CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 28, 1994

Appeal No. AP-93-055

IN THE MATTER OF an appeal heard on October 27, 1993, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise dated March 22, 1993, under section 59 of the *Special Import Measures Act*.

BETWEEN

J.B. MULTI-NATIONAL TRADE INC. **Appellant**

AND

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

DECISION OF THE TRIBUNAL

The appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-055

J.B. MULTI-NATIONAL TRADE INC. **Appellant**

and

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

This is an appeal under section 61 of the Special Import Measures Act from a re-determination of the Deputy Minister of National Revenue for Customs and Excise dated March 22, 1993, of the normal value of carbon steel welded pipe imported into Canada and subject to the Tribunal's finding of material injury dated January 23, 1992, in respect of certain carbon steel welded pipe originating in or exported from Brazil, Luxembourg, Poland, Turkey and Yugoslavia. The issue in this appeal is whether the respondent erred in his re-determination of the normal value of the goods in issue.

HELD: *The appeal is allowed. In the Tribunal's view, the respondent, in applying paragraph 19(b) of the Special Import Measures Act to determine the normal of value of the goods in issue, incorrectly determined the identity of the exporter of the goods in issue and, on that basis, incorrectly determined the normal value. The Tribunal remands the matter to the Deputy Minister of National Revenue for Customs and Excise to determine the normal value of the goods in issue in accordance with sections 15 to 23 of the Special Import Measures Act, based on the sales and/or costs of Fasal S/A-Comércio e Indústria de Produtos Siderúrgicos as the exporter.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*October 27, 1993*
Date of Decision:	*April 28, 1994*
Tribunal Members:	*Anthony T. Eyton, Presiding Member* *Charles A. Gracey, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael Kaylor, for the appellant* *Anick Pelletier, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-055

J.B. MULTI-NATIONAL TRADE INC. **Appellant**

and

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

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
CHARLES A. GRACEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*[1] (SIMA) from a re-determination of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) of the normal value of carbon steel welded pipe imported into Canada on August 22 and October 31, 1991, and subject to the Tribunal's finding of material injury in *Certain Carbon Steel Welded Pipe Originating in or Exported from Brazil, Luxembourg, Poland, Turkey and Yugoslavia*.[2] The issue in this appeal is whether the respondent erred in his re-determination of the normal value of the goods in issue.

The goods in issue of which the normal value was determined were manufactured by Fornasa S.A. (Fornasa), a manufacturer of pipe in Brazil, from hot-rolled steel coil (coil) manufactured by Usinas Siderúrgicas de Minas Gerais S.A. (Usiminas), a steel mill in Brazil. Fasal S/A-Comércio e Indústria de Produtos Siderúrgicos (Fasal), a stockholder and distributor of coil in Brazil, purchased the coil from Usiminas and supplied it to Fornasa to have it manufactured into pipe.

Mr. Paulo Sergio João, Export Manager for Fornasa, testified that, prior to the exportation of the goods in issue to the appellant, Fornasa was both a manufacturer and an exporter of pipe. Its general practice, at that time, was to purchase coil directly from steel mills rather than from Fasal, since Fasal was and is a stockholder of coil, not a producer of coil. However, in 1990, Fornasa encountered financial difficulties and was unable to secure enough credit to continue its normal pattern of purchasing the coil that it required.

In order to continue to manufacture pipe for export and to stay in business, Fornasa entered into an agreement with Fasal on December 11, 1990,[3] as amended by an agreement dated March 6, 1991.[4] This agreement provided that: (1) Fasal would supply coil to Fornasa and Fornasa would convert the coil into pipe and send the pipe to an agreed-upon port

1. R.S.C. 1985, c. S-15.
2. Inquiry No. NQ-91-003, January 23, 1992.
3. As the document is written in Portuguese, the appellant filed with the Tribunal a notarized English translation by an official Brazilian translator.
4. *Ibid.*

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warehouse; (2) Fornasa would be responsible for negotiating the sales of the pipe to its traditional clients, including transferring letters of credit on Fasal's behalf and attending new clients introduced by Fasal; and (3) Fasal would receive payment for the pipe by letter of credit from the purchaser and remit the balance to Fornasa after payment of all of its costs, including stowage, taxes, freight, warehousing, agents' commissions and an amount for the coil. The agreement established a formula to determine the amount to be paid to Fasal for the coil. The amendment to the agreement established that a minimum price of US$297 per ton would be retained by Fasal from the proceeds.

