



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Application EP-2022-001

DLA Energy

*Order and reasons issued
Wednesday, October 19, 2022*

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IN THE MATTER OF an application made by DLA Energy, pursuant to subsection 81.32(1) of the *Excise Tax Act*, for an order extending the time to serve four notices of objection pursuant to section 81.17 of the *Excise Tax Act* with respect to a notice of determination of the Minister of National Revenue allegedly issued by the Canada Revenue Agency on April 9, 2020.

ORDER

The Canadian International Trade Tribunal has considered the application made by DLA Energy, and is satisfied that the requirements and conditions set out in subsections 81.32(6) and (7) of the *Excise Tax Act* have been met. As the Minister of National Revenue does not contest the application as filed by DLA Energy, the Tribunal grants the extension of time. The Minister of National Revenue is ordered to accept DLA Energy's four notices of objection, dated November 15, 2021, as having been filed as of the date of issuance of this Order.

Frédéric Seppey

Frédéric Seppey
Presiding Member

Susan D. Beaubien

Susan D. Beaubien
Member

Serge Fréchette

Serge Fréchette
Member

STATEMENT OF REASONS

INTRODUCTION

[1] DLA Energy (DLA) has filed an application, pursuant to subsection 81.32(1) of the *Excise Tax Act* (the Act)¹, seeking an extension of time to serve the Minister of National Revenue (Minister) with four notices of objection pursuant to section 81.17 of the Act.

[2] DLA, or Defense Logistics Agency (DLA) of the United States Department of Defense, purchases aviation fuel at Canadian airports for use by United States military aircraft. This matter concerns aviation fuel purchased by DLA during the four following periods:

- September 2, 2017, to September 26, 2017;
- October 1, 2017, to December 30, 2017;
- March 2, 2018, to August 27, 2018; and
- January 1, 2018, to December 31, 2018.

[3] DLA contends that it was wrongly charged Canadian excise tax for the fuel purchases made during the above-noted periods. It filed applications for refunds with the Canada Revenue Agency (CRA) in 2019 and 2020.²

[4] DLA states that, on September 2, 2021, a CRA representative informed DLA that its four applications for refund had been denied, but the CRA was allegedly unable to locate and provide DLA with the corresponding notice of determination.

[5] On November 15, 2021, DLA sent the CRA four notices of objection with regard to the CRA's rejection of DLA's applications for refund.³

[6] Sometime during the month of June 2022, DLA received a letter from the CRA dated May 11, 2022, stating that DLA's objections could not be considered because they were not filed within 90 days after the date of the notice of the Minister's determination.⁴ While this letter indicated that the date of the notice of determination was April 9, 2020, DLA claims it never received that notice.⁵

¹ R.S.C., 1985, c. E-15.

² Exhibit EP-2022-001-01.C at 7, 12, 19, 27.

³ *Ibid.* at 45–48.

⁴ *Ibid.* at 50. The CRA's letter of May 11, 2022, refers to a "notice of assessment". The Tribunal notes that an assessment pursuant to section 81.1 of the Act would properly be the subject of an objection pursuant to section 81.15, whereas the Tribunal understands DLA to be seeking an extension of time to object, pursuant to section 81.17, to a determination of the Minister in response to DLA's applications for refund made pursuant to section 68.

⁵ This Order and reasons refer to a single notice, consistent with the CRA's letter of May 11. However, the Tribunal notes that it expects each objection to receive its own determination by the Minister, even if all are conveyed in a single notice.

[7] On August 8, 2022, DLA filed this application⁶ with the Tribunal, seeking an extension of time to object to the denial of its applications for refund.

[8] The CRA advised the Tribunal on September 15, 2022, that it did not oppose DLA's request for an extension of time.⁷

STATUTORY FRAMEWORK

[9] Subsection 81.17(1) of the Act provide as follows:

81.17(1) Any person who has made an application under any of sections 68 to 69 and who objects to the determination of the Minister respecting the application may, within ninety days after the day on which the notice of determination is sent to that person, serve on the Minister a notice of objection in the prescribed form setting out the reasons for the objection and all relevant facts on which that person relies.

[10] The relevant paragraphs of section 81.32 of the Act provide as follows:

81.32 (1) Subject to subsection (6), any person entitled to serve a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, or to appeal to the Tribunal under section 81.19 may, at any time before or after the expiration of the time limited by that section for so objecting or appealing, apply to the Tribunal for an order extending that time.

(5) An application under subsection (1) or (3) shall set out the reasons why the applicant is or was not able to comply with the time limitation.

(6) No application may be made pursuant to subsection (1) or (3) more than one year after the expiration of the time limited.

(7) On application pursuant to subsection (1) or (3), the Tribunal or Court may grant an order extending the time limited if

(a) it has not previously made an order extending that time; and

(b) it is satisfied that

(i) the circumstances are such that it is just and equitable to extend the time,

(ii) but for the circumstances referred to in subparagraph (i), an objection would have been made or an appeal would have been instituted, as the case may be, within that time,

(iii) the application was brought as soon as circumstances permitted, and

(iv) there are reasonable grounds for the objection or appeal.

⁶ DLA amended its application on August 22, 2022, to designate certain information as confidential.

