Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-053

Ferragamo U.S.A. Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Friday, March 2, 2007

Corrigendum issued
Monday, March 19, 2007

Canada

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IN THE MATTER OF an appeal heard on September 20, 2006, 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 President of the Canada Border Services Agency dated December 28, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

FERRAGAMO U.S.A. INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Serge Fréchette
Serge Fréchette
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 20, 2006
Tribunal Members:	Pierre Gosselin, Presiding Member James A. Ogilvy, Member Serge Fréchette, Member
Research Manager:	Paul R. Berlinguette
Counsel for the Tribunal:	Eric Wildhaber
Registrar Officer:	Valérie Cannavino
Appearances:	Michael Kaylor, for the appellant Alexandre Kaufman, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

REASONS FOR DECISION

1. This is an appeal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the President of the Canada Border Services Agency (CBSA), dated December 28, 2005, under subsection 60(4) of the *Act*.

2. The issue in this appeal is the determination of the value for duty of the goods imported by Ferragamo U.S.A. Inc. (FUSA), a non-resident importer. Specifically, the issue is whether the CBSA erred in determining that FUSA did not qualify as a "purchaser in Canada", under the provisions of subparagraph 2.1(*c*)(ii) of the *Valuation for Duty Regulations*.[2] The CBSA established that the relevant sale for valuation purposes was the sale between FUSA and Ferragamo Canada (FC), rather than the sale between FUSA and its foreign supplier. The goods in issue are footwear and clothing imported mostly from Salvatore Ferragamo Italy (SFI).

3. Under the *Act*, a value must be attributed to goods that are imported into Canada in order to determine duty. Subsection 47(1) of the *Act* stipulates that the primary basis for appraising the value for duty of goods is the transaction value of the goods. Subsection 48(1) adds that the value for duty of goods is the transaction value of the goods if the price paid or payable for the goods can be determined and the goods are sold for export to Canada to a "purchaser in Canada". Subsection 45(1) provides that the term "purchaser in Canada" has the meaning assigned by the *Regulations*. Section 2.1 of the *Regulations* reads 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.

> 2.1 Pour l'application du paragraphe 45(1) de la Loi, « acheteur au Canada » s'entend :
>
> *a*) d'un résident;
>
> *b*) d'une personne, autre qu'un résident, qui a un établissement stable au Canada;
>
> *c*) d'une personne, autre qu'un résident, qui n'a pas d'établissement stable au Canada et qui importe les marchandises faisant l'objet de la détermination de la valeur en douane :
>
> (i) pour sa consommation ou son utilisation personnelles et qui ne les destinent pas à la vente,
>
> (ii) pour les vendre au Canada pourvu que, avant leur achat, elle n'ait pas passé un accord visant leur vente à un résident.

4. Section 2 of the *Regulations* defines "resident" for purposes of the above definition as follows:

> "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.

> « résident »
>
> *a*) une personne physique qui réside habituellement au Canada;
>
> *b*) une personne morale qui exerce son activité au Canada et dont la gestion et le contrôle s'exercent au Canada;
>
> *c*) une société de personnes ou autre organisme non constitué en personne morale qui exerce son activité au Canada, si le membre ou la majorité des membres qui en exercent la gestion et le contrôle résident au Canada.

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

5. On December 28, 2005, the CBSA issued the determination that FUSA did not qualify as a "purchaser in Canada" under subparagraph 2.1(*c*)(ii) of the *Regulations* because FUSA had entered into an agreement to sell the goods in issue to a resident in Canada—namely FC—before purchasing the goods from its overseas suppliers. According to the CBSA, the goods in issue were therefore sold for export to Canada to a purchaser in Canada, and the value for duty should be based on the price of the goods sold to FC by FUSA, rather than on the price of the goods sold to FUSA by the overseas suppliers. FUSA appealed to the Tribunal on March 21, 2006.

6. Ms. Elizabeth Dowling, Customs Compliance Manager for FUSA, and Mr. Frank Torrent, Corporate Comptroller for FUSA, both testified on behalf of FUSA. The CBSA did not call any witnesses. Ms. Dowling and Mr. Torrent testified to the facts upon which FUSA relied in arguing its case, the relevant elements of which will be examined below.

