



Ottawa, Friday, June 13, 2003

**Appeal No. AP-2001-094**

IN THE MATTER OF an appeal heard on October 28, 2002,  
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of  
the Canada Customs and Revenue Agency dated  
December 10, 2001, with respect to a request for redetermination  
under subsection 60(4) of the *Customs Act*.

**BETWEEN**

**AAI.FOSTERGRANT OF CANADA CO.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Patricia M. Close  
Patricia M. Close  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2001-094

AALFOSTERGRANT OF CANADA CO.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

This is an appeal from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) dated December 10, 2001, concerning the value for duty of goods imported by AAi.FosterGrant of Canada Co. (AAi Canada) during the period from September 1998 to December 1999. In his decision, the Commissioner states that the value for duty of goods imported by AAi Canada should be determined in accordance with the transaction value with respect to the sale between AAi Canada's U.S.-based parent and Canadian retailers. The Commissioner contends that, during the period at issue, AAi Canada did not qualify as a "purchaser in Canada".

AAi Canada argues that it qualifies as a "purchaser in Canada" pursuant to subsection 2(1) of the *Valuation for Duty Regulations*. Therefore, the value for duty should be based on the intercompany selling price for the goods applied between it and its U.S.-based parent.

**HELD:** The appeal is dismissed. The Tribunal is of the view that AAi Canada did not carry on business in Canada during the period at issue. AAi Canada's employees did not have direct access to funds with which to conduct business. While some of the sales revenue generated in Canada was deposited into AAi Canada's bank accounts, these funds were immediately transferred to an account in the United States, to which none of AAi Canada's employees had access. These banking arrangements clearly had an impact on AAi Canada's ability to carry on business, since its employees in Canada had no capacity to pay for goods and services required for the Canadian operations. AAi Canada's employees negotiated contracts with customers, but worked within parameters determined by its U.S.-based parent. AAi Canada performed primarily administrative functions in Canada, such as ordering merchandise, creating and purchasing display racks for placement in stores and showing merchandise to customers.

Since AAi Canada was not carrying on business in Canada during the period at issue, it neither was a resident of Canada nor did it maintain a permanent establishment in Canada, as these terms are defined in the *Valuation for Duty Regulations*. Consequently, it was not a "purchaser in Canada", for the purposes of the *Customs Act*, and the transfer price for goods established between AAi Canada and its U.S.-based parent cannot form the basis for appraising the transaction value for the goods imported by AAi Canada during the period at issue.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 28, 2002  
Date of Decision: June 13, 2003

Tribunal Members: James A. Ogilvy, Presiding Member  
Pierre Gosselin, Member  
Patricia M. Close, Member

Counsel for the Tribunal: John Dodsworth

Clerk of the Tribunal: Margaret Fisher

Appearances: Glenn A. Cranker, for the appellant  
Patricia Johnston and Lynn Marchildon, for the respondent



Appeal No. AP-2001-094

AALFOSTERGRANT OF CANADA CO.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

TRIBUNAL: JAMES A. OGILVY, Presiding Member  
PIERRE GOSSELIN, Member  
PATRICIA M. CLOSE, Member

## REASONS FOR DECISION

### INTRODUCTION

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from a decision of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), dated December 10, 2001. The decision concerns the value for duty of sunglasses, accessories and costume jewellery imported by AAi.FosterGrant of Canada Co. (AAi Canada) during the period from September 1998 to December 1999.

AAi Canada claimed that the value for duty of the goods should be based on the intercompany price at which it allegedly purchased the goods from its parent, AAi FosterGrant, Inc. of Smithfield, Rhode Island (AAi U.S.). In his decision, the Commissioner determined that the intercompany selling price was not an acceptable basis for the value for duty because AAi Canada was not a “purchaser in Canada” during the period at issue. The Commissioner therefore determined that the value for duty of the goods should be determined on the basis of the price at which AAi U.S. allegedly sold the goods directly to Canadian retailers. Since January 1, 2000, given changes in AAi Canada’s business practices, the Canada Customs and Revenue Agency has considered AAi Canada a “purchaser in Canada”.

