



Ottawa, Monday, November 20, 2000

**Appeal Nos. AP-99-093 to AP-99-102
and AP-2000-010 to AP-2000-012**

IN THE MATTER OF appeals heard on July 26, 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 September 24 and 30, 1999, and March 7, 2000, with respect to notices of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

**WESTERN CONSTRUCTION COMPANY LIMITED,
J-1 CONTRACTING LTD.,
PENNEY CONSTRUCTION LIMITED,
S M CONSTRUCTION COMPANY LIMITED,
LABRADOR CONSTRUCTION LIMITED,
RDN CONSTRUCTION LIMITED,
PROVINCIAL PAVING LIMITED,
TERRA NOVA INDUSTRIES LTD.,
TRIPLE C HOLDINGS LTD./PENNEY INVESTMENTS LTD.,
MCNAMARA CONSTRUCTION COMPANY, A DIVISION OF TARMAC CANADA INC.,
MODERN PAVING LIMITED,
PYRAMID CONSTRUCTION LIMITED AND
CLIFFORD SHEAVES CONSTRUCTION LIMITED**

Appellants

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

AND

CANADIAN CONSTRUCTION ASSOCIATION

Intervener

DECISION OF THE TRIBUNAL

The appeals are allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-99-093 to AP-99-102 and AP-2000-010 to AP-2000-012

WESTERN CONSTRUCTION COMPANY LIMITED,
J-1 CONTRACTING LTD.,
PENNEY CONSTRUCTION LIMITED,
S M CONSTRUCTION COMPANY LIMITED,
LABRADOR CONSTRUCTION LIMITED,
RDN CONSTRUCTION LIMITED,
PROVINCIAL PAVING LIMITED,
TERRA NOVA INDUSTRIES LTD.,
TRIPLE C HOLDINGS LTD./PENNEY INVESTMENTS LTD.,
MCNAMARA CONSTRUCTION COMPANY, A DIVISION OF
TARMAC CANADA INC.,
MODERN PAVING LIMITED,
PYRAMID CONSTRUCTION LIMITED AND
CLIFFORD SHEAVES CONSTRUCTION LIMITED

Appellants

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

AND

CANADIAN CONSTRUCTION ASSOCIATION

Intervener

These are appeals pursuant to section 81.19 of the *Excise Tax Act* of assessments of the Minister of National Revenue with respect to excise tax imposed on diesel fuel used for heating aggregate rock in the manufacture of asphalt. The issue in these appeals is whether the fuel oil that is intended for use and actually used by the appellants to heat aggregate rock in the manufacture of asphalt is “heating oil” within the definition of “diesel fuel” found in subsection 2(1) of the *Excise Tax Act* and, consequently, whether the fuel oil so used is exempt from the excise tax to which it would otherwise be subject pursuant to subsection 23(9.1) of the *Excise Tax Act*.

HELD: The appeals are allowed. The evidence adduced in these appeals clearly leads to the conclusion that the term “heating oil” has to be construed according to the terminology given by people familiar with the petroleum industry. The evidence before the Tribunal is that the heating fuel oils covered by the national standards are intended for use in oil-burning equipment for the generation of heat for domestic and industrial purposes. The Tribunal is also of the view that “industrial purposes” can refer to the heating of aggregate rock in the manufacture of asphalt. The Tribunal is also convinced that this approach fairly reflects the object of the *Excise Tax Act* and the intention of Parliament. Therefore, the Tribunal finds that the fuel oil used by the appellants to heat aggregate rock in the manufacture of asphalt is heating oil and is exempt from excise tax under the *Excise Tax Act*.

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 26, 2000
Date of Decision: November 20, 2000

Tribunal Members: Pierre Gosselin, Presiding Member
Peter F. Thalheimer, Member
James A. Ogilvy, Member

Counsel for the Tribunal: Gilles B. Legault
Dominique Laporte (articling student)

Clerk of the Tribunal: Margaret Fisher

Appearances: Glen S. Belbin, for the appellants
Lysanne K. Lafond, for the respondent
Brian C. Pel, for the intervener



Appeal Nos. AP-99-093 to AP-99-102 and AP-2000-010 to AP-2000-012

WESTERN CONSTRUCTION COMPANY LIMITED,
J-1 CONTRACTING LTD.,
PENNEY CONSTRUCTION LIMITED,
S M CONSTRUCTION COMPANY LIMITED,
LABRADOR CONSTRUCTION LIMITED,
RDN CONSTRUCTION LIMITED,
PROVINCIAL PAVING LIMITED,
TERRA NOVA INDUSTRIES LTD.,
TRIPLE C HOLDINGS LTD./PENNEY INVESTMENTS LTD.,
MCNAMARA CONSTRUCTION COMPANY, A DIVISION OF
TARMAC CANADA INC.,
MODERN PAVING LIMITED,
PYRAMID CONSTRUCTION LIMITED AND
CLIFFORD SHEAVES CONSTRUCTION LIMITED

