CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, June 24, 1992

Appeal No. AP-91-115

IN THE MATTER OF an appeal heard on April 1, 1992, under section 18 of the *Softwood Lumber Products Export Charge Act*, R.S.C., 1985, c. 12 (3rd Supp.) and section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated November 29, 1990, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

RICHMOND FOREST PRODUCTS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-91-115

RICHMOND FOREST PRODUCTS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the products made by the appellant and exported to the United States correspond to those mentioned at paragraph 1(l) of Part III of the Schedule to the Softwood Lumber Products Export Charge Act and are therefore subject to tax at a lower rate.

***HELD**: Lacking any conclusive evidence to the contrary, the Tribunal finds that the goods made by the appellant and exported to the United States during the assessment period meet the description of "Battens, K.D." The appeal is allowed.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*April 1, 1992*
Date of Decision:	*June 24, 1992*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Kathleen E. Macmillan, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Robert Desjardins*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Ernest A. Hawrish, for the appellant* *John B. Edmond, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-115

RICHMOND FOREST PRODUCTS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
KATHLEEN E. MACMILLAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

The appellant exported to the United States what it calls "kiln-dried battens." Following an audit conducted on the appellant's premises on October 17, 1989, the appellant was assessed for $32,637.03 as taxes unpaid plus interest and penalty in respect of transactions under the *Softwood Lumber Products Export Charge Act*[1] (the Act) during the period of January 8, 1987, to August 31, 1989. The export charge was assessed on the difference between the appellant's f.o.b. mill price for its products and the input value of the lumber used in the manufacture of these products. By notice of objection dated February 5, 1990, the appellant objected to the assessment. By notice of decision dated November 29, 1990, the respondent confirmed the assessment on the ground that the evidence showed that the products exported to the United States did not fall within Part III of the Schedule to the Act.

The Act provides that products described in Part II of the Schedule be subject to an *ad valorem* export charge. The amount of the export charge is as prescribed by either section 5 or 6 of the Act, depending upon whether the products in question are also listed in Part III. Products described in Part II and not listed in Part III are subject to an export charge based on the export price, as prescribed by section 5 of the Act. However, in order not to impose a charge on the value that is added to softwood lumber in the course of manufacturing, in Canada, the products listed in Part III of the Schedule, section 6 of the Act prescribes that the export charge be levied solely on the value of the softwood lumber used in the manufacture of these products.

The issue in this appeal is whether the products sold to the United States by the appellant correspond to those mentioned at paragraph 1(*l*) of Part III of the Schedule to the Act, namely "battens, kiln dried."

To interpret the Schedule, recourse may be had to the December 30, 1986, Memorandum of Understanding between the United States and Canada. Appendix B of this memorandum describes the products, "Battens, K.D.," in terms of paragraph 113 of the Standard Grading Rules for West Coast Lumber (Standard Grading Rules) published by the West Coast Lumber Inspection Bureau. Paragraph 113-a provides that battens of this grade be of sound wood and that pieces be clear or have only a few minor and unimportant characteristics such as stained wood, very light skips, medium torn grain, two tight pin knots and two small pockets.

1. R.S.C., 1985, c. 12 (3rd Supp.).

Mr. David Uppal testified on behalf of the appellant. He is the appellant's secretary and the person in charge of its operations. He described the appellant as a "lumber remanufacturer." In brief, the appellant would buy kiln-dried lumber (mostly two-by-fours of various lengths) on the open market and cut or split it to produce smaller pieces of wood such as a batten. In Mr. Uppal's view, a batten is a flat piece of wood which contains only minor imperfections. Two pieces of wood were introduced as Exhibits A-1 and A-2, which the witness considered as being typical of the products manufactured by the appellant during the period covered by the assessment, namely battens. These two exhibits came respectively from a one-by-four and a two-by-four. Mr. Uppal described the products in issue as being roof-tile battens of an eight-foot length. According to the witness, any piece of wood that contained too many defects was not sold as battens, but as pallet wood. As to the prices charged by the appellant for the battens, he stated that the company was strictly a price-taker. In essence, the appellant contended that it manufactured and sold battens during the assessment period and that there is no evidence that the products shipped to the United States were of a lower grade than those described in paragraph 113-a of the Standard Grading Rules.

Questioned by counsel for the respondent about the discrepancy between clients' order forms which referred only to one-by-two or two-by-two dimension lumber and the appellant's corresponding invoices which contained the term "battens," Mr. Uppal explained that all of the appellant's business was conducted over the telephone and that clients verbally placed orders for battens.

