CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR
CANADA

Ottawa, Thursday, September 28, 2000

Appeal No. AP-99-014

IN THE MATTER OF an appeal heard on November 29, 1999, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated March 11 and 12, and April 7, 1999, with respect to requests for redetermination under section 63 of the *Customs Act*.

BETWEEN

PATAGONIA INTERNATIONAL, INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed. The matter is returned to the respondent for re-appraisal of the value for duty of the goods in issue in a manner consistent with the reasons for this decision.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
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UNOFFICIAL SUMMARY

Appeal No. AP-99-014

PATAGONIA INTERNATIONAL, INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the *Customs Act*. The issue in this appeal is the proper value for duty of certain clothes imported by the appellant. In particular, the issue is the proper method of valuation of the goods in issue. The appellant claims that the transaction value method should be used or, alternatively, the deductive value method. The appellant claimed, in the further alternative, that the computed value method should be used. The respondent determined that the residual method should be used.

HELD: The appeal is allowed. The appellant submitted that a sale for export to Canada took place between the U.S. contractors and Patagonia, Inc. (PI). Even if the Tribunal were to accept that the transaction between the U.S. contractors and PI constituted a sale, it could not conclude that this sale was for export to Canada. Indeed, at the time of a specific sale, there was nothing to indicate that certain goods sold were destined for Canada. As acknowledged by the appellant's witness, the clothing was not earmarked for Canada at that point, nor were the goods received in PI's warehouse segregated for further export to Canada. Given the Tribunal's conclusion that the transaction between the U.S. contractors and PI did not constitute a sale for export to Canada, the transaction value method cannot be applied with respect to that transaction.

The appellant submitted, in the alternative, that the transaction between PI and the appellant should serve as the basis for the application of the transaction value method. To use this method requires a sale for export to Canada. For a sale to take place, there must be two parties standing in relation of buyer and seller to one another. In the present appeal, the Tribunal must determine whether such was the relationship between PI and the appellant. Under the circumstances and considering, particularly, the very high degree of control exercized by PI over the appellant, it is the Tribunal's view that the appellant did not stand in the position of a principal, a buyer, with respect to the transactions between it and PI, but rather in the position of an agent. Therefore, no sale took place between PI and the appellant. Accordingly, the transaction value method cannot be used in relation to the transactions between PI and the appellant to appraise the value of the clothing in issue.

The next method to be used is the deductive value method. It is with respect to the deduction for profit that the disagreement between the appellant and the respondent arose. The respondent determined that no amount for profit could be deducted. The appellant filed an income statement relating to the Canadian operations of the appellant. However, no method of apportionment of the appellant's profits between the United States and Canada has been proposed. Given the activities conducted in the United States by the appellant, clearly such an apportionment would, at a minimum, have been required. Under these circumstances, the Tribunal agrees with the respondent that the deductive value method could not be applied to appraise the clothing in issue.

In the Tribunal's view, the "producer", for the purpose of the application of the computed value method, should be seen as the person or company that is responsible for bringing the goods into existence. In the present circumstances, the Tribunal determines that PI was the producer of the clothing in issue. The appellant has provided the costing data for the clothing in issue. The appellant also provided data relating to profit and general expenses made by PI. Nothing indicated, and the respondent did not show, that those numbers were not consistent with the amount generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised by producers that deal with importers in a manner consistent with that of persons who are not related.

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 29, 1999
Date of Decision: September 28, 2000

Tribunal Members: Pierre Gosselin, Presiding Member
Richard Lafontaine, Member
Arthur B. Trudeau, Member

Counsel for the Tribunal: Philippe Cellard
John Dodsworth

Clerk of the Tribunal: Anne Turcotte

Appearances: Richard S. Gottlieb and J. Peter Jarosz, for the appellant
Meghan Castle, for the respondent

Appeal No. AP-99-014

PATAGONIA INTERNATIONAL, INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
RICHARD LAFONTAINE, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the Act in March and April 1999. The issue in this appeal is the proper value for duty of certain clothes imported by the appellant from 1993 to 1997. In particular, the issue is the proper method of valuation of the goods in issue. The appellant claimed that the transaction value method should be used or, alternatively, the deductive value method. The appellant claimed, in the further alternative, that the computed value method should be used. The respondent determined that the residual method should be used. The relevant provisions of the Act are as follows:

> 48. (1) . . . 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.
>
> 51. (1) . . . 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.
>
> (3) . . . 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.
>
> (4) . . . the price per unit . . . shall be adjusted by deducting therefrom an amount equal to the aggregate of
>
> (*a*) . . .
>
> (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.
>
> 52. (1) . . . 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 of amounts equal to

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].

