CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, February 21, 1997

Appeal No. AP-95-124

IN THE MATTER OF an appeal heard on June 4, 1996, 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 May 30, 1995, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

NORTHWEST AIRLINES, 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

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-95-124

NORTHWEST AIRLINES, 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 July 24, 1992. The appellant was assessed $1,755,666.15 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" tickets involving travel to a location in Canada and a subsequent departure to the United States, followed by several stopovers in the United States, and, from there, a departure to a destination outside North America, are subject to air transportation taxes. An illustrative itinerary that included a Canadian destination and a subsequent departure from Canada was: London, United Kingdom—Detroit—Minneapolis—Edmonton—Minneapolis—Miami—Memphis—Los Angeles—Detroit—London, United Kingdom.

HELD: The appeal is dismissed. The Tribunal is of the opinion that the issue in this appeal was resolved in its decision in *USAir, Inc.* v. *The Minister of National Revenue*. In the present appeal, the transportation described in the illustrative itinerary included a departure from Edmonton, which is a point in Canada. The evidence shows that the purpose of the stopover in Edmonton was to allow the passenger to visit the city and not simply to emplane on a connecting flight. As such, the departure from Edmonton did not result from a transfer stop. In the Tribunal's view, when a passenger leaves Edmonton, that passenger is destined for London, which is outside the taxation area. In other words, the passenger's journey will end in London, notwithstanding the fact that the aircraft, which departs from Edmonton, will land in a US city. In the Tribunal's view, the stopovers in the United States can simply be described as "intermediate stops," which simply mean stops along the way, or stops 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 Edmonton, which is in Canada, on a specific flight having as a destination an airport in the United States, 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 4, 1996
Date of Decision:	February 21, 1997
Tribunal Members:	Arthur B. Trudeau, Presiding Member Raynald Guay, Member Desmond Hallissey, Member
Counsel for the Tribunal:	Heather A. Grant
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Dan M. Fiorita, for the appellant J. Sanderson Graham, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-95-124

NORTHWEST AIRLINES, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, 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 July 24, 1992. The appellant was assessed $1,755,666.15 for unpaid air transportation taxes, plus interest and penalty, pursuant to section 12 of the Act. The appellant served a notice of objection dated October 12, 1992, that was allowed in part by the respondent in a decision dated May 30, 1995.

At the hearing, counsel for both parties agreed to the following facts surrounding the present case. The appellant is a licensed air carrier providing air transportation services to its passengers. Its principal place of business is in the United States. During the period covered by the assessment, the appellant sold promotional air transportation packages known as "Visit USA" tickets or VUSA tickets. 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 stopover was: London, United Kingdom—Detroit—Minneapolis—Edmonton—Minneapolis—Miami—Memphis—Los Angeles—Detroit—London, United Kingdom.

The issue in this appeal is whether all or any portion of the VUSA tickets involving travel to a location in Canada and a subsequent departure to the United States, followed by several stopovers in the United States, and, from there, a departure to a destination outside North America are subject to air transportation taxes pursuant to section 12 of the Act.

For the 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.

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

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> 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.

Relying on the decision of the Supreme Court of Canada in *Québec (Communauté urbaine)* v. *Corp. Notre-Dame de Bon-Secours*,[2] counsel for the appellant argued that the onus in this appeal is on the respondent, since the legislative provision at issue imposes a tax obligation on the taxpayer instead of creating a tax exemption. Counsel argued that the respondent erred in law by misinterpreting subsections 12(2) and (4) of the Act and by assessing air transportation taxes on VUSA tickets, which included departures from a location in Canada to a location in the United States. He argued that the intent of Parliament in enacting subsection 12(4) of the Act was to impose air transportation taxes on flights from overseas to Canada, not to impose such taxes on flights from overseas to the United States and, subsequently, to Canada. Counsel submitted that, by imposing an air transportation tax on VUSA tickets, the respondent has introduced this tax to concepts associated with the Goods and Services Tax. More specifically, he argued that the respondent has confused the purposes of the two taxes. He said that the purpose of the air transportation tax is to help defray the costs of running Canada's air navigation system, while the purpose of the Goods and Services Tax is to raise general revenue for the federal government.

