Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2019-002

Landmark Trade Services

v.

President of the Canada Border Services agency

Decision and reasons issued Monday, January 13, 2020

Canada

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IN THE MATTER OF an appeal heard on October 8, 2019, 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 25 January, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

LANDMARK TRADE SERVICES **Appellant**

AND

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

DECISION

The appeal is allowed.

Peter Burn

Peter Burn
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 8, 2019
Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Sarah Perlman, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Landmark Trade services	Wendy Wagner Hunter Fox

Respondent	**Counsel/Representatives**
The President of the Canada Border Services Agency	Gabrielle White Alexander Gay

WITNESSES:

Ryan Drouillard Vice President Landmark Trade Services	Alan Dewar Executive Vice President Geo. H. Young & Co. Ltd.
Cora Di Pietro General Manager and Vice President Livingston International Inc.	Nicholas Leonard Senior Recourse Program Advisor Canada Border Services Agency

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Landmark Trade Services (Landmark) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision by the President of the Canada Border Services Agency (CBSA) dated January 25, 2019, made pursuant to subsection 60(4).

2. Landmark challenges the validity of the CBSA's decision on the basis that Landmark is not a "prescribed person" to whom notice of re-determination may be given. The main issue in this appeal is whether Landmark is the importer of the goods in issue.

PROCEDURAL HISTORY

3. Landmark is a licensed customs broker in Canada. It uses its "customs broker non-commercial imports account" to account for shipments of e-commerce purchases imported by individual customers.

4. The relevant transactions occurred from January 1 to March 31, 2017, where various foodstuffs, namely freeze-dried yogurts, cheeses, butter, eggs, powdered milk, quinoa, whole-wheat flour, and freeze-dried fruit (goods in issue) were imported into Canada. Landmark declared itself as the importer in its interim accounting, with its business number indicated on the B3 Canada Customs Coding Forms (B3 Forms). It originally declared these goods under tariff item Nos. 1517.90.91, 2104.10.00, 2106.10.00, 2106.90.99, 2936.90.00, and 4901.99.00. Landmark also paid the applicable duties and taxes.

5. In early 2018, the CBSA initiated a Trade Compliance Verification of tariff classification against Landmark under sections 42 and 42.01 of the *Act*. On April 16, 2018, the CBSA issued a Trade Compliance Verification Interim Report whereby it determined that Landmark was the importer of record and that all examined transactions had incorrect tariff classification. The CBSA accepted that the goods in issue were generally destined to household addresses for non-commercial uses and were eligible for exemption of tariff-rate quota on agricultural products "within access commitment" to a set amount specified in *General Import Permit 1* and *8*,[2] with goods in excess classified as "over access commitment" as per *General Import Permit 100*.[3] Accordingly, the CBSA re-determined the classification of the goods in issue under tariff item Nos. 0402.10.10, 0402.10.20, 0403.10.10, 0403.10.20, 0405.90.10, 0405.90.20, 0406.20.11, 0406.20.12, 0406.20.91, 0406.20.92, 0406.90.11, 0406.90.12, 0408.91.10, 0408.91.20, 0813.40.00, 1008.50.00, 1101.00.20 and 3502.11.20.

6. Landmark objected to the Interim Report, arguing that it was not the true importer of the goods and should therefore not be liable for any further duties.

7. On June 22, 2018, the CBSA issued the Trade Compliance Verification Final Report, maintaining its position and confirming Landmark as the importer of the goods in issue. The CBSA subsequently issued Detailed Adjustment Statements (DASs) under subsection 59(1) of the *Act* on that basis, re-determining the tariff classification of the goods in issue as indicated above.[4] In addition, the CBSA directed Landmark to correct all other transactions of the same goods that were verified for the previous four years.

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1. R.S.C., 1985, C. 1 (2nd Supp.) [*Act*].
2. *General Import Permit No. 1 – Dairy Products for Personal Use*, SOR/95-40 [*GIP 1*]; *General Import Permit No. 8 – Eggs for Personal Use*, SOR/95-42 [*GIP 8*].
3. *General Import Permit No. 100 – Eligible Agriculture Goods*, SOR/95-37.
4. Pursuant to subsection 59(2) of the *Act* and subsection 3(2) of the *Determination, Re-determination and Further Re-determination of Origin, Tariff Classification and Value for Duty Regulations*, a notice of determination, re-determination or further re-determination shall be given to the importer of the goods, among others.