ARGUMENT

7. FUSA argued that FC is a separately incorporated entity that carries out the day-to-day activities of a Ferragamo retail store in Vancouver, British Columbia, but that the management and control of FC's operations rest with FUSA. In this regard, FUSA submitted that it makes all significant decisions affecting FC's operations. Although FC may have some minor input concerning the merchandise to be purchased, that decision is also ultimately made by FUSA. According to FUSA, if the management and control of FC are outside Canada, then FC is not a "resident" within the meaning of the *Regulations*, which means that FUSA cannot be correctly said to have entered into an agreement to sell the goods in issue to a "resident". It was FUSA's submission that it had entered into an agreement to sell the goods in issue to someone other than a "resident". It was FUSA's submission that it, not FC, was the "purchaser in Canada" within the meaning of the *Regulations*. Indeed, FUSA submitted that, since there was a sale of the goods in issue for export directly to Canada from SFI to FUSA, FUSA was in fact the "purchaser in Canada". According to FUSA, all the requirements of section 48 of the *Act* were present, and the value for duty should therefore have been based on the sale price from SFI to FUSA.

8. FUSA also argued that, in order to use the transaction value, i.e. the price that was paid or payable by FC to FUSA, there would have to have been a sale for export to Canada from an exporting vendor to a "purchaser in Canada". In this regard, FUSA argued that there had been no sale for export to Canada between FUSA and FC because there had only been an "agreement to sell" those goods before they were delivered to FC and that FC was a non-resident. According to FUSA, legal responsibility and/or the title to or ownership of the goods in issue rested with FUSA until the goods were delivered to FC.[3] In support of its position, FUSA referred to the Tribunal's decision in *Cherry Stix Ltd. v. President of the Canada Border Services Agency*[4] and submitted that, in the case of a sale, there is an immediate transfer of title to or ownership of the goods from the vendor to the purchaser, whereas in the case of an "agreement to sell", the transfer of title or ownership is either deferred to a specific time in the future or made subject to the fulfilment of one or more conditions. Consequently, at the time that FUSA placed the order for the goods in issue with SFI, and while they were in transit from Italy directly to Canada, it was FUSA alone that had legal ownership. Indeed, the goods were owned by FUSA until they were sold by FUSA to FC, which was a transaction that occurred in Canada.

3. FUSA indicated that, in accordance with the agreement between the two companies, FUSA's insurance policy covers loss or damage to the goods in issue right up until they are actually delivered to FC's premises.
4. (6 October 2005), AP-2004-009 (CITT), at para. 31 [*Cherry Stix*].

9. FUSA submitted that section 48 of the *Act* did not apply, since there was no sale for export to Canada to a "purchaser in Canada" between FUSA and FC, but rather "an agreement to sell" between the two, once the goods were in Canada. FUSA argued that there is a well-established legal meaning of the word "sale" and that, in the absence of a specific definition of this word in the *Act*, which could have mirrored, for example, the specific definition of that term that exists in the *Special Import Measures Act*,[5] the Tribunal must look to the jurisprudence for guidance.[6] Furthermore, FUSA argued that paragraphs 2 and 3 of Memorandum D13-4-2,[7] which define the word "sale" as including an "agreement to sell", are in the guidelines portion of the memorandum and are not legal in nature. FUSA argued that such advisory opinions do not constitute law and that jurisprudence clearly shows that one is not allowed to use such opinions or administrative practices to interpret legislation that is clear on its face. In these circumstances, FUSA submitted, the price that was to be paid by FC to FUSA cannot be used as the basis under section 48 to determine the value for duty of the goods as imported by FUSA and that the deductive value method or the computed value method are the appropriate methods of determining the value for duty of the goods in issue.

