CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, December 1, 1992

Appeal No. AP-91-256

IN THE MATTER OF an appeal heard on August 14, 1992, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated December 30, 1991, relating to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

BRANDON FOREST PRODUCTS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. While the Tribunal considers that it has jurisdiction to decide this case on its merits, the appellant does not meet the requirements of Memorandum ET-202.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-91-256

BRANDON FOREST PRODUCTS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant manufactures pressure-treated lumber using chemicals that it dilutes at its premises. In some cases, lumber used for chemical treatment is supplied by the appellant's customers. The appellant, while using established values to determine its tax liability in accordance with Memorandum ET-202, was assessed on the sale price of the pressure-treated lumber as the Minister of National Revenue determined that the requirements of Memorandum ET-202 were not met.

This case involves two issues: whether the Tribunal has jurisdiction to hear the appeal as it involves only a question related to the application of Memorandum ET-202 and, if the first question is answered in the affirmative, whether the appellant's pressure-treated wood sales to clients that supplied the lumber are sales of "regular lines" of production according to Memorandum ET-202.

HELD: *The appeal is dismissed. Although the Tribunal finds that it has jurisdiction to hear the appeal on its merits, the appellant does not qualify under Memorandum ET-202. Indeed, its production of pressure-treated wood from lumber supplied by its customers is not production of regular lines, but custom production. Therefore, the sales of these goods are excluded from the amount of sales to wholesalers to determine "representative quantities ... to ... independent wholesalers," which is another criterion for the use of established values under Memorandum ET-202.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*August 14, 1992*
Date of Decision:	*December 1, 1992*
Tribunal Members:	*Charles A. Gracey, Presiding Member* *Arthur B. Trudeau, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Randy Bennett, for the appellant* *Meg Kinnear, for the respondent*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-256

BRANDON FOREST PRODUCTS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a decision of the Minister of National Revenue (the Minister).

The appellant, Brandon Forest Products Ltd. (Brandon), pressure treats lumber for sale. On March 7, 1990, it was assessed the amount of $116,420.49, including taxes, interest and penalty, for sales covering the period from March 8, 1986, to January 31, 1990. The appellant served a notice of objection to the assessment that was confirmed by the Minister on December 30, 1991. The assessment was appealed to the Tribunal on March 16, 1992.

The parties agreed at the hearing that the only matter under appeal respecting the assessment relates to the applicability of established values as provided for in Memorandum ET-202[2] (the Memorandum) for computing sales tax, instead of the sale price as provided for by the Act.

Notwithstanding the above, there are two issues to resolve. The first issue relates to the jurisdiction of the Tribunal to hear the case. In recent decisions, the Tribunal decided that it had no jurisdiction to determine the qualification of a taxpayer for the use of the Memorandum since it has no statutory or regulatory basis. Given that the appellant's arguments are based exclusively on the applicability of the Memorandum, the respondent submitted that this Tribunal has no jurisdiction to hear the case and moved, as a preliminary matter, that the appeal be dismissed for want of jurisdiction.

If the Tribunal finds that it has jurisdiction, then it will have to decide on the merits of the case whether the appellant qualified under the terms of the Memorandum. Consequently, the Tribunal will have to determine whether the appellant's production of pressure-treated wood from lumber supplied by its customers constituted regular lines of production for purposes of calculating the "representative quantities" that are required for the application of established values provided in the Memorandum.

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1. R.S.C. 1985, c. E-15.
2. Department of National Revenue, Excise, December 1, 1975.

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THE JURISDICTION OF THE TRIBUNAL

Counsel for the respondent argued that the Tribunal lacks jurisdiction to hear the merits of this case as it relates exclusively to the appellant's qualification for the use of established values under the Memorandum as shown by the relevant documents on file, namely, the notice of assessment, the notice of decision and the appellant's notice of appeal. Counsel relied upon the Tribunal's recent decisions,[3] in which the Tribunal determined that it lacked the jurisdiction to disregard the statutorily prescribed basis of the tax liability found in subsection 50(1) of the Act in favour of an administrative concession or administrative policy such as contained in the Memorandum. Counsel contended that the Tribunal is a statutory creature and, as such, its jurisdiction with respect to appeals under the Act is limited to the powers provided in the Tribunal's enabling statute as well as in the Act and regulations. Counsel also argued that the Tribunal has no jurisdiction to grant equitable relief.

