

Ottawa, Monday, December 13, 1993

Appeal No. AP-92-248

IN THE MATTER OF an appeal heard on May 20, 1993,
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 29, 1992, relating to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

CAROL ANNE WRIGHT

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey

Desmond Hallissey
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-248

CAROL ANNE WRIGHT

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant made payments to a travel service for eight travel packages which included flights, hotel accommodation, all transfers, and both the Canadian air transportation tax, in the amount of \$296.00, and foreign departure taxes payable to U.S. agencies or corporations, in the amount of \$60.80. The tour company providing the packages used Odyssey International, a licensed air carrier. The tour company levied and collected the domestic and foreign departure taxes from the appellant on behalf of the carriers. However, it declared bankruptcy in 1990, before the travel packages were used, and a departure on the tour packages never took place.

The appellant applied to the Ontario Travel Industry Compensation Fund for compensation of the total amount that she had paid for the eight travel packages and received 99 percent of her total eligible amount. The Canadian and foreign departure taxes were ineligible amounts for refund from the Ontario Travel Industry Compensation Fund, as they were not considered to be travel services.

The appellant applied for a refund of \$356.80, representing the Canadian and foreign departure taxes, which was denied and confirmed by a decision of the Minister of National Revenue. The issue in this appeal is whether the appellant is entitled to the Canadian air transportation tax and foreign departure taxes, amounting to \$356.80, paid in respect of the eight tour packages purchased from Thomson Vacations Ontario Limited.

HELD: *The appeal is dismissed. The Excise Tax Act makes clear that Odyssey International or its parent air carrier, both licensed under the Excise Tax Act, are responsible for refunding to the appellant the tax paid on the transportation of a person by air that has not been provided. In turn, provision is made for the licensed air carrier to apply for and receive from the Department of National Revenue a refund of these moneys. The Excise Tax Act does not provide for such an application by the appellant, nor for the Department of National Revenue to refund these moneys directly to the appellant.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 20, 1993
Date of Decision: December 13, 1993

Tribunal Members: Desmond Hallissey, Presiding Member
Kathleen E. Macmillan, Member
Sidney A. Fraleigh, Member

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

Appeal No. AP-92-248

CAROL ANNE WRIGHT

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal heard under section 81.19 of the *Excise Tax Act*¹ (the Act) from a determination of the Minister of National Revenue (the Minister) disallowing the appellant's application for an air transportation tax refund. The hearing proceeded by way of written submissions on the basis of an agreed statement of facts as supplemented by briefs submitted by the parties and the administrative record.

As stated in the agreed statement of facts, on February 16 and April 10, 1990, the appellant made payments to Hanover Travel Service in Owen Sound, Ontario, for eight travel packages. The packages were for return flights between Toronto, Ontario, and Las Vegas, Nevada, including hotel accommodation, all transfers, and both the Canadian air transportation tax, in the amount of \$296.00, and foreign departure taxes payable to U.S. agencies or corporations, in the amount of \$60.80. The total amount paid by the appellant for the eight packages was \$4,271.20.

Thomson Vacations Ontario Limited (Thomson) was the tour company providing the packages. It used Odyssey International (Odyssey), a division of Soundair Corporation (Soundair), as the air carrier. Each of these carriers was licensed under section 17 of the Act. Thomson levied and collected the domestic and foreign departure taxes from the appellant on behalf of the carriers. However, Thomson declared bankruptcy in 1990, before the travel packages were used, and a departure on the tour packages never took place.

The appellant applied to the Ontario Travel Industry Compensation Fund (the Fund) on June 19, 1990, to be compensated for the total amount that she had paid for the eight travel packages. The Fund paid the appellant \$3,633.70, amounting to 99 percent of her total eligible amount. It was indicated by a representative of the Fund that the Canadian and foreign departure taxes were ineligible amounts for refund from the Fund, as they were not considered to be travel services.

On August 16, 1991, the appellant applied to the Minister for a refund of \$356.80, representing the Canadian and foreign departure taxes. By notice of determination dated September 6, 1991, the application was disallowed on the basis that the air transportation tax was

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

not refundable by the Department of National Revenue (Revenue Canada) to a customer. On October 1, 1991, the appellant filed a notice of objection, which was answered by a notice of decision dated September 29, 1992, disallowing the objection and confirming the earlier determination. On December 3, 1992, the appellant appealed the determination to the Tribunal.

The issue in this appeal is whether the appellant is entitled to the Canadian air transportation tax and foreign departure taxes, amounting to \$356.80, paid in respect of the eight tour packages purchased from Thomson.

In support of her position, the appellant argued that the tour packages were not used and, as such, that she had paid a tax on something that she did not receive. As a departure never took place, she should not be charged a departure tax. She also argued that it is against her constitutional right for the federal government to withhold moneys for services not received.

Counsel for the respondent noted that, under subsection 10(1) of the Act, an air transportation tax is imposed on each amount paid or payable in Canada for transportation of a person by air where that transportation begins and ends at a point in the taxation area, which is defined to include Canada and the United States. Subsection 18(1) of the Act places the burden of levying and collecting the tax imposed under subsection 10(1) of the Act on the licensed air carrier. In addition, paragraph 18(1)(b) of the Act requires every licensed air carrier to:

(b) make adjustments in or refund any portion of the tax paid on the transportation of a person by air that has not been provided or only partially provided or any tax that has been collected in error by the licensed air carrier.

Section 68.11 of the Act permits licensed air carriers to apply to Revenue Canada for a refund of this tax. This section states that:

68.11 Where tax under Part II has been remitted by a licensed air carrier and the carrier has, in accordance with subsection 18(1), made an adjustment or refund in respect of the tax, an amount equal to the amount of that adjustment or refund shall, subject to this Part, be paid to that carrier if it applies therefor within two years after the adjustment or refund.

Counsel submitted that the licensed carrier, Odyssey and/or its parent company Soundair, are responsible, under subsection 18(1) of the Act, for refunding to the appellant an amount equal to the amount of tax that Odyssey remitted in respect of the tours for which the air transportation has not been provided. In turn, it is the carrier that is permitted, under section 68.11 of the Act, to apply for a refund from Revenue Canada of any such moneys. Otherwise, there are no provisions under the Act through which the appellant could obtain a refund of the air transportation tax. Therefore, the appellant must apply to the carrier in order to obtain a refund of the tax paid.

After reviewing the facts, arguments of the parties and the relevant legislative scheme of the Act, the Tribunal is in agreement with the submissions of counsel for the respondent. The Act makes clear that Odyssey or its parent air carrier, both licensed under the Act, are responsible for refunding to the appellant the tax paid on the transportation of a person by air that has not been provided. In turn, provision is made for the licensed air carrier to apply for

and receive from Revenue Canada a refund of these moneys. The Act does not provide for such an application by the appellant, nor for Revenue Canada to refund these moneys directly to her.

Accordingly, the appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member