Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-028

Bluestein Enterprises Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, March 31, 2014

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on December 10, 2013, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF nine decisions of the President of the Canada Border Services Agency, dated March 26, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

BLUESTEIN ENTERPRISES INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 10, 2013
Tribunal Member:	Serge Fréchette, Presiding Member
Counsel for the Tribunal:	Jidé Afolabi
Manager, Registrar Programs and Services:	Sarah MacMillan
Acting Senior Registrar Officer:	Haley Raynor

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Bluestein Enterprises Inc.	Richard S. Gottlieb Zave Kaufman

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Agnieszka Zagorska Kirk Shannon

WITNESS:

David Bluestein
President
Bluestein Export Import Inc.

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
15th Floor
333 Laurier Avenue West
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) on June 18, 2013, by Bluestein Enterprises Inc. (Bluestein) pursuant to subsection 67(1) of the *Customs Act*.[1] This appeal pertains to nine decisions of the President of the Canada Border Services Agency (CBSA), made pursuant to subsection 60(4) and dated March 26, 2013, concerning the value for duty of printed T-shirts and other concert memorabilia imported by Bluestein.

2. The first issue in this appeal is whether the deductive value method for the determination of value for duty can be properly applied to the aforementioned importations and was properly applied by the CBSA. The alternative put forward by Bluestein is the application of the computed value method.

3. The second issue in this appeal is whether, contrary to the position taken by the CBSA, royalties paid by merchandisers based in the United States, to licence holders also based in the United States, subsequent to the sale of the aforementioned goods in Canada, can be considered general expenses in connection with sales in Canada, to be deducted in the determination of value for duty pursuant to the deductive value method. A related question is whether the legislative regime pertaining to the value for duty of imports reveals the existence of a general rule pursuant to which royalties are non-dutiable.

PROCEDURAL HISTORY

4. Between April 1, 2006, and March 31, 2007, Bluestein imported concert memorabilia into Canada, accounting for the goods under the transaction value method for the determination of value for duty, as set out in section 48 of the *Act*. The transaction value method is premised on a sale for export to a purchaser in Canada.

5. In all instances, Bluestein was not a purchaser of the memorabilia. Rather, for a fee, Bluestein acted as importer of record for the memorabilia, which remained the property of U.S.-based merchandisers. Subsequent to importation, Bluestein made the memorabilia available at various concert venues for the purpose of sales to Canadian customers. In accounting for the memorabilia for the purposes of value for duty, Bluestein declared the cost of acquisition incurred by the U.S.-based merchandisers, such as the wholesale cost of buying blank T-shirts, plus the cost of imprinting the memorabilia with various licensed designs.

6. From April 1, 2006, to June 18, 2009, Bluestein was the subject of a CBSA verification undertaken pursuant to section 42.01 and subsection 42(2) of the *Act*. Subsequent to the verification, the CBSA issued a ruling letter amending the method of determination of the value for duty of the memorabilia to the deductive value method as set out in section 51.[2] That ruling letter was followed by a decision pursuant to subsection 59(1), issued on June 30, 2009, affirming the amendment.[3]

7. In making the amendment, the CBSA concluded that the transaction value method could not be applied to the importations since there was no sale for export to a purchaser in Canada. The CBSA's determination of value for duty using the deductive value method was based on the selling price of the memorabilia to concert-goers in Canada.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2013-028-05B (protected), tab 2, Vol. 2.
3. Exhibit AP-2013-028-07B (protected), tab 1, Vol. 2.

8. On September 28, 2009, Bluestein filed a request for a re-determination of the value for duty of the memorabilia, pursuant to section 60 of the *Act*. Bluestein requested that the CBSA utilize the computed value method as set out in section 52, instead of the deductive value method, in deriving the value for duty of the memorabilia. In addition, Bluestein requested that the CBSA consider deducting royalties paid subsequent to sales in Canada by the sellers of the memorabilia, the U.S.-based merchandisers, to the U.S.-based licence holders of the designs imprinted on the memorabilia.[4]

9. On March 26, 2013, the CBSA responded to Bluestein's request for a re-determination pursuant to subsection 60(4) of the *Act*. The CBSA maintained its decision amending the method of determination of the value for duty of the memorabilia to the deductive value method. In addition, the CBSA denied the deduction of royalties from the selling price of the memorabilia.

10. On June 18, 2013, Bluestein filed this appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

LEGAL FRAMEWORK

11. The *Act* requires that a value be attributed to imported goods for the purposes of the imposition of customs duties on such goods. Section 46 of the *Act* stipulates that this value for duty be determined in accordance with sections 47 to 55, which set out a number of methods pursuant to which the value for duty of imported goods can be determined. In addition, subsection 47(2) stipulates that the aforementioned methods must be considered in the order in which they appear in the *Act*.

