

Ottawa, Friday, January 26, 1996

Appeal No. AP-94-317

IN THE MATTER OF an appeal heard on June 22, 1995, 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 7, 1994, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

USAIR, INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Desmond Hallissey

Desmond Hallissey
Member

Lise Bergeron

Lise Bergeron
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-317

USAIR, INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue dated March 31, 1993, in the amount of \$1,159,732.14 for unpaid air transportation taxes, plus interest and penalty, pursuant to section 12 of the Excise Tax Act. The issue in this appeal is whether all or any portion of “Visit USA” fare tickets involving travel to a location in Canada and a subsequent departure to the United States and, from there, to a destination overseas are subject to the air transportation tax. An illustrative itinerary that included a Canadian destination and a subsequent departure from Canada was: Paris—New York City—Ottawa—New York City—Paris.

HELD: *The appeal is dismissed. The transportation described in the illustrative itinerary included a departure from Ottawa, which is a point in Canada. The evidence shows that the purpose of the stopover in Ottawa was to allow the passenger to visit the city and not simply to emplane on a connecting flight. As such, the departure from Ottawa did not result from a transfer stop. In the Tribunal’s view, when a passenger leaves Ottawa, that passenger is destined for Paris, which is outside the taxation area. In other words, the passenger’s journey will end in Paris, notwithstanding the fact that the aircraft, which departs from Ottawa, will land in New York City. In the Tribunal’s view, the stopover in New York City can simply be described as an “intermediate stop,” which simply means a stop along the way, or a stop in the midst of a longer journey before a final stop. Finally, the transportation in the illustrative itinerary included an emplanement by a person on an aircraft at an airport in Ottawa, which is in Canada, on a specific flight having as a destination an airport in New York City, which is outside Canada, and a subsequent deplanement by the person from the flight at that airport.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: June 22, 1995
Date of Decision: January 26, 1996*

*Tribunal Members: Arthur B. Trudeau, Presiding Member
Desmond Hallissey, Member
Lise Bergeron, Member*

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Michel P. Granger

*Appearances: Dan M. Fiorita, for the appellant
Anne M. Turley, for the respondent*

Appeal No. AP-94-317

USAIR, INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
DESMOND HALLISSEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of an assessment of the Minister of National Revenue dated March 31, 1993. The appellant was assessed \$1,159,732.14 for unpaid air transportation taxes, plus interest and penalty, pursuant to section 12 of the Act. The appellant served a notice of objection dated June 28, 1993, that was disallowed by the respondent in a decision dated October 7, 1994.

At the hearing, counsel for both parties agreed to a series of facts surrounding the present case. The Tribunal also called Mr. Stuart J. Statland, Tax Manager at USAir, Inc., as a witness to obtain additional information.

The appellant is a licensed air carrier providing air transportation services to its passengers. Its head office is located in Arlington, Virginia. During the period covered by the assessment, the appellant sold promotional transportation packages called “Visit USA” fare tickets or VUSA fare tickets, which involved the purchase and issuance of airline tickets outside North America. These tickets allowed for travel to and from destinations in the United States and, on occasion, for travel to a location in Canada from a location in the United States. The journey began and ended at an overseas location. The transportation packages allowed passengers who purchased the tickets the opportunity to visit each city on the itinerary for an unspecified period of time. The only limitation was that the entire trip could not exceed 60 days. An illustrative itinerary that included a Canadian destination and a subsequent departure from Canada was: Paris—New York City—Ottawa—New York City—Paris.

Mr. Statland explained that VUSA fare tickets were sold in conjunction with international trans-oceanic tickets overseas. He explained that, although there may have been two or more airlines involved, there was only one ticket. As such, there was only one journey or transportation made by the ticket holder. All flights were reserved when the passenger purchased the ticket. According to Mr. Statland, the agency which sold the tickets usually collected all the applicable taxes, including the air transportation tax. He explained that all flights within North America would be on USAir, while trans-oceanic flights would likely be on some other airline. He testified that, in the illustrative itinerary, the final destination of the specific flight departing from Ottawa was New York City, and not Paris.

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

The issue in this appeal is whether all or any portion of VUSA fare tickets involving travel to a location in Canada and a subsequent departure to the United States and, from there, to a destination overseas are subject to the air transportation tax pursuant to section 12 of the Act.

