



Ottawa, Wednesday, November 19, 1997

**Appeal No. AP-93-372**

IN THE MATTER OF an appeal heard on June 17, 1997, 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 10, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**ELDORADO PETROLEUMS LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-93-372**

**ELDORADO PETROLEUMS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* of a determination of the Minister of National Revenue with respect to the imposition of the tobacco products inventory tax on the appellant. The appellant owns three gas stations in Alberta, all of which sell tobacco products. The issue in this appeal is whether the appellant is entitled to the 200,000 unit exemption provided for under section 31 of the *Excise Tax Act* in respect of each of its three locations. A related issue is whether the respondent was correct in determining the level of the appellant's tobacco product inventory for the period relevant to this appeal.

**HELD:** The appeal is allowed. The appeal turns on the question of whether each of the appellant's stores is a "separate retail establishment" within the meaning of the *Excise Tax Act*. The resolution of that issue, in turn, revolves around the issue of whether separate records, books of account and accounting systems were maintained in respect of each of the stores. The Tribunal is satisfied, based on the testimony presented and, in particular, the documentary evidence introduced, that separate records, books of account and accounting systems were maintained in respect of each of the appellant's stores.

Places of Video Conference

Hearing: Hull, Quebec, and Calgary, Alberta  
Date of Hearing: June 17, 1997  
Date of Decision: November 19, 1997

Tribunal Members: Charles A. Gracey, Presiding Member  
Patricia M. Close, Member  
Robert C. Coates, Q.C., Member

Counsel for the Tribunal: John L. Syme

Clerks of the Tribunal: Margaret Fisher and Anne Jamieson

Appearances: Thomas H. Olson, for the appellant  
Janet Ozembloski, for the respondent

**Appeal No. AP-93-372**

**ELDORADO PETROLEUMS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member  
PATRICIA M. CLOSE, Member  
ROBERT C. COATES, Q.C., Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of a determination of the Minister of National Revenue with respect to the imposition of the tobacco products inventory tax on the appellant.<sup>2</sup> The appellant owns three gas stations in Alberta, all of which sell tobacco products. The issue in this appeal is whether the appellant is entitled to the 200,000 unit exemption provided for under section 31 of the Act in respect of each of its three locations. A related issue is whether the respondent was correct in determining the level of the appellant's tobacco product inventory for the period relevant to this appeal.

The provisions of the Act relevant to this appeal are as follows:

29. In this Part,  
“separate retail establishment” of a person means a shop or store of the person
- (a) that is geographically separate from other places of business of the person,
  - (b) at which, in the ordinary course of the person's business, the person regularly sells, otherwise than through vending machines, tobacco products to consumers, within the meaning of section 123, attending at the shop or store, and
  - (c) in respect of which separate records, books of account and accounting systems are maintained.
31. Tax under this Part in respect of the inventory of all taxed tobacco<sup>[3]</sup> of a person that is held at the beginning of February 27, 1991 at a separate retail establishment of the person is payable only on the quantity of that inventory in excess of 200,000 units.<sup>[4]</sup>

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1. R.S.C. 1985, c. E-15.
  2. This appeal was heard together with Appeal No. AP-93-373, *Gas King Oil Co. Ltd. v. The Minister of National Revenue*. The appellants and the respondent, respectively, were represented by the same counsel in each of the appeals. The appeals were heard through the medium of video conferencing, the Tribunal sitting in Hull, Quebec, with counsel for the respondent and counsel for the appellants and their witnesses sitting with a Tribunal representative in Calgary, Alberta.
  3. Under section 29 of the Act, “taxed tobacco” of a person means cigarettes, tobacco sticks and loose tobacco that, at the beginning of February 27, 1991, were owned by that person for sale in the ordinary course of a business of the person.
  4. Note: 200,000 units represents 1,000 cartons of cigarettes.

Sections 33 and 34 of the Act required persons liable to pay tax under section 31 to file a return on or before May 31, 1991, and to remit any tax owing within a prescribed time frame. At no time did the appellant file a return.

The appellant was audited by the respondent in 1992 and assessed an amount for unpaid taxes, penalty and interest. The assessment was made based on the respondent's determination that the appellant's stations were not "separate retail establishment[s]." To qualify as a separate retail establishment under section 29 of the Act, a location must be "a shop or store of the person" (a) that is geographically separate; (b) where tobacco products are sold to consumers; and (c) in respect of which separate records, books of account and accounting systems are maintained. The respondent determined that the appellant's three gas stations satisfied conditions (a) and (b), but did not satisfy condition (c). The respondent maintained that position in this appeal.

Counsel for the appellant called Mr. Brent Morris, the son of the owner of Eldorado Petroleum Ltd., to testify. Mr. Morris's testimony focused first on the respondent's determination regarding the tobacco products which each of the appellant's three locations had in inventory on February 27, 1991. Mr. Morris testified that the respondent, in calculating that inventory, had "double counted" certain sales of tobacco products which the various locations had made in January. Mr. Morris stated that the miscalculation had resulted in an overstated level of tobacco products in inventory as at February 27, 1991. Counsel introduced considerable documentary evidence to support Mr. Morris's testimony on this point.

The Tribunal notes that counsel for the respondent did not take issue with Mr. Morris's testimony on the inventory issue. Moreover, the respondent's witness, Mr. Richard Desjardins, who performed the audit on the appellant, acknowledged that, based on the documentary evidence provided by Mr. Morris, it appeared that certain invoices for tobacco products purchased by the appellant were mistakenly included in the respondent's inventory calculation for February 27, 1991. In argument on this point, counsel stated that, if the Tribunal were to find for the appellant on the "separate retail establishment" issue, the respondent could re-examine the appellant's records and any errors in calculation would be corrected at that time.

