CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, August 26, 1997

Appeal Nos. AP-96-129 to AP-96-194

IN THE MATTER OF 66 appeals heard together on May 22, 1997, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF 66 decisions of the Deputy Minister of National Revenue dated September 25, October 7, 8 and 29, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

NU SKIN CANADA, INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Raynald Guay
Raynald Guay
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-96-129 to AP-96-194

NU SKIN CANADA, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The appellant and an associated company, Nu Skin International, Inc. (NSI), sell skin care products. Goods were acquired from independent manufacturers and either shipped directly to Canada or first consolidated at NSI's warehouse for shipment to Canada. During the period at issue, NSI and the appellant were considered a single business entity. The issue in these appeals is whether the value for duty of the imported goods can be determined based on the price paid for the goods by the appellant or NSI.

HELD: The appeals are allowed. The Tribunal finds that a sale did occur between the independent manufacturers and NSI. Furthermore, as goods destined for the Canadian market were acquired by unique purchase order and physically distinct from goods to be sold in the US market, the Tribunal is of the view that they were sold for export to Canada within the meaning of section 48 of the *Customs Act*. That some goods were not shipped directly to Canada was not fatal to this finding.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 22, 1997
Date of Decision:	August 26, 1997
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Raynald Guay, Member Lyle M. Russell, Member
Counsel for the Tribunal:	David M. Attwater
Clerk of the Tribunal:	Anne Jamieson
Appearances:	W. Jack Millar, for the appellant Ian McCowan, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-96-129 to AP-96-194

NU SKIN CANADA, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
RAYNALD GUAY, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

This represents 66 appeals heard together under section 67 of the *Customs Act*[1] (the Act) from 66 decisions of the Deputy Minister of National Revenue made under section 63 of the Act. The appellant appealed the respondent's decisions that the computed value method of appraisal was appropriate for determining the value for duty of certain imports during the period from October 1989 to March 1991.

The appellant and Nu Skin International, Inc.[2] (NSI) are Utah corporations that sell skin care and health care products. During the period at issue, the appellant imported goods under two scenarios:

(1) Approximately 90 percent of all importations during the period at issue were purchased from company X.[3] Purchase orders were placed on company X by the appellant or by NSI on behalf of the appellant. Goods were shipped directly by company X from its US production facilities to Canada. Company X invoiced the appellant, which issued a cheque to company X. The value for duty declared by the appellant at the time of importation was company X's sale price to the appellant.

(2) NSI placed separate purchase orders with various third-party producers. The goods were shipped to NSI, consolidated and then forwarded to the appellant. NSI billed the appellant for the goods. The value for duty declared by the appellant at the time of importation was the third-party producer's sale price to NSI.

All products purchased from company X and the third-party producers by, or on behalf of, the appellant were clearly destined for Canada (e.g. metric size bottles, bilingual labels, etc.).

In March 1991, NSI started using a transfer pricing formula based on the "resale price method" for goods shipped to the appellant. As the pricing formula was to apply from the time of the start-up of the appellant's business, company X refunded all amounts paid to it by the appellant and re-invoiced NSI for the same amount. NSI then invoiced the appellant based on the transfer pricing formula.

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. The appellant and NSI are affiliated companies through common ownership.
3. The actual name of this company is confidential information.

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On March 31, 1991, the appellant advised the Department of National Revenue (Revenue Canada) of the new transfer price and requested confirmation that it was acceptable for determining the value for duty of the imported goods. In June 1992, the appellant filed amendments with Revenue Canada to increase the value for duty of the imported goods. In the appellant's brief, it is indicated that, on December 14, 1992, Revenue Canada rejected the transfer pricing formula and advised that the deductive value method was the appropriate method of valuation. On the contrary, in the respondent's brief, it is indicated that the appellant volunteered to use the deductive value method, which Revenue Canada agreed was the appropriate method for determining the value for duty. However, Revenue Canada rejected the appellant's calculations using this method and advised how value for duty should be determined.

By letter dated March 11, 1993, Revenue Canada elaborated on how it calculated value for duty using the deductive value method. Revenue Canada would not allow a deduction for profits earned under subparagraph 51(4)(*a*)(ii) of the Act because NSI and the appellant are related companies and because NSI is a non-resident corporation that maintains central management control for itself and the appellant. Under the circumstances, it was Revenue Canada's policy to consider all profits to be earned by NSI. In addition, Revenue Canada would not allow a deduction for expenses incurred in the United States under the same provision of the Act.

By letter dated September 11, 1995, Revenue Canada informed the appellant that, as of January 1, 1993, it was considered a valid purchaser in a sale for export to Canada. As such, value for duty could be determined using the transfer pricing formula between NSI and the appellant under the transaction value method because Revenue Canada determined that the relationship between NSI and the appellant did not influence the price paid or payable by the appellant for the goods. Revenue Canada indicated that, prior to 1993, the appellant did not have sufficient control over its daily operations to be considered a valid purchaser in a sale for export.