12. Sections 47 and 48 of the *Act* set out the transaction value method as the first for consideration with regard to the determination of the value for duty of imported goods. Thus, subsection 48(1) provides that ". . . the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined . . . ." In addition, the "price paid or payable", as defined in subsection 45(1), relates to "the sale of goods for export to Canada".

13. With regard to the importations at issue, the CBSA determined that the memorabilia were not, at the time of importation, sold for export to Canada to a purchaser in Canada. Thus, the CBSA concluded the transaction value method is not applicable.[5] While Bluestein initially accounted for the memorabilia under the transaction value method, it later agreed with the CBSA and also submitted to the Tribunal that the transaction value method is not applicable to the importations of the memorabilia.[6] It is the Tribunal's opinion that the position of both parties on the issue is accurate.

14. Should the transaction value method not be applicable, section 49 of the *Act* directs the application of the transaction value method of identical goods and, should that method also not be applicable, section 50 directs the application of the transaction value method of similar goods. As the facts at hand do not at any time include a sale for export, the parties are similarly in agreement that these two subsequent methods are not applicable to the importations of the memorabilia,[7] and the Tribunal is of the opinion that the position of the parties on the issue is accurate.

4. Exhibit AP-2013-028-07A at para. 9, Vol. 1A.
5. *Ibid.* at para. 21.
6. Exhibit AP-2013-028-05A at para. 29, Vol. 1.
7. *Ibid.*; AP-2013-028-07A at para. 23, Vol. 1A.

15. The next method for consideration is the deductive value method, as set out in section 51 of the *Act*. That section provides as follows:

> 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*
>
> 51.(1) Sous réserve des paragraphes (5) et 47(3), la valeur en douane des marchandises est, dans les cas où elle n'est pas déterminée par application des articles 48 à 50, leur valeur de référence, si elle est déterminable.
>
> (2) La valeur de référence des marchandises à apprécier est un prix unitaire, déterminé conformément au paragraphe (3), ajusté conformément au paragraphe (4), choisi selon les modalités suivantes :
>
> *a*) lorsque, au moment de l'importation des marchandises à apprécier ou à peu près à ce moment, ces marchandises, des marchandises identiques ou semblables sont vendues au Canada dans l'état où elles ont été importées, c'est le prix unitaire de vente du plus grand nombre de marchandises des trois catégories au moment sus-indiqué qui est retenu;
>
> *b*) lorsque les marchandises à apprécier, des marchandises identiques ou semblables sont vendues au Canada, non dans les situations visées à l'alinéa *a*), mais dans l'état où elles ont été importées dans les quatre-vingt-dix jours suivant l'importation des marchandises à apprécier, c'est le prix unitaire de vente du plus grand nombre de marchandises des trois catégories à la date la plus proche de l'importation des marchandises à apprécier qui est retenu;
>
> *c*) lorsque les marchandises à apprécier, des marchandises identiques ou semblables ne sont pas vendues au Canada dans les situations visées aux alinéas *a*) ou *b*), que les marchandises à apprécier, après assemblage, emballage ou transformation complémentaire, y sont vendues dans les cent quatre-vingts jours suivant leur importation et que l'importateur des marchandises à apprécier demande l'application du présent alinéa à la détermination de leur valeur en douane, c'est le prix unitaire de vente du plus grand nombre des marchandises à apprécier qui est retenu.
>
> (3) Pour l'application du paragraphe (2), le prix unitaire des marchandises à apprécier, de marchandises identiques ou de marchandises semblables *désigne le prix unitaire auquel ces marchandises sont vendues, au premier niveau commercial après leur importation*, à des personnes qui, à la fois : *a*) ne sont pas

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

liées, au moment de la vente, aux vendeurs des marchandises en question;

b) n'ont fourni, directement ou indirectement, sans frais ou à coût réduit, aucune des marchandises ou aucun des services visés au sous-alinéa 48(5)*a*)(iii) pour être utilisés lors de la production et de la vente à l'exportation des marchandises en question.

Le prix unitaire retenu à cet égard est le prix unitaire de vente *du plus grand nombre de ces marchandises* lorsque, selon le ministre ou son délégué, ce nombre est suffisamment important pour permettre la détermination de ce prix.