(*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.

53. Where the value for duty of goods is not appraised under sections 48 to 52, it shall be appraised on the basis of

(*a*) a value derived from the method, from among the methods of valuation set out in sections 48 to 52, that, when applied in a flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and

(*b*) information available in Canada.

EVIDENCE

Mr. Tom Lowe, Export Manager, Patagonia International, Inc., testified on behalf of the appellant. Mr. Lowe adopted the factual content of the appellant's brief as his testimony. The appellant's brief indicated that, at the time of the transactions in this appeal, the appellant was a corporation having its head office in the United States. The appellant was related, within the meaning of subsection 45(3) of the Act, to Patagonia, Inc. (PI), which provided the appellant with the clothing that it imported into Canada. PI also had its head office in the United States. Lost Arrow Corporation (Lost Arrow), another U.S. company, was also related to PI and the appellant.

The sequence of events leading to the importation of the clothing in issue into Canada was described in the appellant's brief. PI first purchased the materials and trims (inputs) from U.S. textile producers. PI directed the inputs to be shipped to various unrelated contractors in the United States. The U.S. contractors were provided with plans, sketches and other designs necessary to manufacture the Patagonia clothing. Mr. Lowe testified that these contractors cut, sewed and packaged the product. Thereafter, the U.S. contractors shipped the final products to PI's warehouse in the United States. Finally, the goods were shipped to the appellant's warehouse in Cowansville, Quebec. The appellant was a non-resident importer. After it was imported, the clothing in issue was sold to Canadian retailers by independent sales representatives.

The appellant's brief indicated that, as commitments for the purchase of inputs, as well as factory space, must be made by PI at least six months before delivery, the appellant was obliged to place orders with PI before Canadian retail buyers placed their orders with the appellant for a particular season. PI issued order acknowledgements and pro forma invoices to the appellant just prior to the shipping season. The selling price from PI to the appellant was set at the former's acquisition cost, plus additional expenses and a markup for profit. Mr. Lowe testified that the transfer price between PI and the appellant was based on a draft transfer pricing report prepared by an accounting firm. Although it was never formally issued, Mr. Lowe testified that the methodology that it laid out was used by PI and the appellant to establish transfer prices.

Mr. Lowe testified that PI listed its sales to the appellant as accounts receivable. The appellant had an inventory account in its books. With respect to expenses, the direct expenses incurred in Canada were paid by the appellant. These direct costs included payments to rent space in the warehouse in Cowansville and payments for services rendered there. They also included telecommunications, brokerage and legal costs. The fees paid to the independent sales representatives residing in Canada and selling the goods in issue were also considered general expenses in the appellant's books. The appellant paid the freight charges relating to shipment from PI's warehouse to the appellant's warehouse in Canada. With respect to expenses incurred by PI, but allocated to the appellant, Mr. Lowe testified that certain payroll charges are allocated to the appellant. He also indicated that, while Lost Arrow is the policyholder for the purpose of insuring the goods of the Patagonia group of companies, the premium expenses are allocated to the various Patagonia subsidiaries. From October 1996 onwards, the appellant was allocated a portion of the insurance premium paid by Lost Arrow. Mr. Lowe also mentioned that the appellant had a bank account in Canada into which the proceeds from its sales were deposited.

During cross-examination, Mr. Lowe acknowledged that the clothing destined for Canada was not manufactured, packaged or labelled differently, nor stored separately, from the clothing remaining in the United States or destined for elsewhere. With respect to the corporate structures of PI and the appellant, Mr. Lowe indicated that their boards of directors were sometimes composed of the same persons. Generally, a majority of the directors of the appellant would also sit on PI's board of directors. As regards the appellant's day-to-day operations in Canada, Mr. Lowe acknowledged that they were handled in PI's office by PI's employees. Mr. Lowe also acknowledged that, although the appellant operated out of PI's offices in Ventura, California, it did not pay any rent or share the office expenses incurred by PI. The allocation of expenses incurred by PI in Ventura for the benefit of the appellant was limited to the salary of the principal dealer service person. According to Mr. Lowe, to allocate all the other expenses has been deemed too burdensome, in light of the fact that the results of the Canadian business were rolled up into the consolidated financial statements of a U.S. company for tax and other accounting purposes. In answer to a Tribunal question, Mr. Lowe indicated that the salary of the principal dealer service person for Canada, which was paid by PI, was allocated to the appellant, even though that person did not spend all her time working for the appellant.