By letter dated May 17, 1996, Revenue Canada advised the appellant that it could determine the value for duty of the goods during the period at issue using either the deductive value method or the computed value method. Revenue Canada further advised as to how the appellant was to calculate profits and general expenses for purposes of using the computed value method. The appellant chose to use the computed value method.

The issue in these appeals is which method for determining value for duty is appropriate for the goods in issue. Counsel for the respondent submitted that it should be determined based on the computed value method as applied by Revenue Canada. Counsel for the appellant submitted that it should be determined based on the price paid or payable to company X and the third-party producers using the transaction value method.

The relevant provisions of the Act read as follows:

> 47.(1) The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.
>
> 48.(1) Subject to subsection (6), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada and the price paid or payable for the goods can be determined and if

> (*d*) the purchaser and the vendor of the goods are not related to each other at the time the goods are sold for export or, where the purchaser and the vendor are related to each other at that time,
>
> (i) their relationship did not influence the price paid or payable for the goods, or
>
> (ii) the importer of the goods demonstrates that the transaction value of the goods meets the requirement set out in subsection (3).
>
> (4) 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 paid or payable in accordance with subsection (5).

Counsel for the appellant proceeded on the basis that NSI and the appellant were a single business entity during the period at issue, as determined by Revenue Canada.[4] Counsel, therefore, did not dispute that NSI was the true purchaser of the goods in issue.

It was submitted that sales by company X and the third-party producers to NSI constitute sales "for export to Canada" within the meaning of section 48 of the Act. Accordingly, the value for duty of the goods in issue should be based on the price paid or payable to company X and the third-party producers, as adjusted in accordance with subsection 48(5) of the Act.[5] For support, counsel for the appellant referred to *Harbour Sales (Windsor) Limited* v. *The Deputy Minister of National Revenue*.[6] Counsel also claimed that this is consistent with Revenue Canada's administrative position set out in Memorandum D13-4-2.[7]

Counsel for the appellant submitted that Revenue Canada improperly calculated the value for duty using the computed value method. Under this method, value for duty is calculated by taking the producer's cost of production and adding an amount for profit and general expenses reflected in sales for export to Canada of goods of the same class or kind. Instead, Revenue Canada took the producer's selling price to NSI and added NSI and the appellant's own profit and general expenses. It was claimed that NSI is not a producer, as suggested by the counsel for the respondent.

Counsel for the respondent submitted that, when NSI asked company X to refund the appellant and re-invoice NSI, the sales were cancelled or voided between company X and the appellant. The true purchaser in a sale for export to Canada would not have its sales cancelled by a third party. As the appellant did not manifest a sufficient degree of independence from NSI, it could not constitute a valid purchaser in a sale for export to Canada. The sales were between company X and NSI. As to sales from the third-party producers, they were also made to NSI, which transferred the goods to the appellant.

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4. In the letter dated March 11, 1993, Revenue Canada stated that "[the appellant] for all practical purposes is merely an extension of NSI. [The appellant] cannot therefore be regarded as a purchaser in any transaction between NSI and [the appellant] as it is not possible for NSI to sell to itself." In the respondent's brief, at paragraph 49, it is stated that the appellant "was simply an extension of NSI during the period in question."
5. Pursuant to subparagraph 48(5)(*a*)(iii) of the Act, the value of certain "assists," provided by the purchaser of goods for use in the production and sale for export of those goods, must be added to the price paid or payable for those goods. For example, the value of the assist provided to company X for production of the glacial mud product should be added to the price paid or payable for those goods.
6. Canadian International Trade Tribunal, Appeal No. AP-93-322, November 4, 1994.
7. *Customs Valuation: Sold for Export to Canada (Customs Act, Section 48)*, Department of National Revenue, Customs and Excise, August 21, 1989.

Counsel for the respondent argued that the transactions between NSI and the appellant did not constitute sales for export. This is because NSI owns the trademarks, controls the manufacturing process and sets the intercompany transfer prices and because there was no passage of title or risk to the goods to the appellant. Furthermore, the appellant is a US corporation that is owned by the shareholders and that has the same board of directors as NSI. NSI has complete management control over the sourcing and distribution of goods and ultimately determines the selling prices and compensation to the various levels of distributors.

According to counsel for the respondent, NSI is the principal in the supply of goods to the appellant.[8] Contradicting himself, counsel argued that company X and the third-party manufacturers were merely providing services to NSI and, therefore, that there were no sales between these parties. The transactions between company X, the third-party manufacturers and NSI do not constitute sales for export under section 48 of the Act, according to the criteria established in *Harbour Sales*. In this regard, counsel noted that, with respect to the third-party manufacturers, title went to NSI and that the goods entered the commerce of the United States. With regard to company X, because the transactions with the appellant were cancelled, title to the goods went to NSI and the goods, therefore, entered the commerce of the United States.

