CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 12, 1989

Appeal No. AP-89-014

IN THE MATTER OF an application heard May 10, 1989, pursuant to section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 as amended;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise pursuant to section 59 of the *Special Import Measures Act* with respect to a request under section 58 of the *Special Import Measures Act*.

BETWEEN

J.C. JANES AND ASSOCIATES LTD. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal finds that a trader's profit is to be deducted from the calculation of the export price of the drywall screws purchased and imported by the appellant from a Japanese manufacturer, Yao Seibyo Co. Ltd., between July 22 and August 27, 1986, in accordance with the respondent's decision of December 2, 1988.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

John C. Coleman
John C. Coleman
Member

Kathleen Macmillan
Kathleen Macmillan
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-89-014

J.C. JANES AND ASSOCIATES LTD. **Appellant**

and

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

Special Import Measures Act - Determination of the normal value and of the export price of the subject goods imported into Canada in July and August 1986, which were covered by a June 1982 finding of likelihood of material injury issued by the Anti-dumping Tribunal.

***DECISION**:* The appeal is dimissed. The Tribunal finds that the appellant failed to supply documented verifiable proof that a buying agent was not a party to the transaction; therefore, a trader's profit should be deducted from the calculation of the export price.

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*May 10, 1989*
Date of Decision:	*October 12, 1989*
Panel Members:	*Sidney A. Fraleigh, Presiding Member* *John C. Coleman, Member* *Kathleen Macmillan, Member*
Counsel for the Tribunal:	*Lyne Letarte*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Edward E. Bowes, for the appellant* *Michael Ciavaglia, for the respondent*
***Statutes Cited**:*	*Special Import Measures Act, R.S.C. 1985, c. S-15, ss. 3, 59 and 61, subss. 2(1) and 29(1); Canadian International Trade Tribunal Act, S.C. 1988, c. 56, s. 60.*

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Appeal No. AP-89-014

J.C. JANES AND ASSOCIATES LTD. **Appellant**

and

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

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
JOHN C. COLEMAN, Member
KATHLEEN MACMILLAN, Member

REASONS FOR DECISION

SUMMARY

The appellant is asking for a review of the calculation of the export price on drywall screws imported from Japan.

The drywall screws were the subject of a finding of likelihood of material injury issued by the former Anti-dumping Tribunal in 1982.

Prior to 1982, the appellant bought drywall screws directly from Toshin Products Co. Ltd. (Toshin), a trading company.

From 1983 to 1985, the appellant bought drywall screws from Yao Seibyo Co. Ltd. (Yao Seibyo), the manufacturer, with Toshin acting as a buying agent, not taking title to the goods. As a result, the trader's profit was not included in the dumping calculation.

In October 1985, Revenue Canada initiated a review of the selling arrangements between the companies and, on May 6, 1986, issued a normal value ruling on the basis that Toshin was directly involved in the transactions. As a result, Revenue Canada lowered the export price, which had the effect of increasing the dumping margin and, hence, the duties owed by the appellant.

In May 1986, the appellant notified Revenue Canada that it had terminated its agreement with Toshin and was buying the drywall screws from Yao Seibyo with no involvement by Toshin.

Another investigation was launched to verify these facts and Revenue Canada was still not convinced.

On November 28, 1986, the appellant filed an appeal on four shipments on which the trader's profit had been included in the export price.

On December 2, 1988, the decision was upheld by Revenue Canada and this appeal was initiated.

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The Tribunal upholds the decision of Revenue Canada that the appellant did not supply sufficient convincing evidence to justify removing a trader's profit from the calculation of the export price.

THE LEGISLATION

For the purpose of this appeal, the relevant provisions of the *Special Import Measures Act*[1] (the Act) are as follows:

> *2. (1) In this Act,*
>
> ...
>
> *"margin of dumping", in relation to any goods, means the amount by which the normal value of the goods exceeds the export price thereof;*
> ...
> *3. There shall be levied, collected and paid on all dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding, before the release of the goods, that the dumping or subsidizing of goods of the same description has caused, is causing or is likely to cause material injury or has caused or is causing retardation, a duty as follows:*
>
> > *(a) in the case of dumped goods, an anti-dumping duty in an amount equal to the margin of dumping of the imported goods; and*
> > ...
>
> *29. (1) Where, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28, the normal value or export price, as the case may be, shall be determined in such manner as the Minister specifies.*

THE FACTS

This is an appeal pursuant to section 61 of the Act from a re-determination by the respondent dated December 2, 1988, with respect to four requests for re-appraisal filed by the appellant. The appeal relates to the calculation of the export price on goods imported by the appellant between July 22 and August 27, 1986.

The goods in issue are drywall screws manufactured in Japan by Yao Seibyo. They are the subject of the finding by the Anti-dumping Tribunal dated June 14, 1982, (following Inquiry No. ADT-5-82 under section 16 of the *Anti-dumping Act*[2]) in which the dumping of the goods in Canada was held to be a likely cause of material injury to the production in Canada of like goods.

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1. R.S.C. 1985, c. S-15 which was known as S.C. 1984, c. 25.
2. R.S.C. 1970, c. A-15 which was repealed December 14, 1984, DORS/84-232.