In answer to a Tribunal question with respect to the appellant's accounting, Mr. Lowe testified that there were financial statements for the appellant, but that they were more of an internal statement for Lost Arrow's financial purposes. The cheques issued by the appellant were signed either by PI employees or by Lost Arrow employees. With respect to the transactions between PI and the appellant, Mr. Lowe testified that the margins at which PI was transferring the goods in issue to the appellant were not the same as the margins at which it sold the goods to independent distributors. During cross-examination, Mr. Lowe acknowledged that the appellant did not make independent decisions with respect to the sales terms between it and PI.

Mr. Guy Parent, Compliance Verification Officer, Canada Customs and Revenue Agency, testified on behalf of the respondent. He stated that, in appraising the value of the goods in issue, the respondent used the residual method by applying, in a flexible manner, the deductive value method. Mr. Parent testified that all the expenses incurred by the appellant in Canada with respect to the goods in issue were deducted for the purpose of determining the value for duty of these goods.

ARGUMENT

The appellant submitted that the transaction value method was applicable to the transaction between the U.S. contractors and PI. The amount paid to the U.S. contractors should serve as a basis to determine the value for duty to which the cost of the inputs should be added as an assist. There was a definite chain of events that led to the goods in issue being exported to Canada. The appellant submitted that the fact that the goods were not earmarked for exportation to Canada was not fatal to the applicability of the transaction value method.

Alternatively, the appellant stated that the transaction value method was applicable to the sale between PI and the appellant. The appellant argued that the relationship between the companies is not fatal to the existence of a sale and to the application of the transaction value method. The appellant stated that the two cases cited in the respondent's brief to support the respondent's contention that there could be no sale between PI and the appellant are distinguishable from the present situation. To support its position, the appellant stressed that payment for the sale is made on the appellant's cheques, that the appellant has an inventory account in its financial statement, while PI has an accounts receivable amount, that there is an invoice issued by PI to the appellant indicating a sale, that each item sold has a price, that proceeds of the sales made by the appellant are deposited in its bank account and that the appellant does not have any input in the production of the goods in issue.

The appellant submitted that, if the transaction value method could not be applied, the deductive value method should be used. The appellant agreed with the respondent that there were no commissions paid to the independent sales representatives and that, therefore, the deduction for commissions was not applicable. However, it submitted that the alternate deduction dealing with profit and general expenses was applicable and should have been granted by the respondent. The appellant submitted that it was evident that it incurred expenses and made profits.

The appellant stated that, if the Tribunal did not find the transaction value method and the deductive value method applicable, then it should use the computed value method. The appellant stated that it has provided all the costing information needed to use this method of valuation.

Finally, the appellant submitted that, even under the residual method, the appellant should be entitled to a deduction that would be most similar to the deduction for profit and general expenses under the deductive value method.

The respondent submitted that none of the three main methods of valuation can be applied to appraise the value for duty of the goods in issue. The respondent stated that, to use the first method of valuation, the transaction value method, there are two conditions that must be present. First, there must be a sale and, second, that sale must be for export to Canada. The respondent submitted that the transaction value method cannot be applied to the sale between the U.S. contractors and PI because the sale is not for export to Canada. Given that the goods produced by the U.S. contractors are not earmarked for Canada and are not segregated in PI's Ventura warehouse, it is impossible to determine which goods sold by the U.S. contractors are for export to Canada.

The respondent submitted that the transaction value method also cannot be applied to the transaction between PI and the appellant. In this case, the respondent argued that no sale took place between PI and the appellant. The respondent submitted that the appellant's Canadian operations are not sufficiently

independent from PI for the two companies to be considered separate parties capable of each giving a free assent, thereby entering into a valid sale contract. According to the respondent, there were factors that clearly indicated such a lack of independence. They included the fact that the appellant was a subsidiary of PI and had common directors and officers with it, the fact that both companies operated out of the same offices and that, yet, no portion of the general operating expenses were allocated to the appellant and the fact that the people who run the appellant's Canadian operations were all employees of PI and paid by PI. The respondent noted that only one salary was allocated to the appellant. The respondent also stressed that the purported sale price from PI to the appellant was formulated by PI on the basis of a profit percentage figure instead of being mutually agreed upon.