Counsel for the appellant argued that the respondent erred by finding that the VUSA 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. Counsel noted that, in the illustrative itinerary, the destination of the specific flight from Edmonton and of the passenger was Minneapolis, Miami, Memphis, Los Angeles or Detroit, which are all cities inside the taxation area, and not London, which is outside the taxation area. Counsel argued that subsections 12(2) and (4) of the Act impose a tax on tickets which are purchased overseas for flights into Canada. Counsel submitted that, in the illustrative itinerary, Edmonton constitutes a "stopover." Furthermore, the city in the United States, where the

2. [1994] 3 S.C.R. 3.

flight from Edmonton will end, does not constitute an "intermediate stop." According to counsel, the city in the United States is the "destination" of the specific flight from Edmonton.

Counsel for the appellant relied on a document entitled *Glossary of Air Transportation Terms: Definitions of Economic and Statistical Terms and Phrases used in CAB Reports, Studies and Proceedings*[3] for a definition of some of the terms found in subsections 12(2) and (4) of the Act. He argued that a transfer stop or connecting point means "[a]n intermediate point in an itinerary at which the passenger deplanes from one flight and boards another flight either on the same carrier, or from the flight of one carrier to a flight of another carrier, for continuation of the journey.[4]" An intermediate stop means "[a] scheduled stop for traffic or technical purposes, made at a point in a scheduled route or flight other than the terminal points.[5]" According to counsel, if a flight from Ottawa to Vancouver stops in Toronto to pick up more passengers, that constitutes an intermediate stop. He argued that an intermediate stop applies to the journey of the aircraft, not to the journey of the passenger. Counsel also relied on the definition of the term "stopover" in the above-noted document, which, he argued, means "[a] deliberate and intentional interruption of a journey by the passenger, scheduled to exceed four hours, domestically (twenty-four hours, internationally), at a point between the place of departure and the place of destination.[6]" Counsel referred to other definitions, namely, those of the terms "transfer," "interline transfer" and "intraline transfer," which, in his view, were relevant to the appellant's case.

Counsel for the appellant submitted that each flight or segment of a passenger's journey has a point of departure and a point of destination. According to counsel, in the illustrative itinerary, Edmonton is the destination of the flight from Minneapolis and Minneapolis, Miami, Memphis, Los Angeles or Detroit is the destination of the flight from Edmonton. Counsel argued that, if a stopover, i.e. Edmonton in the illustrative itinerary, can eventually be considered a point of departure, then the US cities, which are also stopovers, should be considered destination points.

Relying again on the decision of the Supreme Court of Canada in *Québec (Communauté urbaine)*, counsel for the appellant argued that the Tribunal must follow ordinary rules of interpretation when interpreting legislative tax provisions such as those at issue. By doing so, counsel argued that the Tribunal will find in the appellant's favour. Furthermore, counsel argued that, if there is any doubt as to the proper interpretation to be given to a taxing statute, that doubt should be resolved in favour of the taxpayer. Counsel submitted that it is not up to the respondent to fill in gaps or add words to the legislation. He argued that the respondent inappropriately qualified the term "destination" in subsection 12(4) of the Act either as a "final destination" or as a "final overseas destination" and, in some cases, as an "intermediate destination." Again, counsel submitted that the flights which depart from Canada terminate in the United States.

Counsel for the appellant also made an argument with respect to the extraterritoriality of the legislation. He argued that the air transportation tax was intended to be a consumption tax. This means that the legislation applies to persons, things, acts or transactions located within the territorial limits of its jurisdiction. Consequently, once a person emplanes on an aircraft at an airport in Canada on a specific flight and subsequently deplanes from that aircraft at an airport outside Canada where the specific flight terminates, what that person does thereafter is not relevant for the purposes of determining whether tax is payable in respect of that person's emplanement on or deplanement from an aircraft in Canada. According to counsel, what the respondent has done is tax flights which depart from the United States, which, he argued, cannot be done.

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3. Economic Evaluation Division, Bureau of Accounts and Statistics, Civil Aeronautics Board, Washington, 1st ed., February 1977.
4. *Ibid*. at 81.
5. *Ibid*. at 101.
6. *Ibid*.

