CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, November 4, 1994

Appeal No. AP-93-322

IN THE MATTER OF an appeal heard on June 17, 1994, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF two decisions of the Deputy Minister of National Revenue for Customs and Excise dated January 10, 1994, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

HARBOUR SALES (WINDSOR) LIMITED **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-322

HARBOUR SALES (WINDSOR) LIMITED **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the Customs Act from two decisions of the Deputy Minister of National Revenue from two determinations of value for duty made in respect of certain goods imported into Canada from Taiwan. The issue in this appeal is whether the Deputy Minister of National Revenue properly determined the value for duty of the goods in issue. The resolution of that issue turned on the interpretation of the expression "sold for export to Canada" which appears in subsections 48(1) and (4) of the Customs Act.

HELD: *The appeal is allowed. The Tribunal is of the view that subsections 48(1) and (4) of the Customs Act are clear and unambiguous and should, therefore, be given their plain and ordinary meaning. The Tribunal is satisfied that the goods in issue were sold for export to Canada, within the meaning of those subsections.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 17, 1994*
Date of Decision:	*November 4, 1994*
Tribunal Members:	*Charles A. Gracey, Presiding Member* *Anthony T. Eyton, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*John L. Syme*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Brenda C. Swick-Martin and Kenneth H. Sorensen, for the appellant* *Frederick B. Woyiwada, for the respondent*

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-322

HARBOUR SALES (WINDSOR) LIMITED **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ANTHONY T. EYTON, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from two decisions of the Deputy Minister of National Revenue (the Deputy Minister) from two determinations of value for duty made in respect of park benches and vinyl floor tiles imported into Canada.

The issue in this appeal is whether the Deputy Minister properly determined the value for duty of the goods in issue. Sections 44 through 55 of the Act govern the calculation of value for duty. Subsection 47(1) 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.*

The relevant portions of subsections 48(1) and (4) of the Act provide as follows:

> *48. (1) Subject to subsection (6), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada and the price paid or payable for the goods can be determined.*
>
> *(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.*

Counsel for the appellant advanced two alternate positions. Counsel's primary position was that, in determining the value for duty of the goods in issue, the Deputy Minister erred in interpreting the expression "sold for export to Canada" which appears in section 48 of the Act. Counsel submitted that the Deputy Minister's error stemmed from the mistaken view that subsection 48(1) of the Act implicitly contemplates a sale between a non-resident entity and a resident entity in Canada. In the alternative, counsel submitted that, even if the Deputy Minister was correct in reading a residency requirement into subsection 48(1) of the Act, based upon the facts of the case, the appellant was, at all relevant times, a resident of Canada.

Mr. Henry S. Muroff, a shareholder and Manager of Harbour Sales (Windsor) Limited, gave evidence on the appellant's behalf. Mr. Muroff testified that the appellant was incorporated

1. R.S.C. 1985, c. 1 (2nd Supp.).

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in 1964. He indicated that he had a 50 percent interest in the appellant. The other shareholders are Mr. Solomon Nivy and Mrs. Eliza Nivy, each of whom has a 25 percent interest in the appellant. The appellant is a direct importer of building materials.

Mr. Muroff testified that the administrative functions related to the appellant's day-to-day operations are carried out at the office of Harbor Sales Company (HSC) of Troy, Michigan, a company owned by Mr. and Mrs. Nivy. He indicated that the arrangement was entered into out of economic necessity. He explained that, when the appellant first began operations, it had very little capital. Therefore, rather than establish an office solely for the appellant, the shareholders decided to use the administrative services of HSC, an established company carrying on a business similar to that of the appellant. Mr. Muroff explained that the costs of operating the Troy office are allocated *pro rata*, on the basis of sales volume, between the appellant and HSC. He also indicated that all documents associated with the appellant's sales are kept separate from those relating to HSC's sales. He testified that the appellant has two bank accounts and that its funds and HSC's funds are never intermingled. He also indicated that, as an Ontario corporation, the appellant pays Canadian income tax.

The two transactions which gave rise to this appeal are similar in a number of respects and, thus, give rise to similar legal issues. Given this similarity, counsel for the appellant chose to treat the transaction relating to the tiles as illustrative of both transactions.