The issue in this appeal is whether AAi Canada was a “purchaser in Canada” during the period at issue for purposes of the *Act* and the *Valuation for Duty Regulations*.<sup>2</sup>

The relevant provisions of the *Act* are 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.

48. (1) . . . 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 and if

(d) the purchaser and the vendor of the goods are not related to each other at the time the goods are sold for export or, where the purchaser and the vendor are related to each other at that time,

(i) their relationship did not influence the price paid or payable for the goods,

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].  
2. S.O.R./86-792 [*Regulations*].

(4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

The *Regulations* define a “purchaser in Canada” as follows:

2.1 For the purposes of subsection 45(1) of the Act, “purchaser in Canada” means

- (a) a resident;
- (b) a person who is not a resident but who has a permanent establishment in Canada; or
- (c) a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,
  - (i) for consumption, use or enjoyment by the person in Canada, but not for sale, or
  - (ii) for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.

Section 2 of the *Regulations* defines both “permanent establishment” and “resident” for purposes of the above definition as follows:

“permanent establishment”, in respect of a person, means a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business.

“resident” means

- (a) an individual who ordinarily resides in Canada;
- (b) a corporation that carries on business in Canada and of which the management and control is in Canada; and
- (c) a partnership or other unincorporated organization that carries on business in Canada, if the member that has the management and control of the partnership or organization, or a majority of such members, resides in Canada.

## EVIDENCE

Ms. Diane Pooles, the first witness for AAi Canada, has been its president since 1995.

According to Ms. Pooles’ testimony, AAi Company of Canada was incorporated on November 1, 1994, in Nova Scotia and changed its name to AAi.FosterGrant of Canada Co. in 1999. AAi Canada is a wholly owned subsidiary of AAi U.S. Ms. Pooles testified that AAi Canada now employs between 85 and 100 full- and part-time representatives. AAi Canada leases premises in Toronto, Ontario, that include offices, a showroom and storage space.

Ms. Pooles testified that she was responsible for developing budgets and approving all pricing, invoicing, office expenses and freight costs for AAi Canada. While the original lease for its Toronto premises was signed by the Vice-Chairman of AAi U.S., Ms. Pooles cosigned an amendment to it in 1997. Ms. Pooles testified that she was also responsible for arranging in-store displays, that is, the display racks in which AAi Canada’s goods were presented to customers in individual stores.

Ms. Pooles testified that she negotiates terms of sales agreements with existing clients. The sales agreements indicate the price and type of merchandise that each retailer will purchase over a specified period, together with projections of the quantity of merchandise that the retailer will require. Ms. Pooles testified that AAi U.S. would establish a target profit margin that AAi Canada should receive on each item and that she would work towards those targets. During the period covered by the sales agreement, AAi Canada’s sales representatives would refill store displays in reference to a plan that showed the specific

quantity of each type of goods that should be available in the display. The sales representatives would then order the goods from AAi U.S. Ms. Pooles testified that the goods were transported to Canada from Rhode Island by courier in consolidated shipments. The courier would clear the consolidated shipment through customs, open the shipment at the courier's warehouse in Canada, and separate and transport individual shipments to the customers' store locations. AAi Canada did not take delivery of the goods in Canada nor did it maintain inventory. Ms. Pooles testified that AAi Canada was responsible for paying the courier and for any duty and transportation charges.

By way of a resolution of AAi Canada's Board of Directors, dated February 25, 1999, Ms. Pooles was elected as an officer of AAi Canada and obtained signing authority in the amount of \$5,000 on AAi Canada's Royal Bank account. The funds for that account were supplied by AAi U.S. On August 15, 1999, Ms. Pooles and Ms. Anne Reed, Vice-President of AAi Canada, gained signing authority for AAi Canada's account at the Bank of America Canada and authority to make wire transfers on that account. By resolution of the Board of Directors dated October 14, 1999, Ms. Pooles became a Director of AAi Canada and, on November 4, 1999, the dollar limit of her signing authority on AAi Canada's Royal Bank, Bank of Montreal and Bank of America Canada accounts was set at \$100,000.