8. Landmark complied and filed self-corrections of the tariff classification for those goods.

9. On September 18, 2018, Landmark filed a request for further re-determination pursuant to subsection 60(1) of the *Act*. Landmark contested the tariff classification decision without providing arguments or supporting documentation concerning tariff classification itself. Rather, Landmark once again challenged its liability for the payment of duties.

10. On January 25, 2019, the CBSA issued a decision pursuant to subsection 60(4) of the *Act*. It found that its powers were restricted thereunder and that it had no authority to deal with the issues raised by Landmark, other than tariff classification. Since Landmark made no submissions regarding the tariff classification itself, the CBSA upheld the section 59 decisions.

11. On April 10, 2019, Landmark filed this appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

12. The Tribunal held a public hearing in Ottawa, Ontario, on October 8, 2019. Landmark called Ryan Drouillard, Vice President for Landmark, Cora Di Pietro, General Manager and Vice President for Livingston International Inc., and Alan Dewar, Executive Vice President for Geo. H. Young & Co. Ltd., as lay witnesses.[5] The CBSA called Nicholas Leonard, Senior Recourse Program Advisor for the CBSA, also as a lay witness.[6]

ISSUE

13. The issue in this appeal is whether Landmark is the "importer" of the goods in issue, as determined by the CBSA. The impact of such a determination is twofold.

14. Firstly, the application of *GIP 1* and *8* depends on the identity of the importer, as goods eligible to tariff-rate quota exemption thereunder must be "for the personal use of the importer and the importer's household".[7] If Landmark is found to be the importer, then the goods are not eligible to the benefits of *GIP 1* and *8* and the "within access commitment" tariff classification, and should be classified under tariff items pertaining to goods "over access commitment".

15. Secondly, as the DASs were issued to Landmark on the basis that it was the importer of record, their validity hinges on Landmark being the importer. Should the Tribunal find that Landmark was not the importer, the DASs issued to Landmark would be invalid.

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5. At the hearing, the CBSA questioned whether Ms. Di Pietro and Mr. Dewar were testifying as expert or lay witnesses, as well as the relevance of their testimony. Landmark submitted that the Tribunal does not have formal rules of evidence, and that the witnesses, although not formal experts, could assist the Tribunal in understanding the customs brokerage industry. The Tribunal agreed with Landmark and allowed the testimony to proceed; *Transcript of Public Hearing* at 63-66; see e.g. *Best Buy Canada Ltd., P & F USA Inc. and LG Electronics Canada Inc. v. President of the Canada Border Services Agency* (27 February 2017), AP-2015-034, AP-2015-036 and AP-2016-001 (CITT) at para. 71.
6. As Mr. Leonard was not excluded from the hearing during the testimony of Landmark's witnesses, the parties agreed that Mr. Leonard would not testify to the facts of the case, but only to processes; *Transcript of Public Hearing* at 62-63.
7. *GIP 1*, s. 3(1); *GIP 8*, s. 3.

JURISDICTION

16. Although the parties agreed that the Tribunal has jurisdiction in this appeal, they disagreed as to the basis of that jurisdiction. Landmark argued that the Tribunal has jurisdiction to set aside DASs for any reason,[8] whereas the CBSA submitted that the Tribunal does not generally have jurisdiction to hear appeals regarding the identity of the importer.[9] However, in this case the CBSA submitted that it would be appropriate for the Tribunal to determine the identity of the importer since this is determinative of the proper tariff classification of the goods in issue due to the potential application of *GIP 1* and *8*.[10]

17. The Tribunal's jurisdiction in customs appeals is rooted in section 67 of the *Act*: the Tribunal may hear appeals from decisions of the President of the CBSA made under section 60 or 61. In *C.B. Powell I*, the Federal Court of Appeal stated that "[a]bsent extraordinary circumstances, . . . parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called 'jurisdictional' issues."[11] The Court also found that it was for the Tribunal to interpret the word "decision" in subsection 67(1) and decide whether it has jurisdiction to hear the appeal.[12]

