Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-012

McAsphalt Industries Limited

v.

President of the Canada Border Services Agency

Decision and reasons issued
Wednesday, November 9, 2005

Canada

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IN THE MATTER OF an appeal heard on January 12, 2005, under subsection 67(1) 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 May 3, 2004, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

MCASPHALT INDUSTRIES LIMITED **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 12, 2005
Tribunal Members:	Pierre Gosselin, Presiding Member Patricia M. Close, Member Ellen Fry, Member
Counsel for the Tribunal:	Nick Covelli Michael Keiver
Clerk of the Tribunal:	Margaret Fisher
Appearances:	James Schmidt, Rick Kesler and Dunniella Kaufman, for the appellant Sonia Barrette, for the respondent

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal under subsection 67(1) of the *Customs Act*[1] from a decision of the Commissioner of the Canada Customs and Revenue Agency (CCRA) (now the President of the Canadian Border Services Agency [CBSA]) dated May 3, 2004. The decision pertains to the value for duty of a used tugboat (the *Everlast*).

2. McAsphalt Marine Transportation Ltd. (MMTL) purchased the *Everlast* in Greece for US$2 million on November 1, 1999. MMTL had identified some mechanical problems during an inspection performed prior to the purchase. The *Everlast* remained in Greece to undergo repairs in order to make it seaworthy before it set sail for Canada on May 14, 2000. During the ocean voyage, several significant defects were discovered. The *Everlast* arrived in Canada on June 8, 2000, under a Temporary Admission Permit issued to Upper Lakes Group Inc. (Upper Lakes Group) and McAsphalt Industries Limited (McAsphalt) on behalf of MMTL. It then underwent extensive repairs. McAsphalt permanently imported the *Everlast* on February 28, 2002.

3. On September 16, 2002, McAsphalt submitted a refund claim pursuant to paragraph 74(1)(*e*) of the *Act* on the basis that the value for duty was incorrectly reported as the condition of the *Everlast* after its temporary importation was found to be worse than when it set sail from Greece. The CCRA denied this claim by way of a decision under subsection 59(1) dated March 24, 2003. McAsphalt then requested a further re-determination under subsection 60(1), claiming that there was no sale for export to a purchaser in Canada, since the *Everlast* underwent repairs after being purchased and prior to its temporary importation. McAsphalt claimed that the value for duty of the vessel should reflect its actual market value at the time of temporary importation. On May 3, 2004, under subsection 60(4), the CBSA re-determined that the value for duty of the *Everlast* was the purchase price plus the cost of repairs undertaken in Greece, resulting from a flexible application of the transaction value method in accordance with section 53.

4. McAsphalt agrees with the CBSA in this prior decision that the appropriate method to value the *Everlast* for duty purposes is the application of section 53 of the *Act*. However, it appeals from the CBSA's application of that section. Conversely, the CBSA's position on appeal is that the value for duty of the *Everlast* should in fact be determined in accordance with the transaction value method under section 48 and that it should not have used a flexible application of the transaction value method pursuant to section 53. Therefore, the issue in this appeal is how to determine the value for duty.

EVIDENCE

5. Mr. Steve Wright, MMTL's project manager, and Mr. Bernard Johnson, a former general manger of engineering for Upper Lakes Group and currently Director of Fleet Integration for Seaway Marine Transport, testified on behalf of McAsphalt.

6. Mr. Wright testified that the *Everlast* is a unique vessel designed to push a barge designed specifically to connect to it.

7. Mr. Johnson testified that Upper Lakes Group conducted a due diligence examination prior to the purchase of the vessel. This included commissioning a third party to survey the vessel and then sending

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

consultants to take photographs and sail it around the harbour. Subsequently, a team representing McAsphalt, Upper Lakes Group and a third party travelled to Greece and spent five days inspecting the vessel in the water and in dry dock. The team found that the *Everlast* appeared to be in satisfactory condition, except for some work that was needed to make the ship seaworthy.