Mr. Muroff testified that, in November 1990, Burlington Imports and Distributors (Burlington) issued a purchase order to the appellant for the tiles. On November 26, 1990, the foreign manufacturer of the tiles issued a pro forma invoice for the tiles to the appellant. On January 29, 1991, a letter of credit was issued in the appellant's name by its bank in respect of the purchase of the tiles. On March 1, 1991, the foreign manufacturer issued an invoice to the appellant in respect of the tiles. The invoice indicated that the tiles were "[f]or account and risk" of the appellant. It also indicated that the tiles were to be sent from Keelung, Taiwan, to Toronto, Canada. On March 3, 1991, UCB Freight Services (UCB) issued a through bill of lading to the appellant in respect of the shipment of the tiles from Keelung to Toronto. On March 4, 1991, HSC issued two invoices to Burlington on behalf of the appellant. Mr. Muroff explained that both invoices carried a number prefaced with the letter "C" to indicate that they were in respect of the appellant's sales and not those of HSC. The appellant's bank subsequently issued statements to the appellant indicating that it had credited its bank account to reflect Burlington's payment for the tiles.

During cross-examination, counsel for the respondent explored various aspects of the appellant's operations and, in particular, the extent of its operations in Canada. Mr. Muroff indicated that the appellant's Canadian office was located at the office of one of its directors. He acknowledged that the appellant had no employees at that office. He also indicated that the appellant's telephone listing was a number for HSC's office that was answered by an employee of HSC. Mr. Muroff readily acknowledged that certain administrative functions for the appellant were performed at HSC's office by its employees.

With respect to the appellant's operations in Canada, Mr. Muroff testified that his function, as Manager, was to identify products that might be of interest to the appellant's customers and to provide its sales agents with leads. Mr. Muroff indicated that the appellant has always had at least one Canadian sales agent. Counsel for the respondent also questioned Mr. Muroff about an invoice from United Customs Brokers to "Harbor Sales" in respect of services that it had performed in connection with the importation of the benches into Canada. Mr. Muroff indicated that the invoice had been issued in error. In subsequent redirect

examination, Mr. Muroff noted that the invoice, while sent to HSC, was for the appellant and that its name appeared in the body of the invoice.

Counsel for the appellant called Ms. Yona Nivy as a witness. She indicated that she worked for HSC. Ms. Nivy confirmed that the appellant has its own bank accounts. She identified her own handwritten notes on the aforementioned invoice from United Customs Brokers to "Harbor Sales" and stated that they indicated that the invoice had been paid with a cheque drawn on one of the appellant's bank accounts.

Counsel for the appellant also called Mr. Robert L. Turnbull, who had in the past acted as a sales agent for the appellant. Mr. Turnbull testified that any sales that he made in Canada were for the account of the appellant, despite the fact that those sales were administered by HSC's office. He also testified that his commission on any sales was paid by the appellant. During cross-examination, Mr. Turnbull stated that, although he acted as a commissioned sales agent for some other companies, 95 percent of his income was derived from work for the appellant. He also indicated that, when he was working for the appellant, he spoke to Mr. Nivy regularly and that he seldom dealt with Mr. Muroff.

Finally, counsel for the appellant called Mr. William H. Richards, an employee of the Department of National Revenue (Revenue Canada). Mr. Richards is the valuations officer whose name appears on the Deputy Minister's decision in respect of the tiles. Counsel asked Mr. Richards questions concerning his involvement in this matter and, in particular, the decision-making process. The parties agreed that Mr. Richards could read into the record a statement that he had prepared describing a conversation that he had had with Mr. Brian Tucker, Assistant Controller for Cashway Building Centres[2] (Cashway), regarding Cashway's dealings with HSC. Essentially, Mr. Tucker advised Mr. Richards that Cashway buys a large volume of goods, on a continuing basis, from HSC. He also indicated that Cashway had no dealings with the appellant.

In argument, counsel for the appellant submitted that the issue in this appeal is whether the value for duty of the goods in issue should be based on the price paid by the appellant to the foreign manufacturers or the price paid to the appellant by Burlington and Cashway. To answer that question, counsel submitted that the Tribunal would have to interpret the meaning of the expression "sold for export to Canada" which appears in subsection 48(1) of the Act.

Counsel for the appellant submitted that the Supreme Court of Canada's decision in *Stubart Investments Limited v. Her Majesty the Queen*[3] is the leading authority on the interpretation of tax legislation. Counsel argued that the approach espoused by the Supreme Court of Canada in the *Stubart* case, referred to as the "words-in-total context" approach, requires that the words of a statute be construed in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and with the intention of Parliament. Counsel also referred the Tribunal to the Supreme Court of Canada's decision in *Canada v. Antosko*[4] which, they argued, introduced a significant refinement to the approach set out in the *Stubart* case. Counsel submitted that, in the *Antosko* case, the Supreme Court of Canada stated that, in applying the "words-in-total context" approach, if the words at issue in the statute were found

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2. Cashway is the company that allegedly purchased the benches from the appellant.
3. [1984] 1 S.C.R. 536.
4. [1994] 2 S.C.R. 312.

to be clear and unambiguous, it would be unnecessary to inquire into the underlying object of the legislation or intent of Parliament.

