Date: 20070214

Docket: T-1317-05

Citation: 2007 FC 166

Ottawa, Ontario, the 14th day of February 2007

Present: The Honourable Mr. Justice Blais

BETWEEN:

TRANSPORT RONADO INC.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

NATURE OF THE PROCEEDINGS

[1] The plaintiff filed an action under section 81.2 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, challenging a decision of the Minister dated May 2, 2005 and bearing reference number RT 777 363 120 CA.

[2] Pursuant to this decision, the Minister of National Revenue (the Minister) ruled that determination 20031204QUE210, dated December 4, 2003, was well founded. This decision essentially concerned the fact that the plaintiff's application for a refund of excise tax had been received by the Minister on March 11, 2003, that is, after the statutory time limit specified in the

Budget Implementation Act, 2003, S.C., c. 15, which set February 17, 2003, as the deadline for submitting such an application.

RELEVANT FACTS

[3] In November 2002, in *Penner International Inc. v. Her Majesty the Queen*, [2003] F.C. 581, 2002 FCA 453 (*Penner*), the Federal Court of Appeal ruled that diesel fuel used to transport goods outside the country constituted exported goods within the meaning of the *Excise Tax Act* and, consequently, that the excise tax paid on the purchase of the fuel was eligible for the tax rebate provided for in section 68.1 of that Act.

[4] Following the decision of the Federal Court of Appeal, an application for leave to appeal against this judgment was filed by the defendant in the Supreme Court of Canada, which dismissed the leave application on May 15, 2003.

[5] Without waiting for the final decision of the Supreme Court, but aware of the tax consequences of the *Penner* judgment if it were to be upheld by the Supreme Court, Parliament decided to enact a legislative amendment to counter the effects of the Federal Court of Appeal judgment.

[6] This legislative amendment was tabled at the same time as the budget on February 18, 2003, through the *Budget Implementation Act 2003*. This Act, assented to on June 19, 2003, with a

retroactive effect, expressly confirmed Parliament's intent to make February 17, 2003, the deadline for taxpayers to apply for a refund of the excise tax on diesel fuel.

[7] In subsection 63(2) of this Act, Parliament created an exception to the refund program for tax paid on exported goods, to the effect that no amount is payable to a person in respect of tax paid on diesel fuel transported out of Canada in the fuel tank of the vehicle that is used for that transportation.

[8] In the following subsection of the Act, namely, subsection 63(3), Parliament specified a date for the application of this exception. This subsection states that the exception applies to any application for a payment "received by the Minister of National Revenue after February 17, 2003".

PLAINTIFF'S EVIDENCE

[9] The plaintiff had two witnesses testify in support of its submissions.

Testimony of Ronny Nadeau

[10] The first witness for the plaintiff was Ronny Nadeau, president of Transport Ronado Inc., a trucking company he has been managing for 20 years. Mr. Nadeau testified to the fact that nearly 100% of the fuel used by his trucks is bought in Canada. He added that deliveries to the United States represent approximately 50% of his sales.

[11] He also mentioned that the quantities of fuel used in each American state and in each Canadian province are tallied by each driver and also archived by a company called "compac", which keeps an accounting of all this data. Mr. Nadeau stated that his spouse, Madonne Caron, is the accountant for his company and is also in charge of tax claims.

[12] Mr. Nadeau also testified that, while dining at a restaurant called "Estaminet" in downtown Rivière-du-Loup, he overheard a conversation at a neighbouring table where persons were discussing the possibility of applying for a refund of the excise tax paid on fuel used in the United States. To the best of his recollection, this conversation was overheard on February 7 or 8, 2003, that is, approximately one week before his spouse submitted the application. Mr. Nadeau also stated that, before that time, he did not know it was possible to claim amounts paid as excise tax on fuel used outside of the country, and that he did not speak with the people at the neighbouring table because he did not know them.

Testimony of Madonne Caron

[13] Madonne Caron was then heard as a witness for the plaintiff. She confirmed that she took care of accounting, general administration and records management for the plaintiff company, which has belonged to her husband for approximately 20 years. She confirmed the conversation overheard at the restaurant on or about February 7 or 8, 2003, and mentioned that, at the first opportunity, she conducted an Internet search and found a form on the Web site of the Canada Customs and Revenue Agency (the Agency) allowing her to claim the excise tax collected on fuel used outside of Canada.

