



Ottawa, Thursday, June 22, 2000

Appeal Nos. AP-98-093 and AP-98-094

IN THE MATTER OF appeals heard on January 27, 2000, 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 November 13, 1998, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

**CAST TERMINALS INC. AND
TERMINUS RACINE (MONTRÉAL) LTD.**

Appellants

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-98-093 and AP-98-094

**CAST TERMINALS INC. AND
TERMINUS RACINE (MONTRÉAL) LTD.**

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

These are appeals pursuant to section 81.19 of the *Excise Tax Act* from determinations of the Minister of National Revenue that rejected applications for a refund of excise tax paid on diesel fuel used in the generation of electricity to power LeTro-porters. The issue in these appeals is whether the respondent properly imposed excise tax on diesel fuel used in the generation of electricity to power the LeTro-porters. More particularly, the Tribunal must determine whether the LeTro-porters are “vehicles” within the meaning attributed to this word in paragraph 23(8)(c) of the *Excise Tax Act* and whether the diesel fuel for use in the generation of electricity is used primarily in the operation of these vehicles.

HELD: The appeals are allowed. The evidence adduced in these appeals clearly leads to the conclusion that LeTro-porters are material handling equipment and not “vehicles” within the meaning to be given to that word in the *Excise Tax Act*. The Tribunal is persuaded that the goods in issue are used essentially for handling containers in terminals and not for transportation. In the Tribunal’s view, the transportation function of the LeTro-porters is incidental to their main functions, which are lifting, lowering, moving and placing containers. Therefore, the Tribunal finds that the diesel fuel used to generate electricity for use in the LeTro-porters qualifies for exemption from excise tax pursuant to paragraph 23(8)(c).

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 27, 2000
Date of Decision:	June 22, 2000
Tribunal Members:	Arthur B. Trudeau, Presiding Member Peter F. Thalheimer, Member Zdenek Kvarda, Member
Counsel for the Tribunal:	Marie-France Dagenais
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Kaylor, for the appellants Claude Morissette, for the respondent

Appeal Nos. AP-98-093 and AP-98-094

**CAST TERMINALS INC. AND
TERMINUS RACINE (MONTRÉAL) LTD.**

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
PETER F. THALHEIMER, Member
ZDENEK KVARDA, Member

REASONS FOR DECISION

INTRODUCTION

These are appeals pursuant to section 81.19 of the *Excise Tax Act*¹ of determinations of the Minister of National Revenue that rejected applications for a refund of excise tax paid on diesel fuel used in the generation of electricity to power LeTro-porters.

The issue in these appeals is whether the respondent properly imposed excise tax on diesel fuel used in the generation of electricity to power the LeTro-porters. More particularly, the Tribunal must determine whether the LeTro-porters are “vehicles” within the meaning attributed to this word in paragraph 23(8)(c) of the Act and whether the diesel fuel for use in the generation of electricity is used primarily in the operation of these vehicles.

For the purposes of these appeals, the relevant provisions of the Act read as follows:

23.(1) Whenever goods mentioned in Schedules I and II are imported into Canada or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this or any other Act or law, an excise tax in respect of those goods at the rate set opposite the applicable item in whichever of those Schedules is applicable computed, where that rate is specified as a percentage, on the duty paid value or the sale price, as the case may be.

(8) The tax imposed by subsection (1) or by section 26 or 27 is not payable in the case of

(c) diesel fuel for use in the generation of electricity, except where the electricity so generated is used primarily in the operation of a vehicle.

EVIDENCE

Mr. Michael Fratianni, Controller for Montréal Gateway Terminals, the appellants’ holding company, and Dr. Bernard-André Genest gave evidence on the appellants’ behalf. Mr. Fratianni provided the Tribunal with a video that showed and described the functions of the LeTro-porters. Mr. Fratianni stated that the company’s basic business is the loading and unloading of container vessels that arrive at the Port of Montréal, on behalf of international shipping companies. He testified that LeTro-porters are used to

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

lift and handle containers in the shipyard and, as such, are container handling equipment. He stated that LeTro-porters essentially lift containers either from stacks onto a trailer bed or from one section of a pile onto a higher section of another pile, as opposed to horizontal transportation. He further testified that LeTro-porters use telescopic spreaders to grab the containers, which are an integral part of the goods in issue. The spreader is adjustable depending on the container that it is handling. Mr. Fratianni testified that LeTro-porters are not designed to travel long distances because the weight of the container puts a lot of stress on the boom and also because the driver's visibility is obscured by the container which is suspended from the spreader.

