
CANADA / JUDGMENT

Penner International Inc. v. The Queen

2001 FCT 988

COURT

Federal Court

DECIDED

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Penner International Inc. v. The Queen

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T-48-98

Decision Content

Date: 20010905

Docket: T-48-98

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BETWEEN:

PENNER INTERNATIONAL INC.

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

AND

Docket: T-49-98

BETWEEN:

BISON DIVERSIFIED INC.

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

HENEGHAN J.

INTRODUCTION

[1] Penner International Inc. ("Penner") and Bison Diversified Inc. ("Bison") are the Plaintiffs in causes T-48-98 and T-49-98, respectively. Penner and Bison are each appealing against decisions made by the Defendant Minister of National Revenue (the "Minister") pursuant to the Excise Tax Act, R.S.C. 1985, c. E-15 as amended (the "Act"). The appeals are proceeding by way of action under the Act.

FACTS

[2] Penner is a corporation incorporated pursuant to the laws of Manitoba. At all material times to this action, it carried on the business of a trucking operation which routinely ran trucks from Canada into the United States of America. Between 1989 and 1992 Penner purchased diesel fuel in Canada which was used in those trucks whose destination was outside Canada and in the United States. It paid federal sales tax and excise tax pursuant to the Act in the amount of \$37,561.00 relative to the purchase of diesel fuel.

[3] Penner submitted an application dated December 30, 1992 for a refund of the Federal Sales Tax ("FST") and Excise Tax ("ET") for the years 1989 to 1992, inclusive. This application was received by the Defendant on January 6, 1993. On February 1, 1993, the Minister issued a Notice of Determination to Penner, disallowing the application.

[4] Penner filed a Notice of Objection on March 2, 1993 and in response, received a Notice of Decision from the Minister dated October 16, 1997, disallowing the objection and confirming the determination. The primary basis for the Minister's decision was that the diesel fuel was removed from Canada to be consumed in the operation of the trucks and not for a commercial purpose, for example, to be sold or otherwise merged with goods in the United States.

[5] Penner now appeals the determination pursuant to section 81.2 of the Act.

- [6] Penner's application for rebate of the FST and ET was made pursuant to section 68.1 of the Act. It also claims entitlement to a drawback of the taxes paid, pursuant to section 70(1)(a) of the Act.
- [7] Penner and the Minister agree that the claim is unaudited and the quantum unverified. Accordingly, if Penner is successful in this appeal, the matter must be referred back to the Minister to conduct an audit for determination of the quantum of taxes paid and the amount of refund to which Penner is entitled.
- [8] Likewise, Bison is a corporation incorporated under the laws of Manitoba and carries on a trucking operation business in which it operates trucks which pick up goods in Canada and delivers them into the United States of America for use or consumption by American or other non-Canadian customers. Between the beginning of 1989 and the end of 1992, Bison purchased diesel fuel in Canada for use in the operation of those trucks for destinations outside Canada in the United States of America. The fuel was consumed during the operation of the trucks and it was not unloaded at any destination outside of Canada. It was not destined for supply or sale to any foreign customer, but was used for the operation of trucks transporting goods to a foreign destination.
- [9] Bison paid FST and ET pursuant to the Act with respect to its purchases of fuel used to operate its trucks. The amount of tax paid by Bison was \$41,771.56.
- [10] On December 20, 1992, Bison filed an application for rebate of the FST and ET paid in the amount of \$41,771.56. The Minister issued a Notice of Assessment to Bison dated January 24, 1993 which disallowed the application for rebate. Bison filed a Notice of Objection on February 26, 1993 and received a Notice of Decision from the Minister dated October 16, 1997, disallowing its objection and confirming the determination.
- [11] Bison now appeals the determination pursuant to section 81.2 of the Act. It filed its application for rebate of the FST and ET pursuant to section 68.1 of the Act and it also claims entitlement to a drawback of taxes paid, pursuant to section 70(1)(a) of the Act.
- [12] Bison and the Minister agree that the claim is unaudited and that quantum is not verified. If Bison is successful, the matter must be referred back to the Minister for the conduct of an audit to determine the quantum of taxes paid and the amount of refund to which Bison is entitled.

