



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2011-062

Fonds d'emprunt communautaire
de la Gaspésie et des Îles

v.

Minister of National Revenue

*Decision and reasons issued
Thursday, November 8, 2012*

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IN THE MATTER OF an appeal heard on August 30, 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 August 9, 2011, with respect to a notice of objection pursuant to section 81.17 of the *Excise Tax Act*.

BETWEEN

**FONDS D'EMPRUNT COMMUNAUTAIRE DE LA GASPÉSIE ET
DES ÎLES**

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION

The appeal is dismissed.

Jason W. Downey
Jason W. Downey
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 30, 2012
Tribunal Members:	Jason W. Downey, Presiding Member Serge Fréchette, Member
Counsel for the Tribunal:	Eric Wildhaber Laura Little
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	Counsel/Representative
Fonds d'emprunt communautaire de la Gaspésie et des Îles	Sonia Gagnon
Respondent	Counsel/Representative
Minister of National Revenue	George Boyd Aitken

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
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 by Fonds d'emprunt communautaire de la Gaspésie et des Îles (Fonds d'emprunt) pursuant to section 81.19 of the *Excise Tax Act*¹ from a decision of the Minister of National Revenue (the Minister) dated August 9, 2011, with respect to a notice of objection served pursuant to section 81.17.

2. The issue in this appeal is to determine whether Fonds d'emprunt is entitled, under paragraph 68.16(1)(g.1) of the *Act*, to a refund of the excise tax paid on the fuel used for the exclusive use of a registered charity for the period from December 15, 2007, to December 15, 2009.

3. On October 1, 2012, the tenure of Ms. Diane Vincent ended after she had participated, as a member in this appeal, in the hearing by way of written submissions and the subsequent deliberations. Effective from that date, in accordance with subsection 9(3) of the *Canadian International Trade Tribunal Act*,² the other two members disposed of the matter with the authorization of the Chairperson of the Tribunal.

PROCEDURAL HISTORY

4. On December 15, 2009, Fonds d'emprunt filed with the Canada Revenue Agency (CRA) its application for a refund of the federal excise tax on fuel paid for the period from December 15, 2007, to December 15, 2009.

5. On April 28, 2010, the CRA indicated that several of the invoices submitted by Fonds d'emprunt were either ineligible or insufficient to support an application for a refund of the excise tax. The CRA therefore asked Fonds d'emprunt to provide supporting documents. Subsequently, Fonds d'emprunt submitted additional information to the CRA on May 26, 2010.

6. On June 14, 2010, the Minister issued a notice of decision rejecting the refund application on the grounds that Fonds d'emprunt had not submitted adequate supporting documents.

7. On July 26, 2010, Fonds d'emprunt filed a notice of objection.

8. On September 21, 2010, a CRA appeals officer requested that Fonds d'emprunt send certain documents to support this objection. Not having received any response, on January 20, 2011, the appeals officer suspended the matter until February 21, 2011, to allow Fonds d'emprunt time to submit the requested information and documents. Subsequently, Fonds d'emprunt submitted additional information to the CRA on February 11, 2011.

9. On August 9, 2011, the Minister upheld his decision to reject the application. The reasons specified that the refund application was not supported by the books and records as required under section 98 of the *Act*.

1. R.S.C. 1985, c. E-15 [*Act*].

2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*]. Subsection 9(3) of the *CITT Act* provides as follows: "Where a person to whom subsection (1) applies or any member has taken part in any matter and has died or for any reason is unable or unwilling to take part in the disposition of the matter, the remaining members, if any, who took part in the matter may, with the authorization of the Chairperson, make the disposition notwithstanding that the quorum of members required to dispose of the matter was lost as a result, and the remaining members where so authorized shall, for that purpose, be deemed to constitute a quorum."

10. On January 24, 2012, Fonds d'emprunt requested and the Tribunal granted an order extending the time to appeal the decision.³

11. On March 29, 2012, Fonds d'emprunt requested the addition of a related organization (Fondation pour le développement des régions) to the appeal. On April 2, 2012, the Tribunal denied this request on the grounds that the Tribunal was unable to consider the appeal in the name of another organization and noted that the request for an extension was made following the Minister's notice of decision of August 9, 2011, in the name of Fonds d'emprunt only.

12. Fonds d'emprunt requested a hearing by way of written submissions. As this was not contested by the Minister, the Tribunal decided hold a hearing by way of written submissions on August 30, 2012.

STATUTORY FRAMEWORK

13. The Tribunal hears appeals of the Minister's decisions, filed pursuant to section 81.19 of the *Act*, which 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.

14. Paragraph 68.16(1)(g.1) of the *Act* allows a registered charity to apply, within the prescribed period, for a refund of the excise tax on fuel (\$0.015 per litre) purchased for the exclusive use of the organization. This paragraph provides as follows:

(1) Where tax under Part III has been paid in respect of any gasoline and the gasoline has been purchased by

...