18. In *C.B. Powell II*, the Tribunal noted that "the only decisions that the President of the CBSA is authorized to make pursuant to subsection 60(1) of the *Act* are re-determinations and further re-determinations of the tariff classification, origin and value for duty of goods that were the subject of a decision pursuant to subsection 59(2)."[13] In that case, C.B. Powell was challenging the origin/tariff treatment of goods following the re-determination of their tariff classification by the CBSA. The Tribunal noted that tariff classification is separate and distinct from origin/tariff treatment and that, absent a decision of the CBSA on origin/tariff treatment pursuant to subsection 60(1), the Tribunal had no jurisdiction to consider the appeal under subsection 67(1).[14]

19. *C.B. Powell II* was appealed to the Federal Court of Appeal, which upheld the Tribunal's decision. The Court noted that there may be situations where the Tribunal will find that implied decisions were made by the CBSA, and that these situations would be determined on a case-by-case basis, taking into consideration the purposes of Part III of the *Act* and its administrative regime.[15]

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8. *Pier 1 Imports (U.S.), Inc. v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 963 (CanLII) [*Pier 1*]; *Grodan Inc. v. President of the Canada Border Services Agency* (1 June 2012), AP-2011-031 (CITT) [*Grodan*]; *Fritz Marketing Inc. v. Canada*, [2009] 4 FCR 314, 2009 FCA 62 (CanLII) [*Fritz Marketing*]; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII) [*C.B. Powell I*].
9. The CBSA argued that the Federal Court has jurisdiction to decide whether a party is an "importer" in remission orders under the *Act* as per *Honey Fashions Ltd. v. Canada (Border Services Agency)*, 2018 FC 1118 (CanLII). However, the Tribunal notes that the Federal Court's jurisdiction to hear the matter was not challenged by the parties and that the matter did not pertain to section 59, 60, 61 or 67 of the *Act*.
10. The CBSA submitted that the goods in issue fell into two groups: (1) those where personal import exemptions were applied contrary to the conditions of the applicable permit, resulting in incorrect tariff classification; and (2) those where personal import exemptions were not applied and whose tariff classification is not in issue. The CBSA submitted that although the Tribunal would not normally have jurisdiction over the goods in group 2, it has jurisdiction over the goods in group 1 and it would therefore be appropriate for the Tribunal to determine the identity of the importer with respect to all relevant transactions.
11. *C.B. Powell I* at paras. 4, 31, 46.
12. *Ibid.* at paras. 5, 47-50. In addition, the Federal Court stated as follows in *Pier 1* at para. 29: "Generally speaking, adjudicative bodies such as the CITT (and the CBSA President exercising the powers under section 60 of the Act) may consider any legal question that is necessary to determine the issue that falls under their jurisdiction."
13. *C.B. Powell Limited v. President of the Canada Border Services Agency* (11 August 2010), AP-2010-007 and AP-2010-008 (CITT) [*C.B. Powell II*] at para. 29.
14. *Ibid.* at paras. 35, 39-41.
15. *C.B. Powell Limited v. Canada (Border Services Agency)*, 2011 FCA 137 (CanLII) at paras. 31-34.

20. In the current case, the CBSA made a decision pursuant to subsection 60(4), re-determining the tariff classification of the goods in issue as indicated above. In doing so, the Tribunal finds that the CBSA made an implied decision on the identity of the importer. Indeed, due to the potential application of *GIP 1* and *8* and the "within access commitment" tariff items, the CBSA necessarily had to consider who the importer of the goods in issue was in order to determine whether they were for the personal use of the importer and the importer's household. The Tribunal therefore has jurisdiction to hear this appeal and to determine the identity of the importer for purposes of tariff classification pursuant to subsection 67(1).

21. Furthermore, as the CBSA issued the DASs to Landmark as the importer of the goods in issue, the Tribunal's decision with regard to the identity of the importer will necessarily affect the validity of the DASs. As indicated in *Grodan*, "the Tribunal has the authority under section 67 of the *Act* to determine not only the correctness of a decision made under section 60 but also its validity."[16] In that case, the Tribunal stated that a decision that is not valid on jurisdictional grounds should not stand, and that the Tribunal is authorized to "deal with" it by making "such order, finding or declaration as the nature of the matter may require", in accordance with subsection 67(3) of the *Act*.[17]

22. The Tribunal therefore finds that, in these circumstances, it has jurisdiction to hear Landmark's appeal pursuant to subsection 67(1) of the *Act* and to determine the validity of the CBSA's decision.

POSITIONS OF THE PARTIES

23. In order to understand the parties' positions, it is first necessary to understand the role of the different actors involved in the importation of the goods in issue.

