



Ottawa, Monday, February 25, 1991

Appeal No. AP-89-282

IN THE MATTER OF an appeal heard on November 13, 1990, under section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated February 2, 1990, made under section 63 of the *Customs Act*.

BETWEEN

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part. The Tribunal finds that the place from which the goods sold for export were shipped directly to Canada was Quanah, Texas. Thus, the appellant is not entitled to a deduction for the costs of transporting the goods prior to that point in calculating their value for duty. The Tribunal also finds that the wrapping and the banding of the goods were necessary to prepare the goods for rail shipment. Therefore, the costs of these associated expenses are properly deductible from the export price of the goods under paragraph 48(5)(b) of the *Customs Act*. Consequently, the Tribunal refers the matter back to the Minister of National Revenue for reconsideration of these costs in the determination of their value for duty.

Kathleen E. Macmillan

Kathleen E. Macmillan
Presiding Member

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-89-282

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

Customs Act - Customs Tariff - Determination of the value for duty of gypsum wallboard - Determination of the place within the country of export from which the goods are shipped directly to Canada.

The appellant is a US lumber and building product broker that imported a quantity of gypsum wallboard to Canada in September 1988. The gypsum wallboard was sold to the appellant by a transporter-intermediary that had purchased the goods directly from the gypsum wallboard mill. The appellant was charged a comprehensive price for the goods that included their transportation from the mill to the railhead at Quanah, Texas, from where the goods began their rail journey to Canada.

The appellant argued that in calculating the value for duty of the goods, all transportation and associated expenses incurred between the mill and their final destination in Canada should be deducted from the price paid for the gypsum wallboard. The respondent's position was that only transportation costs incurred from their point of last departure in the United States, Hayford, Illinois, should be deducted in calculating the value for duty of the goods.

HELD: *The appeal is allowed in part. The Tribunal finds that the place from which the goods sold for export were shipped directly to Canada was Quanah, Texas. Thus, the appellant is not entitled to a deduction for the costs of transporting the goods prior to that point in calculating their value for duty. The Tribunal also finds that the wrapping and the banding of the goods were necessary to prepare the goods for rail shipment. Therefore, the costs of these associated expenses are properly deductible from the export price of the goods under paragraph 48(5)(b) of the Customs Act. Consequently, the Tribunal refers the matter back to the Minister of National Revenue for reconsideration of these costs in the determination of their value for duty.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: November 13, 1990
Date of Decision: February 25, 1991*

*Tribunal Members: Kathleen E. Macmillan, Presiding Member
Robert J. Bertrand, Q.C., Member*

Clerk of the Tribunal: *Sidney A. Fraleigh, Member*
Joseph Larose

Appearances: *Michael A. Kelen, for the appellant*
Gilles Villeneuve, for the respondent

Statutes Cited: *Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), Subs. 48(1), (4) and (5); Customs Tariff, R.S.C., 1985, c. 41 (3rd Supp.), s. 17.*

Appeal No. AP-89-282

WESTERN INTERNATIONAL FOREST PRODUCTS, INC. Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE Respondent

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

The issue in this appeal is to determine the value for duty of gypsum wallboard imported into Canada from the United States in September 1988. Under subsection 48(4) of the *Customs Act*¹ (the Act), the value for duty is determined by ascertaining the price paid for the goods when the goods are sold for export to Canada and adjusting the price in accordance with subsection 48(5) of the Act. Subparagraph 48(5)(a)(vi) authorizes the addition to the price of transportation costs "... to the place within the country of export from which the goods are shipped directly to Canada." Under subparagraph 48(5)(b)(i), the cost of transportation and other charges associated with the transportation of the goods "... from the place within the country of export from which the goods are shipped directly to Canada ..." may be deducted from the price.

At issue in this appeal is a determination of the place within the country of export from which the goods were shipped directly to Canada, and thus which transportation and other costs the appellant is entitled to deduct from the price paid for the goods in calculating the value for duty. The relevant legislation is as follows:

Customs Act

Transaction Value of the Goods

48. (1) Subject to subsection (6), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada and the price paid or payable for the goods can be determined ...

...

1. R.S.C., 1985, c. 1 (2nd Supp.).

(4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(a) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to

...

