



Ottawa, Tuesday, February 26, 1991

**Appeal No. 3013**

IN THE MATTER OF an appeal heard on October 30, 1990,  
under section 61 of the *Special Import Measures Act*,  
R.S.C., 1985, c. S-15;

AND IN THE MATTER OF a re-determination of the Deputy  
Minister of National Revenue for Customs and Excise dated  
March 31, 1988, made pursuant to section 59 of the *Special  
Import Measures Act*.

**BETWEEN**

**XYZ DYNAMO LTD.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE  
FOR CUSTOMS AND EXCISE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed. The respondent was entitled to retroactively re-determine normal values on the appellant's shipments of induction motors entered into Canada under Entry Nos. E029741 and M050021. Further, the appellant has failed to provide evidence enabling the Tribunal to conclude that the respondent erred in her determination of normal values.

Sidney A. Fraleigh

Sidney A. Fraleigh  
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau  
Member

Michèle Blouin

Michèle Blouin  
Member

Robert J. Martin

Robert J. Martin  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. 3013**

**XYZ DYNAMO LTD.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE  
FOR CUSTOMS AND EXCISE**

**Respondent**

*The appellant entered two shipments of induction motors into Canada, one in October 1985, the other in January 1986. Officials employed by the respondent re-determined normal values for these shipments in June and August 1987. The appellant challenged the actions of the officials in retroactively re-determining normal values and their assessment of those normal values.*

**HELD:** *The appeal is dismissed. The respondent was entitled to retroactively re-determine normal values on the appellant's shipments of induction motors into Canada under Entry Nos. E029741 and M050021. Further, the appellant has failed to provide evidence enabling the Tribunal to conclude that the respondent erred in her determination of normal values.*

*Place of Hearing: Winnipeg, Manitoba  
Date of Hearing: October 30, 1990  
Date of Decision: February 26, 1991*

*Tribunal Members: Sidney A. Fraleigh, Presiding Member  
Arthur B. Trudeau, Member  
Michèle Blouin, Member*

*Clerk of the Tribunal: Nicole Pelletier*

*Appearances: Bernard Bohemier, for the appellant  
Geoffrey Lester, for the respondent*

***Statutes and  
Regulation Cited:***

*Anti-dumping Act, R.S.C., 1970, c. A-15, s. 9; Special Import Measures Act, R.S.C., 1985, c. S-15, ss. 15, 16, 17, 19, 56 and 57; Special Import Measures Regulation, SOR/84-927, Canada Gazette, 1984, Part II, p. 4286.*

**Appeal No. 3013**

**XYZ DYNAMO LTD.**

**Appellant**

**and**

**THE DEPUTY MINISTER OF NATIONAL REVENUE  
FOR CUSTOMS AND EXCISE**

**Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member  
ARTHUR B. TRUDEAU, Member  
MICHÈLE BLOUIN, Member

**REASONS FOR DECISION**

**THE ISSUE**

In this case, the appellant, XYZ Dynamo Ltd. (XYZ), is seeking a refund of anti-dumping duties it paid on certain integral induction motors (small induction motors) imported from Toshiba International Corporation (Toshiba) of Houston, Texas. The small induction motors were subject to anti-dumping duties pursuant to a material injury finding issued by the Anti-dumping Tribunal on April 15, 1983, respecting dumping of these goods from the United States.

The anti-dumping duties in issue pertain to two shipments of small induction motors covered by the finding. The first shipment cleared the port of Emerson, Manitoba, on October 9, 1985, under Entry No. E029741 (Entry No. 1). The other shipment cleared the port of Winnipeg, Manitoba, on January 21, 1986, under Entry No. MO50021 (Entry No. 2). These shipments contained three different types of small induction motors: open drip-proof motors (ODP); totally enclosed fan-cooled motors (TEFC); and totally enclosed explosion proof motors (TEXP).

Anti-dumping duties were not assessed on the motors when the shipments first entered Canada. However, acting pursuant to subsection 56(2) of the *Special Import Measures Act*<sup>1</sup> (the Act), which deems a determination of normal values to have been made, and following a routine post-entry audit of import documents, officials with the Department of National Revenue for Customs and Excise (Revenue Canada) concluded that the appellant purchased the motors at prices below their normal value, i.e., at dumped prices. On June 23, 1987, Revenue Canada officials re-determined the normal value for Entry No. 2 and assessed the appellant \$5,801.56 in anti-dumping duties. On August 11, 1987, these officials also re-determined the normal values for Entry No. 1 and assessed the appellant \$11,338.12 in anti-dumping duties.