24. Landmark is a licensed customs broker in Canada, and is a corporate affiliate of Landmark Global Inc. (LGI). LGI is a logistics company based in the U.S. that provides services relating to the shipment of goods. LGI had a contract for logistic services with an unaffiliated third party logistics provider, who in turn provided services to the foreign vendor of the goods in issue.[18]

25. The goods in issue were sold by the foreign vendor to individual Canadian e-commerce purchasers. In these transactions, Landmark acted solely as a customs broker for LGI.[19] Landmark used its customs broker import account to account for the goods in issue. The goods were not accounted for under the Courier Low Value Shipment (CLVS) program using the CLVS consolidated entry, as the goods were foodstuffs ineligible for the CLVS program. Rather, Landmark used non-consolidated B3 Forms to account for the goods, filing the required import documents and paying the applicable duties and taxes.

26. The Tribunal will now turn to the parties' positions.

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16. *Grodan* at para. 33. The Tribunal also noted in paras. 29-31 that "Parliament intended to confer on the Tribunal broad appellate jurisdiction", that this "authority is broader than just determining the correct tariff classification, origin or value for duty *per se*", and that this is reinforced by section 16 of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.), which states that the duties and functions of the Tribunal are, *inter alia*, to "hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, and all matter related thereto".
17. *Grodan* at paras. 34, 41.
18. *Transcript of Public Hearing* at 7, 9-11, 14, 56-59.
19. *Transcript of Public Hearing* at 7, 9-10.

Landmark

27. Landmark submitted that a customs broker is not the importer, owner, any person liable for payment of duties at the time of release, or the person who accounted for the goods under subsection 32(1), (3) or (5) of the *Act*. Landmark therefore submitted that the CBSA had no authority to issue the notice of re-determination to it, nor to require that it pay duties or make corrections resulting from the CBSA's verification.

28. Landmark submitted that an "importer" is the intended recipient of the goods in Canada, and that it is wrong to assert that someone is an importer simply because its business name is listed on declaration documents.[20] Landmark also submitted that the identity of the importer depends on the commercial realities between the parties involved.[21]

29. Landmark submitted that it is not the "importer" for the relevant transactions because it did not purchase the goods, participate in the structuring of the sales transaction, receive the goods, or benefit financially from the sale of the goods, apart from a small customs brokerage fee.[22] According to Landmark, the fact that it used its importer account for the purpose of customs documentation is not determinative of liability. Rather, Landmark submitted that it acted as an agent in these transactions.

30. Furthermore, Landmark submitted that the CBSA's long-standing practice is that it will not consider customs brokers liable as the "importer" and that any customs broker liability would arise from penalties imposed in relation to its customs broker functions, whereas liability for failure to pay duties is prescribed against importers.[23] Landmark also submitted that, looking into the legislative history of the *Act*, the definitions of "owner", "importer" and "exporter" were removed from the *Act* to limit the liability of customs brokers.[24]

31. Landmark also argued that it is not the owner, any person liable for payment of duties at the time of release, or a person who accounted for the goods under subsection 32(1), (3) or (5). However, the Tribunal finds that it need not consider these arguments since the DASs were issued to Landmark on the basis that it was the importer, and their validity relies solely on whether Landmark is in fact the importer.

32. Finally, Landmark noted that it would be absurd to subject it to audit and make it liable for duties where it cannot meet the burden of proof regarding the goods in issue. Landmark submitted that it relied on information provided to it by the foreign vendor, over which it has no control, and that it therefore has no ability to contest the tariff classification proposed by the CBSA.

CBSA

33. The CBSA submitted that the definition of "importer" as "the person who is in reality the importer of the goods" in the *Special Import Measures Act* should be adopted.[25] The CBSA also submitted that it can be inferred from the definition of "import" in section 2 of the *Act* that the importer is the person who performs or causes the importation.[26] The CBSA argued that, in light of all the facts of the case, Landmark is properly identified as the importer.