(vi) the cost of transportation of, the loading, unloading and handling charges and other charges and expenses associated with the transportation of, and the cost of insurance relating to the transportation of, the goods to the place within the country of export from which the goods are shipped directly to Canada;

(b) by deducting therefrom amounts, to the extent that each such amount is included in the price paid or payable for the goods, equal to

(i) the cost of transportation of, the loading, unloading and handling charges and other charges and expenses associated with the transportation of and the cost of insurance relating to the transportation of, the goods from the place within the country of export from which the goods are shipped directly to Canada, and ...

FACTS

This is an appeal from a decision of the respondent dated February 2, 1990, with respect to the value for duty of gypsum wallboard imported into Canada at Sarnia, Ontario, under entry No. 13581000477346 on September 28, 1988. The appellant, Western International Forest Products, Inc. (Western), is an American vendor entering the goods as a non-resident importer. It carries on business in the City of Portland as a broker for lumber and building products throughout the United States and Canada. The company sources these goods from various manufacturers and distributors throughout the United States and supplies them to customers throughout its marketing area.

Jim Raines & Co., Inc. (Raines) is a company incorporated under the laws of the State of Oklahoma, United States. Mr. Raines, the owner of that company, appeared at the hearing and stated that, at the time relevant to this appeal, his company operated as a distributor of commodities including gypsum wallboard, and was also in the business of transporting and transloading these products from trucks onto railcars. Raines operates transload facilities in Oklahoma City, Oklahoma, and in Quanah, Texas.

In late August of 1988, Western contacted by telephone Lumber King Limited (Lumber King), a lumber retailer in Scarborough, Ontario, and Don & Son Building Supply (Don & Son) in Oshawa, Ontario, and obtained commitments from them for the purchase of a quantity of gypsum wallboard. Receipt of that order was acknowledged by the appellant on or about September 26, 1988, quoting a price of \$136 per unit, "subject to product availability."

Western then contacted Raines and placed an order or orders for delivery of a quantity of gypsum wallboard. According to Mr. Raines, the terms of sale were F.O.B. mill, delivered to and loaded onto railcar. On the invoice from Raines to Western dated September 9, 1988, for gypsum wallboard loaded onto Burlington Northern railcar BN No. 625168, the price of the goods is set at \$35 per unit and the cost of transportation from the mill to the reload centre and reloading at \$32 per unit, for a total of \$67 per unit. The terms of sale are not indicated. The gypsum wallboard sold by Raines to Western was purchased from the Gold Bond Building Products, Division of National Gypsum Wallboard Company (Gold Bond Mill) in Rotan, Texas, at \$46 per unit, F.O.B. mill.

At the hearing, counsel for the appellant provided a corrected invoice from Raines, which revised the allocation of costs included in the total of \$67 per unit to \$46 per unit for the price of the goods and \$21 per unit for the cost of transportation.

Railcar BN No. 625168 was loaded with gypsum wallboard at the railhead in Quanah, Texas, and directed to Chicago. The goods were then transported via railcar BN No. 625168 by Canadian National Railroad to Kitchener, Ontario. The railcar was unloaded at Kitchener by the Ed Wiersma Trucking Company and shipped by truck to Don & Son in Oshawa and Lumber King in Scarborough.

On September 28, 1988, the appellant imported the goods into Canada through the port at Sarnia, Ontario. The total selling price of the goods delivered in Canada was CAN\$15,667 for 115,200 sq. ft. of gypsum wallboard. This quantity represents 3,600 sheets, 4 ft. wide x 8 ft. long and ½ in. thick, the capacity of one A-frame railcar or four truckloads. From this total, the appellant claimed deductions of CAN\$10,405 for transportation, loading and packaging. The total value for duty of the goods was claimed to be CAN\$5,262.

