



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal Nos. AP-2005-022 and  
AP-2005-023

Les Entreprises O. Dubé Enr. and  
3669602 Canada Inc.

v.

Minister of National Revenue

*Decision and reasons issued  
Wednesday, March 21, 2007*

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IN THE MATTER OF appeals heard on October 24, 2006, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue, dated June 15 and 16, 2005, with respect to notices of objection under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**LES ENTREPRISES O. DUBÉ ENR. AND 3669602 CANADA INC.**

**Appellants**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION**

The appeals are dismissed.

Elaine Feldman  
Elaine Feldman  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 24, 2006

Tribunal Members: Elaine Feldman, Presiding Member  
Pierre Gosselin, Member  
Meriel V. M. Bradford, Member

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Parties: Virginie Massé, for the appellants  
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## STATEMENT OF REASONS

### BACKGROUND

1. These are appeals pursuant to section 81.19 of the *Excise Tax Act*<sup>1</sup> from decisions of the Minister of National Revenue (the Minister) dated June 15 and 16, 2005, with respect to objections to determinations of the Minister under section 81.17 of the *Act*.

2. The issue in these appeals is whether Les Entreprises O. Dubé Enr. (Dubé) and 3669602 Canada Inc. (3669602 Canada) are entitled to refunds of excise tax paid on the portion of diesel fuel purchased in Canada and transported out of Canada in the fuel tank of a vehicle, but consumed in the United States. Dubé's claim was for the period from January 1, 2001, to January 1, 2003. 3669602 Canada's claim was for the period from October 1, 2001, to January 1, 2003.

3. These are two of a series of appeals under the *Act* that have arisen as a result of the Government's decision to respond legislatively to the decision of the Federal Court of Appeal in *Penner International Inc. v. Canada*.<sup>2</sup>

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 (CCRA) (now the Canada Revenue Agency) after February 17, 2003.

5. Bill C-28, the *Budget Implementation Act, 2003*,<sup>3</sup> 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):**

(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.

**(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.**

**63.(1) L'article 68.1 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :**

(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) 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.**

7. Dubé and 3669602 Canada submitted their refund applications to the Minister by registered mail on February 17, 2003. The Minister received Dubé's refund application at the CCRA Taxation Centre located in Summerside, Prince Edward Island, on February 26, 2003. The Minister received 3669602 Canada's application at the same facility on February 27, 2003. None of the parties contested these facts.

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

2. [2003] 2 F.C. 581 (C.A.) [*Penner*].

3. S.C. 2003, c. 15.

8. With the consent of the parties, the Tribunal decided to hold a hearing by way of written submissions pursuant to rules 25, 25.1 and 36.1 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> A notice to this effect was published in the September 16, 2006, edition of the *Canada Gazette*.<sup>5</sup> The Tribunal invited Dubé and 3669602 Canada to submit a reply brief by September 24, 2006; none was received.

## ANALYSIS

9. The Minister argued that the refund applications were not timely because they were received by the Minister after February 17, 2003. Dubé and 3669602 Canada made several arguments in favour of the granting of their refund applications. The Tribunal was not persuaded by any of them.

10. First, the Tribunal examined Dubé and 3669602 Canada's contention that they had rights to an excise tax rebate that vested prior to February 18, 2003. The Tribunal finds that this was not the case. Indeed, as it has done in several cases<sup>6</sup> involving such refund applications made on or about February 18, 2003, when Bill C-28 was tabled in Parliament, the Tribunal recalls that the Government had stated, at that time, its intention to retroactively apply the amendment to the *Act* as set out in *The Budget Plan 2003*:<sup>7</sup>

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.<sup>8</sup>

11. *The Budget Implementation Act, 2003*, which became effective on June 19, 2003, 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. It was intended to be retroactive to the date of the budget announcement, and it was intended to affect expectations to receive a refund if the application was received by the Minister after February 17, 2003. The Tribunal notes that retroactive application of taxing legislation to the date of its announcement is not unusual.

12. Second, the Tribunal considered Dubé and 3669602 Canada's arguments regarding the significance of when their refund applications were put in the mail. Dubé and 3669602 Canada contended that their refund applications were timely because they were sent to the Minister by Canada Post registered mail on February 17, 2003 and because, in their view, Canada Post should properly be considered as the Minister's agent.

13. In the Tribunal's view, the terms “. . . received by the Minister of National Revenue . . .” of subsection 63(2) of the *Budget Implementation Act, 2003* are clear and must be given their ordinary meaning. In the Tribunal's view, they cannot be read to comprise the moment at which a refund application is mailed to the Minister. Indeed, the word “received” is clear and unambiguous and must be given its

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4. S.O.R./91-499.

5. C. Gaz. 2006.I.2720.

6. See, *inter alia*, *Holste Transport Limited v. M.N.R.* (14 July 2006), AP-2004-001 (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); *Transport Gilles Perreault Inc. v. M.N.R.* (28 March 2006) AP-2004-051 (CITT).

