

Ottawa, Thursday, December 6, 1990

Appeal No. 3072

IN THE MATTER OF an appeal heard on May 17 and 18, 1990, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a notice of decision by the Minister of National Revenue dated July 8, 1988, with respect to a notice of objection filed under section 81.17 of the *Excise Tax Act*.

BETWEEN

IRVING OIL LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal of the decision of the Minister of National Revenue (the Minister) with respect to item I.A (referred to as the "Esso Charter Bunkerings") of the Appellant's Preliminary Brief is dismissed.

The Minister is ordered, under paragraph 81.27(1)(b) of the *Excise Tax Act*, to reconsider his decision with respect to items II.A, II.B, II.C, II.D, III.A, a portion of item I.B (audit item Nos. 135 and 164) and a portion of I.C (portion "Irving Ocean, International" of audit item No. 154) of the Appellant's Preliminary Brief, on the basis of the evidence provided by the appellant to the respondent after the latter issued Notice of Decision No. 70338AE dated July 8, 1988.

The Tribunal accepts the appellant's request to withdraw parts of the appeal and, consequently, dismisses the appeal of the Minister's decision with respect to:

- the items referred to as "sales by company-operated service stations" in the October 5, 1988, letter of appeal;

- item III.B of the Appellant's Preliminary Brief; and,
- the remaining portion of item I.C (portion "Irving Ocean, Montréal" of audit item No. 154) of the Appellant's Preliminary Brief.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 3072

IRVING OIL LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - The issue in this appeal had been identified initially as whether the appellant was entitled to a recovery of federal sales tax on several items covered by the assessment. The issue is more correctly described as whether the respondent correctly assessed the appellant in respect of item I.A of the Appellant's Preliminary Brief (referred to as the Esso Charter Bunkerings).

This is an appeal under section 51.19 (now 81.19) of the Excise Tax Act (the Act) of Notice of Decision No. 70338AE by the Minister of National Revenue (the Minister), dated July 8, 1988, with respect to a notice of objection dated September 7, 1987, filed under section 51.17 (now 81.17) of the Act.

The appellant subsequently decided to withdraw parts of the appeal.

The respondent then requested that the Tribunal order the Minister to reconsider his decision with respect to certain items under appeal.

The appellant is requesting that the Tribunal dismiss the assessment with respect to the Esso Charter Bunkerings and order the respondent to reconsider his decision with respect to certain other items as requested by the respondent.

The appellant has attempted to establish, through testimony and collateral documents, that documents it issued, upon which the respondent relied to assess the appellant, were not what they purported to be.

Considering the numerous missing links and the apparent contradictions in the series of documents submitted by the appellant in its attempt to demonstrate a continuous flow in the transactions, as well as its failure to produce supplementary documents requested by the Tribunal (such as a copy of the ships' log books for all the relevant periods), the Tribunal finds that the appellant has failed to discharge the burden of proof that the Minister incorrectly made the assessment.

HELD: *The appeal of the Minister's decision with respect to item I.A (referred to as the "Esso Charter Bunkerings") of the Appellant's Preliminary Brief is dismissed.*

The Minister is ordered, under paragraph 81.27(1)(b) of the Act, to reconsider his decision with respect to items II.A, II.B, II.C, II.D, III.A, a portion of item I.B (audit item Nos. 135 and 164) and a portion of I.C (portion "Irving Ocean, International" of audit item No. 154) of the Appellant's Preliminary Brief, on the basis of the evidence provided by the appellant to the respondent after the latter issued Notice of Decision No. 70338AE dated July 8, 1988.

The Tribunal accepts the appellant's request to withdraw parts of the appeal and, consequently, dismisses the appeal of the Minister's decision with respect to:

- *the items referred to as "sales by company-operated service stations" in the October 5, 1988, letter of appeal;*
- *item III.B of the Appellant's Preliminary Brief; and,*
- *the remaining portion of item I.C (portion "Irving Ocean, Montréal" of audit item No. 154) of the Appellant's Preliminary Brief.*

Place of Hearing: Ottawa, Ontario
Dates of Hearing: May 17 and 18, 1990
Date of Decision: December 6, 1990

Tribunal Members: Robert J. Bertrand, Q.C., Presiding Member
Sidney A. Fraleigh, Member
W. Roy Hines, Member

Clerk of the Tribunal: Janet Rumball

Appearances: John D. Wallace, for the appellant
John B. Edmond, for the respondent

Statute Cited: Excise Tax Act, R.S.C., 1970, c. E-13, as amended.