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20. *Price Chopper Canada Inc. v. The Queen*, 2008 TCC 451 (CanLII) at para. 25.
21. *Canada v. Singer Manufacturing Co.*, [1968] 1 Ex CR 129; *Artificial Graphite Electrodes and Connecting Pins (Re)*, [1987] CIT No 14 [*Artificial Graphite*].
22. *Transcript of Public Hearing* at 6-8, 11-13.
23. Exhibit AP-2019-002-06A, Vol. 2 (protected) at 397-417.
24. Exhibit AP-2019-002-06, Vol. 1 at 100-105, 173-174.
25. Subsection 2(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 [*SIMA*].
26. Subsection 2(1) of the *Act* defines "import" as "import into Canada". The CBSA further relies on dictionary definitions of "importer" to support its position: *Black's Law Dictionary* defines importer as "[a] person or entity

34. The CBSA submitted that there was no evidence that the Canadian consumers who purchased the goods in issue knew that they were being imported, that Landmark would account for the goods on their behalf, or that any duties and taxes may be owed. The CBSA submitted that Landmark imported the goods in issue through the commercial stream, using its business account to account for the goods and pay duties, without having a valid agency agreement with individual Canadian consumers.[27] The CBSA submitted that Landmark's actions went beyond those of a traditional customs broker and that Landmark caused the goods to be imported into Canada. Accordingly, the CBSA submitted that it was entitled to refuse to transact business with Landmark as an agent, and to treat Landmark as the importer of the goods in issue.

35. Finally, the CBSA submitted that, since the appeal is heard on a *de novo* basis, the Tribunal has the authority to hear evidence on the correctness of the application of personal exemptions.

36. Although the CBSA agreed that the goods in issue were in some cases imported for the personal use of Canadian consumers, it submitted that the personal exemptions under *GIP 1* and *8* should not have been applied since Landmark is the importer of the goods in issue. The CBSA submitted that the goods in issue should be classified under the tariff items pertaining to "over access commitment" where applicable.

ANALYSIS

37. The Tribunal will now determine whether Landmark is the importer of the goods in issue.

Landmark is not the importer

38. Contrary to the CBSA's submissions above, Landmark submitted that it does not meet the definition of "importer" in *SIMA*, or any other definition submitted by the CBSA. The Tribunal agrees for the reasons that follow.

Landmark is not in reality the importer of the goods in issue

39. Landmark and the CBSA agree that the definition of "importer" in *SIMA* cited above is applicable in the context of customs, and therefore to this appeal.[28] Although the Tribunal is of the view that this definition is not strictly applicable to the *Act*, it is nevertheless useful in determining who the importer is in the context of the *Act*.

40. The predecessor to the Tribunal, the Canadian Import Tribunal (CIT), considered the question of who is "in reality" the importer of goods under *SIMA* in *Artificial Graphite*.[29] In that case, goods were exported by Airco Carbon Division of The BOC Group, Inc. (Airco) (the manufacturer), and were consigned to Eastern Steelcasting Division/Ivaco Inc. (Ivaco) (the purchaser of the goods). The importer of

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that brings goods into a country from a foreign country and pays customs duties"; the *Larousse* dictionary defines "importateur" (*importer*) as "qui fait des importations" (*one who imports*), and "importation" (*import*) as "action d'importer, de faire entrer dans un pays des produits soumis ou non aux tarifs douaniers; action de faire entrer dans un pays un usage, un produit, etc." (*the act of importing, of bringing goods into a country, whether or not they are subject to customs duties; the act of bringing into a country a custom, a product, etc.*).

27. Subsection 10(1) of the *Act* and *Memorandum D1-6-1 – Authority to Act as Agent*; Exhibit AP-2019-002-06A, Vol. 2 (protected) at 293-294.
28. Subsection 2(8) of *SIMA* states that "[f]or greater certainty, this Act shall be considered, for the purposes of the *Customs Act*, to be a law relating to the customs."
29. The CBSA argued that *Artificial Graphite* was distinguishable from the present case on the basis that the purchaser in that case was aware and consented to the goods being imported from another country. However, the Tribunal is not convinced that such ignorance, even if true, would transform a paper intermediary into an importer.

record and vendor was Speer Canada, Division of Canadian Oxygen Limited (Speer Canada), which was owned by The BOC Group Inc. plc. The Canada Customs Invoices indicated that Airco was the vendor, Speer Carbon Company was the purchaser, and that the consignee was Speer Canada c/o Ivaco at the address of Ivaco's plant. Speer Canada, as the agent for Airco, facilitated the clearance of the goods and the payment of duties. Ivaco then paid Speer Canada, but claimed not to be aware of any agency arrangement between Speer Canada and Airco.

