Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-040

John Draganiuk

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, September 27, 2006

Canada

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IN THE MATTER OF an appeal heard on August 10, 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 7, 2005, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

JOHN DRAGANIUK **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 10, 2006
Tribunal Member:	Serge Fréchette, Presiding Member
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Counsel for the Tribunal:	Nick Covelli
Registrar Officer:	Valérie Cannavino
Parties:	John Draganiuk, for the appellant Joanna Hill, for the respondent

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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 7, 2005, under subsection 60(4) of the *Act*.

2. The issue in this appeal is whether the trade-in allowance of a 1991 Cadillac DeVille automobile should be deducted from the value for duty of a used 2000 Cadillac DeVille automobile (the vehicle in issue) imported by Mr. John Draganiuk.

3. The Tribunal decided to hold a hearing by way of written submissions in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.[2] A notice to this effect was published in the July 15, 2006, edition of the Canada Gazette.[3]

4. Under the *Act*, a value must be attributed to goods that are imported into Canada to determine duty. Section 46 of the *Act* specifies that the value for duty of imported goods shall be determined in accordance with sections 47 to 55. Subsection 47(1) 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 goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined. Subsection 48(4) provides for certain adjustments to the price paid or payable of imported goods. Finally, subsection 45(1) provides that the term "price paid or payable", in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor.

EVIDENCE

5. The vehicle in issue was purchased in Clearwater, Florida, for US$17,500 on January 21, 2005. At the time of entry into Canada, the CBSA assigned a value for duty of CAN$19,500 in order to determine the amount of duties and taxes owed. In essence, Mr. Draganiuk stated that the net purchase price of the vehicle in issue should be established at CAN$14,375 (Canadian Red Book value of $17,350 for a 2000 Cadillac DeVille plus $100 for excise tax less $3,075 for the trade-in of a 1991 Cadillac DeVille) for valuation purposes.

6. In its determination, the CBSA stated that the valuation methods set out in the *Act* are all inclusive and that the ordering priority is mandatory. According to the CBSA, neither it nor the importer is permitted to apply other formulations to determine the value for duty of imported goods. Furthermore, the CBSA determined that the sale between the purchaser and the vendor of the vehicle in issue was an arms length transaction and, hence, that there is no legal basis on which to reject the value stated on the dealer's invoice. As a result, the value for duty of the vehicle in issue remained at CAN$19,500.

ARGUMENTS

7. Mr. Draganiuk submitted that the trade-in allowance of a 1991 Cadillac DeVille should be taken into account in determining the value for duty of the vehicle in issue and that the trade-in value in the Canadian Red Book should be used in this regard. He submitted that, in buy and sell situations, the marketplace establishes the value of goods and takes into consideration any discount or trade-in allowance.

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.O.R./91-499.
3. C. Gaz. 2006.I.2126.

This results in a fair cost to the purchaser. Mr. Draganiuk further submitted that the trade-in allowance was not an "enticement" for the purpose of making a deal. According to Mr. Draganiuk, the transaction was based on the advertised purchase price of the vehicle in issue and the trade-in value of the 1991 Cadillac DeVille, i.e. US$5,496.50, which was determined by two appraisers from the dealership. Mr. Draganiuk submitted that this is in accordance with established business practices in the Canadian automobile industry. In support of his argument, Mr. Draganiuk filed a *pro forma* vehicle purchase agreement from a local dealership in Scarborough, Ontario. Mr. Draganiuk argued that no deduction for a trade-in allowance constitutes double taxation because the traded automobile was taxed when purchased. Furthermore, Mr. Draganiuk submitted that, on previous occasions and in similar circumstances, a deduction for a trade-in allowance was allowed in determining the value for duty of the imported automobile.

8. The CBSA argued that the value for duty of the vehicle in issue must be determined in accordance with the *Act*, which requires a sequential application of the methods outlined in sections 48 to 53 of the *Act*. It submitted that the transaction value in section 48 is the primary basis for appraisal because (1) there was a sale for export to Canada to a purchaser in Canada; (2) the vendor and the purchaser are not related; and (3) all the elements of the price paid or payable can be determined from the automobile purchase agreement. Accordingly, the value for duty of the vehicle in issue was properly determined at CAN$19,500 on the basis of the selling price of US$17,500. The CBSA submitted that, even when the flexible approach in section 53 is applied, the transaction value method under section 48 remains applicable and that no adjustment can be made. The CBSA further submitted that it is not permitted to assign a value to a trade-in or exchange or otherwise apply any adjustment to the price paid or payable for imported goods other than those provided under subsection 48(5).

DECISION

9. In determining the value for duty for any normal importation of goods into Canada, 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.

10. Pursuant to subsection 47(1) of the *Act*, the primary basis for appraisal of the value for duty of goods is the transaction value in accordance with two initial requirements in section 48.

11. First, there must be a sale for export to Canada. In the present appeal, the vehicle in issue was purchased by Mr. Draganiuk for importation into Canada. As a result, the transaction represents a sale for export to Canada to a purchaser residing in Canada. There was no debate between the parties on this issue.