7. Department of Finance, *The Budget Plan 2003* (Ottawa: Canada, 2003).

8. *Ibid.* at 344.

ordinary meaning,<sup>9</sup> which does not equate to when something is mailed. Both the English and the French versions of the *Budget Implementation Act, 2003* are equally clear. In French, “*reçu*” (received), in the Tribunal’s view, cannot be equated to “*posté*” (mailed). Similarly, in English, “received” cannot be equated to “mailed”. Indeed, when Parliament wants to accept “mailing” and “. . . the date of [a] postmark . . .” as evidence of when something occurs (such as receipt of a “return”), it does so expressly, as it specifically did within the *Budget Implementation Act, 2003*, when it adopted another amendment to the *Act*. Specifically, section 102 of the *Budget Implementation Act, 2003* reads as follows:

**102.(1) Section 79.2 of the [Excise Tax] Act is replaced by the following:**

**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.

(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) Subsection (1) comes into force or is deemed to have come into force on July 1, 2003.**

**102.(1) L’article 79.2 de la même loi [la Loi sur la taxe d’accise] est remplacé par ce qui suit :**

**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) Pour l’application de la présente loi, une somme n’est considérée payée ou remise que lors de sa réception par le receveur général.

**(2) Le paragraphe (1) entre en vigueur ou est réputé être entré en vigueur le 1<sup>er</sup> juillet 2003.**

14. In fact, the Tribunal notes that subsections 79.2 (1) and (2) of the *Budget Implementation Act, 2003* provide contrasting examples of when mailing is deemed to be the date of receipt and when it is not. Indeed, in subsection 79.2(1), mailing is deemed to be the date of “filing” of “a return” (i.e. the date on which the Minister is deemed to have received “a return”), whereas, in subsection 79.2(2), when a person is required to pay or remit an amount, that amount is not considered paid until it is “. . . received by the Receiver General . . .” (i.e. when someone owes money to the Receiver General, mailing is not anticipated but, rather, only the actual moment of receipt of a payment or remittance). Accordingly, the *Act* specifically provides that the date of mailing is envisaged as a circumstance when a return is deemed to have been “filed” (other circumstances are when a return is actually given to a department official or to the Minister himself). However, no reference to mailing or to a postmark being evidence of the date of receipt is found in section 63 of the *Budget Implementation Act, 2003*. Accordingly, the Tribunal concludes that the only circumstance envisaged by Parliament with respect to the refund applications in issue was their actual receipt by the Minister on or before February 17, 2003. The Tribunal further notes that, for the reasons above with respect to the distinction between “received” and “filed”, it is clear that the legislation does not envisage Canada Post to be an agent of the Minister. Otherwise, there would have been no need for Parliament to have provided for the distinction between the date of receipt by the Minister and the date of filing of a return by mail.

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9. See, for example, *Le nouveau Petit Robert, 2007*, s.v. “recevoir”: “Être mis en possession de (qqch.) par un envoi, un don, un paiement, etc.”. See also *Oxford Concise Dictionary*, 9th ed., s.v. “receive”: “take or accept (something offered or given) into one’s hands or possession.” See also *Dictionnaire de droit québécois et canadien*, 2nd ed., s.v. “réception”: “Action ou fait de recevoir un objet, un document, une communication.”

15. In addition, Dubé and 3669602 Canada argued that section 63 of the *Budget Implementation Act, 2003* creates certain inequities. The Tribunal has held, in several decisions, that it does not have jurisdiction to order equitable relief.<sup>10</sup> It is obliged to respect statutory limitation periods even if, for example, there was no prior notice of a tax change.<sup>11</sup> It is limited to making findings within its express statutory mandate.

16. Finally, the Tribunal has taken judicial notice of the Federal Court's decision in *Transport Ronado Inc. v. Her Majesty the Queen*,<sup>12</sup> which raised similar, if not identical, issues to those raised in these appeals.

17. Accordingly, the Tribunal finds that the refund applications in issue were received on February 26 and 27, 2003, in accordance with the CCRA's usual mail reception policies, and were therefore received by the Minister after February 17, 2003.

## DECISION

18. For the foregoing reasons, the appeals are dismissed.

Elaine Feldman  
Elaine Feldman  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Member

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10. See, for example, *Walbern Agri-Systems Ltd. v. M.N.R.* (21 December 1989), AP 3000 (CITT); *Peniston Interiors (1980) Inc. v. M.N.R.* (22 July 1991), AP-89-225 (CITT); *Sturdy Truck Body (1972) Limited v. M.N.R.* (23 June 1989), 2979 (CITT); *A.G. Green Co. Limited v. M.N.R.* (9 August 1990), AP-89-134 (CITT).

11. *Aerotec Sales and Leasing Ltd. v. M.N.R.* (25 January 1996), AP-94-114 (CITT); *Power's Produce Ltd. v. M.N.R.* (1 February 1993), AP-90-011 (CITT).

12. 2007 FC 166.