



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2008-028

Cherry Stix Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, May 10, 2010*

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IN THE MATTER OF an appeal heard on December 2, 2009, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 20, 2009, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CHERRY STIX LTD.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Ellen Fry
Ellen Fry
Member

Stephen A. Leach
Stephen A. Leach
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 2, 2009

Tribunal Members: Serge Fréchette, Presiding Member
Ellen Fry, Member
Stephen A. Leach, Member

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Respondent	Counsel/Representative
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WITNESS:

David Apperman
Vice-President, Finance
Cherry Stix Ltd.

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Cherry Stix Ltd. (Cherry Stix) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on January 20, 2009, by the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4), concerning the value for duty of various styles and colours of women's T-shirts (the goods in issue) imported by Cherry Stix and sold to Wal-Mart.

2. The issue in this appeal is whether, pursuant to section 48 of the *Act*, the CBSA was correct in applying the transaction value to determine the value for duty of the goods in issue.

PROCEDURAL HISTORY

3. On January 8, 2004, Cherry Stix imported the goods in issue.

4. On January 22, 2008, pursuant to subsection 74(1) of the *Act*, Cherry Stix applied to the CBSA for a refund of customs duties on the basis that the value for duty should have been calculated on the price paid by Cherry Stix to its overseas suppliers, not on the price paid by Wal-Mart to Cherry Stix.²

5. On March 27, 2008, pursuant to subsection 59(2) of the *Act*, the CBSA denied Cherry Stix's request.

6. On April 30, 2008, pursuant to subsection 60(1) of the *Act*, Cherry Stix requested a further re-determination of the CBSA's decision.

7. On January 26, 2009, pursuant to subsection 60(4) of the *Act*, the CBSA issued its final determination, in which it again denied Cherry Stix's request for a refund.

8. On February 24, 2009, Cherry Stix appealed the CBSA's final determination to the Tribunal. Cherry Stix originally submitted that the issue was whether the value for duty should be calculated using the deductive value method, but the parties later agreed at the hearing that the issue was simply whether or not using the transaction value was the correct method.

9. The Tribunal held a public hearing in Ottawa, Ontario, on December 2, 2009.

10. Mr. David Apperman, Vice-President, Finance, of Cherry Stix appeared as a witness on the company's behalf. The CBSA did not call any witnesses.

PRELIMINARY MATTER—*RES JUDICATA*

11. In its brief, the CBSA alleged that Cherry Stix was attempting to re-argue an issue that had already been decided by the Tribunal in a previous case involving Cherry Stix³ and that the current appeal was therefore *res judicata*. It asked the Tribunal to dismiss the appeal on this basis.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. Respondent's brief, tab A, para. 10.

3. *Cherry Stix Ltd. v. President of the Canada Border Services Agency*, (6 October 2005), AP-2004-009 (CITT) [*Cherry Stix 2004*].

12. The Tribunal invited the CBSA and Cherry Stix to file written submissions on this matter. On November 6, 2009, having considered the submissions, the Tribunal informed the parties that it had decided to deny the motion to dismiss the appeal. The following are the Tribunal's reasons for this decision.

13. In order to succeed on a motion to dismiss an appeal on the basis of *res judicata*, the moving party must establish that the same issue was decided in an earlier case, that the earlier decision was final and that the parties are the same in both cases.⁴

14. In the Tribunal's view, although the last two requirements are met, the first is not.

15. The issue in *Cherry Stix 2004*, was whether Cherry Stix qualified as a "purchaser in Canada" under the *Valuation for Duty Regulations*.⁵ The goods in issue in that appeal were women's and children's apparel, purchased by Cherry Stix from foreign suppliers and subsequently sold to customers in Canada, including Wal-Mart.

16. As indicated above, the issue in this appeal is whether the CBSA was correct in applying the transaction value method, pursuant to section 48 of the *Act*, rather than some other method in determining the value for duty. This is clearly an issue that is different from the issue in *Cherry Stix 2004*. Therefore, the Tribunal denies the CBSA's motion to dismiss this appeal.