10. The CBSA argued that there is no doubt as to the existence of a contract of sale between FUSA and FC, since there is an agreement between the companies whereby all the terms are specifically settled, including the model numbers, the price and the quantity of the goods that are being purchased. In support of its position, the CBSA referred to the definition of a "contract of sale" in British Columbia's *Sale of Goods Act*, which includes in the definition of "sale" an "agreement to sell". In this context, the CBSA submitted that whether there is a sale or an "agreement to sell" the goods in issue is irrelevant because British Columbia's *Sale of Goods Act* considers that a sale has occurred.

11. The CBSA submitted that section 48 of the *Act* prescribes that the value for duty will be ". . . the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada . . . ." According to the CBSA, it is irrelevant whether there is an actual transfer of the goods when they come into Canada; all that matters is that there are a seller and a buyer in Canada that have agreed to the terms. The CBSA submitted that, under these circumstances, there is a sale. In this connection, the CBSA referred to *Cherry Stix* where, even before the transfer of property, the word "sold" was used to reference an agreement of the mind that, eventually, goods would be received. Furthermore, the CBSA submitted that it knew of no case law addressing the issue of whether the word "sold" includes "a sale". The CBSA submitted that the word "sold" comprises "a sale" and an "agreement to sell".

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5. R.S.C. 1985, c. S-15, which defines "sale" as including leasing and renting, an agreement to sell, lease or rent and an irrevocable tender.
6. FUSA made reference to the standard of statutory interpretation set forth by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915, at paras. 33, 35; *Moda Imports, Inc. v. D.M.N.R.* (3 September 1997), AP-95-296 (CITT); *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601; British Columbia's *Sale of Goods Act*, R.S.B.C. 1996, c. 410; Ontario's *Sale of Goods Act*, R.S.O. 1990, c. S.1.
7. Canada Customs and Revenue Agency, "Customs Valuation: Sold for Export to Canada (*Customs Act*, Section 48)" (21 August 1989). Paragraph 2 of Memorandum D13-4-2 explains that, for goods to be appraised under the transaction value method, the importer must be able to show (1) the goods presented to customs have been "sold", i.e. the vendor has transferred, or agreed to transfer, title for a price to the purchaser of the subject goods, and (2) the subject goods were "for export to Canada" as a condition of the sale agreement between the vendor and the purchaser. Paragraph 3 explains that the term "sale" is used in the widest sense in the context of a sale for export to Canada, and includes, without limiting the meaning of the word, agreements to sell and contracts for sale of goods that result in the transfer of ownership as contemplated in the agreement or contract.

12. The CBSA argued that FC is a "purchaser in Canada" under paragraph 2.1(*b*) of the *Regulations* because, at the very least, it has a "permanent establishment" in Canada. Consequently, the value for duty should be based on the value of the transaction between FUSA and FC, not between FUSA and its foreign supplier. Moreover, since FUSA had entered into an agreement to sell goods to FC, it should not qualify as a "purchaser in Canada" under paragraph 2.1(*c*), and the appeal should therefore be dismissed.

13. Furthermore, the CBSA argued that FC met the requirement to be a "resident" because it carried on business in Canada and that, contrary to what was argued by FUSA, it had the management and control of its activities. In this regard, the CBSA submitted that:

- FUSA and FC act independently of each other;
- FC has its own bank account;
- FC has a lease for the premises that it occupies;
- FC prepares its own income tax returns;
- FC is represented by its own accountants and attorneys; and
- FC purchases *inter alia* fixtures for its retail operation.

In addition, the CBSA submitted that FC management personnel is responsible for all its retail store's functions, such as providing input in the selection and quantities of merchandise, receiving goods and arranging displays, as well as hiring, training or dismissing employees and serving its clientele. According to the CBSA, FUSA has no involvement in these matters. The CBSA also submitted that FC has signing authority of up to US$50,000 for necessary expenditures and that this is indicative of the management and control of its own affairs.

ANALYSIS

14. FUSA's appeal requires the Tribunal to answer the following questions: (1) Which transaction constituted a "sale for export" to Canada (if any)? (2) Who is the "purchaser in Canada"? and (3) Is FC a "resident"?

Which transaction constituted a "sale for export" to Canada?