In answering questions from the Tribunal, Mr. Fratianni testified that the LeTro-porters are referred to as machinery and not trucks. He further testified that the LeTro-porters are not structurally designed to travel longer distances than the distance in the yard between the tractor-trailer flatbed and the stack. He also stated that, for security reasons, LeTro-porters are not designed for travelling in the yard with weights suspended in midair, as the container could move sideways and provide for a very dangerous and unsafe situation.

Dr. Genest was qualified as an expert in the field of transportation. He testified that the prime source of power of a LeTro-porter is its diesel engine that is used to produce electricity. This engine does not directly contribute to hoisting containers or moving the LeTro-porter. He also testified that a LeTro-porter has separate electric motors for hoisting containers, for controlling the spreader, for moving and for steering. He explained that there are four types of work performed by a LeTro-porter, namely, lifting and lowering containers, controlling the spreader, moving back and forth, and steering. He noted that the objective of his report was to try and estimate the proportion of fuel used by LeTro-porters for handling containers, as opposed to moving the machine. He estimated that at least 58 percent of the work performed by LeTro-porters is the hoisting of containers.

Mr. James C. Patry gave evidence on the respondent's behalf. Mr. Patry was qualified as an expert in the field of transportation. In response to Dr. Genest's expert report, he provided the Tribunal with his own findings based on the same time and motion information, the same technical specifications and the same raw data that Dr. Genest used in preparing his report, with certain modifications. By adjusting some of the numbers, Mr. Patry estimated that at least 48 percent of the work performed by LeTro-porters is the lifting and lowering of containers.

ARGUMENT

The appellants argued that LeTro-porters are not vehicles and, in the event that the Tribunal finds that the goods in issue fall within the meaning of the word "vehicle", that the diesel fuel used in the generation of electricity is not primarily used in the operation of the goods in issue.

The appellants submitted that LeTro-porters are not vehicles. They argued that, as the term "vehicle" is not defined in the Act, it must be given its ordinary meaning. According to several dictionaries, a vehicle is something that is used, as its primary purpose, for the transportation of persons or things. They further argued that, while LeTro-porters carry containers, that is not their principal purpose. In their view, the evidence was clear that the goods in issue move over very short distances within the confines of the shipyard and are, as such, nothing more than material handling equipment. According to the appellants, the flatbeds are really the vehicles that transport the containers.

The appellants further argued that LeTro-porters are not designed to transport the containers over considerable distances. The evidence showed that, when transporting a container, they provide for very poor

vision, since the container is hoisted in front of the driver and obscures the driver's vision. The appellants contended that the LeTro-porters' primary purpose is to lift a container and to place it a few feet away from its original location. While the appellants admitted that LeTro-porters are engaged in a minor amount of carriage, they argued that the carriage function is incidental to their main purpose, which is material handling.

In support of their argument that the intended purpose of "vehicles", as provided in the statute, is the carriage of persons or goods, the appellants referred to the decision of the Federal Court of Canada in *Seaspan International v. Canada*.² They also made reference to the decision of the Federal Court of Canada in *Westar Mining v. The Queen*³ where the Federal Court of Canada, in referring to a decision of the Supreme Court of Canada,⁴ held that a "vehicle" must be a means of conveyance provided with wheels and used for the carriage of persons or goods. They submitted that, in the present appeals, LeTro-porters are not a means of conveyance, even though they may move the containers over a short distance. Finally, the appellants referred to the decision of the Supreme Court of Canada in *Sugar City Municipal District v. Bennett and White*,⁵ where it was held that, if the main purpose of a self-propelled unit is something other than the carriage of persons or goods, such as haulage, it would not qualify as a vehicle within the normal meaning of the word.