17. The Tribunal will now consider whether the CBSA was correct in applying the transaction value in determining the value for duty for the import transaction in issue.

IMPORT TRANSACTION IN ISSUE

18. In his testimony before the Tribunal, Mr. Apperman explained his understanding of the five main steps involved in the import transactions in issue.

19. The first step is that Cherry Stix's design department creates a sketch that is then worked into a sample for use by the company's sales people in promoting a new garment "concept".⁶

20. The second step is the marketing process, in which Cherry Stix's sales associates generally visit Wal-Mart with the new design.⁷ Wal-Mart may express an interest in certain styles of an item and/or in certain quantities and prices. This is usually done through oral discussions.⁸ When Wal-Mart expresses an interest in the items, Cherry Stix explores production arrangements with its foreign suppliers, including cost, quantities and delivery times, taking care to ensure that the goods will meet Wal-Mart standards. If these exploratory discussions with the suppliers yield satisfactory results, Cherry Stix engages in sales negotiations with Wal-Mart.⁹

21. The third step is the sales negotiation process. The standard terms for all sales to Wal-Mart are stipulated in its "Vendor Agreement".¹⁰ If the sales negotiations are successful, Wal-Mart issues a "Blanket Order/Estimated Quantities (Not Firm Commitment)" (blanket order) to Cherry Stix. The blanket order covers important transaction information, such as the prices and quantities of the items, and their delivery dates.¹¹

4. *Canada (Minister of Employment and Immigration) v. Chung*, [1993] 2 F.C. 42.

5. S.O.R./97-443 [*Regulations*].

6. *Transcript of Public Hearing*, 2 December 2009, at 49.

7. *Ibid.* at 50-51. On occasion, Wal-Mart's buyers call on Cherry Stix.

8. *Ibid.* at 10, 55, 57.

9. *Ibid.* at 7, 13, 58, 74.

10. Appellant's Confidential Book of Documents, tab 1.

11. *Transcript of Public Hearing*, 2 December 2009, at 13-14, 67-68.

22. The fourth step is the manufacturing process. Cherry Stix places an order with its foreign suppliers for the production of the merchandise covered by the blanket order and opens an irrevocable letter of credit in favour of the suppliers. Once the goods have been satisfactorily produced, Cherry Stix's freight consolidator in the People's Republic of China (China) arranges for them to be shipped by container to the warehouse of Wal-Mart's freight consolidator in the port of Vancouver, British Columbia. Cherry Stix pays for the shipping and warehousing costs, purchases insurance coverage with Cherry Stix as the insured and remains responsible for the merchandise while it is in the consolidator's warehouse in Vancouver.¹²

23. The fifth step is delivery. Cherry Stix faxes an "Allocation Request Form" to Wal-Mart, advising that the merchandise has arrived and is available for delivery, and asks for instructions as to which distribution centre it should be sent. Cherry Stix also arranges to have the items tested for quality at Wal-Mart's laboratory.¹³

24. If the quality tests are favourable, Wal-Mart splits the blanket order into individual "Purchase Orders", assigns each one a 10-digit customer number and allocates each one to the distribution centre that has been designated by Wal-Mart. Cherry Stix then delivers the merchandise to the designated distribution centre and, for each purchase order, sends Wal-Mart an invoice containing the same 10-digit customer number as on the purchase order.¹⁴

LAW

25. Under the *Customs Act*, in order to impose customs duties on imported goods, a value must first be attributed to the goods. Section 46 of the *Act* specifies that the value for duty must be determined in accordance with sections 47 to 55.

26. Section 47 of the *Act* provides as follows:

47. (1) The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.

(2) Where the value for duty of goods is not appraised in accordance with subsection (1), it shall be appraised on the basis of the first of the following values, considered in the order set out herein, that can be determined in respect of the goods and that can, under sections 49 to 52, be the basis on which the value for duty of the goods is appraised:

- (a) the transaction value of identical goods that meets the requirements set out in section 49;
- (b) the transaction value of similar goods that meets the requirements set out in section 50;
- (c) the deductive value of the goods; and
- (d) the computed value of the goods.

