



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-012

J. Lamb

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, March 6, 2015*

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 DECISION 6

IN THE MATTER OF an appeal heard on December 2, 2014, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 18, 2014, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

J. LAMB

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 2, 2014
Tribunal Member: Daniel Petit, Presiding Member
Counsel for the Tribunal: Jidé Afolabi
Registrar Officer: Haley Raynor

PARTICIPANTS:**Appellant**

J. Lamb

Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Mr. J. Lamb with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*.¹ Mr. Lamb is appealing a re-determination of the value for duty of his imported 2011 Volvo XC90 (the Volvo), made pursuant to subsection 60(1) by the President of the Canada Border Services Agency (CBSA).

2. The sole issue in this appeal is whether, pursuant to the residual method for the determination of value for duty as set out in section 53 of the *Act*, the value for duty of the Volvo should be determined on the basis of a flexible application of the deductive value method with reference to the *Canadian Automobile Red Book – Official Used Car Valuations* (the *Red Book*),² as the CBSA has determined, or with reference to the appraised value of the vehicle, as Mr. Lamb has submitted.

PROCEDURAL HISTORY

3. On October 22, 2010, Mr. Lamb bought the Volvo in Germany for CAN\$38,558.09.³

4. On August 21, 2013, Mr. Lamb imported the Volvo into Canada from Germany. The Volvo arrived in Halifax on September 9, 2013.⁴

5. At the time of the arrival of the Volvo in Halifax, the CBSA determined its retail value to be \$34,925.00 based on the October 1, 2013, to December 31, 2013, edition of the *Red Book*.⁵ From that amount, the CBSA deducted 5% in Goods and Services Tax, 6.1% in duty, as well as a personal exemption in the amount of \$10,000 pursuant to tariff item No. 9805.00.00,⁶ and thus arrived at a value for duty of \$21,349.58. In arriving at this value, the CBSA utilized the residual method pursuant to section 53 of the *Act*.

6. On October 26, 2013, Mr. Lamb had the Volvo appraised at a Volvo dealership in Ottawa. An employee of the dealership concluded that the Volvo possessed a retail value of \$23,460.⁷ Thus, Mr. Lamb's position is that the value for duty of the Volvo should be \$13,460, a figure arrived at after the deduction of the aforementioned personal exemption in the amount of \$10,000.⁸

7. On November 8, 2013, on basis of the appraised value of the Volvo, Mr. Lamb filed a "request for a refund of duty" pursuant to paragraph 74(1)(e) of the *Act*. On November 12, 2013, the CBSA denied Mr. Lamb's request pursuant to paragraph 59(1)(a).⁹

8. Subsequently, on November 28, 2013, Mr. Lamb submitted a request for a re-determination of the value for duty of the Volvo, pursuant to subsection 60(1) of the *Act*. The CBSA denied that request on March 18, 2014.¹⁰

1. R.S.C., 1985, c. 1 (2nd Supp) [*Act*].

2. Respondent's Brief, Tab 5 at 1-4.

3. Respondent's Brief at para. 4.

4. *Ibid.*

5. Respondent's Brief at para. 6.

6. Respondent's Brief, Tab 4 at 1.

7. Appellant's Brief, Tab 9; Appellant's Brief at para. 2.

8. Respondent's Brief, Tab 4 at 1.

9. Respondent's Brief at para. 8.

10. *Ibid.*

9. On May 20, 2014, Mr. Lamb filed his notice of appeal with the Tribunal.¹¹

10. On September 19, 2014, Mr. Lamb requested that the hearing proceed by way of written submissions. The CBSA agreed with Mr. Lamb's request on September 24, 2014.¹² Thus, on the same day, the Tribunal advised the parties that the hearing would proceed by way of written submissions.