[14] In order to prepare the application, she asked her secretary to retrieve the documents stored in another room, particularly the "compac" reports, which contained information about the fuel used by their trucks during the period subject to the claim. Because she had the monthly fuel reports on hand, she was able to rapidly collect the data, and within about half an hour she was able to fill out the form, the original of which was filed in the Court record as D-1.

[15] Ms. Caron stated that first she filled out a rough draft of the form, then transcribed it on a blank photocopy of the form supplied by the Canada Customs and Revenue Agency, which she signed on February 13, 2003. On that same day, around 11:00 a.m., she allegedly gave the form to Ms. Malenfant, the letter carrier who takes mail back and forth between the post office and their company. Ms. Malenfant allegedly took the envelope to send it on to the address appearing on the form: Summerside Tax Centre, 275 Pope Road, Suite 101, Summerside, Prince Edward Island.

[16] She also confirmed having filed a refund application covering two consecutive periods, namely, from January 1 to December 31, 2001, and from January 1 to December 31, 2002, as it appears on the form. Still according to her testimony, after having admitted that she knew she could make a claim for a previous two-year period, she did not know why she had not made a claim for the most recent period, namely, from January 1 to February 13, 2003.

[17] Ms. Caron did not give any answer as to why she did not use safer mail such as registered mail or another type of mail service which could have proved the exact date on which the document

was sent and could have given her confirmation that the document had in fact been received at the Summerside Tax Centre.

[18] Finally, Ms. Caron alleged that on that date she did not have any reason to think that a few days later Parliament would impose a time limit for filing such a claim.

DEFENDANT'S EVIDENCE

[19] The defendant also had two witnesses testify.

Testimony of Gilles Séguin

[20] The first witness, Gilles Séguin, is a senior employee at Canada Post Corporation (Canada Post) in Ottawa, in charge of service quality at Canada Post. He testified in detail about the management of mail traffic at Canada Post in general, and in particular for deliveries from Rivière-du-Loup to Summerside, Prince Edward Island.

[21] Mr. Séguin testified that the time required for the delivery of a regular letter, for example, from Québec to Québec, that is, within the same city, is two business days. From one destination to another within the province of Quebec, three business days are required, while from any place in the province of Quebec to any other place within Canada but outside Quebec, four business days are required. If a weekend falls inside the count, another two days must be added. Mr. Séguin referred to Exhibit 8 of the defendant's record, a document concerning Canada Post's service standards, which confirms the traffic data mentioned in his testimony.

[22] However, Mr. Séguin also confirmed that Canada Post entrusted an independent company with the measurement of service quality and, in particular, service reliability in terms of delivery times. This independent company, which sends 100,000 pieces of mail throughout Canada to test the reliability of the system, concluded that for delivery from one province to another, the four business day standard is met 96% of the time. If a one-day grace period is allowed, the reliability rate goes up to 99%, and if two days are allowed, the reliability rate rises to 99.7%.

[23] Because the plaintiff claimed to have mailed the letter on a Thursday, two extra days for the weekend must be added to the usual four days, giving a delivery time of six days. If the letter was mailed on February 13, 2003, Mr. Séguin is of the opinion that it should have been delivered on February 19, 2003, at the latest. If a two-day grace period is added to attain a higher percentage of reliability, there is 99.7% chance that the letter would have been delivered eight days later, that is, on Friday, February 21, 2003.

[24] Mr. Séguin then gave an even more specific explanation of the routing of a letter mailed from Rivière-du-Loup. Assuming the letter was given to the letter carrier around 11:00 a.m. on February 13, 2003, she should have taken this letter to the main post office at Rivière-du-Loup, where outgoing mail is processed between 6:00 p.m. and 8:00 p.m. At the end of the day, around 8:00 p.m., the envelope would have been placed in the bag to be sent to the main post office in Québec, on St-Paul Street, which was operational at that time, and would have been processed during the night of February 13 to 14, 2003. The envelope would then have been placed back in a

bag at the beginning of the day of February 14, 2003, at the Québec post office, where a truck from Montréal would stop around 3:00 p.m. to pick up the bags bound for Halifax, taking away the mail bound for Nova Scotia and Prince Edward Island. This was route L.-112.