In carrying out the agreement in respect of sales to the appellant, which was one of its former customers, Fornasa continued to negotiate the terms and conditions of the sales of pipe, including the price, and continued to have regular contact with the appellant. This continuing contact was important to the appellant because a language barrier prevented the appellant from dealing directly with Fasal. Fasal retained ownership of the coil, was named as vendor, exporter and shipper on the customs and shipping documents and received payment for the pipe by letters of credit issued in its name, as required by the agreement.

Mr. Joe Barazin, President of J.B. Multi-National Trade Inc., appeared as a witness for the appellant and supplied copies of commercial invoices obtained from Fasal for purchases of coil by Fasal from Usiminas, with the headings translated into English, and accompanied by a summary sheet of the conversion to U.S. dollars. The converted invoice amounts showed that the coil was purchased from Usiminas by Fasal for approximately US$100 per ton less than the minimum figure of US$297 per ton established in the amendment to the agreement. It was suggested that the apparent margin between the US$297 figure and the actual cost of the coil to Fasal represented Fasal's business profits from the sales of the pipe.

Mr. Richard Chung, Senior Program Officer in the Anti-dumping and Countervailing Division of the Department of National Revenue (Revenue Canada), appeared as a witness for the respondent and explained that the constructed-cost approach under paragraph 19(*b*) of SIMA was used to determine the normal value of the goods in issue. He stated that, in applying the formula under paragraph 19(*b*) of SIMA, it was determined that: (1) Fornasa was the exporter; (2) the cost of production of the goods in issue was Fornasa's conversion cost plus the amount of US$297 per ton, which was the minimum amount established in the amendment negotiated by Fasal and Fornasa; and (3) an amount should be included for interest, expressed as a percentage of Fornasa's total cost of production, and prorated for the pipe exported to the appellant. Mr. Chung described Fasal's role as "facilitator."

Accepting that the constructed-cost approach under paragraph 19(*b*) of SIMA was the correct approach for determining the normal value, counsel for the appellant submitted that there were three problems with Revenue Canada's determination of the normal value of the goods in issue. First, counsel disputed the inclusion of the amount of US$297 per ton in Fornasa's cost of production of the pipe as the cost of the coil. Second, counsel submitted that Revenue Canada incorrectly attributed the interest charges to Fornasa's cost of production, including the amount of US$297 per ton as the cost of the coil. Third, counsel contended that, as a result of the first two errors, the quantum calculated as profit was also incorrect.

Counsel for the appellant submitted that Fornasa's cost of production of the pipe should only include its processing costs and that, if the Tribunal is of the view that there should be an amount for the coil included in the cost of production, the amount for the cost of the coil should be the cost or purchase price paid by Fasal to Usiminas. In support of his position that the amount of US$297 per ton should not be included as a cost of production, counsel referred to

the agreement which provides that Fasal is to supply coil to Fornasa for the purpose of production, on a consignment basis, without any charge to Fornasa. Counsel also pointed out that there are no entries in Fornasa's books or records showing that Fornasa paid Fasal for the cost of the coil. Finally, counsel referred to a letter from Revenue Canada dated October 5, 1992, which describes the amount of US$297 per ton as an imputed cost and submitted that the law does not use the phrase "imputed cost."

Counsel for the appellant did not dispute the inclusion of interest charges as a cost mentioned in subparagraph 19(*b*)(ii) of SIMA which reads "an amount for administrative, selling and all other costs." Counsel submitted that, since Fornasa did not incur any interest costs in respect of raw materials used to manufacture the goods in issue, the interest charge should only apply to Fornasa's processing costs. Alternatively, counsel argued that, if the Tribunal determined that the interest charge should apply to the cost of production, including the cost for the coil, the cost for the coil should be the amount paid by Fasal to Usiminas.

According to counsel for the respondent, the first issue to be addressed by the Tribunal is the identity the exporter. She submitted that, in determining the normal value of the pipe, Revenue Canada had established that: (1) in reality, Fornasa was the exporter since the purchase order was from the appellant to Fornasa; (2) Fornasa negotiated the terms of the sales, including the final price; (3) there was correspondence between Fornasa and the appellant concerning the sales; and (4) the goods in issue were marked for delivery to the appellant when they left Fornasa's premises. Counsel submitted that Fasal is a stockholder and does not normally export pipe. However, since Fornasa was in "*concordata*[5]" and could not obtain coil, Fasal acted as an intermediary and supplied the coil to Fornasa in exchange for an agreed-upon amount of money. She submitted that the Tribunal should go behind the documentation and review what happened from a commercial or business perspective. In particular, she submitted that the Tribunal should be persuaded by the fact that Fornasa negotiated the price to be paid for the pipe and was the producer of the pipe.