47. (1) La valeur en douane des marchandises est déterminée d'après leur valeur transactionnelle dans les conditions prévues à l'article 48.

(2) Lorsque la valeur en douane des marchandises n'est pas déterminée par application du paragraphe (1), elle l'est d'après les valeurs suivantes qui peuvent constituer la base de l'appréciation par l'application des articles 49 à 52, prises dans l'ordre où elles s'appliquent :

- a) la valeur transactionnelle de marchandises identiques répondant aux exigences visées à l'article 49;
- b) la valeur transactionnelle de marchandises semblables répondant aux exigences visées à l'article 50;
- c) la valeur de référence des marchandises;
- d) la valeur reconstituée des marchandises.

12. *Ibid.* at 15-20, 29-30, 72-73, 85-86.

13. *Ibid.* at 22-28.

14. *Ibid.* at 29-32.

27. Subsection 48(1) of the *Act* provides as follows:

48. (1) Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined

48. (1) Sous réserve des paragraphes (6) et (7), la valeur en douane des marchandises est leur valeur transactionnelle si elles sont vendues pour exportation au Canada à un acheteur au Canada, si le prix payé ou à payer est déterminable [...].

ARGUMENT

28. Cherry Stix submitted that neither the blanket order nor the purchase order indicates that the transaction value method should be used, for the following reasons:

- the blanket order did not involve a “sale”, only an agreement to sell. Transfer of title, an essential requirement for a sale, did not take place under this agreement. Rather, the blanket order was only an agreement to sell at a future date, upon the fulfillment of numerous conditions; and
- although it was a sale, the purchase order did not involve merchandise being “sold for export”. The basic definition of a “sale” is a transfer of title in exchange for a payment of the purchase price, and a sale for export means a sale that is intended for export. When the goods were delivered and title was transferred to Wal-Mart under the purchase order, this constituted a domestic sales transaction, since the goods had already been imported at that point.

29. Cherry Stix further submitted that the sales transactions between itself and its foreign supplier would not be eligible for the transaction value method since Cherry Stix is not a “purchaser in Canada” within the meaning of the *Regulations*. This was determined in *Cherry Stix 2004*, which, in its view, involved import transactions structured in the same way as the import transactions in issue.

30. The CBSA submitted that, in its view, the blanket order was indeed a sale for export to a purchaser in Canada, i.e. Wal-Mart, and that the transaction value method should therefore be applied. In this regard, the CBSA urged the Tribunal to adopt an approach to the interpretation of “sold for export” that, in its view, would follow commercial realities. It submitted that Parliament intended the transaction value to be the primary method of appraisal and that only when it is impossible to apply the method should one resort to other means of valuation.

31. The CBSA referred to the *United Nations Convention on Contracts for the International Sale of Goods*, which states as follows: “Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”¹⁵

32. The CBSA also referred to an advisory opinion of the World Customs Organization that recommended that, for purposes of the uniformity of interpretation and application of commercial terms, “sale” should be taken in the widest sense.¹⁶

15. 1980, U.N. Doc. A/Conf. 97/18 (180); 19 I.L.M. 668 (1980), Article 3(1).

16. World Customs Organization, Technical Committee on Customs Valuation, “Application of Article 1 of the WTO Valuation Agreement for Goods Imported Below Cost”, Doc. No. VT0084E1.

33. The CBSA also referred to subsection 31(1) of the Ontario *Sale of Goods Act*, which provides as follows: “Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, the delivery of the goods to a carrier whether named by the buyer or not, for the purpose of transmission to the buyer, is, in the absence of evidence to the contrary, delivery of the goods to the buyer.”¹⁷ The CBSA argued that under this provision, delivery of the merchandise to the freight consolidator in China constituted delivery to Wal-Mart and therefore consummated the sale. According to the CBSA, that sale is a sale for export to Canada under subsection 48(1) of the *Act*, and therefore the transaction value of the goods at that point must be considered as the value for duty.