The Tribunal notes that, pursuant to subsection 47(1) of the Act, "[t]he value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48" of the Act. For the value for duty of goods to be determined using the transaction value method when related parties are involved, it may be demonstrated that "their relationship did not influence the price paid or payable for the goods.[9]" Counsel for the respondent argued that, during the period at issue, the appellant did not constitute a valid purchaser in a sale for export to Canada, as it did not manifest a sufficient degree of independence from NSI. As such, the value for duty of the goods in issue cannot be determined based on the transfer price of those goods between NSI and the appellant. This was not challenged by counsel for the appellant.

Rather, counsel for the appellant accepted, for purposes of this appeal, that NSI and the appellant constituted as single business entity during the period at issue. As such, and consistent with the reasoning in *Harbour Sales*, the sales by company X and the third-party manufacturers to NSI constituted sales for export for purposes of section 48 of the Act. In contrast, counsel for the respondent submitted that these transactions were not sales, but rather contracts for services or, if they were sales, that they did not qualify as sales for export under section 48 of the Act.

In *Harbour Sales*, the Tribunal interpreted the expression "sold for export to Canada" in section 48 of the Act as not imposing a Canadian residency requirement on the purchaser of the goods being exported to Canada. In that case, the Tribunal had regard to two conditions in finding that goods were sold for export to Canada within the meaning of the Act. First, a sale of goods was required and, second, those goods had to have been sold for export to Canada.[10] The Tribunal is of the view that, if it finds that the transactions involving company X and the third-party manufacturers with NSI meet these criteria, it need not go on to

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8. See *Mattel Canada Inc.* v. *The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal Nos. AP-95-126 and AP-95-255, January 15, 1997.

9. Subparagraph 48(1)(*d*)(i) of the Act.

10. See, also, *JewelWay International Canada, Inc. and JewelWay International, Inc.* v. *The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal Nos. AP-94-359 and AP-94-360, March 26, 1996, where the Tribunal stated:

> Subsection 48(1) of the Act provides that the value for duty of goods is the transaction value of the goods if the goods are "sold for export to Canada." In the Tribunal's view, the transaction value used for the purposes of determining value for duty must, therefore, be in respect of a sale of goods and those goods must have been sold for the purpose of export to Canada.

consider any subsequent transaction or other method of valuation in determining the value for duty of the imported goods.

For purposes of this appeal, and in the absence of any evidence to the contrary, the Tribunal accepts that NSI and the appellant constituted a single business entity during the period at issue.

As to the transactions involving company X and the third-party manufacturers and NSI, the Tribunal finds that they were sales of goods and not the mere provision of services to NSI. The Tribunal is of the view that NSI did not exercise sufficiently close supervision over the production of the goods to conclude that company X and the third-party manufacturers were merely providing services to NSI. In support of this conclusion, the Tribunal notes that the relationship between the manufacturers and NSI was governed through the use of purchase orders and invoices, that no manufacturing agreements existed during the period at issue, that the manufacturers could vary the minor ingredients in the goods without NSI's prior approval, that the manufacturers had control over the actual production processes, that, except for the glacial marine mud, NSI did not provide the manufacturers with any raw materials, labels[11] or packaging and that NSI did not have the right to inspect the production process or facilities of company X[12] nor, apparently, of the third-party manufacturers. These vendor and purchaser relationships were not displaced merely because the vendors were producing goods formulated to NSI's specifications and bearing the Nu Skin trademarks.

The Tribunal is also of the view that the goods sold to NSI were for export to Canada. With regard to sales by company X, goods destined for the Canadian market were distinguished from other Nu Skin products, in that they had metric sizing and bilingual labels that indicated the appellant's name and address. Goods for the Canadian market were acquired by a distinct purchase order[13] and, from their place of manufacture, they were shipped directly to the appellant's warehouse in Oakville, Ontario.

With regard to sales by the third-party manufacturers, the goods were also acquired by a distinct purchase order and they had metric sizing and bilingual labels that indicated the appellant's name and address. However, the goods were not shipped directly to Canada, but rather to a warehouse, or portion thereof, set aside by NSI for receiving goods destined for the Canadian market. These goods were physically separated from other Nu Skin products. The appellant's witness, Mr. Corey B. Lindley, said that the containers for these goods would clearly be marked for export to Canada. He added that the goods were not shipped directly to Canada from the third-party manufacturers for reasons of economy. As there tended to be smaller volumes from these manufacturers, the goods were consolidated and shipped to Canada on a full truckload basis once a week. Under the circumstances, the Tribunal is of the view that the stopover at NSI's warehouse is not fatal to a finding that the goods were sold for export to Canada within the meaning of section 48 of the Act.

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11. They did, however, provide label copy and specifications for certain stamps and instructions on how they should be applied.

12. However, through negotiation, they were allowed to inspect company X's facilities on one occasion during the period at issue.

13. The purchase order numbers were preceded by the prefix "C" and, toward the end of the period at issue, the purchase orders indicated "Nu Skin Canada."

Accordingly, the appeals are allowed. The Tribunal finds that, during the period at issue, the value for duty of the goods in issue should be based on the price paid to company X and the third-party manufacturers using the transaction value method found at section 48 of the Act.

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