CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, July 19, 1991

Appeal No. 3079

IN THE MATTER OF an appeal heard on March 12, 1991, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a notice of decision of the Minister of National Revenue dated June 30, 1988, to which a notice of objection was served under section 81.15 of the *Excise Tax Act*.

BETWEEN

M.H. RILEY ENTERPRISES OF FLORIDA, INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part. Considering the evidence and the admissions of both parties, the Tribunal hereby varies the part of the assessment with respect to the amount owing, which was established by the Minister of National Revenue based on the difference between the value for charge declared on monthly returns and the value declared on export notices, by reducing the remaining amount in issue, $9,947.58, by a further amount of $5,516.96 for a balance owing of $4,430.62, plus interest and penalty.

Michèle Blouin
Michèle Blouin
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
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Member

Michel P. Granger
Michel P. Granger
Acting Secretary

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UNOFFICIAL SUMMARY

Appeal No. 3079

M.H. RILEY ENTERPRISES OF FLORIDA, INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal made pursuant to section 81.19 of the Excise Tax Act against an assessment based on sections 4 and 7 of the Softwood Lumber Products Export Charge Act. After admissions by both parties, the remaining issues were whether the appellant was responsible for the tax owing on the grounds that it had been erroneously identified by the producer (Dunkley Lumber Ltd.) as the exporter and whether it should be liable for outstanding interest and penalties with respect to the assessment in general because the respondent has taken too long to reply.

HELD: *The appeal is allowed in part. Considering the evidence and the admissions of both parties, the Tribunal hereby varies the part of the assessment with respect to the amount owing, which was established by the Minister of National Revenue based on the difference between the value for charge declared on monthly returns and the value declared on export notices, by reducing the remaining amount in issue, $9,947.58, by a further amount of $5,516.96 for a balance owing of $4,430.62, plus interest and penalty.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*March 12, 1991*
Date of Decision:	*July 19, 1991*
Tribunal Members:	*Michèle Blouin, Presiding Member* *Arthur B. Trudeau, Member* *Sidney A. Fraleigh, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Susan D. Clarke, for the respondent*
Case Cited:	*Les Presses Lithographiques Inc. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 2997, June 26, 1989.*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3079

M.H. RILEY ENTERPRISES OF FLORIDA, INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
ARTHUR B. TRUDEAU, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal made pursuant to section 81.19 of the *Excise Tax Act*[1] against an assessment based on sections 4 and 7 of the *Softwood Lumber Products Export Charge Act*[2] (the Act).

ISSUES AND APPLICABLE LEGISLATION

The issues in this appeal are whether the appellant has been correctly assessed as being the exporter of the softwood lumber products on which the export charge was levied and whether the appellant is liable for different outstanding penalties and interests.

The relevant provisions of the Act read as follows:

> *4. (1) There shall be imposed, levied and collected a charge determined under this Act on softwood lumber products set out in Part II of the schedule that are exported to the United States after January 7, 1987.*
>
> ...
>
> *7. (1) The charge imposed under this Act on softwood lumber products exported to the United States is payable at the time of export by the exporter under whose licence or temporary licence the products are purported to be exported.*
>
> *(2) Every exporter who is required by subsection (1) to pay a charge shall make each month a true return, in the form and containing the information prescribed, of all amounts payable by the exporter on account of the charges imposed under this Act for the last preceding month.*
>
> ...

1. R.S.C., 1985, c. E-15, as amended.
2. R.S.C., 1985, c. 12 (3rd Supp.).

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13. Every exporter shall, before effecting any export to the United States of softwood lumber products set out in Part II of the schedule, present or cause to be presented to an officer, at such time and place and in such manner as may be specified in the regulations, a notice of the export in the form and containing the information prescribed.

...

18. For the purposes of this Act, sections 81.1 to 81.32 and 81.34 to 81.39 of the Excise Tax Act apply, with such modifications as the circumstances require, in respect of a charge or other sums payable by any person under this Act.