The resolution of the Board of Directors dated February 25, 1999, approved a service agreement and a master purchase agreement between AAi Canada and AAi U.S. In the service agreement, AAi U.S. agreed to provide to AAi Canada accounts receivable and cash management services, accounting management information systems, sourcing assistance and promotional, advertising and marketing advice. The service agreement also established a formula for determining the price that AAi Canada was to pay to AAi U.S. for these services.

The master purchase agreement established the terms and conditions by which AAi Canada would purchase goods from AAi U.S. The master purchase agreement indicated that AAi Canada was responsible for paying the cost of transportation of the goods from AAi U.S.'s Rhode Island warehouse and would be responsible for importing the product from the United States into Canada.

According to the master purchase agreement, title, risk of loss and risk of responsibility and liability for the goods passed to AAi Canada at the F.O.B. point in Rhode Island. Ms. Pooles indicated that no insurance on the goods was obtained since it was too expensive. She testified that AAi Canada was responsible for transportation costs and that title to the goods transferred from AAi Canada to the customer at the customer's warehouse or store in Canada. According to the master purchase agreement, risk for purchases made by the Canadian retailers on credit was the responsibility of AAi Canada. She testified that, in her view, the service agreement and master purchase agreement did not change existing practices, that nothing fundamentally was different in the way that AAi Canada did business before and after the agreements were signed.

Ms. Pooles stated that the Canadian company was responsible for paying rebates to customers for markdowns or end-of-season sales. Markdowns were authorized by Ms. Pooles and came out of AAi Canada's account. Ms. Pooles testified that damaged goods were sold to an unrelated company that disposed of them in discount markets.

On cross-examination, Ms. Pooles testified that, until May 1999, customers paid for their goods by depositing a cheque into AAi Canada's Nations Bank "lock-box" account, which was in the name of AAi U.S. and located in the United States. Subsequently, the retailers deposited their cheques in payment into AAi Canada's Bank of America Canada "lock-box" account located in Canada. Ms. Pooles testified that these "lock-box" accounts were cleared of all funds nightly and that the money was moved to a bank

account in Rhode Island. She testified that no one employed by AAi Canada had access to the Nations Bank “lock-box” account. Similarly, no one employed by AAi Canada had access to the Bank of America Canada account until she and Ms. Reed were granted signing authority.

Ms. Pooles testified that the Royal Bank account was used to pay AAi Canada’s operating expenses, such as rent, utilities and fixtures. Ms. Pooles testified that she sometimes paid for goods and services for AAi Canada using her own personal cheques and was later reimbursed after submitting an expense claim to AAi U.S. in Rhode Island. Ms. Pooles testified that she would place an order for the goods or services required by AAi Canada and that, when the invoice was received for payment, she would sign, indicating her approval, and send it to AAi U.S. for payment. She testified that AAi U.S. would deposit money into AAi Canada’s Royal Bank account and the invoice would then be paid by cheque, signed by an officer of AAi U.S. Ms. Pooles testified that she has been signing cheques since obtaining signing authority on AAi Canada’s bank accounts, but that, until January 1, 2000, the cheques continued to be cosigned by the Chief Financial Officer of AAi U.S. AAi Canada also maintained an account with the Bank of Montreal, which was used for AAi Canada’s payroll. AAi U.S. would deposit money in this account, and a separate company was hired to handle the administrative functions of paying AAi Canada’s employees. Ms. Pooles testified that all bank statements went to AAi U.S. in Rhode Island.