DESCRIPTION OF THE GOOD IN ISSUE

11. The 2011 Volvo XC90 is a motor vehicle designed primarily for the transport of persons. It has a 3.2 litre engine, that is, a 3,200 cubic centimetre cylinder capacity.¹³

STATUTORY FRAMEWORK

12. Section 44 of the *Act* provides that a tariff rate is applicable to the value of imported goods in accordance with sections 45 to 55.

13. Sections 48 to 55 of the *Act* then proceed to list a number of methods by which the value of such goods can be determined. It is only to the extent that the value for duty of imported goods cannot be appraised on the basis of their transaction value that any subsidiary bases of appraisal can be considered. Whenever recourse to another method of valuation is necessary, the order of priority stipulated in subsection 47(2) must be followed. The order in which each method is to be applied is set out in section 47 as follows:

- (1) section 48 – the transaction value of the goods;
- (2) section 49 – the transaction value of identical goods that meets the requirements;
- (3) section 50 – the transaction value of similar goods that meets the requirements;
- (4) section 51 – the deductive value of the goods;
- (5) section 52 – the computed value of the goods; and
- (6) section 53 – the residual method.

POSITIONS OF PARTIES

14. According to the CBSA, each of the methods set out in sections 48 to 52 of the *Act* is inapplicable with regard to the determination of the value for duty of the Volvo for the following reasons:

- (1) the transaction value method does not apply because the Volvo was not sold for export to Canada;
- (2) the method regarding the transaction value of identical goods does not apply because it is very difficult to find sales for export to Canada of used Volvos that are identical to the good in issue;
- (3) the method regarding the transaction value of similar goods does not apply because it is very difficult to find sales for export to Canada of used vehicles similar to the good in issue;

11. Appellant's Brief.

12. Respondent's Communications to Appellant (September 24, 2014).

13. Respondent's Brief at para. 31.

- (4) the deductive value method does not apply because the Volvo was not resold and is not set for resale in Canada; and
- (5) the computed value method does not apply because that method bases the value of the good on the cost of production, and the Volvo is not produced as a used good.¹⁴

15. As a result, the CBSA asserted that section 53 of the *Act*, detailing the residual method, should be applied and, further, that the application of that section should be premised on the flexible application of the deductive value method. Mr. Lamb did not disagree with the CBSA on the applicability of section 53, and did not assert the applicability of an alternative section.¹⁵

16. Section 53 of the *Act* provides as follows:

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.

17. The CBSA argued that a flexible application of the deductive value method, undertaken pursuant to the terms of the residual method under section 53 of the *Act*, is best achieved through the use of the *Red Book*. In support of its position, the CBSA asserted that, “[a]ccording to the Ontario government, the Red Book is an accepted industry standard for determining the value of a used car by listing its wholesale and retail values” and, further, that “[t]he Red Book is an accepted industry standard used by car dealers, insurance companies, and other provincial governments”¹⁶

18. In addition, the CBSA noted that the Tribunal upheld the utilization of the *Red Book* with regard to the determination of the retail value of a car in a previous value-for-duty case.¹⁷

19. Further, the CBSA submitted that Mr. Lamb’s appraisal was undertaken contrary to the CBSA’s published approach to the valuation of imported personal vehicles as set out in Memorandum D13-10-2. That memorandum stipulates that the importer should provide the retail sale value in the country of export for an identical or similar vehicle in average conditions as determined by neutral sources. Should the importer be unable to provide such a value, the memorandum indicates that the CBSA will utilize the *Red Book*.¹⁸ In this instance, Mr. Lamb provided a value from a neutral source in the country of import, Canada, rather than the country of export, Germany.

20. In addition, the CBSA contended that, upon inquiries made by it to the Volvo dealership where Mr. Lamb’s Volvo had been appraised, the General Manager of the dealership indicated that the individual who undertook the appraisal no longer worked for the dealership and, further, that the dealership has no

14. Respondent’s Brief at paras. 19-25.

15. Appellant’s Brief at para. 3.

16. Respondent’s Brief at paras. 36-37.

17. *Ibid.* at 16; *Peter Kanis Jr. v. The Deputy Minister of National Revenue for Customs and Excise* (5 May 1993), AP-92-106 (CITT).

