



Ottawa, Wednesday, September 23, 1992

Appeal No. AP-91-171

IN THE MATTER OF an appeal heard on July 9, 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 March 18, 1991, with respect to a
notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

J.S. BAL

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the appellant is not eligible for a refund pursuant to section 68.16 of the *Excise Tax Act* on purchases of propane fuel.

Desmond Hallissey

Desmond Hallissey
Presiding Member

W. Roy Hines

W. Roy Hines
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-171

J.S. BAL

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant, who was the owner and operator of a propane-fuelled taxicab, received gasoline excise tax refunds which were later determined to have been paid in error, as propane was held not to be a fuel eligible for the refunds in question. The appellant was accordingly assessed for the amount of the refunds. He argued that, because the errors were not his fault, he should not be required to repay the money. The appellant also argued that propane was a gasoline-type fuel which conformed to the definition of "gasoline" found in subsection 2(1) of the Excise Tax Act. He claimed, therefore, that he was entitled to the refunds which he received. Counsel for the respondent maintained that the Excise Tax Act allows a refund only when excise tax has been paid on gasoline pursuant to section 23 of the Excise Tax Act. She contended that the appellant had not led any evidence to establish that he had paid excise tax on his purchases of propane. Counsel argued, therefore, that the appellant was not eligible for a refund. She further maintained that the errors committed by officials of the Department of National Revenue did not create a right in law.

HELD: *The appeal is dismissed. The appellant did not discharge the burden of proving that he paid excise tax on his purchases of propane. While the Tribunal sympathizes with the appellant's frustration over having to repay money which was paid to him in error, it does not have the authority to refuse to apply the law, even on grounds of equity.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: July 9, 1992
Date of Decision: September 23, 1992*

*Tribunal Members: Desmond Hallissey, Presiding Member
W. Roy Hines, Member
Robert C. Coates, Q.C., Member*

Legal Services: Karen Jensen

Clerk of the Tribunal: Dyna Côté

*Appearances: J.S. Bal, for the appellant
Linda J. Wall, for the respondent*

Appeal No. AP-91-171

J.S. BAL

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
W. ROY HINES, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal of an assessment made pursuant to section 81.19 of the *Excise Tax Act*¹ (the Act). By a decision dated March 18, 1991, the respondent confirmed Notice of Assessment No. OTT 0018 dated June 6, 1990, under which a total of \$603.11 was assessed for taxes, penalties and interest for the period covering January 1, 1987, to December 31, 1988.

The appellant, Mr. J.S. Bal, was the owner and operator of a taxicab which he fuelled with propane. On five separate occasions, he applied for a refund of the excise tax paid on the propane using forms intended for refunds of excise tax paid on gasoline. On two of the five occasions, the appellant specified that the claim was based on purchases of propane.

On the basis of the five refund claims, the appellant was refunded a total of \$577.60. However, following an audit in 1990, officials of the Department of National Revenue (Revenue Canada) concluded that the refunds had been paid in error, as propane was determined not to be a fuel eligible for the refund in question. Therefore, a notice of assessment was issued requiring the appellant to repay the moneys from the last four refund claims. In addition, penalties and interest were levied against the appellant. Mr. Bal's first refund claim was not subject to audit because it was beyond the four-year period within which a taxpayer may be assessed pursuant to subsection 81.11(2) of the Act. Accordingly, the first refund claim of \$150.50 was not included in the assessment.

The issues in this appeal are: (1) whether, pursuant to section 68.16 of the Act, the appellant was entitled to the refunds of excise tax paid on gasoline; and (2) whether the respondent was precluded from assessing the appellant for the refunds of excise tax which had been allowed.

Mr. Bal testified on his own behalf. He stated that although he initially had some doubts as to whether he was eligible for a gasoline excise tax refund, his doubts were removed after he received his first three refunds. The appellant testified that the third refund claim form provided space under the heading "Non Eligible Fuels," where applicants were requested to indicate whether their claim included purchases of diesel fuel, heating fuel, propane or aviation fuel. The appellant testified that he truthfully reported that he used propane to fuel his taxicab, thereby making it clear, he thought, that he was basing his claims on his use of propane and not of gasoline. During cross-examination, the appellant indicated that he interpreted the

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

question regarding the type of fuel that he used to mean that exceptions would be made for certain non-eligible fuels. Mr. Bal explained that he drew this conclusion because, although it was clearly indicated that propane was a non-eligible fuel, nowhere on the claim form was it stipulated that refunds would not be given to propane users. When the appellant received a refund on the basis of this third claim, he became convinced that refunds were available for propane. On that basis, he submitted his fourth and fifth claims, shortly after which he received refund cheques for both.

