



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

Ottawa, Tuesday, February 24, 2004

**Appeal No. AP-2002-094**

IN THE MATTER OF an appeal heard on June 2, 2003, under 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 4, 2002, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**CONSBEC INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Ellen Fry  
Ellen Fry  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



## UNOFFICIAL SUMMARY

### Appeal No. AP-2002-094

**CONSBEC INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

This is an appeal pursuant to section 81.19 of the *Excise Tax Act* from a determination of the Minister of National Revenue with respect to excise tax imposed on diesel fuel used as part of an industrial process for the manufacture of shot rock. The issue in this appeal is whether the fuel oil that is intended for use and actually used by Consbec Inc. as part of an industrial process for the manufacture of shot rock is “heating oil” within the definition of “diesel fuel” found in subsection 2(1) of the *Excise Tax Act* and, consequently, whether the fuel oil so used is exempt from the excise tax to which it would otherwise be subject pursuant to subsection 23(9.1) of the *Excise Tax Act*.

**HELD:** The appeal is allowed. The Tribunal is of the view that the term “heating oil” must be interpreted having regard to its jurisprudence concerning a similar issue. The Tribunal is of the view that the term “heating oil” should be interpreted to reflect the purpose of the *Excise Tax Act*, the intention of Parliament and the meaning given by the industry or users affected by the provisions of the legislation. Thus, the Tribunal finds that the term “heating oil” should be interpreted to mean fuel oil that is used to heat either space or equipment that is used for a variety of purposes, including industrial purposes. Therefore, the Tribunal finds that the fuel oil used by Consbec Inc. as part of the industrial process for the manufacture of shot rock is “heating oil” and is exempt from excise tax under the *Excise Tax Act*.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 2, 2003
Date of Decision:	February 24, 2004
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Marie-France Dagenais
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Owen J. Thompson, for the appellant Richard Casanova, for the respondent



**Appeal No. AP-2002-094**

**CONSBEC INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member  
ZDENEK KVARDA, Member  
ELLEN FRY, Member

**REASONS FOR DECISION**

**INTRODUCTION**

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*<sup>1</sup> from a determination of the Minister of National Revenue (the Minister) with respect to excise tax imposed on diesel fuel used as part of an industrial process for the manufacture of shot rock. The issue in this appeal is whether the fuel oil that is intended for use and actually used by Consbec Inc. (Consbec) as part of an industrial process for the manufacture of shot rock is “heating oil” within the definition of “diesel fuel” found in subsection 2(1) of the *Act* and, consequently, whether the fuel oil so used is exempt from the excise tax to which it would otherwise be subject pursuant to subsection 23(9.1) of the *Act*.

For the purposes of this appeal, the relevant provisions of the *Act* read as follows:

2. (1) . . .

“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.

23. (1) Subject to subsections (6) to (8.3) and 23.2(6), whenever goods mentioned in Schedules I and II are imported into Canada or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this 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 whichever of those Schedules is applicable, computed, where that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be.

[23](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.

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

Schedule I to the *Act*, which concerns goods subject to tax under Part III, provides the following under section 9.1:

Diesel fuel and aviation fuel, other than aviation gasoline, \$0.04 per litre.

## EVIDENCE

Mr. Richard Bertrand, Regulatory Coordinator, Consbec Inc., testified on Consbec's behalf. He explained that Consbec is in the business of drilling and blasting rock for mining purposes, pipeline work and road construction. He testified that Consbec uses diesel fuel as part of an industrial process for the manufacture of shot rock. He explained the steps involved in the process of manufacturing shot rock. First, boreholes are drilled following a blast pattern designed by engineers to achieve the desired size of rock for the customer. Second, an explosive blasting agent composed of fuel oil and ammonium nitrate is prepared in an auger truck that meters the mixture and thoroughly mixes the two elements together, just prior to use. This mixture is generally known as the ANFO (ammonium nitrate and fuel oil) mixture. The mixture is then pressurized to approximately 100 lb./in.<sup>2</sup> in a container truck. Finally, the container truck is used to transport the ANFO mixture and inject it into the boreholes.