In the respondent's submission, the next method of valuation, the deductive value method, could not be applied strictly to determine the value for duty of the goods in issue. The respondent noted that the amounts paid to the independent sales representatives not being commissions, they could not be deducted under the deductive value method. As for the possibility of deducting an amount for profit and general expenses, the respondent submitted that he did not have sufficient information to do so. He suggested that the profit allocation to the sale to the retailers in Canada, as can be determined from the confidential documents filed by the appellant for the purposes of this appeal, was unreasonably high and was unacceptable, given the limited selling activities of Patagonia in Canada in relation to the sales in Canada. The respondent also did not consider the computed value method to be applicable. He submitted that, in order to apply the computed value method, the goods appraised must be sold for export.

The respondent submitted that it had, therefore, to apply the residual method and that the most appropriate method to apply flexibly was the deductive value method. Pursuant to this, the respondent deducted from the sale price, at the first trade level after importation, the amounts paid to the independent sales representatives and all the other expenses incurred by the appellant in Canada.

DECISION

There are three main methods to appraise the value for duty of imported goods under the Act: the transaction value method, the deductive value method and the computed value method. Subsection 47(1) of the Act provides that recourse should be had to the transaction value method in the first place, in accordance with the conditions set out in section 48. Subsection 48(1) indicates, in part, that the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada. Therefore, in order to apply the transaction value method, the goods must be sold and they must be sold for the purpose of export to Canada.[2]

The appellant submitted that a sale for export to Canada took place between the U.S. contractors and PI. Even if the Tribunal were to accept that the transaction between the U.S. contractors and PI constituted a sale, it could not conclude that this sale was for export to Canada. Indeed, at the time of a specific sale, there was nothing to indicate that certain goods sold were destined for Canada. As acknowledged by Mr. Lowe, the clothing was not earmarked for Canada at that point, nor were the goods received in PI's warehouse segregated for further export to Canada. This factual situation is to be opposed to a situation like the one present in Appeal Nos. AP-96-129 to AP-96-194,[3] where the Tribunal found that the goods in issue in that case that were destined for the Canadian market were acquired by a distinct purchase

2. *JewelWay International* v. *DMNR* (26 March 1996), AP-94-359 and AP-94-360 at 11 (CITT).
3. *Nu Skin* v. *DMNR* (26 August 1997) (CITT) at 5.

order, had metric sizing and bilingual labels that indicated the appellant's name and address and, when they were not shipped directly to Canada, were physically separated from other products. Given the Tribunal's conclusion that the transaction between the U.S. contractors and PI did not constitute a sale for export to Canada, the transaction value method cannot be applied with respect to that transaction.

The appellant submitted that, in the alternative, the transaction between PI and the appellant should serve as the basis for the application of the transaction value method. As stated above, to use this method requires a sale for export to Canada.

For a sale to take place, there must be two parties standing in relation of buyer and seller to one another. In the present appeal, the Tribunal must determine whether such was the relationship between PI and the appellant. Having regard to the relevant facts, the Tribunal comes to the conclusion that the relationship between PI and the appellant was not one of buyer and seller, but rather one of agency.

Various factors have been considered relevant for the purposes of determining whether there is an agency relationship. The courts have considered such factors as the extent to which one party controls another and the risk assumed by the alleged agent. However, the Tribunal notes that no one factor has been considered by the courts to be determinative of the issue of agency, and the courts have, in making their determinations, considered the facts as a whole and weighed the relative importance of the factors as they may apply.[4]

In the present case, the degree of control exercized by PI over the appellant was substantial. The following facts illustrate it: (1) PI owned the appellant's shares; (2) there were overlapping directors of PI and the appellant; (3) the persons involved in the management of the appellant were all PI employees; (4) all these employees were paid by PI; and (5) the signing authority over the appellant's bank accounts and cheques resided with either PI or Lost Arrow.

There were also other factors which illustrated the appellant's lack of independence. Among them were the following: (1) there were financial statements for the appellant, but Mr. Lowe acknowledged that they were more an internal statement for Lost Arrow's financial purposes; (2) even though the appellant shared premises with PI, it did not pay any rent; (3) the policyholder for the clothing in issue was Lost Arrow, and the payment of the insurance premiums was only allocated to the appellant for part of the period during which the transactions took place; and (4) none of the other costs incurred by PI in the United States for the benefit of the appellant were allocated to it. The fact that the appellant had a bank account in Canada and paid the expenses incurred in Canada does not establish a sufficient degree of independence of the appellant. On this point, the Tribunal recalls that the withdrawals made and the cheques issued by the appellant required the signature of PI or Lost Arrow employees.