Appellants

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

AND

CANADIAN CONSTRUCTION ASSOCIATION

Intervener

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
PETER F. THALHEIMER, Member
JAMES A. OGILVY, Member

REASONS FOR DECISION

INTRODUCTION

These are appeals pursuant to section 81.19 of the *Excise Tax Act*¹ of assessments of the Minister of National Revenue with respect to excise tax imposed on diesel fuel used for heating aggregate rock in the manufacture of asphalt. On February 29 and June 28, 2000, the Tribunal granted the appellants' request to join the appeals and have them heard together. On March 13, 2000, the Tribunal granted intervener status to the Canadian Construction Association (CCA).

The issue in these appeals is whether the fuel oil that is intended for use and actually used by the appellants to heat aggregate rock in the manufacture of asphalt is "heating oil" within the definition of "diesel fuel" found in subsection 2(1) of the Act and, consequently, whether the fuel oil so used is exempt from the excise tax to which it would otherwise be subject pursuant to subsection 23(9.1) of the Act.

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

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

[2(1)] “diesel fuel” includes any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel oil that is intended for use and is actually used as heating oil.

23(1) Subject to subsections (6) to (8.3) and 23.2(6), 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 applicable rate set out in the applicable section 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.

[23](9.1) Where fuel other than aviation gasoline has been purchased or imported for a use for which the tax imposed under this Part on diesel fuel or aviation fuel is not payable and the purchaser or importer sells or appropriates the fuel for a purpose for which the fuel could not have been purchased or imported without payment of the tax at the time he purchased or imported it, the tax imposed under this Part on diesel fuel or aviation fuel shall be payable by the person who sells or appropriates the fuel

- (a) where the fuel is sold, at the time of delivery to the purchaser; and
- (b) where the fuel is appropriated, at the time of that appropriation.

Schedule I to the Act, which concerns goods subject to tax under Part III, provides the following under section 9.1:

Diesel fuel and aviation fuel, other than aviation gasoline, \$0.04 per litre.

EVIDENCE

The appellants and the respondent provided the Tribunal with an agreed statement of facts with respect to the use of the fuel oil and the manufacturing process. The appellants carry on business in Newfoundland and conduct, among other things, road construction work using asphalt manufactured or produced by them in portable asphalt drum mixing plants. The parties conceded that the fuel purchased by the appellants is suitable for use in an internal combustion engine of the compression-ignition type. The appellants and the respondent agreed that the fuel was used exclusively to generate the heat necessary to manufacture or produce the asphalt mix (i.e. to heat and dry the aggregate materials). In the manufacturing process, the crushed rocks, or aggregate, are fed from a cold feed unit to a conveyor. The aggregate is then fed into a large cylinder-shaped dryer burner and blower, where specially designed flights cascade it through an intense burner flame. When the aggregate is heated to the appropriate temperature in the burner, it continues to move through the system. Pre-heated liquid asphalt is then supplied in direct proportion to the amount of incoming aggregate, and the combination is mixed in a drum to produce a uniform, thoroughly coated mix.

In addition to the information contained in the agreed statement of facts, the Tribunal heard the evidence of Mr. John A. Taylor on the manufacture, sale and utilization of petroleum-based fuels and on the standards that apply to them. The Tribunal qualified Mr. Taylor, who is Senior Advisor, Fuels and Additives, at Petro-Canada, as an expert in petroleum fuel standards used in Canada, including diesel and heating oil. Mr. Taylor gave evidence on the appellants' behalf. Mr. Taylor stated that he was Petro-Canada's representative on a number of Canadian General Standards Board (CGSB) committees and working groups on petroleum fuels. He explained that the CGSB was a federal government agency accredited by the Standards Council of Canada to develop voluntary national standards for various

products. One of the CGSB's committees, the Committee on Middle Distillate Fuels (CMDf), is charged with the responsibility for standards relating to middle distillate and residual petroleum-derived fuels. The CMDf numbers approximately 40 persons, including representatives of producers, consumers, retailers and governments, as well as members of different technical, professional and trade associations. One of the standards for which the CMDf is responsible is for heating fuel oil (HFO), and it applies to three types of distillate fuel oils and three types of heavier oils.²

Mr. Taylor stated that the standard for HFO became effective in 1981. The CMDf, which developed this standard, was at that time comprised of a number of persons among whom were several representatives from different departments of the federal government. Mr. Taylor indicated that the standard for HFO is, in fact, the national standard in Canada and is used without modification by the Government of Canada for its purchases of heating oil. He further indicated that the Canadian standards were very similar to the U.S. standard.

