Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2006-036 and AP-2006-037

Location Robert Ltée and Transport Robert (1973) Ltée

v.

Minister of National Revenue

Decision and reasons issued Wednesday, February 13, 2008

Canada

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IN THE MATTER OF appeals heard on September 11, 2007, 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 August 31, 2006, with respect to notices of objection filed under section 81.17 of the *Excise Tax Act*.

BETWEEN

LOCATION ROBERT LTÉE AND TRANSPORT ROBERT (1973) LTÉE **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION

The appeals are dismissed.

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

Ellen Fry
Ellen Fry
Member

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 11, 2007
Tribunal Members:	Meriel V. M. Bradford, Presiding Member Ellen Fry, Member Serge Fréchette, Member
Counsel for the Tribunal:	Alain Xatruch
Registrar Officer:	Gillian Burnett
Appearances:	Serge Fournier, for the appellants Jean-Robert Noiseux and Stéphanie Dion, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. These are appeals under section 81.19 of the *Excise Tax Act*[1] from decisions of the Minister of National Revenue (the Minister) dated August 31, 2006, with respect to notices of objection filed under section 81.17.

2. The decisions dismissed, under section 68.1 of the *Act*, various refund applications filed by Location Robert Ltée and Transport Robert (1973) Ltée (the Robert companies) for 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. The applications filed by the Robert companies were for the period from January 1, 1992, to December 31, 2000.

3. Subsection 68.1(1) of the *Act* reads as follows:

68.1(1) Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations made by the Minister, exported the goods from Canada, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person if that person applies therefor within two years after the export of the goods.	68.1(1) Lorsque la taxe prévue par la présente loi a été payée sur des marchandises qu'une personne a exportées du Canada en conformité avec les règlements pris par le ministre, un montant égal à cette taxe est, sous réserve des autres dispositions de la présente partie, payé à la personne si elle en fait la demande dans les deux ans suivant l'exportation des marchandises.

4. In November 2002, after several years of litigation, the Federal Court of Appeal ruled, in *Penner International Inc. v. Canada (C.A.)*,[2] that diesel fuel used by vehicles in the transportation of goods outside the country must be considered an export under the *Act* and that, therefore, excise tax paid on the purchase of diesel fuel was eligible for the tax refund provided in section 68.1 of the *Act*.

5. 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. It also announced that the amendment would apply to any rebate application ". . . received by the Minister of National Revenue after February 17, 2003."

6. Bill C-28, the *Budget Implementation Act, 2003*,[3] received royal assent on June 19, 2003.

7. 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.

1. R.S.C. 1985, c. E-15 [*Act*].
2. [2003] 2 F.C. 581 (F.C.A.) [*Penner*]. This decision followed a September 2001 Federal Court ruling on the same matter.
3. S.C. 2003, c. 15.

(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.**

8. The refund applications prepared by the Robert companies for excise tax paid on the exported diesel fuel during the period of January 1, 1992, to December 31, 2000, were received by the Minister on March 29, 2004. This evidence was not contested in these appeals.

9. The issue in these appeals is whether the Robert companies are entitled to a refund of excise tax paid on the portion of diesel fuel purchased in Canada but used in vehicles for the transportation of goods outside the country, despite the fact that the applications were not submitted to the Minister within two years of the export of the diesel fuel, as prescribed in subsection 68.1(1) of the *Act*, and on or before the deadline of February 17, 2003, as prescribed in subsection 63(2) of the *Budget Implementation Act, 2003*.

EVIDENCE

10. Ms. Line Robert-Messier, financial controller for the Robert companies, testified at the hearing that the companies' non-compliance with the deadlines prescribed by the *Act* was due to a 1993 verbal agreement between her and Mr. Claude Bernard-Roby, an official from the Department of National Revenue (Revenue Canada). In June 1993, Mr. Bernard-Roby visited Ms. Robert-Messier to discuss certain notices of objection filed by the Robert companies following Revenue Canada's refusal to refund the excise tax paid on diesel exported prior to 1992. During the meeting, Mr. Bernard-Roby allegedly suggested to Ms. Robert-Messier that she not file refund applications for the years subsequent to those covered by the notices of objection already filed and, to avoid "blocking up the system" [translation], to wait for the decision in a similar case before the Federal Court i.e. *Penner*.

11. According to the Robert companies, they respected the "agreement" that they made with Mr. Bernard-Roby and they kept in their companies' records all the information relating to diesel exported in truck fuel tanks in subsequent years. Moreover, every year, they consulted their accountant to see if there had been any developments with regard to the excise tax and the court record on this matter.

