CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, September 30, 1993

Appeal No. AP-92-204

IN THE MATTER OF an appeal heard on April 6, 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 October 10, 1991, relating to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

GEORGES BEAULIEU **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Michèle Blouin
Michèle Blouin
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-92-204

GEORGES BEAULIEU **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellant should be held liable for the payment of sales tax under the diversion of fuel provision of the Excise Tax Act.

HELD: *The appeal is allowed. It appears that, for almost 15 years, the appellant sold and delivered heating fuel to a certain customer. However, for a period of six months, the appellant wrote "marked diesel" on the invoice while delivering the same product to the same customer at the same location without charging taxes. In light of the explanations given at the hearing, there is no reason for the Tribunal to believe, to paraphrase subsection 27(5) (now subsection 50(8)) of the Excise Tax Act, that the fuel which was purchased for heating and lighting by the appellant was sold or appropriated by him for a purpose for which the fuel could not have been purchased or imported exempt from tax under Part VI of Schedule III to the Excise Tax Act.*

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 6, 1993
Date of Decision:	September 30, 1993
Tribunal Members:	Lise Bergeron, Presiding Member W. Roy Hines, Member Michèle Blouin, Member
Counsel for the Tribunal:	Gilles B. Legault
Clerk of the Tribunal:	Dyna Côté
Appearances:	Rénald Beaulieu, for the appellant Gilles Villeneuve, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-204

GEORGES BEAULIEU **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member
W. ROY HINES, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from an assessment that was confirmed by the Minister of National Revenue.

The appellant is a bulk dealer for Husky Oil Ltd. (Husky Oil) who supplied fuel to various contractors during the period of assessment. On February 27, 1989, he was assessed in the amount of $120,251.75 including unpaid sales tax, interest and penalty on the grounds that he had eluded payment of sales tax on fuel purchased for heating or lighting during the period from August 1, 1984, to June 8, 1987. On June 25, 1990, the appellant served a notice of objection claiming that he was an intermediary between Husky Oil and the customers and, as he was not aware of the end use of the fuel, that he should not be liable for the payment of sales tax. On October 10, 1991, the respondent allowed, in part, the appellant's objection. The notice of decision states that the examination of the appellant's financial statements and lease agreement with Husky Oil indicates that the appellant purchased heating fuel that he resold as heating fuel or as diesel fuel. The respondent vacated the portion of the assessment relating to the purchase and resale of heating fuel, as the heating fuel was invoiced as such to the appellant's customers. However, the portion of the assessment relating to heating fuel purchased exempt from tax under Part VI of Schedule III to the Act and resold as diesel fuel was confirmed. From the original amount of unpaid sales tax in the amount of $83,127.58, the appellant now owes $23,816.43, for a total amount of $51,448.20, including interest and penalty.

The issue in this appeal is whether the appellant should be held liable for the payment of sales tax under the diversion of fuel provision of the Act. Subsection 27(5) (now subsection 50(8)) of the Act reads as follows:

> *27.(5) Where fuel has been purchased or imported for use for heating or lighting and the purchaser or importer, as the case may be, sells or appropriates the fuel for a purpose for which the fuel could not have been purchased or imported exempt from tax under this Part at the time he purchased or imported it, the tax imposed under this Part shall be payable by the person who so sells or appropriates the fuel, on the sale price*
> *(a) where the fuel is sold, at the time of delivery to the purchaser, and*
> *(b) where the fuel is appropriated, at the time of such appropriation,*
> *and the Minister may determine the value of the fuel for the purpose of calculating the tax imposed under this Part.*

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

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At the hearing, the appellant was represented by his son, Mr. Rénald Beaulieu. Mr. Rénald Beaulieu also testified on behalf of the appellant, as did Mrs. Linda Beaulieu, who worked as a clerk for the appellant, and Mr. Danny Beaulieu, another son of the appellant, who delivered the products in issue. Counsel for the respondent asked for and was granted the exclusion of witnesses.

Mrs. Beaulieu testified that, in January 1987, she telephoned a representative of Husky Oil regarding the different products sold by the appellant, as she realized that different taxes applied to those products. Mrs. Beaulieu testified that, during her phone conversation, she was told to start writing the words "marked diesel" on the invoices of one of the appellant's customers, Mr. Lionel Veilleux, although the customer in question was still purchasing the same product, namely heating fuel. It was not until June 11, 1987, that she received a letter from the Husky Oil representative explaining the modification. From that time on, taxes were imposed on sales to this customer. Mrs. Beaulieu also explained that the appellant sells the product according to Husky Oil's delivery and pricing instructions, and in accordance with Husky Oil's invoices. Moreover, the appellant never remits sales tax directly to the Department of National Revenue (Revenue Canada), but that tax is included in the price paid to Husky Oil which, in turn, remits sales tax to Revenue Canada.