PLAINTIFFS' SUBMISSIONS

- [13] The Plaintiffs seek relief pursuant to both section 68.1 and 70(1)(a) of the Act. Section 68.1 provides that an application for rebate shall be made within two years of having paid the tax in issue. If the Plaintiffs are out of time in their rebate application for the years 1989 and 1990, they say that they are entitled to the benefit of the drawback application provided for in section 70(1)(a), which application must be made within four years after payment of the taxes.

- [14] The Plaintiffs argue that they are entitled to a rebate of the FST and the ET on the basis that the taxes were paid in relation to goods which were exported from Canada pursuant to sections 68.1 and 70(1) of the Act. The Plaintiffs rely on the decision of the Supreme Court of Canada in *R. v. Carling Export Brewing and Malting Co.*, [1930] 2 D.L.R. 725 (reversed on other grounds in [1931] A.C. 435 P.C.)).
- [15] The Plaintiffs submit that according to the relevant jurisprudence, the removal of diesel fuel in the operation of their trucks constitutes an "export" from Canada to the United States. The Plaintiffs also rely on the decisions in *Muller v. Baldwin* (1874), 9 L.R. 457 (Q.B.), *Fox v. Kooman*, [1919] 121 L.T. 575 (K.B.) and *R. v. Wulff*, [1970] 74 W.W.R. 549 (B.C.C.A.).
- [16] The Plaintiffs further argue that Parliament had the option of excluding fuel in a gas tank as a commodity eligible for rebate and chose not to do so.

DEFENDANT'S SUBMISSIONS

- [17] The Defendant initially submits that the Plaintiffs have failed to discharge the onus upon them of demonstrating that they are entitled to the benefit of an exemption in a taxing statute; see *Canada v. Sarnia Brewing Co.*, [1928] Ex.C.R. 219 at 222. The Defendant argues that in the present case, the onus lies upon the Plaintiffs to show that they have met all requirements for a refund or drawback pursuant to Act and in the absence of doing so, their claims must be dismissed.
- [18] Second, the Minister argues that the word "export" as used in the Act must be interpreted in a commercial sense, having regard to the context and purpose of tax legislation. The Defendant submits that the commercial sense of "export" is to be understood in accordance with its ordinary and generally accepted meaning as referring to the ordinary activities of purchase and sale of goods. The Defendant Minister disputes that the word "export" as used in the Act could include the use of fuel for the operation of trucks engaged in the transportation industry.
- [19] The Minister refers to accepted principles of statutory interpretation, the ordinary dictionary meaning of the word "export" and the decisions in *Old HW-GW Ltd. v. Canada* [1991] 1 C.T.C. 460, *Old HW-GW Ltd. v. Canada* [1993] 1 C.T.C. 363 (F.C.A.) and *Flavell v. Deputy Minister of National Revenue, Customs and Excise*, [1997] 1 F.C. 640.
- [20] The Minister submits that the removal of the diesel fuel from Canada to the United States in the manner described by the Plaintiffs does not meet the test of "export" in that these goods were not intended for a foreign destination nor was there a severance of these goods from the general mass of goods in one country and their unification with the mass of goods in another country. In these circumstances, the Minister argues that the Plaintiffs have failed to establish that there has been an "export" of the diesel fuel as that term is generally understood in the jurisprudence, and accordingly their actions must fail.

- [21] The Minister also argues that the application for a rebate pursuant to section 68.1 of the Act, for the years 1989 and 1990, is out of time since the application was made more than two years after the removal of the goods in question.
- [22] Alternatively, the Minister argues that the Plaintiffs are not entitled to a drawback pursuant to section 70(1)(a) of the Act since the operation of that section depends upon establishment that the goods have been exported from Canada. However, in the event that the court should find that the goods were in fact exported, the Defendant Minister argues that the drawback relief pursuant to section 70(1)(a) is not available because the Plaintiffs did not apply for such relief in accordance with that section. Section 70(1)(a) provides that a drawback may be granted on application. No application was filed by the Plaintiffs and accordingly, the Defendant Minister says that that relief is not available.
- [23] Further, the Defendant Minister argues that even if the application for refund is found to be a claim for a drawback, the Act does not provide a statutory right of appeal from the Minister's decision denying a drawback pursuant to section 70(1). Therefore, the Court is without jurisdiction to grant relief pursuant to that section.

