

Ottawa, Thursday, November 19, 1992

**Appeal No. AP-90-164**

IN THE MATTER OF an appeal heard on October 5, 1992,  
under section 81.19 of the *Excise Tax Act*, R.S.C. 1985,  
c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of  
National Revenue dated October 31, 1990, with respect to a  
notice of objection served under section 81.17 of the *Excise  
Tax Act*.

**BETWEEN**

**KIM HUTTON**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Presiding Member

Michèle Blouin  
Michèle Blouin  
Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

*UNOFFICIAL SUMMARY*

**Appeal No. AP-90-164**

**KIM HUTTON**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The issue in this appeal is whether the appellant has established any entitlement to a refund of excise tax paid on gasoline purchased during periods other than those allowed by the respondent. A key factor in this case, as admitted by both parties, is whether the appellant actually filed the refund claim as he alleges to have done in May or June 1987.*

**HELD:** *The appeal is dismissed.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: October 5, 1992*  
*Date of Decision: November 19, 1992*

*Tribunal Members: Sidney A. Fraleigh, Presiding Member*  
*Michèle Blouin, Member*  
*Robert C. Coates, Q.C., Member*

*Counsel for the Tribunal: Robert Desjardins*

*Clerk of the Tribunal: Dyna Côté*

*Appearances: Isidore R. Germain, for the appellant*  
*Frederick Woyiwada, for the respondent*

**Appeal No. AP-90-164**

**KIM HUTTON**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member  
MICHÈLE BLOUIN, Member  
ROBERT C. COATES, Q.C., Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act).

The appellant, self-employed in the transportation industry, operated two trucks for which he purchased gasoline for business purposes. By application dated November 3, 1988, the appellant claimed a refund of excise tax in the amount of \$1,540.46. This amount allegedly represented the tax paid on gasoline purchased by the appellant between May 1, 1984, and April 30, 1987.

By notice of determination dated January 16, 1989, the respondent allowed a refund in the amount of \$557.52. This amount represented the excise tax paid by the appellant on gasoline purchased between November 10, 1984, and May 24, 1985, and between November 10, 1986, and April 30, 1987. The remainder of Mr. Hutton's refund claim was disallowed on the grounds that claims for refunds of excise tax on gasoline purchased before May 24, 1985, must have been made within four years of the date of purchase and that claims for refunds of excise tax on gasoline purchased on or after May 24, 1985, must be made within two years of the date of purchase. In a notice of objection dated March 9, 1989, Mr. Hutton claimed that an application for a refund of excise tax on gasoline purchased between May 1, 1984, and April 30, 1986, had already been made in May or June 1987.

The issue in this appeal is whether the appellant has established any entitlement to a refund of excise tax on gasoline purchased during periods other than those allowed by the respondent. A key factor in this case, as admitted by both parties, is whether the appellant actually filed the refund claim as he alleges to have done in May or June 1987.

The appellant's accountant, Mr. Isidore R. Germain, appeared on Mr. Hutton's behalf. Allowed to testify on the facts in this case, Mr. Germain was adamant about the fact that he had filed the first claim in the spring of 1987. He argued that that claim had been lost by officials of the Department of National Revenue (Revenue Canada). He described Revenue Canada's system as being a complete mess. In his view, the taxpayer should not be penalized by a system that does not work properly. Mr. Germain also pointed out that he had no receipt of registered mail to

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1. R.S.C. 1985, c. E-15, as amended.

support the contention that a refund claim had been filed in the spring of 1987. On this point, he explained that it was not required nor was it his practice to use registered mail except for formal documents. The case, as he argued, rests essentially on the question of whether the Tribunal accepts his word or that of the respondent.

In cross-examination, Mr. Germain acknowledged that he does not have a copy of the 1987 refund claim in his files. He further added that Mr. Hutton's files contain no numerical evidence of calculations relating to the alleged 1987 refund claim.

In essence, counsel for the respondent argued that the onus was on the appellant to show that the 1987 refund claim had actually been filed. He noted that the appellant's representative, while having a paper trail for other tax matters, did not have a copy of the 1987 refund claim allegedly filed. Counsel suggested that it was possible to imagine that the appellant's representative, in the wake of a busy business period, did not file the 1987 refund claim, but came to believe that he had actually filed it.

Having reviewed the evidence and considered the arguments, the Tribunal is of the opinion that the appeal should be dismissed. The Tribunal agrees with counsel for the respondent that the appellant has the onus to establish clearly that he is entitled to the benefit of the claimed refund. More specifically, the appellant has the burden of showing that every condition necessary for the refund has been respected, one of which being the filing of the refund claim within the time limitations set by the Act. In this respect, the Tribunal is of the view that the appellant has failed to discharge the burden of proving that the alleged refund claim had been filed in May or June 1987. The Tribunal has duly noted the appellant's inability to provide any kind of written evidence that a refund claim was actually filed in the spring of 1987. Although the Tribunal may feel a degree of sympathy for the appellant, it has no basis on which to conclude that the appellant prepared and properly filed a refund claim with the respondent. Furthermore, the Tribunal has no jurisdiction to apply or consider principles of equity.

Accordingly, the appeal is dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh  
Presiding Member

Michèle Blouin

Michèle Blouin  
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member