FACTS AND EVIDENCE

On February 9, 1988, the Department of National Revenue, Customs and Excise (the Department) assessed the appellant an amount of $151,894.84, including export charges, penalties and interest, for the period from January 8, 1987, to November 30, 1987. Notice of Assessment QUE 1521 was established as follows:

Difference between Canadian & American funds	$ 91,323.27
Difference between value for charge declared on monthly returns and value declared on export notice	$ 49,213.17
Penalty and interest as of February 28, 1988	$ 11,358.40
	$151,894.84

On April 27, 1988, the appellant filed a notice of objection opposing the amount of $49,213.17 and the penalty and interest in total. The Notice of Decision dated June 30, 1988, which is the subject of this appeal, allowed the objection in part and deleted an amount of $39,265.59, being an overstatement due to duplicate export notices received by the Department. The notice of decision provides that $9,947.58 represents the difference between the appellant's monthly returns and export notices received by the Departmental office in Sherbrooke. That amount of $9,947.58, which constitutes the main subject of litigation in this appeal, pertains to eight export notices identified as Notices D2.1A to D2.1H.

On February 25, 1991, the appellant submitted its brief and notified the Tribunal that it would not be present at the hearing. The hearing was held on March 12, 1991.

ARGUMENTS

In their brief, both the respondent and the appellant admitted certain facts with respect to the remaining amount in issue of $9,947.58. It is therefore useful to consider in turn arguments and admissions with respect to Export Notices D2.1A to D2.1H.

With respect to Export Notice D2.1A, the appellant contends that there is evidence of double payment and admits that it owes $13.40 as a result of a set-off between the amount of charges pertaining to two different shipments, one of which having been the subject of the double payment. The respondent takes no issue with respect to the appellant's position, accepts the set-off and agrees that the appellant still owes the sum of $13.40.

As for Export Notice D2.1B, the appellant argues that it paid an amount of $2,855.45 to Dunkley Lumber Ltd., which has erroneously indicated the appellant as the exporter. It adds that its client is the person responsible for the export charge and that it might be easier for the respondent to collect from Dunkley Lumber Ltd. since the company is located in Canada.

The respondent argues that section 7 of the Act makes it clear that the export charge is payable at the time of export by the exporter under whose licence the products are purported to be exported. The respondent contends in this regard that Export Notice D2.1B shows that the appellant's company, Gulf Coast Forest Products, was the licensed exporter of the lumber. The respondent argues that Export Notice D2.1B indicates the current address and licence number of the appellant. Furthermore, the appellant has never denied being the licensed exporter of the lumber nor has disputed the amount of the charge in issue. The contractual relationship between the parties as to whether the appellant or the owner is the exporter, he contends, is irrelevant. Finally, the respondent has no mandate to pursue the owner-supplier even though section 8 establishes that the owner-supplier is jointly and severally liable for the export charge.

Ms. Amy Browell, an employee of the Department, testified for the respondent. The crux of her testimony was her explanation of the fact that a different licence number appeared on Export Notice D2.1B. She explained that an application for a sales tax licence was filed with the request that it be issued in the name of Gulf Coast Forest Products. Instead, the licence was accorded to the appellant, M.H. Riley Enterprises of Florida, Inc., under No. W 2888360. According to the witness, licences beginning with the letter "W" are wholesale licence. The witness also explained that another licence was issued with respect to "softwood." This type of licence begins with the letter "X" that, she explained, appears on all export notices in issue but Export Notice D2.1B. According to the witness, the licence number beginning with the letter "W" and appearing on Export Notice D2.1B is an older licence, i.e., a sales tax licence.

The respondent does not take issue with the appellant's position relevant to Export Notices D2.1C to D2.1F and is prepared to reduce the assessed amount by $4,257.45.

As for Export Notices D2.1G and D2.1H, the appellant recognizes, in its brief, owing a sum of $587.48. The respondent acknowledges that charges are owing based on values shown on these export notices and, therefore, submits that there is no appeal with respect to these charges in the amount of $587.48.