The appellants further submitted that, should the Tribunal find that LeTro-porters are vehicles, then it is clear from the evidence that the electricity generated by the diesel fuel is not used primarily in the operation of the LeTro-porters. First, the appellants argued that the diesel fuel is used mainly for loading and unloading cargo containers and not for transporting those containers. They argued that Parliament's intention⁶ in adopting the exempting provision at issue was to tax the diesel fuel used to generate electricity that would be used for transportation and not for material handling or for commercial and industrial purposes. They further argued that the word "operation" found in the exempting provision has been interpreted to mean forward or backward propulsion or movement, i.e. transportation.⁷ The appellants made reference to the Tribunal's decision in *Via Rail Canada v. MNR*,⁸ where the Tribunal held that the diesel fuel that produces electricity which is applied to the passenger compartment portions for heat, light and electricity is exempt from excise tax because those functions are not part of transportation. The appellants argued that, in the present appeals, the electricity generated by the diesel fuel is used primarily for functions other than the transportation of containers by the goods in issue and, as such, that all the diesel fuel so consumed should not be subject to excise tax.

The appellants also submitted that the second requirement of the exempting provision is that the electricity be used primarily for a purpose other than transportation. They argued that the word "primarily" has been interpreted by the jurisprudence to mean in excess of a ratio of 50 percent of the total use of the assets.⁹ The appellants referred to their expert evidence that demonstrates that more than 50 percent of the electricity is used for lifting, lowering, steering and using the spreader, as opposed to the forward and backward movement of the LeTro-porters.

2. [1994] 1 F.C. 524 (TD) [hereinafter *Seaspan*].

3. (26 September 1990) 3 T.C.T. 5325 (TD), aff'd (6 June 1991) 4 T.C.T. 6197 (CA) [hereinafter *Westar*].

4. *Farr v. The Township of Moore*, [1978] 2 S.C.R. 504.

5. [1950] S.C.R. 450.

6. Commons Debates, June 23, 1966, at 6805.

7. *Supra* note 3.

8. (28 September 1993), AP-91-190 to AP-91-200 [hereinafter *Via Rail*].

9. *Mid-West Feed v. MNR*, 87 D.T.C. 395; and *Brown (C.G.) v. Canada*, [1995] G.S.T.C. 38.

The respondent submitted that exempting provisions should be construed strictly and that all the elements have to be proven by the claimant in order to benefit from the exemption. First, he argued that LeTro-porters are vehicles. He argued that the term “vehicle” found in different dictionaries has a broad meaning and encompasses different types of goods that are used as means of conveyance for transporting people and goods. He argued that this connotation comprehends a receptacle in which something is placed in order to be moved. He made reference to the decision in *Seaspan*, where it was held that tugboats and train ships should be considered “vehicles” and that such an interpretation was made in keeping with the general tenor of the Act and with Parliament’s intention in adopting it. The respondent argued that the LeTro-porters move and carry containers over a short or long distance from trucks to a specific place on the port or vice-versa and, as such, are vehicles. He made reference to the decision in *Westar*, where it was held that ore haulers used in the confines of a mining area to transport ore from one point to another were vehicles within the meaning of the relevant provisions of the Act.

The respondent submitted that the different functions of the LeTro-porters should not be separated and that each function is essential to the use of the goods in issue. He argued that the lifting and moving functions act as a whole and cannot be separated. He argued that LeTro-porters are used within a restricted area as intermediaries in a big transportation system. He distinguished the Tribunal’s decision in *Via Rail* from the present appeals and maintained that, in that case, the hotel services, namely, light, heat and electricity, could easily be separated from the other functions of the train, as opposed to the lifting and moving functions of the LeTro-porters. Thus, the diesel fuel used to produce the electricity for these services was found to be exempt.

The respondent submitted that “operation” of a vehicle has a broad meaning and covers the overall functioning and operation of a vehicle. While it includes the concept of motion, it also includes activities such as the running of engines and generators which generate electricity to heat, cool or light vehicles. He made reference to ruling 7120/34¹⁰ and Excise Communiqué 191/TI¹¹ which offer a detailed description of the interpretation of the terms “vehicle” and “operation of a vehicle”.

Turning to the meaning of “primarily”, the respondent agreed that it represents an amount that is significantly more important than 50 percent, but argued that the term can also be defined as “first in importance”.¹² He submitted that, with respect to the goods in issue, the diesel fuel used to generate electricity is primarily used in the operation of the LeTro-porters, which includes the loading and unloading of cargo containers.

DECISION

Paragraph 23(8)(c) of the Act provides that the excise tax imposed by subsection 23(1) is not payable in the case of diesel fuel for use in the generation of electricity, except where electricity so generated is used primarily in the operation of a vehicle.