41. The CIT noted that identification of the real importer must be examined in light of the scheme of the relevant provisions of *SIMA*. The CIT stated that liability for payment of anti-dumping duties is placed on the importer of dumped goods to discourage and deal with the mischief of dumping. The CIT stated that, in identifying the importer, *SIMA* had concern for substance as opposed to form. The CIT noted that "the simple designation of a person or firm in the Customs entry documents as the importer (the so-called importer of record) obviously has little meaning."

42. Ultimately, the CIT was not convinced that Speer Canada, as vendor and declared importer of record, was "in reality" the importer of the goods, even though it facilitated the payment of all charges at the port of entry. The CIT noted that there was no real sale of the goods between Airco and Speer Canada and that all selling costs, freight, duty, customs broker's fees and currency translation costs were borne by Airco. The CIT also noted that Speer Canada was a simple paper intermediary, that it had done nothing to sell the goods to Ivaco, that it made no profit or commission on the resale of the goods, that it never had possession of the goods, and that the real transaction was between Airco and Ivaco. Accordingly, the CIT found that Ivaco was the importer in Canada of the goods.

43. Applying the reasoning above to the current appeal, it is clear that Landmark is not in reality the importer of the goods in issue. The Tribunal finds that, for the purposes of the *Act*, customs forms and documentation provide an indication of the identity of the importer. However, the CBSA submitted, and the Tribunal agrees, that the mere fact that someone has put a business number on a B3 Form is not enough to establish that they are the importer and, in fact, that the totality of the matter should be considered to make this determination.[30] As such, the Tribunal is of the view that substance also plays a role in the proper identification of the importer, particularly where there is conflicting information, such as in this case.

44. Indeed, Landmark is identified on some documents as "importer 1", while also being identified as the customs broker and the purchaser.[31] These documents also show the destination of the goods in issue as LGI's bonded warehouse, where the goods were maintained in bond pending their release, and which served as a return address to reattempt delivery.[32]

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30. *Transcript of Public Hearing* at 205. The Tribunal further notes that *Memorandum D17-1-22 – Accounting for the Harmonized Sales Tax, Provincial Sales Tax, Provincial Tobacco Tax and Alcohol Markup/Fee on Casual Importations in the Courier and Commercial Streams* states that "indicating the foreign or non-resident vendor as the importer on the documents may not in itself make the vendor the importer of the goods for purposes of the *Customs Act*. In the case where a Canadian resident orders casual goods from a foreign company, even if the goods are imported and accounted for on a Form B3-3, *Canada Customs Coding Form*, with the name of the foreign company in the importer name field, it is the CBSA's position that the importer of the goods is the person in Canada to whom the goods have been addressed."
31. *Transcript of Public Hearing* at 32-36, 39, 54; Exhibit AP-2019-002-10B, Vol. 2 (protected) at 75-76, 85-86; see also Exhibit AP-2019-002-06A, Vol. 2 (protected) at 77, 82, 87, 94, 101, 107, 116, 125, 130, 135, 140, 146, 151, 160, 171. Mr. Drouillard testified that Landmark was identified as the purchaser in some customs documentation due to a system default where the importer and the purchaser were identified as being the same.
32. *Transcript of Public Hearing* at 31-33, 45, 124; Exhibit AP-2019-002-10B, Vol. 2 (protected) at 78.

45. However, the documentation also lists the name and address of the consignee as that of the Canadian consumer, and the B3 Form specifically lists the Canadian consumer as the importer.[33] In addition, Landmark submitted that the packages are addressed to the consignees before they cross the border, and Mr. Drouillard testified that each consumer's shipment was broken out into its own individual transaction at the request of the CBSA, rather than put into a consolidated customs entry.[34]

46. Furthermore, Mr. Drouillard testified that Landmark did not purchase the goods or take title or possession of the goods at any time, that Landmark and LGI had no participation in the sales transactions themselves, and that it understood that these transactions were between the foreign merchant and the Canadian consumer. Mr. Drouillard testified that Landmark would get the customs data from LGI, which it would provide to the CBSA to obtain the release of the goods, following which Landmark would pay duties and taxes on behalf of the consignee.[35]

47. Like Speer Canada in *Artificial Graphite*, Landmark acted as a paper intermediary with no ties to the sale of the goods in issue. The transactions regarding the goods in issue were between the vendor of the products and the e-commerce purchasers in Canada, with Landmark acting in some respects as the importer of record, facilitating the payment of any taxes and duties owed.