More particularly, with respect to the transactions in question, the Tribunal notes that the forecasts made in advance of ordering the goods from the U.S. contractors were made by a PI employee, that the quantity of goods finally shipped by the appellant was decided by PI employees and that the alleged price of the transactions between PI and the appellant was also set by PI. The Tribunal further notes that, finally, even the price at which the clothing in issue was sold to the Canadian retailers had to be established by PI.

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4. *Supra* note 2 at 12.

Given the level of dependence of the appellant, and the fact that all financial decisions were made by employees of other companies, it is difficult to talk of risk-taking by the appellant. The fact that not all expenses related to the appellant's business were allocated to it also distorted its results. This can be explained by the fact that those results were consolidated with those of Lost Arrow.

Under these circumstances and considering, particularly, the very high degree of control exercized by PI over the appellant, it is the Tribunal's view that the appellant did not stand in the position of a buyer with respect to the transactions between it and PI, but rather in the position of an agent. Therefore, no sale took place between PI and the appellant. Accordingly, the transaction value method cannot be used in relation to the transactions between PI and the appellant to appraise the value of the clothing in issue.

Where goods cannot be appraised on the basis of their transaction value, subsection 47(2) of the Act provides that they should be appraised on the basis of the transaction value of identical goods or, if this method is not applicable, on the basis of the transaction value of similar goods. Given that the parties have agreed that none of these two methods were applicable to the transactions in question, the Tribunal will not consider them.

The next method to be used is the deductive value method. Under this method, the basis for appraisal is the unit price in respect of sales of the goods at the first trade level after importation. In the present appeal, and given that the clothing in issue was sold only when it was in the Cowansville warehouse, there is no question that the relevant price is the price at which the clothing was sold to the Canadian retailers. The Tribunal also accepts the evidence from Mr. Lowe that the goods in issue were generally sold in Canada within 90 days after their importation. From the price to the Canadian retailers, it is possible, pursuant to paragraph 51(4)(*a*) of the Act, to deduct the amount of commission generally earned on a unit basis or the amount for profit and general expenses, 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.

The parties have agreed that the fee and fixed bonus paid to the independent sales representatives did not constitute commissions and that they cannot, therefore, be deducted under the deductive value method. As for the deduction for an amount for profit and general expenses, the parties agree on the possibility to deduct all the expenses that were incurred in Canada in connection with the sales of the clothing in issue. In its determination, which is the subject of the present appeal, the respondent accepted to deduct these expenses when applying the deductive value method flexibly, pursuant to the residual method. This includes the expenses relating to the independent sales representatives. It is with respect to the deduction for profit that the disagreement between the appellant and the respondent arose. The respondent determined that no amount for profit could be deducted.

Subsection 5(1) of the *Valuation for Duty Regulations*[5] provides, in part, that, for the purposes of the deduction to be made under the deductive value method, the amount for profit and general expenses shall be calculated on a percentage basis and determined from sufficient information that is prepared in a manner consistent with generally accepted accounting principles and supplied by or on behalf of the importer of the goods being appraised. In Appeal No. AP-96-105,[6] the Tribunal indicated that the deduction for profit and general expenses under the deductive value method was limited to profits earned and expenses incurred in Canada. While the appellant claimed that, clearly, profits were made on its sales in Canada, it did not refer to a precise figure. The Tribunal notes that the appellant filed an income statement relating to the Canadian operations of the appellant. According to this statement, the appellant made profits on its sales to

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5. S.O.R./86-792 [hereinafter Regulations].
6. *Armstrong Bros. Tool* v. *DMNR* (15 August 1997) at 6-7 (CITT).

Canada. Even if the Tribunal were to forget about the expenses which were not allocated to the appellant and accept the accuracy of the profit figure, the Tribunal could not rely on the figure provided. Indeed, no method of apportionment of the appellant's profits between the United States and Canada has been proposed. Given the activities conducted in the United States by the appellant, clearly such an apportionment would, at a minimum, have been required. Under these circumstances, the Tribunal agrees with the respondent that the deductive value method could not be applied to appraise the clothing in issue.

