CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, March 6, 1996

Appeal No. AP-93-083

IN THE MATTER OF an appeal heard on August 2, 1995, 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 May 27, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

LEGGETT & PLATT INCORPORATED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-083

LEGGETT & PLATT INCORPORATED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue. The issue in this appeal is whether the appellant is entitled to a refund of certain charges that it remitted under the Softwood Lumber Products Export Charge Act. Under that act, certain softwood lumber products were subject to a charge when exported to the United States.

The appellant was in the business of manufacturing mattresses and box springs made from, among other materials, softwood lumber. The appellant exported some of its goods to the United States. It was agreed by the parties that, prior to January 1, 1988, mattresses and box springs of the sort exported by the appellant were not taxable under the Softwood Lumber Products Export Charge Act. The appeal turned on whether, notwithstanding that fact, the appellant was precluded from recovering the charges at issue, by virtue of a two-year limitation period contained in the Softwood Lumber Products Export Charge Act. The appellant argued that the limitation period did not apply, as the charges at issue had been remitted pursuant to an assessment.

***HELD**: The appeal is dismissed. The Minister of National Revenue, after completing an assessment, is required to send to the person assessed a notice of assessment. It is the notice of assessment that creates legal rights and obligations. Until the notice is issued, the taxpayer has no obligation to pay additional charges and can claim no right to any form of credit. The Tribunal finds that the charges remitted by the appellant prior to the issuance of the notice of assessment cannot be said to have been remitted pursuant to an assessment. The refund of those charges is, therefore, subject to the applicable two-year statutory limit.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*August 2, 1995*
Date of Decision:	*March 6, 1996*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Lyle M. Russell, Member* *Anita Szlazak, Member*
Counsel for the Tribunal:	*John L. Syme*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Gordon B. Greenwood, for the appellant* *Frederick B. Woyiwada, for the respondent*

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-083

LEGGETT & PLATT INCORPORATED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
LYLE M. RUSSELL, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of an assessment of the Minister of National Revenue (the Minister) pursuant to section 81.15 the Act. The issue in this appeal is whether the appellant is entitled to a refund of certain charges that it remitted under the *Softwood Lumber Products Export Charge Act*[2] (the Softwood Lumber Act).

The sections of the Softwood Lumber Act relevant to this appeal came into effect on January 8, 1987. Under sections 4 and 6 of the Softwood Lumber Act, certain softwood lumber and softwood lumber products, respectively, were subject to a charge when exported to the United States.

At all times material to this appeal, the appellant was engaged in the business of manufacturing mattresses and box springs made from, among other materials, softwood lumber. From January 31, 1987, onward, the appellant filed monthly returns with the Department of National Revenue (Revenue Canada) and remitted charges under the Softwood Lumber Act in respect of the mattresses and box springs that it exported to the United States. The appellant calculated the charges owing based on the purchase price of the softwood lumber that it used in the manufacture of the mattresses and box springs, as opposed to the export price. In the period between January 8 and November 13, 1987, the appellant exchanged correspondence with Revenue Canada regarding the correct method of calculating charges under the Softwood Lumber Act in respect of its exports.

In September 1989, Revenue Canada audited the appellant's softwood lumber products export charge returns for the period from January 8, 1987, to September 30, 1989. By notice of assessment dated December 27, 1989, the appellant was assessed unpaid charges of $409,623.95, plus interest and penalties. Of that amount, $326,717.76 represented the difference between the charges that the appellant remitted in 1987, based on the purchase price of softwood lumber inputs, and the charges payable based on the appellant's export price.

On March 2, 1990, the appellant served a notice of objection in respect of the assessment. That objection was followed by a letter dated October 28, 1991, from counsel for the appellant in which counsel asserted that, prior to certain amendments to the Softwood Lumber Act effective January 1, 1988, the goods exported by the appellant to the United States were not subject to any charge under the Softwood Lumber Act.

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

On March 20, 1992, the Tribunal issued its decision in *Bois-Aisé de Roberval Inc. v. The Minister of National Revenue*.[3] In that decision, the Tribunal held that mattress frame components were not chargeable under the Softwood Lumber Act prior to January 1, 1988.

By notice of decision dated May 27, 1993, the appellant's objection was allowed in part. The appellant was credited for charges paid in error after December 27, 1987. These included overpayments made pursuant to the notice of assessment dated December 27, 1989. These also included charges remitted by the appellant in January 1988 in respect of the appellant's exports to the United States in November and December 1987. However, citing the fact that the appellant had not been an "intervenant" in *Bois-Aisé* and the two-year limitation period imposed by the Act and the Softwood Lumber Act, the Minister declined to credit the appellant for the charges under the Softwood Lumber Act, calculated on the basis of the input purchase cost, which the appellant had remitted in respect of exports during the period from January 8 to October 31, 1987. It is those charges that are the subject of this appeal.

