Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-001

Holste Transport Limited

v.

Minister of National Revenue

Decision and reasons issued
Friday, July 14, 2006

Canada

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IN THE MATTER OF an appeal heard on June 14, 2006, 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 February 19, 2004, with respect to an objection to a determination of the Minister of National Revenue under section 81.17 of the *Excise Tax Act*.

BETWEEN

HOLSTE TRANSPORT LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION

The appeal is dismissed.

Elaine Feldman
Elaine Feldman
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 14, 2006
Tribunal Members:	Elaine Feldman, Presiding Member Pierre Gosselin, Member Ellen Fry, Member
Counsel for the Tribunal:	Duane Schippers Eric Wildhaber
Registrar Officer:	Valérie Cannavino
Appearances:	D. Andrew Rouse, for the appellant Joanna Hill, for the respondent

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STATEMENT OF REASONS

1. This is an appeal pursuant to section 81.19 of the *Excise Tax Act*[1] from a decision of the Minister of National Revenue (the Minister) dated February 19, 2004, with respect to an objection to a determination of the Minister under section 81.17 of the *Act*.

2. The issue in this appeal is whether Holste Transport Limited (Holste) is entitled to a refund of excise tax paid on the portion of diesel fuel purchased in Canada and transported outside of Canada in the fuel tank of a vehicle, but consumed in the United States, for the period from January 1, 2000, to December 31, 2002.

3. This is one of a series of appeals[2] under the *Act* that have arisen as a result of the Government's legislative response to the decision of the Federal Court of Appeal in *Penner International Inc. v. Canada*.[3]

4. Following the decision in *Penner*, the Government announced, in the Federal Budget of February 18, 2003, its intention to amend Part VII of the *Act* to clarify that diesel fuel taken out of the country in the fuel tank of a vehicle does not qualify as an export and that no rebate of tax is payable in respect of that fuel. The Government also announced that the amendment would apply to rebate applications received by the Canada Customs and Revenue Agency (now the Canada Revenue Agency [CRA]) after February 17, 2003.

5. Bill C-28, the *Budget Implementation Act, 2003*, received royal assent on June 19, 2003.

6. Section 63 of the *Budget Implementation Act, 2003* reads as follows:

63. (1) Section 68.1 of the Act is amended by adding the following after subsection (2):	63. (1) L'article 68.1 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :
(3) For greater certainty, no amount is payable to a person under subsection (1) in respect of tax paid on gasoline or diesel fuel transported out of Canada in the fuel tank of the vehicle that is used for that transportation.	(3) Il est entendu qu'aucun montant n'est à payer à une personne aux termes du paragraphe (1) au titre de la taxe payée sur l'essence ou le combustible diesel qui est transporté en dehors du Canada dans le réservoir à combustible du véhicule qui sert à ce transport.
(2) Subsection (1) *applies in respect of any application* for a payment under section 68.1 of the Act received by the Minister of National Revenue after February 17, 2003.	(2) Le paragraphe (1) *s'applique à toute demande* de paiement, prévue à l'article 68.1 de la même loi, reçue par le ministre du Revenu national après le 17 février 2003.

[Emphasis added]

FACTS AND PROCEEDINGS

7. In its brief, Holste asserted that it had mailed its refund application to the Minister on February 14, 2003, claiming a $53,720.40 fuel excise tax rebate.

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1. R.S.C. 1985, c. E-15 [*Act*].
2. See *Transport Gilles Perreault Inc. v. M.N.R.* (28 March 2006), AP-2004-051 (CITT); *2544-7343 Québec Inc. v. M.N.R.* (10 May 2006), AP-2005-001 (CITT); *2758-4747 Québec Inc. v. M.N.R.* (10 May 2006), AP-2005-002 (CITT); *Les Opérations JTC (Richelieu) Inc. v. M.N.R.* (10 May 2006), AP-2005-003 and AP-2005-004 (CITT).
3. [2003] 2 F.C. 581 (C.A.) [*Penner*].

8. The Minister alleged that Holste's refund application was received on March 24, 2003, and provided a photocopy of the refund application date stamped "March 24, 2003".

9. On March 14, 2006, the Tribunal advised the parties that it was preparing to schedule a hearing by videoconference in this appeal. It requested that the parties indicate the number of witnesses that each party was expecting to call and file any additional authorities or documents by April 17, 2006.

10. On March 24, 2006, the Minister advised the Tribunal that he would not be calling any witnesses and would not be filing any additional documents, exhibits or authorities.

11. On April 13, 2006, Holste advised the Tribunal that it would not be filing additional documents, exhibits or authorities and would not be calling any witnesses. It requested that the appeal proceed by way of written submissions only.