---

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

The appellant requested a re-determination by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) to review the matter. On March 31, 1988, the Deputy Minister confirmed the normal values and the amount owing regarding Entry No. 2, but re-determined the normal values with respect to Entry No. 1 and allowed a partial refund of anti-dumping duty of \$9,341.27. As a result, the appellant was assessed a total of \$7,798.41 in anti-dumping duties.

The appellant appealed this decision to the Canadian International Trade Tribunal (the Tribunal) and, in so doing, raised two issues: firstly, were Revenue Canada officials entitled in June and August 1987 to retroactively re-determine the normal values of the goods contained in Entry No. 1 and Entry No. 2 and thus the amount of anti-dumping duties payable; and, secondly, was the respondent incorrect in its establishment of normal values as it pertained to the shipments in issue.

### THE FACTS

The facts in this appeal were gathered from the sworn documentary evidence of Mr. Nyun Hlaing, an employee of the respondent holding the position of Enforcement and Appeals Officer, and the testimony of Mr. Bernard Bohemier, a representative of XYZ.

The appellant, in beginning its testimony, stated that it had very little cooperation either from Toshiba in obtaining copies of the exporter's invoices to purchasers in the United States, or from Revenue Canada in obtaining copies of Toshiba's Stocking Distributors List price sheets. Nevertheless, the appellant testified that the respondent's normal value determinations did not accord with commercial realities and thus, were incorrect. For example, the appellant said that Revenue Canada established a higher normal value for an ODP motor of particular horsepower compared to a TEFC motor of the same horsepower. Yet, the appellant said that price lists from other manufacturers (Exhibit A-5) indicated that TEFC motors cost more to buy than ODP motors. The appellant also submitted small induction motor prices from a catalogue published by Vaughen's Price Publishing Co. Inc. (Exhibit A-4). Motor prices in the catalogue are based on price catalogues from a number of leading manufacturers and averaged. The appellant said that, according to this catalogue, TEFC motors were more expensive than ODP motors.

The appellant further testified that the respondent's normal value determination pertaining to TEXP motors was incorrect because approximately 18 months after establishing the multiplier or factor used in the determination of normal values for this type of motor, Revenue Canada officials reduced the multiplier by 20 percent.

The appellant submitted several invoices for small induction motors purchased from Toshiba by different companies in the United States. All purported to show that XYZ purchased its motors at prices that were either the same or more expensive than those prices charged to the customers named in the invoices. Of one invoice that showed sales at prices less than that charged to XYZ (Exhibit 23B), Mr. Bohemier testified that "they only had to buy one motor to get those prices. We had to buy a container which was 35-40 thousand pounds." Of another invoice that showed that prices were roughly the same, except for TEXP motors on which XYZ paid more (Exhibit 23A), Mr. Bohemier noted that "prices were the same except that we paid more for Explosion Proof, but we had to buy in bigger quantities." In fact, whereas XYZ was purchasing motors in quantities of between 35 and 40 thousand pounds, these invoices were for amounts that ranged between 14 to 21 thousand pounds. The final invoices (Exhibit A-6) were to distributors that also purchased in smaller quantities.

The respondent, through the sworn documentary evidence, provided testimony as to how Revenue Canada officials established normal values. Pursuant to meetings in June 1984 between Revenue Canada officials and officers of Toshiba, the manufacturer of the motors in issue, and following subsequent submissions by Toshiba to Revenue Canada, normal values for ODP, TEFC and TEXP small induction motors exported by Toshiba to Canada were established on October 24, 1984, in accordance with section 9 of the *Anti-dumping Act*.<sup>2</sup> For distributors in Canada like XYZ, these values were determined to be the net prices shown in Toshiba's Stocking Distributor List price sheets.

On May 1, 1985, Toshiba published new prices for its Stocking Distributor List price sheets. Thereafter, normal values for the three categories of small induction motors in issue exported by Toshiba to distributors in Canada were determined to be the net prices as shown in the revised price sheets. It was these normal values that Revenue Canada officials used in August 1987 to re-determine whether the motors contained in Entry No. 1 were entered at dumped prices. The officials did this by comparing the purchase prices indicated on the import documents against the net prices taken from the Stocking Distributor List price sheets.

Effective January 2, 1986, following further meetings between officials of Toshiba and Revenue Canada, and based on information provided by Toshiba, normal values for the three types of small induction motors shipped by Toshiba to distributors in Canada were established in accordance with the Act. Specifically, normal values were determined to be the gross prices published in Toshiba's May 1, 1985, revision of its Stocking Distributor List price sheets times a multiplier or factor.