For purposes of this appeal, the relevant legislative provisions are found at sections 8 to 20 of the Act. Sections 8 and 12 read, in part, as follows:

8. *In this Part,*

“taxation area” means

- (a) Canada,*
- (b) the United States (except Hawaii), and*
- (c) the Islands of St. Pierre and Miquelon.*

12.(1) There shall be imposed, levied and collected an air transportation tax, determined under section 13, on each amount paid or payable in Canada for transportation of a person by air where that transportation begins at a point in the taxation area and ends at a point outside the taxation area.

(2) There shall be imposed, levied and collected an air transportation tax, determined under section 13, on each amount paid or payable outside Canada for the transportation of a person by air where such transportation

(a) begins at a point in the taxation area and ends at a point outside the taxation area, and

(b) includes an emplanement by the person on an aircraft at an airport in Canada on a specific flight having as a destination an airport outside Canada and subsequent deplanement by the person from the flight at an airport outside Canada,

payable by the person at the time when, in respect of the transportation, he emplanes at the airport in Canada described in paragraph (b) on the aircraft therein described, except where the air transportation tax has been paid before that time to a licensed air carrier or his agent and evidence of the prepayment of tax is submitted by the person, in a manner and form and to a member of a class of persons prescribed by regulation of the Governor in Council.

(3) For the purposes of subsection (1), transportation by air begins at a point in the taxation area and ends at a point outside the taxation area if the transportation or any part thereof includes at least one departure from a point in the taxation area, other than a departure resulting from a transfer stop, to a destination outside the taxation area.

(4) For the purposes of subsection (2), transportation by air begins at a point in the taxation area and ends at a point outside the taxation area if the transportation or any part thereof includes at least one departure from a point in Canada, other than a departure resulting from a transfer stop, to a destination outside the taxation area, whether or not there are any intermediate stops.

Counsel for the appellant argued that the respondent misinterpreted subsections 12(2) and (4) of the Act by finding that VUSA fare tickets, which included departures from a location in Canada to a location in the United States, constituted transportation by air which “begins at a point in the taxation area and ends at a point outside the taxation area.” He argued that all flights departing from Canada terminated in the United States, which is in the taxation area. He noted that, in the illustrative itinerary, the destination of the specific flight from Ottawa and of the passenger was New York City, and not Paris, which is outside the taxation area. Counsel argued that New York City did not constitute an “intermediate stop.” He argued that this interpretation was contrary to the definition of this term in Excise Memorandum ET 108² (Memorandum ET 108). The term “intermediate stop” is defined as “a stopover during a journey by air at a point other than the specific flight’s destination.” According to counsel, no part of any VUSA itinerary contained a departure from a point in Canada to a point outside the taxation area. In all cases, the departure to a point outside the taxation area was from the United States. Furthermore, counsel noted that the transportation or journey of 60 days in the illustrative itinerary began in Paris, a point outside the taxation area.

Counsel for the respondent argued that the onus is clearly on the appellant to establish that the respondent’s assessment is incorrect. She argued that, all of the conditions of the relevant sections of the Act having been met, the appellant was properly assessed for unpaid air transportation taxes. More specifically, counsel argued that, in the illustrative itinerary presented for analysis purposes, the cost of the transportation was paid or payable outside Canada. Furthermore, the transportation included a departure from Ottawa, which is a point in Canada, and the stopover in Ottawa was not a “transfer stop” because its purpose was to allow the passenger to visit the city and not simply to emplane on a connecting flight. Counsel argued that the departure from Ottawa was to Paris, which is a point outside the taxation area. According to counsel, the stopover in New York City constituted an “intermediate stop,” and not a “transfer stop.” In counsel’s view, “intermediate stop” means a stop along the way, or a stop in the midst of a longer journey before a final stop. As such, Paris, and not New York City, was the final destination of the specific flight departing from Ottawa. Counsel argued that the object of the Act is to tax a passenger who purchases a ticket, which includes a departure from a location in Canada, and not the aircraft or the specific flight.

In addition, counsel for the respondent argued that the legislation is clear and that there is no need to refer to extrinsic sources, such as Memorandum ET 108, to interpret the ordinary meaning of the terms “transfer stop” and “intermediate stop.” However, in the event that the Tribunal finds that subsection 12(4) of the Act is ambiguous, counsel argued that regard should be had to the industry meaning of the terms, as outlined by the National Transportation Agency, and not to Memorandum ET 108, which, according to counsel, only confuses their common and ordinary meanings.