On October 17, 1988, a determination was made under subsection 58(1) of the Act revising the value for duty of the goods upwards from \$5,262.00 to \$11,437.20 and demanding payment of additional duties totalling \$580.45. The appellant appealed this determination and, on February 2, 1990, the respondent rendered the decision in issue in this appeal, disallowing deductions for transportation and other costs incurred prior to the departure of the goods from the railhead at Quanah. In the decision, the respondent ruled that the value for duty of the goods was \$8,427.33 calculated as follows:

A.	the selling price of the goods after the 2% cash discount:	\$15,454.77
B.	less - transportation and other eligible expenses:	\$ 5,497.71
	BN railroad Quanah, Texas, to Chicago, Illinois:	\$ 2,572.67
	CN railroad to Kitchener, Ontario:	\$ 1,580.04
	Ed Wiersma Trucking to customers:	\$ 1,295.00
	brokerage fee:	50.00
C.	less - sales tax at 8%:	\$ 737.56
D.	less - duty at 9.4%:	<u>\$ 792.17</u>
	value for duty	<u>\$ 8,427.33</u>

At the hearing, the president of Forest City Trading Group Inc., a holding company for nine trading companies including Western, and a trader for Western gave evidence concerning the events relevant to this appeal and the business practices of the company. The appellant was unable to produce many of the original documents relating to the sales at issue, as these had evidently been lost. Instead, the appellant entered into evidence duplicate or representative documents that were stated to be indicative of the company's business practice.

The appellant produced handwritten purchase orders similar to the ones that would have been drawn up by the trader for the Canadian sales at issue in which the sale price is stated to be an F.O.B. price. A reproduction of the computer-generated purchase order to Raines for the sale at issue, dated October 4, 1988, sets the cost of the gypsum wallboard at \$35 plus \$32 trucking and loading. The witness for the appellant testified that while this document does not expressly state that the terms of sale are F.O.B. mill, this is indicated by the placement of certain information in a particular column. The origin of the goods is noted as Oklahoma City, OK. and the "routing" as "BN."

Four bills of lading from Gold Bond to Raines were also entered as appellant's exhibits. Mr. Raines stated that each bill of lading was for the sale of one truckload of gypsum wallboard, and that the four truckloads made up the quantity of gypsum wallboard shipped to Canada on railcar BN No. 625168. On these documents, Raines is identified as the purchaser. The origin of the goods is stated to be Rotan. The destination of the goods, or "country unloaded in" is stated as Oklahoma. The area marked "ship to" contains the handwritten information, "Western PO#52337 car BN#625-168." Mr. Raines stated that this notation was added to the bill of lading by one of his company's office clerks after the goods were loaded onto the railcar. An invoice from Gold Bond to Raines corresponding to the mill order number on the bill of lading sets the price of the goods at \$46 per unit, F.O.B. mill. The appellant also entered as evidence a letter addressed to the regular customers of Raines in which Mr. Raines makes the following statement, "We sell gypsum wallboard, all of which is priced F.O.B. the mills of our suppliers."

The appellant also provided an analysis of what it considered to be a reasonable estimate of the transportation and packaging charges incurred in transferring the gypsum wallboard between the mill and the railcar. According to a representative of the appellant testifying at the hearing, the railway company requires that the gypsum wallboard be properly protected to avoid damage during shipment. The protective material - plastic bags and steel banding - was put on at the Quanah reload facility and removed by Ed Wiersma Trucking once the goods arrived in Kitchener.

The respondent entered into evidence a Canada Customs invoice, dated September 19, 1988, filed on behalf of the appellant upon importation of the goods into Canada that indicated that "the transportation mode and place of direct shipment to Canada" was by Flat car BN No. 625168. The respondent also entered price lists, dated July 1988, distributed by Raines to another company to whom it supplies gypsum wallboard in which it is stated: "Prices are effective immediately. Prices are F.O.B. loaded on railcars." These price lists set out a single price for a product, including transportation and loading costs. It was the evidence of Raines that although the company regularly distributes such price lists, it did not sell to Western or the company from whom the price list was obtained according to those price lists.

ARGUMENTS

The appellant argues that the goods at issue were purchased F.O.B. mill and began their direct

and continuous journey to Canada from the mill in Rotan, Texas. Thus, all transportation and associated loading and packaging costs are properly deductible from the selling price in Canada, under subsection 48(5) of the Act. These include the cost of transporting the gypsum wallboard by truck from the Gold Bond Mill to the railhead at Quanah, Texas, and the cost of wrapping the gypsum wallboard in plastic, banding it and loading it onto the railcar.

