CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 21, 1997

Appeal Nos. AP-95-174, AP-95-175 and AP-95-176

IN THE MATTER OF appeals heard on September 26, 1996, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated June 27, 1995, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BURROWS LUMBER CD LIMITED, BURROWS LUMBER INC. AND WILDWOOD FOREST PRODUCTS INC. **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

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

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
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 Nos. AP-95-174, AP-95-175 and AP-95-176

BURROWS LUMBER CD LIMITED, BURROWS LUMBER INC. AND WILDWOOD FOREST PRODUCTS INC. **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in these appeals is whether the amounts of federal sales tax paid by the appellants on the underweight charges should be refunded as money paid in error. More particularly, the issue is whether these charges should be included in "the price for which the goods were purchased" by the appellants.

HELD: The appeals are dismissed. The Tribunal is of the view that the underweight charges are a component of the sale price that the appellants must pay in order to take possession of lumber from the manufacturer or mill. The phrase "the price for which the goods were purchased" in section 50 of the *Excise Tax Act* does not permit wholesalers, such as the appellants, to avoid paying federal sales tax on the "sale price" of the lumber, as that price includes the underweight charges. There seems no logical reason to interpret the *Excise Tax Act* in a manner that would import different meanings to the phrases "sale price" and "the price for which the goods were purchased" within the context of section 50.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 26, 1996
Date of Decision:	March 21, 1997
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Raynald Guay, Member Desmond Hallissey, Member
Counsel for the Tribunal:	Gerry H. Stobo
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Wayne C. Matheson, for the appellants 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 Nos. AP-95-174, AP-95-175 and AP-95-176

BURROWS LUMBER CD LIMITED, BURROWS LUMBER INC. AND WILDWOOD FOREST PRODUCTS INC. **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

These three appeals under section 81.19 of the *Excise Tax Act*[1] (the Act) of eight determinations of the Minister of National Revenue that rejected the appellants' applications for refunds of federal sales tax (FST) were heard together, as they involved similar facts and the same provisions of the Act.

The appellant in Appeal No. AP-95-174 is Burrows Lumber CD Limited (Burrows Lumber CD); the appellant in Appeal No. AP-95-175 is Burrows Lumber Inc. (Burrows Lumber); and the appellant in Appeal No. AP-95-176 is Wildwood Forest Products Inc. (Wildwood). The appellants are lumber wholesalers. Burrows Lumber sells primarily Canadian western spruce, pine and fir dimensional lumber (western S-P-F) to customers in the United States, while Burrows Lumber CD and Wildwood sell primarily the same types of lumber to customers in Canada and to customers in both the United States and Canada, respectively. The appellants also import plywood and lumber of other species to sell in the domestic market.

The appellants each filed an application for a refund of FST allegedly paid in error on "underweight charges" paid by them to their suppliers. The applications were rejected by the respondent.

The issue in these appeals is whether the amounts of FST paid by the appellants on the underweight charges should be refunded as money paid in error. More particularly, the issue is whether these charges should be included in "the price for which the goods were purchased" by the appellants.

The relevant provisions of the Act read as follows:

> 50.(1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods
>
> (*c*) sold by a licensed wholesaler, payable by him at the time of delivery to the purchaser, and the tax shall be computed
>
> (ii) on the price for which the goods were purchased by the licensed wholesaler, if they were not imported by him, which price shall include the amount of the excise duties on goods sold in bond.

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

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

The term "sale price" is defined in section 42 of the Act, in part, as follows:

> "sale price", for the purpose of determining the consumption or sales tax, means
>
> (*a*) except in the case of wines, the aggregate of
>
> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,
>
> (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter.

Section 46 of the Act further provides, in part, that:

> 46. For the purpose of determining the consumption or sales tax payable under this Part,
>
> (*c*) in calculating the sale price of goods manufactured or produced in Canada, there may be excluded
>
> (ii) under such circumstances as the Governor in Council may, by regulation prescribe, an amount representing
>
> (B) the cost of transportation of the goods incurred by the manufacturer or producer in transporting the goods between premises of the manufacturer or producer in Canada, or in delivering the goods from the premises of the manufacturer or producer in Canada to the purchaser, where the goods are sold at a price that includes those costs of transportation,
>
> determined in such manner as the Governor in Council may, by regulation, prescribe.

Mr. Wayne C. Matheson, a commodity tax consultant, represented the appellants and testified on their behalf. The relevant facts are straightforward and are not disputed by the parties. They can be summarized as follows.

(1) The appellants purchase western S-P-F in various dimensions, lengths and qualities from lumber mills in British Columbia, Alberta, Saskatchewan, Manitoba and northwestern Ontario, which, as licensed manufacturers under the Act, produce the lumber.