[25] This envelope, which was carried by truck, would have arrived in Halifax during the night of Saturday, February 15, 2003. Because of the weekend break, the mail would have been removed from the truck and processed beginning Sunday, February 16, 2003, at 4:00 pm. This was the time at which the Canada Post employees at the Halifax main post office returned to work after their weekend off. Any mail for Prince Edward Island in the bags carried to Halifax would have been sorted on Monday, February 17, 2003, and the envelope would have been left by truck at the end of the day, arriving in Moncton, New Brunswick, in the evening of February 17, 2003. The truck would have left for Prince Edward Island that same evening, arriving at the Summerside post office around 2:00 a.m. on February 18, 2003. Once in Summerside, the mail would have been sorted until approximately 7:00 a.m. on February 18, 2003. Later that day, the mail would have been sent by truck to the Canada Customs and Revenue Agency at 275 Pope Road.

[26] Following this analysis and the usual Canada Post procedure, Mr. Séguin therefore concluded that, according to the statistics established by an independent company monitoring the reliability of the Canada Post system, the chances that a letter sent on February 13, 2003, from Rivière-du-Loup was received in Summerside on February 18, 2003, at the latest were 96%, and if a two-day grace period is added, the chances that the letter sent on February 13, 2002, arrived no later than February 21, 2003, were 99.7%.

[27] Using the same parameters, Mr. Séguin concluded that the letter stamped at the Canada Customs and Revenue Agency on March 11, 2003, that is, the original Exhibit D-1, the refund application sent by Ms. Caron, would most probably have been mailed on March 3, 2003, and not on February 13, 2003.

[28] However, Mr. Séguin added that certain circumstances may delay mail delivery, such as snow storms, truck breakdowns, closure of the bridge to Prince Edward Island, or a strike. However, he added that there had been no strike during the period in question and that the traffic on the Confederation Bridge between New Brunswick and Prince Edward Island had only been interrupted twice, on February 27, 2003, and on March 3, 2003. Moreover, from February 12, 2003, to March 20, 2003, there had been 52 accidents on the roads travelled by Canada Post, but only the two one-day closures of the Confederation Bridge could have had a real impact on mail delivery.

[29] Mr. Séguin also mentioned that if mail is damaged during transportation, it is taken to a special place in one of the offices along the mail route. The envelope is then repaired, inserted in a plastic bag and re-sent with an explanatory letter. This may add a delay of one to two days.

[30] Mr. Séguin also added that when items are sent by express or registered mail, a bar code is applied to the envelope, making it easier to trace the mailing date.

[31] Mr. Séguin finally noted that a Canada Post seal is placed on a letter when it is received at Rivière-du-Loup on the day it is mailed, and it is possible that another sticker containing the postal code, date and time is placed on the envelope when it is processed at the Québec sorting centre.

Testimony of David Kelly

[32] The second witness for the defendant, David Kelly, is an employee of the Canada Customs and Revenue Agency at Summerside, Prince Edward Island, who has been a mail management team leader since 2005. He therefore did not hold this position at the time when the letter in question was sent from Rivière-du-Loup to Summerside, either in February or March 2003.

[33] However, he mentioned having had numerous conversations with the employees working at that time and referred several times during his testimony to information received from these employees. According to his testimony, mail processing has not changed significantly since 2003.

[34] Essentially, Mr. Kelly explained how mail is managed from the time it is received in Summerside. For example, he mentioned that the truck or trucks which deliver the mail arrive at approximately 4:00 a.m. at the shipping and receiving section of the building. Two employees of the Canada Customs and Revenue Agency take care of receiving the mail and taking the bags out of the truck and into the Agency building. Agency employees immediately sign receipts for letters sent by express mail, which must have proof of delivery.

[35] The other employees report for work between 5:00 a.m. and 5:30 a.m. and systematically open the envelopes sent to the Summerside Tax Centre. They must do an initial sorting which is completed around 7:00 a.m. The employees count each piece of mail received and open every envelope. A certain number of envelopes, that is, those containing T-1 and T-2 returns, are kept with the returns as evidence of the exact date of receipt for tax purposes and possible penalties. In the case of mail regarding excise tax, the envelopes are destroyed after they are opened.

[36] Mr. Kelly explained that sorting is facilitated in part by the fact that the envelopes will have different postal codes on them, depending on the recipient. For example, envelopes for GST returns have a different postal code from those concerning income tax returns or applications for excise tax refunds. The postal code C1N 6E7 appears on the envelopes of excise tax refund applications. Mr. Kelly also stated that all letters concerning GST and excise tax are stamped with their entry date on the morning of their receipt. Around 7:00 a.m., all the mail is sent to the various departments for analysis.

[37] Finally, in answer to the written questions filed by the plaintiff, the defendant also submitted answers in writing, which were shown to the witness, who managed to conduct a certain analysis of this information. More specifically, on the day on which the letter sent by Ms. Caron was received, namely, March 11, 2003, Summerside received 32,006 pieces of mail. Of that number, a total of 314 were sent to the excise tax department.