In light of the foregoing, the only remaining issue in the appeal is whether each of the appellant's gas stations is a shop or store in respect of which separate records, books of account and accounting systems are maintained. With respect to this issue, Mr. Morris testified that each of the three gas stations accounted separately for profit and loss, that each store had a local manager and that, while the appellant oversaw each individual store, it did not involve itself in day-to-day management. Mr. Morris also testified that each store had a separate bank account and that each manager ordered inventory from suppliers and approved payments to be made to suppliers. Moreover, orders from different suppliers were not combined by the appellant for the three stores. Mr. Morris also testified that each manager prepared the payroll for the local store and sent same to head office which issued the pay cheques, which were drawn on the appropriate store's bank account.

Mr. Morris elaborated on the accounting procedures in place at each store to keep track of inventory, daily sales, etc. Such information was kept on a daily basis and summarized monthly for submission to the appellant. The appellant, in turn, submitted this information to its accountants, along with the monthly bank statements. With this information, the appellant's accountants prepared separate financial statements for each of the appellant's stores. Examples of these statements were put into evidence by the appellant. Consolidated statements were also prepared for purposes of reporting to the Department of National Revenue and the appellant's bank.

In cross-examination, Mr. Morris testified that only the appellant has signing authority for the accounts established for each of the stores. In respect of invoices from suppliers to the stores, counsel for the respondent established that they were paid by the appellant, but Mr. Morris did not agree with counsel's suggestion that such payments were consolidated into a single payment for each supplier. Mr. Morris testified that the appellant wrote a separate cheque, drawn on each store's bank account, when it was paying for supplies purchased by that store.

Mr. Morris explained that the stores' managers maintained "day sheets" which were totalled at the end of the month for the appellant. The day sheets contained a summary of the day's sales of items such as fuel, oil and groceries. On the reverse side of the day sheet, the manager recorded the cash and credit card receipts. Mr. Morris indicated that the figures for sales and receipts should balance. Finally, Mr. Morris explained that the reason that separate records were kept for each location was to allow the appellant to monitor the profitability of each store.

The respondent's witness, Mr. Desjardins, testified that he had gained some knowledge of the appellant's accounting systems in conducting his audit of the appellant. He testified that he believed that the appellant was capable of preparing separate statements for its individual stores, as well as consolidated statements for its stores as a whole. He stated that he did not know whether the appellant consolidated invoices from its separate stores for purposes of paying suppliers. Under cross-examination, Mr. Desjardins agreed that the appellant maintained a separate general ledger for each store.

In argument, counsel for the appellant addressed the question of whether each of the appellant's stores maintained separate records, books of account and accounting systems. Counsel submitted that financial statements and accounting records can serve a number of different purposes. Counsel pointed out that different statutes require that certain kinds of accounting information be captured and presented in various forms. He cited, as examples, the *Income Tax Act*<sup>5</sup> and securities legislation generally. Counsel argued that the appellant maintained accounting records in various forms for different purposes. For income tax purposes, it maintained consolidated financial records. However, for business planning and strategy purposes, it maintained separate records for each of its stores.

Counsel for the appellant then reviewed the evidence regarding the nature, extent and purpose of the books, records and statements of account maintained in respect of each of the appellant's stores. Counsel argued that the fact that some of the accounting work in respect of the separate records was performed by the appellant did not detract from the fact that separate records were kept for each store, nor, in counsel's submission, did the existence of consolidated statements for the appellant's business detract from the separate nature of the records used in producing those statements.

Counsel for the respondent submitted that, other than the inventory calculation issue addressed above, the only issue before the Tribunal was whether there were separate records, books of account and accounting systems maintained in respect of each of the appellant's stores. Counsel pointed out that paragraph (c) of the definition of "separate retail establishment" under section 29 of the Act contains the word "and" as opposed to "or" and submitted that, in order to comply with that paragraph, each of the three elements must be satisfied. Counsel submitted that the three requirements are not satisfied by the appellant in this case. In support of that contention, counsel submitted that the appellant maintains a single accounting system at its head office; that the bank accounts for each of the stores are controlled by head

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5. R.S.C. 1985 (5th Supp.).

office; and that payroll and accounts payable are handled through head office. In counsel's submission, each store merely prepares records, but any "final accounting" is performed by the appellant at its head office.

In the Tribunal's view, the evidence is clear that separate records, books of account and accounting systems are maintained in respect of each of the appellant's three stores. In reaching this view, the Tribunal relies both on the testimony of Mr. Morris and, in particular, on the documentary evidence submitted by the appellant. That documentary evidence included separate profit and loss statements and balance sheets for each of the three stores, as well as suppliers' invoices addressed to each of the three stores. The fact that a consolidated statement for the three stores was produced by the appellant does not diminish, and in fact confirms, that suitable records, books of account and accounting systems were maintained at the individual store level and that, from these, it was possible to prepare a consolidated statement.

There was the suggestion in counsel for the respondent's argument that the fact that certain of the records and accounting functions were performed at the appellant's head office somehow detracted from the separateness of those records. In the Tribunal's view, paragraph (c) of the definition of "separate retail establishment" under section 29 of the Act does not contain a geographical component. In other words, in order to satisfy that paragraph, it is not necessary that the records, books of account and accounting systems be maintained at different locations. The key is that the records, books of account and accounting systems set out the information separately with respect to each store. It is, therefore, conceivable that, even if all of the records, books of account and accounting systems in respect of the appellant's three stores were maintained by the appellant at its head office, those stores could satisfy paragraph (c).

Consequently, the appeal is allowed.

Charles A. Gracey  
Charles A. Gracey  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member