(4) Pour l'application du paragraphe (2), le prix unitaire qui y est visé est ajusté en *retranchant la somme des montants suivants* :

a) le montant, déterminé de la manière réglementaire, représentant, *dans le cadre de la vente au Canada* de marchandises de même nature ou de même espèce que les marchandises en question :

(i) soit le montant de la commission normale payée sur une base unitaire,

(ii) soit le montant pour les bénéfices et frais généraux, considérés comme un tout et comprenant tous les frais de commercialisation, normalement inclus dans le prix unitaire;

b) les coûts et frais de transport et d'assurance des marchandises à l'intérieur du Canada, y compris les coûts et frais connexes, généralement supportés lors de la vente au Canada des marchandises à apprécier, des marchandises identiques ou des marchandises semblables, dans la mesure où ils ne sont pas déduits avec les frais généraux visés à l'alinéa *a*);

c) les coûts et frais supportés afférents aux marchandises en question et visés au sous-alinéa 48(5)*b*)(i), dans la mesure où ils ne sont pas déduits avec les frais généraux visés à l'alinéa *a*);

d) les droits et taxes visés à la division 48(5)*b*)(ii)(B), dans la mesure où ils ne sont pas déduits avec les frais généraux visés à l'alinéa *a*); *e*) dans le cas visé à l'alinéa (2)*c*), la valeur ajoutée aux marchandises en question par suite de leur assemblage, emballage ou transformation complémentaire au Canada.

(5) Si, en l'absence de renseignements

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*).

(6) In this section, "time of importation" means

(*a*) in respect of goods other than those to which paragraph 32(2)(*b*) applies, the date on which an officer authorizes the release of the goods under this Act or the date on which their release is authorized by any prescribed means; and

(*b*) in respect of goods to which paragraph 32(2)(*b*) applies, the date on which the goods are received at the place of business of the importer, owner or consignee.

suffisants, la valeur visée à l'alinéa (4)*e*) n'est pas déterminable, la valeur en douane des marchandises à apprécier ne doit pas se fonder sur l'alinéa (2)*c*).

(6) Dans le présent article, la date de l'importation des marchandises est, selon le cas :

a) à l'égard de marchandises autres que celles visées à l'alinéa 32(2)*b*), la date à laquelle leur dédouanement est autorisé en application de la présente loi par un agent ou selon les modalités réglementaires;

b) à l'égard de marchandises visées à l'alinéa 32(2)*b*), la date de réception de celles-ci à l'établissement de l'importateur, du propriétaire ou du destinataire.

[Emphasis added]

16. Thus, pursuant to section 51 of the *Act*, the deductive value is the price per unit of the concert memorabilia, determined and adjusted pursuant to the provisions of that section. The deductive value can be determined, and the method for which it is named can be utilized if:

- the goods, 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;
- a price per unit, at which the greatest number of units of the goods are sold, can be determined by ascertaining the unit price of the goods in respect of sales, to unrelated persons, at the first trade level after importation; and
- the price per unit can be adjusted by way of a number of deductions, of which those pertinent to the facts at hand, and to be considered alternatively, are either the amount of commission generally earned on a unit basis or the amount for profit and general expenses generally reflected on a unit basis, that are in connection with sales of goods of the same class or kind in Canada.

FACTS

17. Before setting out the positions of the parties, as well as the Tribunal's analysis, it is important to briefly outline the approach taken by the CBSA with regard to the application of the deductive value method to the importations at issue.

18. In determining the value for duty of the concert memorabilia pursuant to the deductive value method, the CBSA established a price per unit, at which the memorabilia are sold to Canadian purchasers, based on selling prices indicated in the price lists of the U.S. merchandisers.[8]

19. The CBSA then subjected the price per unit to deductions as mandated by subsection 51(4) of the *Act*. That subsection provides an option between deducting commission generally earned on a unit basis on the one hand, or profit and general expenses generally reflected on a unit basis on the other hand. In either instance, deductions must be in connection with sales of goods of the same class or kind in Canada. Pursuant to the option outlined above, the CBSA made deductions for profit and general expenses.[9]

20. In making deductions for profit, the CBSA effectively interpreted the phrase ". . . profit and general expenses . . . in connection with sales in Canada . . .", contained in subsection 51(4) of the *Act*, as meaning profit realized by a Canadian-based earner, and expenses incurred in Canada. Pursuant to that interpretation, the CBSA did not take into account any profit realized by the U.S. merchandisers from sales in Canada.[10] Instead, the CBSA deducted the fees charged by Bluestein for its services to the U.S. merchandisers, pursuant to the reasoning that those fees cover Bluestein's expenses in importing and facilitating the sale of the memorabilia, with any residual amount appearing as profit in Bluestein's books and records.[11]

21. With regard to general expenses, and pursuant to the list of allowable deductions contained in paragraphs 51(4)(*a*) to (d) of the *Act*, the CBSA rendered various amounts as an aggregate percentage of gross sales and deducted that percentage from the previously established price per unit. The aggregate was made up of expenses on Bluestein's books and records, such as retail GST and PST, credit card fees, security fees, road fees, venue fees, freight and brokerage, and import duty and taxes.[12] As earlier indicated, to account for other expenses as well as profit, the aggregate also included Bluestein's fees.