Counsel for the appellant submitted that the plain meaning of subsection 48(1) of the Act requires that two conditions be met to determine the transaction value: first, that goods be sold and, second, that the goods be sold for export to Canada. Counsel also submitted that the evidence is clear that the goods in issue were sold and that they were sold for export to Canada by the foreign manufacturers to the appellant. In support of this latter submission, counsel referred to the fact that manufacturers' invoices in respect of the goods in issue indicate that the goods were to be shipped from Keelung to Toronto. Counsel also referred to the fact that the respective bills of lading, freight invoices and instructions to UCB all indicate that the goods in issue were to be shipped from Taiwan to Canada.

Finally, counsel for the appellant argued in the alternative that, if the Tribunal is prepared to accept the Deputy Minister's position that there is an implicit residency requirement in subsection 48(1) of the Act, the appellant, as a resident of Canada, satisfies that requirement.

Counsel for the respondent submitted that the key issue in this appeal is the meaning of the expression "sold for export to Canada." In counsel's submission, goods are for export to Canada when there is a sale transaction that takes place with a purchaser in Canada. It is that sale which, in counsel's submission, causes the export to Canada. In support of that position, counsel for the respondent referred the Tribunal to a report of the Tariff Board in respect of customs valuation.[5] In its report, the Tariff Board considered the proposed draft wording for subsection 37(1) of the Act, which stated that:

> *the value for duty of imported goods is the transaction value of the goods when the goods are sold for export to Canada by a vendor to a purchaser in Canada.*[6]

Counsel for the respondent argued that, in its report, the Tariff Board stated that the words "by a vendor to a purchaser in Canada" were superfluous and, on that basis, recommended that they be deleted. Counsel submitted that the Tariff Board's views provided support for the Deputy Minister's position that the words "by a vendor to a purchaser in Canada" should be read into the statute.

Counsel for the respondent also referred the Tribunal to Memorandum D13-4-2[7] (the Memorandum) which, counsel submitted, the Tribunal could consider, if it was of the view that subsection 48(1) of the Act was ambiguous. Counsel led the Tribunal through several examples contained in the Memorandum, all of which, in counsel's submission, support the Deputy Minister's position that the value for duty is the price paid by a purchaser in Canada to a vendor outside Canada.

Counsel for the respondent argued that the goods in issue were sold for export to Burlington and Cashway by HSC and that the appellant played no active role in those sales.

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5. Reference No. 159, A Report of an Inquiry by the Tariff Board respecting the GATT Agreement on Customs Valuation, Part 1, Proposed Amendments to the Customs Act, March 27, 1981.
6. *Ibid.* at 57.
7. Revised D13-4-2, Customs Valuation: "Sold for Export to Canada" (Customs Act, Section 48), Department of National Revenue, Customs and Excise, August 21, 1989.

Counsel argued in the alternative that, if the Tribunal is prepared to conclude that the appellant did play an active role in the sales, the appellant should not be considered a Canadian vendor or a vendor in Canada.

The Tribunal agrees that the key issue in this appeal is the meaning to be attributed to the words of subsections 48(1) and (4) of the Act. Counsel for the appellant argued that, in construing these provisions, the Tribunal should employ the approach to the construction of tax legislation espoused by the Supreme Court of Canada in the *Antosko* decision. In that case, in deciding that the appellants could make certain deductions from their incomes, the Supreme Court of Canada stated:

> *In the absence of evidence that the transaction was a sham or an abuse of the provisions of the Act, it is not the role of the court to determine whether the transaction in question is one which renders the taxpayer deserving of a deduction. If the terms of the section are met, the taxpayer may rely on it, and it is the option of Parliament specifically to preclude further reliance in such situations.*[8]

Coincidentally, on the day prior to the release of the *Antosko* decision, the Supreme Court of Canada released its decision in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*.[9] That case also dealt with the construction of tax legislation. The Supreme Court of Canada affirmed the "words-in-total context" approach espoused in the *Stubart* case. After quoting a passage from its decision in *Her Majesty the Queen v. Phyllis Barbara Bronfman Trust*,[10] the Supreme Court of Canada stated:

> *In light of this passage there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. At p. 87 of his text Construction of Statutes (2nd ed. 1983), Driedger fittingly summarizes the basic principles: "... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision.*

Pursuant to the Supreme Court of Canada's decision in the *Antosko* case, the Tribunal is of the view that, where the wording of a provision in a tax statute is clear and unambiguous and a taxpayer clearly falls within the scope of that provision, absent a sham, the taxpayer is entitled to claim the benefit of the provision. However, pursuant to the *Québec (Communauté urbaine)* case, where there is an ambiguity in the legislation, the "words-in-total context" approach contemplates a more detailed examination of the legislation's object and of Parliament's legislative intention.