Ms. Pooles testified that the 1997 tax return was signed by AAi U.S.’s Chief Financial Officer since AAi Canada had no financial officer. In 1999, AAi Canada’s income statement showed that it had retained earnings, but that they had been retained in the United States, by AAi U.S. in its Rhode Island headquarters. Ms. Pooles testified that no employee of AAi Canada could access this money.

Ms. Pooles testified that two invoices were generated by AAi U.S. to document sales. A master invoice itemized the goods that were ordered by AAi Canada’s sales representatives and were included in the specific shipment. This invoice indicated the intercompany transfer price between AAi Canada and AAi U.S., which was established as being the landed cost of goods plus 10 percent for value for duty purposes. The master invoice would generate a sale on AAi Canada’s books, but Ms. Pooles testified that no funds were actually transferred from AAi Canada to AAi U.S. to pay for these goods. The second invoice documented the sale between AAi Canada and the Canadian retailers and included a markup.

Ms. Reed, Vice-President of AAi Canada since 1995, also testified on behalf of AAi Canada. Ms. Reed described the process of developing sales “programs” with specific retail customers. She described how, each year, she worked with each client to determine the estimated retail sales for each customer. She determined the exact mix of style and product type that would enable AAi Canada to achieve the margins needed to meet its “Canadian goals”.

Ms. Reed testified that, when negotiating a sale for a new Canadian customer, AAi U.S. would calculate the cost and profit margins for the specific product mix that the customer required, including the impact of all the cost variables, such as fixtures, advertising and damaged merchandise. AAi U.S. assessed these figures in order to determine if the account would be a profitable venture. If AAi Canada wanted to proceed, it then provided the proposal to the Vice-Chairman and Chief Executive Officer of AAi U.S. for approval. If the proposal was approved, AAi Canada purchased the merchandise from AAi U.S. AAi Canada was provided with a net income margin budget that it was required to respect.

On cross-examination, Ms. Reed testified regarding the nature of the “approval” provided by AAi U.S. Approval indicated that AAi U.S. would support the program, that it fell within AAi Canada’s budget, that AAi Canada would be allowed to go forward and buy the merchandise and that AAi U.S. agreed to all the conditions of the proposal, such as returns and mark-down arrangements.

The witness for the Commissioner was Ms. Rosemary Pick, Compliance Verification Officer with the Canada Customs and Revenue Agency. She gave testimony on the verification report that she prepared, which formed the basis of the Commissioner's decision that AAi Canada was not "carrying on business" in Canada during the period at issue.

Ms. Pick testified that, while AAi Canada had some power in negotiating contracts, it needed approval from AAi U.S. on pricing, discounts and delivery. Further, she testified that AAi U.S. arranged the shipment of the goods by courier and hired a company to dispose of damaged merchandise for which AAi Canada was responsible. Ms. Pick testified that AAi Canada could buy office supplies and other requirements to run the business, but that it had no ability to pay for them.

Ms. Pick testified that salaries of AAi Canada's permanent employees were negotiated with AAi U.S. and that part-time service representatives were paid by the hour and were hired by AAi Canada. Ms. Pick testified that most of AAi Canada's customers were well established so that no soliciting by AAi Canada was required. Further, AAi Canada's sales representatives ordered goods directly from the United States with reference to manuals provided by AAi U.S. Ms. Pick testified that, since the proceeds deposited in AAi Canada's accounts were cleared nightly and held in Rhode Island, AAi U.S. necessarily undertook collection efforts regarding unpaid accounts.

According to Ms. Pick, she was told in August 1998 that the Canadian retailers took title to the goods in Rhode Island. She testified that she had been told during her verification visit that AAi U.S. had not prepared a transfer price study regarding the price that was attributed to AAi Canada in payment for the goods. Ms. Pick testified that AAi Canada's Board of Directors met in the United States, and that AAi Canada's books and records were located in the United States. Further, Ms. Pick stated that, as of January 1, 2000, AAi Canada had filed a tax return only for 1997 and that none had been filed for 1998 and 1999.