(g.1) a registered charity, within the meaning of the *Income Tax Act*,

...

for the sole use of the purchaser and not for resale, an amount equal to that portion of the tax equal to one and one-half cents per litre shall, subject to this Part, be paid

(h) to the purchaser, or

(i) in accordance with such terms and conditions as the Governor in Council may by regulation prescribe, to the manufacturer, producer, wholesaler, jobber or other dealer,

if the purchaser applies therefor within two years after he purchased the gasoline.

15. The *Income Tax Act*⁴ defines a registered charity as follows:

248(1) In this Act,

...

“registered charity” at any time means

(a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or

3. *Fonds d'emprunt communautaire de la Gaspésie et des Îles* (24 January 2012), EP-2011-007 (CITT).

4. R.S.C. 1985 (5th suppl.), c. 1.

(b) a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf,

that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation.

16. Section 98 of the *Act* requires the taxpayer to keep the supporting documents containing such information that enables the determination of the amount of taxes that should have been paid or collected for six years or until the final disposition of any pertinent objection or appeal. The relevant provisions of the *Act* provide 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.

POSITIONS OF PARTIES

Fonds d'emprunt

17. Fonds d'emprunt submitted that, due to its status as a registered charity, it is entitled to a refund in the amount of \$822 for the excise tax paid on fuel purchased (96,000 litres) from the years 2007 to 2009. Fonds d'emprunt alleged that it had previously received such refunds, specifically in 2003, 2004 and 2006.

18. According to Fonds d'emprunt, it could not provide any additional proof that the invoices submitted are related to the organization's work for the following reasons: its volunteers must continually drive long distances in order to work with the different communities scattered throughout the territory of the Gaspé Peninsula; the volunteers regularly buy fuel for work-related purposes and have no control over the information contained in the various types of receipts that they receive from the service stations; and since 2011, Fonds d'emprunt is no longer able to have the purchaser's name entered manually on fuel receipts that are now issued electronically by the service stations.

19. In light of the above, Fonds d'emprunt submitted additional information to the CRA in support of its refund application on December 15, 2009, and, later, in support of its notice of objection on July 26, 2010. The documentation that it submitted included some explanation of the distance travelled by its volunteers for work-related purposes and an estimate that \$10 bought 10.2 litres of fuel.

20. Moreover, Fonds d'emprunt submitted that it had never been notified of any requirement to provide receipts with the name of the organization or the buyer, as well as the quantity of fuel purchased by the organization or the buyer in question.

Minister

21. The Minister does not object to the registered charity status claimed by Fonds d'emprunt. Rather, his position is to the effect that the invoices submitted by Fonds d'emprunt did not enable the CRA to determine whether the fuel had been used by the organization for eligible activities as opposed to other purposes not recognized by the *Act*.

22. The Minister based his position on section 98 of the *Act* and argued that Fonds d'emprunt did not keep its books and records in such a way that would enable it to prove that the fuel purchases were related to the organization's operations. Specifically, the CRA was unable to verify the alleged connection between the purchase of the fuel at issue and the organization's activities.

23. This situation was exacerbated by the fact that certain invoices included several ineligible expenses (snacks, chips, chewing gum, etc.) or were otherwise insufficient to support an application for an excise tax refund. In some cases, it was difficult, and even impossible, to separate the expenses claimed by Fonds d'emprunt from those also claimed by Fondation pour le développement des régions.

24. In addition, several invoices only indicated the total price paid for the fuel, without showing the quantity of fuel purchased, and none of the invoices identified the name of the purchaser or the organization to which the purchase was charged.

25. The Minister submitted that, in order to support such applications, an organization like Fonds d'emprunt must manage its volunteers' work-related expenses and travel and be able to justify how its purchases are related to its charitable activities.

ANALYSIS

26. According to subsections 68.16(1) and 98(1) of the *Act*, Fonds d'emprunt has the burden of establishing that it was entitled to a tax refund in this case.

27. The Tribunal accepts that Fonds d'emprunt is a registered charity, despite the fact that it did not provide any direct evidence in this regard; moreover, it was not contested by the Minister.⁵

28. It is well established in Tribunal jurisprudence that section 98 of the *Act* requires that applications submitted under the *Act* be supported by sufficient documentary evidence to enable the amount of tax allegedly paid in error to be determined.⁶

5. Although Fonds d'emprunt did not submit direct evidence to that effect, the Tribunal notes, in particular, that the "Application for Refund of Federal Excise Tax on Gasoline" completed by Fonds d'emprunt on December 15, 2009, indicates that its charitable registration number assigned by the CRA is "860684661RR0001". Tribunal Exhibit AP-2011-062-10, tab B-7.

6. *The Russo Group Inc. v. M.N.R.* (1 April 2003), AP-2002-008 (CITT); *Les Pignons L.V.M. du Québec Inc. v. M.N.R.* (19 August 2002), AP-93-315 (CITT).