The appellant contends that it should not be liable for any interest and penalties with respect to the assessment in general. The appellant argues that it had not been notified of the correct manner of paying its tax liability in September 1987. The appellant explains that from that date everything was done correctly, except that the figure was not converted into Canadian funds. It argues in this regard that nothing in the Act nor in the excise communiqué clearly explains this process. The appellant also contends that it took almost nine months for the respondent to bring that fact to its attention and that it paid the tax correctly when notified of the proper manner to calculate its liability. The appellant argues that it had tried to resolve the amount of tax owed since February 1988. The appellant finally argues, based on the date of the Notice of Decision, which is June 30, 1988, that it took almost five months for the respondent to state that the initial assessment was overstated by $39,265.59. In sum, it should not be liable for interest and penalties since it is not the party that has taken so long to reply.

The respondent rebuts the appellant's claim regarding the lack of information that the charge would necessarily be calculated and payable in Canadian funds. That information was available to the appellant. The respondent also argues that the delay was caused by an audit process consecutive to the failure of compliance with the Act on the part of the appellant. It is incumbent on the appellant to seek and obtain the information necessary for compliance with the Act. Based on the Tribunal's decision in *Les Presses Lithographiques Inc. v. The Minister of National Revenue*,[3] the respondent also argues that the Tribunal has no jurisdiction to alter the penalty. At the hearing, counsel for the respondent admitted that the Tribunal would have jurisdiction to determine whether the appellant was in default. Such a question, however, is not in issue because the appellant admits that it is in default.

REASONS

The Tribunal first observes that the notice of objection filed by the appellant was directed against the assessed amount of $49,213.17 pertaining to eight export notices and against all the penalties and interest imposed. This being said, the Tribunal takes note of the different admissions made by both parties. Thus, the Tribunal ascertains there are two issues remaining to be dealt with:

1. whether the appellant is the exporter of the softwood products and thus responsible for the export charge; and

2. whether the appellant is responsible for the penalties and interest.

As to the first issue, the Tribunal notes that the appellant is liable for the activities conducted under the name of Gulf Coast Forest Products. For instance, while Export Notice D2.1B refers to Gulf Coast Forest Products, the appellant admitted in its brief that its client, Dunkley Lumber Ltd., "is the one who errored [sic] in showing us as the exporter." It is noteworthy that both the appellant and Gulf Coast Forest Products share the same address in Florida.

As for the discrepancies between the licence number appearing on Export Notice D2.1B and the one appearing on the other export notices, the Tribunal accepts the explanation of the respondent's witness.

The Tribunal is also of the view that the mere allegation that the appellant's client has erroneously designated the appellant as the exporter is not sufficient in view of the wording of subsection 7(1) to authorize the Tribunal to vacate that assessment.

The Tribunal is therefore convinced that the appellant is the exporter under whose licence or temporary licence the products are purported to have been exported as provided in subsection 7(1) of the Act and, as such, is liable for the charge imposed by the Act and in virtue of which it was assessed.

With respect to the interest and penalties issue, the Tribunal recalls its decision in *Les Presses Lithographiques Inc.*, which the respondent has cited. The provision of the Act is similar to the provision referred to in the above-mentioned case. Furthermore, the appellant has recognized that it was liable for the other amounts due to the assessment. Having established that the appellant had been

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3. Canadian International Trade Tribunal, Appeal No. 2997, June 26, 1989.

correctly assessed, the Tribunal finds that the appellant is in default and liable for penalty and interest pursuant to subsection 7(6) of the Act.

CONCLUSION

The appeal is allowed in part. Considering the evidence and the admissions of both parties, the Tribunal hereby varies the part of the assessment with respect to the amount owing, which was established by the Minister of National Revenue based on the difference between the value for charge declared on monthly returns and the value declared on export notices, by reducing the remaining amount in issue, $9,947.58, by a further amount of $5,516.96 for a balance owing of $4,430.62, plus interest and penalty.

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