Mr. Bertrand testified that the ANFO mixture is used to fill the space left after a non-electric detonator has been placed near the bottom of the borehole. The purpose of the detonator is to initiate the chemical reaction, i.e. to ignite the ANFO mixture. He stated that the fuel oil represents 6 percent of the composition of the ANFO mixture. He further stated that the fuel oil content has a significant impact on the effect of a blast; too little fuel oil would produce only a shattering of the rock without moving it. He explained that it is the high pressure of the expanding gases that actually moves and heaves the rock.

In cross-examination, Mr. Bertrand acknowledged that Consbec does not use oil-burning equipment in the process.

In answer to questions from the Tribunal, Mr. Bertrand specified that the coloured fuel oil used in the ANFO mixture coats the ammonium nitrate and that a small quantity is actually absorbed into the ammonium nitrate. He explained that a blast machine is used on site, which generates an electric current that detonates the blasting cap that triggers a sequence of events. When the blasting cap is detonated, the ANFO mixture burns. He further testified that the burning of the fuel oil with the ammonium nitrate produces gases and that it is these heated gases, expanding in a confined space, that actually shatter the rock.

Mr. Brad Sheeller, an instructional assistant at McMaster University, testified on Consbec's behalf. He prepared a document entitled "The Chemistry of ANFO" based on his review of different chemistry textbooks. The chemical equations found in this document show that oxygen is needed for the combustion of fuel oil. The blasting cap ignites the fuel oil, thereby producing heat, which leads to the decomposition of the ANFO. This chemical reaction releases oxygen and other gases. The oxygen from the decomposition of the ammonium nitrate is needed to burn the fuel oil in the borehole. The heat from this combustion causes the gases in the borehole to expand rapidly, thereby producing high pressures that destroy the confining walls. He stated that, in the process of manufacturing shot rock, the fuel oil actually produces two thirds of the heat energy of the ANFO mixture. He also stated that this reaction is characterized as a combustion reaction, which is basically fuel oil acting as the combustible agent with the oxygen that is produced from the ammonium nitrate decomposition.

## ARGUMENT

Consbec submitted that the evidence shows that the fuel oil in the ANFO mixture is used specifically for the purpose of heating the gases contained in the borehole and that the resulting pressure is necessary to the production of shot rock. According to Consbec, an improper mixture of fuel oil or the absence of fuel oil may result in an incomplete shattering or in no movement of the rock; that would make the finished product unmarketable. As such, Consbec argued that the fuel oil utilized in the ANFO mixture is oil used for heating purposes in an industrial process.

To support its position, Consbec made reference to *Western Construction Company Limited v. M.N.R.*,<sup>2</sup> where the Tribunal accepted evidence to the effect that the term “heating oil”, as commonly understood in the Canadian petroleum industry, referred to a fuel that is used either to heat space or to heat equipment. Consbec submitted that the Tribunal, in *Western Construction*, also stated, based on a review of parliamentary speeches, that the tax would not apply to heating oil in the home or elsewhere. The Tribunal also added, in that decision, that it therefore appeared that Parliament did not intend to limit the tax exemption to heating oil for domestic heating purposes, but rather allowed the exemption to apply to other uses, such as commercial heating purposes or industrial purposes. Consbec argued that this rationale should be applied to the diesel fuel in the present case, which is being used for an industrial purpose.

Consbec made reference to ruling 7120/31,<sup>3</sup> in which it was determined that packaged charcoal and briquettes qualified for sales tax exemption pursuant to section 5 of Part VI of Schedule III to the *Act* as “fuel for lighting or heating”. Consbec argued that there is a similarity between briquettes and the ANFO mixture, insofar as the oil used is combined with other products to form a unique product, which, in itself, combusts in a similar manner.