12. Second, a price paid or payable must be determined. As noted in paragraph 4, "price paid or payable" means "the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor". In this regard, the automobile purchase agreement provided by Mr. Draganiuk lists the aggregate of all direct and indirect payments for the vehicle in issue as US$17,500.00. It establishes that an allowance of US$5,496.50 was made for a pre-owned vehicle that resulted in a balance of payment of US$12,003.50. This information allows for the determination of the "price paid or payable for the goods". Whatever determination the Tribunal makes at the end of its analysis, in terms of the actual transaction value that should be applied for the purpose of the importation under consideration, it is clear that the result will be either the Canadian equivalent of the selling price or the balance of payment as indicated in the automobile purchase agreement. Even taking into

account any applicable adjustment under subsection 48(5) of the *Act*, the elements of the price paid or payable can be determined from this document within the meaning of subsection 48(4). Moreover, no adjustments to the transaction value are required to reflect a non-arm's length relationship, as outlined in subsection 48(3). The fact that taxes had already been paid on the trade-in vehicle when originally purchased does not change the fact that the price paid for the vehicle in issue is the selling price indicated in the automobile purchase agreement. Section 48 does not contemplate the consideration of the method of payment as a relevant factor in determining the price paid for imported goods. Whether the financial resources (cash and/or goods) that have been used to satisfy the selling price have been subject to any form of taxation (sales tax or income tax) is irrelevant to determining the actual value of the transaction under the scheme prescribed in section 48. Consequently, the Tribunal is satisfied that the second requirement is met, in that adequate documentary evidence is available to determine the price paid for the vehicle in issue, and that the purchaser and the vendor are not related.

13. As noted earlier, the automobile purchase agreement indicated that Mr. Draganiuk obtained a trade-in allowance of US$5,496.50, resulting in a balance of payment of US$12,003.50 for the vehicle in issue before dealer fees and state taxes. In this regard, the CBSA submitted that the trade-in represents a condition or consideration in respect of which a value cannot be determined and is excluded from the determination of the value for duty pursuant to paragraph 48(1)(*b*) of the *Act*. The CBSA also argued that none of the price adjustments outlined in paragraph 48(5)(*a*) are applicable to the transaction[4] and that there are no transportation costs, post-importation construction or assembly costs, or duties and taxes paid to be deducted from the price as outlined in paragraph 48(5)(*b*).[5] In the latter case, this would have been the only means by which the value of the trade-in vehicle could have been deducted from the selling price as an indication of the price paid for the vehicle in issue, had it been specifically allowed for under one of the negative adjustments listed under paragraph 48(5)(*b*). The Tribunal considered every single adjustment provided for under this paragraph and determined that none is applicable.

14. In this regard, the Tribunal is bound by the provisions of the *Act*. Consequently, while the *Act* provides for certain adjustments to the price, it does not provide for an adjustment for a trade-in allowance in calculating the value for duty of the vehicle in issue. The Tribunal notes that Memorandum D13-10-2[6] provides some guidance in the manner in which the value for duty of used automobiles is to be determined. It states that a value attributed to a trade-in or exchange is simply a notional value ascribed to it by the vendor and may be more or less than what is claimed. It could possibly be an enticement to attract potential car buyers.[7] Although Mr Draganiuk submitted that a trade-in value of US$5,496.50 was determined by two appraisers from the dealership for the 1991 Cadillac DeVille, this cannot be considered an arm's length relationship.

15. Taking into account the above factors, specifically that the trade-in represents a condition or consideration regarding the price paid for the vehicle in issue in respect of which an objective value cannot be determined, the Tribunal is of the view that not all the requirements of section 48 of the *Act* have been met. Consequently, the value for duty of the vehicle in issue must be determined under the subsequent methods of valuation provided for in sections 49 to 53.

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4. For example, commissions, brokerage fees, packing costs, other incorporated goods, production materials, royalty or licence fees, subsequent proceeds of sale or transportation costs to be added.
5. In this regard, subsection 48(4) of the *Act* states: "The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price payable in accordance with subsection (5)."
6. Canada Border Services Agency, "Used Automobiles, Motor Vehicles, Boats, and Other Vessels (*Customs Act*, Sections 48 to 53)" (30 March 2001).
7. *Ibid.* at para. 24.

16. In order to apply the valuation methods set out in sections 49, 50, 51 and 52 of the *Act*, the Tribunal would have to have information that is not available to it in this case. 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 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 vehicle in issue was not imported for resale. Likewise, section 52, which deals with the computed value method, would not be suitable because the vehicle in issue was not a new automobile. Consequently, the CBSA relied on section 53 of the *Act*, which deals with the residual method of valuation.

17. 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.

18. The CBSA submitted that section 53 of the *Act* only permits the requirements of previous sections to be flexibly applied, not disregarded completely. Consequently, the transaction value method described in section 48 remains applicable and no adjustment can be made for the trade-in. In other words, the residual method calls for the flexible use of whichever method described in sections 48 to 52 conforms more closely to the requirements of that method. The flexible use of the transaction value method under section 48 is applied because it requires the least amount of adjustment. This results in taking the price paid and not making any deduction for the trade-in allowance because, as indicated earlier, trade-in allowances are not on the list of price adjustments set out in paragraph 48(5)(*b*).

19. In light of the above, the Tribunal concludes that, even when the flexible approach described in section 53 of the *Act* is applied, the transaction value method described in section 48 remains applicable and that no adjustment can be made. Accordingly, the value for duty of the vehicle in issue was properly determined at CAN$19,500 based on the selling price of US$17,500.

20. With respect to Mr. Draganiuk's argument that, on previous occasions and in similar circumstances, a deduction for a trade-in allowance was allowed in determining the value for duty of the imported automobile, the Tribunal is of the view that this is irrelevant in the present appeal.

21. For the foregoing reasons, the appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member