The appellant appealed the respondent's decision to the Canadian International Trade Tribunal on January 31, 1989. The appellant seeks an order rectifying the export price of the subject goods which was calculated by the respondent. It contends that no trading company was involved in its transactions with the Japanese manufacturer.

The respondent states in the re-determination:

> *It is noted that the reason for the four requests was to contest the deduction of 16.98% for traders profit in determining the export price of the goods since it is claimed that a trading company was not involved in these shipments. It should be noted that Customs officials visited the premises of the producer of the goods, Yao Seibyo Co. Ltd. in late 1986. At the time of Customs' visit, officials of Yao Seibyo were unable to establish to Customs' satisfaction that the transaction for goods sold by them and ultimately imported by J.C. Janes was a direct sale without the involvement of a trading company. Evidence to support such a claim was not provided and indeed more evidence suggests that a trading company was involved with the goods shipped to Canada.*

In sum, the respondent states that the appellant has not supplied sufficient documentation proving that no trading company was involved in the transactions so as to justify a re-determination of the export price.

The pertinent facts drawn from written and oral evidence can be summarized as follows.

In 1983, a buying agent agreement existed between Grabber Industrial Products Ltd., a sister company of the appellant (same President, same business address), and Toshin (Exhibit B-1) for the purchase of drywall screws. Until 1986, the respondent made no deduction from the export price for a trader's profit.

In 1985, the Tokyo office of Revenue Canada conducted a normal value review of the Asian industry dealing with drywall screws exported to Canada. Revenue Canada investigators concluded that Toshin was purchasing the subject goods from the Japanese manufacturer Yao Seibyo for further resale to the appellant. On May 6, 1986, the respondent issued a normal value ruling which reduced the export price on the basis that the trading company Toshin was directly involved in the transactions. In response to the respondent's decision, the appellant forwarded a copy of its May 20, 1986, letter to Toshin terminating the buying agent agreement (Exhibit A-2). The respondent replied by reinstating the ruling, pending confirmation and verification of Toshin's new status.

In August 1986, the Tokyo office of Revenue Canada initiated a second review. The conclusions arrived at by Revenue Canada investigators were the same. No company could provide or was willing to give access to verifiable documents which could have evidenced that Yao Seibyo sold the goods in issue directly to the appellant. The appellant objected to the reinstatement of the ruling in November 1986. On December 2, 1988, the respondent confirmed that a trader's profit was to be considered in calculating the margin of dumping. Thus, the present appeal.

An officer of Revenue Canada, who took part in the two investigations, provided uncontradicted evidence on the method of verification and review. When a company is alleged to be dumping goods in Canada, a questionnaire requesting information is sent out to it. Once the Revenue Canada regional office receives the response, a group of Revenue Canada officials visits the company's premises to verify the information received and to complete the documentation.

During Revenue Canada's two reviews of this claim, its investigators asked representatives of Yao Seibyo and of Toshin for access to all documents that would enable them to verify that direct payments between the appellant and Yao Seibyo did occur. Access to the relevant documents was refused in all instances by Yao Seibyo, as well as by Toshin. Once the appeal was launched by the appellant, the Tokyo office for the respondent reinvestigated the status of Toshin. It sent a request for information to Yao Seibyo. The company said it was not able to supply the documents requested.

The appellant's president gave the following testimony. Between August 1983 and May 1986, Toshin's business relationship with the appellant was one of a buying agent for the purchase of drywall screws. Toshin was not to take title to or possession of the goods. Further, the import documents and the invoices, which are relevant during the 1983 to 1986 period, refer to Yao Seibyo as the vendor. In cross-examination, the appellant's president acknowledged that during that period the appellant paid through Toshin the amounts it owed on invoices received from Yao Seibyo.

As to the importations in issue, the witness assured the Tribunal that shipment and insurance were arranged and paid by Yao Seibyo. All payments relating to those purchases were made by bank transfers directly to Yao Seibyo. The appellant's witness said that the relevant documents existed but, in view of the fact that his 1986 records were difficult to locate, he had asked the Managing Director of Yao Seibyo, as well as the President of Toshin, to testify on the business relationship which existed between the three companies.

A letter dated May 9, 1989 (Exhibit A-9), signed by the Managing Director of Yao Seibyo, was filed listing an account of the four shipments and stating that no third party was involved in those direct shipments. The appellant's president explained that he had requested the Managing Director of Yao Seibyo to bring the document to the hearing. This letter was signed on May 9, 1989, the day before the hearing.

The Managing Director of Yao Seibyo, who signed the letter, was the appellant's second witness. He testified that he had not brought the commercial and banking documents, that would have supported the statements in the letter, to the hearing because of his concerns about Japan's tax laws. For the same reasons, he had earlier withheld such documents from Revenue Canada investigators. He also explained that he had heard about the 1985 visit from the respondent's Tokyo office. He stated that he was unaware of the 1986 visit and did not know that the Canadian officials had asked for documents and been refused them. Nevertheless, he indicated to the Tribunal that, because of Japanese tax considerations, no additional document had been or would be divulged to the respondent. He added that, until Yao Seibyo started to sell the goods directly to the appellant pursuant to the termination of the agent agreement between the appellant and Toshin on May 20, 1986, the appellant was buying its product through Toshin. After Toshin was excluded, Yao Seibyo received payment for the delivered goods in issue directly from the appellant.

