CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 16, 1997

Appeal No. AP-96-114

IN THE MATTER OF an appeal heard on June 6, 1997, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated October 8, 1996, with respect to a request for re-determination under subsection 63(3) of the *Customs Act*.

BETWEEN

TOOTSIE ROLL OF CANADA LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The matter is referred back to the Deputy Minister of National Revenue for re-calculation of the value for duty according to the deductive value method.

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

Raynald Guay
Raynald Guay
Member

Lyle M. Russell
Lyle M. Russell
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-96-114

TOOTSIE ROLL OF CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal pursuant to section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue made under section 63. The appellant appealed the respondent's decision, stating that goods imported as inventory to the appellant's Canadian warehouse on consignment for sale should be valued according to the computed value method (section 52) rather than the deductive value method (section 51). The appeal relates to candy products imported into Canada.

HELD: The appeal is allowed. The Tribunal refers the matter back to the respondent for re-calculation of the value for duty according to the deductive value method.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 6, 1997
Date of Decision:	September 16, 1997
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Raynald Guay, Member Lyle M. Russell, Member
Counsel for the Tribunal:	Gerry H. Stobo
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Brenda C. Swick-Martin and Kenneth H. Sorensen, for the appellant Janet Ozembloski, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
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Appeal No. AP-96-114

TOOTSIE ROLL OF CANADA LTD. **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 is an appeal pursuant to section 67 of the *Customs Act*[1] (the Act) from a decision of the Deputy Minister of National Revenue made under section 63. The appellant appealed the respondent's decision, stating that goods imported as inventory to the appellant's Canadian warehouse on consignment for sale should be valued according to the computed value method (section 52) rather than the deductive value method (section 51). The appeal relates to candy products imported into Canada under transaction No. 17566445101799.

The appellant is a Canadian importer and seller of various types of candy. It is a wholly owned subsidiary of Tootsie Roll Industries (TRIUS). The appellant operates a Canadian warehouse where it stores its inventory of candy for sale in the Canadian market. The Canadian staff consists of a general sales manager and an administrative assistant.

The appellant imports candy on a regular basis into Canada in order to replenish the inventory of its Canadian warehouse. The candy is then sold to Canadian clients at a date subsequent to importation, usually within 90 days. Orders by clients for the appellant's candy are placed with independent Canadian brokers. The brokers forward the orders to the appellant. Once the orders have been processed, the candy is shipped from the Canadian warehouse to the clients.

In the past, in rare cases, if an order consisted of a full truckload, the goods used to be shipped directly from TRIUS in the United States to the Canadian clients, thereby bypassing the warehouse completely. However, such shipments were completely discontinued in 1996. Presently, all Canadian orders are supplied from the Canadian warehouse's existing stock, regardless of the size of any individual order.

The facts in this case are not in dispute. On December 18, 1995, officials of the Department of National Revenue (Revenue Canada) visited the appellant in order to determine which valuation method should apply to the goods imported into Canada.

On January 22, 1996, Revenue Canada issued a decision advising the appellant that goods shipped directly from the United States to a Canadian client must be valued using the transaction value method set out in section 48. With respect to goods shipped to the Canadian warehouse for subsequent sale, Revenue Canada advised that the transaction value of identical goods method (section 49) applied.

1. R.S.C. 1985, c. 1 (2nd Supp.). All statutory references in this appeal are to the *Customs Act*.

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On February 8, 1996, the respondent issued a Detailed Adjustment Statement (DAS) pursuant to section 61 regarding the goods being shipped to the appellant's warehouse. The DAS stated the following:

> The value for duty has been adjusted to reflect the transaction value of identical goods, in accordance with valuation ruling file No. L7160-1 (KAB) LO/WO152587.

On April 4, 1996, the appellant filed an appeal pursuant to section 63 requesting that the value for duty of the goods shipped to the Canadian warehouse be re-appraised using the deductive value method (section 51).

On October 8, 1996, the respondent issued a DAS pursuant to subsection 63(3). The DAS stated the following:

> The value for duty remains as determined by the Southern Ontario Region in accordance with ruling letter V-6277-1, 7160-4 (DA).