Appeal No. 3072

IRVING OIL LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under section 51.19 (now 81.19) of the *Excise Tax Act* (the Act) of Notice of Decision No. 70338AE by the Minister of National Revenue (the Minister), dated July 8, 1988, with respect to a notice of objection dated September 7, 1987, filed under section 51.17 (now 81.17) of the Act.

FACTS

The appellant is a licensed manufacturer of refined petroleum products that was audited by the respondent for the period from October 31, 1984, to August 31, 1986, and was assessed, on June 10, 1987, a total of \$2,768,519.67 (Notice of Assessment No. ATL1809).

On September 7, 1987, the appellant filed a notice of objection to the notice of assessment under section 51.17 of the Act. By Notice of Decision No. 70338AE dated July 8, 1988, the appellant's objection was allowed in part, on the basis of the additional evidence and documentation that was made available to the respondent for audit review after the issuance of the notice of assessment, and the assessment was varied downward to \$1,094,685.49.

On October 5, 1988, the appellant filed an appeal of the Minister's decision with the Tariff Board, under section 51.19 of the Act, with respect to four groups of items (bunkerings, sales by company-operated service stations, antifreeze sales assessed in error and tax-exempt sales assessed in error) representing approximately \$197,000 in assessment. The appeal was taken up and continued by the Canadian International Trade Tribunal (the Tribunal) under section 60 of the *Canadian International Trade Tribunal Act*.¹

1. S.C. 1988, c. 56.

In a letter dated February 7, 1989, and filed with the Tribunal on February 14, 1989, to which was attached a document entitled "Objection to Notice of Decision," the appellant further informed the Tribunal that it concurred with the assessment of \$65,599 with respect to the items referred to as "sales by company-operated service stations" in the October 5, 1988, letter of appeal and wished to withdraw the appeal in this respect.

In the "Objection to Notice of Decision" (later called Appellant's Preliminary Brief), the scope of the appeal was narrowed to three groups of items (I. tax-paid chartered vessel fuelings, II. items already cleared by Excise audit after the issuance of the Minister's notice of decision and III. remaining areas of disagreement) representing \$128,629.39 in assessment.

On February 7, 1990, the respondent filed a document entitled "Respondent's Brief" in which it was submitted that, as the appellant had provided certain documentation (with respect to eight items at issue in the appeal) subsequent to the issuance by the Minister of his notice of decision, the Minister would be prepared to reconsider and vary his determination, in the event that the Tribunal ordered reconsideration under paragraph 81.27 (1)(b) of the Act, of items II.A, II.B, II.C, II.D, III.A, a portion of I.B (audit item Nos. 135 and 164) and a portion of I.C (portion "Irving Ocean, International" of audit item No. 154) of the Appellant's Preliminary Brief, representing \$68,968.51 in assessment.

On May 16, 1990, the appellant filed a document entitled "Appellant's Supplementary Brief" in which it further narrowed the scope of the appeal, by submitting that:

- it was prepared to withdraw its appeal of the Minister's decision with respect to the remaining portion of item I.C (portion "Irving Ocean, Montréal" of audit item No. 154) of the Appellant's Preliminary Brief in the event the Tribunal, as requested by the respondent, ordered a reconsideration by the Minister of the items enumerated by the respondent in the Respondent's Brief;
- it wished to withdraw its appeal of the Minister's decision with respect to item III.B (sales to John Hickey - O'Donnell's Trucking) of the Appellant's Preliminary Brief; and,
- it concurred with the respondent's request that the Tribunal order a reconsideration by the Minister, under paragraph 81.27 (1)(b) of the Act, of items II.A, II.B, II.C, II.D, III.A, a portion of I.B (audit item Nos. 135 and 164) and a portion of I.C (portion "Irving Ocean, International" of audit item No. 154) of the Appellant's Preliminary Brief, representing \$68,968.51 in assessment.