(2) The appellants were, at all material times, licensed wholesalers under the Act.

(3) The lumber, usually packaged in pallets or "lifts," was shipped by rail in carloads or by truck in truckloads primarily to reload facilities in Winnipeg, Manitoba, contracted for or operated by the appellants. The appellants then selected various lifts to make up truckloads based on specific sales orders for shipment to their customers. The lumber was then delivered to the customers.

(4) In selling to Canadian customers, the appellants generally deliver the lumber to the customers' premises from the reload facilities and, unless the customers provide appropriate documentation indicating exemption from the former FST, calculate and charge the amount owing for the FST.

(5) Lumber mills charge their customers a price that includes the freight costs of delivery to those customers. Such customers include wholesalers. Some customers prefer to make their own delivery arrangements.

(6) Even where customers, like the appellants, decide to arrange their own delivery to their reload facilities, the lumber mills charge an amount for profit that they would have received if they had in fact delivered the lumber. The difference is referred to as the "underweight charge."

(7) Underweight charges are imposed, in part, to cushion lumber mills from fluctuations in costs to which they may be exposed arising from the pre-purchase of shipping services from railway and trucking companies. It appears that an underweight charge is an amount which represents an average of freight losses or gains experienced by the lumber mills.

(8) The appellants all paid FST on the underweight charges.

The appellants' representative contended that the appellants paid FST on an amount greater than "the price for which the goods were purchased by the licensed wholesaler" and that they are, consequently, entitled to refunds of FST allegedly paid in error. The representative claimed that the underweight charges, those being the amounts paid to the manufacturers for arranging transportation, should not have been included in the purchase price and that, accordingly, FST should not have been paid on those amounts. Rather, he claimed, these amounts should have been deducted from the purchase price, as they constitute costs of transportation as defined in clause 46(*c*)(ii)(B) of the Act.

The appellants' representative submitted that there are different methods for calculating FST for manufacturers and wholesalers under sections 42 and 50 of the Act. He argued that the "sale price" is the base price upon which a manufacturer is to calculate FST, while "the price for which the goods were purchased" is the base price upon which a wholesaler is to calculate FST. These two bases give rise to two different FST calculations, he argued.

The appellants' representative further submitted that underweight charges have been deducted for the purposes of calculating FST in other circumstances. Specific reference was made to the *Softwood Lumber Products Export Charge Act*.[2] Pursuant to interpretations of that act given by officials of the Department of National Revenue, underweight charges were to be considered part of the transportation costs and were, therefore, deductible from the amount on which FST had to be paid. In other words, underweight charges have been acknowledged by those officials as legitimate transportation costs.

The appellants' representative went on to argue that Parliament could have specifically stated that amounts paid for "advertising, financing, servicing, warranty, commission or any other matter" were to be calculated into "the price for which the goods were purchased" by a wholesaler as they are for a manufacturer. This would have allowed the underweight charge to be included in the purchase price for the purposes of the FST calculation. However, as legislative reference to these "add-on" amounts is made only with respect to licensed manufacturers, it was not, he argued, Parliament's intention to have those amounts included in the licensed wholesaler's purchase price for the purposes of calculating the FST.

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

The appellants' representative further submitted that the respondent's reliance on paragraph 9 of Excise Memorandum ET 201,[3] which indicates that the purchase price is to include amounts paid for advertising, financing, servicing, warranty, commission and excise duty, is incorrect. The legislation allows these amounts to be tagged on to the "sale price," as defined in section 42 of the Act, but not to "the price for which the goods were purchased." According to the representative, this latter phrase, unlike the term "sale price," is not defined in the Act and, as charging sections of income tax legislation must be interpreted strictly,[4] these "extra" charges which can apply to the "sale price" cannot apply to "the price for which the goods were purchased." Accordingly, a licensed wholesaler is only required to pay FST on the price paid for the actual item, i.e. the lumber costs.

Finally, the appellants' representative argued that reference by the respondent to the *Sales Tax Transportation Allowance Regulations*[5] (the Regulations), which refer to the amounts which can be excluded from the sale price as transportation costs, does not apply to licensed wholesalers. Rather, he argued, the Regulations only apply to manufacturers or producers. As the Regulations do not refer to "actual" costs, they cannot, in any event, assist in defining which amounts relating to transportation can be deducted.

Counsel for the respondent submitted that the appellants' attempts to import a different meaning to the phrase "the price for which the goods were purchased" and the term "sale price" are without merit. He pointed out that the reason that the phrase "the price for which the goods were purchased" is included in the legislation is simply to clarify the sale transaction to which the term "sale price" refers. Indeed, the term "sale price" is found in the preamble to section 50 of the Act, in which the phrase "the price for which the goods were purchased" is also found. Consequently, all those amounts in section 42 which are to be taken into account, such as "advertising, financing, servicing, warranty, commission or any other matter," are necessarily taken into account by wholesalers and manufacturers.