During his testimony, Mr. Taylor referred to a document on the standard for HFO, which provides uses for six different types of fuel oils. He testified that the standard for HFO specifies that types 0, 1 and 2 fuel oils are intended for the generation of heat for both domestic space heating purposes and industrial purposes. He further stated that, with respect to types 4, 5 and 6 fuel oils, the standard provides, as for the first three types of fuel oils, that they can be used for the generation of heat in both domestic and industrial applications. In response to the respondent's questions, Mr. Taylor testified that heating oil includes furnace oil and stove oil and agreed that one of the purposes of heating oil is to heat a home or building. He also provided the example of type 1 heating oil being used in tobacco curing. In answering questions from the Tribunal, Mr. Taylor testified that the term "heating oil", as commonly understood in the Canadian petroleum industry, refers to a fuel that is used either to heat spaces where people live or to heat up equipment that is used for a variety of industrial purposes. He noted that the same domestic and industrial defined uses were found in the 1981 version of the standard for HFO and are currently provided in the U.S. standard for HFO. When asked to define what was commonly understood by the expression "used for industrial purposes", Mr. Taylor testified that it could be any industrial use and gave examples of several types of non-domestic applications, such as in asphalt dryers. Furthermore, Mr. Taylor testified that, in his view, the type of fuel oil that would generally be used to fire the burners in portable asphalt drum mixing plants could range from natural gas to liquid fuel oil.

ARGUMENT

Relying on Mr. Taylor's testimony and the agreed statement of facts, the appellants indicated that the term "heating oil" is not defined in the Act and submitted that heating oil does not have any particular physical properties that differentiate it from other light and middle distillate fuels. The appellants stated that the evidence presented by Mr. Taylor clearly indicates that the fuel oils covered by the standard for HFO are intended for use in oil-burning equipment for the generation of heat for both domestic and industrial purposes. In the appellants' view, the standard for HFO is representative of the common understanding of the industry. The appellants submitted that the standard clearly covers fuel oils that are intended for use in oil-burning equipment for the generation of heat for domestic and industrial purposes. The appellants also submitted that, historically, fuel oil has always been sold to asphalt manufacturers exempt from excise tax as heating oil.

2. Exhibits 10.1 and 16.1.

The respondent urged the Tribunal to follow the Tariff Board ruling in *Canadian Utilities v. DMNRCE*,³ in which the Tariff Board attributed to the term “heating” the meaning of raising the temperature in buildings for human convenience. The appellants argued, however, that the limited interpretation put on these words cannot be justified. The appellants argued that the Tariff Board had adopted a strict and literal approach, construed to the detriment of the taxpayer, wherein the written expression almost exclusively prevailed over the legislation’s context and objectives. The appellants also noted that *Canadian Utilities* did not deal with the term “heating oil”, but was rather a case about natural gas for illuminating or heating purposes under the federal sales tax regime.

For the purpose of demonstrating that the ruling in *Canadian Utilities* was unfounded, the appellants went through a historical review of the provisions of the Act and its predecessor, the *Special War Revenue Act*,⁴ as well as the different legislative amendments that took place over the years. The appellants argued that the legislative purpose of the 1949 amendments made to Schedule III to the *Special War Revenue Act* was clearly set out in the budget speech delivered on October 20, 1949, by the Hon. Douglas Abbott, Minister of Finance at that time.⁵ The speech contained specific references to industrial uses of heating oil, particularly in the pulp and paper and steel industries. In light of the historical legislative review, the appellants submitted that there was no doubt that the exemption for fuel oil for heating was not restricted to homes or buildings, but that it also applied to industrial uses. They made reference to the decision in *Attorney-General of Quebec v. Eastmain Band*⁶ where the Federal Court of Appeal held that a court may take judicial notice of debates in the House of Commons, in particular a speech from a minister, to determine which of two statutory interpretations was more consistent with Parliamentary intent. Therefore and for the above reasons, the appellants submitted, *Canadian Utilities* was essentially of little value in the context of the history and purpose of the Act.

The appellants noted that fiscal statutes, such as the Act, are no longer to be construed by a strictly literal method; they are to be interpreted according to the principles that apply to all legislation. The appellants submitted that section 12 of the *Interpretation Act*⁷ imposes a duty to give any enactment a fair, large and liberal construction and interpretation in order to ensure the attainment of its object. The CCA supported the appellants’ position.