12. In February 2003, Ms. Robert-Messier learned of the Federal Court of Appeal's decision in *Penner*. At that time, the Robert companies immediately filed the refund applications for 2001 and 2002. According to Ms. Robert-Messier, no one immediately made a connection between *Penner* and the files for 1992 to 2000. It was not until August 2003, when she received a call from a Canada Customs and Revenue Agency[4] official who wanted to settle the 1990 and 1991 refund applications, that the Robert companies made the connection between *Penner* and the files for 1992 to 2000. In later discussions with the official, Ms. Robert-Messier mentioned her "agreement" with Mr. Bernard-Roby, but she received no answer regarding to whom she should send her documents or with whom she should discuss the procedure for filing the refund applications for 1992 to 2000. In March 2004, Ms. Robert-Messier decided to send the refund applications to the Canada Revenue Agency (CRA)[5]. The Minister received those applications on March 29, 2004, and rejected them by notice of determination on April 27, 2004. In response, the Robert companies filed notices of objection to those notices of determination on July 20, 2004. On August 31, 2006, by notice of decision, the Minister disallowed the notices of objection and confirmed the determinations.

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4. The Department of National Revenue became the Canada Customs and Revenue Agency on November 1, 1999.
5. The Canada Customs and Revenue Agency became the Canada Revenue Agency (and the Canada Border Services Agency) on December 12, 2003.

13. Mr. Asif Moinuddin, manager in the CRA's Excise Duties and Taxes Division, Audit Section, testified at the hearing that, since *Penner* had been pending for some time, the CRA's practice was to hold in abeyance any refund application for excise tax paid on the portion of diesel fuel purchased in Canada but used in vehicles for the transportation of goods outside the country, until the matter had been finally settled. Mr. Moinuddin stressed that the applicants still had to continue to submit their refund applications in order to protect their rights because of the two-year deadline under subsection 68.1(1) of the *Act*.

14. As for the purported "agreement" between Mr. Bernard-Roby and Ms. Robert-Messier, Mr. Moinuddin said that CRA officials are not authorized to extend the two-year deadline set out in the *Act*. However, Mr. Moinuddin admitted that he had not been in charge of the Robert companies' files at the time that the purported "agreement" was made.

ARGUMENT

15. The Robert companies argued that the statements and undertakings by a CRA official that there was no need to file refund applications until the legal situation regarding fuel exports was resolved had the effect of extending the deadlines set out in section 68.1 of the *Act* and that this extension period continued until the Robert companies received new information from the CRA regarding a final decision in *Penner*. Since the Robert companies did not learn of the decision until August 2003, they maintained that the refund applications received by the Minister in March 2004 were filed within the prescribed deadlines.

16. The Robert companies argued that the provisions of section 68.1 of the *Act* are limitation provisions that govern the deadlines within which a taxpayer's rights must be exercised and that the legal consequences of the CRA official's undertaking must be determined based on the civil law applicable in the province of Quebec. To this end, the Robert companies cited section 2904 of the *Civil Code of Québec*, which states that "[p]rescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others." The Robert companies contended that, by voluntarily extending the limitation periods, the CRA official's actions made it impossible for the Robert companies to act.[6]

17. The Robert companies added that the administrative case law has also clearly shown that, in similar situations, a person cannot lose his or her rights for having relied upon representations made by government officials. To this end, they cited the doctrine of legitimate expectations.[7] The Robert companies argued that the CRA official's undertaking did not constitute an interpretation of the provisions of the *Act*, but rather an administrative ruling regarding the filing of refund applications, that is, the procedural application of the *Act*. The CRA official did not create a right, but rather suspended one.

18. Regarding the effect of section 63 of the *Budget Implementation Act, 2003*, the Robert companies contended that the deadline of February 17, 2003, was not applicable in this case, in light of the "agreement" made between them and the CRA official and the fact that the refund applications filed by the Robert companies were for exports that occurred prior to the period covered by this provision. In other words, given the period covered by subsection 68.1(1) of the *Act*, the Robert companies argued that the February 17, 2003, deadline could apply only to exports that occurred in the two years immediately preceding this date.

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6. The Robert companies cited a Supreme Court of Canada judgment to support their argument that an official's actions can result in an inability to act. See *Oznaga v. Société d'exploitation des loteries et courses du Québec*, [1981] 2 S.C.R. 113.
7. The Robert companies submitted two Quebec judgments which, in their view, confirm that there is an obligation to act fairly to allow the filing of applications beyond the deadline. See *Millette c. Québec (Sous-ministre du Revenu)*, 2006 QCCS 3006 (CanLII) and *Lee v. Lavigne*, 1994 CanLII 5924 (QC C.A.).

19. For his part, the Minister argued that the provisions of section 63 of the *Budget Implementation Act, 2003* were sufficient to settle these appeals. Since the refund applications of the Robert companies were received on March 29, 2004, that is, more than a year after the February 17, 2003, deadline, the Minister had no choice but to reject them. The Minister added that the date of February 17, 2003, set out in subsection 63(2) of the *Budget Implementation Act, 2003* is an implementation date and, accordingly, cannot be considered a limitation period. The Minister also argued that allowing the claims in these appeals would be contrary to the legislator's express intent.