48. Considering the above, the Tribunal finds that Landmark was not in reality the importer of the goods in issue.

Landmark is not otherwise the importer of the goods in issue

49. The CBSA's dictionary definitions of "importer" indicate that the importer is the person or entity that brings or acts to bring goods into a country. In light of the above, it cannot be said that Landmark acted to bring the goods in issue into Canada. Landmark was hired to facilitate the importation transaction, but was never involved in the action or in the decision to bring the goods into Canada.

50. Although the CBSA argued that Landmark and LGI's actions should be conflated, the evidence before the Tribunal is that the two entities are separate and perform different functions, including in the transactions in issue, and are otherwise treated as separate entities by the CBSA.[36] Moreover, even if the Tribunal was convinced that Landmark and LGI acted as one and that Landmark's actions went beyond those of a traditional customs broker, this does not suffice to make Landmark the importer. As noted above, neither Landmark nor LGI participated in the purchase and sale of the goods in issue: the transaction is a result of a purchase by a Canadian consumer of goods from a foreign vendor. Landmark and LGI's services were retained solely for customs brokerage and logistics purposes.

51. As indicated above, the CBSA argued that Landmark was not a properly authorized agent and was therefore the importer. The Tribunal finds that subsection 10(1) of the *Act* does not have that result; an improperly authorized customs broker does not *ipso facto* become the importer if it is not properly authorized.[37] The default position remains that the identity of the importer is to be determined on the facts of each case.

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33. *Transcript of Public Hearing* at 37, 41-42; Exhibit AP-2019-002-10B, Vol. 2 (protected) at 86-87; Exhibit AP-2019-002-06A, Vol. 2 (protected) at 76-77, 81-82, 86-87, 91-94, 98-101, 105-107, 111-117, 122-125, 129-130, 134-135, 139-140, 144-146, 150-151, 155-161, 166-172.
34. *Transcript of Public Hearing* at 47, 123-124.
35. *Transcript of Public Hearing* at 7-8, 11-13, 54.
36. *Transcript of Public Hearing* at 9-14, 56-59.
37. Subsection 10(1) of the *Act* provides as follows: "Subject to the regulations, any person who is duly authorized to do so may transact business under this Act as the agent of another person, but an officer may refuse to transact

52. Therefore, the Tribunal is of the view that the question whether Landmark acted as a properly authorized agent has no impact on determining whether Landmark is the importer.

53. Mr. Drouillard testified that the CBSA directs customs brokers to use their own customs broker non-commercial import account business number for permitted casual goods importation, as the Canada Revenue Agency does not wish to provide business numbers to every single Canadian consignee.[38] Mr. Leonard further testified that there are three ways in which a customs broker can use its own business number without incurring liability: (1) to account for goods imported through the CLVS program; (2) to account for non-commercial goods imported through the commercial stream where there is an agency agreement with the person importing the goods; and (3) for one-time commercial importations if authorized to do so.[39]

54. Considering the above, the Tribunal cannot automatically find that a customs broker is the importer when its business number is used in customs documents. Rather, the Tribunal must make its determination based on the facts as a whole, and it is not convinced that the facts support interpreting Landmark as the importer of the goods in issue.

55. Therefore, the Tribunal finds that Landmark is not the "importer" of the goods in issue.

CONCLUSION

56. Considering that Landmark is not the importer of the goods in issue, the CBSA could not issue DASs to Landmark on that basis. Therefore, the DASs issued to Landmark under section 59 of the *Act* are invalid, and Landmark is not required to pay any amount owing under subsection 59(3) as the importer of the goods in issue.

57. As such, and in accordance with the Tribunal's broad powers, the Tribunal remands the matter to the CBSA to determine the proper importer, and the correct tariff classification of the goods in issue, in a manner consistent with the Tribunal's decision.

DECISION

58. The appeal is allowed.

Peter Burn

Peter Burn
Presiding Member

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business with any such person unless that person, on the request of the officer, produces a written authority, in a form approved by the Minister, from the person on whose behalf he is acting."

38. Ms. Di Pietro and Mr. Dewar also testified in that sense, and Mr. Leonard confirmed that a business number is required for all goods, commercial or not, imported through the commercial stream; *Transcript of Public Hearing* at 17-18, 39, 68-69, 76-77, 83-84, 98.

39. *Transcript of Public Hearing* at 100-101.