Consbec argued that the requirement found in the definition of the term “heating oil” in ET/SL Policy Statement EP-001<sup>4</sup> issued by the Canada Customs and Revenue Agency (CCRA), which provides, in part, that heating oil must be used in oil-burning equipment, is not a requirement prescribed by the *Act*. However, should the Tribunal determine that that requirement must be met, Consbec argued that the boreholes are, in fact, the equipment where the combustion reaction takes place. In support of its position, Consbec relied on *Horton CBI Limited v. Deputy M.N.R.C.E.*,<sup>5</sup> in which the Tariff Board determined that oil storage tanks were part of oil-burning equipment and, therefore, exempt from tax.

The Minister argued that the fuel in issue was not used in oil-burning equipment for the generation of heat, but was used as an element in the composition of ANFO. He argued that, once the ammonium nitrate and the fuel oil are mixed together, the fuel loses its identity and is used for the purposes of manufacturing an explosive product, which is not intended to heat a place and, as such, does not qualify for the exemption.

In applying the modern rule of statutory interpretation, which prescribes that the “words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the

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2. (20 November 2000), AP-99-093 to AP-99-102 and AP-2000-010 to AP-2000-012 (CITT) [*Western Construction*].

3. Department of National Revenue, July 21, 1987.

4. “The Meaning of the Term ‘Heating Oil’ for the Purpose of the Definition of ‘Diesel Fuel’ in Subsection 2(1) of the *Excise Tax Act* (ETA)”, April 29, 2002.

5. (1977), 6 T.B.R. 415 (T.B.).

scheme of the Act, the object of the Act, and the intention of Parliament”,<sup>6</sup> the Minister argued that the term “heating oil” means oil that is used to heat a place, not a hole. He further argued that, based on the wording of the definition of “diesel fuel”, Parliament certainly did not create an exemption for fuel used to produce explosives.

The Minister argued that a distinction must be made between the Tribunal’s decision in *Western Construction* and this appeal. In *Western Construction*, the manufacture of the asphalt involved equipment, such as a large cylinder-shaped burner/dryer, that used fuel oil to apply intense heat to the crushed stone, which is totally different from the manufacture of explosives in this appeal.

The Minister submitted that, according to the 1979 budget speech, the intent of the Minister of Finance at that time was to provide financial help to families, since the cost of heating oil for homes was very high during the energy crisis. Further, the term “elsewhere” cannot be interpreted as meaning a hole to create an explosion.

The Minister submitted that the CCRA’s policy statement, developed following the Tribunal’s decision in *Western Construction*, provides guidance as to what should be the appropriate definition of “heating oil”. The definition provides that “heating oil” means “any fuel for use in oil-burning equipment for the generation of heat for domestic or industrial purposes”. The policy statement then defines oil-burning equipment to mean “any liquid-fuel-burning device that contains a burner to produce an open flame but does not include internal combustion engines.”<sup>7</sup> The Minister submitted that a borehole cannot be considered a liquid-fuel-burning device, as there is no evidence that it does create an open flame.

Finally, the Minister submitted that the above-mentioned ruling concerning briquettes and the Tribunal’s decision in *Western Construction*, to which Consbec referred in its submissions, are not relevant, as they dealt with different products and issues.

In rebuttal, Consbec argued that the evidence indicates that the combustion of ANFO in the borehole would create an open flame, but that it cannot be seen.

## DECISION

Subsection 2(1) of the *Act* defines “diesel fuel” as including “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”.

The issue in this appeal is whether the fuel oil that is intended for use and actually used by Consbec as part of an industrial process for the manufacture of “shot rock” is “heating oil” and, as such, excluded from the definition of “diesel fuel” found in subsection 2(1) of the *Act*. There is no definition of the term “heating oil” in the *Act*.

Consbec urged the Tribunal to follow its ruling in *Western Construction*, in which the Tribunal considered the December 1979 budget speech and concluded that it was clear from that speech that the tax was aimed at encouraging conservation of fuels in the transportation area and would “not apply to heating

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6. E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87.

7. *Supra* note 3.

oil in the home or elsewhere”.<sup>8</sup> Consbec also submitted that, in *Western Construction*, the Tribunal further concluded that, by using the term “elsewhere”, it appeared that Parliament did not intend to limit the tax exemption to heating oil for domestic uses, but rather allowed the exemption to apply to other uses, such as for commercial heating purposes or industrial purposes.