The Tribunal must construe the expression "sold for export to Canada" as it appears in subsections 48(1) and (4) of the Act. The Tribunal agrees with counsel for the respondent that, if it found subsections 48(1) and (4) of the Act to be ambiguous, resort could be had to a variety of sources to discover the object of those provisions and Parliament's intention in enacting them. However, the Tribunal is of the view that subsections 48(1) and (4) of the Act are not ambiguous

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8. *Supra*, note 4 at 328.
9. Unreported, [1994] S.C.J. No. 78, September 30, 1994.
10. [1987] 1 S.C.R. 32.

and should, on the basis of the Supreme Court of Canada's decision in the *Antosko* case, be given their plain and ordinary meaning.

In the present case, it is beyond dispute that the goods in issue were sold. With respect to those sales, the evidence before the Tribunal discloses as follows:

(1) each of the manufacturers of the goods in issue sent pro forma invoices to the appellant confirming its orders;

(2) each of the manufacturers subsequently invoiced the appellant in respect of the sales, both invoices clearly indicating the appellant as purchaser and indicating that the goods were at the risk of the appellant;

(3) a letter of credit was opened in the appellant's name in respect of both transactions of purchase and sale; and

(4) the appellant's bank subsequently issued two debit advices to the appellant indicating that it had debited its account in the amount of the purchase price for the tiles and the benches.

On the basis of this evidence, the Tribunal is of the view that the goods in issue were sold by the respective manufacturers to the appellant. The fact that much of the administrative work connected with these transactions was performed by employees of HSC does not alter the Tribunal's view. The appellant at no time tried to conceal the fact that such work was performed by HSC. The Tribunal finds the appellant's explanation as to the cost-saving rationale for that arrangement to be reasonable. The Tribunal also notes that the appellant maintained separate bank accounts from HSC and that the accounting system employed ensured that the sales of the respective companies were not intermingled. Finally, notwithstanding the fact that much of the administrative work connected with these transactions was performed by employees of HSC, it was the appellant that was legally liable for payment for the goods in issue and at risk in the event that the goods were lost or damaged in transit.

The only remaining issue is whether the sales to the appellant were for export to Canada. With respect to this issue, the manufacturers' pro forma invoices and final invoices, UCB's bill of lading and invoices, and Canada Customs documentation all contemplate that the goods in issue were for export from Keelung for delivery in Toronto. The appellant took legal title to the goods from the manufacturers when the goods were in Taiwan. The goods in issue were then exported directly from Taiwan to Canada. Prior to the goods in issue being imported into Canada, they did not enter the commerce of any other country and title to the goods was not transferred to any other person. In other words, no event or person interrupted the export of the goods in issue from Taiwan to Canada. After importation, the appellant transferred title to the goods in issue to Burlington and Cashway. On the basis of the foregoing, the Tribunal finds that the goods in issue were sold for export to Canada.

The Tribunal has not addressed the question of whether the appellant is a resident of Canada. In the Tribunal's view, the relevant provisions of the Act do not contain a residency requirement. In support of his submission that those provisions do contain such a requirement, counsel for the respondent referred the Tribunal to the report of the Tariff Board. Counsel noted that the Tariff Board's recommendation that the words "by a vendor to a purchaser in Canada" be removed was based on the Tariff Board's view that those words were superfluous. On that ground, counsel argued that subsections 48(1) and (4) of the Act should still be read as

containing a residency requirement. However, the Tribunal is of the view that, to discover the true rationale for the Tariff Board's recommendation, it is necessary to read all of the Tariff Board's discussion pertaining to this issue. At pages 57 and 58 of its report, the Tariff Board writes:

> *It has been represented to the Board that the application of these references to a "purchaser in Canada" could result in problems involving situations where the goods are actually purchased by a foreigner or by a non-resident importer. While the Board finds it difficult to conceive of situations where there will be no importer or agent in Canada who will be responsible for the goods, it recognizes that the terminology employed in these provisions might cause some confusion. In the Board's view the words "by a vendor to a purchaser in Canada", which are the cause of the problem, are superfluous and add nothing to the intended meaning.*

The Tribunal is of the view that the Tariff Board recognized the legitimacy of a non-resident importer, but was merely dubious that such a circumstance would arise. The Tariff Board recommended that the words at issue be removed to eliminate any confusion as to the existence of a residency requirement, in the event such a circumstance did arise. With regard to the residency issue, the Tribunal also notes that Canada is a signatory to the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*,[11] Part I of which establishes rules on customs valuation. None of those rules require that, for purposes of customs valuation, an importer of goods be a resident of the country into which goods are imported.

For the foregoing reasons, the appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member

11. Signed in Geneva on April 12, 1979.