18. Memorandum D13-10-2, Respondent’s Brief, Tab 3; Final Decision, File Number: M0336341 (March 18, 2014), Exhibit AP-2014-012-01A.

record of the appraisal. Further still, the General Manager refuted the appraisal, and substituted an approximate generic value of \$33,000.¹⁹

21. For his part, Mr. Lamb asserted that the CBSA erred in using the *Red Book* to determine the value for duty of the Volvo in the face of an appraisal undertaken by a neutral and expert party.²⁰

22. Further, Mr. Lamb took the position that the CBSA's utilization of the *Red book* was additionally erroneous due to the fact that his Volvo was purchased in Germany but manufactured to US specifications, rendering the *Red Book*, an authority listing Canadian vehicles, inaccurate for the purposes of his vehicle. Along this vein, he argued that a Volvo XC90 built to US specifications possesses a value that is substantially less than one built to Canadian specifications for the Canadian market.²¹

23. Mr. Lamb also argued that it would have been unreasonable to get his Volvo appraised before exporting it to Canada, for two reasons. The first is that he had expected that the CBSA would determine an "accurate" value for his Volvo.²² The second is that, in his reasoning, it was unreasonable to expect an individual to acquire "... an accurate valuation of a US Spec car for the Canadian market while the vehicle is situated in Germany."²³ In his contention, the impracticality of such a requirement meant any required appraisal would have to await the arrival of the vehicle in Canada.

ANALYSIS

24. The Tribunal is not faced with whether, but rather how, section 53 of the *Act* should be applied in arriving at a value for the imported Volvo, for the purpose of the calculation of duty. In that regard, the sole discord between the parties concerns the use of the *Red Book*, on the one hand, or an appraisal acquired in Canada, on the other hand.

25. In adjudicating this dispute, it is important to start by noting that subsection 152(3) of the *Act* places the onus on Mr. Lamb.²⁴ Thus, it is for Mr. Lamb to establish that his preferred approach properly constitutes a possible flexible application of the deductive value method pursuant to section 53 and, further,

19. Respondent's Brief at paras. 14-15. The General Manager also substituted a specific value of \$26,000 to \$29,000 with regard to Mr. Lamb's own Volvo. That valuation was also arrived at without the benefit of an actual physical inspection.

20. Appellant's Brief at para. 3.

21. *Ibid.* at para. 4.

22. *Ibid.* at para. 7.

23. *Ibid.* at para. 8.

24. Section 152 of the *Act* provides in part as follows:

152. (1) In any proceeding under this Act relating to the importation or exportation of goods, the burden of proof of the importation or exportation of the goods lies on Her Majesty.

(2) For the purpose of subsection (1), proof of the foreign origin of goods is, in the absence of evidence to the contrary, proof of the importation of the goods.

(3) Subject to subsection (4), in any proceeding under this Act, the burden of proof in any question relating to

(a) the identity or origin of any goods,

(b) the manner, time or place of importation or exportation of any goods,

(c) the payment of duties on any goods, or

(d) the compliance with any of the provisions of this Act or the regulations in respect of any goods

lies on the person, other than Her Majesty, who is a party to the proceeding

Thus, once the Crown has established the importation of the goods, subsection 152(3) provides that the burden of proof in any question relating, *inter alia*, to the payment of duties on any goods or the compliance with any of the provisions of the *Act* lies on the party to the proceedings other than the Crown.

that it represents a more appropriate application of that method, flexibly undertaken, compared to the approach utilized by the CBSA.²⁵ In other words, Mr. Lamb has the burden of establishing that the CBSA erred in the way it chose to apply the deductive value method in a flexible manner in order to appraise the value for duty of the Volvo pursuant to section 53.