The respondent submitted that the appellants did not intend to use or did not actually use the fuel oil as heating oil and that, therefore, it was not exempt from the provisions of the Act.

With respect to the decision in *Canadian Utilities*, the respondent submitted that, even though it dealt essentially with the federal sales tax exemptions under the Act, it is relevant to the present case, as it provided a definition of the words “heating” and “heating purposes”. In the respondent’s view, this case is also of significant importance because it refers to the “popular sense” of the word “heating”.

The respondent submitted that the jurisprudence clearly indicates that a statute must be construed according to the ordinary meaning of the words when the provision is clear and unambiguous. This is particularly the case when there is no technical or trade meaning for the word, which, counsel argued, is the case here for the term “heating oil”.⁸ The respondent argued that the term “heating oil” was defined in

3. (1963) 3 T.B.R. 60 (hereinafter *Canadian Utilities*).

4. R.S.C. 1927, c. 179.

5. *Official Report of Debates*, House of Commons, Vol. 1, 1949, at 972.

6. (1992) 98 D.L.R. (4th) 206 (FCA).

7. R.S.C. 1985, c.I-21.

8. *Canadian National Railway v. Canada*, 171 N.R.64 (FCA).

dictionaries as “fuel oil: used in domestic heating units”⁹ and as “[o]il used for residential heating”.¹⁰ Consequently, the respondent argued that the appellants have not demonstrated that the fuel oil should be exempt from tax, in that they did not demonstrate that the fuel was intended for use or actually used as heating oil to raise the temperature in a building, home or structure. Finally, if Parliament had intended to exempt fuel oil used in the manufacture of asphalt or for purposes other than to heat homes, structures or buildings, the respondent argued, Parliament would have said so expressly.

Dealing with the standard for HFO, the respondent submitted that it is irrelevant for the purposes of understanding the meaning of the terms “heating” and “diesel fuel”, since it does not give any indication of the legislator’s intent for the purpose of the Act. In addition, the respondent argued that the evidence presented by Mr. Taylor revealed that the words “heating oil” do not bear any specific industry or technical meaning. In fact, the respondent noted, several names can be given to different fuel products.

Turning to the reference to the term “industrial purposes” which is provided by the standard for HFO, the respondent argued that the evidence demonstrates that no recognized understanding or definition exists in the industry of what is meant by these words.

The respondent noted that the definition of diesel fuel was included in the Act in 1981. The respondent referred to the December 1979 budget speech of the Minister of Finance,¹¹ which outlined that the purpose for the excise tax on gasoline, diesel and transportation fuel was to encourage people to use fewer oil products, to conserve oil products and to raise revenues. The respondent further argued that it was unnecessary to give any weight to the House of Commons debates to interpret the legislation, since, in this case, the ordinary sense of the words “heating oil” should prevail. In respect of the historical analysis provided by the appellants, the respondent submitted that the legislative evolution that led to the provisions referred to in *Canadian Utilities*, as well as the House of Commons Debates going back to 1949, were not relevant to the interpretation of the words “heating oil” found in the 1981 amendments to the Act.

DECISION

Subsection 2(1) of the Act defines “diesel fuel” as including any fuel oil that is suitable for use in internal combustion engines of the compression-ignition type, other than any such fuel oil that is intended for use and actually used as heating oil.

The issue in these appeals is whether the fuel oil that is used by the appellants to heat aggregate rock in the manufacture of asphalt is excluded from the definition of “diesel fuel” found in subsection 2(1) of the Act by virtue of qualifying as fuel oil that is intended and actually used as heating oil. The parties did not dispute the fact that the appellants used and intended to use the fuel oil for the purpose of heating aggregate rock in the manufacture of asphalt. It has also been agreed that the heat is applied through an intense burner flame. The appellants’ fuel oil is also admitted as being suitable for use in internal combustion engines of the compression-ignition type. Therefore, the Tribunal must decide if the fuel oil used by the appellants is “heating oil” within the meaning to be given to that term in the Act. If the appellants’ fuel oil is found to be “heating oil” within the meaning of the Act, it will be exempt from excise tax.

There is no definition of the term “heating oil” in the Act. How, then, is it to be interpreted? The respondent urges the Tribunal to rely on dictionaries, where heating oil is defined as “fuel oil: used in

9. *McGraw-Hill Dictionary of Scientific and Technical Terms*, 4th ed., s.v. “heating oil”.

10. *Manual of Oil and Gas Terms*, 8th ed., s.v. “Heating oil”.

11. *Budget Speech*, Department of Finance, 11 December 1979 at 4.

domestic heating units” and “[o]il used for residential heating”.¹² Such interpretations are in line with the Tariff Board’s interpretation of “heating purposes” in *Canadian Utilities*.