There would appear to be no disagreement between the parties that, prior to January 1, 1988, mattresses and box springs of the sort exported by the appellant were not taxable under the Softwood Lumber Act. The primary issue between the parties is whether, notwithstanding that fact, the appellant is precluded from recovering charges remitted in 1987, by virtue of section 10 of the Softwood Lumber Act. Section 10 provides as follows:

> *10.(1) Subject to subsection (2), where a person otherwise than pursuant to an assessment has paid any money in error, whether by reason of mistake of fact or law or otherwise, and the money has been taken into account as a charge, a penalty or interest under this Act, the Minister may grant a refund of the money to that person.*
>
> *(2) No refund of money shall be granted under subsection (1) unless an application for the refund, in the form and containing the information prescribed, is made to the Minister within two years after the money was paid in error.*

Counsel for the appellant advanced several arguments in support of the position that the charges at issue should be refunded, with interest, to the appellant. Counsel first argued that the Tribunal should allow the appeal on the basis that, in the notice of decision, the Minister erred in rejecting the appellant's objection on the ground that the appellant was not an "intervenant" in *Bois-Aisé* and was, therefore, subject to the two-year limitation period imposed by section 10 of the Softwood Lumber Act.

Counsel for the appellant also pointed out that section 10 of the Softwood Lumber Act applies only to charges paid "otherwise than pursuant to an assessment." Counsel submitted that, as the charges at issue were paid pursuant to an assessment, the two-year limitation in section 10 did not represent a bar to a refund. Counsel submitted that, in construing the meaning of the word "assessment" in subsection 10(1), the Tribunal should have regard to the principles set out in the Supreme Court of Canada's decision in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*.[4] Specifically, counsel argued that, contrary to the position taken by the Minister, an assessment is not limited to the notice of assessment itself, but includes the process leading up to the issuance of such a notice. That process, which may involve discussions between Revenue Canada and a taxpayer, an exchange of correspondence between those parties or an audit, forms part of the "assessment." Therefore, in counsel's submission, charges paid pursuant to such discussions, correspondence or audits are paid "pursuant to an assessment" within the meaning of

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3. Appeal Nos. AP-90-169 and AP-91-100, 5 T.C.T. 1156.
4. [1994] 3 S.C.R. 3.

subsection 10(1) of the Softwood Lumber Act and are, therefore, not subject to the two-year limitation period imposed by subsection 10(2).

Counsel for the appellant pointed out that the appellant and Revenue Canada began corresponding in February 1987 regarding the manner in which charges under the Softwood Lumber Act should be calculated. It was counsel's submission that, as this correspondence was an assessment, the charges subsequently paid by the appellant were paid pursuant to an assessment and were, therefore, not subject to the two-year limitation period. On that basis, counsel argued that the Tribunal should allow the appeal.

With respect to the appellant's first argument, counsel for the respondent submitted that the Minister's reasons for rejecting, in part, the appellant's objection were not relevant to this appeal. Counsel submitted that, pursuant to section 81.19 of the Act,[5] it is the assessment that is the subject of the present appeal and not the Minister's decision. Counsel submitted that, even if it were the Minister's decision that was the subject of the appeal, the reasons underlying the decision could not form the basis of the appeal. The appeal would be restricted to a determination of whether, on the facts and law relevant to the matter at issue, the decision reached by the Minister was correct.

With respect to the limitation period in section 10 of the Softwood Lumber Act, counsel for the respondent submitted that the correspondence exchanged between Revenue Canada and the appellant in 1987 was not an "assessment" and that the charges remitted by the appellant in 1987 were simply paid in the normal course of the appellant's operations. On that basis, counsel submitted that those charges were not excluded from section 10. In light of the two-year limitation period in subsection 10(2), neither the Minister nor the Tribunal has the authority to refund those charges to the appellant.

Counsel for the respondent submitted that, by virtue of the deeming provision in subsection 81.1(6) of the Act, which is incorporated by reference into the Softwood Lumber Act by section 18, the appellant had made an application for a refund on December 27, 1989, the date of Revenue Canada's notice of assessment. Counsel submitted that, pursuant to subsection 10(2) of the Softwood Lumber Act, the Minister only had the power to refund the appellant charges remitted in the two-year period which immediately preceded that deemed application.

