



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-008

Brenda Restoule

v.

Minister of National Revenue

*Decision and reasons issued
Thursday, October 21, 2004*

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IN THE MATTER OF an appeal heard on October 6, 2004, 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 September 17, 2003, with respect to a notice of objection under section 81.17 of the *Excise Tax Act*.

BETWEEN

BRENDA RESTOULE

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Ellen Fry
Ellen Fry
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 6, 2004

Tribunal Members: Ellen Fry, Presiding Member
Pierre Gosselin, Member
Meriel V. M. Bradford, Member

Counsel for the Tribunal: Nick Covelli

Clerk of the Tribunal: Anne Turcotte

Appearances: Michael Restoule, for the appellant
Ramona Rothschild, for the respondent

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REASONS FOR DECISION

1. This is an appeal under section 81.19 of the *Excise Tax Act*¹ from a decision of the Minister of National Revenue (the Minister), dated September 17, 2003, under section 81.17 of the *Act*.
2. The issue in this appeal is whether Mrs. Brenda Restoule is entitled to a refund of excise tax imposed, pursuant to section 23 and Schedule I of the *Act*, on gasoline sold to her and delivered to her residence on the Nipissing First Nation Reserve.
3. Section 23 of the *Act* provides in part as follows:
 - 23.(1) Subject to subsections (6) to (8), whenever goods mentioned in Schedule I are imported or are manufactured or produced in Canada and delivered to a purchaser of those goods, there shall be imposed, levied and collected . . . an excise tax in respect of the goods at the applicable rate set out in the applicable section of that Schedule, computed, if that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be.
 - (2) . . . where goods are manufactured or produced and sold in Canada, the excise tax shall be payable by the manufacturer or producer at the time of delivery of the goods to the purchaser thereof.
 - (6) The tax imposed by subsection (1) is not payable in the case of goods mentioned in Schedule I that are purchased or imported by a licensed wholesaler for resale by him.
4. Schedule I of the *Act* provides in part as follows:
 9. (a) Unleaded gasoline and unleaded aviation gasoline, \$0.10 per litre.
5. Mrs. Restoule is a Status Indian under the *Indian Act*.²
6. Between January 1, 2000, and December 31, 2002, Mrs. Restoule purchased gasoline from an Imperial Oil dealer for delivery to her residence on the reserve. Mrs. Restoule purchased the gasoline for her personal use and consumption. She was not an importer, manufacturer, producer or wholesaler of gasoline.
7. On December 24 and 31, 2002, Mrs. Restoule applied for a refund of the excise tax on the gasoline that she had purchased. On April 9, 2003, the Minister denied the applications.
8. Mrs. Restoule filed a notice of objection, dated May 14, 2003, to the Minister's decision under section 81.17 of the *Act*. The Minister denied the objection on September 17, 2003.
9. Based on erroneous information provided by the Minister, Mrs. Restoule filed a notice of appeal, dated December 5, 2003, with the Tax Court of Canada. On March 23, 2004, pursuant to section 81.32 of the *Act*, the Tribunal ordered that the time to appeal to the Tribunal be extended to June 23, 2004. Mrs. Restoule filed an appeal with the Tribunal on June 23, 2004.
10. The parties submitted an agreed statement of fact before the hearing. At the request of the parties, the Tribunal decided to proceed by way of a hearing based on a combination of the agreed statement of fact and the oral arguments of those appearing for the parties, in accordance with subrule 25(d) of the *Canadian International Trade Tribunal Rules*.³ At the hearing, the parties presented oral arguments, but did not introduce additional evidence or call any witnesses.

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

2. R.S.C. 1985, c. I-5.

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

ARGUMENT

11. Mrs. Restoule conceded that she did not have a legal obligation to pay the excise tax under the *Act*. However, she claimed that her rights as a Status Indian were nevertheless eroded because the tax burden was passed on to her in the price that she paid for the gasoline, which included an amount equal to the excise tax that was payable by Imperial Oil.

12. Mrs. Restoule contended that section 87 of the *Indian Act* exempted her from bearing the burden of the tax. According to Mrs. Restoule, this exemption entitled her to a refund of the excise tax.

