CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, July 20, 1992

Appeal No. AP-91-189

IN THE MATTER OF an appeal heard on May 14, 1992, under section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), as amended;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated September 24, 1991, relating to requests for re-appraisal made under section 60 of the *Customs Act*.

BETWEEN

NORDIC LABORATORIES INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is dismissed. The value for duty of the goods was appraised correctly.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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UNOFFICIAL SUMMARY

Appeal No. AP-91-189

NORDIC LABORATORIES INC. **Appellant**

and

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

The sole issue in this appeal is whether an agreement on an alternate value structure negotiated by, or on behalf of, the appellant with its supplier and a subsequent credit note constitute a "rebate of, or other decrease in, the price paid or payable for the goods that [was] effected after the goods [were] imported," in which case, it has been properly disregarded in the determination of the transaction value in accordance with paragraph 48(5)(c) of the Customs Act.

HELD: *The appeal is dismissed. As established in evidence, it is not until April 1989, that is to say a few months after the importation of the goods, that the exporter accepted that a generic product was available for sale in Canada. The acceptance of the exporter was a condition of the coming into force of the new price structure and, therefore, even in considering the Department of National Revenue's liberal interpretation of paragraph 48(5)(c) given through Excise Memorandum D13-4-10, the Tribunal finds that the rebate or decrease provided through the credit note was properly disregarded as a rebate effected after the goods were imported.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 14, 1992*
Date of Decision:	*July 20, 1992*
Tribunal Members:	*Michèle Blouin, Presiding Member* *Kathleen E. Macmillan, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Raymond DeWaele, for the appellant* *Christine Hudon, for the respondent*

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Appeal No. AP-91-189

NORDIC LABORATORIES INC. **Appellant**

and

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

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
KATHLEEN E. MACMILLAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue for Customs and Excise pursuant to subsection 63(3) of the Act. Most of the hearing was held *in camera*.

The appellant, Nordic Laboratories Inc. (Nordic), imported benzothiazepine derivative, also known as diltiazem hydrochloride, into Canada. In appraising the value for duty of the goods, an agreement with the exporter effecting a decrease in the value of the goods was disregarded in the calculation of the transaction value of the goods.

The sole issue in this appeal is whether the said agreement negotiated by, or on behalf of, the appellant with its supplier and a subsequent credit note constitute a "rebate of, or other decrease in, the price paid or payable for the goods that [was] effected after the goods [were] imported," in which case, it has been correctly disregarded in the determination of the transaction value in accordance with paragraph 48(5)(*c*) of the Act.

According to subsections 48(1) and 48(5) of the Act, the value for duty of imported goods is their transaction value or, more precisely, the price paid by adding and deducting different amounts and, pursuant to paragraph 48(5)(*c*), "by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that is effected after the goods are imported." The Tribunal must, therefore, examine the different events that occurred before and after the importation.

In 1982, the appellant became affiliated with an American corporation by the name of Marion Laboratories Inc. (Marion). Both companies had pre-existing agreements with Tanabe Seiyaku Co. (Tanabe), the Japanese supplier and exporter of the diltiazem hydrochloride, which is used in the treatment of angina. These agreements were subsequently amended to allow the appellant to continue to receive the product from Tanabe, although the purchase orders were placed with, and paid to, Marion.

1. R.S.C., 1985, c. 1 (2nd Supp.), as amended.

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On or about December 14, 1988, January 18, 1989, and February 7, 1989, Nordic imported quantities of diltiazem hydrochloride to Canada from Tanabe. Prior to the shipment of the goods, an agreement had been reached with Tanabe for a new value structure for the supply of the product, which was to take effect as soon as a generic diltiazem product became available in Canada. The appellant, indeed, negotiated a price reduction in the event that a generic product became available after the expiry of the patent protection ending March 28, 1989. According to Mr. Peter R. Slaughter, Vice-President Legal Affairs for the appellant, Nordic and Marion reached the agreement with Tanabe during the summer of 1988. That agreement was discussed at a Nordic Board of Directors meeting held in July 1988. On December 26, 1988, a Restated and Modified Supply Agreement was finally signed between Marion and Tanabe.

The generic product became available in Canada sometime in the fall of 1988. Discussions then occurred between Nordic and Marion, and the latter and Tanabe, in view of the coming into force of the new price structure laid down in the 1988 agreement. During the said period, Nordic sent three purchase orders to Tanabe, which resulted in importation in December 1988, and January and February 1989. On April 4, 1989, upon confirmation by Tanabe that the generic product had been introduced into Canada, Marion provided the appellant with a credit note reflecting the difference between the price actually charged by the exporter and the price applicable in the event of generic competition. In fact, due to the mechanism of the bilateral agreement between Marion and Tanabe, it appears that the new price structure meant increased supply to Marion and monetary credit to Nordic by Marion, and not by Tanabe.

In argument, counsel for the appellant submitted that the value for duty declared at the time of importation was incorrect and that the correct value is based on the alternate value structure which was negotiated by, or on behalf of, the appellant with Tanabe. The alternate value, he said, was negotiated before the introduction of the generic product and before the importations into Canada. Furthermore, the substitution of the alternate price was the result of certain events having occurred, i.e. the appearance of the generic product, and which were beyond the control of the appellant. In counsel's view, it is only due to unknown facts, which had not been acknowledged by Tanabe at the time of importation, that the value for duty was incorrectly stated. Moreover, there has never been any rebate or other decrease in the price paid or payable for the product effected after the product was imported. Counsel also argued that the word "effected" in paragraph 48(5)(*c*) is not defined by the Act. The verb "to effect," he continued, means to cause. As the conditions of the price substitution were met before the importations, counsel submitted that the price substitution does not constitute a rebate or decrease in the price of the product which was caused after the product was imported. To that effect, counsel pointed out paragraph 3 of Excise Memorandum D13-4-10 (the Memorandum) issued on June 1, 1986, by the Department of National Revenue (Revenue Canada) which provides that a discount be taken into account in calculating the price paid if "the obligation or condition to which a discount relates is fulfilled or met - prior to importation."

Counsel for the respondent argued that the agreement for an alternate value structure bind Tanabe and Marion and is, therefore, irrelevant to this matter. The appellant is not a part of this agreement and the sales, as established in evidence, have occurred between Marion and the appellant. The credit note is a "decrease in," or a "rebate of" the price paid or payable effected after the time of the importations, and such credit cannot be deducted from the price paid when determining the transaction value in accordance with paragraph 48(5)(*c*) of the Act. Counsel also argued that the decrease in the price paid or payable was not effected until after the goods were imported.

In the Tribunal's view, what is determinant in this case is the fact that the 1988 agreement between Marion and Tanabe requires not only that a generic substitute be available in Canada, but that Tanabe recognize the existence of the new product. As established in the evidence, Tanabe's acceptance did not come until April 1989, some months after the generic product appeared on the market and the importations occurred. Hence, in the Tribunal's view, even in considering Revenue Canada's liberal interpretation of paragraph 48(5)(*c*) set forth in the Memorandum, the condition to which the discount related was not met prior to importation. Consequently, the rebate or decrease provided through Marion's credit note to Nordic was correctly disregarded as a rebate effected after the goods were imported.

For the foregoing reasons, the appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
Member