12. On April 18, 2006, the Minister advised that he did not object to proceeding by way of written submissions.

13. On April 28, 2006, the Tribunal advised the parties that a hearing by way of written submissions would take place on June 14, 2006, pursuant to rules 25, 25.1 and 36.1 of the *Canadian International Trade Tribunal Rules*.[4] It invited Holste to make further written submissions on the Minister's brief, if any, by May 12, 2006.

ARGUMENT

14. Holste argued that the Minister erred in determining that it was not entitled to the refund claimed because the refund application was not received on or before February 17, 2003.

15. Holste further argued that subsection 68.1(3) of the *Act* provides for a retrospective limitation period with respect to the time when persons could no longer apply for the rebate. It argued that its right to a fuel excise tax rebate had vested prior to February 18, 2003, the date that the legislation repealing a right to a rebate became effective.

16. Holste submitted that statutes are presumed not to have retroactive effect, only prospective application. It also relied on the decision of the Ontario Court of Appeal in *Re Falconbridge Nickel Mines Ltd. v. Minister of Revenue for Ontario*[5] to support its claim that its right to a refund had vested.

17. Holste also relied on authorities that support the proposition that statutes that impose a limitation period must be strictly construed and, where there is ambiguity, construed in favour of the plaintiff.[6]

18. Holste relied on subsection 79.2(1) and repealed subsection 68.162(7) of the *Act* to argue that its refund application was deemed to be filed with the Minister on the date that the application was mailed and not the date that the application was actually received.

19. The Minister argued that section 63 of the *Budget Implementation Act, 2003* was clear and unambiguous and that it was expressly intended to have retroactive effect. He submitted that any presumption against interference with vested rights was rebutted. Further, he argued that section 68.1 of the *Act* had not been repealed, but rather, subsection 68.1(3) had been added to clarify the Government's legislative intent.

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4. S.O.R./91-499.
5. (1981), 121 D.L.R. (3d) 403 (Ont. C.A.) [*Falconbridge*].
6. See *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

20. The Minister further submitted that it was also clear that any refund applications *received* by the Minister after February 17, 2003, were not eligible for a refund; it was not sufficient for an application to have been mailed on or before February 17, 2003; it actually had to be received by February 17, 2003.

21. The Minister argued that the term "received by the Minister" is different from "filed with the Minister" and, given that the legislature is presumed to speak coherently within a statute, the terms are different. He cited the plain language and legal meanings for the term "received" to mean "in the possession of the Minister".

DECISION

Effect of Section 63 of the *Budget Implementation Act,* 2003

22. Although a statute is presumed to have only prospective effect, it is a rebuttable presumption.[7] In *Sullivan and Dreidger on the Construction of Statutes*, one can read: "Retroactive legislation often states that it is deemed to come into force or to take effect on a date prior to the date of enactment . . . ."[8] In *Gustavson Drilling (1964) Ltd. v. M.N.R.*,[9] the Supreme Court of Canada stated*:*

> . . .
>
> . . . The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances, the statute operates retrospectively . . . .[10]

23. The Supreme Court has reaffirmed, on several occasions, that the presumption against retroactivity or interference with vested rights can be rebutted by the express words of the statute or by necessary implication.[11] If the intended application of a statute is not clear from a plain reading of the words of the statute, it is necessary to ascertain the intent of the legislature to determine if the statute was intended to operate retroactively or interfere with vested rights.[12]

24. In construing a statute, the Tribunal must read the words in their context and in their ordinary and grammatical sense in a manner that is harmonious with the scheme of the act, the object of the act and the intention of Parliament.[13]

25. The intention of the government is expressed in clear terms in *The Budget Plan 2003*[14] released on February 18, 2003. The government explains that its past practice was not to rebate tax paid on fuel that is transported outside of Canada in the fuel tanks of a vehicle and similarly not to apply tax to fuel transported into Canada in the fuel tanks of a vehicle. Further, the government expressly states that it is clarifying its

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7. See Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002).
8. *Ibid.* at 562.
9. [1977] 1 S.C.R. 271, Dickson J.
10. *Ibid.* at 279. Subsequently, the term "retrospective" used by Dickson J. has been more appropriately referred to as "retroactive". See Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 562.
11. *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880 at paras. 81, 97-101; *Dikranian v. Quebec (Attorney General)*, [2005] S.C.J. No. 75 (QL) at paras. 30-36; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50 (QL) at paras. 69-72, 74-75; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1192; *Grand Rapids (Town) v. Graham*, [2004] M.J. No. 342 (Man. C.A.) (QL) at paras. 14, 23-28.
12. *Quebec (Attorney General) v. Healey*, [1987] 1 S.C.R. 158 at 165-67.
13. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at 580-81.
14. Department of Finance Canada, *The Budget Plan 2003* (Ottawa: Canada, 2003) at 343.

