CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, June 11, 1993

Appeal No. AP-92-054

IN THE MATTER OF an appeal heard on January 6, 1993, 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;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated March 30, 1992, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

FALCON LUMBER LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-054

FALCON LUMBER LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 18 of the Softwood Lumber Products Export Charge Act and section 81.19 of the Excise Tax Act from a decision of the Minister of National Revenue dated March 30, 1992. The issue in this appeal is whether the respondent's assessment of the appellant for unpaid export charges, penalty and interest in the amount of $35,878.99 for the period from August 1, 1987, to April 30, 1990, was correct. More particularly, the Tribunal must determine: (1) whether the phrase "free on board mill price paid" should be interpreted to mean the price paid to the production mill or the price paid to the resawing mill, including transportation and resawing costs, and markup; (2) whether the appellant was eligible for an exemption from the imposition of the export charge for certain sales of lumber; and, finally, (3) whether the appellant should be liable for outstanding penalty and interest in respect of the unpaid export charges.

HELD: *The appeal is dismissed. The phrase "Free on board mill price paid" means the export price paid to the final mill by the purchaser and, therefore, includes the amount paid for the lumber to the production mill, the transportation costs from the production mill to the resawing mill, the resawing costs and any markup. Further, the appellant was not able to discharge its burden of proving that certain lumber that it purchased originated in a province exempt from the imposition of the export charge under the Softwood Lumber Products Export Charge Act or that it was itself an exempt exporter. The Tribunal finds that the appellant was subject to the export charge for which it was assessed and is, therefore, liable for penalty and interest calculated from the time that the export charge became payable under the Softwood Lumber Products Export Charge Act and that it was in default of such payment.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*January 6, 1993*
Date of Decision:	*June 11, 1993*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *W. Roy Hines, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Peter Hilbert, for the appellant* *Ian McCowan, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-054

FALCON LUMBER LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
W. ROY HINES, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 18 of the *Softwood Lumber Products Export Charge Act*[1] (the Act) and section 81.19 of the *Excise Tax Act*[2] from a decision of the Minister of National Revenue (the Minister) dated March 30, 1992. The issue in this appeal is whether the respondent's assessment of the appellant for unpaid export charges, penalty and interest in the amount of $35,878.99 for the period from August 1, 1987, to April 30, 1990, was correct. After admissions by the appellant, the Tribunal specifically had to determine: (a) whether the phrase "free on board mill price paid" should be interpreted to mean the price paid to the production mill or the price paid to the resawing mill, including transportation and resawing costs, and markup; (2) whether the appellant was eligible for an exemption from the imposition of the export charge for certain sales of lumber; and, finally, (3) whether the appellant should be liable for outstanding penalty and interest in respect of the unpaid export charges.

In September 1990, the appellant was audited by the Department of National Revenue (Revenue Canada) for the period from August 1, 1987, to April 30, 1990. On September 13, 1990, as a result of the audit, a written summary of the audit results was issued to the appellant indicating that it owed $27,152.11 for various alleged errors that it committed in calculating its export charge liability under the Act. The appellant paid $10,000.00 of the amount on October 15, 1990, and served a notice of objection in respect of the balance on June 17, 1991, after the issuance of the notice of assessment dated April 24, 1991. By notice of decision dated March 30, 1992, the Minister allowed the appellant's objection in part, and the "Statement of Amount Owing or Overpayment" was adjusted to account for a credit for lumber that was assessed at the incorrect rate.

Mr. Peter Hilbert, Secretary and Treasurer of Falcon Lumber Limited, appeared at the hearing and explained that the appellant carries on business as a lumber wholesaler and purchases lumber from various production mills in Canada which it then sells to customers in the United States. The lumber is sometimes shipped as is, without any further manufacture, directly from the production mill. Alternatively, the lumber is sometimes transported to a mill closer to the Canada/United States border where it is resawed and subsequently shipped to a customer in the United States at a price which includes the amount paid to the production mill, the transportation costs from the production mill to the resawing mill, the resawing costs and the appellant's markup.

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

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The appellant's representative argued that the phrase "free on board mill price paid," which under section 5 of the Act is the value on which the export charge is to be imposed, should not be interpreted to include the appellant's markup, but should only include actual costs.

Further, the appellant's representative submitted that the appellant was assured that the lumber that it purchased from J.D. Irving, Inc. either originated in New Brunswick, which is an exempt province under the Act, or in the United States, which would also qualify for an exemption, since J.D. Irving, Inc. held a certificate of exemption from the imposition of the export charge on lumber originating in the United States.

Finally, the appellant's representative disputed the inclusion of the penalty and interest in the assessment figure. He contended that the appellant, at all times, acted in good faith and that it should not be subject to the payment of any penalty. With respect to the issue of interest, the appellant's representative argued that the respondent incorrectly calculated interest from the time that the written summary of the audit results was issued and that the interest was charged on the $10,000 paid prior to the issuance of the notice of assessment.

Counsel for the respondent argued that the goods exported by the appellant fall within the list of products under Part II of the Schedule to the Act and that they are thereby subject to the imposition of an export charge based on the free on board mill price of the goods as provided for under section 5 of the Act. Counsel referred to the Tribunal's decision in *Réal Grondin Inc. v. The Minister of National Revenue*[3] and argued that the resawing of the goods did not constitute a manufacturing process. Since the goods were not the subject of a manufacturing process, they do not fall within the list of further manufactured products under Part III of the Schedule to the Act. Therefore, the value on which the export charge is to be imposed is not the free on board mill price paid for the lumber used in the manufacture of the products, as provided for under section 6 of the Act.