8. Mr. Wright testified that Upper Lakes Group paid a US$25,000 commission on the purchase.[2]

9. Mr. Wright testified that the work carried out in Greece after the purchase included repairs to fuel tank vents that were rotten and not watertight, some communications equipment and accommodation upgrades, some piping repairs and some minor steel work. Mr. Wright considered this work necessary to prepare for an ocean voyage. The total cost of these repairs, including supplies and wages, was approximately CAN$250,000.[3]

10. Mr. Wright testified that the problems encountered on the voyage to Canada concerned piping, auxiliary equipment and the two main engines. Mr. Johnson referred to a significant number of burnt exhaust valves, overheated generators, fuel pump and injector issues, and exhaust boilers and a tow cable that were non-functional.[4] According to Mr. Wright, the vessel barely made it to Canada, arriving with only 40 to 45 percent engine power.

11. Mr. Wright testified that a portion of the extensive repairs that were undertaken during the period of temporary importation were intended to put the *Everlast* in working order. These repairs included the dismantling of engines, pumps, piping and virtually every piece of equipment on the vessel. Mr. Wright indicated that the total cost of these repairs was about CAN$1.3 million.[5] Additional repair costs were incurred to meet reflagging requirements.[6]

12. In view of these problems, Mr. Johnson opined that the *Everlast*, at the time of purchase, was CAN$600,000 or CAN$700,000 less valuable than the purchase price. In addition to this testimony, McAsphalt submitted three appraisal reports regarding the market value of the *Everlast.* Each appraisal valued the *Everlast* at well below the purchase price.

ARGUMENT

13. McAsphalt argued that the value for duty of the *Everlast* could not be established using section 48 of the *Act* because there was no sale for export. This was due to the time that had elapsed between the purchase and the vessel's entry into Canada, and the extensive repairs required for the voyage and to restore the vessel to operating condition. Rather, the appropriate value could be established pursuant to section 53 on the appraisals provided or, alternatively, by deducting from the purchase price the costs of repairs and depreciation since the purchase. McAsphalt rejected the suggestion that the commission should be added to the value for duty because it was paid to the agent of the buyer for help in purchasing the vessel.

14. The CBSA argued that the transaction value method under section 48 of the *Act* is the correct one to use because, at the time of purchase, the *Everlast* was clearly intended for export and use in Canada. Thus, under subparagraph 48(5)(*a*)(iii), the CBSA would adjust the invoice price to add the repairs carried out in Greece prior to importation and, under subparagraph 48(5)(*a*)(i), would add the commission. The CBSA

2. *Transcript of Public Hearing*, 12 January 2005, at 153. See also Respondent's Brief, Tab 7G.
3. *Transcript of Public Hearing*, 12 January 2005, at 75-80.
4. *Ibid.* at 183-84.
5. Appellant's Brief, Tab 7.
6. *Transcript of Public Hearing*, 12 January 2005, at 104-106.

rejects the reliance on the appraisals to establish the value for duty because all three were subsequent to the extensive repairs done in Canada and one was not truly independent.

15. In the alternative, the CBSA argued that recourse could be had to section 53 of the *Act* in the application of section 48 because sections 49 to 52 are not applicable, i.e. there are no importations of identical or similar used vessels, the *Everlast* was not imported for resale, and the vessel is not new, which precludes the use of a computed value. However, the CBSA argues that the outcome would be the same.

DECISION

16. Section 47 of the *Act* requires that the different valuation methods be used sequentially. Only when one method cannot be used to calculate the value for duty can one move to the next. Section 48 is the primary basis for appraisal. If it cannot be used, an importer must utilize the subsequent enumerated methods, as outlined in sections 49 to 53. Therefore, the Tribunal must first decide whether it would be appropriate to establish the value for duty on the basis of section 48.

17. Section 48 of the *Act* provides that the value for duty is the price paid or payable for the goods ". . . if the goods are sold for export to Canada . . . ." The preponderance of the evidence indicates that MMTL intended to export the *Everlast* to Canada. MMTL went to great lengths to inspect and obtain the vessel with the view to importing it into Canada for use with a barge that is specifically designed for use with the *Everlast*.