13. Section 87 of the *Indian Act* provides in part as follows:

87.(1) Notwithstanding any other Act of Parliament . . . the following property is exempt from taxation, namely,

(b) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

14. According to Mrs. Restoule, this exemption is consistent with the Royal Proclamation of 1763, the Jay Treaty of 1794, the Robinson-Huron Treaty of 1850 and the *Constitution Act, 1982*.⁴ Mrs. Restoule added that the Crown has a fiduciary duty to preserve her entitlement to this exemption.

15. The Minister submitted that only the taxpayer (i.e. Imperial Oil) would be entitled to a refund of excise tax. The Minister added that section 87 of the *Indian Act* is not applicable because the excise tax was levied on Imperial Oil, rather than on the personal property of Mrs. Restoule.

DECISION

16. The Tribunal dealt with a similar issue in *Les Industries Fermco Ltée v. M.N.R.*⁵ The issue in that appeal was whether sales of construction framing to Status Indians living on a reserve were exempt from federal sales tax (FST) imposed under section 50 of the *Act*. The FST imposed under section 50 of the *Act* is payable by the manufacturer or producer at the time of delivery to the purchaser. The Tribunal found that the Indians were not exempt from payment of FST by virtue of section 87 of the *Indian Act* for the following reasons:

The Tribunal finds that the FST must be paid by the manufacturer under section 50 of the *Act*.

The burden or incidence of the tax is normally passed on to the consumer by the manufacturer by including the amount of the tax in the sale price. The consumer, under such circumstances, is not the real taxpayer. The consumer is subject to the payment of an indirect tax.

In the *Saugeen Indian Band* case, the issue was whether section 87 of the *Indian Act* should be interpreted so as to allow the appellant to claim a refund of FST paid on certain goods purchased. The Federal Court ruled that the appellant was not entitled to the refund. During his analysis, MacGuigan J. referred to the decision of Reed J. of the Trial Division ([1989] 3 F.C. 186 at 203). Reed J. concluded that “the words of section 87 stating that no Indian band ‘is subject to taxation in respect of...’, must be read as meaning that such bands are not to be taxed as taxpayers,” and that “[h]ad it been intended that the Indians and Indian bands were to be exempt from all incidence or burden of indirect taxes, as well as from direct liability for taxes, surely section 87 would have been more specifically worded to so provide.”

4. *Canada Act* 1982 (U.K.), 1982, c. 11, Sch. B.

5. AP-92-353 (13 January 1994) (CITT) [*Fermco*].

MacGuigan J. reached conclusions similar to those of Reed J. ([1990] 1 F.C. 403). Since the Indians are not the real taxpayers in this instance, they are not exempt from the payment of FST under section 87 of the *Indian Act*.

[Footnote omitted]

The Tribunal notes that, in *Saugeen Indian Band v. Canada*,⁶ the Supreme Court of Canada dismissed an application for leave to appeal the decision of the Federal Court of Canada.

17. Key elements of the legislative scheme in section 50 of the *Act* are the same as those in section 23. Both provisions impose a tax at a prescribed rate on the sale price of goods when they are delivered to a purchaser by the manufacturer or producer in Canada, which is payable by that manufacturer or producer. Consequently, the Tribunal considers that the reasoning adopted in *Saugeen Indian Band* and *Fermco* is applicable to the present case.

18. Mrs. Restoule was not the real taxpayer in this case. By her own acknowledgement, only Imperial Oil had a legal obligation to pay the tax. In such circumstances, section 87 of the *Indian Act* is not applicable. In light of the above, the Tribunal finds that Mrs. Restoule is not entitled to a refund of the excise tax.

19. The Tribunal notes that, in the cases cited by Mrs. Restoule, where Status Indians were found to be tax-exempt, the taxes in question were direct taxes. The taxes in those cases were payable by Indians who were taxpayers under the relevant legislation, unlike the situation in the present case where the tax is payable by another party that is legally the taxpayer but has passed on the financial burden of the tax to a Status Indian.

20. Therefore, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

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

6. [1990] S.C.C.A. No. 52 [*Saugeen Indian Band*].