On October 10, 1996, the respondent issued ruling letter 7160-4(DA) V-6277-1 in which it was held that the value for duty of goods sold to purchasers in Canada prior to importation should be determined using the transaction value method set out in section 48. However, as regards the goods shipped to the Canadian warehouse, the respondent ruled that the computed value method set out in section 52 should apply.

The appellant agrees that section 48 should apply to the goods shipped directly from TRIUS to the Canadian purchaser. However, the appellant disagrees with the application of the computed value method for the valuation of goods shipped as general inventory to the appellant's Canadian warehouse. This is the only issue with which the Tribunal will deal in this appeal.

The relevant sections of the Act are 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.
>
> (2) Where the value for duty of goods is not appraised in accordance with subsection (1), it shall be appraised on the basis of the first of the following values, considered in the order set out herein, that can be determined in respect of the goods and that can, under sections 49 to 52, be the basis on which the value for duty of the goods is appraised:
>
> (*a*) the transaction value of identical goods that meets the requirements set out in section 49;
>
> (*b*) the transaction value of similar goods that meets the requirements set out in section 50;
>
> (*c*) the deductive value of the goods; and
>
> (*d*) the computed value of the goods.
>
> (3) Notwithstanding subsection (2), on the written request of the importer of any goods being appraised made prior to the commencement of the appraisal of those goods, the order of consideration of the values referred to in paragraphs (2)(*c*) and (*d*) shall be reversed.
>
> 51.(1) Subject to subsections (5) and 47(3), where the value for duty of goods is not appraised under sections 48 to 50, the value for duty of the goods is the deductive value of the goods if it can be determined.
>
> (2) The deductive value of goods being appraised is
>
> (*a*) where the goods being appraised, identical goods or similar goods are sold in Canada in the condition in which they were imported at the same or substantially the same time as the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold;

(*b*) where the goods being appraised, identical goods or similar goods are not sold in Canada in the circumstances described in paragraph (*a*) but are sold in Canada in the condition in which they were imported before the expiration of ninety days after the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold at the earliest date after the time of importation of the goods being appraised; or

(*c*) where the goods being appraised, identical goods or similar goods are not sold in Canada in the circumstances described in paragraph (*a*) or (*b*) but the goods being appraised, after being assembled, packaged or further processed in Canada, are sold in Canada before the expiration of one hundred and eighty days after the time of importation thereof and the importer of the goods being appraised requests that this paragraph be applied in the determination of the value for duty of those goods, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised are so sold.

(3) For the purposes of subsection (2), the price per unit, in respect of goods being appraised, identical goods or similar goods, shall be determined by ascertaining the unit price, in respect of sales of the goods at the first trade level after importation thereof to persons who

(*a*) are not related to the persons from whom they buy the goods at the time the goods are sold to them, and

(*b*) have not supplied, directly or indirectly, free of charge or at a reduced cost for use in connection with the production and sale for export of the goods any of the goods or services referred to in subparagraph 48(5)(*a*)(iii),

at which the greatest number of units of the goods is sold where, in the opinion of the Minister or any person authorized by him, a sufficient number of such sales have been made to permit a determination of the price per unit of the goods.

(4) For the purposes of subsection (2), the price per unit, in respect of goods being appraised, identical goods or similar goods, shall be adjusted by deducting therefrom an amount equal to the aggregate of

(*a*) an amount, determined in the manner prescribed, equal to

(i) the amount of commission generally earned on a unit basis, or

(ii) the amount for profit and general expenses, including all costs of marketing the goods, considered together as a whole, that is generally reflected on a unit basis

in connection with sales in Canada of goods of the same class or kind as those goods,

(*b*) the costs, charges and expenses in respect of the transportation and insurance of the goods within Canada and the costs, charges and expenses associated therewith that are generally incurred in connection with sales in Canada of the goods being appraised, identical goods or similar goods, to the extent that an amount for such costs, charges and expenses is not deducted in respect of general expenses under paragraph (*a*),

(*c*) the costs, charges and expenses referred to in subparagraph 48(5)(*b*)(i), incurred in respect of the goods, to the extent that an amount for such costs, charges and expenses is not deducted in respect of general expenses under paragraph (*a*),

(*d*) any duties and taxes referred to in clause 48(5)(*b*)(ii)(B) in respect of the goods, to the extent that an amount for such duties and taxes is not deducted in respect of general expenses under paragraph (*a*), and

(*e*) where paragraph (2)(*c*) applies, the amount of the value added to the goods that is attributable to the assembly, packaging or further processing in Canada of the goods.