Despite counsel's arguments, the Tribunal finds that it has the jurisdiction to decide this case on its merits. The Tribunal considers that the decisions upon which the respondent relied can be distinguished from the case at hand. In *Artec Design, Seine River, Imperial Cabinet, Hyalin* and, finally, in *Alrich Custom Cabinets Ltd. v. The Minister of National Revenue*,[4] the appellants sought authorization to use the determined value set forth in the Memorandum to calculate their sales tax liability under the Act. Each of the appellants had previously paid sales tax on the basis of the sale price of its goods in accordance with subsection 50(1) of the Act. They subsequently filed refund claims for sales tax paid in error under section 68 of the Act and argued that they had only later become aware of their eligibility to use determined values as provided in the Memorandum. In dismissing the appeals, the Tribunal decided that the conditions for eligibility to use the determined values provided in the Memorandum were not based on the Act or a regulation under the Act. The Tribunal stated that it did not have jurisdiction to disregard the statutorily prescribed basis on which tax was paid, i.e. the sale price, in favour of another method inconsistent with the Act. Consequently, the Tribunal refused to consider whether sales tax had been paid in error under section 68 of the Act.

There are significant differences between the above-mentioned appeals and the case before us. The first distinction is that this is an appeal from an assessment, while the other appeals dealt with sales tax refund claims based on section 68 of the Act. Furthermore, in those appeals, the Tribunal had to deal with the notion of tax paid in error, where the appellants, having paid tax on the statutory basis, relied upon the non-statutory measures of the Memorandum to obtain a refund of sales tax.

In this case, the appellant computed and paid sales tax using the concessions provided in the Memorandum rather than on the sale price as provided by the Act. The appellant was assessed because, as stated in the notice of assessment, tax was "remitted on [an] incorrect value for tax." The appellant then filed a notice of objection, claiming that it was entitled to benefit from the "determined value" in the Memorandum. Thereafter, it received the Minister's decision, which concluded that it did not qualify under the Memorandum. Furthermore, the decision

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3. *Artec Design Inc. v. The Minister of National Revenue*, Appeal No. AP-90-117, March 2, 1992; *Seine River Cabinets Ltd. v. The Minister of National Revenue*, Appeal No. AP-90-118, March 2, 1992; *Imperial Cabinet (1980) Co. Ltd. v. The Minister of National Revenue*, Appeal No. AP-91-045, March 2, 1992; and *Hyalin International (1986) Inc. v. The Minister of National Revenue*, Appeal No. AP-89-013, March 10, 1992.

4. Canadian International Trade Tribunal, Appeal No. 3078, September 8, 1992.

mentioned that the assessment could be appealed to the Tribunal pursuant to section 81.19 of the Act. Those proceedings are in keeping with the administrative remedy mechanism provided to the taxpayer and which ultimately led to this appeal. There is therefore no doubt that the Tribunal is properly seized of an appeal according to the Act. Accepting as we must that the appellant has a right to appeal the assessment to the Tribunal and that the Tribunal is properly seized of the appeal, the Tribunal must be very wary of refusing to exercise its jurisdiction and, by doing so, to deprive the appellant of the right of appeal under the Act.

For the foregoing reasons, the Tribunal deems it necessary to once again address the question of the administrative remedy mechanism provided in the Act with respect to an assessment. First, under subsection 81.15(1), a person who has been assessed and objects to the assessment may serve on the Minister a notice of objection "setting out the reasons for the objection and all relevant facts on which that person relies." Second, upon reception of the objection, the Minister must reconsider the assessment and, among other things, provide a brief explanation of his decision. Finally, section 81.19 provides that a person who has served a notice of objection may appeal the assessment to the Tribunal. Once the appeal is instituted, the Tribunal must notify the Deputy Minister of National Revenue for Customs and Excise and, according to subsection 81.25(2), he "shall send to the Tribunal copies of all returns, applications, notices of assessment, notices of objection, notices of decision and notifications, if any, that are relevant to the appeal." Although it is the assessment that is being appealed, and not the Minister's decision, and despite the fact that the appeal involves a hearing *de novo*, there is no doubt that an appeal under section 81.19 is related to the assessment, the notice of objection as well as the notice of decision, which must all be filed with the Tribunal pursuant to subsection 81.25(2). Thus, given that there have been discussions and decisions as to the application of the Memorandum in all preceding steps leading to this appeal, it seems quite inappropriate to dismiss the appeal for want of jurisdiction to adjudicate issues that arise from the conditions imposed by the said memorandum. There is indeed no statutory limitation to that effect in section 81.19 of the Act nor in paragraph 16(*c*) of the *Canadian International Trade Tribunal Act*[5] which, to the contrary, provides that one of the Tribunal's function is to:

> *hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, and all matters related thereto.*

In fact, by accepting to hear this case on its merits, the Tribunal is simply accomplishing its function to hear, determine and deal with an appeal made to the Tribunal under the Act as mentioned in section 16 of the Tribunal's enabling statute.

Briefly stated, if a taxpayer argues that it falls squarely within the terms and conditions of the concessions made in a memorandum that is used by the Department of National Revenue, Customs and Excise (Revenue Canada), to levy sales tax under the Act, there is no reason why the Tribunal should refuse to hear the appeal and, if it agrees with the appellant, why the Tribunal could not refer the matter back to the Minister for reconsideration pursuant to paragraph 81.27(1)(*b*) of the Act. This situation, in fact, is different from a case where the appellant would request the Tribunal to change the applicable standard enunciated in such policy which, obviously, the Tribunal would not have jurisdiction to undertake.[6] In conclusion,

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5. R.S.C. 1985, c. 47 (4th Supp.).