In support of its argument, the appellant referred to Customs Memorandum D13-3-4, dated November 13, 1987, setting out administrative guidelines for determining the point of direct shipment. Paragraphs 2 and 4 of that memorandum state as follows:

Place of Direct Shipment

2. *For Customs purposes the place of direct shipment is that place from which goods begin their direct and uninterrupted journey to Canada. This continuous journey may only be broken for reasons of transshipment.*

Inland Freight

4. *The dutiable status of inland freight charges and other inland charges is contingent on the place at which the goods commence their continuous and uninterrupted journey to Canada. This question may arise, for example, where a manufacturer in a foreign country is located at an inland point but sells his goods for export on an f.o.b. seaport basis. If the place of direct shipment can be established as the inland point, the freight charges incurred in transporting the goods from the inland point to the seaport would not be dutiable. The non-dutiable status of the inland freight charges is contingent upon establishing that the goods remain at the seaport only for the purposes of transshipment.*

The appellant argues that the documentary evidence confirms the actual routing of the goods from the mill to Canada, and that the journey was direct and continuous and was broken only for reasons of transshipment from truck to rail. Before the goods left the mill, Western had arranged for each transportation step in the direct and continuous journey to Canada.

The appellant argues that it is irrelevant that the gypsum wallboard was purchased from Raines, and not from the Gold Bond Mill directly, and that Raines only acted as a conduit that is in the business of operating a trucking company. It is for this reason that Raines set up a pricing structure that enabled it to make its profit on the transportation charges, even while it incurred a loss on the price of the gypsum wallboard.

The respondent argues that the interpretation of the "point of direct shipment" given by the appellant does not accord with the provisions under section 48 of the Act for determining the dutiable status of transportation costs. Rather, to arrive at the proper deduction for transportation costs from the place of direct shipment to Canada, one must properly construe the words, "from the place within the country of export from which the goods are shipped directly to Canada." In the respondent's view, to interpret this as the point at which the goods begin their direct and uninterrupted journey to Canada is too generous for the following reasons.

First, this interpretation of subparagraph 48(5)(b)(i) is so wide as to render

subparagraph 48(5)(a)(vi) practically meaningless. The latter subparagraph deals with those transportation costs to the place within the country of export from which the goods are shipped directly to Canada that are to be added to the price paid or payable for the goods. Second, as the Act and the *Customs Tariff*² are intended to be read together, the Tribunal may seek guidance on the meaning of "direct shipment" from section 17 of the *Customs Tariff*, which states:

For the purposes of this Act, goods are shipped directly to Canada from another country when the goods are conveyed to Canada from that other country on a through bill of lading to a consignee in Canada.

Thus, goods are directly shipped to Canada when the bill of lading evidences that they are sent from another country to a consignee in Canada. In this case, the respondent argues, the place of direct shipment to Canada is Hayford, Illinois, near Chicago, as it is there that the goods were consigned to Canada. This is the only interpretation that gives proper meaning to subparagraph 48(5)(a)(vi), which provides that transportation costs to the point of direct shipment to Canada are to be added to the purchase price.

Finally, the respondent states that the interpretation given in an administrative memorandum may not be relied upon to interpret the meaning of an act when it is not consistent with the plain words of the act. Thus, the Customs Memorandum referred to by the appellant is irrelevant for interpreting the meaning of "point of direct shipment" when a definition is provided under the *Customs Tariff*.

FINDING OF THE TRIBUNAL

At issue in this appeal is a determination of the place within the country of export from which the goods were shipped directly to Canada, and thus which transportation and other costs the appellant is entitled to deduct in accordance with subsection 48(5) of the Act from the price paid for the goods in calculating the value for duty.

This requires the Tribunal to interpret the meaning of the phrase "place within the country of export from which the goods are shipped directly to Canada." In the Tribunal's view, Customs Memorandum D-13-3-4 provides a reasonable interpretation of subsection 48(5) in designating the place of direct shipment as the place from which the goods begin a continuous and uninterrupted journey to Canada, broken only for reasons of transshipment. The Tribunal accepts that "direct" has a connotation of continuous and uninterrupted and a sense of a final destination in Canada. In the Tribunal's view, the place of direct shipment is the place at which the goods are earmarked or intended for export to Canada and begin their continuous and uninterrupted journey there, broken only for reasons of transshipment.

