CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, October 4, 1999

Appeal No. AP-92-222

IN THE MATTER OF an appeal heard on March 1, 1999, 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 4, 1992, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

LES HUILES IDÉAL INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Raynald Guay
Raynald Guay
Member

Anita Szlazak
Anita Szlazak
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-222

LES HUILES IDÉAL INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellant was entitled to continue to use the Alternative Tax Accounting Method (Alternative Method) after June 1, 1985. The respondent submits that the appellant continued to use the Alternative Method until the end of the assessment period, i.e. after June 1, 1985, which it was not entitled to do. The appellant, on the other hand, claims that it settled its tax liability by paying sales and excise taxes to its suppliers upon the purchase of petroleum products and that the respondent's officials authorized it to do so even after June 1, 1985.

HELD: The appeal is dismissed. The Tribunal is of the view that the appellant failed to prove that the assessment was incorrect. The appellant concedes that it was liable for tax pursuant to the *Excise Tax Act*. If the appellant were indeed liable for tax under the *Excise Tax Act*, the Tribunal could not change the application of that legislation. The only reasons adduced by the appellant in this respect are that: it was authorized to continue to apply the Alternative Method after June 1, 1985; Department of National Revenue officials, on the one hand, misinformed it about its tax liability after June 1, 1985, and, on the other hand, refused to investigate further during the audit, even though they knew that the appellant had continued to pay tax to its suppliers after that date; there may be double taxation if all or some suppliers also remitted to the Department of National Revenue the amounts paid by the appellant; the delay between its objection to the assessment and the date of the respondent's decision was not reasonable; in *Alpha Fuels* v. *Minister of National Revenue*, the Tribunal allowed the appeal of an assessment because a tax accounting method, other than the one provided in the *Excise Tax Act*, had been accepted by the Department of National Revenue; and there is some doubt as to whether the assessment was established equitably. According to the Tribunal, none of these arguments are conclusive.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 1, 1999
Date of Decision:	October 4, 1999
Tribunal:	Pierre Gosselin, Presiding Member Raynald Guay, Member Anita Szlazak, Member
Counsel for the Tribunal:	Gilles B. Legault
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Philippe H. Trudel, for the appellant Louis Sébastien, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No AP-92-222

LES HUILES IDÉAL INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
RAYNALD GUAY, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] of a decision of the Minister of National Revenue with respect to a notice of objection to a notice of assessment dated July 22, 1987.

The appellant's brief and the notice of assessment refer to a total liability of $178,201.86 for the period from September 1, 1984, to December 31, 1986, that is, $91,896.39 for unpaid federal sales tax, $59,008.76 for unpaid excise tax and $29,365.58 in interest and penalty (whereas an amount of $2,068.87 is payable to the appellant).

The hearing began with a discussion to determine the exact nature of the issue in this appeal. It would be time-consuming and pointless to report the discussion, especially since the parties finally reached an agreement. However, the Tribunal is compelled to point out that it was surprised that an appeal that began almost 15 years ago could not have been better prepared in order to spare the Tribunal this type of futile debate.

In essence, the parties having reached a consensus, the issue of this appeal is simply whether the appellant was entitled to continue to use the Alternative Tax Accounting Method (Alternative Method) after June 1, 1985.[2] In the respondent's brief, it was submitted that the appellant continued to use the Alternative Method until the end of the assessment period, i.e. beyond the allowable period ending June 1, 1985. The appellant, on the other hand, claims that it duly settled its tax liability by paying sales and excise taxes upon the purchase of petroleum products from its suppliers and that officials of the Department of National Revenue (Revenue Canada) authorized it to continue to use the Alternative Method.

During the hearing, the Tribunal heard the testimony of Mr. Maurice Beaulieu, owner and operator of Les Huiles Idéal Inc., a distributor of petroleum products, especially gasoline and diesel. Mr. Beaulieu explained that he had been informed, in a Revenue Canada letter dated July 15, 1985, that the appellant could no longer use the Alternative Method as of 12:01 a.m. on June 1, 1985. However, given that the appellant's assets were to be sold on November 30, 1985, the witness explained that he had requested permission to continue to use the same tax accounting method, i.e. paying taxes at the time of purchase and receipt of inventory from the wholesalers, and that he was authorized to do so in a telephone conversation with a Revenue Canada official. When the sale of the business was postponed until the spring of 1986, Mr. Beaulieu called Revenue Canada again, whereby an official allegedly confirmed that he could continue to use the same method, provided the amounts of tax paid were indicated on the invoices and corresponded