Ms. Pick accepted that AAi Canada maintained an establishment in Canada. Ms. Pick testified as to the changes made to, and by, AAi Canada prior to 2000, when it was determined that AAi Canada was, at that point, a "purchaser in Canada". Specifically, the decision was based on the fact that it was not until November 1999 that the President of AAi Canada received signing authority for \$100,000 and was then able to pay for purchases and invoices from the Toronto office. All these changes occurred, according to Ms. Pick, between May 1999 and the end of that year. Moreover, Canadian directors had been added, and Ms. Pooles could now run the day-to-day business of AAi Canada without contacting the U.S.-based parent.

## ARGUMENT

AAi Canada argued that, during the period at issue, it was a "purchaser in Canada" and that the transfer price for the goods paid by AAi Canada to AAi U.S. should therefore form the basis for establishing the value for duty of the goods in accordance with the *Act*.

AAi Canada argued that, in accordance with paragraph 2.1(a) of the *Regulations*, it was a resident, since its management and control were in Canada and it carried on business in Canada. In support of its position that it maintained management and control in Canada, AAi Canada referred to the fact that Ms. Pooles exercised control over hiring, firing, budgets, negotiations, prices, credits, promotional allowances and approval of cheques. AAi Canada argued that it carried on business, given that it maintained an office and bank accounts in Canada, employed representatives who transacted business in Canada and was responsible for damaged goods. AAi Canada also pointed to the fact that delivery of the goods to Canadian retailers occurred in Canada, that Canadian retailers deposited payment for goods into AAi



Canada's Canadian bank accounts and that AAi Canada's expenses were paid out of these bank accounts. AAi Canada further argued that the fact that it negotiated contracts with Canadian retailers and that purchase orders were issued and filled in Canada, with very little involvement of AAi U.S., also provided evidence that it "carried on business" in Canada during the period at issue.

AAi Canada also argued that it qualified as a purchaser in Canada by virtue of paragraph 2.1(b) of the *Regulations*, given that it carried on business in Canada and maintained a permanent establishment in Canada.

AAi Canada argued that there is no evidence to support the factual basis of the assessment that the Canadian retail customers take title and ownership of the goods in the United States. To the contrary, the master purchase agreement establishes that AAi Canada itself takes title in the United States. AAi Canada argued that, since it had title at the time of importation, it should be regarded as the purchaser in Canada according to a decision of the Supreme Court of Canada.<sup>3</sup> Risk of loss was with AAi Canada until delivery to customers in Canada, and AAi Canada was responsible for paying the duty and transportation. AAi Canada argued that it was not acting as an agent for its U.S.-based parent, nor was there evidence to suggest that AAi Canada was a sham. AAi Canada argued that there was a true buyer and seller relationship between AAi Canada and AAi U.S.

AAi Canada argued that the Tribunal's decision in Appeal No. AP-98-100<sup>4</sup> supported its position. AAi Canada referred to the fact that, in *Brunswick*, the Tribunal found the appellant to have a permanent establishment in Canada, in that it had a number of fixed places of business in Canada from which its employees solicited customers. As in the present situation, in *Brunswick*, the appellant's employees had the authority to negotiate terms of contracts. Further, invoices were issued in the appellant's name and payments made by Canadian customers were received by the appellant in Canadian bank accounts.

The Commissioner argued that AAi Canada did not "carry on business" in Canada during the period at issue and, therefore, was not a "purchaser in Canada" for purposes of the *Regulations*. Therefore, the transfer price between AAi Canada and its U.S.-based parent cannot be considered the transaction value for the purpose of determining the value for duty of the goods.

The Commissioner referred to the fact that AAi U.S. exercised control over AAi Canada's bank accounts and that the proceeds of sales deposited to AAi Canada's bank accounts were transferred to AAi U.S. on a daily basis. Therefore, the Commissioner submitted, AAi Canada was merely a conduit through which Canadian retailers paid AAi U.S. The Commissioner argued that this shows that there was no profit being made by this Canadian corporation, which he suggested is key to finding that a business entity carries on business in Canada.