29. In the Tribunal's view, the evidence submitted by Fonds d'emprunt in support of its claim lacks probative value.

30. Specifically, there are no invoices specifying the amount of fuel consumption, the persons responsible for this consumption and the relationship between the consumption and the duties of the persons responsible for these expenses at the organization.⁷

31. Certain exhibits submitted by Fonds d'emprunt included copies of its correspondence with the CRA, in which Fonds d'emprunt provided additional information in support of its initial refund application and its objection to the Minister's decision of June 14, 2010.⁸ Although these exhibits may help to explain the grounds of Fonds d'emprunt's application, they are of little use to the Tribunal because none of the documents provides evidence in support of Fonds d'emprunt's claim.

32. The Tribunal notes that the CRA's letter dated June 3, 2010, specifies the following inadequacies in the documentation submitted by Fonds d'emprunt: "... you or your employees or volunteers must complete expense accounts or reports demonstrating that the fuel purchase was used for activities related to the operation of the foundation and not for personal use. These expense accounts or reports must indicate, in particular, the trips made, the organization for which they were made, the dates, the departure and arrival points and the kilometres travelled, and match these trips to the corresponding invoices. You must be able to prove that you manage these expenses, which would allow you to substantiate a refund application"⁹ [translation].

33. The evidence on record shows that Fonds d'emprunt subsequently provided the CRA with explanations regarding the erroneous inclusion of certain expenses unrelated to fuel purchases, but Fonds d'emprunt indicated that the calculations of the kilometres travelled and the corresponding quantities of fuel used by the volunteers for work-related purposes were only estimates.

34. Subsequently, the Minister rejected the refund application, on the grounds that the documents submitted "... do not enable us to determine whether the fuel was used by your organization for eligible activities and not for personal purposes. We cannot make the connection between the purchase of this fuel and your organization's activities. ... The examination of these invoices leaves serious doubt regarding the legitimacy of these documents"¹⁰ [translation].

35. The Tribunal notes that the "Report on an objection"¹¹ [translation] indicates that, in the Minister's opinion, "[n]ot only are the invoices of a personal nature but they are almost all made to the name of [H.] Nelligan when they are identified. For example, there are 162 photocopies of invoices, of which 118 are in the name of [H.] Melligan or Nelligan and 30 are not identified. Nearly all the gasoline was purchased from Dépanneur de la Petite Rivière in New Richmond. ... There are also tire repairs, oil, antifreeze, gloves, windshield washer fluid, lawn mower repairs, etc. ... We must consider fraud in this matter ..." [translation]. The Tribunal notes that this last allegation was not raised by the Minister in this appeal.

7. The Tribunal did not have the benefit of seeing copies of the invoices in question because they were not filed. Nonetheless, the parties agree, and the Tribunal accepts, that some of these invoices only indicate the monetary value and not the quantity, and that no invoice indicates the organization to which the fuel purchase must be charged.

8. Tribunal Exhibit AP-2011-062-06C, appendices A-3, A-4.

9. Tribunal Exhibit AP-2011-062-10, tab B-5.

10. Tribunal Exhibit AP-2011-062-10, tab B-1.

11. Tribunal Exhibit AP-2011-062-10, tab B-2 at 3.

36. In the absence of invoices or other detailed documents in support of Fonds d'emprunt's claim, its submission essentially was that the Tribunal should account for a lump sum that is "... reasonable, since it is difficult to prove that our invoices are related to our work..."¹² [translation]. In this regard, Fonds d'emprunt estimated an "acceptable average" [translation] of an annual amount but failed to prove it.¹³

37. The Tribunal is unable to render a decision based on such an estimate. Such an approach does not overcome the inadequacies noted in the keeping of records and books of account by Fonds d'emprunt with respect to the requirements of the *Act*, specifically paragraphs 68.16(1)(g.1), (h) and (i) and subsection 98(1).

38. The Tribunal cannot ignore Fonds d'emprunt's admission that it is unable to substantiate the claims to which it says it is entitled. This is contrary to subsection 98(1) of the *Act*, which requires the taxpayer to "... keep records and books of account ... 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 ... to be determined."

39. Therefore, the Tribunal is of the view that the documentary evidence on record is insufficient to support Fonds d'emprunt's claim and that, consequently, Fonds d'emprunt has not discharged its burden of proof.

40. As regards the allegation that Fonds d'emprunt was never notified by the CRA that it had to provide expense accounts and written reports to demonstrate its activities, the Tribunal notes that the *Act* does not impose such an obligation on the CRA and that the Tribunal cannot draw inferences from the fact that Fonds d'emprunt has already obtained similar refunds in the past in order to rule on its eligibility for refunds in this case.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member

Serge Fréchette

Serge Fréchette
Member

12. Tribunal Exhibit AP-2011-062-06C, Appendix A-4.2.

13. *Ibid.*