



Ottawa, Thursday, February 11, 1993

Appeal No. AP-90-243

IN THE MATTER OF an appeal heard on October 21, 1992, 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 December 4, 1990, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

ED MARKOWSKI

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-243

ED MARKOWSKI

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act from a decision of the Minister of National Revenue. The issue is whether the respondent's assessment allocating 20 percent of the gasoline and diesel fuel purchased by the appellant under his sales tax bulk permit between November 7, 1985, and June 30, 1989, to "on-highway" use is correct. More specifically, the issue is whether the appellant has provided the respondent with sufficient documentation on the amount of fuel that he used for "on-highway" purposes to enable the respondent to assess him for less than the 20-percent "on-highway" use allocation set out in Bulletin FTR #31.

HELD: *The appeal is dismissed.*

Place of Hearing: Edmonton, Alberta
Date of Hearing: October 21, 1992
Date of Decision: February 11, 1993

Tribunal Members: Sidney A. Fraleigh, Presiding Member
Arthur B. Trudeau, Member
Desmond Hallissey, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Dyna Côté

Appearances: Ed Markowski, for the appellant
Linda Wall, for the respondent

Appeal No. AP-90-243

ED MARKOWSKI

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) from a decision of the Minister of National Revenue (the Minister).

The issue is whether the respondent's assessment allocating 20 percent of the gasoline and diesel fuel purchased by the appellant under his sales tax bulk permit (the permit) between November 7, 1985, and June 30, 1989, to "on-highway" use is correct. More specifically, the issue is whether the appellant has provided the respondent with sufficient documentation on the amount of fuel that he used for "on-highway" purposes to enable the respondent to assess him for less than the 20-percent "on-highway" use allocation set out in Bulletin FTR #31² (the Bulletin).

Mr. Ed Markowski operates a farm of approximately 1,600 acres of cultivated land which is comprised of more than one parcel of land separated by county roads. To facilitate his farming operation, Mr. Markowski owns two half-ton pick-up trucks, a one-ton truck, one single axle five-ton grain truck and four tractors, which all use coloured gasoline and diesel fuel. Although all of these vehicles are intended for "off-highway" use on the farm, the nature of Mr. Markowski's farming operation requires that these vehicles sometimes be used "on-highway." Mr. Markowski did not take any odometer readings or keep records to show the extent to which these farm vehicles are used for "on-highway" travel. However, he did provide estimates of the percentage of "on-highway" use which, he believes, is between 5 and 10 percent.

At the hearing, Mr. Markowski explained how he arrived at the figure of 5-to-10-percent "on-highway" use. Using a 160-acre section of his farm as an example, he estimated that 584 gallons of fuel are required to perform the field operations, such as plowing, cultivating and combining, to produce a crop of canola. Further, he estimated that, depending on the yield, it takes 6 to 12 trips with his truck to haul the crop to the market, that is, according to his figures, 18 miles round trip. The truck operates at 10 miles per gallon. Therefore, if 6 trips were made, 11 gallons of fuel would be used "on-highway," and if 12 trips were made, 22 gallons of fuel would be used.

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

2. Department of National Revenue, Excise Gasoline Tax Refunds and Rebates, June 12, 1987.

Mr. Markowski then compared the amount of fuel required for the field operations, i.e. 584 gallons, to the amount of fuel required to transport the crop "on-highway" to the elevator, i.e. from 11 to 22 gallons, and submitted that his use of fuel for "on-highway" purposes was less than 20 percent of his total fuel consumption.

Mr. Markowski indicated that 20 percent of his fuel purchases would amount to approximately 2,000 gallons of fuel per year. At a mileage rate of 12 miles per gallon, 2,000 gallons of fuel would be the equivalent of 24,000 miles per year. He also stated that another 700 or 800 gallons would be purchased from a service station, which would be the equivalent of 8,000 or 9,000 miles per year. He submitted that it would be impossible for a farmer to travel over 30,000 miles on the highway in a year because it would require 600 or 700 working hours.

Mr. Markowski elaborated on the nature of his farming operation. He explained that, since his farm is comprised of more than one parcel of land, going from one parcel to another requires some "on-highway" travel on county roads. He estimated that the distance between parcels is approximately 1 to 1.5 miles. Further, he stated that the distance from his farm to town is about 15 miles and that trips are made into town using one of the farm vehicles approximately once a week and two to three times a week during the busy seasons of spring and fall. The grain truck is used occasionally on the highway to transport goods to the elevator 9 miles away from the farm, although Mr. Markowski could not give any estimates of the number of times that this could occur.

Ms. Linda M. Zimmer, a senior auditor with the Department of National Revenue (Revenue Canada) for five years, was the appeals officer assigned to review Revenue Canada's decision after the appellant had filed his notice of objection. At the hearing, she outlined how the percentage of "on-highway" use is determined. She stated that only fuel from the bulk tank is taken into account and that purchases of clear fuel from service stations are not included. Ms. Zimmer discussed how the condition of the vehicles is relevant for determining how much fuel is used for "on-highway" purposes since the amount of fuel used will vary significantly if the rate of fuel consumption changes by 1 or 2 miles per gallon.