In the present case, the respondent assessed air transportation taxes on amounts paid or payable outside Canada in accordance with subsection 12(2) of the Act. Paragraph 12(2) of the Act provides that such taxes shall be imposed, levied and collected for the transportation of a person by air where such transportation begins at a point in the taxation area and ends at a point outside the taxation area.

2. Air Transportation Tax Instructions, Department of National Revenue, Customs and Excise, March 31, 1989.

Subsection 12(4) of the Act provides that, for the purposes of subsection 12(2), transportation by air begins at a point in the taxation area and ends at a point outside the taxation area if the transportation or any part thereof includes at least one departure from a point in Canada, other than a departure resulting from a transfer stop. In the present case, the transportation described in the illustrative itinerary included a departure from Ottawa, which is a point in Canada. “Transfer stop” is not defined in the Act. It is well established, however, that “[a]dministrative policy and interpretation are not determinative but are entitled to weight and can be an ‘important factor’ in case of doubt about the meaning of legislation.”³ In this regard, the Tribunal referred to Memorandum ET 108, which defines “transfer stop” as “a stop at an airport by an aircraft from which the passenger deplanes solely for the purpose of emplaning on a connecting flight.” The evidence shows that the purpose of the stopover in Ottawa was to allow the passenger to visit the city and not simply to emplane on a connecting flight. As such, the departure from Ottawa did not result from a transfer stop.

Subsection 12(4) of the Act also provides that the departure must be to a destination outside the taxation area, whether or not there are any intermediate stops. “Destination” is defined in The Oxford English Dictionary⁴ as “the place for which a person or thing is destined; the intended end of a journey or course.”⁵ In the Tribunal’s view, when a passenger leaves Ottawa, that passenger is destined for Paris, which is outside the taxation area. In other words, the passenger’s journey will end in Paris, notwithstanding the fact that the aircraft, which departs from Ottawa, will land in New York City. In the Tribunal’s view, the stopover in New York City can simply be described as an “intermediate stop.” This term is defined in Memorandum ET 108 as “a stopover during a journey by air at a point other than the specific flight’s destination.” The evidence shows that the purpose of the stopover in New York City was to allow the passenger to visit the city. As such, it is not the final destination of the passenger, who will eventually end up in Paris. The Tribunal, therefore, does not accept counsel for the appellant’s argument that it should rely on the definition of the term “intermediate stop” in Memorandum ET 108 or, more particularly, on his interpretation of the term “specific flight.” The Tribunal agrees with counsel for the respondent that this would create confusion in the legislation or, more particularly, in the meaning of paragraph 12(2)(b) of the Act, as evidenced below. The Tribunal is of the view that the term “intermediate stop” simply means a stop along the way, or a stop in the midst of a longer journey before a final stop. The Tribunal notes that it is not bound by the definitions in Memorandum ET 108.⁶ Therefore, the Tribunal finds that the requirements of paragraph 12(2)(a) are met and that the transportation begins at a point in the taxation area, which is Ottawa, and ends at a point outside the taxation area, which is Paris.

Paragraph 12(2)(b) of the Act provides that the transportation must include an emplanement by the person on an aircraft at an airport in Canada on a specific flight having as a destination an airport outside Canada and subsequent deplanement by the person from the flight at an airport outside Canada. The transportation in the illustrative itinerary included an emplanement by a person on an aircraft at an airport in Ottawa, which is in Canada, on a specific flight having as a destination an airport in New York City, which is outside Canada, and a subsequent deplanement by the person from the flight at that airport. The requirements of paragraph 12(2)(b) are, therefore, also met.

3. *Gene A. Nowegijick v. Her Majesty the Queen*, [1983] 1 S.C.R. 29 at 37; and *Smed Manufacturing Inc. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-081, May 17, 1994, at 5.

4. Second ed., Vol. IV (Oxford: Clarendon Press, 1989).

5. *Ibid.* at 536.

6. *Supra*, note 3.

For all these reasons, the appeal is dismissed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Desmond Hallissey

Desmond Hallissey
Member

Lise Bergeron

Lise Bergeron
Member