Consequently, the only remaining matter of disagreement between the parties on the day of the hearing was item I.A of the Appellant's Preliminary Brief (referred to as the Esso Charter Bunkerings), representing \$56,241.13 in assessment.

The hearing was held in Ottawa on May 17 and 18, 1990.

With the permission of the Tribunal, the appellant and the respondent submitted their closing arguments in writing on June 17, 1990, and on July 17, 1990, respectively.

LEGISLATION

The relevant provisions of the Act, as they read at the time in question, are as follows:

2.(1) ...

"manufacturer or producer" includes

...

(e) any person who sells gasoline, diesel fuel or aviation fuel, other than a person who sells such goods exclusively and directly to consumers,

...

27.(1) *There shall be imposed, levied and collected a consumption or sales tax at the rate specified in subsection (1.1) on the sale price of all goods*

(a) *produced or manufactured in Canada*

(i) *payable ... by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,*

...

(1.1) *Tax imposed by subsection (1) is imposed*

(c) *in the case of regular gasoline, unleaded gasoline, premium leaded gasoline, premium unleaded gasoline and diesel fuel, at the rate set opposite the applicable item in Schedule II.1, adjusted according to subsection 27.1(1) and multiplied by the rate of tax specified in paragraph (d), expressed as a decimal number and multiplied by one hundred;*

...

29.(1) *The tax imposed by section 27 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of Schedule III that are sold to or imported by persons exempt from consumption or sales tax under subsection 31(2).*

SCHEDULE III

PART VI

FUELS AND ELECTRICITY

...

4. *Fuel oil for use in the generation of electricity except where the electricity so generated is used primarily in the operation of a vehicle.*

5. *Fuel for lighting or heating, but not including fuel when for use in internal combustion engines; ...*

(Emphasis added)

ISSUE

The issue in this appeal had been identified initially as whether the appellant was entitled to a recovery of federal sales tax on several items covered by the assessment. The issue is more correctly described as whether the respondent correctly assessed the appellant in respect of item I.A (referred to as the Esso Charter Bunkerings) of the Appellant's Preliminary Brief.

ARGUMENTS

The appellant's argument was that, at all times relevant to this appeal, there had been, between Irving Oil Limited and Irving Steamships Limited, no sales of bunkering fuel for the operation of certain vessels under its control and that the respondent had erred in assessing it under the Act for the non-payment of federal sales tax.

Copies of charter party agreements filed as Exhibits A-1 to A-11 demonstrated, according to the appellant, that the vessels were chartered, at all times relevant to this appeal, to Imperial Oil Limited or Esso Petroleum, a division of Imperial Oil Limited.

According to Mr. Kirstiuk, a witness for the appellant, who is currently controller for the marketing division of Irving Oil Limited responsible for charter party agreements, the words "all fuel and port charges for the Account of the Charterer" (or words to that effect) that could be found in a clause of each of these charter party agreements meant that the charterer (i.e., Imperial Oil Limited) was responsible for supplying the bunkering fuel needed for the operation of the vessels while on charter to charterer.

The forms marked "Irving Oil Limited - Invoice - Facture" addressed to Irving Steamships Limited were, according to Mr. Kirstiuk, items of interdivisional documentation of Irving Oil Limited, the purpose of which was to capture and record all the annual operating costs of each of the vessels under the control of Irving Oil Limited in order to compare the efficiency of operation of one vessel with another and of each vessel from one year to the next. The appellant, in preparing these documents, had relied mainly on the Imperial Oil Limited bunker receipts (stating the quantity of bunkering fuel delivered to a vessel) supplied in the normal course of business by Esso Petroleum and, in order to obtain a useful base of comparison, had multiplied the number of litres of fuel appearing on each Imperial Oil Limited bunker receipt by a price per litre that was an Irving Oil Limited price.