The Commissioner further argued that AAi Canada did not incur risk or liabilities in Canada. In this regard, the Commissioner referred to evidence indicating that AAi Canada did not buy insurance for the goods that were shipped to Canada from the U.S.-based parent's warehouse. The carrier maintained insurance, but since AAi U.S. arranged the carrier, the Commissioner argued that this is akin to showing that AAi U.S. actually insured the goods. Further, the Commissioner referred to the fact that any purchases made by AAi Canada were paid for with funds provided by AAi U.S. AAi Canada's role was merely to approve invoices for goods purchased.

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3. *Canada v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100 [*Mattel*].

4. *Brunswick International (Canada) Limited v. Deputy M.N.R.* (14 December 1999) (CITT) [*Brunswick*].

The Commissioner distinguished the facts in this appeal from those in *Brunswick*. In *Brunswick*, the appellant maintained inventory in Canada, had the authority to amend contracts and did not need to report daily to the U.S. parent, as did AAi Canada. Further, the appellant in *Brunswick* had the authority to purchase supplies, whereas AAi Canada had to forward invoices for supplies to AAi U.S. for payment.

## DECISION

Sections 47 and 48 of the *Act* provide that the value for duty of goods is to be the transaction value 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.

As noted above, “purchaser in Canada” for purposes of the *Act* is defined in the *Regulations* as, *inter alia*, a resident or a person who is not a resident, but who has a permanent establishment in Canada. In respect of corporations, “resident” is defined as “a corporation that carries on business in Canada and of which the management and control is in Canada”. The *Regulations* define a “permanent establishment” as “a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business.”

The Tribunal is of the view that AAi Canada was not a “purchaser in Canada” during the period at issue, since it did not carry on business in Canada. The Tribunal finds it significant that AAi Canada’s employees did not have direct access to funds with which to conduct business. The evidence indicates that, at the start of the period at issue, the practice was for Canadian retailers to deposit their payment for goods into AAi U.S.’s Nations Bank account, located in the United States. While Canadian retailers issued cheques in payment in AAi Canada’s name, and some of the sales revenue generated in Canada was deposited into AAi Canada’s bank accounts, these funds were immediately transferred to an account located in Rhode Island, to which none of AAi Canada’s employees had access.

These banking arrangements clearly undermined AAi Canada’s ability to carry on business, since its employees in Canada had no capacity to pay for the goods and services required for the Canadian operations. Nor did they have the capacity to pay for the goods purchased from their parent in the United States. On occasion, Ms. Pooles paid for AAi Canada’s expenses using her own personal cheques. While Ms. Pooles testified that AAi Canada paid for various costs relating to its operations, such as transporting the imported goods to the Canadian retailers, the evidence indicates that, when an invoice was received by AAi Canada, it was sent to AAi U.S. for payment. AAi U.S. deposited the specific amount of money required to pay for the purchase into AAi Canada’s Royal Bank account and a cheque was issued in payment by an officer of AAi U.S. AAi Canada’s employees did not obtain authority over AAi Canada’s accounts in any significant amount until near the end of the period at issue, and Ms. Pooles testified that cheques continued to be cosigned by the Chief Financial Officer of AAi U.S. until January 1, 2000.

Similarly, while AAi Canada’s payroll was paid out of its Bank of Montreal account, AAi U.S. deposited into the account the necessary funds and a company, independent of AAi Canada, was engaged to handle the administrative functions of paying AAi Canada’s employees. All bank statements were forwarded to the U.S.-based parent, not to AAi Canada. While AAi U.S. issued an invoice indicating that AAi Canada was charged a transfer price for the imported goods, AAi Canada did not issue a cheque in payment for the goods. The transaction was documented as an entry in AAi Canada’s financial statements maintained by AAi U.S. and the invoice presented for customs purposes. The Tribunal notes that there was no evidence on the record establishing that AAi U.S. had conducted a transfer price study in regard to this transaction, nor were AAi Canada’s income tax returns in Canada for 1998 and 1999 submitted in evidence.