ANALYSIS

34. It is important to state at the outset that the parties agree on the following facts: (1) Cherry Stix acquired title to the goods in issue from its supplier prior to their importation to Canada; (2) a contract for the sale of the goods existed between Cherry Stix and Wal-Mart before the importation of the goods in issue; and (3) a sale of those goods was actually completed between the parties. The evidence is consistent with these conclusions.

35. Subsection 48(1) of the *Act* establishes the following three conditions that must be met before the transaction value can be used to appraise the value for duty:

- there must be a *sale for export*;
- there must be a *purchaser in Canada*; and
- the price paid or payable must be ascertainable.¹⁸

36. In *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*,¹⁹ the Supreme Court of Canada held that “[f]or the purposes of valuation under s. 48 of the *Customs Act*, the relevant sale for export is the sale by which title to the goods passes to the importer. The importer is the party who has title to the goods at the time the goods are transported into Canada.”²⁰ Thus, the Tribunal must determine whether, as argued by the CBSA, there is a transfer of title of the goods in issue by Cherry Stix to Wal-Mart prior to their importation into Canada. If not, the transaction value cannot be applied.

37. The Tribunal agrees with the CBSA that the most relevant statute to assist the Tribunal in reaching its decision is the Ontario *Sale of Goods Act*. There is strong support for that proposition in the evidence.²¹ Subsections 18(1) and (2) of the Ontario *Sale of Goods Act* provide as follows:

- (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

17. R.S.O. 1990 c. S.1.

18. *The Pampered Chef, Canada Corporation v. President of the Canada Border Services Agency* (13 February 2008), AP-2006-048 (CITT); *Ferragamo U.S.A. Inc. v. President of the Canada Border Services Agency* (2 March 2007), AP-2005-053 (CITT).

19. [2001] 2 S.C.R. 100 [*Mattel*].

20. *Mattel* at para. 45.

21. Appellant’s Confidential Book of Documents, tab 1 at 3, tab 4 at 42.

38. In determining the time at which the parties intended the property (i.e. title) in the goods to be transferred, the Tribunal will first examine the terms of the contract between the parties. The vendor agreement, the vendor information manual, which is an inherent part of the agreement, and the purchase order contain the contractual regime that Wal-Mart requires of its suppliers. Together, those three documents set out the structure and provide for the entire set of contractual terms and conditions that apply to the commercial relationship, from the moment of the initial negotiations between the parties with respect to a possible purchase of goods to the ultimate completion of the sale of those goods.

39. The vendor agreement states the following in its first paragraph: “THIS AGREEMENT IS A LEGALLY BINDING DOCUMENT AND THE PARTIES HERETO AGREE TO BE BOUND BY ALL TERMS AND CONDITIONS HEREIN; HOWEVER, THIS VENDOR AGREEMENT AND OTHER TERMS, CONDITIONS AND STANDARDS INCORPORATED HEREIN DO NOT CREATE AN OBLIGATION FOR PURCHASER TO PURCHASE MERCHANDISE OR OTHER GOODS.”²²

40. The vendor agreement further states that a purchase order is necessary to finalize a sales transaction between Wal-Mart and a vendor and provides for the general terms and conditions of the purchase order. It provides that “[t]his [purchase] order sets forth the entire agreement between the Seller and Purchaser with respect to the sale and purchase of the goods, and it is not valid unless signed or initialled by an authorised buyer for Purchaser”. It specifically provides as follows: “Acceptance of this [purchase] order may be made only by shipment of the goods in accordance herein and ACCEPTANCE IS EXPRESSLY LIMITED TO ALL THE TERMS AND CONDITIONS OF THIS [PURCHASE] ORDER”²³

