FCA 65 (CanLII).

39. Finally, relying on a number of decisions of the Tribunal,[10] the Minister submitted that the Tribunal does not have jurisdiction to order the Minister to waive or cancel interest and penalties that have been assessed under the *Act* and that decisions made by the Minister pursuant to section 88 of the *Act* are discretionary and are not subject to appeal or review by the Tribunal. The Minister added that, even if the Tribunal had jurisdiction, the issue would be premature, as the Minister has not yet made a decision as to whether to waive or cancel interest and penalties that have been assessed against United.

ANALYSIS

40. As mentioned above, the issues in this appeal are whether the Minister properly assessed United for failing to remit excise tax on fuel that it purchased for a tax-exempt purpose but subsequently sold for a taxable purpose, whether United can be considered a "licensed wholesaler" within the meaning assigned to that expression by section 42 of the *Act* and whether the Tribunal can order the Minister to waive or cancel interest and penalties that have been assessed under the *Act*.

Did the Minister Properly Assess United for Its Failure to Remit Excise Tax on Diverted Fuel?

41. In order to determine whether the Minister properly assessed United, the Tribunal must first establish under which provision of the *Act* the assessment was made. United claims that the assessment was made pursuant to subsection 50(8) of the *Act*, as indicated in the notice of decision. The Minister states that the notice of decision is in error and that the assessment was made pursuant to subsection 23(9.1).

42. While the notice of assessment (upon which United's objection and, by extension, the Minister's notice of decision are based) does not indicate under which provision of the *Act* the assessment was made, the Tribunal notes that there is no explicit legal requirement for it to do so. The Tribunal also notes that, even if there were such a requirement, subsection 81.12(3) of the *Act* would prevent the Tribunal from vacating or varying the assessment for the sole reason that the notice of assessment failed to indicate the provision of the *Act* under which the assessment was made.

43. On the basis of the evidence on the record, the Tribunal finds that the assessment was made pursuant to subsection 23(9.1) of the *Act*. In this regard, the interview questionnaire used by Ms. Lalonde as part of her audit of United's purchases and sales of fuel includes a clear reference to subsection 23(9.1) at the top of the first page.[11] According to Ms. Lalonde, this was the provision of the *Act* that was relied upon by the Minister to make the assessment.[12]

44. As for the erroneous reference to subsection 50(8) of the *Act* in the notice of decision, Ms. Lalonde testified that she believed that this was a mistake on the part of the Appeals Division of the CRA, which

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10. *C.B. Powell Limited v. President of the Canada Border Services Agency* (11 August 2010), AP-2010-007 and AP-2010-008 (CITT); *Volpak Inc. v. President of the Canada Border Services Agency* (8 November 2010), AP-2010-031 (CITT); *BMI Canada Inc. v. President of the Canada Border Services Agency* (2 August 2011), AP-2010-039 (CITT) [*BMI*]; *Les Presses Lithographiques Inc. v. M.N.R.* (26 June 1989), 2997 (CITT) [*Les Presses Lithographiques*]; see procedural order in *Spike Marks Inc. v. President of the Canada Border Services Agency* (31 October 2006), AP-2006-007 (CITT).
11. Tribunal Exhibit AP-2011-054-11A, tab 13 at 203.
12. *Transcript of Public Hearing*, 26 June 2012, at 48.

handled United's notice of objection.[13] In accordance with subsection 81.12(3), such an error, in and of itself, does not constitute a sufficient reason for the Tribunal to vacate or vary the assessment. Regardless, and as noted by the Minister, section 81.19 clearly states that it is the assessment, and not the notice of decision, that is appealed to the Tribunal. As the Tribunal has already found above, the assessment was made pursuant to subsection 23(9.1).

45. That being said, the Tribunal notes that the Minister's notice of decision also contained other errors or irregularities. In addition to the improper reference to subsection 50(8) of the *Act*, the notice made reference to subsection 301(3), which pertains to the reconsideration by the Minister of an assessment made in respect of the payment of GST.[14] The notice also cited United's GST account number rather than its excise tax account number and oddly stated, in one part of the notice, that the objection was "disallowed" and yet, in another, that it was "confirmed".[15] While not having the effect of invalidating the assessment itself, the Tribunal is concerned that these errors and irregularities in the notice of decision could be perceived as being reflective of an attitude of indifference to the right of the taxpayer to be informed of the correct basis of an assessment.

46. Although there is ultimately no doubt that the notice of decision confirmed the assessment,[16] the Tribunal believes that these errors or irregularities were most likely the cause of some confusion for United. In fact, had the notice been more carefully drafted in the first place, with a proper explanation of the Minister's decision confirming the assessment, this appeal may not have been filed with the Tribunal. The Tribunal would urge the CRA to exercise more care in drafting such notices in the future.