Proceeding on the basis that Fornasa was the exporter, counsel for the respondent submitted that the amount of US$297 per ton would have to be included in Fornasa's cost of production of the pipe. She acknowledged that Fornasa never incurred a cost for the coil, but submitted that, since Fornasa received a net payment from the sale of the pipe from which US$297 per ton had been retained by Fasal, it had, in effect, paid US$297 per ton for the coil. She also pointed out that it was on the basis of the known value (US$297 per ton) that Fornasa negotiated the sales of the pipe.

With respect to the issue of the interest expense calculation, counsel for the respondent submitted that, in accordance with paragraph 11(*c*) of the *Special Import Measures Regulations*,[6] the interest expense associated with Fornasa's general cost of doing business, including interest on operational loans, late payment charges, etc., should be included as an interest expense. Counsel indicated that Fornasa was requested to confirm that the interest expense related to the coil, but it did not do so.

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5. See transcript at 49; Mr. João described "*concordata*" as the status of a company undergoing bankruptcy proceedings in Brazil.

6. SOR/84-927, November 22, 1984, Canada Gazette Part II, Vol. 118, No. 25 at 4286.

Counsel for the respondent submitted that the allocation of the interest expense to Fornasa's cost of production of the pipe, including the amount of US$297 per ton for the coil, was reasonable.

SIMA establishes a sequential series of methodologies that may be employed to determine normal value, depending on the availability of comparable information concerning sales of like goods. In this appeal, the parties have agreed that the normal value must necessarily be determined using the constructed-cost approach established under paragraph 19(*b*) of SIMA. The evidence of Mr. Donald J. Goodwin, the appellant's representative for the verification process, and of Mr. Chung indicates that the method under paragraph 19(*b*) of SIMA was used to calculate the normal value of the goods in issue since it had been determined that Fornasa's sales were made at a loss during the period reviewed.

The Tribunal observes that subsection 16(2) of SIMA expressly provides for situations where sales are made at a loss. Paragraph 16(2)(*b*) provides as follows:

> *(2) In determining the normal value of any goods under section 15, there shall not be taken into account*
>
> *(b) any sale of like goods that, in the opinion of the Deputy Minister, forms part of a series of sales of goods at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit.*

In the Tribunal's view, the inclusion of the phrase "in the opinion of the Deputy Minister" in subsection 16(2) of SIMA suggests that the question of whether a series of sales is below cost is specifically reserved to the discretion of the Deputy Minister. The Tribunal accepts, for purposes of this appeal, the testimony of Mr. Chung that a determination was made that Fornasa's sales of like goods in Brazil did not provide for the recovery of its costs and a profit and that, therefore, the normal value could not be determined in accordance with section 15 of SIMA.

Paragraph 19(*b*) of SIMA provides that the normal value shall be the aggregate of (1) the cost of production of the goods, (2) an amount for administration, selling and all other costs and (3) an amount for profits. However, there is no indication as to whose costs and profits are to be included. It is a principle of statutory interpretation that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[7]" Therefore, in order to determine whose costs and profits are to be included, it is necessary to read paragraph 19(*b*) of SIMA in the context of all of the SIMA provisions relating to normal value and to interpret it consistently with the scheme and object of the Act.

Section 2 of SIMA defines "normal value" as the normal value determined in accordance with sections 15 to 23, 29 and 30. Section 15 provides that the normal value of goods sold to an importer in Canada is to be determined on the basis of the price of like goods sold by the

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7. E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at 87. This principle was adopted by the Supreme Court of Canada in *Stubart Investments Limited v. Her Majesty The Queen*, [1984] 1 S.C.R. 536 and, more recently, in *Elizabeth C. Symes v. Her Majesty The Queen*, unreported, File No. 22659, December 16, 1993.

exporter in the country of export. Section 16 sets out which of the exporter's sales of like goods may be considered in applying section 15. Section 17 sets out how the price of like goods sold by the exporter is to be determined in applying section 15. Paragraph 19(*a*) provides that, where the normal value cannot be determined under section 15, the normal value shall be determined as "such price of like goods when sold by the exporter to importers in any country other than Canada."