41. It is therefore clear that Wal-Mart and Cherry Stix intended for the purchase order to be a critical element required for the completion of any sale transaction that would take place under the general terms of the vendor agreement. It is also clear that the acceptance of the order placed by Wal-Mart by way of the purchase order can only occur upon shipment of the goods by Cherry Stix to Wal-Mart. From this, the Tribunal concludes that the vendor agreement establishes that it was not the intention of the parties that the transfer of title to the goods take place before the importation, rather that it only take place when the sale transaction is completed, which, in accordance with their contractual regime, is not until Cherry Stix ships the goods to Wal-Mart. In short, the completion of the sale and, therefore, the transfer of title of the goods in issue cannot occur until Wal-Mart, the purchaser, places the purchase order with Cherry Stix, the vendor, and Cherry Stix accepts the purchase order by shipping the goods in issue to Wal-Mart.

42. The Tribunal will now consider the conduct of the parties. As discussed below, the evidence indicates that the manner in which the transaction under consideration was actually conducted is consistent with intention indicated by the terms of the contractual documents.

43. The testimony indicates that the placement of the purchase order by Wal-Mart takes place after the placement of the blanket order.²⁴ Other evidence on the record, which consists, among other things, of various transactional documents and written communications between Cherry Stix and Wal-Mart, convinces the Tribunal that (1) the placement of the blanket order occurs before the importation of the goods in issue²⁵ and (2) the placement of the purchase order by Wal-Mart occurs after the importation has taken place.²⁶

22. *Ibid.*, tab 1 at 1; *Transcript of Public Hearing*, 2 December 2009, at 33-34.

23. Appellant’s Confidential Book of Documents, tab 1 at 2, 5; *Transcript of Public Hearing*, 2 December 2009, at 35-36.

24. *Transcript of Public Hearing*, 2 December 2009, at 13-14, 28-32.

25. Appellant’s Book of Documents, tabs 3-6; *Transcript of Public Hearing*, 2 December 2009, at 13-14.

26. Appellant’s Book of Documents, tabs 12-15; *Transcript of Public Hearing*, 2 December 2009, at 30-31.

44. It is clear from the conduct of the parties that the blanket order is not the final step in the transaction. It does not complete the sale. It is only an intermediary step in a transaction that comprises multiple steps. The blanket order serves to register Wal-Mart's interest in purchasing specific goods from Cherry Stix. At the time of the blanket order, many conditions still had to be met before Wal-Mart placed the purchase order with Cherry Stix. In fact, as the evidence demonstrates, certain very important aspects of the transaction remained unsettled at that point (such as price, inspection/testing of the goods and final shipment conditions).²⁷ Moreover, the evidence demonstrates that Cherry Stix remained responsible for the goods until the time of shipment to Wal-Mart.²⁸

45. The Tribunal does not consider that there are any other relevant circumstances that should be taken into account, as contemplated by section 18 of the Ontario *Sale of Goods Act*.

46. In summary, having examined the terms of the contract between Cherry Stix and Wal-Mart, and their actual conduct in the completion of the transaction under examination,²⁹ the Tribunal concludes that Cherry Stix, not Wal-Mart, held title in the goods in issue at the time of importation.³⁰

CONCLUSION

47. As indicated above, subsection 48(1) of the *Act* requires that three conditions be met before applying the transaction value method to determine the value for duty of imported goods. The importation process for the goods in issue fails to meet the first condition. Therefore, the transaction value cannot be applied.

DECISION

48. The appeal is allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Ellen Fry
Ellen Fry
Member

Stephen A. Leach
Stephen A. Leach
Member

27. Appellant's Book of Documents, tabs 9-11, *Transcript of Public Hearing*, 2 December 2009, at 23-30.

28. Appellant's Book of Documents, tab 8; Appellant's Confidential Book of Documents, tab 1; *Transcript of Public Hearing*, 2 December 2009, at 16-19, 30, 34.

29. In the Tribunal's view, there were no other relevant circumstances to consider, as contemplated by subsection 18(2) of the Ontario *Sale of Goods Act*.

30. Appellant's Book of Documents, tabs 3-6, 8, 12-15; *Transcript of Public Hearing*, 2 December 2009, at 15, 30-31.