20. Moreover, the Minister argued that the two-year deadline set out in subsection 68.1(1) of the *Act* is a period for extinction of right that cannot be extended by an inability to act. The Minister argued that the *Civil Code of Québec* recognizes the existence of two types of deadline, that is, the limitation period and the period for extinction of right, and that, in these appeals, the nature of the deadline under subsection 68.1(1) and the lack of discretion in its application indicated that it is a period for extinction of right. Accordingly, since the Robert companies did not file their applications within the two-year deadline, the Minister had no choice but to reject them.

21. The Minister also submitted that the principle that the Crown cannot be estopped from applying the proper interpretation of an act, even if this interpretation contradicts representations made by government officials, has been cited many times in case law. According to the Minister, the principle of legitimate expectations raised by the Robert companies must fail, since this would be inconsistent with a clear, unambiguous and unequivocal statutory provision.

22. Lastly, the Minister denied that Mr. Bernard-Roby had told the Robert companies that they did not need to file refund applications until a decision was made in *Penner*.

ANALYSIS

23. On a number of occasions, the Supreme Court of Canada has confirmed that the presumption against retroactivity or interference with vested rights can be rebutted by the express words of the statute or by necessary implication.[8]

24. As the Tribunal has declared in several cases[9] concerning such refund applications received by the Minister after February 17, 2003, the *Budget Implementation Act, 2003*, which came into force on June 19, 2003, is very clear. It expressly amended section 68.1 of the *Act* and explicitly 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 legislator intended the *Budget Implementation Act, 2003* to be retroactive to the date of the Budget announcement and to affect expectations (or rights) to a refund if the application was *received* by the Minister after the deadline of *February 17, 2003*. According to the Tribunal, it is clear that this date is an implementation date rather than a limitation period, as suggested by the Robert companies.

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8. *Venne v. Quebec (Commission de la protection du territoire agricole)*, [1989] 1 S.C.R. 880 at paras. 81, 97-101; *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530 at paras. 30-36; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2. S.C.R. 473 at paras. 69-72, 74-75; see also *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1192; *Grand Rapids (Town) v. Graham et al.*, 2004 MBCA 138 (CanLII) at paras. 14, 23-28.
9. See, *inter alia*, *Les Entreprises O. Dubé Enr. and 3669602 Canada Inc. v. M.N.R.* (21 March 2007), AP-2005-022 and AP-2005-023 (CITT); *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).

25. In *Transport Ronado Inc. c. Canada*,[10] a recent case that also concerned the effect of section 63 of the *Budget Implementation Act, 2003*, the Federal Court ruled on the right of the legislator to amend or restrict a taxpayer's acquired rights:

> While it may seem arbitrary that the legislator can sometimes enact a law that restricts rights that had hitherto existed for the benefit of a taxpayer, the inalienable right of the legislator to pass legislation to amend certain taxpayer benefits has always been recognized by the courts.
>
> [Translation]

26. The Tribunal therefore finds that subsection 63(2) of the *Budget Implementation Act, 2003* has the effect of extinguishing *any* right to a refund that may have existed on or before February 17, 2003, if the refund application was not received by the Minister on or before February 17, 2003. The Tribunal is also of the view that no right to a refund can arise after February 17, 2003.

27. In the Tribunal's opinion, this provision alone is sufficient to settle these appeals. Uncontested evidence shows that the refund applications submitted by the Robert companies were received by the Minister on March 29, 2004. There is therefore no argument that this date is later than February 17, 2003, and that, by this simple fact, the CRA had no authority to grant the refund requested by the Robert companies. It is therefore the Tribunal's opinion that the Minister's decisions issued on August 31, 2006, are well-founded.

28. In light of the foregoing, the Tribunal does not need to rule on whether there was an extension of the two-year deadline set out in subsection 68.1(1) of the *Act*, on the exact nature of this deadline, on the applicability of the doctrine of legitimate expectations or on whether there was an "agreement" between the Robert companies and a CRA official.

29. The Tribunal notes however that, even if it had decided to accept the argument of the Robert companies that the two-year deadline set out in subsection 68.1(1) of the *Act* had been extended and that they were therefore still entitled to file refund applications, it is of the opinion that this right was extinguished when the refund applications were not received by the Minister on or before February 17, 2003. To conclude otherwise would mean that representations made by a government official can interfere with the sovereignty of Parliament. As indicated by the Minister at the hearing, such a result would be illogical and unconstitutional.

30. The Tribunal is aware that, from the perspective of the Robert companies, their situation may seem unfair. However, as the Tribunal has stated on many occasions, the Tribunal does not have jurisdiction to order equitable relief, even if a taxpayer is misled or receives erroneous information.[11] It must respect legislative deadlines even in cases where, for example, there is no prior notice of a tax change.[12] The Tribunal can only make findings within the mandate expressly conferred upon it by its enabling legislation.

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10. 2007 CF 166 (CanLII).
11. See, for example, *Walbern Agri-Systems Ltd. v. M.N.R.* (21 December 1989), 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).
12. *Aerotec Sales & 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).

DECISION

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

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

Ellen Fry
Ellen Fry
Member

Serge Fréchette
Serge Fréchette
Member