CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, February 19, 2002

Appeal Nos. AP-97-086 to AP-97-090

IN THE MATTER OF appeals heard on October 16, 2001, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated June 28, 1996, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BEATRICE FOODS INC., CANADA SAFEWAY LIMITED, H & R TRANSPORT LIMITED, PORTER TRUCKING LTD. AND ROBYN'S TRUCKING SERVICES LTD. **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-97-086 to AP-97-090

BEATRICE FOODS INC., CANADA SAFEWAY LIMITED, H & R TRANSPORT LIMITED, PORTER TRUCKING LTD. AND ROBYN'S TRUCKING SERVICES LTD. **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

These are appeals, pursuant to section 81.19 of the *Excise Tax Act*, from determinations made by the Minister of National Revenue, rejecting applications for refunds made under section 68 of the *Excise Tax Act* with respect to excise tax imposed on fuel oil consumed in integrated heat production systems. The first issue in these appeals is whether, as end users of the fuel oil, the appellants are eligible to apply for refunds pursuant to section 68 of the *Excise Tax Act*. Should the appellants be eligible to apply for refunds, the second issue is whether the fuel oil falls within the definition of "diesel fuel" found in section 2 of the *Excise Tax Act*.

HELD: The appeals are dismissed. At the outset, the appellants filed a notice of motion for an order of the Tribunal, allowing Shell Canada Ltd. and Imperial Oil Ltd. to be added as parties to these appeals in order to address the issue of whether the appellants are eligible to apply for the refunds. The appellants submitted that, should the Tribunal dismiss the motion, these appeals should not be heard on the merits, since they agree with the respondent's argument that, as end users of the fuel oil, they are not legally eligible to apply for the refunds. Although the respondent's administrative policy led the end users to file the refund claims, the Tribunal does not have jurisdiction pursuant to the *Excise Tax Act* to add parties to these appeals. The Tribunal dismissed the motion.

Places of Videoconference Hearing:	Hull, Quebec, and Calgary, Alberta
Date of Hearing:	October 16, 2001
Date of Decision:	February 19, 2002
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Ellen Fry, Member
Counsel for the Tribunal:	Marie-France Dagenais
Clerks of the Tribunal:	Margaret Fisher Anne Turcotte
Appearances:	H. George McKenzie, Q.C., and D. Blair Nixon, for the appellants Ritu Banerjee, for the respondent

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Appeal Nos. AP-97-086 to AP-97-090

BEATRICE FOODS INC., CANADA SAFEWAY LIMITED, H & R TRANSPORT LIMITED, PORTER TRUCKING LTD. AND ROBYN'S TRUCKING SERVICES LTD. **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

REASONS FOR DECISION

Delivered from the Bench at Hull, Quebec, on Tuesday, October 16, 2001

These are appeals, pursuant to section 81.19 of the *Excise Tax Act*,[1] from determinations made by the Minister of National Revenue, rejecting applications for refunds made under section 68 of the Act with respect to excise tax imposed on fuel oil consumed in integrated heat production systems. The first issue in these appeals is whether, as end users of the fuel oil, the appellants are eligible to apply for refunds pursuant to section 68 of the Act. Should the appellants be eligible to apply for refunds, the second issue is whether the fuel oil falls within the definition of "diesel fuel" found in section 2 of the Act.

At the outset, the appellants filed a notice of motion for an order of the Tribunal, allowing Shell Canada Ltd. and Imperial Oil Ltd. to be added as parties to these appeals in order to address the issue of the appellants' eligibility to apply for the requested refunds.

The appellants argued that Shell Canada Ltd. and Imperial Oil Ltd., as the refiners/manufacturers of the diesel fuel purchased, remitted the excise tax in respect of the fuel oil and, as such, are eligible to apply for the refunds. However, the appellants filed correspondence and other documentation from the Department of National Revenue (now the Canada Customs and Revenue Agency) as evidence that, despite this fact, it was the respondent's administrative practice to ask that refund claims be filed by end users rather than by refiners/manufacturers.

1. R.S.C. 1985, c. E-15 [hereinafter Act].

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The appellants relied on various Federal Court cases[2] to support their position that parties can be added to an appeal in order for a case to be heard on its merits and not be dismissed on a technicality. They further argued that adding these parties to these proceedings would not prejudice the respondent.[3] Finally, the appellants submitted that, should the motion be dismissed, the Tribunal would not need to address the substantive issue relating to the use of the fuel oil since, as argued by the respondent, as end users of the fuel oil, they do not have status in these proceedings.

In reply to the arguments made by the appellants on this motion, the respondent argued that at no time did the refiners/manufacturers, wholesalers or licensed retailers file refund claims pursuant to the Act with respect to the fuel oil in. The respondent's evidence confirmed that it was its administrative practice, at the relevant time, to ask that refund claims be filed by end users rather than by refiners/manufacturers, and further indicated that this administrative practice was still in effect as of the date of the hearing. However, the respondent noted that the *Canadian International Trade Tribunal Rules*[4] are quite clear as to who can commence an appeal and as to the kind of decision that can be appealed before the Tribunal. He further noted that there is no other statutory authority that would allow the Tribunal, under the present circumstances, to join the parties in this matter. Accordingly, the respondent argued that the proposed new parties could not be added as appellants before the Tribunal, since no decisions with respect to these parties have been issued; hence, there is nothing that could be appealed. Finally, he argued that the new parties were now statute barred from making any refund claims under the time limitations set out in the Act.

The Tribunal delivered the following decision from the Bench:

> This is an appeal under the Excise Tax Act. That Act which sets out some very precise steps to be followed by a taxpayer when claiming a refund.
>
> These proposed new appellants which are the subject of this motion never submitted refund claims pursuant to the Excise Tax Act and as such Revenue Canada never issued notices of determination to determine if they were entitled to a refund.
>
> The right of appeal [in front] of the Tribunal is available to a party when following a notice of determination a notice of objection is served. We don't have notices of determination for the proposed new appellants and no notices of objection.
>
> Although the respondent's administrative policy has led the end user to file this claim rather than the producer or manufacturer, the Tribunal does not have jurisdiction pursuant to the Excise Tax Act to add these parties to the present appeals.
>
> Accordingly, the panel has decided that the motion is dismissed.[5]

The appellants submitted that, should the Tribunal dismiss the motion, these appeals should not be heard on the merits, since they agree with the respondent's argument that, as end users of the fuel oil, they are not legally eligible to apply for the refunds.

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2. *Stevens* v. *Canada (Commissioner, Commission of Inquiry)*, [1998] 4 F.C. 125 (FCA); *Honeywell* v. *Litton Systems Canada* (4 November 1982), 67 C.P.R. (2d) 129 (FCTD); *Eastman Kodak* v. *Hoyle Twines* (2 July 1985), 5 C.P.R. (3d) 264 (FCTD).
3. *Pecaflor Construction* v. *Royal Bank of Canada*, [1994] A.J. No. 490 (Atla. Q.B.); *PanCanadian Petroleum* v. *Husky Oil Operations,* [1994] A.J. No. 207 (Atla. Q.B.).
4. S.O.R./91-499.
5. *Transcript of Public Hearing*, 16 October 2001, at 48-49.

Consequently, the appeals are dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member