The first witness for the respondent was Mr. Don Campbell, Audit Unit Manager at Revenue Canada, Excise and GST, who conducted the appellant's audit. Mr. Campbell testified that, after a quick tour of the appellant's operation, he was provided reasonably free access to the available information at the appellant's disposal. He did not obtain the standard accounting books; nonetheless, the export notices filed at border points were used to acquire the needed information. Mr. Campbell said that he did not recall actually seeing the products in issue during his visit to the appellant's premises. As he stated, documentary evidence made it very clear to him that the products in issue were not battens mentioned in Part III of the Schedule to the Act. In this respect, Mr. Campbell spelled out a number of reasons. One such reason relates to price considerations; in essence, the price charged by the appellant for the products in issue would appear to be quite low compared to the price that a comparable product fitting the description of a batten would fetch on the market.

Mr. Leslie Funk was the respondent's expert witness. Mr. Funk, District Supervisor for the Northwest Washington District for the West Coast Lumber Inspection Bureau, has been a lumber grader since 1950. His duties are to supervise the inspection of mill graders. In his testimony, he discussed board[2] grades contained in the Standard Grading Rules, namely "Select Merchantable," "Construction," "Standard," "Utility" and "Economy." Mr. Funk also mentioned that a batten, as defined in paragraph 113-a of the Standard Grading Rules, is a high-quality product. At one point of his testimony, he talked about his involvement in reinspections of wood in such instances where there would be a dispute between a buyer and a seller as to the quality of the wood sold. In such a case, looking solely at the invoices would not be sufficient for him to make a determination. Asked by counsel for the respondent how he would go about reinspecting the goods sold by the appellant to one of its customers, Mr. Funk unequivocally stated that he would actually have to look at the lumber. Finally, Mr. Funk referred to Exhibits A-1 and A-2 as "battens," albeit not of the standard size.

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2. As defined by Mr. Funk, a board is lumber up to an inch and a half nominal thickness.

Counsel for the appellant argued that there were no reasons not to accept that the battens (Exhibits A-1 and A-2) are similar to the products in issue, produced and sold by the appellant during the assessment period. This similarity means that the latter goods fall within Part III of the Schedule to the Act. He also underlined Mr. Funk's testimony in which he stressed his unwillingness to pass judgement on pieces of wood solely upon the examination of invoices.

Counsel for the respondent argued that the case rests upon the question of the best evidence available to establish the nature of the products that the appellant was selling during the assessment period. Acknowledging that no sample was taken from the shipments to the United States, he argued essentially that Exhibits A-1 and A-2 selected from a 1991 set of products constituted questionable evidence as to what was really sold in 1987. He also underlined the question of prices, arguing that the evidence has clearly revealed that the pieces of wood adduced as evidence by the appellant at the hearing carry a higher price than the one charged by the appellant for the goods sold during the assessment period. He mentioned that the appellant had used a phrase (kiln-dried battens) that purported to bring the goods in issue within the ambit of the exempting provision of the statute, when in fact the products that it sold were not within the statute.

Having considered the evidence and reviewed the arguments, the Tribunal is of the opinion that the appeal should be allowed. The evidence has revealed, first, that no sample of the products manufactured by the appellant during the assessment period were taken by the respondent from the shipments made to the United States. Second, Mr. Campbell admitted that he had been made aware by the appellant's employees, during his visit to the premises, of the company's claim that the goods that it produced at that time were battens or roof-tile battens. Mr. Campbell knew then that there was, or would be, an issue relating to the exemption relating to paragraph 113 of the Standard Grading Rules. Despite this awareness, Mr. Campbell did not see a sample of the appellant's products in issue, nor did he ever seek to obtain such a sample. The importance of actually seeing the products was well underlined by the respondent's expert witness, whose testimony established without any doubt that documentary evidence alone (e.g. invoices) would not be sufficient to conduct a reinspection of wood subject to a contractual dispute. The Tribunal is of the view that the auditor should have asked to see the products manufactured by the appellant when he visited its premises on October 17, 1989.

The Tribunal accepts Mr. Funk's opinion that Exhibits A-1 and A-2 are battens. The appellant has contended that these two pieces of wood are illustrative of its products sold during the assessment period. The Tribunal is of the view that the various arguments founded mainly on documentary evidence and put forth by the respondent do not support the respondent's position that the products sold by the appellant and exported to the United States during the assessment period were of a lower grade than those described in paragraph 113-a of the Standard Grading Rules. For instance, with respect to the question of pricing to which the respondent has attached great weight, the Tribunal would point out that the calculations prepared by the auditor dealt with products different from those in issue, namely mouldings. On this point, the Tribunal would simply note Mr. Campbell's statement, during cross-examination, that the appellant's products were "not at all" mouldings. As to the question of discrepancy of terms between the order forms and invoices, the Tribunal considers the appellant's explanations to be satisfactory. On the whole, the Tribunal is satisfied that the case made by the appellant supports its position that it manufactured and sold "kiln-dried battens" during the assessment period.

The appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
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