15. As noted above, section 48 of the *Act* provides that the value for duty of goods is the transaction value if *inter alia* the goods are sold for export to Canada to a "purchaser in Canada". In this appeal, the evidence shows that there are two distinct transactions, specifically, one between SFI and FUSA followed by a second between FUSA and FC. The Tribunal must determine which of these transactions is the sale for export. In reviewing the facts in this case and taking into account relevant jurisprudence, the Tribunal is of the view that the transaction between SFI and FUSA constitutes the sale for export. In this regard, the Tribunal notes the Supreme Court of Canada's decision in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*,[8] which reads as follows:

> . . .
>
> For the purposes of valuation under s. 48 of the *Customs Act*, the relevant sale for export is the sale by which title to the goods passes to the importer. The importer is the party who has title to the goods at the time the goods are transported into Canada. The importer may be the intermediary or the ultimate purchaser, depending on which party actually imports the goods into the country. For the

8. [2001] 2 S.C.R. 100 [*Mattel*].

> purposes of determining whether a sale is for export, the residency of the purchaser or of the party transporting the goods is not material.[9]
>
> . . .

16. In *Mattel*, the Supreme Court of Canada also indicated the following:

> In order for there to be a sale for export, there must obviously be a person who exports. For there to be an exporter, there must be an importer. Put in a different way, a sale for export cannot exist without a corresponding purchase to import.[10]

17. The evidence shows that FUSA took legal title to the goods in issue from SFI when the goods were in Italy. The goods were then exported directly from Italy to Canada, arriving in Vancouver while still the property of FUSA. During the period that the goods were in transit, FUSA assumed insurance coverage. Prior to the goods being imported into Canada, the goods in issue did not enter the commerce of any other country, and the title to the goods was not transferred to any other person. Once the goods were in Canada, FUSA paid the applicable duties through its broker. After the goods cleared customs, FUSA then invoiced FC for the goods after they had been delivered to FC's place of business in Vancouver. On the basis of the foregoing, the Tribunal finds that the sale between SFI and FUSA is the sale for export to Canada and that FUSA is the importer, since it retained title to the goods when they entered Canada.

Who is the "purchaser in Canada"?

18. Another element required in order to use the value of the transaction between SFI and FUSA as the basis for the value for duty of the goods in issue is that FUSA must be a "purchaser in Canada". As noted above, section 2.1 of the *Regulations* gives various meanings to the term "purchaser in Canada". FUSA argued that it is not a "resident" and that it does not have a "permanent establishment" in Canada.

19. The Tribunal agrees with FUSA that it is not a "resident" within the meaning of section 2 of the *Regulations*, and therefore FUSA is not a "purchaser in Canada" within the meaning of paragraph 2.1(*a*). The Tribunal is also of the view that FUSA does not have a "permanent establishment" in Canada, and therefore FUSA is not a "purchaser in Canada" within the meaning of paragraph 2.1(*b*). Consequently, the issue to be determined is whether FUSA qualifies as a "purchaser in Canada" under paragraph 2.1(*c*), which also defines a "purchaser in Canada" as "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, . . . 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."

20. The evidence shows that, for all importations made by FUSA, it had made a prior commitment to sell the goods to FC after they cleared customs and as soon as they were delivered to FC. There is therefore a need to consider the issue of whether FC is a resident.

Is FC a resident?

21. FUSA's position is that, while it had agreed to sell the goods in issue to FC once they arrived in Canada, FC does not meet the definition of "resident" at paragraph (*b*) of section 2 of the *Regulations*, i.e. "a corporation that carries on business in Canada *and* of which the management and control is in Canada" [emphasis added]. FUSA's position was therefore that it qualified as a "purchaser in Canada". Regarding this matter, FUSA claimed that, while FC assumes the day-to-day functions of managing the retail outlet in Vancouver

9. *Mattel* at para. 45.
10. *Mattel* at para. 42.

and is therefore carrying on business[11] in Canada, all the important decisions are made by FUSA, FC's parent company.