18. However, the evidence also makes it clear that the *Everlast* was upgraded in Greece after it was purchased and suffered significant deterioration during its voyage to Canada. In the Tribunal's view, because of the upgrades and the significant deterioration and resultant repairs required, the vessel that was sold for export to Canada was effectively not the same vessel that entered Canada more than eight months later. While paragraph 48(5)(*a*)(iii) provides for certain adjustments to the price paid, including ". . . (A) materials, components, parts and other goods incorporated in the imported goods . . .", it does not provide for an adjustment for unanticipated changes in the condition of the goods between the time of sale and the time of importation. Therefore, in the Tribunal's view, the transaction value method under section 48 is not reliable for calculating the value for duty of the *Everlast*.[7]

19. As mentioned, both parties took the position that the valuation methods set forth in sections 49 to 52 of the *Act* are inapplicable. The Tribunal agrees. Section 49, which contemplates the use of the transaction value of identical goods in a sale for export to Canada, cannot be used because the Tribunal does not have confidence in the evidence concerning identical goods. Section 50, which contemplates the use of the transaction value of similar goods in a sale for export to Canada, cannot be used for the same reason. Also, section 51, which deals with the deductive value method, would not be suitable because the *Everlast* was not imported for resale. Likewise, section 52, dealing with the computed value method, would not be suitable because the *Everlast* was not a new vessel. Therefore, the Tribunal is of the view that it would be inappropriate to appraise the *Everlast* on the basis of sections 49 to 52 and, consequently, the Tribunal must rely on section 53.

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7. The CBSA makes reference to *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, regarding its sale for export argument; however, that case involved the issue of license and royalty fees.

20. Section 53 of the *Act* provides as follows:

> 53. Where the value for duty of goods is not appraised under sections 48 to 52, it shall be appraised on the basis of
>
> (*a*) a value derived from the method, from among the methods of valuation set out in sections 48 to 52, that, when applied in a flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and
>
> (*b*) information available in Canada.

> 53. Lorsqu'elle n'est pas déterminée conformément aux articles 48 à 52, la valeur en douane des marchandises se fonde sur les deux éléments suivants :
>
> *a*) une valeur obtenue en utilisant celle des méthodes d'appréciation prévues aux articles 48 à 52 qui, appliquée avec suffisamment de souplesse pour permettre de déterminer une valeur en douane pour les marchandises, comporte plus de règles adaptables au cas que chacune des autres méthodes;
>
> *b*) les données accessibles au Canada.

21. In the Tribunal's view, a flexible application of the transaction value method under section 48 of the *Act* would conform more closely to the requirements of section 53 than if any of the other methods under sections 49 and 52 were applied. As mentioned, section 48 provides for appraisal on the basis of the price paid, plus or minus certain adjustments. It is the Tribunal's view that certain adjustments, over and above those provided for in section 48, are required to arrive at a fair and reasonable value for the vessel at the time that it was imported into Canada.

22. Paragraph 48(5)(*a*) of the *Act* reads as follows:

> (5) The price paid or payable in the sale of goods for export to Canada shall be adjusted
>
> (*a*) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to
>
> (i) commissions and brokerage in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale,
>
> . . .
>
> (iii) the value of any of the following goods and services, determined in the manner prescribed, that are supplied, directly or indirectly, by the purchaser of the goods free of charge or at a reduced cost for use in connection with production and sale for export of the imported goods, apportioned to the imported goods in a reasonable manner in accordance with generally accepted accounting principles:
>
> (A) materials, components, parts and other goods incorporated in the imported goods,
>
> . . .

> 5) Dans le cas d'une vente de marchandises pour exportation au Canada, le prix payé ou à payer est ajusté :
>
> *a*) par addition, dans la mesure où ils n'y ont pas déjà été inclus, des montants représentant :
>
> (i) les commissions et les frais de courtage relatifs aux marchandises et supportés par l'acheteur, à l'exclusion des honoraires versés ou à verser par celui-ci à son mandataire à l'étranger à l'occasion de la vente,
>
> […]
>
> (iii) la valeur, déterminée de façon réglementaire et imputée d'une manière raisonnable et conforme aux principes de comptabilité généralement acceptés aux marchandises importées, des marchandises et services ci-après, fournis directement ou indirectement par l'acheteur des marchandises, sans frais ou à coût réduit, et utilisés lors de la production et de la vente pour exportation des marchandises importées :
>
> (A) matières, composants, pièces et autres marchandises incorporés dans les marchandises importées,
>
> [...]

23. With this in mind, the Tribunal is of the view that the upgrades that were carried out between the time of the sale in Greece and the *Everlast*'s setting sail for Canada were improvements to the overall condition of the vessel. The installation and incorporation of new materials, components and parts in Greece were necessary for the voyage to Canada and, overall, increased the value of the vessel. As such, in accordance with the approach in clause 48(5)(*a*)(iii)(A) of the *Act*, those costs should be added to the purchase price.