Counsel for the respondent argued that the onus is clearly on the appellant to establish that the respondent's assessment is incorrect. Counsel argued that, all the conditions of subsections 12(2) and (4) of the Act having been met, the appellant was properly assessed for unpaid air transportation taxes. More specifically, in the illustrative itinerary presented for analysis purposes, the cost of the transportation was paid or payable outside Canada. Counsel acknowledged that the destination of the flight which departs Canada is the United States, which is in the taxation area. He argued, however, that the portion of the transportation which begins in Canada, which is at issue in this appeal, ends in London, which is outside the taxation area. Counsel argued that, in the illustrative itinerary, the transportation included a departure from Edmonton, which is a point in Canada, and that the stopover in Edmonton 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. According to counsel, the stopovers in the US cities, namely, Minneapolis, Miami, Memphis, Los Angeles or Detroit, constituted intermediate stops. 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. In support of his argument, counsel referred to several decisions[7] dealing with international carriage, under the *Carriage by Air Act*,[8] and the Tribunal's decision in *USAir, Inc.* v. *The Minister of National Revenue*.[9]

In the view of counsel for the respondent, the legislation is clear and unambiguous. Accordingly, there is no need to refer to extrinsic sources, such as the definitions to which counsel for the appellant referred or Memorandum ET 108,[10] to interpret the ordinary meaning of such terms as "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 the definitions to which counsel for the appellant referred, which, in his view, only confuse their common and ordinary meanings. More specifically, counsel argued that, to avoid confusion in the meaning of paragraph 12(2)(*b*) of the Act which refers to the destination of a specific flight, the destination referred to in subsection 12(4) of the Act must mean the final destination of the portion of the transportation by air that departs Canada, not the destination of the flight that terminates at an intermediate stop along the journey. In support of this argument, counsel referred to the Tribunal's decision in *USAir*, which, he submitted, applies directly to the facts of this appeal. Finally, counsel argued that section 12 of the Act has no extraterritorial application, since it applies to air carriers that carry on the business of transporting passengers for hire or reward partly in Canada and partly outside Canada. According to counsel, the statute imposes a tax on a departure from Canada, not on a departure from the United States.

The Tribunal is of the view that its decision in *USAir* applies directly to the facts of the present appeal. The only difference is that the Tribunal is dealing with a different illustrative itinerary, which involves several stopovers in the United States instead of only one, which was the situation in *USAir*. Indeed, the Tribunal is of the opinion that the issue in this appeal was resolved in *USAir*. No argument made by counsel for the appellant has convinced the Tribunal that it should rule any differently in this appeal. A few arguments, however, need to be addressed. In addition, the Tribunal will reiterate some of the reasons for its decision in *USAir* and apply them to the facts of this appeal.

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, which provides that such taxes shall be

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7. *Grein* v. *Imperial Airways, Limited*, [1937] 1 K.B. 50; *Qureshi* v. *K.L.M. (Royal Dutch Airlines)* (1979), 41 N.S.R. (2d) 653 (N.S.S.C.T.D.); and *Friesen* v. *Air Canada and British Airways* (1981), 30 A.R. 527 (Q.B.).
8. R.S.C. 1985, c. C-26.
9. Appeal No. AP-94-317, January 26, 1996.
10. *Air Transportation Tax Instructions*, Department of National Revenue, Customs and Excise, March 31, 1989.

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.