The issue in these appeals is whether the goods in issue, LeTro-porters, are “vehicles” within the meaning to be given to that word in the Act. If the appellants’ products were not found to be “vehicles” within that context, the diesel fuel used by the LeTro-porters in the generation of electricity would be exempt from tax. Therefore, the Tribunal has to determine, firstly, the meaning of the term “vehicle” within that paragraph and, secondly, whether the goods in issue, the LeTro-porters, fall within that meaning.

10. Department of National Revenue, 25 May, 1989.

11. Department of National Revenue, *Diesel Fuel/Fuel Oil Used to Generate Electricity in Vehicles*, December 1989.

12. *Glaxo Wellcome Inc. v. R.*, [1996] 1 C.T.C. 2904.

Finally, if the LeTro-porters are found to be “vehicles”, the Tribunal has to determine whether the electricity generated by the diesel fuel is used primarily in the operation of a vehicle.

There is no definition of the term “vehicle” in the Act. As recognized by the Tribunal in previous decisions, the Tribunal will, therefore, look to the ordinary meaning of the word as found in conventional dictionaries. The Tribunal considered the definition of the term “vehicle” found in *The New Shorter Oxford English Dictionary on Historical Principles*, where it is defined as “[a] means of conveyance, usu. with wheels, for transporting people, goods, etc.; a car, cart, truck, carriage, sledge, etc. . . . Any means of carriage or transport; a receptacle in which something is placed in order to be moved”. Furthermore, in giving meaning to the word “vehicle” in the context of the facts of these appeals, the Tribunal relies on the decision in *Westar* where the Federal Court of Canada held, in referring to a decision of the Supreme Court of Canada,¹³ that a “vehicle” must be a means of conveyance with wheels and used for the carriage of persons or goods.

In the Tribunal’s view, the essential elements of the term “vehicle” are that it is a receptacle with wheels used as a means of conveyance for transporting persons or goods. There remains to determine whether the goods in issue fall within that description.

The evidence before the Tribunal is that the main purpose of the LeTro-porters is to handle containers. Their functions consist of locking onto a container with a spreader, lifting or lowering the container from a flatbed truck or a pile of containers and then moving that container over a short distance to the location where it is to be stored or to another flatbed for further movement. The LeTro-porter lifts, lowers and tilts containers with its telescopic spreader. The carrying capacity of the LeTro-porters is restricted to a 20- or 40-ft. container and their lifting capacity is up to three containers high. The LeTro-porter does not have a receptacle in which containers can be placed in order to be moved, nor is it a receptacle itself in which containers can be transported. It is by the action of the spreaders that containers are lifted and carried.

The Tribunal notes that LeTro-porters are not designed to transport containers over any great distance, since they can easily tip forward or be severely damaged when operating on uneven surfaces. The Tribunal also acknowledges that, because of the LeTro-porter’s design, the operator’s vision is impaired when it is carrying a container because the container is directly in his line of vision.

The Tribunal accepts the evidence that the LeTro-porters are used to lift and handle containers in the shipyard and, as such, are container handling equipment. The Tribunal agrees that the goods in issue are used essentially for handling containers in terminals and not for transportation. The Tribunal further agrees that the transportation function of the LeTro-porters is incidental to their main functions which are lifting, lowering, moving and placing containers either from stacks onto a trailer bed or from one section of a pile onto a higher section of another pile. While the evidence is clear that LeTro-porters are engaged in a minor amount of transportation, that transportation is incidental to their main purpose, which is material handling.

Finally, the Tribunal acknowledges the testimony of both experts, which assists the Tribunal in determining whether the LeTro-porters should be considered “vehicles”. In the Tribunal’s view, it is obvious, from the experts’ evidence on the calculations of the percentage of fuel used by the LeTro-porters to perform each of their functions, that lifting, lowering and placing containers are the key attributes of the LeTro-porters.

13. *Supra* note 4.

The Tribunal is persuaded by the evidence that the LeTro-porters are not “vehicles” within the meaning to be given to that word in the Act. In light of this, the Tribunal does not have to determine whether the electricity generated by the diesel fuel is used primarily in the operation of the LeTro-porters.

The Tribunal concludes from its examination of the evidence, the dictionary definitions and the jurisprudence that LeTro-porters are material handling equipment. Thus, the Tribunal finds that the diesel fuel used to generate electricity for use in the LeTro-porters qualifies for exemption from excise tax pursuant to paragraph 23(8)(c) of the Act.

Accordingly, the appeals are allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

Zdenek Kvarda

Zdenek Kvarda
Member