ISSUES

- [24] The issues arising in these actions are as follows:
1. Was the diesel fuel consumed by the Plaintiffs' trucks in the course of their cross-border trucking businesses "exported" goods as contemplated by section 68.1 of the Act?
 2. If the diesel fuel is found to be exported pursuant to section 68.1 were the Plaintiffs' applications for refund with respect to the years 1989 and 1990 commenced after the expiry of the limitation period and consequently, are statute barred.
 3. Are the Plaintiffs entitled to a drawback of tax paid on the diesel fuel pursuant to section 70(1)(a) of the Act.

ANALYSIS

- [25] The relevant statutory provisions for the disposition of these actions are section 68.1 and section 70(1)(a) of the Act which provide as follows:

68.1 (1) Where tax under this Act has been paid in respect of any goods and a person has, in accordance with regulations made by the Minister, exported the goods from Canada, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person if that person applies therefor within two years after the export of the goods.

68.1 (1) Lorsque la taxe prévue par la présente loi a été payée sur des marchandises qu'une personne a exportées du Canada en conformité avec les règlements pris par le ministre, un montant égal à cette taxe est, sous réserve des autres dispositions de la présente partie, payé à la personne si elle en fait la demande dans les deux ans suivant l'exportation des marchandises.

70. (1) Subject to subsection (5), on application, the Minister may, under regulations of the Governor in Council, grant a drawback of the taxes imposed by Part III, IV, V or VI and paid on or in respect of

(a) goods exported from Canada;

70. (1) Sous réserve du paragraphe (5), le ministre saisi d'une demande peut, en application de règlements du gouverneur en conseil, accorder un drawback des taxes imposées par les parties III, IV, V ou VI payées à l'égard des marchandises_:

a) exportées du Canada;

[26] The key to the disposition of these appeals is the meaning to be accorded to the word "export" as that term is used in the Act. The primary basis for the Minister's decision, in respect of each Plaintiff, is that the removal of the diesel fuel from Canada did not occur in the context of a commercial transaction. The negative Notice of Decision issued by the Minister to each Plaintiff provided, in part, as follows:

The fuel at issue was neither for delivery or unloading in another country nor was it destined, as a commercial transaction, for the supply or sale of fuel to a foreign customer. Furthermore, the fuel was not intended for uniting with the mass of goods belonging to another country, but it was rather consumed during transportation services provided by you. In addition, the fuel was not declared for the purpose of export to Canada Customs authorities.

[27] The Minister reached the following conclusion:

In the circumstances, the diesel fuel at issue, for consumption in your own highway vehicles in the United States, cannot be considered as goods exported under the ordinary notion of export, as commonly understood in commerce, and as contemplated by the ETA.

[28] The arguments advanced by the Plaintiffs in the present case rest on the view that the mere removal of goods from Canada, independent of any further sale of those goods in a foreign country, meets the legal definition of "export". On the other hand, the Minister argues that the removal of goods from Canada must occur in a context of trade or sale in order to abstract the exemption for taxation provided by the Act.

[29] The Plaintiffs urge a literal interpretation of the word "export" in order to obtain a favourable resolution and recovery of taxes paid on the diesel fuel consumed in their trucking operation. The Minister bases his argument on principles of statutory interpretation, having regard to the nature of the legislation in issue. The two different approaches were considered by this Court in *Flavell v. Deputy Minister of National Revenue, Customs and Excise*, supra, in respect of the issue of the importation of goods into Canada and the Customs Act, R.S.C. 1985 (2nd Supp.), c. 1.

[30] In *Flavell*, supra, the taxpayer appealed from the decision of the Canadian International Trade Tribunal (CITT) which upheld the imposition of duty upon a houseboat which had been outfitted with a new engine in the United States of America, following the irreparable

breakdown of the former engine. This engine replacement had been completed in the United States of America and the installation of the new engine was reported to Canadian customs officials upon the re-entry of the vessel into Canada. That reporting led to the classification of the houseboat and the Customs Tariff as a motorboat, other than an outboard motor. Mr. Flavell was then assessed for duty on the entire value of the houseboat.

[31] Although the value of the boat for duty purposes was subsequently reduced, the Deputy Minister confirmed the tariff classification and duty. On appeal, the majority of the CITT held that "import" meant "to bring into" the country, and therefore the houseboat was imported and subject to duty. This Court reversed that decision upon further appeal by the taxpayer.