22. Reasoning that the deductive value method does not specifically provide for the deduction of royalty amounts from the price per unit, the CBSA concluded that such amounts are dutiable under the deductive value method. Thus, the CBSA did not deduct the royalties paid by the U.S. merchandisers to the U.S. licence holders.[13]

POSITIONS OF PARTIES

Bluestein

23. With regard to the first issue in this appeal—the question of the applicability of the deductive value method to the importations of concert memorabilia—Bluestein took the position that the method is rendered unsuitable by the production and shipment scenarios utilized with regard to the memorabilia. The four scenarios set out by Bluestein were as follows:

8. Exhibit AP-2012-028-07A at para. 28, Vol. 1A.
9. *Ibid.* at para. 46. As noted in para. 29 of the same exhibit, the CBSA also concluded that amounts referred to as commissions on the books and records of Bluestein were not commissions in the true sense of the word, but were instead the fees charged by Bluestein for its services to the U.S. merchandisers.
10. Exhibit AP-2012-028-07A at paras. 30, 31, 38 to 44, Vol. 1A.
11. *Ibid.* at paras. 46, 47, 75; *Transcript of Public Hearing*, 10 December 2013, at 44, 47.
12. Exhibit AP-2012-028-07A at paras. 46, 47, Vol. 1A.
13. *Ibid.* at paras. 50-59.

- the U.S. merchandisers purchase blank goods, such as T-shirts, and have them shipped to printers for the application of licensed images, thus converting them into memorabilia, before the finished goods are shipped to Canada;
- the U.S. merchandisers purchase blank goods, such as T-shirts, and have them shipped to printers for the application of images licensed only for Canada, thus converting them into memorabilia, before the finished goods are shipped to Canada;
- the U.S. merchandisers purchase blank goods, such as T-shirts, and have them shipped to printers for the application of licensed images for a tour encompassing both U.S. and Canadian venues, and after the U.S. portion of the tour, the remaining memorabilia are shipped to Canada; and
- the U.S. merchandisers purchase blank goods, such as T-shirts, and have them shipped to printers for the application of licensed images; the memorabilia are then co-mingled in the merchandiser's inventory prior to the shipment of some to Canada.[14]

24. Bluestein submitted that 50 percent of the goods are produced pursuant to a scenario in which goods destined for the United States and those destined for Canada have to be co-mingled, such that it is impossible to determine which will ultimately be imported into Canada.[15] Bluestein further submitted that an unknown amount of unsold goods is returned to the United States, leading to a duty drawback. Bluestein argued that the production and shipment scenarios that pertain to the concert memorabilia led to a situation in which the value for duty cannot, at the time of importation, be determined through the use of the deductive value method.[16]

25. Secondly, Bluestein took issue with the CBSA's decision to not account for profits realized by the U.S. merchandisers from sales in Canada. Bluestein submitted that the legislative language in paragraph 51(4)(*a*) of the *Act* does not support the conclusion that allowable deductions pertain only to profits realized by a Canadian-based earner and expenses incurred in Canada. Bluestein argued that, with specific regard to profits and the need for a connection with sales in Canada, it is sufficient to demonstrate that profits were realized in Canada even if the earner is elsewhere.[17]

26. Thirdly, Bluestein argued that, to the extent that profits realized by the U.S. merchandisers from sales in Canada are excluded as a deduction, due to the fact that neither Bluestein nor the CBSA has unfettered access to the financial records of those U.S. merchandisers, precise figures for profits are unavailable. Bluestein posited that, in such an instance, the application of the legislative scheme pertaining to the deductive value method cannot simply be abridged; instead, the next applicable method for the determination of the value for duty—the computed value method—must be considered for utilization.[18]

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14. Exhibit AP-2013-028-05A at para. 8, Vol. 1.
15. *Ibid.* at para. 32.
16. *Ibid.* at para. 47. Bluestein earlier asserted, in para. 31 of its brief, that for the deductive value method to be applicable, "it is essential that a sale of goods be made for export to Canada". In fact, the opposite is true. The lack of a sale for export is a basis for the inability to determine the price paid or payable for an imported good pursuant to subsection 48(1) of the *Act* and, consequently, for the inability to use the transaction value method, leading to the possible use of the deductive value method. As the assertion is entirely contrary to the legislative scheme as set out in sections 47 to 51, the Tribunal does not consider it worthy of further exploration and, as such, it will not be considered in the Tribunal's analysis.
17. Exhibit AP-2013-028-05A at paras. 35, 38. In making this argument, Bluestein relied on the reasoning in *Armstrong Bros. Tool Co. v. Deputy M.N.R.* (15 August 1997), AP-96-105 (CITT) [*Armstrong*].
18. Exhibit AP-2013-028-05A at paras. 19, 45, Vol. 1. In making this argument, Bluestein relied upon the reasoning in *Patagonia International, Inc. v. Deputy M.N.R.* (28 September 2000), AP-99-014 (CITT).