position as a result of the decision in *Penner*. Finally, the government states its intention to apply the amendment retroactively:

> The budget proposes to amend Part VII of the Excise Tax Act to clarify that fuel taken out of the country in the fuel tank of a vehicle being driven across the border does not qualify as an export and that no rebate of excise tax is payable in respect of that fuel. It is proposed that this amendment apply to rebate applications received by the Canada Customs and Revenue Agency on or after February 18, 2003.[15]

26. The *Budget Implementation Act, 2003*, which became effective on June 19, 2003, expressly amended section 68.1 of the *Act* and expressly stated that the amendment applied "*. . . in respect of any application* for a payment under section 68.1 of the Act *received by the Minister of National Revenue after February 17, 2003*." [Emphasis added] The legislation is not ambiguous. The legislation was intended to be retroactive to the date of the budget announcement and it was intended to affect expectations (or rights) to receive a refund if the application was *received* by the Minister after *February 17, 2003*.

27. The decision of the Ontario Court of Appeal in *Falconbridge* is distinguishable from the present appeal and legislation. In that case, the language of the statute was amended to place a two-year limitation period on refund applications. The legislation was not specific as to whether the two-year limitation period applied to rights to a refund vesting prior to enactment of the limitation period. In the present case, there is no ambiguity.

28. Therefore, the Tribunal concludes that the effect of the amendment is to extinguish any right to a refund existing on or before February 17, 2003, where a refund application has not been received by the Minister on or before February 17, 2003. Further, in the Tribunal's opinion, no right to a refund can arise after February 17, 2003.

Meaning of "received by the Minister" in Subsection 63(2) of the *Budget Implementation Act, 2003*

29. The Tribunal has not interpreted the meaning of the words "received by the Minister" in the *Act* in its previous decisions.

30. Section 79.2 of the *Act* reads as follows:

79.2 (1) If a person who is required under this Act to file a return with the Minister does so by mailing the return, the return is deemed to have been filed with the Minister on the day on which the return was mailed and the date of the postmark is evidence of that day.	79.2 (1) Pour l'application de la présente loi, lors de la production par la poste d'une déclaration, cette dernière est réputée produite le jour où elle a été postée, la date du cachet en faisant foi.
(2) A person who is required under this Act to pay or remit an amount to the Receiver General shall not be considered as having paid or remitted the amount until it is received by the Receiver General.	(2) Pour l'application de la présente loi, une somme n'est considérée payée ou remise que lors de sa réception par le receveur général.

31. Section 79.2 of the *Act*, on which Holste relied, does not use the language "received by the Minister", rather it refers to the filing of a return. Parliament did not use the term "filing" or "return" in subsection 63(2) of the *Budget Implementation Act, 2003*. There is no provision in the *Act*, such as subsection 248(7) of the *Income Tax Act*,[16] that deems an application to be "received" on the date that it is

15. *Ibid.* at 344.
16. R.S.C. 1985, c. 1 (5th Supp.).

mailed. The Tax Court has construed "received by the Receiver General" in subsection 248(7) to mean the date of actual receipt.[17]

32. Further, former subsection 68.162(5) of the *Act*, referred to by Holste in support of its argument that the date of receipt is the date of mailing, offers no support for its argument. Apart from the fact that the subsection was repealed on April 6, 2001, former subsection 68.162(5) of the *Act*, like current section 79.2, referred to the date that a document was deemed to have been filed. As noted above, Parliament has used different language in subsection 63(2) of the *Budget Implementation Act, 2003*.

33. The Tribunal finds that the expression "received by the Minister", as it is used in subsection 63(2) of the *Budget Implementation Act, 2003*, is unambiguous and means the date of actual receipt by the Minister or his agent (i.e. the CRA), not the date of mailing.

34. The Minister filed as evidence a copy of the refund application bearing a date of receipt stamp of March 24, 2003, at the Summerside Tax Centre. The certification box of the refund application is signed "Della Brophy", V.P. Administration of Holste, and dated February 14, 2003. The Minister asserted that, in accordance with the policies and directives that CRA employees follow, mail must be date stamped as soon as it arrives in the mailroom. The Tribunal finds that Holste's refund application was received by the Minister on March 24, 2003. Accordingly, Holste is not entitled to a refund because its application was received after February 17, 2003.

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

Elaine Feldman
Elaine Feldman
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member

17. *The Source Enterprises Limited v. Her Majesty the Queen*, [2001] T.C.J. No. 814, wherein the court held that it was clear, unequivocal and unambiguous that the remittance had to be actually received by the Receiver General and that the date of mailing was irrelevant.