According to the witness, the debit and credit codes appearing in these documents referred to two divisions of Irving Oil Limited and supported the argument that they were items of interdivisional documentation. Mr. Kirstiuk testified that the word "invoice" and the terms and method of payment should not have appeared on these documents, but he also testified that invoice forms were also used by the appellant for internal purposes.

According to Mr. Whitcomb, a senior manager with Deloitte & Touche responsible for the audit, completion of tax returns and financial statements for Irving Oil Limited, its divisions and Irving Steamships Limited, the posting of interdivisional transactions on pieces of paper that have the word "invoice" written on them was a practice used by several other companies.

According to the witnesses, at the time in question, Irving Steamships Limited operated one vessel, the Irving Wood, which is not one of the vessels involved in this matter. It is alleged that the reference to Irving Steamships Limited appearing on the forms marked "Irving Oil Limited - Invoice - Facture" has been made in error.

To further support its arguments, the appellant filed (Exhibit A-13, Schedule A) Esso Petroleum invoices identified by Mr. Kirstiuk as documents internal to Esso Petroleum obtained from Esso Petroleum by the appellant after it had been assessed by the respondent. By comparing the quantity (in metric tons and in litres) of bunkering fuel delivered, the date of delivery, the vessel that had received the fuel and the name of the company that delivered the fuel, the appellant argued that there was a direct link between the Imperial Oil Limited bunker receipts, the Esso Petroleum invoices, the Irving Oil items of interdivisional documentation and the charter party agreements.

Relying on the fact that the Esso Petroleum invoices addressed to Imperial Oil Limited indicated that the applicable federal sales tax was being charged, the appellant further argued that the Imperial Oil Limited bunker receipts, the Esso Petroleum invoices, the Irving Oil items of interdivisional documentation and the charter party agreements demonstrated that the bunkering fuel, in respect of which the appellant had been assessed \$56,241.13 in federal sales tax, had been supplied by the charterer in accordance with the charter party agreements and that the federal sales tax had already been paid by the charterer.

The respondent's argument was that, in assessing the appellant, he had relied on forms marked "Irving Oil Limited - Invoice - Facture" directed to Irving Steamships Limited (a separate but subsidiary legal entity), detailing sales of bunkering fuel and signed or initialled by two or three persons as "Checked and Approved." Counsel for the respondent pointed out that testimony had revealed that there was nothing to distinguish these invoices from other Irving Oil Limited invoices requiring payment and that the persons who had signed or initialled these invoices were officers or employees of the company.

A witness for the respondent, Mr. McIntyre, then senior auditor with Revenue Canada, Excise, responsible for the audit of Irving Oil Limited, testified that Irving Oil Limited was assessed because, in totalling up the Irving Oil Limited invoice binder, it appeared that Irving Oil Limited had not paid tax on diesel fuel for which it had invoiced Irving Steamships Limited.

In support of the argument, the respondent argued that Irving Steamships Limited also treated the forms marked "Irving Oil Limited - Invoice - Facture" as invoices when Irving Steamships Limited, in accordance with the Act (subsection 29(1) and Schedule III, Part VI), made a claim for refund of tax that it had paid in respect of that part of the bunkering fuel used on board a vessel for lighting and heating purposes.

The witnesses for the appellant, however, testified that this claim had been made in error, that the name of the claimant should read "Irving Steamships, Division of Irving Oil Limited" rather than "Irving Steamships Limited," and that the part of the claim that dealt with bunkering fuel used while the vessels were on charter to Esso Petroleum should not have been made at all, as the bunkering fuel had been supplied by Esso Petroleum.

CONSIDERATION OF THE EVIDENCE AND ARGUMENTS

The appellant attempted to establish, through testimony and collateral documents that the forms marked "Irving Oil Limited - Invoice - Facture," upon which the respondent relied to assess the appellant, were not what they purported to be.

In order to succeed, the appellant had to produce the most convincing evidence. It was within the power of the appellant to produce the relevant financial statements of Irving Oil Limited and Irving Steamships Limited, as well as the invoices addressed to Esso Petroleum or Imperial Oil Limited with respect to the alleged charter party agreements. It was also within the power of the appellant to produce, as witnesses, the employees (Marion Breau, Freeman Byers and Karen Patterson) who were directly involved in this matter.