22. In the Tribunal's opinion, the evidence on file indicates that the management and control of FC rest with FUSA and, consequently, outside Canada, and that FC is therefore not a "resident". In reaching this conclusion, the Tribunal examined three critical functions of the business, i.e. selecting and ordering the quantities of merchandise, deciding the location of the retail stores and controlling the finances.

23. With respect to the first function, the Tribunal notes that the store manager's job description[12] states that the incumbent has the authority to make decisions in relation to the management of the store and acts as liaison between the store and the corporate offices. The evidence presented at the hearing clearly showed however that, although FC has some minor input concerning the merchandise to be purchased and the quantities to be ordered for its operation, the final and effective decision-making power rests with FUSA, as it does in all of its retail stores located in North America.

24. As for the second function, the testimony of Ms. Dowling revealed that FUSA is responsible for the negotiations of the lease agreement for FC's place of business.[13]

25. With respect to the third function, the evidence showed that, while FC has a bank account through which it finances its day-to-day operations, the authority to open such an account rests with FUSA.[14] Furthermore, FC is not in a position to commit significant funds to its business operation, since the signing authority for amounts in excess of US$50,000 also rests with FUSA.[15] In actual practice, testimony revealed that the two Canadian residents who have signing authority over FC's bank account sign only for payroll cheques and small expense invoices. The non-resident Canadians who are authorized to sign on this bank account are persons who are in fact FUSA officers acting under instruction from FUSA. It is those individuals who sign for the general operating expenses of the store, such as rent, utilities and any large dollar amounts.[16] In the Tribunal's view, this amounts to effective control, by FUSA, of FC expenditures (except, as noted, for routine payroll and petty cash expenditures), even below the US$50,000 threshold.

26. The Tribunal therefore concludes that the evidence that it has before it shows that FUSA exercised overarching management and control of all but relatively minor aspects of FC's operations.[17] Therefore, the Tribunal finds that FC was not a "resident" within the meaning of the *Regulations*. Thus, the agreement between FUSA and FC was an agreement entered into before the purchase of the goods, whereby FUSA is to sell certain goods to a non-resident after FUSA has imported them. In other words, FUSA, at the time of importation of the goods, had not entered into an agreement to sell the goods to a "resident" within the meaning of subparagraph 2.1(*c*)(ii) and section 2 of the *Regulations*. Therefore, FUSA, a non-resident without a "permanent establishment" in Canada, imported certain goods into Canada, which goods were then sold to FC, itself a non-resident. Accordingly, FUSA was the "purchaser in Canada" within the meaning of subparagraph 2.1(*c*)(ii).

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11. For its interpretation of the phrase "carrying on business", FUSA relied on *AAi.FosterGrant of Canada Co. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*, 2004 FCA 259.
12. Tribunal Exhibit AP-2005-053-17A, Tab A.
13. *Transcript of Public Hearing*, 20 September 2006, at 15.
14. Tribunal Exhibit AP-2005-053-17A, Tab A.
15. *Ibid*.
16. *Transcript of Public Hearing*, 20 September 2006, at 13.
17. *Ibid.*, testimony of Mr. Torrent and Ms. Dowling *ad passim* and, in particular, at 6-22.

DECISION

27. Based on the foregoing reasons, the Tribunal finds that: (1) the transaction between SFI and FUSA is a transaction whereby the "goods are sold for export to Canada to a purchaser in Canada"; (2) FUSA is the "purchaser in Canada"; and (3) the transaction value should be based on the sale between SFI and FUSA.

28. Accordingly, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Serge Fréchette
Serge Fréchette
Member

IN THE MATTER OF an appeal heard on September 20, 2006, 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 President of the Canada Border Services Agency dated December 28, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

FERRAGAMO U.S.A. INC. **Appellant**

AND

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

CORRIGENDUM

The fourth sentence of paragraph 25 of the Statement of Reasons should read as follows: The non-resident officers who are authorized to sign on this bank account are persons who are in fact FUSA officers acting under instruction from FUSA.

By order of the Tribunal,

Susanne Grimes
Acting Secretary