[32] In his decision, Justice Campbell considered the principles of statutory interpretation, beginning with the interpretative guideline of applying the literal or grammatical meaning of the words "all goods that are imported". He concluded that these words should be interpreted within a clearly commercial context, that is embracing the idea of a transfer of goods from one country to another. He also found that the majority of the CITT misinterpreted the words of Strayer J. (as he then was) in *Old HW-GW Ltd. v. Canada* (Minister of National Revenue), *supra*, [1997] 1 F.C. 640 and said as follows at pages 663 and 664:

22. I find that there is a misinterpretation within the Tribunal's majority decision which undermines its value in determining ordinary meaning. In arriving at its own interpretation of "export", the majority uses Strayer J.'s quotes from *Old HW-GW Ltd. v. Canada* (now reported at [1991] 1 C.T.C. 460) that, at page 466:

... "export" normally involves the transfer of goods from one country to another ...

... the most natural meaning in a commercial context for the term "export" or "exportation" is the sending of goods from one country to another, foreign, country". [Emphasis added.]

From these phrases the majority [at page 204]:

... adopts the definition of "export", meaning to send out from one country and into another or cause to be sent out from one country and into another". [Emphasis mine.]

23. The error is that the majority finds from Strayer J.'s words the meaning of "export" to be the downgraded notion of mere mechanical movement from one country to another. The words used by Strayer J. as authority state much more; a "transfer" of goods from one country to another or "a sending" within a commercial context.

24. The question is, what would Côté's more properly stated "average person on the street" understand by the words "export" and "import" used in an Act administering the collection of customs. Within my understanding of what generally informed people think, there is no doubt that international trade comes to mind with trucks and ships transporting goods to and from Canada and nations around the world. Thus, the words should be interpreted within this clearly commercial context.
- [33] In his conclusion, Justice Campbell rejected the narrow, literal interpretation of the words "goods that are imported" urged by the Minister. He adopted the interpretation submitted by the taxpayer, to the effect that goods originating in Canada which are removed from the country and then brought back into Canada, independent of trade or a commercial exchange, should remain free from the imposition of duty. The Court rejected a mechanical interpretation, having regard to the absence of a statutory definition of "export".
- [34] In my opinion, the submissions advanced by the Plaintiff must yield to the arguments advanced by the Minister which focus on the nature and purpose of the Act.
- [35] The Act is a taxation statute. It is designed to generate revenues for the government. There is no indication in the Act that the word "export" should bear anything other than its ordinary meaning. The ordinary meaning is related to the sphere of international trade and commerce which usually involves some form of economic transaction. On the facts of the present cases, the diesel fuel is not the subject of trade but is consumed by the Plaintiffs themselves in the course of carrying out their transportation business which operates between Canada and the United States.
- [36] Finally, even if economic transactions of purchase and sale are not required for the purposes of "export", I agree with the Minister's argument that at a minimum, the goods must be intended for a foreign destination in the sense that they are severed from the mass of goods in one country and merged with the mass of goods in another country. That test cannot be met in the present cases since the fuel was consumed en route and there was nothing left for merger with a mass of goods in the United States of America.
- [37] The requirements of severance and merger are specifically addressed in the decision in *Canada v. Carling Export Brewing and Malting Co.*, supra, which was relied on by the Plaintiffs, where the Court said as follows at pages 733 and 735:

Generally speaking, export, no doubt, involves the idea of a severance of goods from the mass of things belonging to this country with the intention of uniting them with the mass of things belonging to some foreign country. It also involves the idea of transporting the thing exported beyond the boundaries of this country with the intention of effecting that.

...there is a great deal to be said in favour of the view that "export" in the sense of the [Special War Revenue Act, S.C. 1915, c. 8 as amended by S.C. 1922, c. 47, s. 14] may be limited in such a way as to exclude export so entirely beyond the ordinary course of commerce.

[38] On the facts presented here, the diesel fuel in question was not merged with the mass of goods in the foreign country. The Plaintiffs have failed to show that this fuel was "exported", within the meaning of the Act, and the appeals cannot succeed. In light of this conclusion the Plaintiffs are not entitled to a rebate of taxes or a drawback pursuant to the Act and regulations. It is not necessary to address the arguments raised concerning the timeliness of the application for a rebate.

[39] These appeals are dismissed with costs.

[40] These reasons will be filed in T-48-98 and placed on T-49-98 and have the same force and effect as if it were filed.

"E. Heneghan"

J.F.C.C.

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