A multiplier was developed for each type of motor. For ODP and TEFC motors, Revenue Canada officials determined that there was a profitable series of sales. Acting pursuant to sections 15 and 17 of the Act, these officials examined the price differential between the gross price listed in the Stocking Distributor List price sheets and the actual selling prices, and converted this price differential into a normal value multiplier. These officials also determined that they could not establish a profitable series of sales for TEXP motors and thus, acting under subsection 16(2) and paragraph 19(b), and on the basis of information supplied by Toshiba, "constructed" a selling price by totalling amounts for cost of production, administrative and selling costs and an amount for profit. They then converted the price differential between the "constructed" selling price and the gross price listed in the May 1, 1985, price sheets to arrive at a normal value multiplier.

Revenue Canada officials then used these normal values in June 1987 to re-determine whether the motors contained in Entry No. 2 were entered at dumped prices. The officials did this by comparing the difference between the purchase prices indicated on the import documents against the gross prices taken from the Stocking Distributor List price sheets times the pre-determined multiplier.

Although this approach was made effective from January 2, 1986, the Deputy Minister also used this approach in March 1988 in re-assessing the October 1985 entry because the normal values established in January 1986 were developed on the basis of Toshiba's listed gross prices and actual domestic selling prices in effect in the United States at about the same time as the October 1985 shipment into Canada. As a consequence of changing the evaluation method for this entry, the appellant received a refund of approximately nine thousand dollars.

---

2. R.S.C., 1970, c. A-15.

## THE LEGISLATION

The legislation concerning the assesment period that is relevant to this appeal is as follows:

56. (1) *Where, subsequent to the making of an order or finding of the Tribunal ... any goods are imported into Canada, a determination by a customs officer*

...

*(b) of the normal value ... on any imported goods that are of the same description as goods to which the order or finding of the Tribunal ... applies*

...

*is final and conclusive.*

56. (2) *Where, in the case of any imported goods referred to in subsection (1), a determination referred to in that subsection that is relevant in the case of those goods is not in fact made in respect of them ... determination shall be deemed to have been made*

...

57. *A designated officer may re-determine any determination referred to in subsection 56(1),*

...

*(b) in any case where he deems it advisable, within two years after the determination, ...*

The legislation concerning the normal value that is relevant to this appeal is as follows:

15. *Subject to section(s) 19 ... , where goods are sold to an importer in Canada, the normal value of such goods is the price of like goods when they are sold by the exporter ...*

*(a) to purchasers*

*(i) with whom the exporter is not associated at the time of the sale of the like goods, and*

*(ii) who are at the same or substantially the same trade level as the importer,*

*(b) in the same or substantially the same quantities as the sale of goods to the importer,*

*(c) in the ordinary course of trade for use in the country of export under competitive conditions,*

...

*adjusted ... to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer and the like goods sold by the exporter.*

16. (2) *In determining the normal value of any goods under section 15, there shall*

*not be taken into account*

...

*(b) any sale of like goods that, in the opinion of the Deputy Minister, forms part of a series of sales of goods at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of ... an amount for profit.*

*19. ... where the normal value of any goods cannot be determined under section 15 by reason that there was not, in the opinion of the Deputy Minister, such a number of sales of like goods that comply with all the terms and conditions referred to in that section ... the normal value of the goods shall be determined, ... as*

...

*(b) the aggregate of*

*(i) the cost of production of the goods,*

*(ii) an amount for administrative, selling and all other costs, and*

*(iii) an amount for profits.*

(Emphasis added)

## THE ARGUMENTS

The appellant's first argument turned on grounds of equity and fairness. The appellant argued that it operates on a low profit margin and that the retroactive application of anti-dumping duties prevented it from recovering these costs from its customers. The appellant argued that it is difficult to run a business without being able to anticipate such costs.

With respect to the calculation of normal values, the appellant argued that the respondent was incorrect in her assessment for two reasons. First, Revenue Canada's determination of normal values for ODP and TEFC small induction motors was different from prevailing market prices. Second, the invoices supplied by the appellant showed that it purchased the motors in issue at prices equal to or higher than those prices charged by Toshiba to its customers in the United States.

Dealing with the appellant's first argument, the respondent replied that it was unfortunate for the appellant to be assessed anti-dumping duty several months after the motors were imported in Canada. Nevertheless, the respondent argued that the Act had to be applied according to its terms. Parliament, through paragraph 57(1)(b), expressly provides Revenue Canada officials a period of two years from the date of importation of the goods into Canada to retroactively re-determine the normal values of the imported goods and thus, whether any anti-dumping duty is owing. The respondent submitted that the re-determinations in June 1987 and August 1987 were within this two-year period.