Counsel for the respondent went on to argue that, because the underweight charge is paid on every purchase by a wholesaler, irrespective of whether the wholesaler itself arranges the delivery of lumber, this charge must be factored into the price. The underweight charge is a profit margin which goes to the manufacturers, along with any profit that they realize from cutting and milling the wood. Without payment of this charge to the manufacturers, the wholesaler will not receive the lumber, even though the wholesaler arranges, as the appellants did in these cases, its own delivery. The fact that this charge is connected to transportation does not, in and of itself, permit it to be considered a transportation cost which can be deducted.

Counsel for the respondent further contended that a specific legislative provision could have been enacted to permit the deduction of the underweight charge from the tax calculation, had Parliament

---

3. *Licensed Wholesalers*, Department of National Revenue, Customs and Excise, September 29, 1989. Paragraph 9 reads:

> 9. For purposes of this memorandum, the cost of domestic goods is defined as the price for which the goods are purchased, as well as any amount paid for advertising, financing, servicing, warranty, commission and excise duty.

4. *British Columbia Railway Company* v. *The Queen*, [1979] 2 F.C. 122; and *The Queen* v. *British Columbia Railway Company*, [1981] 2 F.C. 783.

5. SOR/83-95, January 21, 1983, *Canada Gazette* Part II, Vol. 117, No. 3 at 497.

considered this to be appropriate. He also submitted that exemption provisions are to be strictly construed and that the appellants bear the onus of demonstrating that an exemption is applicable to their case.[6]

Having considered the legislation, as well as the evidence and arguments presented in these appeals, the Tribunal is of the view that the underweight charge is an amount charged by the manufacturer for its efforts in arranging transportation for all its customers, which is ultimately added to the manufacturer's profit margin. The charge itself has nothing to do with the cost of physically delivering the lumber from the manufacturer to the purchaser (including wholesalers such as the appellants). It is an amount that must be paid to the manufacturer before any lumber is transferred to a purchaser, irrespective of whether the purchaser arranges its own method of transporting the lumber. The transportation cost relating to the movement of the lumber to the purchaser is a separate item which is not charged to purchasers, like the appellants, that arrange their own transportation.

What makes this underweight charge somewhat unusual is that it is obviously referable to transportation and is not a cost typically incurred in preparing the goods for sale. It is an "add-on" cost which, within the lumber industry, has a long history, so much so that purchasers accept it as a cost that must be paid before they can take possession of the lumber.

The appellants' representative argued that a licensed manufacturer pays FST on the "sale price," but the licensed wholesaler pays it on "the price for which the goods were purchased." These terms do not, he contends, mean the same thing. Unlike the term "sale price," the phrase "the price for which the goods were purchased" is not defined in the Act. Following the representative's logic, it would seem that the term "sale price," as defined in section 42 of the Act, would include underweight charges because it would include amounts charged for advertising, financing, servicing, warranty, commission or any other matter (which presumably would include an amount such as the underweight charge).

Even if the Tribunal were to construe section 50 of the Act strictly, as urged by the appellants' representative, his logic is flawed. The underweight charge goes to the manufacturer's margin of profit, which manufacturer has pre-arranged shipping contracts with railway and trucking companies. The charge is paid by purchasers in each case. It is not a cost of physically moving the lumber from one location to another. By any commonsense understanding of "the price for which the goods were purchased," the phrase would include the amount paid for the underweight charge, just as it would be included in the definition of "sale price."

The Tribunal agrees with counsel for the respondent that the phrase "the price for which the goods were purchased" is nothing more than a way of identifying which sale transaction involving the wholesaler is to be used in order to calculate the amount of FST payable. Furthermore, there seems little purpose in attempting to give the phrase "the price for which the goods were purchased" a different meaning from "sale price" within the context of section 50 of the Act. Both seem to imply, even without the aid of section 42 of the Act, that the cost must be paid to a supplier, manufacturer, retailer, etc., before a purchaser will be given possession of the item.

Given this finding, it is unnecessary to deal with the other arguments of the parties.

---

6. See *Walter G. Lumbers* v. *The Minister of National Revenue*, [1943] Ex. C.R. 202, affd. [1944] S.C.R. 167.

For the reasons outlined above, the Tribunal concludes that the FST paid on the underweight charges was not paid in error and that these charges are included in "the price for which the goods were purchased." Accordingly, the appeals are dismissed.

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

Raynald Guay
Raynald Guay
Member

Desmond Hallissey
Desmond Hallissey
Member