47. Having established that the assessment was made pursuant to subsection 23(9.1) of the *Act*, the Tribunal must now determine whether the Minister properly assessed United pursuant to this provision for its failure to remit excise tax on diverted fuel.

48. Subsection 23(9.1) of the *Act* provides that, where fuel has been purchased for a tax-exempt purpose but subsequently sold for a taxable purpose (i.e. diverted to a taxable sale), excise tax is payable by the person who sells the fuel at the time the fuel is delivered to the purchaser. In this case, the audit or fuel diversion analysis conducted by the CRA demonstrates that 1,185,867 litres of the fuel that United purchased as heating oil during the relevant period were subsequently sold as diesel fuel.[17]

49. As no excise tax was paid on the fuel that was sold to United as heating oil,[18] excise tax became payable pursuant to subsection 23(9.1) of the *Act* when United subsequently sold that fuel as diesel fuel. Thus, multiplying the amount of litres of diverted fuel as calculated by the CRA (1,185,867 litres) by the applicable rate of tax for diesel fuel ($0.04 per litre) results in an amount payable of $47,434.68, which is the exact amount that was assessed.

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13. *Ibid*. at 48, 58.
14. Tribunal Exhibit AP-2011-054-01 at 3.
15. *Transcript of Public Hearing*, 26 June 2012, at 66, 69.
16. The notice of decision stated that the assessment was correct and that it was confirmed.
17. Tribunal Exhibit AP-2011-054-11A at paras. 4-9, tab 18.
18. Excise tax normally imposed under subsection 23(1) of the *Act* was not payable, as heating oil is excluded from the definition of "diesel fuel" found at subsection 2(1).

50. The Tribunal notes that United did not dispute the fact that it diverted 1,185,867 litres of fuel during the relevant period.[19] Moreover, by its own admission, it did not account for fuel diversion nor did it remit any excise tax during the relevant period.[20] It even implicitly recognized that it was not in compliance with the *Act* during this time.[21]

51. In light of the foregoing, the Tribunal finds that the Minister properly assessed United pursuant to subsection 23(9.1) of the *Act* for failing to remit $47,434.68 in excise tax on diverted fuel.

Can United Be Considered a Licensed Wholesaler Under the Act?

52. United submitted that it was deemed a licensed wholesaler by the Minister for purposes of the assessment. However, the Tribunal can find no indication that such was the case. First, the notice of assessment does not make any reference to the term "licensed wholesaler" nor does it make reference to the provisions of the *Act* that define the term or that set out the conditions under which a licence may be granted. Although the evidence indicates that the CRA did open an excise tax account for United as a result of the assessment,[22] this is wholly unrelated to the granting of a licence to a wholesaler that meets the conditions set out in subsection 55(1) of the *Act*.

53. Second, United's position that it was deemed a licensed wholesaler was mainly premised on the assumption that the assessment had been made pursuant to subsection 50(8) of the *Act*. However, as the Tribunal has established above, the assessment was actually made pursuant to subsection 23(9.1). An assessment pursuant to that provision does not, in any way, imply that United was deemed a licensed wholesaler.[23] In fact, had United been considered a licensed wholesaler, it would have been assessed pursuant to subsection 23(4), which requires the payment of excise tax on the sale of diesel fuel by a licensed wholesaler, rather than pursuant to subsection 23(9.1).

54. Further, the evidence adduced at the hearing indicates that, while United asked the CRA about the possibility of becoming a licensed wholesaler, it never actually filed a formal application in this regard.[24] The evidence on the record also indicates that United considered itself a retailer rather than a wholesaler during the relevant period.[25]

55. As United never formally applied to become a licensed wholesaler and the Minister never rendered a decision in this respect, the Tribunal does not have jurisdiction to hear this matter in the context of the present appeal. The Tribunal is also without jurisdiction to hear this matter, given that the decision to grant a

19. *Transcript of Public Hearing*, 26 June 2012, at 7, 31-33.
20. Tribunal Exhibit AP-2011-054-11A, tab 13 at 205B; *Transcript of Public Hearing*, 26 June 2012, at 23, 25.
21. United submitted that it has complied with the *Act* since the time of the audit, thereby implying that it did not comply with the *Act* during the relevant period. See Tribunal Exhibit AP-2011-054-01 at 2; Tribunal Exhibit AP-2011-054-09 at 1.
22. *Transcript of Public Hearing*, 26 June 2012, at 52; Tribunal Exhibit AP-2011-054-11A at paras. 9, 12.
23. The Tribunal notes that, even if United had been assessed pursuant to subsection 50(8) of the *Act*, it would also not have implied that it was deemed a licensed wholesaler. The language of subsection 50(8) does not suggest that it is only applicable to licensed wholesalers.
24. *Transcript of Public Hearing*, 26 June 2012, at 20, 36-37.
25. Tribunal Exhibit AP-2011-054-11A, tab 13 at 204.

licence pursuant to subsection 55(1) of the *Act* would appear to be discretionary.[26] In any event, it appears that United did not meet the requirements of subsection 55(1) during the relevant period and thus could not have been considered a licensed wholesaler.[27]

56. United also submitted that it should be considered a licensed wholesaler for periods prior to the relevant period and be reimbursed an amount of $246,000 to account for the excise tax that it could not recover as a result of not being considered a licensed wholesaler. However, the Tribunal also lacks jurisdiction to consider this matter in the context of the present appeal.

