



Ottawa, Friday, March 20, 1992

Appeal No. AP-91-100

IN THE MATTER OF an appeal heard on January 21, 1992, under section 18 of the *Softwood Lumber Products Export Charge Act*, R.S.C., 1985, c. 12 (3rd Supp.) and section 81.21 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF an authorization by the Minister of National Revenue dated June 26, 1991, allowing the appellant to appeal directly to the Tribunal with respect to an application for refund, a notice of determination and a notice of opposition filed under section 81.17 of the *Excise Tax Act*.

BETWEEN

BOIS-AISÉ DE ROBERVAL INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The Tribunal allows the appeal. The goods exported by the appellant were not covered by the *Softwood Lumber Products Export Charge Act* and, consequently, the appellant is entitled to a refund of the amounts paid in error.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Desmond Hallissey
Desmond Hallissey
Member

Robert J. Martin
Robert J. Martin
Secretary



Ottawa, Friday, March 20, 1992

Appeal No. AP-90-169

IN THE MATTER OF an appeal heard on January 21, 1992, under section 18 of the *Softwood Lumber Products Export Charge Act*, R.S.C., 1985, c. 12 (3rd Supp.) and section 81.21 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a decision by the Minister of National Revenue dated November 9, 1990, with respect to a notice of opposition, filed under section 81.15 of the *Excise Tax Act*.

BETWEEN

BOIS-AISÉ DE ROBERVAL INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed. At the time of the assessment, the goods in issue were not covered by the *Softwood Lumber Products Export Charge Act*.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Desmond Hallissey
Desmond Hallissey
Member

Robert J. Martin
Robert J. Martin
Secretary

CORRIGENDUM

UNOFFICIAL SUMMARY

Appeal Nos. AP-90-169 and AP-91-100

BOIS-AISÉ DE ROBERVAL INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant manufactures and exports mattress frame components to the United States. The issue is to determine whether these goods are softwood lumber products within the meaning of section 4, Part II of the Schedule to the Softwood Lumber Products Export Charge Act (the Act).

HELD: *The appeals are allowed. As a result of the amendment of the Memorandum of Understanding concerning trade in certain softwood lumber products between the Government of Canada and the Government of the United States dated December 30, 1986, the amendment of Part III of the Schedule to the Act filled a gap by including in the category of remanufactured products "box spring mattress frame components supplied to customer specifications." Consequently, it cannot be said that the goods were covered by the so-called more general provisions of the Act, in this instance, the provisions of Part II, prior to the amendment of the Act. Moreover, if Parliament had intended to link the tax base of the Act to the classification of the Tariff Schedule of the United States, it would have done so expressly or would have used the imperative form in subsection 2(3) of the Act. Therefore, the goods in issue were not covered by the Act at the time of the assessment.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: January 21, 1992
Date of Decision: March 20, 1992*

*Tribunal Members: Michèle Blouin, Presiding Member
W. Roy Hines, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Dyna Côté

*Appearances: Claude Nadeau, for the appellant
Rosemarie Millar, for the respondent
Gordon B. Greenwood, for the intervenor Clemson Corporation,
which carries on business as National Frame Company, in
support of the appellant in appeal No. AP-90-169*

Appeal Nos. AP-90-169 and AP-91-100

BOIS-AISÉ DE ROBERVAL INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
W. ROY HINES, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is two appeals filed under section 81.19 of the *Excise Tax Act*,¹ with respect to an assessment imposed under sections 4 and 7 of the *Softwood Lumber Products Export Charge Act*² (the Act) and an application for refund.

The appellant manufactures and exports mattress frame components to the United States. On March 31, 1988, it received a notice of assessment for \$659,905.17, including tax, interest and penalty. The period covered by the assessment was from January 8, 1987, to December 30, 1987. On May 24, 1988, the appellant objected to the assessment that was, nevertheless, confirmed by the Minister of National Revenue on November 9, 1990. On January 18, 1991, the appellant appealed this decision to the Tribunal. On February 20, 1991, the appellant was also refused its application for a refund of the tax it claims to have paid in error during the assessment period. On June 26, 1991, the appellant received permission from the respondent to appeal this decision directly to the Tribunal. The Tribunal heard both appeals on January 21, 1992.