1. R.S.C. 1985, c. E-15 [hereinafter *Act*].
2. *Transcript of Public Hearing* (1 March 1999), AP-92-222 at 23-25.

to the cheques that the appellant had made out to the suppliers. The sale of the business was put off yet again, and Mr. Beaulieu proceeded in the same manner and, as he alleges, was again assured that he could continue to pay taxes the same way. Even though Mr. Beaulieu repeatedly asked for written confirmation, officials which whom he spoke at Revenue Canada never provided him with any. It was only after Revenue Canada audited the appellant that Mr. Beaulieu was informed that the appellant's suppliers had not remitted to Revenue Canada the amounts that they collected from it as taxes.

The Tribunal also heard the testimony of a Revenue Canada official, Mr. Marcel Bouthillier, who, although he had not audited the appellant himself, was familiar with the file. Mr. Bouthillier's testimony revealed that the major change made on June 1, 1985, was that the sale price of the petroleum products became irrelevant; tax, from then on, was payable based on the volume sold at a given rate. In essence, according to Mr. Bouthillier, Revenue Canada's new policy was aimed at eliminating the ambiguity in the Alternative Method, which allowed companies to pay taxes at the time of purchase or sale. This ambiguity arose from the fact that the amount of tax differed depending on whether it was calculated using the retailer's purchase price or the sale price to the consumer. Following the new guideline, retailers such as the appellant had to obtain a licence to sell petroleum products, whereby they could buy such products tax free and then charge tax at the time of sale for remittance to Revenue Canada at a later date. In Mr. Bouthillier's opinion, this new way of calculating tax rendered the Alternative Method redundant. According to Mr. Bouthillier, the statement "this tax accounting option [the Alternative Method] will no longer be necessary" contained in the May 23, 1985, *Excise Communiqué*,[3] as well as in the July 15, 1985, Revenue Canada letter, simply means that the option no longer existed because the tax was only payable at the time of sale by the licensed petroleum product dealer. These changes were just as clearly referred to in the government's ways and means motion as in the related budget at the time. Therefore, the appellant's assessment was based on the volume of petroleum products sold, calculated directly from the invoices.

In fact, according to Mr. Bouthillier, the audit table provided at tab 4 of the respondent's brief illustrates the federal sales tax and excise tax liability for the assessment period, the appellant's remittance and the amounts payable in both cases, i.e. $89,738.39 in federal sales tax and $59,008.76 in excise tax. Mr. Bouthillier pointed out, notably, that both amounts referred to sales made after June 1, 1985, while the rest of the assessment applied only to the period from September 1, 1984, to May 31, 1985, and covered only marked diesel sales. The respondent has given a rebate on such sales to farmers licensed to purchase in bulk. Mr. Bouthillier proceeded to point out that only remittances made by the appellant were considered. Remittances that may have been made by the appellant's suppliers were not taken into account and, in this respect, Mr. Bouthillier noted that the latter could have recovered the sums in question, either by claiming them from Revenue Canada or by asking its suppliers to reimburse them. During cross-examination, Mr. Bouthillier admitted that it was possible that a supplier had remitted the tax to Revenue Canada, in which case, the tax might end up being paid twice should the Tribunal find the assessment to be correct. Mr. Bouthillier also stated that other tax accounting methods, similar to the Alternative Method, could eventually be used after June 1, 1985, but in other trade sectors.

Based on Mr. Bouthillier's testimony and the supporting documents in the respondent's brief, counsel for the appellant claimed that the appellant could still account for taxes using the Alternative Method after June 1, 1985. In fact, according to counsel, Revenue Canada officials themselves repeatedly told Mr. Beaulieu that the appellant could continue to use the Alternative Method until the business was sold. Furthermore, even though Revenue Canada officials were aware of the appellant's situation at the time of the audit, they still decided not to continue their inquiry, especially regarding the taxes that it had paid to suppliers. Counsel added that, if the assessment was upheld, taxes might be collected twice, considering that the appellant's suppliers may have remitted to Revenue Canada tax paid by the appellant upon the purchase

3. Department of National Revenue, Customs and Excise, at 4.

of petroleum products. Counsel also emphasized that the *Act* imposes no restrictions on the use of the Alternative Method and that, indeed, it would be surprising if it did, since the remittance of taxes in this manner was allowed in an administrative ruling. It is not likely that the legislator would modify the *Act* to restrict the application of an administrative ruling. In addition, counsel adduced that there had been an unreasonable delay between the time of the assessment and the objection and the date of the respondent's decision. Finally, referring to the Tribunal's decision in *Alpha Fuels* v. *Minister of National Revenue*,[4] counsel claimed that the Tribunal had allowed the appeal of an assessment because a tax accounting method, other than the one provided in the *Act*, had been accepted by Revenue Canada. Finally, counsel raised the issue of equity, adducing that the manner in which the assessment was made was questionable in this regard.