[38] The parties submitted several documents in support of their submissions and closed their cases after the four witnesses had been heard.

ISSUE

[39] The issue to be decided is the following: Did the Minister of National Revenue receive the plaintiff's N-15 application for refund within the meaning of subsection 63(2) of the *Budget Implementation Act, 2003* before or after February 17, 2003?

ANALYSIS

[40] As stated by the defendant, there is no doubt in my mind that the plaintiff's N-15 application for refund was physically received by the Summerside Tax Centre in Prince Edward Island on March 11, 2003.

[41] The defendant submits that, no matter on what date the application for refund was mailed, the decisive date was the day on which the envelope was received by the Canada Customs and Revenue Agency in Summerside, because under the *Budget Implementation Act, 2003*, in order to be accepted, the application for refund must be "received by the Minister of National Revenue before February 17, 2003".

[42] The plaintiff, however, submits that the date of mailing is decisive, because under paragraph 2(2)(*c*) of the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, leaving mail with the addressee or his servant or agent is deemed to be delivery to the addressee. Furthermore, the plaintiff submits

that under section 23 of the *Canada Post Corporation Act*, the corporation is an agent of Her Majesty in Right of Canada.

[43] The defendant submits that the plaintiff's arguments are flawed, because the provisions of the *Canada Post Corporation Act* concerning the receipt of documents on behalf of Her Majesty in Right of Canada do not apply in this case. The defendant submits that for this presumption to operate to the advantage of the plaintiff in this case, Canada Post would have to be characterized as a person apparently authorized by the Minister to receive delivery of mail addressed to the Minister. According to the defendant, the role of Canada Post is restricted to the transmission and delivery of messages to their addressees in accordance with subsection 5(1) of its incorporating act.

[44] It should be noted that for certain documents sent to the Minister, particularly income tax returns on April 30 of each year, the moment of mailing is the decisive factor. For example, section 102 of the *Budget Implementation Act, 2003* specifies that a return "is deemed to have been filed with the Minister on the day on which the return was mailed".

[45] I agree with the defendant's position, because in my opinion Canada Post can be considered to be an agent of the Minister of National Revenue only where it is expressly mentioned in the Act or regulations in force, as for example in the case of the mailing of income tax returns during the month of April of every year. Although Parliament was not overly zealous in clarifying Canada Post's occasional role as agent, it does not seem reasonable to me to draw a general conclusion to the effect that Canada Post is at all times an agent of the Minister of National Revenue. It would not

be reasonable to conclude that every time a document is sent to one of the Minister's offices throughout Canada, the mailing date is determinative. I cannot agree with this interpretation. I conclude, rather, that where Her Majesty the Queen intends that Canada Post act as an agent of any of her ministers or agencies, she will specifically provide for it in the Act or regulations.

[46] Moreover, the Canadian International Trade Tribunal also rendered a decision on this point in *Holste Transport Limited v. Minister of National Revenue*, AP-2004-001, concluding at paragraph 33 that the expression "received by the Minister" is "unambiguous and means the date of actual receipt by the Minister or his agent (i.e. the CRA), not the date of mailing".

[47] In any event, I am not convinced that this conclusion is determinative in the present case, for reasons I will explain further on in my decision.

[48] The plaintiff also submits that it had acquired rights when it mailed the application for refund on February 13, 2003.

[49] It argues that before the bill was tabled on February 18, 2003, there was no time limit for filing its application for refund. It suggests that it had acquired rights under section 43 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that the repeal in whole or in part of an enactment does not affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed. The plaintiff thus argues that acquired rights to refunds crystallize as soon as an application for refund is mailed. Therefore, it submits that the subsequent

amendment to the *Excise Tax Act* would be of no effect with respect to the existence of its acquired rights to a refund which were crystallized by simply mailing its application for refund.