The issues in the first appeal are to determine whether the mattress frame components manufactured by the appellant and exported to the United States constitute softwood lumber products within the meaning of section 4 and Part II of the Schedule to the Act and, if so, whether the appellant is subject to the export charge as an exporter of the goods in issue according to section 7 of the Act. In the second appeal, the issue is to determine whether the appellant is entitled to a refund of the tax it claims to have paid in error.

The appellant called a number of witnesses. Mr. Ghislain Lamontagne, President and General Manager of a sawmill, first explained that he supplied the appellant with small pieces of wood. He explained that the wood was too small for the construction industry and that it would

1. R.S.C., 1985, c. E-15, as amended.

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

have been made into chips if not for the appellant's ability to use it. Mr. Gaston Castonguay, President of the appellant company, indicated that the wood purchased in bulk from the sawmill is first transformed into laths, then dried and smoothed on all four sides and finally the ends are cut. However, the production of the mattress frame components themselves is not begun until firm orders are received with the specific needs of the client. Mattress frame components can be produced in close to 200 different dimensions. The witness also explained that 25 percent of the components used in producing a mattress are rounded using a machine built by the appellant. The wood destined for mattress frame components must also meet the quality standards set by the client with respect to the presence of knots, cracks and holes. The humidity level of the wood must also meet client specifications. Once production is complete, the client's logo is stamped on the components that are then stored. Mattress frame components are shipped unassembled. Lastly, Mr. Robert Rosecrans, President of the National Frame Company, a wholesaler and the appellant's main client, testified that half of the appellant's shipments goes directly from the appellant's plant in Roberval to the clients of the National Frame Company, that are basically mattress manufacturers. The other half is delivered to the National Frame Company warehouses.

The Tribunal also heard the expert testimony of Mr. Gilles Jeanrie, Director of the Quality Control Department and Senior Inspector for the Quebec Lumber Manufacturers Association, who testified for the appellant. As part of his work, Mr. Jeanrie inspects wood classified under the *Standard Grading Rules for Canadian Lumber* (Canadian Rules). This witness stated that the mattress frame components could not be classified under these rules. Mr. Jeanrie then compared the headings in the Canadian Rules with those in the *Standard Grading Rules for West Coast Lumber* (the American Rules). It should be noted that Schedule B of the *Memorandum of Understanding concerning trade in certain softwood lumber products* (the Memorandum) between the Government of Canada and the Government of the United States dated December 30, 1986, refers to the American Rules with respect to the list of remanufactured products covered by the agreement. Mr. Jeanrie pointed out that he could not classify the goods in issue as mattress frame components under any heading in the Canadian Rules because this classification does not exist or, in other words, because neither the headings in the American Rules nor their Canadian equivalent provide written standards to cover this type of product. Under cross-examination, the witness did identify Exhibit B-1, a few samples of the goods in issue, as being sanded or dressed softwood lumber, which was in keeping with the written testimony of Mr. Réal Rhéaume, the respondent's expert witness and inspector for the *Canadian Lumber Standards Accreditation Board* (CLSAB).

Lastly, Mr. Louis-Philippe Dion, who conducted the audit for the purposes of the assessment, testified for the respondent. Mr. Dion explained that, on the basis of a letter from the interpretation service of the Department of National Revenue-Customs and Excise, he had excluded from the tax base all mattress frame components that were rounded.