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 Edmonton, which is a point in Canada. "Transfer stop" is not defined in the Act. As stated in *USAir*, it is well established that "[although] [a]dministrative policy and interpretation are not determinative [they] are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation.[11]" In this regard, the Tribunal, as it did in *USAir*, 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 Edmonton was to allow the passenger to visit the city and not simply to emplane on a connecting flight. As such, the departure from Edmonton 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 Dictionary*[12] as "the place for which a person or thing is destined; the intended end of a journey or course.[13]" In the Tribunal's view, when a passenger leaves Edmonton, that passenger is destined for London, which is outside the taxation area. In other words, the passenger's journey will end in London, notwithstanding the fact that the aircraft, which departs from Edmonton, will land in one of the US cities listed in the illustrative itinerary. In the Tribunal's view, the stopovers in the United States can simply be described as intermediate stops. In *USAir*, the Tribunal said that, in its view, "intermediate stop" means "a stop along the way, or a stop in the midst of a longer journey before a final stop.[14]" The Tribunal adopts this definition in the present case. As in *USAir*, the Tribunal is of the view that, to adopt any other definition of this term would create confusion in the legislation or, more particularly, in the meaning of paragraph 12(2)(*b*) of the Act. The Tribunal, therefore, finds that the requirements of paragraph 12(2)(*a*) of the Act are met and that the part of the transportation that leaves Canada begins at a point in the taxation area, which is Edmonton, and ends at a point outside the taxation area, which is London.

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 Edmonton, which is in Canada, on a specific flight having as a destination an airport in one of the US cities listed in the illustrative itinerary, which is outside Canada, and a subsequent deplanement by the person from the flight at that airport. The Tribunal, therefore, finds that the requirements of paragraph 12(2)(*b*) of the Act have also been met.

No authority was presented to the Tribunal by either counsel to support their arguments with respect to the extraterritoriality of the legislation at issue. The Tribunal was not convinced by counsel for the appellant's argument that the interpretation given to subsections 12(2) and (4) of the Act by the respondent and by the Tribunal in *USAir*, and now in the present appeal, is wrong because of the concept of

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11. *Supra* note 9 at 4; *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.
12. Second ed., Vol. IV (Oxford: Clarendon Press, 1989).
13. *Ibid*. at 536.
14. *Supra* note 9 at 4.

extraterritoriality. Indeed, the Tribunal was unable to find any basis upon which to apply this concept to the circumstances of this appeal.

With respect to the argument in respect of the onus in this appeal, the Tribunal notes the following statements that it made in *Michelin Tires (Canada) Ltd.* v. *The Minister of National Revenue*:[15]

> It is settled law that the burden of proof in challenging an assessment or a determination of the Minister rests upon the taxpayer [reference made to the decision of the Supreme Court of Canada in *Assessment Commissioner* v. *Mennonite Home Association* (1972), [1973] S.C.R. 189]. The Minister, typically, bases an assessment or a determination on some assumptions and, then, it is up to the taxpayer who has knowledge of the underlying facts to rebut these assumptions. The Tribunal notes, however, that recent case law suggests that the onus may sometimes shift to the Minister where no assumptions have been pleaded or where some or all of the pleaded assumptions have been successfully rebutted. In such a case, the Minister may bear the ordinary burden to prove the facts which support a position unless those facts have already been put in evidence by the taxpayer [reference made to the decisions of the Federal Court of Appeal in *Her Majesty the Queen* v. *Joseph Leung* (1993), [1994] 1 F.C. 482 and in *John Arthur Pollock* v. *Her Majesty the Queen*, unreported, Federal Court of Appeal, Appeal Nos. A-75-90 and A-76-90, October 14, 1993].

The Tribunal went on and found that, in *Michelin Tires*, regardless of whether the onus was on the appellant or on the respondent, the evidence clearly showed that all of the necessary conditions of section 274 of the Act had been met and that the general anti-avoidance rule applied to the circumstances of that case to deny the appellant its refund under section 68.2 of the Act. In the present appeal, counsel for the appellant relied on the decision of the Supreme Court of Canada in *Québec (Communauté urbaine)* and argued that, since the legislative provision at issue imposes a tax obligation on the taxpayer instead of creating a tax exemption, the onus is on the respondent, not on the appellant. In the Tribunal's view, that case constitutes further authority for the proposition that the onus may sometimes shift to the respondent. However, in the present appeal, the Tribunal adopts an approach similar to that in *Michelin Tires* and finds that, whether the onus is on the appellant or on the respondent, it is of the view that the evidence clearly shows that all of the conditions of subsections 12(2) and (4) of the Act have been met and that the respondent correctly assessed air transportation taxes on the VUSA tickets.

Accordingly, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member

15. Appeal No. AP-93-333, March 22, 1995.