57. Having rejected United's claim that it was considered a licensed wholesaler during the relevant period, the Tribunal further notes that United never filed a formal application to be considered a licensed wholesaler prior to that period, with the Minister never rendering a decision in this respect. In any event, insofar as this matter pertains to a period of time outside that covered by the assessment, it is not within the scope of the present appeal.

Can the Tribunal Order the Minister to Waive or Cancel Interest and Penalties?

58. Subsection 81.1(1) of the *Act* provides the Minister with the authority to assess a person for any tax, penalty, interest or other sum payable by that person under the *Act*. In this case, the notice of assessment issued by the Minister included amounts of $3,617.35 in interest and $1,649.74 in penalties.

59. United has not argued that the Minister was without authority to assess these amounts or that the amounts are incorrect. Therefore, the Tribunal can see no reason for it to conclude that the Minister improperly assessed United in this regard.

60. United did request that the interest and penalties be waived or cancelled pursuant to section 88 of the *Act*. Section 88 allows for the Minister to waive or cancel, either on its own initiative or on the filing of an application, interest or penalties that have been assessed. However, in the Tribunal's view, decisions of the Minister under section 88 are not subject to appeal to the Tribunal.

61. Section 81.19 of the *Act* provides that any person who receives a decision regarding an objection to an assessment may appeal the assessment to the Tribunal. It is clear that the assessment of interest and penalties by the Minister is a matter that is entirely distinct from a decision of the Minister to waive or cancel such interest and penalties. In an appeal pursuant to section 81.19, the Tribunal's jurisdiction is limited to determining whether assessments have been made in accordance with the relevant provisions of the *Act*, which does not include determining whether a request for taxpayer relief has been properly considered by the Minister. Moreover, section 88 provides as follows: "The Minister *may* . . . waive or cancel any amount . . . that is interest or a penalty . . ." [emphasis added]. Thus, decisions of the Minister pursuant to section 88 are discretionary in nature and may not be appealed to the Tribunal.

62. This conclusion is supported by previous decisions of the Tribunal. For example, in *BMI*, the Tribunal held that it did not have jurisdiction to order the Canada Border Services Agency to waive interest that had been charged to the appellant, given that a decision to waive or cancel interest or penalties pursuant

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26. Subsection 55(1) of the *Act* provides as follows: "A *bona fide* wholesaler or jobber **may** be granted a licence . . ." [bold added for emphasis]. Therefore, the Minister's decision to grant or not to grant a licence pursuant to subsection 55(1) may be made on the basis of factors not expressly set out in the *Act*. In these circumstances, the Tribunal would be unable to conclude that the Minister's decision was not made in accordance with the relevant provisions of the *Act*. See also the Tribunal's references to discretion in paras. 61 and 62 of these reasons.
27. *Transcript of Public Hearing*, 26 June 2012, at 21-22.

to section 3.3 of the *Customs Act*,[28] which is discretionary in nature, was not subject to appeal to the Tribunal.[29] Similarly, in *Les Presses Lithographiques*, the Tribunal held that it did not have jurisdiction to grant the appellant's request to cancel or reduce the penalty that had been assessed by the respondent in relation to the payment of sales tax.[30]

63. Therefore, the Tribunal cannot grant United's request that the interest and penalties assessed against it be waived or cancelled. The Tribunal notes that, even if decisions of the Minister pursuant to section 88 of the *Act* could be appealed to the Tribunal and the Tribunal could order the Minister to waive or cancel interest and penalties that have been assessed, it would be premature to do so, as a decision regarding the request for taxpayer relief that United filed with the CRA has not yet been made by the Minister.[31]

DECISION

64. For the foregoing reasons, the appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

28. R.S.C. 1985 (2d Supp.), c. 1.
29. See *BMI* at paras. 126-27.
30. See *Les Presses Lithographiques* at 7.
31. In a letter dated August 15, 2011, the CRA informed United that its request for taxpayer relief would be reviewed once the disposal of its objection had been finalized and all appeal rights had expired. See Tribunal Exhibit AP-2011-054-11A, tab 21 at 274.