The appellant testified that he did not know whether he paid excise tax when he purchased propane for his taxicab. He further explained that, when he submitted his claims, he was not aware that refunds were only provided to persons who had paid excise tax on fuel purchases. Mr. Bal declared that he read the information guide which accompanied the claim form. However, he stated that he did not recall any mention that excise tax refunds were only available to those gasoline purchasers who had paid excise tax on their fuel purchases.

Mr. Bal argued that propane is a "gasoline type" fuel which conforms to the definition of gasoline found in subsection 2(1) of the Act. He contended that the claim forms, which specify that propane is a non-eligible fuel, are inconsistent with the definition of "gasoline" found in the Act. He claimed, therefore, that he was entitled to the refunds which he received.

Mr. Bal further stated that the lack of information on the claim forms and in their accompanying information guides created confusion as to whether a refund was available for excise tax paid on propane. Mr. Bal argued that he should not be forced to repay the refunds because the confusion and the errors that were committed in granting him the refunds were not his fault.

Counsel for the respondent did not call any witnesses to testify. Counsel stated that the onus was on the appellant to prove that he had paid the excise tax for which he had received a refund. Counsel maintained that the appellant had not proved that he had paid tax on the propane and, therefore, he was not entitled to keep the moneys refunded to him in error.

Counsel for the respondent noted that section 23 of the Act imposes excise tax on gasoline. Section 68.16 of the Act allows a refund under certain limited circumstances when tax has been paid on the gasoline pursuant to section 23 of the Act. Where a refund has been paid in error, section 81.39 of the Act stipulates that the payment is deemed to be a tax payable by the person to whom the money was initially paid. The Minister is thereby provided with the authority to issue a notice of assessment. Counsel argued, therefore, that the notice of assessment which the appellant received was in conformity with the legislation.

Counsel for the respondent contended that the errors made by Revenue Canada officials in granting the appellant refunds based on his propane use did not create a right in law. Counsel stated that the law was not altered by the fact that Revenue Canada made an error. She relied on the cases of *A.G. Green Co. Limited v. The Minister of National Revenue*² and *Walbern Agri-Systems Ltd. v. The Minister of National Revenue*,³ in which the Tribunal held that an error or misinformation provided by officials of Revenue Canada does not excuse a person from his tax liability nor does it constitute a reason for avoiding it. Counsel also noted that these two decisions follow the *Joseph Granger v. Employment and Immigration Commission*⁴ decision in which the Federal Court of Canada held that an administrative tribunal cannot overrule the text of the Act regardless of how unfortunate an individual's situation may be.

2. Unreported, Canadian International Trade Tribunal, Appeal No. AP-89-134, August 9, 1990.

3. Unreported, Canadian International Trade Tribunal, Appeal No. 3000, December 21, 1989.

4. [1986] 3 F.C. 70.

Section 68.16 of the Act very clearly stipulates that a refund is available only when excise tax has been paid in respect of the purchase of gasoline. The basic premise upon which the assessment was based is that the appellant was not eligible for the excise tax refund. The assessment indicated that propane did not qualify for the refund of excise tax paid on gasoline, and counsel for the respondent stressed that no excise tax was paid on propane. As such, on an appeal of the assessment, the onus was on the appellant to prove that he had paid the excise tax for which a refund was provided under section 68.16 of the Act.⁵ The Tribunal finds that the appellant did not discharge the burden of proving that he had paid excise tax on his purchases of propane. As a result, he is not entitled to any refunds.

Although the appellant may not have felt properly informed about the conditions under which a refund of excise tax would be paid, the Tribunal is precluded from relieving him of the obligation to repay the money that he owes on this basis. The Tribunal agrees with the respondent that errors made by Revenue Canada officials do not excuse an individual from his tax liability.⁶

The Tribunal sympathizes with the appellant's frustration over having to repay money which was mistakenly given to him. However, the Tribunal does not have the authority to refuse to apply the law.⁷ The Act is clear that where a person receives a payment to which that person is not entitled, the amount is deemed to be a tax imposed upon that person, and a notice of assessment is issued. Similarly, the Act requires the imposition of a penalty and interest charge in respect of outstanding moneys owed by a person. The Tribunal has no discretion to waive these charges.⁸

For the foregoing reasons, the Tribunal finds that the appellant is required to pay the amounts assessed by the Minister of National Revenue. Accordingly, the appeal is dismissed.

Desmond Hallissey

Desmond Hallissey
Presiding Member

W. Roy Hines

W. Roy Hines
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

5. The Supreme Court decision of *Roderick W.S. Johnston v. The Minister of National Revenue*, [1948] S.C.R. 486, established the principle that a person challenging a tax assessment must bring evidence to demolish the basic facts upon which the taxation is based.

6. *Walbern Agri-Systems Ltd. v. The Minister of National Revenue*, *supra*, note 3.

7. *Ibid.*

8. Unreported, *Oerus Corporation Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-056, September 3, 1992.