The next method of appraisal under the hierarchical order found in the Act is the computed value method. Subsection 52(2) of the Act provides, in part, that the computed value of goods being appraised is the aggregate of amounts equal to the costs, charges and expenses incurred in respect of, or the value of, the materials employed in producing the goods and the production or other processing of the goods being appraised. To this must be added an 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.

Essentially, the computed value method starts with the costs of production to which an amount for profit and general expenses is added. The appraisal of the costs of production of the goods must be based on the commercial accounts of the producer of the goods being appraised or on other sufficient information relating to the production of those goods.[7] As for the amount to be added for profit and general expenses, it must be determined from data supplied by or on behalf of the producer of the goods being appraised.[8] To use the computed value method in the present appeal, the Tribunal must therefore determine whether PI was the producer of the clothing in issue.

The word "producer" is defined as "a person, company, country, etc, that produces goods or materials".[9] "Produce" is defined, in turn, as: "1) bring (something) into existence; 2) manufacture (goods) from raw materials etc.".[10] In the Tribunal's view, the "producer", for the purpose of the application of the computed value method, should be seen as the person or company that is responsible for bringing the goods into existence. In a case like the present appeal, this will yield a valuation which is closer to the value of the goods at the time of export.

While, in many cases, the manufacturer and the producer may be the same entity, it will not always be the case. This is especially true today when many companies subcontract some operations, but keep an important level of control over the manufacture of the goods. The circumstances of this appeal illustrate one such case. PI bought the inputs and shipped them to the U.S. contractors. PI also provided the U.S. contractors with plans, sketches and other designs necessary to produce the Patagonia clothing. The U.S. contractors' activities were limited to cutting, sewing and packaging the clothing in issue according to PI's instructions. Had it not been for PI, the clothing in issue would never have been brought into existence. Consequently, the Tribunal determines that PI was the producer of the clothing in issue.

The respondent submitted that, in order to apply the computed value method, the goods appraised must be sold for export. In the Tribunal's opinion, subsection 52(2) of the Act and the Regulations do not comprise such a requirement. Under the Regulations, the costs, charges and expenses, or the value, referred to in subsection 52(2), must be determined on the basis of the commercial accounts of the producer of the goods being appraised or other sufficient information relating to the production of the goods.

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7. *Supra* note 5, s. 6(1).
8. *Ibid.* s. 6(2).
9. *The Canadian Oxford Dictionary*, 1998, *s.v.* "producer".
10. *Ibid. s.v.* "produce".

As regards the amount to be added for profit and general expenses, the Regulations provide that it shall be calculated on a percentage basis and determined from sufficient information that is prepared in a manner consistent with generally accepted accounting principles of the country of production of the goods being appraised and is supplied by the producer of the goods being appraised. There is no requirement that the goods produced by the producer be sold for export. The percentage arrived at using the information provided by a producer which is not selling its goods for export may or may not be consistent with the amount 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 in sales for export to Canada. This must be determined on the facts of the specific transactions. Therefore, in the Tribunal's opinion, there is no prohibition against using information supplied by a producer which relate to sales which are not for export, as long as the amount for profit and general expenses is reflective of the amount for profit and general expenses relating to sales for export to Canada of goods of the same class or kind as the goods being appraised by producers that deal with importers in a manner consistent with that of persons who are not related.[11]

In the Tribunal's view, the clothing in issue should be appraised using the computed value method. The appellant has provided the costing data for the clothing in issue.[12] In order to arrive at a proper value for duty, an amount must be added for profit and general expenses. The U.S. Wholesale Income Statement provided by the appellant for the purpose of this appeal indicated the general expenses incurred and the profits made by PI for the year 1994-95.[13] Nothing indicated, and the respondent did not show, that those numbers were not consistent with the amount for profit and general expenses generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised by producers that deal with importers in a manner consistent with that of persons who are not related. Therefore, for the purpose of adding an amount for profit and general expenses pursuant to paragraph 52(2)(*b*) of the Act, the Tribunal directs the respondent to use those numbers. As such, the Tribunal returns the matter to the respondent for re-appraisal of the value for duty of the clothing in issue in a manner consistent with these reasons.

For the foregoing reasons, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

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11. *Supra* note 5, s. 6(3).
12. "Appellant's Book of Documents and Authorities" (protected) at tab 2.
13. *Ibid.* at tab 10.