The appellant chose not to do so. Instead, the appellant produced, as witnesses, an employee of Irving Oil Limited and an auditor with Deloitte & Touche who were not involved in this matter at the time in question. The appellant also produced documents that, as may be noted below, raised more questions than brought answers.

ESSO PETROLEUM INVOICES

The appellant argued that these invoices demonstrate that the charterer paid for the bunkering fuel. However, no one from Imperial Oil Limited or from its division, Esso Petroleum, appeared as a witness to testify that these documents were indeed invoices. Such a witness, for example, could have testified as to why Esso Petroleum invoiced Imperial Oil Limited for the fuel delivered when, according to the Imperial Oil Limited bunker receipts, the fuel delivered was charged by Imperial Oil Limited to the account of Esso Petroleum.

Considering the testimony of Mr. Whitcomb to the effect that he was familiar with several instances in various other companies where there are interdivisional transactions posted on pieces of paper that have the word "invoice" written on them, the Tribunal finds that these documents could very well be items of interdivisional documentation made for internal purposes rather than invoices documenting a sale.

ERRORS BY ESSO PETROLEUM

The appellant argued that Esso Petroleum made an error when, in three instances, it invoiced Irving Oil Limited for the delivery of bunkering fuel that, according to the appellant, Esso Petroleum was responsible for supplying under the charter party agreements (Exhibits A-1, A-9 and A-11 in these instances). Mr. Kirstiuk testified that these invoices were actually paid by Irving Oil Limited and that the amounts paid were recovered from Esso Petroleum. The witness, on behalf of the appellant, agreed to provide the Tribunal with any additional information that Irving Oil Limited might have to confirm that these amounts were recovered from the charterer.

Mr. Al Gordon provided, on behalf of the appellant, what he referred to as "Proof of billing back Esso re. three fuelings invoiced I.O. Limited inadvertently." Upon examination, one must conclude that none of these documents contains information (credit memo or other documentation from Esso Petroleum) that would confirm that the amounts paid were recovered from Esso Petroleum.

In fact, Schedule A of the "Proof of billing," which was provided by the appellant to confirm that the tax-included amount of \$12,035.49 (for 25 MT [metric tons] of fuel at \$481.42 per MT) invoiced in error (Exhibit A-12.1 and Schedule A(1) of Exhibit A-13) was recovered from Esso, indicates, instead, a sale by Irving Oil Limited to Esso Petroleum of 54.94 MT of fuel at \$480.27 per MT for a total of \$26,386.03.

Furthermore, Schedule C of the "Proof of billing," which was provided by the appellant to confirm that the tax-included amount of \$18,784.48 (for 50.08 MT of fuel at \$375.09 per MT) invoiced in error (Exhibit A-12.12 and Schedule A(19) of Exhibit A-13) was recovered from Esso, refers to that amount under "Plus additional purchases as per attached invoice" and has attached to it Schedule A(19) of Exhibit A-13, but it also indicates sales by Irving Oil Limited to Esso Petroleum of 15.1 MT of fuel at \$346.30 per MT and of 27.1 MT of fuel at \$425 per MT.

Finally, Schedule E of the "Proof of billing," which was provided by the appellant to confirm that the tax-included amount of \$19,847.23 (for 40 MT of fuel at \$496.18 per MT) invoiced in error (Exhibit A-12.15 and Schedule A(24) of Exhibit A-13) was recovered from Esso, indicates, instead, a sale by Irving Oil Limited to Esso Petroleum of 37.667 MT of fuel at \$496.18 per MT for a total of \$18,689.61.

It appears that these schedules to the "Proof of billing" do not support the argument that Esso Petroleum made an error when, in three instances, it invoiced Irving Oil Limited for the delivery of bunkering fuel, as no link between the Esso Petroleum invoices and the Irving Oil Limited "Proof of billing" is clearly demonstrated.