> (5) Where there is not sufficient information to determine an amount referred to in paragraph (4)(*e*) in respect of any goods being appraised, the value for duty of the goods shall not be appraised under paragraph (2)(*c*).
>
> 52.(1) Subject to subsection 47(3), where the value for duty of goods is not appraised under sections 48 to 51, the value for duty of the goods is the computed value of the goods if it can be determined.
>
> (2) The computed value of goods being appraised is the aggregate amount equal to
>
> (*a*) subject to subsection (3), the costs, charges and expenses incurred in respect of, or the value of,
>
> (i) materials employed in producing the goods being appraised, and
>
> (ii) the production or other processing of the goods being appraised,
>
> determined in the manner prescribed; and
>
> (*b*) the amount, determined in the manner prescribed, for profit and general expenses considered together as a whole, that is generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised made by producers in the country of export.
>
> (Emphasis added)

The appellant's products are generally sold to its Canadian customers by commissioned food brokers that use the appellant's price list. The broker contacts the appellant with the order and, if it is properly documented, the order is accepted in Canada and filled with stock held at the Canadian warehouse. The paperwork is then sent to TRIUS, that generates an invoice for the appellant. It is clear that the sale to the Canadian customer is the first trade level sale in Canada. According to the evidence, the appellant's products are transferred to the Canadian facility at cost, that is to say, their manufactured cost.

Counsel for the respondent has argued that, in theory, the different valuation methods should yield the same transaction value for the purposes of assessing duty. The Tribunal agrees with this proposition. The variety of routes provided in sections 48 to 53 attempt to capture the variety of different scenarios which are typically used to bring goods into Canada, for example, intra-company sales, arms length sales between two unrelated parties or sales between parties that submit information which is either incomplete or untrustworthy. Although calculations done pursuant to the different sections should all produce approximately the same value for duty figure, it is possible that they do not. For example, if the information provided is not exact or if the different valuation methods were to permit (either advertently or inadvertently) different deductions, then the value for duty may well be different.

It is clear that the Act requires the respondent to use the valuation methods in hierarchical order.[2] If the first valuation method cannot be used, the next method in the sequence is to be used. The deductive value method precedes the computed value method. The Act, however, permits a taxpayer, at his request, to skip from the deductive value method to the computed value method.[3] Only the taxpayer has that option. The respondent can only rely on a valuation method other than the deductive value method if, by using it, the value for duty cannot be determined or if there is not sufficient information (subsection 51(1)).

In this case, while it appears that the appellant may have initially thought that the deductive value method could not be used, it is apparent that it did not request the computed value method in preference to

2. Subsection 47(2).
3. Subsection 47(3).

the deductive value method. The Tribunal notes that, in the exchange of correspondence between the parties, wherein Revenue Canada indicated which valuation method was to be used, it made no reference as to why the deductive value method was not appropriate. It simply indicated that the computed value method was going to apply.[4] As the appellant did not request the computed value method, the burden rests upon the respondent to show that the deductive value method cannot be used to determine the transaction value.

In arguing that the deductive value method was not appropriate, counsel for the respondent quotes from Professor Maureen Irish who, when discussing the deductive and computed value methods, states: "[i]nstead of deducting from a resale price in Canada, [in order to calculate the deductive value], computed value works forward from the cost of production[5]" (emphasis added). Counsel interprets this to mean that, if the deductive value method is to be used, there must be a sale from TRIUS to the appellant. There must be a sale of goods to Canada and a resale of them in Canada. In other words, if a product is transferred at cost, such as in this case, the deductive value method cannot be used.

Counsel for the respondent then argued that the interpretation of profit and general expenses by the appellant using the deductive value method results in a transaction value that is little more than the cost of production. This, counsel argued, simply does not represent a fair or accurate "actual value" amount. The Tribunal shares some of counsel's concerns regarding how profit and general expenses are being interpreted by the appellant, particularly as they relate to expenses incurred in the United States. This is not to say, however, that the value for duty cannot be determined using the deductive value method. The way in which one approaches the application of adjustments for profit and general expenses in sections 52 and 53 are different, but, once again, they are designed to ultimately arrive at the same transaction value.