Counsel for the appellant has advanced two arguments in support of the appellant's application for a refund. The first argument was founded upon an alleged error in the Minister's reasons for rejecting, in part, the appellant's objection. The Tribunal agrees with counsel for the respondent that the Minister's reasons have little or no significance in the context of an appeal under section 81.19 of the Act. In reaching this conclusion, the Tribunal considered section 81.19 of the Act, which was cited by counsel for the respondent, and subsection 81.27(1) of the Act, which provides as follows:

> *81.27(1) After hearing an appeal under this Part, the Tribunal may dispose of the appeal by making such finding or declaration as the nature of the matter may require and by making an order*
>
> *(a) dismissing the appeal; or*

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5. Section 81.19 provides as follows:

> *Any person who has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, may, within ninety days after the day on which the notice of decision on the objection is sent to him, appeal the assessment ... to the Tribunal.* (Emphasis added)

> *(b) allowing the appeal in whole or in part and vacating or varying the assessment or determination or referring it back to the Minister for reconsideration.* (Emphasis added)

Having regard to these provisions, it is, in the Tribunal's view, clear that appeals under section 81.19 of the Act are appeals of assessments or determinations and do not relate directly to the notices of decision of the Minister or the reasons contained therein.

The Tribunal is of the view that this appeal turns on the question of whether or not the charges remitted by the appellant in 1987 were remitted pursuant to an assessment. If they were not remitted pursuant to an assessment, then the Tribunal would have to conclude that they are not excluded from section 10 of the Softwood Lumber Act and that the limitation period in subsection 10(2) would preclude the refund of the charges under the Softwood Lumber Act remitted by the appellant in 1987.

Sections 81.1 through 81.18 of the Act govern assessments under the Act. These provisions are incorporated by reference into the Softwood Lumber Act by section 18. Having regard to those provisions, the Tribunal is not persuaded that the charges under the Softwood Lumber Act remitted by the appellant in 1987 were remitted pursuant to an assessment. In particular, the Tribunal notes the following provisions of the Act:

> *81.1(1) The Minister may, in respect of any matter, assess a person for any tax, penalty, interest or other sum payable by that person under this Act and may, notwithstanding any previous assessment covering, in whole or in part, the same matter, make such additional assessments as the circumstances require.*
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> *81.1(3) An assessment shall be completed with all due dispatch and may be performed in such manner and form and by such procedure as the Minister considers appropriate.*
>
> *81.13(1) After completing an assessment, ... the Minister shall send to the person assessed a notice of assessment in the prescribed form setting out*
>
> *(a) the date of the assessment;*
> *(b) the matter covered by the assessment;*
> *(c) the amount owing or overpayment, if any, by the person assessed;*
> *(d) a brief explanation of the assessment; and*
> *(e) the period within which an objection to the assessment may be made under section 81.15.*
>
> *(2) Where an assessment establishes that any tax, penalty, interest or other sum payable under this Act remains unpaid by the person assessed, the notice of assessment shall set out separately the taxes, penalties, interest and other sums payable and the aggregate thereof.*
>
> *...*
>
> *(7) For the purposes of this section and section 81.14,*
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> *"amount owing", in respect of a person assessed, means*
>
> *(a) where the assessment is an original assessment, the amount by which*
>
> *(i) the aggregate of all taxes, penalties, interest and other sums remaining unpaid by that person, as set out in the notice of assessment pursuant to subsection (2),*

exceeds

(ii) the aggregate of

(A) all amounts payable to that person, as set out in the notice of assessment pursuant to subsection (3), and

(B) the credits allowable to that person, as set out in the notice of assessment pursuant to subsection (4).

The Tribunal agrees with counsel for the appellant that there is a process that typically leads to the issuance of a notice of assessment. In the present case, that process involved discussions between Revenue Canada and the appellant, an exchange of correspondence and an audit. However, that information-gathering process, while a necessary precondition to the issuance of a notice of assessment, created no legal rights or obligations on the appellant or the Minister.

Subsection 81.1(3) of the Act provides that "[a]n assessment shall be completed with all due dispatch." Subsection 81.13(1) requires the Minister to send a notice of assessment to the person assessed. In the Tribunal's view, it is only upon the issuance of a notice of assessment that legal rights and obligations are created. A notice of assessment is required to set out, among other things, the date of the assessment and the amount owing or overpayment. Until the notice of assessment is issued, the taxpayer has no obligation to pay additional charges and can claim no right, pursuant to the assessment, to any form of credit. Prior to the notice of assessment being issued, the amount owing or the credit due the taxpayer has simply not been established. A taxpayer would have no way of knowing the results of the assessment and whether it owed any additional amount or was entitled to a credit. It is, in the Tribunal's view, the notice of assessment that creates those legal obligations and rights.

In light of the foregoing, the Tribunal is of the view that it cannot be said that charges remitted by the appellant in 1987, prior to the issuance of the notice of assessment dated December 27, 1989, were remitted pursuant to an assessment. Accordingly, the appeal is dismissed.

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

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member