27. In its fourth argument, Bluestein contended that the profit and general expenses of the U.S. merchandisers regarding sales in Canada are, in keeping with the language in paragraph 51(4)(*a*) the *Act*, representative of percentages of profit and general expenses that would occur in connection with sales in Canada of goods of the same class or kind as the concert memorabilia.[19] The Tribunal considers the implication of this submission to be that paragraph 51(4)(*a*) essentially refers to industry-wide norms for profit and general expenses and not only that such norms exist with regard to concert memorabilia but also that the profit and general expenses of the U.S. merchandisers are in keeping with such norms. The conclusion, according to Bluestein, would thus be that should the deductive value method be the correct valuation method regarding the importations in issue, the profit and general expenses of the U.S. merchandisers can rightly be adopted with regard to the determination of the value for duty of those importations pursuant to that method.

28. In its fifth argument, made concerning the second issue in this appeal, Bluestein took the position that the correct approach in applying the deductive value method to the facts at hand is to deduct royalties paid by the U.S. merchandisers to U.S. licence holders since royalties are not dutiable. In support of this position, Bluestein asserted that royalties are only explicitly indicated for inclusion in the value for duty of goods in subsection 48(5) of the *Act*, which concerns the transaction value method.[20] The corollary, according to Bluestein, is that, since royalties are not mentioned for inclusion elsewhere, they are generally not dutiable and should be deducted in every other instance.[21]

29. Further, by way of a sixth argument, Bluestein posited that royalties in the context of the deductive value method are, in broad terms, "general expenses". Bluestein took the position that, in the instance at hand, those expenses would appear on the books and records of the U.S. merchandisers as "vendor expenses" connected with sales in Canada. Bluestein concludes that those expenses should thus be deducted in keeping with both subparagraph 51(4)(*a*)(ii) of the *Act* and Bluestein's characterization of the *ratio decidendi* in *Armstrong*.[22]

30. Related to the preceding, Bluestein contended, in its seventh argument, that timing is supportive of the conclusion that the royalties in the instance at hand are "general expenses". Bluestein argued that the royalties are only payable after the goods have been imported and sold, and after a determination of net profit has been made.[23] Bluestein took the view that rather than being construed as part of the "price per unit" of the memorabilia, the timing of payment of the royalties effectively means that they ought to be characterized as "general expenses" connected to sales in Canada.

31. In its eighth argument, Bluestein made the point that no adjustment is mandated with regard to the determination of value for duty pursuant to the deductive value method if royalties are not paid.[24] The corollary would be that, where paid, such royalties ought to be deducted as they do not belong in that method of determining value for duty.

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19. Exhibit AP-2013-028-05A at para. 40, Vol. 1.
20. *Ibid.* at paras. 50-54. In making this argument, Bluestein relied upon the reasoning in *Jana & Company v. Deputy M.N.R.* (3 September 1996), AP-94-150 (CITT).
21. Exhibit AP-2013-028-05A at para. 26, Vol. 1.
22. *Ibid.* at para. 41.
23. *Ibid.* at para. 55.
24. *Ibid.* at para. 55.

32. In making a ninth argument with regard to this appeal, Bluestein referred to advisory opinion 4.8 in the *GATT Agreement and Texts of the Technical Committee on Customs Valuation*.[25] The advisory opinion sets out a scenario in which an importer enters into one agreement pursuant to which royalties are to be paid to a licence holder in a country of export and a second agreement pursuant to which goods are to be manufactured and imprinted with the licensed images secured pursuant to the first agreement, also in the country of export. Subsequent to the manufacture and imprinting of the goods, they are sold for export to the importer by the party to the second agreement.

33. The Technical Committee on Customs Valuation opined that, in such an instance, two unrelated agreements exist and that the latter of those agreements, which is the agreement that pertains to the sale for export, does not include the payment of royalties as a condition of the sale of the goods. The result is that the royalty payments in such an instance do not form part of the value for duty of the goods. Bluestein posited that the facts at hand are similar to the scenario set out in the advisory opinion.[26]

34. Lastly, Bluestein's tenth argument is premised upon the Supreme Court of Canada's decision in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*[27] Bluestein asserted that *Mattel* stands for the proposition that, in order for royalty payments to be dutiable, ". . . a 'prerogative' of 'refusal to sell unless a payment is made' must be communicated by the vendor/licensor, to the buyer by virtue of a mention in the accompanying commercial documents or in a license agreement."[28] Bluestein asserted that no such prerogative exists in the commercial documents or agreements related to the facts at hand.