In support of its position that the product exported is not softwood lumber, rough, dressed or worked within the meaning of the Act, the appellant argues that the goods in issue were pieces of furniture not covered by the Memorandum. Counsel for the appellant claims, in effect, that the amendment of the Memorandum in 1987 and the *Softwood Lumber Products Export Charge Act*

Schedule Amendment Order, No. 2,³ which resulted therefrom, had the effect of adding box spring mattress frame components supplied to customer specifications to Part III of the Schedule to the Act. These components were not therefore covered by the Act prior to the amendment, which took effect after the period of assessment. It is therefore evident from the Memorandum that, except for the amendment made on December 16, 1987, the signatories did not intend to impose an export charge on softwood lumber manufactured for special usages, as is the case with the goods in issue.

Since a clear text is necessary in the taxation field in order to impose a charge, it cannot be presumed that the goods in issue were subject to the tax during the period of assessment. According to counsel, the appellant was therefore correct in objecting to the assessment.

Counsel for the respondent claims that the goods in issue were governed by section 4 of the Act during the period prior to the amendment of Part III of the Act's Schedule - section 4 refers to Part II of the Schedule that lists the different types of lumber covered by the Act. The amendment made to Part III of the Act's Schedule is not retroactive and cannot be invoked against the general principle of taxation. Counsel also maintains that, under subsection 2(3) of the Act, the Memorandum can be used in interpreting the Schedule and that the expression "softwood lumber products," within the meaning of the Memorandum, includes goods classified under items 202.03 to 202.30 of the *Tariff Schedule of the United States* (the American Tariff). In counsel's view, the Department of the Treasury - US Customs Service would classify the goods in issue under item 202.03, 202.09 or 202.18, which, according to the schedule to the Act, would make them softwood lumber products subject to the charges stipulated in section 4.

The Tribunal is of the opinion that the absence of a clear provision with respect to the goods in issue is a determining factor in this matter. It also agrees with the appellant that, under Canadian tax law, a charge cannot be imposed without a clear text. It is obvious from the Memorandum, and from the Act, that the signatories agreed to make a distinction between softwood lumber products and remanufactured products: the first being charged an export charge of 15 percent; and the second being charged a levy based on the value of the softwood lumber used in their manufacture. The amendment of Part III of the Schedule to the Act, following the amendment of the Memorandum, resulted in the inclusion of "box spring mattress frame components supplied to customer specifications" in the category of remanufactured products. This wording, as shown by the evidence, applies to the goods in issue. Although these goods are manufactured of softwood lumber, they bear additional features, such as the degree of humidity and the quality requirements, not to mention the dimensions specified by the purchaser. It is the opinion of the Tribunal that, because of these features, these goods are more than "softwood lumber, rough, dressed or worked" as described in Part II of the Schedule to the Act and defined in Part I. In this respect, the amendment filled a gap in Part III and, consequently, it cannot be said that the goods were covered by the so-called more general provisions of the Act, in this instance, those of Part II prior to the amendment.

As for the respondent's argument concerning the American classification, the Tribunal notes that subsection 2(3) of the Act states that recourse "may" be had to the Memorandum in interpreting the Schedule. Nevertheless, the provisions of the Memorandum and those of the American Tariff are not an integral part of the Act. This is an important distinction to make

3. SOR/88-158, *Canada Gazette*, Part II, 1988, p. 1444.

because, if Parliament had intended, beyond a shadow of a doubt, to link the tax base of the Act to the American classification, it would have done so expressly or would have used the imperative form in subsection 2(3). Having said this, even if the Tribunal was disposed to consider recourse to the American classification, it is of the opinion the evidence of this classification must be clearly established, even though the burden of proof to show the invalidity of the assessment generally rests on the appellant. Given the evidence presented by the respondent - a letter from an American customs officer in which there is no express mention of the goods in issue - the Tribunal is not convinced that these goods would have in fact received the classification suggested by the respondent.

For all these reasons, the Tribunal finds that the goods in issue were not covered by the Act during the period of assessment. Given the Tribunal's decision on the first question at issue, there is no need to decide on the second. As for the refund request, it must also be allowed since the appellant paid the money in error and these funds were considered as tax when no tax existed.

For these reasons, the Tribunal allows the appeals.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Desmond Hallissey
Desmond Hallissey
Member