At the beginning of the period at issue, the relationship between AAi Canada and AAi U.S. was not subject to a written agreement, so the evidence is not conclusive with respect to when and where title to the goods passed prior to the master purchase agreement. The master purchase agreement that was entered into during the period at issue indicates that title and risk for the goods passed to AAi U.S. However, the extent to which this risk to AAi Canada manifested itself is unclear to the Tribunal, given the control that AAi U.S. had over the revenues generated in Canada.

With respect to AAi Canada's position regarding the Supreme Court of Canada's decision in *Mattel*, the Tribunal notes that the decision did not involve the interpretation of the expression "purchaser in Canada" as found in subsection 48(1) of the *Act*. In fact, the words "purchaser in Canada" were added to the *Act* by statutory amendment subsequent to the importation at issue in *Mattel*. Instead, in *Mattel*, the Supreme Court of Canada interpreted the words "sale for export" as found in subsection 48(1) of the *Act*.

The service agreement entered into between AAi Canada and AAi U.S. documented the fact that, for a fee, AAi U.S. would perform certain services for AAi Canada, including accounting services. In the Tribunal's opinion, while this arrangement might be both efficient and financially prudent for the parties, the fact that these core business functions were performed outside Canada by a separate, though related company, detracts, in these circumstances, from AAi Canada's argument that it "carried on business" in Canada.

The Tribunal is also of the view that the evidence indicates that AAi U.S. maintained control over the negotiation of supply arrangements with Canadian retailers. AAi Canada did not have the authority to negotiate with new clients or to negotiate the resale terms of the goods sold in the Canadian market without seeking the confirmation from AAi U.S. Although AAi Canada's employees maintained some leeway in deciding how individual "programs" for clients were structured, they worked within specific price and margin "target ranges" that were provided by AAi U.S.

In concluding that AAi Canada did not carry on business in Canada during the period at issue, the Tribunal also notes that AAi Canada's sales representatives placed orders directly with AAi U.S. and that no inventory was maintained in Canada. AAi U.S. arranged for shipment of the goods to individual customers in Canada, and AAi Canada typically did not take delivery of the imported goods. Invoices documenting sales were generated in the United States, and AAi U.S., not AAi Canada, pursued unpaid accounts of Canadian retailers. Further, Ms. Pooles did not become a member of AAi Canada's Board of Directors until later in the period at issue, and no meeting of the Board of Directors ever occurred in Canada.

The Tribunal is of the view that the extent of the involvement of AAi U.S. in carrying on business in Canada distinguishes the present case from the Tribunal's decision in *Brunswick*. In fact, it would appear that, during the period at issue, the Canadian business was conducted by AAi U.S. from its Rhode Island location. Other than the circumscribed role played by AAi Canada's employees in negotiating contracts, as discussed above, the evidence indicates that it performed primarily administrative functions in Canada from that location, such as ordering merchandise, creating and purchasing store displays and showing merchandise to customers. In the Tribunal's opinion, these limited functions do not amount to "carrying on business" for purposes of the *Regulations*.

Therefore, AAi Canada did not maintain a permanent establishment in Canada, since it did not "carry on business" at its Toronto location. Furthermore, since AAi Canada did not "carry on business" in Canada during the period at issue, it was not a "resident" for purposes of the *Regulations*. While the evidence clearly supports the conclusion that management and control did not reside in Canada, there is no need to consider the issue of management and control any further.

Consequently, AAi Canada was not a “purchaser in Canada” for the purposes of the *Act*, and the transfer price for goods established between AAi Canada and AAi U.S. cannot form the basis for appraising the transaction value for the goods imported by AAi Canada during the period at issue. Therefore, the appeal is dismissed.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Patricia M. Close  
Patricia M. Close  
Member