35. It is noteworthy that, during the oral hearing into this appeal, Bluestein removed its second, third and fourth arguments—made concerning the issue of profits realized by the U.S. merchandisers from sales in Canada—from consideration.[29] Thus, the Tribunal will not set out the CBSA's responses to those arguments and, further, will not undertake an analysis of the law with regard to the questions raised by those arguments.

CBSA

36. In response to Bluestein's first argument, that the production and shipment scenarios pertaining to the concert memorabilia result in the inability to determine and use the deductive value method at the time of import, the CBSA countered that paragraph 51(2)(*a*) of the *Act*, which sets out the relevant basis for the applicability of the deductive value method, refers to identical goods or similar goods, in addition to the goods being appraised, supportive of the conclusion that the specific production and shipment scenarios of the goods being appraised are irrelevant to the determination of value for duty pursuant to the deductive value method.[30]

37. Concerning Bluestein's fifth argument, that royalties are not dutiable save for the explicit indication of their inclusion in subsection 48(5) of the *Act*, which concerns the transaction value method, the CBSA countered that royalties in the present appeal are dutiable since they are included in the selling price of the

25. Customs Co-operation Council, Brussels [*Customs Valuation Agreement Opinions*].
26. Exhibit AP-2013-028-05A at paras. 56-58, Vol. 1.
27. [2001] 2 S.C.R. 100 [*Mattel*].
28. Exhibit AP-2013-028-05A at para. 59, Vol. 1.
29. *Transcript of Public Hearing*, 10 December 2013, at 43, 47-48.
30. Exhibit AP-2012-028-07A at para. 70, Vol. 1A.

concert memorabilia.[31] The CBSA additionally contended that, in the determination of value for duty pursuant to the deductive value method, the *Act* does not contain a provision for the deduction of royalty amounts from the selling price of goods.[32]

38. Addressing Bluestein's sixth argument, that royalties in the context of the deductive value method are in broad terms "general expenses", the CBSA relied on the widely recognized text by S. Sherman and H. Glashof—*Customs Valuation: Commentary on the GATT Customs Valuation Code*.[33] In support of the position that royalties are not "general expenses", the CBSA quoted the following excerpt from the *Commentary*:

> Deductive value . . . under Article 5 provides for customs valuation on the basis of resale price in the country of exportation, less certain deductions. Royalties and licence fees are not expressly mentioned, either in connection with the resale price or the deductions. Except in a situation where the importer resells at a loss, the resale price must cover not only the price of imported goods but also any associated royalty or licence fee. The only deduction provided for which might include a royalty payment or licence fee is "general expenses", and ordinarily generally accepted accounting practice would not characterize such payments as general expenses.[34]

39. As concerns Bluestein's seventh argument, that timing is supportive of the conclusion that the royalties in the instance at hand are "general expenses", the CBSA countered that, quite apart from the opinion offered by the *Commentary* that royalties are not "general expenses", amounts such as royalties which are related to the business activities of the U.S. merchandisers are, in the context of the deductive value method, outside the national ambit defined by the *Act* for both the price per unit and for deductions from it.[35]

40. The CBSA did not directly address Bluestein's eighth argument.

41. Bluestein's ninth argument concerned advisory opinion 4.8 of the *Customs Valuation Agreement Opinions*. In its response to that argument, the CBSA asserted that the scenario in advisory opinion 4.7 more closely resembles the facts in this appeal. Advisory opinion 4.7 sets out a scenario in which a record company enters into an agreement with an artist, in the country of export, concerning royalty payments to be made in exchange for the assignment of the artist's worldwide distribution rights. The record company subsequently enters into a distribution and sales agreement with an importer, assigning those distribution rights to the importer in return for a quantified royalty payment of 10 percent with regard to sales in the country of export.

42. The Technical Committee on Customs Valuation opined that, in such an instance, the quantified royalty payment of 10 percent is a condition of sale for export by virtue of the second agreement, pursuant to which the importer must remit it to the record company. The CBSA contended that, similar to the above scenario, Bluestein is not privy to the contract between the U.S. merchandisers and the U.S. licence holders, but Bluestein's agreements with the U.S. merchandisers stipulate the remittance of royalty amounts, and those amounts are rightly included in the price per unit of the goods.[36]

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31. Exhibit AP-2012-028-07A at para. 50, Vol. 1A.
32. *Ibid.* at para. 52.
33. ICC Publishing S.A., 1987 [*Commentary*].
34. Exhibit AP-2012-028-07A at para. 52, Vol. 1A.
35. Exhibit AP-2012-028-07A at para. 59, Vol. 1A.
36. *Ibid.* at paras. 61, 62.