⁷ Exhibit EP-2022-001-03 at 1.

ANALYSIS

The statutory requirements for an order extending the time to object are met

[11] A party seeking an extension of time bears the onus of demonstrating, on a balance of probabilities, that the requirements and conditions set out in subsections 81.32(6) and (7) of the Act have been fulfilled. The Tribunal finds that DLA has met its onus to show that the criteria of subsections 81.32(6) and (7) of the Act have been met, for the following reasons.

[12] Subsection 81.17(1) provides that an objection to the Minister's determination may be made within 90 days after the day on which the notice of determination is sent to the person who made an application for refund. DLA states that it never received the notice referred to in its discussion with the CRA representative on September 2, 2021, and in the CRA's letter of May 11, 2022. As such, DLA could not object within the prescribed time limitation because it was unaware that the notice existed. This explanation is consistent with the contents of the notices of objection DLA attempted to submit to the CRA on November 15, 2021.

[13] More significantly, the CRA did not contest DLA's allegation that it had never received a notice of determination from the CRA. Although the CRA's letter of May 11, 2022, stated that the notice denying DLA's refund applications was dated April 9, 2020, there is no indication that the notice was ever actually sent. As such, the Tribunal finds that the time limitation for filing its objections never began to run, and therefore that DLA could not possibly comply with it.

[14] For that reason, the Tribunal finds that DLA's application meets the requirement of subsection 81.32(6) of the Act, which bars applications for extension that are made more than one year after expiration of the prescribed limitation period. The time limitation for DLA to file its objections never began to run, and therefore never expired.

[15] With regard to paragraph 81.32(7)(a), the Tribunal has not previously made an order extending the time for DLA to make its objections. Therefore, the Tribunal finds that this requirement is met.

[16] DLA was unable to submit its notices of objection within the 90 days after the notice of determination was sent, because it did not receive the notice referred to in CRA's letter of May 11, 2022. Therefore, having regard to subparagraph 81.32(7)(b)(i) of the Act, the Tribunal is satisfied that it would be just and equitable to grant the application.

[17] As outlined above, DLA attempted to submit four notices of objection that were rejected by the CRA because they were purportedly not filed within the 90-day time limitation. The Tribunal has already found that the applicable limitation period never began to run because DLA did not receive notice that its applications for refund had been denied by the CRA, purportedly by way of notice dated April 9, 2020. However, DLA did attempt to submit its notices of objection on November 15, 2021, less than 90 days after September 2, 2021, i.e. the day it appears to have first learned that its applications for refund had been denied. In the circumstances, the Tribunal considers this to be sufficient evidence to enable it to conclude that DLA would have similarly submitted its notices of objection within 90 days of receiving the CRA's notice dated April 9, 2020, had that notice been received. The Tribunal is therefore satisfied that the requirement of subparagraph 81.31(7)(b)(ii) of the Act has been met.

[18] The Tribunal must also consider the requirement of subparagraph 81.32(7)(b)(iii) of the Act, which provides that the application for extension must be made as soon as circumstances permit. As the Tribunal has previously noted, whether the application was made as soon as circumstances permitted is a fact-specific determination without a bright-line test.⁸ Although DLA did not file its application immediately after receiving, in June 2022, the CRA's letter of May 11, 2022, the Tribunal finds that it did so within a reasonable period thereafter. As the Tribunal has limited insight into the circumstances that may have impacted the timing of DLA's application, and again noting that the CRA did not contest the application for an extension of time, the Tribunal is satisfied that the requirement of subparagraph 81.32(7)(b)(iii) is met. That said, the Tribunal emphasizes that parties must be diligent in bringing applications such as this one as early as practicable.

[19] Finally, DLA must demonstrate that there are reasonable grounds for the objection, as per subparagraph 81.32(7)(b)(iv) of the Act. DLA submitted that it is entitled to refunds of the tax paid in certain transactions during the relevant periods, which it argued was paid in error. In support of this position, it submitted that the supply of aviation fuel through those transactions is exempt from tax pursuant to paragraph 2(b), Part V of Schedule VI to the Act, and/or is eligible for refund on the basis that it qualifies as fuel used as ships' stores pursuant to subsection 68.01(2).

[20] The Tribunal is persuaded that DLA has raised an arguable issue for determination. That is sufficient to meet the requirement of subparagraph 81.32(7)(b)(iv). In finding that DLA is advancing an arguable case for its claim to a refund on excise tax purportedly paid on the purchase of aviation fuel, the Tribunal should not be taken as having considered the merits of DLA's arguments or to have made any findings of fact or law concerning the issues that DLA has raised. The Tribunal considers it appropriate for the Minister to be able to consider DLA's objections in full.

DECISION

[21] For the above reasons, the Tribunal grants the extension of time and orders the Minister to accept as timely DLA's four notices of objection, dated November 15, 2021.

Frédéric Seppey

Frédéric Seppey
Presiding Member

Susan D. Beaubien

Susan D. Beaubien
Member

Serge Fréchette

Serge Fréchette
Member

⁸ *Coalision Inc.* (18 September 2019), EP-2019-002 (CITT) at para. 14; *Latoplast Ltd.* (25 July 2019), EP-2019-001 (CITT) at para. 18.