26. The deductive value method concerns the use of a “price per unit” in arriving at a value for duty. In this regard, subsection 51(3) of the *Act* indicates in part as follows:

(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 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.

27. Thus, in arguing for the use of an appraisal acquired in Canada in the calculation of the value for duty of his imported Volvo, it is important that Mr. Lamb establish that such an appraisal represents a plausible price per unit, possibly through the submission of evidence showing that a sufficient number of sales are completed in Canada on the basis of specific appraisals.

28. Should Mr. Lamb meet the above test, and should the CBSA meet it also, it would then be important for Mr. Lamb to establish that his approach represents a more appropriate application of the deductive value method, flexibly undertaken, compared to the CBSA’s approach. Mr. Lamb would be able to accomplish this in a number of ways. For instance, subsection 51(3) of the *Act* refers to the price “at which the greatest number of units of the goods is sold”. A flexible application of that excerpt might lead to an assertion by him, supported by evidence, that more used vehicles are sold on the basis of appraisals than are sold on the basis of the *Red Book*, or that one approach is a more authoritative approach to the pricing of used vehicles than the other.

29. On the basis of the documentary evidence before it, the Tribunal cannot conclude that Mr. Lamb has discharged the onus upon him. There is no evidence or argument from Mr. Lamb on the record regarding why an appraised value arrived at in Canada would represent a plausible price per unit for his imported Volvo. Even assuming that the Tribunal nonetheless finds it reasonable to conclude, on the basis

25. It is important to make clear that the parties are not in disagreement over the use of the deductive value method with regard to the application of section 53 of the *Act*. That is, the Tribunal is not faced with a situation in which one party is arguing for the flexible use of the deductive value method, and another is arguing for the flexible application of another method of appraisal, such as, for instance, the flexible use of the transaction value method. Thus, the question the Tribunal faces is not which of the two provided options, in the language of section 53, “conforms closer to the requirements with respect to that method than any other method”. Rather, the question concerns the possibility that one of those options might not properly constitute a flexible approach to the application of the deductive value method, and should both constitute a possible flexible manner to apply the deductive value method, that one might be more appropriate to use than the other.

of its own reasoning, that a sufficient number of used vehicle sales are completed in Canada on the basis of specific appraisals, Mr. Lamb's position remains untenable upon the consideration of the second test as set out above.

30. Mr. Lamb has provided no authority to support the supposition that his approach represents a more appropriate application of the deductive value method, flexibly undertaken, compared to the CBSA's approach. In contrast, the CBSA has gone to some length to underscore the authority of the *Red Book* with regard to used vehicle sales in Canada. The CBSA's reasoning, that the *Red Book* as an accepted industry standard should compare more favourably against a single appraisal, is compelling. Compared against that appraisal, the *Red Book* constitutes a more authoritative approach to the pricing of used vehicles and, thus, a more appropriate application of the deductive value method.

31. It is noteworthy that Mr. Lamb's case was not assisted by the fact that the appraisal he sought to rely on was refuted by the General Manager of the car dealership that supposedly issued it. Further, the Tribunal finds the fact that Mr. Lamb's Volvo was purchased in Germany but manufactured to US specifications irrelevant to the issue in this appeal, which pertains to the determination of the value for duty of a used vehicle imported from Germany.²⁶

CONCLUSION

32. For the foregoing reasons, the Tribunal concludes that, on the basis of section 53 of the *Act*, the value for duty of the Volvo should be determined based on a flexible application of the deductive value method with reference to the *Red Book*, as determined by the CBSA.

DECISION

33. The appeal is dismissed.

Daniel Petit
Daniel Petit
Presiding Member

26. Also, the Tribunal notes that the CBSA's indication that an independent appraisal undertaken in Germany would have been acceptable and could constitute a flexible application of the transaction value method within the ambit of section 53 of the *Act* and, thus, a valid approach to valuation.