Mr. Danny Beaulieu testified that he delivered heating fuel to Mr. Veilleux, in the bush, into a 2,000-gallon tank connected to a garage that was heated and that had a generator for the production of electricity. The witness also explained that he delivered, in town, clear diesel that included excise taxes and that was used for Mr. Veilleux's trucks and machinery. During cross-examination, the witness acknowledged that Mr. Veilleux had machinery in the bush where the witness delivered the heating fuel. Answering questions from the Tribunal, the witness stated that, for 15 years, he delivered the same product to Mr. Veilleux in the bush, that during the six-month period at issue, the invoice indicated "marked diesel" and that, after receiving the explanations from Husky Oil, he started charging the taxes on the invoices.

The Tribunal also heard the testimony of Mrs. Kathleen Styacko who is the District Director of the Brandon Excise Office for Revenue Canada. Mrs. Styacko does not have personal knowledge of the facts of the case, but she reviewed the file after the appellant was audited and, as such, she introduced as an exhibit the excise audit report prepared by Mrs. K.E. Kuzik.

In argument, Mr. Rénald Beaulieu, on behalf of the appellant, contended that the evidence establishes that the appellant did charge, collect and remit taxes in all cases where taxes were due and that the appellant has not gained any money from the operations which are the subject of the case at issue.

Counsel for the respondent argued that the appellant sold heating fuel as "marked diesel" to three of its customers and, therefore, is liable for the payment of sales tax under the diversion of fuel provision contained in subsection 27(5) of the Act. Counsel also contended that the onus to demonstrate that the assessment is wrong rests on the appellant and cited, in this regard, the decision of the Federal Court, Trial Division, in *Moshe Schwarz v. Her Majesty the Queen.*[2] Finally, counsel argued that it is clear from the testimony of Mr. Danny Beaulieu that Mr. Veilleux's

2. 87 D.T.C. 5274.

operations in the bush were 60 miles from the town where the witness stated that he delivered diesel fuel and questioned where Mr. Veilleux would have fuel available at that location for his machinery without heating fuel being diverted for that purpose.

The Tribunal agrees with counsel for the respondent that the onus is on the appellant to establish that the assessment is wrong. However, it is worth noting that, in the *Moshe Schwartz* case cited by counsel for the respondent in support of his contention that the appellant had to prove the assessment is wrong, Justice Strayer conferred considerable importance to the question of the credibility of witnesses. On the onus of proof, Justice Strayer stated that:

> *The law places the onus on the taxpayer in such cases to prove wrong the Minister's reassessment on the basis that the taxpayer is in a better position to prove what actually happened, if he chooses and is able to do so.*

Then, the learned judge continued:

> *Unfortunately, the plaintiff has not been willing or able to particularize in any way the purchases made by him. He has confirmed on many occasions that the figures provided by his accountant as to his total purchases were correct. If he had made any effort to corroborate this and if his oral evidence had seemed forthcoming and credible, it might have been possible to find in his favour even in the absence of any vouchers, receipts, or other written records. Unfortunately neither of these requirements were met.*
>
> (Emphasis added)

In the instant case, the Tribunal finds substantial credibility in the witnesses' testimonies that were straightforward, consonant and without ambiguity as to the circumstances under which the transactions at issue were made. It appears that, for almost 15 years, the appellant has been selling heating fuel to a certain customer. The only change which occurred, during the first six months of 1987, was that the appellant, on instructions from Husky Oil, wrote the words "marked diesel" on the invoices. The tax was only added to sales following the explanations received from Husky Oil in June 1987. This situation led the respondent to believe that the appellant had diverted the fuel and was, therefore, liable to pay sales tax under the diversion of fuel provision contained in the Act. In light of the testimony heard at the hearing, the Tribunal disagrees with the respondent. There is indeed no reason for the Tribunal to believe, to paraphrase subsection 27(5) of the Act, that the fuel which was purchased for heating and lighting by the appellant was sold or appropriated by him for a purpose for which the fuel could not have been purchased or imported exempt from tax under Part VI of Schedule III to the Act. In interpreting subsection 27(5) of the Act, the Tribunal puts emphasis on the words "for a purpose" that clearly indicate that a degree of fraudulent intent is required. The Tribunal finds that the evidence established that the appellant had no such fraudulent intent.

Lastly, the Tribunal notes that, at paragraph 17 of his brief, counsel for the respondent refers to sales made to two other customers, namely J.L. Veilleux and Fortier and Sons, which counsel also claimed were diverted. But, at Tab 6 of the respondent's brief, there is only one

invoice to J.L. Veilleux which does not mention "marked diesel," but "furnace fuel." The Tribunal received no evidence of fuel diversion with respect to these two customers mentioned in the respondent's brief.

In light of the foregoing, the appeal is allowed.

Lise Bergeron
Lise Bergeron
Presiding Member

W. Roy Hines
W. Roy Hines
Member

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Michèle Blouin
Member