The witness came to Canada one month before the hearing. He acknowledged that he had come partly in order to testify on behalf of the appellant. Further, he admitted he had been aware of the issue to be addressed by the Tribunal, but had brought no documentation with him. As to the drafting of Exhibit A-9, he explained that he had asked his Japanese accounting department, by phone, a couple of days prior to the hearing, to prepare a letter stating that the direct payments to his firm had been made by the appellant for the importations in issue. The document was sent from Japan to Canada by facsimile transmission and was signed the day prior to the hearing by the witness in Vancouver, on behalf of the company. Having complete trust in his accounting department, the witness had not seen fit to ask for the substantiating documents, i.e. bank transfers.

The President of Toshin testified that his firm was not involved in the transactions which are the subject of this appeal. In cross-examination, he was asked to clarify what kind of agreements his firm had with the appellant during the last decade. He responded that, prior to August 1983, Toshin purchased drywall screws and sold them to the appellant. From August 1, 1983 to May 20, 1986, Toshin became a buying agent for the appellant and, as such, bought goods on behalf of the appellant. For its services, Toshin would receive a monthly fixed commission. Subsequent to May 20, 1986, Toshin was not involved in the purchase of the subject goods. The witness could not recall whether Toshin made payments to Yao Seibyo for drywall screws purchased between 1983 and 1986.

THE ISSUE

The question the Tribunal is asked to address is whether a trading company was a party to the transactions in issue.

The appellant's counsel argued that the originating purchase orders, invoices from Yao Seibyo, bills of lading and the confirmation of payment submitted as Exhibit A-9 establish a complete chain of direct dealings between the appellant and the manufacturer at the time the goods were imported. The appellant relied upon the buying agent termination letter (Exhibit A-3) and the manufacturer's acceptance of a direct purchase relationship to support its case that no agent was involved. Counsel underlined the testimony of the three witnesses who came forth to reiterate that, with respect to the transactions in issue, Yao Seibyo received direct payment for the goods imported from the appellant and that Toshin was no longer involved in the specific transactions.

Counsel for the appellant concluded that there was sufficient convincing evidence before the Tribunal that the goods were sold directly from the manufacturer to the appellant without the intervention of a buying agent. The respondent's December 2, 1988, decision should be rescinded and the Tribunal was requested to declare that no trader's profit was to be deducted from the calculation of the export price.

The respondent's counsel argued that all parties involved were given ample opportunity to submit documents, like bank transfers, to substantiate the appellant's position. If Toshin were not a party to the relevant transaction, payment from the appellant would have been made to the manufacturer. No convincing evidence was put forward to clarify the status of Toshin, either for the respondent or the Tribunal. Because of the lack of verifiable information as to direct sales from Yao Seibyo to the appellant, the Tribunal should conclude that Toshin remained an integral part of the sales of the goods in issue to Canada. Therefore, a trader's profit should be deducted from the export price. The appeal should be dismissed and the decision of the respondent confirmed.

DECISION

For the Tribunal to find in favor of the appellant, it must be able to conclude that the agreement of May 20, 1986, removed the trading company, Toshin, as a direct participant in the sales of drywall screws to the appellant by the Japanese manufacturer.

In the Tribunal's opinion, documentary evidence supplied on the nature of the transactions was insufficient to corroborate the oral testimony offered on behalf of the appellant.

Despite repeated requests by Revenue Canada officials, the appellant's Japanese witnesses testified that, because of their concern about Japanese tax laws, they could not produce the sort of banking and commercial documents that would have proved the appellant's case. Knowing of the Japanese firms' inhibitions in this regard and the earlier requirements of Revenue Canada, the appellant could have brought documents to the hearing or undertaken, at the hearing, to provide information from its own records to assist the Tribunal in verifying its assertions and those of its witnesses. The appellant's failure to do so leaves the Tribunal unable to decide in its favor.

The documents the appellant did supply are of little assistance to the Tribunal without banking records or similar commercial documents to verify their accuracy. The timing of the May 20, 1986, letter from Yao Seibyo to Toshin so soon after Revenue Canada's May 6, 1986, ruling raises doubts as to whether the business relationship between the two was actually terminated. Similar questions are posed by the May 9, 1989, letter. It was prepared at the request of the appellant and sent from Japan to Canada where it was signed and then presented as evidence by the appellant's president and the witness who signed the letter. The latter admitted that he could not personally verify the letter's content, but rather relied on information supplied by an officer of his corporation. The circumstances surrounding the preparation and execution of this letter lead the Tribunal to attach little weight to it.

CONCLUSION

The appellant has not satisfied the Tribunal that it was dealing directly with the manufacturer Yao Seibyo. Because of the lack of convincing evidence on this critical issue, the Tribunal decides that the respondent was justified in deducting a trader's profit from the calculation of the export price.

The appeal is dismissed.

Sidney A. Fraleigh
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Presiding Member

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Member