[50] Although it may seem arbitrary that Parliament may from time to time enact legislation that restricts rights which up to then had favoured the taxpayer, our courts have always acknowledged Parliament's inalienable right to enact legislation to modify certain advantages available to taxpayers. Case law has very clearly established that the presumption of non-retrospectivity of legislation may be rebutted when Parliament clearly mentions it. The general rule to this effect was established by the Supreme Court of Canada in *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271, at paragraph 11:

> First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

[51] Moreover, in *Transport Gilles Perreault Inc. v. Minister of National Revenue*, AP-2004-051, the Canadian International Trade Tribunal dealt with the plaintiff's argument in a decision rendered on a similar issue for the following reasons, at paragraph 18:

> The *Budget Implementation Act, 2003*, which became effective on June 19, 2003, expressly amended section 68.1 of the *Excise Tax Act* and expressly stated that the amendment applied ". . . *in respect of any application* for a payment under section 68.1 of the Act *received by the Minister of National Revenue after February 17, 2003*." (Emphasis added). The legislation is not ambiguous. The legislation was intended to be retroactive to the date of the budget announcement and it was intended to affect expectations (or rights) to receive a refund if the application was *received* by the Minister

> after *February 17, 2003*. The Tribunal notes that retroactive application of taxing legislation to the date of its announcement is not unusual.

[52] I would now like to briefly deal with the plaintiff's factual submissions to the effect that the application for refund had been mailed on February 13, 2003, that is, before the February 17, 2003 deadline, and that the delays which led to the Minister's physically receiving said document on March 11, 2003, were not attributable to the plaintiff, but rather to delays in mail delivery and processing by the Summerside Tax Centre.

[53] I must acknowledge that the witnesses heard by the plaintiff, namely, Mr. Nadeau and Ms. Caron, did not convince me that the application for refund was in fact placed in the hands of a Canada Post agent on the morning of February 13, 2003. The two testimonies to the effect that the information about the excise tax refund had been obtained through a conversation overheard at a restaurant in Rivière-du-Loup one week before February 13, 2003, which led Ms. Caron to search the Internet for a claim form and then send it by regular mail on the morning of February 13, 2003, are not convincing.

[54] These testimonies are in stunning contrast to the very precise and convincing testimony of Mr. Séguin about the transportation of that mail. Although I may admit that this is not a precise science, that delivery times are not guaranteed, and that a few days of delay may be attributed to Canada Post in spite of the very precise description of the usual routing of a letter sent from Rivière-du-Loup to Summerside, in this case, there is a discrepancy of more than two weeks, even if several days of delay are attributed to Canada Post. In addition, it must be acknowledged that the

plaintiff's representatives were especially ill advised in not taking special measures to obtain physical evidence of the mailing of such an important document as the claim for $123,000 sent by regular mail.

[55] The exceptionally precise testimony of Mr. Kelly, an employee in the Summerside Tax Centre, was also very convincing, and I have no difficulty in taking for granted that all the envelopes received at the Tax Centre were opened that morning and accounted for. Therefore, I have no doubt that the letter in question, which was stamped March 11, 2003, actually was received on March 11, 2003, at the Summerside Tax Centre.

[56] It is rather surprising that a company in the transportation industry, for which this excise tax represents a considerable amount of money, could have been completely unaware of the possibility of claiming a refund, and that it was simply a conversation overheard by chance in a restaurant that prompted the company to submit a claim just a few days before the deadline.

[57] On a balance of probabilities, I am satisfied that it is not possible that the application for refund sent by Ms. Caron was physically mailed before February 17, 2003. The application was probably mailed in the days following the budget statement tabled on February 18, 2003.

[58] This finding of fact in itself renders any application for refund inadmissible and is sufficient reason for this action to fail.

[59] There is no doubt that the plaintiff's claim may inspire sympathy for reasons of fairness, but a State has the inalienable power to legislate from time to time to modify the rights of taxpayers, and taxpayers who have or believe that they have legitimate rights also have a responsibility to make their intentions known as soon as possible.

[60] Finally, the Canadian International Trade Tribunal has already heard, on many occasions, claims that are somewhat similar to those in the case at bar and has rejected them for the reasons I discussed in the preceding. Although the Federal Court is not bound by decisions of the Canadian International Trade Tribunal, it is obvious that the Court nevertheless has a duty to study these decisions and to take into consideration the thoroughness with which the statutory amendments in the *Budget Implementation Act, 2003* were studied by the Tribunal. In the present case, I do not see any reasons why the conclusions reached by the Canadian International Trade Tribunal should be disregarded.

[61] I am of the opinion that determination 20031204QUE210, dated December 4, 2003, to the effect that the plaintiff's application for refund had been received by the Minister on March 11, 2003, that is, after the statutory time limit specified in the *Budget Implementation Act, 2003*, which set February 17, 2003, as the final date for submitting such an application, was well founded.

[62] Accordingly, the plaintiff's appeal must be dismissed.

JUDGMENT

1. The Court dismisses the plaintiff's appeal;

2. With costs.

"Pierre Blais"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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