Counsel for the appellant, on the other hand, argued that a sale between TRIUS and the appellant is not essential in order to use the deductive value method. Reference was made to Sherman and Glashoff, who indicate that a deductive value calculation "(a) … begins with the resale price in the country of importation, and (b) appropriate deductions are then made to arrive at value at the point of importation[6]" (emphasis added). It is apparent that the notion of resale is, to counsel, compatible with using the deductive value method.

Counsel for the appellant continued by defining resale as a sale in the country of importation, irrespective of whether or not there has been a previous sale. Furthermore, they give the following example of the use of the deductive value method:

> One of the most common situations in which DDV [deductive value] will be applied is where the manufacturer ships on consignment to an agent or a branch in the country of importation, who then markets the product for the exporter. In this situation, the sale by the agent is included in our term 'resale' even though there has been no prior sale. To use the term 'sale' would risk confusion with the sale for export.[7]

4. Appellant's brief, Tab 4.
5. M. Irish, *Customs Valuation in Canada* (Don Mills: CCH Canadian, 1985) at 222.
6. S.L. Sherman and H. Glashoff, *Customs Valuation - Commentary on the GATT Customs Valuation Code* (New York: ICC Publishing, 1988) at 209.
7. *Ibid*.

It seems that the facts of the appellant's circumstances are analogous to those in the author's example. In the Tribunal's view, use of the deductive value method does not require a sale between TRIUS and the appellant.

Finally, when considering the circumstances under which the deductive value method can be used, the authors state:

> Lastly it may be asked whether there can be a DDV where the only sales are made through a branch of the manufacturer located in the country of importation. In principle, there would seem to be no reason why not. The general expenses incurred by the branch in its marketing operation in the country of importation should be easy enough to ascertain. There would probably also be a method of allocating an appropriate part of any profit to the branch under generally accepted accounting principles.[8]

Notwithstanding this support for the appellant's position, the Tribunal must look at the provisions of the Act to see if the deductive value method can be used to determine the value for duty, given the facts of this case.

Subsection 51(2) states, in part, that the deductive value of goods being appraised is:

> (*a*) where the goods being appraised, identical goods or similar goods are sold in Canada in the condition in which they were imported at the same or substantially the same time as the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold;
>
> (3) For the purposes of subsection (2), the price per unit, in respect of goods being appraised … shall be determined by ascertaining the unit price, in respect of sales of the goods at the first trade level after importation thereof to persons who
>
> (*a*) are not related to the persons from whom they buy the goods at the time the goods are sold to them.

The evidence clearly shows that the goods being appraised are sold in Canada in the identical condition to customers such as Wal-Mart, Shoppers Drug Mart and Biway, at the same or "substantially the same time," usually less than 90 days. The sales in Canada to its customers are the first trade level after importation. These customers are not related to the appellant. Furthermore, the price at which the greatest number of units is sold is available by reference to the appellant's price list, subject to appropriate deductions. Using the information provided by the appellant and performing the calculations, one can arrive at the "predominant" price per unit. From this price, adjustments for profit earned and general expenses can be made.

With respect to these adjustments, the parties will, of course, have reference to the provisions of paragraph 51(4)(*a*) which deals with the adjustment of price per unit. In particular, the Tribunal notes that subparagraph 51(4)(*a*)(ii) provides that the adjustment for profit and general expenses is to be determined with reference to sales in Canada of goods of the same class or kind as the goods being appraised. This allows the respondent to take into account profits earned or sales in Canada by other companies in the same line of business.

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8. *Ibid*. at 217-18.

There is little doubt that the computed value method can also be used to calculate the value for duty in this case. In fact, using the computed value method may well be simpler for the respondent. This, however, is not the issue.

The respondent has not demonstrated to the Tribunal that, using the information available, the value for duty using the deductive value method cannot be determined. The Tribunal refers the matter back to the respondent for re-calculation of the value for duty according to the deductive value method.

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