The appellants say that “heating oil” is to be interpreted having regard to the industry or users affected by the provisions of the legislation. The Tribunal agrees with this approach. The correct approach to statutory interpretation, including taxation and fiscal legislation, is the modern contextual approach which provides that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.¹³

Given the provision under consideration here and the definition and interpretation of diesel fuel suitable for use in internal combustion engines, it is appropriate to have regard to how the petroleum industry would define the term “heating oil”. This is consistent with the position taken by the Federal Court of Appeal when deciding whether to rely on a common or “popular” definition of the word “pipeline” or to rely on the interpretation given to that word by the industry in question. The Federal Court of Appeal stated:

[Pipeline] is a word in fairly common usage . . . I would have thought that in construing it in its “popular sense” would mean that sense “which people conversant with the subject matter with which the statute is dealing . . . would attribute to it” . . . not the popular sense derived from the perception of the man in the street not conversant with either the user industries or pipelines.¹⁴

Accordingly, the Tribunal is of the view that, under the Act, “heating oil” has to be construed according to the meaning given by people familiar with the petroleum industry rather than that given by dictionary definitions. The Tribunal, in considering on which definition to rely, is persuaded that the views expressed by Mr. Taylor should prevail. His participation on CGSB committees on petroleum fuels in general, and on the CMDF in particular, has given him an in-depth perspective on matters relating to [the uses of] fuel oils. He claims, and it is supported by the standard for HFO, that heating oil can refer to products that have both residential and industrial applications. The evidence before the Tribunal is that the HFO covered by the standard is intended for use in oil-burning equipment for the generation of heat for domestic and industrial purposes. In particular, section 1.2.2 of the standard indicates that types 4, 5 and 6 fuel oils are essentially industrial fuels suitable for use in boilers, metallurgical operations, etc.¹⁵ The Tribunal accepts Mr. Taylor’s testimony to the effect that the term “heating oil”, as commonly understood in the Canadian petroleum industry, refers to a fuel that is used either to heat space or to heat equipment that is used for a variety of industrial purposes. He gave numerous examples of what constitutes “industrial purposes”, and the Tribunal is persuaded that the term can refer to things not primarily intended or used for warming people.

Moreover, the Tribunal is convinced that this approach fairly reflects the object of the Act and the intention of Parliament. The object of the Act is the raising of revenues by means of a tax on diesel fuel, with the exception of diesel fuel used as heating oil. According to the jurisprudence,¹⁶ regard can be given to Parliamentary debates and speeches when assessing the purpose of an act and the intention of Parliament. The Tribunal notes that the term “diesel fuel” was added to subsection 2(1) of the Act on July 8, 1981.

12. *Supra* notes 9 and 10.

13. E.A. Driedger, *Construction of Statutes*, 2nd ed. at 87, cited in *Will-Kare Paving & Contracting v. Canada*, [2000] S.C.J. No.35 and *Stuart Investments v. The Queen*, [1984] 1 S.C.R. 536 at 578.

14. *Her Majesty the Queen v. Nova, An Alberta Corporation* [1988] 2 C.T.C. 167 (FCA) at 174.

15. *Supra* note 2.

16. *Supra* note 6.

The budget speech of the Minister of Finance¹⁷ prior to the amendment announced that an excise tax was to be imposed on gasoline, diesel and other transportation fuels. The Minister of Finance's speech made it clear that the tax would "not apply to heating oil in the home or elsewhere" [emphasis added]. It appears, therefore, that Parliament did not intend to limit the tax exemption to heating oil for domestic uses only, but rather allowed the exemption to apply to other uses, such as for commercial heating purposes or industrial purposes. The Tribunal notes that the definition of diesel fuel was introduced in the Budget Papers of December 11, 1979.¹⁸ The Tribunal also notes that the standard for HFO was in force when the Act was amended to include diesel fuel. Accordingly, the Tribunal concludes that Parliament intended to give the term "heating oil" the trade meaning commonly accepted in the oil industry.

In view of the legislative and definitional evolution with respect to the term "heating oil", the Tribunal feels that this case can be distinguished from the *Canadian Utilities* decision issued by the Tariff Board in 1963.

In conclusion, the Tribunal finds that the fuel oil used by the appellants to heat aggregate in the manufacture of asphalt is heating oil and is, therefore, exempt from excise tax under the Act.

Accordingly, the appeals are allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

James A. Ogilvy
James A. Ogilvy
Member

17. On December 11, 1979.

18. *Notices of Ways and Means Motions and supplementary information on the Budget*, Department of Finance, 11 December 1979.