The Tribunal does not accept the respondent's argument that it must apply the definition of direct shipment provided in section 17 of the *Customs Tariff* for two reasons. First, the focus of the *Customs Tariff* definition is the country of direct shipment in order to determine, among other things, the tariff rate applicable. It is not clear to the Tribunal that this Act is of assistance in designating the place within the exporting country for the purpose of determining eligible deductions from export price. Further, the Tribunal accepts the appellant's argument that section 17 of the *Customs Tariff* is expressed in such a way that it leaves open the possibility that other methods can be used to determine

2. R.S.C., 1985, c. 41 (3rd Supp.).

the place of direct shipment.

Turning to the facts of this case, the Tribunal must consider whether the goods began a continuous and direct journey to Canada when they left the mill. To decide in favor of the appellant, the Tribunal would have to be satisfied that the goods were intended for export to Canada when they left the mill.

The documentary evidence provided by the appellant does not satisfy the Tribunal that the goods were destined for Canada when they left the mill. The only link that exists between the mill shipment and the order placed by the appellant on behalf of the Canadian buyers is the handwritten Western purchase order numbers and railcar number on the pick-up slips accompanying the goods when they travelled between Rotan and Quanah. The testimony of Mr. Raines, however, was that these particulars were added by one of his employees after the goods left the mill (or after they arrived at the railhead). The only documents provided that concern the shipment from the mill indicate dealings between Raines and the mill with no indication that the goods were destined for Canada. Therefore, on the basis of the documents provided, the Tribunal is unable to conclude that the mill at Rotan was the place of direct shipment to Canada.

The appellant based its argument on the testimony that the goods were priced on an F.O.B. mill basis; however, the evidence leads the Tribunal to conclude differently. Because it was not open to the appellant to buy only the goods at the F.O.B. mill price quoted by Raines, without their transportation cost, the Tribunal views the sale price of the goods as a comprehensive F.O.B. railhead price, and not an F.O.B. mill price. Price lists entered into evidence by the respondent indicated that, at times, Raines priced on an F.O.B. railhead basis to Canadian customers. Further, Raines' decision in this case to change the allocations between transportation cost and cost of the goods themselves suggests the somewhat arbitrary nature of its transportation charges. The Tribunal is unable to accept the view that at the time of this transaction, Raines acted only as a transporter of the goods and not as a distributor-wholesaler. Consequently, the Tribunal concludes that the F.O.B. mill notation indicated on the invoice to Western does not properly reflect the terms of this transaction.

Accordingly, the Tribunal concludes that the goods were directly shipped to Canada from Quanah, Texas. It was at that point where the goods were identified with a specific order, loaded onto a railcar and commenced their journey northward. The bulky nature of the goods meant that the appellant was required to order a railcar of a specific size and configuration. According to the appellant's testimony, it planned the railcar's routing to its destination in Canada. On the basis of this testimony and the fact that the journey was accomplished in a relatively short time, the Tribunal concludes that the journey was continuous and uninterrupted.

The Tribunal does not accept the respondent's argument that Hayford, Illinois, was the place of direct shipment. Although the Tribunal agrees that the documents concerning the journey between Texas and Illinois are substantially deficient, the appellant's testimony concerning its planning of rail routes was, on the whole, plausible. There is no evidence to suggest that, given the considerable expense of engaging a railcar, the appellant did not have a destination in mind for the goods and selected the most expedient and economical way of arriving there.

With respect to the other costs at issue, the Tribunal finds that the wrapping and banding of the goods were necessary to prepare the goods for rail shipment. Therefore, the costs of these associated expenses are properly deductible from the export price of the goods under paragraph 48(5)(b) of the

Act. However, the actual wrapping and packing costs were not invoiced separately and the Tribunal has only the appellant's estimated cost breakdown of these charges by Raines, the details of which were not challenged by the respondent. Consequently, the Tribunal refers the matter back to the Minister of National Revenue for reconsideration of this amount in the determination of the value for duty.

CONCLUSION

The appeal should be allowed in part.

Kathleen E. Macmillan

Kathleen E. Macmillan

Presiding Member

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.

Member

Sidney A. Fraleigh

Sidney A. Fraleigh

Member