6. See *Brigham Pipes Limited v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-078, July 6, 1992.

the Tribunal finds that within these parameters it has the jurisdiction to hear the matter and decide accordingly.

THE MERITS

As mentioned earlier, the merits of the case rest on the issue of whether the appellant's production of pressure-treated wood from lumber supplied by its customers constitutes regular lines of production within the meaning of the Memorandum.

The Memorandum allows manufacturers selling goods to different classes of customers the use of a so-called "established value" to calculate their federal sales tax liability under the Act. Manufacturers who have an established price to wholesalers for regular lines of goods of their manufacture may account for sales tax on such sales, although other sales may be made at higher prices to retailers and end users. However, in order to benefit from this provision, representative quantities, namely, not less than 15 percent of total domestic sales during the preceding 12-month period, must be sold to 2 or more wholesale customers.

From the evidence adduced at the hearing, the facts related to this issue can be summarized as follows. The appellant manufactures chemically treated lumber, commonly called pressure-treated lumber. The chemical used by the appellant is a dilution of a concentrated chemical manufactured in the United States and shipped to the appellant. The chemical cannot be offered for sale as such because of regulatory requirements in Ontario. It contains a 60-percent concentration of chromic acid, arsenic and copper oxide, which respectively carry fixative, fungicide and pesticide functions. The solution is diluted at the appellant's premises in mixing equipment. Then the solution is applied to lumber that may or may not be supplied by the appellant's customers. When lumber is supplied by customers, it is treated with the chemical and then returned to them. The lumber does not undergo any other operation such as cutting. The cost of pressure-treated wood, which is expressed by board foot, bears some relationship with the chemical applied and retained in each board foot or cubic foot of wood. The total cost includes labour, overhead, profit and the cost of wood, except for transactions where lumber is supplied by the customer. Sales of pressure treated-wood from lumber supplied by customers accounted for about 25 percent of the appellant's total sales of pressure-treated wood during the relevant period. The appellant sells pressure-treated lumber to all levels of trade, namely, wholesalers, retailers and end users. Finally, the evidence revealed that the appellant would have met the 15-percent criterion of sales to wholesalers if sales of pressure-treated wood from lumber supplied by its customers had been taken into account by the auditor for Revenue Canada.

The appellant argued that it manufactures a chemical dilution, sells a treatable product and is, therefore, a manufacturer of the chemical within the meaning of paragraph 2(1)(*f*) of the Act. The chemical, it contended, is sold as part of the wood and can only be sold as such according to pesticide control regulations in Ontario. As the appellant is a manufacturer of a chemical, the goods sold by it constitute a regular line of production. Furthermore, as the evidence shows that these sales meet the representative quantities criterion of 15 percent, it should therefore be allowed the use of the established value.

The respondent's position is that the pressure-treated wood from lumber supplied by the appellant's customers is custom made and cannot be included in the calculation of the representative quantities as it does not constitute a regular line of the appellant's own manufacture. The appellant does not sell a chemical, but rather wood that is treated with a chemical. Furthermore, dilution of the chemical is only one step in the manufacturing process,

which ends with the treatment of wood to customers' specifications. Accordingly, the respondent contends that such wood treated by the appellant cannot be considered as a regular line of production because the lumber is not the appellant's own product and, more importantly, the goods are made to customers' specifications as established in evidence. As the representative quantity fixed at 15 percent by the Memorandum is not met without taking into account the appellant's custom sales, counsel for the respondent concluded that the appeal should be dismissed.

The Tribunal notes that both parties agreed that the established values in the Memorandum can be used to calculate the appellant's sales tax liability, provided not less than 15 percent of its total dollar volume of domestic sales over the preceding 12-month period is sold to 2 or more wholesale customers. There is also no issue that the 15-percent criterion applies only to goods of a regular line of production. The only issue, then, is whether the appellant's sales of pressure-treated wood from lumber supplied by customers constitute a regular line of production.

In the Tribunal's view, the evidence clearly establishes that the appellant does not produce and sell a chemical, but pressure-treated lumber. That the chemical cannot be sold as is because of pesticide control requirements is irrelevant. What is important is that the appellant dilutes the chemical, uses a specific process to apply it to lumber, and such lumber has new characteristics. When lumber is supplied by the appellant's customers, the pressure-treated lumber must meet their specifications and, therefore, they are "made to the order or specification of the customer" and as such are excluded from the definition of the term "regular lines" in the Memorandum. Accordingly, the appellant has not met the requirements of the Memorandum as it produces goods which, as customs goods, are specifically excluded from the term "regular lines."

For the foregoing reasons, the Tribunal finds that the assessment is correct and, accordingly, dismisses the appeal.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member