Counsel for the respondent, for his part, pointed out that the assessment could not be called into question and was presumed valid until such time as the Tribunal is convinced otherwise. Counsel for the respondent conceded that the section of the *Act* under which the assessment was established was not submitted before the Tribunal and that this could present a problem. He added, however, that, in light of the *Excise Communiqué*, one could see why the policy suddenly changed. In this regard, counsel referred to the testimony of his witness, Mr. Bouthillier, who explained that it was no longer "necessary" to use the Alternative Method as of June 1, 1985, since tax was from then on based on volume. Furthermore, counsel claimed that this change stemmed from what is clearly specified in the *Act*. According to counsel, the appellant was informed of these changes. As for the appellant's allegation that it was misinformed by Revenue Canada officials, counsel relied on the Tribunal's decision in *Walbern Agri-Systems* v. *Minister of National Revenue*,[5] where the Tribunal found, on the basis of the Federal Court of Appeal decision in *Joseph Granger* v. *Employment and Immigration Commission*[6] that "[i]t is settled law that misinformation by officials of the Department does not excuse a person from paying nor constitute a reason for avoiding tax liability".[7] Finally, counsel adduced that the Tribunal was not authorized to introduce concepts of equity and that Revenue Canada was not, in any way, held to inquire into taxes paid by the appellant to suppliers.

On the whole, the Tribunal concurs with the respondent and is of the opinion that the appeal should be dismissed. However, it is fortunate for the respondent that the appellant conceded that it was liable for sales and excise taxes under subsections 23(1) and 50(1) of the *Act*, because, as counsel for the respondent admitted, he failed to provide the Tribunal with the statutory provisions adduced, contrary to subparagraph 35(2)(*b*)(iv) of the *Canadian International Trade Tribunal Rules*.[8] Even though, under the *Canada Evidence Act*,[9] judicial notice is taken of all acts, even if not specially pleaded, it is one thing to make a general reference to a legislative provision without submitting it and quite another to refer to the government's ways and means motion, the Minister of Finance's budget and administrative documents such as *Excise News* and *Excise Communiqué*. Indeed, the legislative text takes precedence. This is especially true in a case where, essentially, the taxpayer is blamed for having continued to use a tax accounting method that was administratively correct until amendments to the *Act* modified the procedure. In this regard, the Tribunal notes that the said amendments to the *Act* were only sanctioned in March 1986,[10] retroactive to June 1, 1985, for sales tax and to September 3, 1985, for excise tax. It appears, therefore, that the Alternative Method ceased to be applied administratively almost nine months before the new legislative provisions came into effect, in response to announcements made by the government in its budget documents.

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4. (6 April 1992), AP-89-264 (C.I.T.T.) [hereinafter *Alpha Fuels*].
5. (21 December 1989), 3000 (C.I.T.T.) [hereinafter *Walbern Agri-Systems*].
6. [1986] 3 F.C. 70 [hereinafter *Joseph Granger*].
7. *Supra* note 5 at 5.
8. S.O.R./91-499.
9. R.S.C. 1985, c. C-5, s. 18.
10. S.C. 1996, c. 9, s. 16 and ss. 48(1), 48(3), 50(1) and 50(2).

On the other hand, the Tribunal is of the opinion that the appellant failed to prove that the assessment was incorrect. Indeed, the appellant admits that it was liable for taxes pursuant to the *Act* and did not question the fact that federal sales tax on gasoline and diesel was calculated on the volume after June 1, 1985.[11] If the appellant is liable for tax pursuant to the *Act*, then the Tribunal is bound by the *Act* and cannot refuse to apply it.[12]

The only reasons adduced by the appellant in this regard are that: it was authorized to continue to apply the Alternative Method after June 1, 1985; Revenue Canada officials, on the one hand, misinformed it about its tax obligations after June 1, 1985, and, on the other, refused to inquire further during the audit, even though they knew that the appellant had continued to pay taxes to its suppliers after this date; there is a possibility of double taxation if all or any of the suppliers remitted to Revenue Canada the tax amounts paid by the appellant; there was an unreasonable delay between the time of its objection to the assessment and the date of the respondent's decision; in *Alpha Fuels*, the Tribunal allowed the appeal of an assessment because a tax accounting method, which differed from the one provided in the *Act*, had been accepted by Revenue Canada; and, finally, there is question as to whether the assessment was established equitably.