43. The CBSA did not directly address Bluestein's tenth argument.

ANALYSIS

44. Earlier in these reasons, the Tribunal set out a three-part test regarding the possibility of utilizing the deductive value method. In applying the first element of that test to the facts of this appeal, the Tribunal can conclude that the goods are indeed sold in Canada in the condition in which they were imported and at substantially the same time as the time of importation. The evidence on the record is that the goods are imported in anticipation of concert venue sales. There is no evidence on the record that the goods are further altered in Canada, and there is no evidence on the record that the goods are stored for a substantial amount of time prior to sale.

45. Secondly, the CBSA has demonstrated that a price per unit can be determined with regard to the goods, based on sales to unrelated persons at the first trade level after importation. In this regard, the Tribunal finds that Bluestein's first argument was premised on irrelevant considerations. In the context of the legislative scheme applicable to the deductive value method, it does not matter that goods bound for import have been stored indistinguishably with other goods and, further, it does not matter that some goods are returned to the country of export unsold. The relevant consideration in the *Act* is whether or not a sufficient number of sales occur at the first trade level after importation, allowing for the determination of a price per unit, and without regard to unsold units.

46. Further, Bluestein's related focus on the time of importation was also misplaced. Since the deductive value method requires the occurrence of sales, it is a method that, in a great number of instances, would rely on transactions that occur after importation, not at the time of importation. It is conceivable that, at the time at which the value for duty is determined, some goods will remain unsold and may in fact never be sold, destined for return to the country of export. Seen in this context, the existence in the *Act* of a duty drawback mechanism does not undermine but rather supports the applicability of the deductive value method.

47. The third element of the test regarding the possibility of utilizing the deductive value method concerns deductions from the price per unit. In this regard, the Tribunal is satisfied that the CBSA, in choosing to deduct profit and general expenses pursuant to subparagraph 51(4)(*a*)(ii) of the *Act*, acted in a legislatively sound manner. Thus, the Tribunal finds that the deductive value method can be properly applied to the importations at issue.

48. As concerns the issue of royalties, the Tribunal is not persuaded by Bluestein's fifth argument, the essence of which is that a general rule exists pursuant to which royalties are not dutiable, save for the inclusion indicated in subsection 48(5) of the *Act*. In making that argument, the Tribunal is of the view that Bluestein incorrectly conflated the legislative requirements of the transaction value method and those of the deductive value method.

49. As concerns value for duty determinations, an express indication in one methodology cannot, on its own, ground any inference or conclusion premised on the absence of that indication in a different methodology. What must instead be considered is the internal coherence of each of the various methodologies, which have been set out with a view to producing relatively comparable values for relatively comparable goods, utilizing differing circumstances of importation as starting points.[37]

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37. *Tootsie Roll of Canada Ltd. v Deputy M.N.R.* (16 September 1997), AP-96-114 (CITT). While the transaction value method can be seen as an exercise in price construction, the deductive value method can be considered an exercise in price reconstruction.

50. Thus, Bluestein misapprehended the legislative scheme in seeking to ground a *deduction* of royalties in section 51 of the *Act* on the absence of a stipulation concerning the *addition* of royalties, arguing that the stipulation is contained in section 48 but nowhere else. What is instead clear is that, where already added in a value for duty determination, it would be improper to deduct an amount absent a stipulation to that effect in the *Act*.

51. Taken together, Bluestein's sixth and seventh arguments are that royalties in broad terms are general expenses and, in terms specific to this appeal, are paid at a time supportive of their inclusion in deductions made for general expenses. The Tribunal is not persuaded by either argument. The Tribunal finds the *Commentary* referred to by the CBSA instructive with regard to the conclusion that royalties are not ordinarily characterized as general expenses.

52. Further, reference can be made to the text of paragraph 51(4)(*a*) of the *Act*, which ties general expenses deducted over the course of determining the deductive value of goods to sales in Canada. An implied conclusion is that other expenses exist which are not connected to such sales, and which are not to be deducted. These would rightly include expenses engaged instead by the formation of the goods in the country of export, expenses that, taken together, result in the creation and eventual cross-border shipment of the goods. For the purposes of the deductive value method, the Tribunal is of the view that royalties, when incurred as an expense prior to importation pursuant to the securing of intellectual property rights in the country of export, are expenses engaged by the foreign formation rather than the Canadian sale of the related goods.

53. The timing of payments, including the payment of expenses, is not determinative with regard to their categorization in value for duty calculations.[38] Thus, an expense engaged by the formation of goods does not become one connected to the sale of those goods simply due to the fact that it is paid subsequent to sales. In the ordinary course of trade, an expense engaged by the formation of goods will become owing at some point in the process of formation, and payment may be made at that point or later.