24. The labour costs associated with these upgrades should be included in the valuation, but not the labour costs for merely manning the vessel during the repairs, which did not add to the value of the *Everlast*, but were required to maintain the vessel.

25. As well, it is the Tribunal's view that the costs to repair the damage that occurred to the *Everlast* during the voyage should be deducted from the valuation, as the vessel, when it entered Canada, was worth considerably less than when it left Greece. This adjustment should take into consideration the costs of the repairs that were necessary to restore the *Everlast* to operating condition. This view is consistent with the principle used in paragraph 74(1)(*c*) of the *Act* with respect to certain refunds. It reads as follows:

> 74. (1) Subject to this section, section 75 and any regulations made under section 81, a person who paid duties on any imported goods may, in accordance with subsection(3), apply for a refund of all or part of those duties, and the Minister may grant to that person a refund of all or part of those duties, if
>
> . . .
>
> (*c*) they are of a quality inferior to that in respect of which duties were paid.
>
> . . .

> 74. (1) Sous réserve des autres dispositions du présent article, de l'article 75 et des règlements d'application de l'article 81, le demandeur qui a payé des droits sur des marchandises importées peut, conformément au paragraphe (3), faire une demande de remboursement de tout ou partie de ces droits et le ministre peut accorder à la personne qui, conformément à la présente loi, a payé des droits sur des marchandises importées le remboursement total ou partiel de ces droits dans les cas suivants :
>
> […]
>
> *c*) elles sont de qualité inférieure à celle pour laquelle les droits ont été payés.
>
> […]

26. On the basis of the same principle, the cost of upgrades that were needed to meet reflagging requirements should not be included in the valuation, since these reflect an increase in value after importation.

27. The Tribunal considered, but does not allow, a deduction for depreciation. In this regard, the Tribunal observes that the valuation provisions in the *Act* refer to "generally accepted accounting principles", which are set out in *CICA handbook—accounting*, which states that depreciation (referred to as "amortization") is ". . . the charge to income that recognizes that life is finite . . . ."[8] The estimated life of the asset is determined at the outset. The *Everlast* was over 20 years old at the time of purchase, so presumably had already been fully amortized. Further, even if that was not the case, the witness for McAsphalt claimed that the company does straight line amortization over a period of 5 to 6 years.[9] Moreover, Memorandum D13-10-2 states that ". . . [b]oats tend to hold their value . . ." and, therefore, the CBSA will normally accept

8. The Canadian Institute of Chartered Accountants, March 1999, Vol. I, section 3061.29.
9. *Transcript of the Public Hearing*, 12 January 2005, at 191.

the purchase price of a used vessel as being the value of the vessel for up to one year after the date of purchase.[10] Less than a year elapsed from the time of purchase to the date of importation.

28. With respect to the commission, as indicated in one of the appraiser's reports, it is industry practice to include a broker's commission in the asking price.[11] In addition, the evidence appears to indicate that at least part of the commission was paid by Upper Lakes Group to a third party for the service of representing Upper Lakes Group in Greece in respect of the sale. Therefore, although the evidence is not entirely clear concerning the commission, in accordance with the approach in subparagraph 48(5)(*a*)(i) of the *Act*, the Tribunal does not consider that the commission should be added to the purchase price.

29. Taking all the above factors into account, the Tribunal concludes that the CBSA's submission at the time of the hearing that section 48 of the *Act* provides the correct calculation for duty is not correct. Rather, the original method under section 53 to calculate the value for duty of the *Everlast* was correct in part. It is the Tribunal's view that the value for duty should be computed based on section 53, by using the transaction value as a starting point, then by adding to the price paid for the vessel the upgrade installation costs to make the ship seaworthy, and then by deducting from that amount the cost of repairs undertaken to correct the damage incurred during the voyage. No other costs should be added, such as those relating to reflagging or the commission, nor should any depreciation be deducted.

30. Therefore, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Ellen Fry
Ellen Fry
Member

10. Canada Border Services Agency, "Used Automobiles, Motor Vehicles, Boats, and Other Vessels (*Customs Act*, Sections 48 to 53)" (30 March 2001), para. 13.
11. Appellant's Brief, Tab 3.