According to the jurisprudence,<sup>9</sup> regard can be had to Parliamentary debates and speeches when assessing the purpose of an act and the intention of Parliament. The Tribunal is of the view that the conclusions reached in *Western Construction* in that context should be applied to the present case and that, accordingly, tax should not apply to diesel fuel that is intended for and used as “heating oil” outside the transportation area.

Consbec also argued that the Tribunal should interpret the term “heating oil” by having regard to the industry or users affected by the provisions of the legislation, as it did in *Western Construction*. In that decision, the Tribunal was convinced that the term “heating oil”, as commonly used in the Canadian petroleum industry, referred to a fuel that is used to either heat space or heat equipment that is used for a variety of industrial purposes.<sup>10</sup>

The Tribunal is of the view that, as in *Western Construction*, the petroleum industry’s definition should be adopted in this appeal.

The correct approach to statutory interpretation, including taxation and fiscal legislation, is the modern contextual approach, which provides that the “words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.<sup>11</sup>

Given that the provision under consideration deals with the interpretation of the term “diesel fuel” and whether the fuel is suitable for use in internal combustion engines or intended for use and actually used as heating oil, the Tribunal is of the view that it is appropriate to have regard to how the petroleum industry defines the term “heating oil”. This is consistent with the position taken by the Federal Court of Appeal, when deciding whether to rely on a common or “popular” definition of a word or on the interpretation given to that word by the industry involved. The Federal Court of Appeal in *Nova, An Alberta Corp. v. M.N.R.*,<sup>12</sup> in which the definition of the term “pipeline” found in the *Income Tax Act* was at issue, stated the following:

The interpretation problem here is not strictly one, in my view, which requires a determination of whether a word used in a statute is used in its ordinary sense or in its strictly technical sense. . . . It is more fundamental. [“Pipeline”] is a word in fairly common usage . . . I would have thought that construing it in its “popular sense” would [mean] that sense “which people conversant with the subject matter with which the statute is dealing [in this case those utilizing the service of the pipeline for the transmission of gas, oil, water, steam or solids] would attribute to it” . . . not the popular sense derived from the perception of the man in the street not conversant with either the user industries or pipelines.<sup>13</sup>

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8. *Supra* note 2 at 7.

9. *Eastmain Band v. James Bay and Northern Quebec Agreement (Administrator)* (1992), 98 D.L.R. (4th) 206 (F.C.A.).

10. *Supra* note 2 at 6.

11. *Supra* note 6.

12. 88 D.T.C. 6386 (F.C.A.)

13. *Ibid.* at 6390.

In *Western Construction*, the Tribunal concluded that the term “diesel fuel”, as commonly understood in the Canadian petroleum industry, referred to a fuel that is used either to heat space or to heat equipment for a variety of industrial purposes and that it was persuaded that the term was not confined to fuels primarily intended or used for warming people.

The Tribunal considers that the same definition of “heating oil”, which was not contradicted by the evidence in this case, should also be applied in this appeal.

The Tribunal notes that the evidence shows that the fuel oil remains a distinct component when it is mixed with the ammonium nitrate, since these components do not chemically react with one another until they are ignited. The Tribunal also notes that the evidence shows that the ignition of this heating oil produces heat in the borehole that starts the oxidation of the ammonium nitrate, which in turn produces gases, and that, when these gases are themselves heated by the combustion of the heating oil, in a confined space, they expand, thereby creating high pressures that fracture the rock. Consequently, the Tribunal finds that the fuel oil used by Consbec does not become an explosive, but is actually used as “heating oil” throughout the process for the manufacture of shot rock.

Accordingly, the Tribunal finds that the fuel oil used by Consbec falls within the meaning to be given to the term “heating oil” and is, therefore, exempt from excise tax under the *Act*.

Accordingly, the appeal is allowed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Ellen Fry  
Ellen Fry  
Member