"IRVING OIL LIMITED - INVOICE - FACTURE"

The appellant argued that the credit and debit codes on the forms marked "Irving Oil Limited - Invoice - Facture" did indicate that these forms were, indeed, used as items of interdivisional documentation and not as invoices. However, an examination reveals that the typesetting used to type for these codes is different from the typesetting used to type for the other information on these forms, and testimony by Mr. Whitcomb supports the view that these codes were typed on these forms after they had been completed.

The appellant argued that the forms marked "Irving Oil Limited - Invoice - Facture" were directed in error to Irving Steamships Limited. All of these forms bear the words "Bunkers while on charter to Esso Petroleum." However, none of the Imperial Oil Limited bunker receipts or the Esso Petroleum invoices contain information that would have permitted someone to conclude that the fuel delivered was bunkering fuel for the vessel while on charter to Esso Petroleum. The Tribunal must then conclude that the person who completed these forms for the appellant relied on some other documents in order to type the words "Bunkers while on charter to Esso Petroleum." The argument of an error would mean that the person who completed these forms, although knowledgeable about the situation, made the same error on 11 of these forms over a period of almost a year (April 15, 1985, to March 21, 1986) relating to 16 Imperial Oil Limited bunker receipts involving 3 different vessels on 11 voyages.

In addition, all of these forms bear, immediately to the right of the words "Irving Steamships Limited," the imprint of a stamp stating "CHECKED AND APPROVED" that has been signed or initialled by at least two persons. Testimony by Mr. Kirstiuk has revealed that two of the persons whose signature or initials appear on the "CHECKED AND APPROVED" stamp were Marion Breau, who works for Freeman Byers, and Freeman Byers, who works for Mr. Kirstiuk. It is not unreasonable to assume that these persons must be knowledgeable about the situation, as it is their work at Irving Oil Limited to check and approve the work of others. The argument of an error would mean that two more persons, knowledgeable about the situation, made the same error on 11 of these forms over a period of almost a year (around April 15, 1985, to March 21, 1986) relating to 16 Imperial Oil Limited bunker receipts involving 3 different vessels on 11 voyages.

Testimony by Mr. Kirstiuk revealed that the "CHECKED AND APPROVED" stamp on these forms basically means that "when this particular document is used as an invoice, we [Irving Oil Limited] would normally have somebody, or two parties, make sure that the quantities and price that are on that invoice are correct" (Emphasis added).

Under these circumstances, the Tribunal finds less plausible the argument to the effect that, in each of the 11 cases, the form marked "Irving Oil Limited - Invoice - Facture" was used as an item of interdivisional documentation and not as an invoice.

CHARTER PARTY AGREEMENTS

The appellant argued that charter party agreements (Exhibits A-1 to A-11) demonstrated that the vessels were chartered at all times relevant to this appeal to Imperial Oil Limited or Esso Petroleum, a division of Imperial Oil Limited. When the issue was raised as to the discrepancy between the dates appearing on these charter party agreements (particularly Exhibit A-1) as the readiness dates of the vessels for charter and the dates appearing on the Irving Oil Limited - Invoice - Facture, the Imperial Oil Limited bunker receipts and the Esso Petroleum invoices as the dates when the vessels were actually on charter, Mr. Kirstiuk agreed to provide the Tribunal with copies of the log book for each vessel under charter for the period under review.

The appellant did not provide the promised copies. Instead, Mr. Al Gordon provided, on behalf of the appellant, a "copy of voyage log excerpt (see Schedule B) for March 1, 1985, charter." The Tribunal understood this excerpt to refer to Exhibit A-1 (charter party agreement of February 1, 1985, as there was no charter party agreement of March 1, 1985, filed as an exhibit.

This excerpt contains the words "Ref: Imperial Oil Charter. Fuel and time statements." According to this excerpt, the vessel M.V. AIME GAUDREAU began the charter at Halifax on February 21, 1985, loaded 25 MT of fuel at Halifax on March 1, 1985, and concluded the charter on March 8, 1985. There is nothing in this excerpt that would permit to link the Imperial Oil charter referred to in this excerpt to the charter party agreement of February 1, 1985 (Exhibit A-1).