54. Similar to its fifth argument, Bluestein misapprehended the legislative scheme in its eighth argument. In essence, Bluestein's assertion was that, since no upward adjustment is mandated with regard to the determination of value for duty pursuant to the deductive value method if royalties are not paid, such royalties ought to be deducted where paid. However, the absence of a generally mandated adjustment where a type of expense is absent cannot ground the deduction of that expense where present. Such a reading of the *Act* does not hold. Goods differ, and so do the expenses that they attract during the course of their formation and sale. As such, each use of a value for duty methodology is specific to its related facts.

55. As concerns Bluestein's ninth argument, and the CBSA's counter-argument, both of which made reference to the *Customs Valuation Agreement* opinions, it suffices for the Tribunal to note that the opinions referenced by both parties correlate in the *Customs Valuation Agreement*[39] itself to the transaction value method for the determination of value for duty in the *Act*. The intention of both opinions is the determination of the "price paid or payable" rather than the "price per unit", and both opinions pertain to a sale for export. While these distinctions may not nullify the utility of both opinions for all purposes related

38. *Double J Fashion Group Inc. v. President of the Canada Border Services Agency* (14 March 2014), AP-2013-017 (CITT) at para 55.
39. *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*, signed in Geneva, Switzerland, on April 12, 1979, GATT BISD, Supp. 26.

to the deductive value method, the Tribunal finds it prudent to refrain from a mixing of analogies in this instance, particularly since the royalties at issue can be conclusively characterized without a resort to the opinions.

56. Bluestein's tenth argument was premised on *Mattel*, a decision concerning the interpretation of provisions pertaining to the transaction value method. As that decision dealt with the *possible inclusion* of royalty payments in the "price paid of payable" pursuant to section 48 of the *Act*, the Tribunal notes that it is not consonant with the facts and law relevant to this appeal, which concern the *possible exclusion* of royalty payments from the "price per unit" pursuant to section 51.

57. For instance, while pursuant to subsection 48(5) of the *Act*, royalties are to be included in the value for duty of goods *if* they constitute a "condition of the sale" of those goods for export, by operation of subsection 51(3) of the *Act*, the CBSA is effectively entitled to the assumption that, to the extent that expenses are passed on to buyers in Canada at the first trade level after importation, those expenses—inclusive of any royalties paid—enter into the "price per unit" subject to the deductions specifically mandated by the *Act*.

58. Thus, if *Mattel* is broadly characterized as addressing the application of duties on royalties in the context of all value for duty determinations, its applicability to a determination pursuant to the deductive value method would have to be premised on the assumption that, in the ordinary course of trade, a prerogative of refusal to sell unless payment is made attaches to royalty payments incurred as an expense in the country of export. This is because, while section 48 of the *Act* is premised on the construction of an import price, assessing expenses such as royalties for inclusion as relevant, section 51 is premised on the reconstruction of that price by way of specific deductions from a sale price in Canada that already includes relevant expenses.[40]

59. Further, section 51 of the *Act* does not contemplate a sale for export, rendering the key question in *Mattel*, that of whether certain royalty payments constituted a condition of the sale of goods for export, moot.

60. In addition, should *Mattel* be broadly characterized, the deductive value methodology in the *Act* would effectively be altered by way of the reading in of a deduction not specifically mandated by subsection 51(4) of the *Act*. That deduction would pertain to royalty payments in instances where it cannot be proven by the CBSA that they were paid pursuant to a prerogative of refusal to sell unless payment is made.

61. In light of the above, it is the Tribunal's conclusion that the deductive value method can be properly applied to the importations at issue. As Bluestein removed the question from consideration, the Tribunal sees no basis for a conclusion regarding the related issue of whether or not the CBSA correctly applied the deductive value method in limiting the deduction of profits to those realized within Bluestein's fees. Further,

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40. Should this broad characterization of *Mattel* be accurate, which in the Tribunal's opinion is not the case, an appellant such as Bluestein may be entitled to the rebuttal of the assumption that, for the application of the deductive value method to its importations, a prerogative of refusal to sell unless payment is made attaches to any royalty payments incurred as an expense in the country of export. In this instance, Bluestein has not adduced any evidence in rebuttal, in order to discharge the onus that it consequently bears. *Les Produits Laitiers Advidia Inc. v. Commissioner of the Canada Customs and Revenue Agency and Dairy Farmers of Canada* (8 March 2005), AP-2003-040 (CITT).

the Tribunal concludes that the royalties paid by the U.S. merchandisers to the U.S. licence holders cannot be deducted from the "price per unit" pursuant to the reasoning that royalties are non-dutiable and, in addition, they cannot be deducted from the "price per unit" pursuant to the reasoning that they constitute "general expenses" in connection with sales in Canada.

DECISION

62. The appeal is dismissed.

Serge Fréchette
Serge Fréchette
Presiding Member