Although there is no reference in paragraph 19(*b*) of SIMA to the exporter, as there is in the other provisions relating to the determination of normal value, paragraph 19(*b*) should be read in the context of these other provisions. SIMA is structured so that normal value is defined in accordance with sections 15 to 23, which set out a method for determining normal value on the basis of the exporter's sales. It is clear that Parliament intended normal value to be determined on the basis of the exporter's sales. If paragraph 19(*b*) is read in this context, it is clear that the costs and profits referred to in paragraph 19(*b*) are intended to be those of the exporter.

In interpreting paragraph 19(*b*) of SIMA such that the normal value is (1) the aggregate of the exporter's cost of production of the goods, (2) the exporter's administrative, selling and all other costs, and (3) the exporter's profits, the threshold issue then becomes the identity of the exporter.

Counsel for the respondent submitted that the Tribunal should adopt the approach set out in *Her Majesty The Queen v. The Singer Manufacturing Company*[8] to determine the identity of the exporter and, if it does, it will find that Fornasa is actually the exporter. The Tribunal observes that, in the *Singer* case, the Exchequer Court of Canada focused on the customs invoice and the relevant sections of the *Customs Act*,[9] and took the approach that the words "exporter" and "importer" must be interpreted from a business or commercial point of view.[10] In adopting this approach, the Exchequer Court of Canada stated the following:

> *The essential feature in my view is that the exporter must be the person in the foreign country who sends the goods into Canada and the importer must be the person to whom they are sent in Canada*.[11]

The Exchequer Court of Canada also stated:

> *I think a person carrying on business in Canada is none the less an importer into Canada (and his supplier is an exporter) even though he makes all arrangements in respect of the despatch of the goods by a United States manufacturer to his Canadian establishment through an office of his own in the United States*.[12]

Adopting this approach, the Tribunal finds that the evidence in this appeal clearly establishes that, for the sales of the goods in issue, Fasal was the exporter, not Fornasa. This is confirmed in many ways, but most importantly by the following facts: (1) the commercial invoices to the appellant are those of Fasal and not Fornasa; (2) the customs and shipping

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8. [1968] 1 Ex.C.R. 129.
9. R.S.C. 1985, c. 1 (2nd Supp.).
10. *Ibid.*, see also *Sanyo Electric Trading Co. Ltd., Sanyo Industries (S) Pte. Ltd. v. Canadian Appliance Manufacturers Association*, Federal Court of Appeal, unreported, File No. A-291-82, March 30, 1984, upholding *Sanyo Industries (S) Pte., Ltd. (S.I.S.) Singapore v. The Deputy Minister of National Revenue for Customs and Excise*, 6 C.E.R. 120; (1983), 9 T.B.R. 23.
11. (1983), 9 T.B.R. 23 at 34 and *supra*, note 8 at 136.
12. *Supra*, note 8 at 136.

documentation shows Fasal as the vendor or shipper/exporter; (3) the Canadian import permit lists Fasal as the supplier; (4) Fasal received full payment for the pipe; (5) the letters of credit used to pay for the pipe were in Fasal's name; (6) the agreement clearly establishes that Fasal is the supplier/exporter, that Fornasa is the manufacturer and that the supplier/exporter will be the exporter of the pipes; (7) the facsimile dated August 13, 1991, wherein Mr. Barazin requests that Mr. Ricardo Macedo of Fornasa ask Fasal to forward certain documentation, and the testimony of Mr. João indicate that Fornasa was acting as a "middleman" for Fasal and the appellant; and (8) Fornasa at no time owned the goods in issue.

The agreement does engage Fornasa to negotiate future sales with its old customers and any new customers suggested by Fasal, but the agreement also provides that Fasal will pay the costs associated with these activities. The fact that Fornasa was once the exporter of record and continued to negotiate the sales is not, in the Tribunal's view, determinative of whether it was the exporter of the goods in issue. The Tribunal finds that, for the sales of the goods in issue, Fornasa acted as the agent of the supplier/exporter, Fasal.

In the Tribunal's view, the fact that Fasal was listed as the vendor or shipper/exporter on all of the documents of title for the goods in issue cannot be disregarded since any legal disputes concerning the shipments would necessarily have focussed upon the exporter of record, Fasal.

Having found that Fasal is the exporter of the goods in issue, the Tribunal remands the matter to the Deputy Minister to determine the normal value of the goods in issue in accordance with sections 15 to 23 of SIMA, based on the sales and/or costs of Fasal as the exporter.

Accordingly, the appeal is allowed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member