In fact, it appears that this excerpt refers to two voyages: one starting on February 21, and one starting in March 1985. The "Proof of billing" sent to the Tribunal by Mr. Gordon as Schedule A confirms this point of view. Indeed, Schedule A contains the words "Final Billing on Aime Gaudreau Trips (2) from February 21 - March 1, 1985." However, the charter party agreement of February 1,

1985 (Exhibit A-1) provides, under clause (2) of the Special Provisions, that "This Charter Party covers one (1) voyage loading Halifax for discharge at Grindstone, Magdalen Island and return Halifax or equivalent distance."

The appellant argued that the words "all fuel and port charges for the Account of the Charterer" (or words to that effect), which could be found in a clause of each of these charter party agreements, meant that the charterer (i.e., Imperial Oil Limited or Esso Petroleum) was responsible for supplying the bunkering fuel needed for the operation of the vessels while on charter to the charterer. Under cross-examination, Mr. Kirstiuk admitted that it was possible for one to operate under the terms of the charter party agreement (Exhibit A-1) and have Irving Oil Limited supply all the bunkering fuel.

If one were to interpret the words "all fuel and port charges for the Account of the Charterer" to mean that the charterer (i.e., Imperial Oil Limited) was responsible for supplying the bunkering fuel needed for the operation of the vessels while on charter to the charterer, for the sake of consistency, one would also have to interpret these words to mean that the charterer is also responsible for supplying (by making an advance) the money needed for the port charges as the clause provides that "all fuel and port charges [are] for the Account of the Charterer" (Emphasis added).

However, an examination of Schedule C of the "Proof of billing" reveals that Irving Oil Limited has invoiced Esso Petroleum for port charges. An examination of Schedule E of the "Proof of billing" reveals, furthermore, that Irving Oil Limited sent this document to Esso Petroleum "To invoice fuel consumption on Aime Gaudreau Charter under Charter Party dated January 9, 1986."

CLAIMS FOR REFUNDS BY IRVING STEAMSHIPS LIMITED

The appellant argued that these claims for refunds were made in error, that the name of the claimant should read Irving Steamships, Division of Irving Oil Limited rather than Irving Steamships Limited and that the part of the claim that dealt with bunkering fuel used while the vessels were on charter to Esso Petroleum could not be made either by Irving Steamships Limited or Irving Oil Limited as the bunkering fuel had been supplied by Esso Petroleum.

Considering that Karen Patterson (the individual who signed these claims to certify that the information contained was true and correct) was, according to the testimony of Mr. Whitcomb, the chief accountant responsible for the operations of Irving Steamships Division of Irving Oil Limited and was also the chief accountant responsible with the vessel operations of the Irving Wood, which was operated by Irving Steamships Limited, the Tribunal finds unconvincing the argument to the effect that these claims were made in error under the name of Irving Steamships Limited.

The argument of an error would mean that Karen Patterson overlooked, on two occasions (on July 15, 1986, and on December 1, 1986) not only the name of the claimant (according to testimony by Mr. Whitcomb, the name of the claimant should have been Irving Steamships, Division of Irving Oil Limited), but also the address of the claimant (the address of Irving Oil Limited appears to be different), the reason for the claim, as well as the listing of the vessels and the following heading on the summary sheet attached to the July 15, 1986, claim:

IRVING STEAM SHIPS LTD.
DIESEL FUEL USED IN THE GENERATION OF
ELECTRICITY AND HEATING FOR 1985

The Tribunal finds untenable the argument to the effect that the claimant should have been Irving Steamships, Division of Irving Oil Limited rather than Irving Steamships Limited when part of the July 15, 1986, claim relates to the operation of the vessel Irving Wood and testimony revealed that Irving Steamships Limited was, at the time in question, operating the vessel Irving Wood.

CONCLUSION

Considering the numerous missing links and the apparent contradictions in the series of documents submitted by the appellant in its attempt to demonstrate a continuous flow in the transactions, as well as its failure to produce supplementary documents requested by the Tribunal (such as a copy of the ships' log books for all the relevant periods), the Tribunal finds that the appellant failed to discharge the burden of proof that the Minister incorrectly made the assessment.

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.

Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh

Member

W. Roy Hines

W. Roy Hines

Member