According to the Tribunal, none of these arguments are conclusive. In terms of the appellant's tax liability, the Tribunal refers to *Walbern Agri-Systems* cited by the respondent. In this case, although the appellant conceded to its tax liability, it also argued that it should be relieved of the assessed tax because Revenue Canada officials had misinformed it about its tax liability and because it had not received the issue of *Excise News* that announced changes in sales tax application resulting from amendments to the *Act*. In this case, the Tribunal found that misinformation by Revenue Canada officials does not excuse a person from paying tax.

Even though the Tribunal needs no further arguments to make its determination in light of the decision cited in *Walbern Agri-Systems*, it nonetheless points out that there is no independent evidence on the record to corroborate Mr. Beaulieu's testimony. Furthermore, although it is possible that officials to whom Mr. Beaulieu spoke would have informed him that he could continue to pay his taxes as before for a short period of time, given that the sale of his company seemed imminent and that the *Act* had not been amended yet at the time of the conversations in question, the fact remains that the appellant failed to demonstrate that the assessment was not established in accordance with the retroactive amendments to the *Act* during the 1987 audit, i.e. after their coming into force in March 1986.

As for any legal obligation that Revenue Canada officials may have had to check with the appellant's suppliers whether they had remitted to Revenue Canada the amounts paid by the appellant as taxes on deliveries of their petroleum products, the Tribunal unfortunately finds none. According to the Tribunal, this argument is in line with the one made by counsel for the appellant, whereby there are doubts as to whether the assessment was established equitably. There again, the *Act* does not contain any legal obligation for the Tribunal to examine concepts of equity in an appeal made under the *Act*. Nor is the Tribunal authorized to apply concepts of equity. As stated in *Walbern Agri-Systems*, "[t]he Tribunal is not authorized to introduce concepts of equity nor to accept compassionate considerations"[13] in dealing with appeals. Indeed, in *Alpha Fuels*, which was cited by counsel for the appellant, the Tribunal points out that the Tribunal clearly spoke of the merit of the appeal in handling the case before discussing concepts of equity more freely.[14] Finally, in terms of the Tribunal's determination as to whether *Alpha Fuels* was well founded and as to

11. The Tribunal notes that, by all appearances, the litre of gasoline was already subject to the excise tax on gasoline before June 1, 1985.
12. *Esselte Pendaflex Canada* v. *Minister of National Revenue* (9 August 1993), AP-91-187 (C.I.T.T.) at 3.
13. *Supra* note 5 at 1.
14. *Supra* note 4 at 6.

how it applies to the present case, the Tribunal notes that, in *Alpha Fuels*, the assessment period was different and, therefore, the provisions of the *Act* that applied were also different from those that apply to the present appeal, at least for a significant portion of the assessment period. The Tribunal also points out that, in *Alpha Fuels*, the use of an alternative tax accounting method was never called into question, whereas, in the present case, the appellant was effectively notified of changes in the administrative policy, even though it was allegedly informed otherwise in the course of telephone conversations.

Finally, in referring to the argument about double taxation, the Tribunal notes that, as in *Pétroles J. & G. Gauthier* v. *Minister of National Revenue*,[15] the appellant provided no substantial evidence of the alleged double taxation. The fact that the respondent's witness admitted that it was possible that some of the appellant's suppliers would have remitted to Revenue Canada "tax" amounts paid to them by the appellant upon purchasing petroleum products is not in itself proof that the sums were indeed paid nor that part or all of the assessment would constitute double taxation.

The Tribunal finally points out that, in his brief, counsel for the appellant appealed to the Tribunal for an alternative solution whereby the penalty and interest liability would be modified, given that the legislative provisions on which the assessment is based became effective in 1986. In light of the above, the Tribunal finds that there was no legislative basis for it to comply with this request.

For all the foregoing reasons, the appeal is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Raynald Guay
Raynald Guay
Member

Anita Szlazak
Anita Szlazak
Member

15. (17 March 1992), 2970 (C.I.T.T.) at 2.