In reviewing Mr. Markowski's file, Ms. Zimmer analyzed the auditor's working papers in the file to see how reasonable Revenue Canada's position was in regard to the 20-percent allocation of fuel use to "on-highway" use. She looked at the figure for total fuel purchased by the appellant under his permit, as established by the auditor based on invoices from the bulk fuel dealer and rebate applications before the appellant was issued a permit. This figure was approximately 202,000 litres. She reviewed the information provided by the appellant with respect to his farming operation. She considered the farm-use equipment and determined which would be mainly for "on-highway" and which would be mainly for "off-highway" use based on her experience talking to farmers and dealing with other similar files, as well as her common knowledge.

Ms. Zimmer then looked at the appellant's estimates of "on-highway" use, as provided in his letter to Revenue Canada dated August 29, 1990, and his estimates of "off-highway" use, which the appellant set out in his brief to this Tribunal dated June 8, 1991. Both estimates were based on 160 acres of the total 1,600 acres under cultivation. Ms. Zimmer multiplied the estimates by 10 to take into account the appellant's total acreage of farmland. In doing this calculation, Ms. Zimmer

found that Mr. Markowski's estimates only reflected 69 to 70 percent of the total fuel purchased, as identified by the auditor.

Based on her review of the information in the auditor's working file and the estimates provided by the appellant, Ms. Zimmer stated that, in her opinion, Mr. Markowski had actually been assessed less than if his estimates had been used to determine "on-highway" use.

In argument, counsel for the respondent submitted that the onus is on the appellant to establish that he is eligible for the fuel tax rebate under section 69 of the Act and that he failed to discharge this onus. The appellant is a "qualified farmer" and, as such, he may obtain a fuel tax rebate under his permit for fuel used for "farming purposes" or "off-highway" use. However, the amount of the rebate is to be calculated in accordance with subsections 69(8.1) and (8.2) of the Act and, in the event that a farmer is not able to produce detailed records of "on-highway" and "off-highway" use as provided under sections 98 and 99 of the Act and subsection 7(1) of the *Sales Tax Bulk Permit Regulations*³ (the Regulations), the rebate is to be calculated in accordance with the 80-percent "off-highway" and 20-percent "on-highway" formula set out in the Bulletin. Counsel submitted that the appellant was unable to produce detailed records to dispute the application of the 80/20 split formula.

Finally, counsel for the respondent argued that the information provided by the appellant was incomplete, inconsistent and unreliable. The appellant provided only general figures for an average year as opposed to actual figures, did not include all of his vehicles in his estimates and gave a conservative number of "on-highway" trips. The estimates provided in the appellant's letter dated August 29, 1990, differed substantially from those provided in his brief dated June 8, 1991. Counsel argued that such inconsistencies have prevented Revenue Canada from coming to a clear determination of the appellant's "on-highway" use of fuel purchased under his permit.

The Tribunal agrees with counsel for the respondent that the appellant has an evidentiary burden to prove that the respondent's assessment is incorrect and that less than 20 percent of the gasoline and diesel fuel purchased under the permit should have been allocated to "on-highway" use. Pursuant to subsection 69(6.1) of the Act, a farmer is entitled to a fuel tax rebate in respect of fuel purchased that is used for farming purposes. Subsection 69(7) of the Act qualifies this entitlement such that a rebate is not available where the fuel is "used to propel a vehicle on a public highway," in other words, where the fuel is used for "on-highway" purposes. This entitlement is further qualified by section 98 of the Act which requires that a fuel tax rebate claimant keep records and books to verify the information relating to a fuel tax rebate claim.

As an alternative to claiming a fuel tax rebate, a farmer may obtain a permit under the Regulations. This permit may be used to purchase fuel from a vendor registered pursuant to the *Registered Vendor Certificate Regulations*⁴ without paying the fuel tax. If fuel is purchased under a permit, it is thus not necessary to file a fuel tax rebate claim. However, subsection 7(1) of the Regulations requires that a permit holder keep a record of the quantity of fuel purchased, the amount of rebate or reduction received and the amount of fuel used for a purpose that would have

3. SOR/86-648, June 12, 1986, Canada Gazette Part II, Vol. 120, No. 13, p. 2573.

4. SOR/86-649, June 12, 1986, Canada Gazette Part II, Vol. 120, No. 13, p. 2576.

disqualified the permit holder from receiving a fuel tax rebate. Since a farmer is not entitled to claim a rebate of the fuel tax paid on fuel that is used for "on-highway" purposes, a farmer with a permit must, therefore, keep records of fuel purchased under the permit and used for "on-highway" purposes.

Revenue Canada issued the Bulletin to address situations where permit holders have not kept the type of records required under the Regulations. Pursuant to the Bulletin, if records of "on-highway" use have not been produced, Revenue Canada will apply the 80/20 split formula to the total fuel purchases of the permit holder.

The Tribunal acknowledges that the amount of fuel used by the appellant for "on-highway" purposes may be less than 20 percent of his total fuel purchased under the permit; however, the appellant cannot substantiate his claim. The evidence submitted by the appellant is insufficient to permit the Tribunal to determine the actual percentage of the total fuel purchased under the permit that has been diverted to "on-highway" use. The Act and the Regulations require that the appellant keep detailed records to verify his "on-highway" use. The appellant admitted that he did not keep such records. As a result, Revenue Canada applied the formula set out in the Bulletin. Accordingly, the appeal is dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau

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Member

Desmond Hallissey

Desmond Hallissey
Member