With respect to the issue of the meaning of the phrase "free on board mill price paid" in section 5 of the Act, the Tribunal notes that the Act provides two different treatments for the imposition of the export charge. Section 5 of the Act applies to lumber products set out in Part II of the Schedule to the Act and provides that the export price is the "free on board mill price paid or payable for the products." Section 6 of the Act applies to lumber products set out in Part III of the Schedule to the Act and provides that "the value of softwood lumber used in the manufacture of softwood lumber products is (a) the free on board mill price paid or payable for the softwood lumber used in the manufacture of the products." It was accepted by the appellant's representative at the hearing that the lumber that it sold did not qualify as having been used in manufacturing and that, therefore, it fell under Part II of the Schedule to the Act and the provisions of section 5 of the Act.

The Act was designed to implement Canada's obligations under the Memorandum of Understanding (the Understanding), dated December 30, 1986, concerning trade on softwood lumber products between the governments of Canada and the United States. The Tribunal, therefore, finds it helpful to examine the Act in the context of the Understanding to clarify any uncertainty regarding the meaning of the phrase "free on board mill price paid." Paragraph 4.b. of the Understanding provides that "[u]nless the export charge is modified under the provisions of paragraph 5, the charge will be equal to 15 percent ... of the f.o.b. final mill price of the exported product." The Tribunal finds that the words "final[4]" and "exported product" are significant and indicate that the phrase "free on board mill price paid" is to be the export price paid by the purchaser to the final mill.

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3. Appeal No. AP-91-212, September 30, 1992.

4. The word "final" does not appear in the French version of paragraph 4.b. of the Understanding.

The export price paid to the final mill in this appeal was the price paid by the U.S. customers to the appellant. This price included the amount paid to the production mill, the transportation costs from the production mill to the resawing mill, the resawing costs and the appellant's markup. The respondent was, therefore, correct in imposing the export charge on the free on board price paid to the appellant by its U.S. customers. The Tribunal does not find that there is any issue to be resolved with respect to the imposition of the export charge on lumber purchased from J.D. Irving, Inc., since that lumber was not resawed, and it was established by the auditor, Mr. Vidya Mamtani, at the hearing, that the export charge in respect of those sales was based upon J.D. Irving, Inc.'s free on board mill price paid, which would not include any of the appellant's markup.

The appellant's representative contended that the lumber that the appellant purchased from J.D. Irving, Inc. should not have been subject to the export charge under the Act. However, there was no evidence presented to show that any of the lumber purchased from J.D. Irving, Inc. came from an exempt province or that the appellant could fall within any of the exemption provisions under the Act. The appellant, therefore, did not discharge its burden of proving that the respondent incorrectly identified certain lumber purchased by the appellant as originating in a non-exempt province or that the respondent incorrectly disallowed an exemption for which the appellant should have been eligible.

The Tribunal recognizes that the appellant acted in good faith and did not intend to avoid its liability for the export charge. However, the Tribunal does not have jurisdiction to cancel or reduce penalty on the basis of good faith. The Tribunal finds that the penalty and interest automatically become payable when the person liable for the export charge fails to remit it within the time prescribed as set out in subsection 7(6) of the Act:

> *On default in payment of any charge or any portion thereof payable under this Act within the time required by subsection (5), the exporter shall pay, in addition to the amount of default, a penalty of one-half of one per cent of that amount plus interest at the prescribed rate or at the rate determined in the manner prescribed.*

The are two possible time limitations for the payment of an export charge under the Act. Subsection 7(1) of the Act provides that "[t]he charge imposed under [the] Act ... is payable at the time of export" and subsection 7(2) of the Act provides that "[e]very exporter who is required by subsection (1) to pay a charge shall make each month a true return ... of all amounts payable by the exporter on account of the charges imposed under [the] Act for the last preceding month." Alternatively, subsection 7(4) of the Act provides that a "person may, with the approval of the Minister, make a return ... in respect of an accounting period that does not coincide with a calendar month." Subsection 7(5) of the Act provides that a return under subsection 7(2) of the Act is to be submitted "not later than the last day of the first month succeeding that in which the charges became payable" and a return under subsection 7(4) of the Act is to be submitted "not later than the last day of the first approved accounting period following the end of the accounting period to which the return relates."

Depending upon the method of payment chosen by the appellant, the export charge became due on the last day of the month following the date that the appellant exported the lumber or on another date agreed to by the appellant and Revenue Canada. However, regardless of the method chosen by the appellant, it is clear that the payment of the charge was due some time prior to the release of the summary of the audit results in September 1990 and the notice of assessment dated April 24, 1991. Subsection 81.11(2) of the *Excise Tax Act*, which is incorporated by section 18 of the Act, further clarifies that the assessment is something distinct from the time when the tax becomes payable. Subsection 81.11(2) of the *Excise Tax Act* reads as follows:

> *Subject to subsections (3) to (5), no assessment shall be made for any tax, penalty, interest or other sum more than four years after the tax, penalty, interest or sum became payable under this Act.*

The default in payment of the export charge, therefore, relates back to the time that the payment of the export charge was due and is not based upon notification of an assessment. Having established that the appellant had been correctly assessed, the Tribunal finds that the respondent was entitled to assess penalty and interest on the assessed amounts commencing from the time that the amounts became payable. The Tribunal finds that the respondent was not entitled to calculate penalty and interest on the full amount owing between the issuance of the summary of the audit results and the notice of assessment, since the appellant had paid $10,000 in October 1990, and refers this matter back to the Minister for a review of the calculation of penalty and interest.

Accordingly, the appeal is dismissed. However, the matter is referred back to the Minister to verify the calculation of the penalty and interest.

Desmond Hallissey
Desmond Hallissey
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member