Turning to the appellant's second argument, the respondent argued that although the appellant has provided several different invoices and documents to indicate the prices Toshiba was charging on small induction motors to various clients in the United States, it was incumbent upon the appellant to make its evidentiary challenge within the terms of the Act, and in particular, section 15 and paragraph 19(b). The respondent submits that the appellant has not done this. The respondent contended that the only evidence as to the determination of normal values within the context of the Act is that provided by the respondent, which counsel submitted, was uncontradicted.

## FINDING OF THE TRIBUNAL

After having carefully considered the evidence, relevant legislation and arguments of the parties, the Tribunal concludes that it cannot grant the appellant the relief it requests. The Tribunal reaches this conclusion for several reasons.

First, there is the issue of whether Revenue Canada officials were empowered to retroactively re-determine normal values and thus, re-assess the appellant several months after the entry of the motors in issue. While the result may work economic hardship on an importer, the law on this matter is quite clear. Pursuant to paragraphs 56(1)(b) and 57(1)(b) and subsection 56(2), Parliament has stated that Revenue Canada officials can re-determine normal values and thus re-assess whether anti-dumping duties are payable within two years of importation of goods. The re-determinations, having occurred on June 23, 1987, and August 11, 1987, were within this two-year period.

This brings the Tribunal to the second argument and the claim by the appellant that Revenue Canada was incorrect in its determination of normal values. The evidence presented by the appellant falls short in persuading the Tribunal the determined normal values were incorrect.

The Tribunal considered the evidence presented by the appellant of other manufacturer's price lists and the prices contained in Vaughen's catalogue in assessing the appellant's claim that Revenue Canada's establishment of normal values for ODP and TEFC small induction motors did not accord with general market conditions at the time of the shipment of the small induction motors into Canada. This evidence showed that, in the market, TEFC motors were more expensive than ODP motors. Revenue Canada's establishment of normal values for a particular horsepower of these types of motors was exactly the opposite.

However, sections 15 to 19 of the Act make it quite clear that normal values are to be established by examining the prices the exporter of the goods in issue charges on like goods when they are sold by the exporter to purchasers in the exporter's home market. In other words, the focus of the inquiry is exporter specific. Only the exporter's prices must be examined. Consequently, other manufacturer's prices or average prices from several different manufacturers do not provide evidence that the Act entitles the Tribunal to use in assessing whether Revenue Canada was incorrect in its determination of Toshiba's normal values.

Sections 15 to 19 also establish limits on the kind of information the Tribunal can consider regarding the exporter's sales in its home market. For example, in examining Toshiba's invoices, submitted by the appellant, of sales to various purchasers in the United States, the Tribunal must only focus on sales to purchasers that are not associated with Toshiba; on sales to purchasers that are at the same or substantially the same trade level as the importer, XYZ; on sales that are in the same or substantially the same quantities as those sold to XYZ; and on sales that are made in the ordinary course of trade in the United States and under competitive conditions.

Given this legislative context, the Tribunal does not consider the invoices provided by the appellant to be helpful to the Tribunal in its assessment of Revenue Canada's determination of normal values. Despite comments to Mr. Bohemier that evidence challenging Revenue Canada's calculation of



normal values must be framed within the legislative context set out in the Act, there was no testimony on whether the purchasers named in the invoices were associated with Toshiba; on whether the sales were made under competitive conditions; on whether the invoiced purchasers were at the same or substantially the same trade level as XYZ; and on sales that were in the same or substantially the same quantities as those sold to XYZ.

Finally, there is the matter of the 20 percent reduction in the multiplier used to assess the normal value of TEXP motors. The multiplier used to determine the normal value of the appellant's shipments of TEXP motors was developed in January 1986 on the basis of a "constructed" selling price pursuant to paragraph 19(1)(b) of the Act. This was done because Revenue Canada officials were unable to determine a profitable series of sales for these types of motors. The multiplier was revised approximately 18 months later. The appellant claimed that the subsequent revision indicated that the January 1986 multiplier was wrong.

In the absence of further evidence, the Tribunal considers that any determination on this matter would be based on conjecture and, therefore, refrains from any comment.

#### CONCLUSION

For all the foregoing reasons, the Tribunal should dismiss the appeal.

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Michèle Blouin  
Michèle Blouin  
Member