Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2020-002

Delta Galil USA Inc.

v.

President of the Canada Border Services Agency

Decision issued
Friday, March 5, 2021

Reasons issued
Thursday, March 25, 2021

Canada

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IN THE MATTER OF an appeal heard on November 5 and 6, 2020, 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 February 11, 2020, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

DELTA GALIL USA INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Via videoconference
Date of Hearing:	November 5 and 6, 2020
Tribunal Panel:	Cheryl Beckett, Presiding Member
Support Staff:	Helen Byon, Counsel Isaac Turner, Student-at-law

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Delta Galil USA Inc.	Darrel H. Pearson Sabrina A. Bandali Katrina Crocker
Respondent	**Counsel/Representative**
The President of the Canada Border Services Agency	Kevin Palframan

WITNESSES:

Stephen Mastropietro
Senior Vice-President of Finance
Delta Galil USA Inc.

Gary Silverstein
Vice-President of Sales
Delta Galil USA Inc.

Nancy Dickey
Vice-President of Merchandising and Design
Delta Galil USA Inc.

Diane Robinson
Director of Production, Quality Control and Customer Service
Delta Galil USA Inc.

Ambi Srithar
Sales Assistant
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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed by Delta Galil USA Inc. (Delta) with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision of the Canada Border Services Agency (CBSA) dated February 11, 2020, made pursuant to subsection 60(4).

[2] The goods in issue are intimate apparel, active wear and socks for men and women, and kids and baby wear, under various brand names, imported between March 12, 2014, to February 28, 2018 (the relevant period).

[3] The issue in this appeal is whether, for the purposes of determining the value for duty based on the transaction value method under section 48 of the *Act*, the sale for export of the subject goods was from the foreign suppliers to Delta as a "purchaser in Canada", as such term is defined in the *Valuation for Duty Regulations*.[2]

[4] For the reasons below, the Tribunal concludes that the sale for export was from the foreign suppliers to Delta as a purchaser in Canada. The appeal is therefore allowed.

PROCEDURAL HISTORY

[5] On July 26, 2016, the CBSA notified Delta of a trade compliance verification, pursuant to sections 42 and 42.01 of the *Act*, of its declared value for duty of the goods imported from January 1, 2015, to December 31, 2015.[3] The CBSA issued an interim report on September 29, 2017.

[6] On December 11, 2017, the CBSA issued its final verification report,[4] which indicated the CBSA's determination that the goods in issue, imported by Delta, should be appraised by the transaction value method under section 48 of the *Act* on the basis of the price paid or payable in the sale for export between Delta, as the vendor of the goods, and the Canadian retail customer, as the purchaser in Canada under the *Regulations*. Delta was required to submit corrections to the value for duty of all goods imported during the relevant period.

[7] Pursuant to section 32.2 of the *Act*, Delta submitted corrections to its value for duty declarations in accordance with the final verification report. The CBSA issued detailed adjustment statements under subsection 59(2) on June 11, 2018, and June 21, 2018.[5]

[8] On September 7, 2018, Delta requested a re-determination pursuant to subsection 60(1) of the *Act*, submitting that the transaction value should be based on the price paid or payable in sale for export between the foreign manufacturers and Delta as the purchaser in Canada.[6]

[9] The CBSA issued its preliminary decision that Delta was not a "purchaser in Canada" on May 16, 2019. On February 11, 2020, the CBSA issued its final decision upholding its previous

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1 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2 SOR/86-792 [*Regulations*].
3 Exhibit AP-2020-002-16A (protected) at 28-31.
4 Exhibit AP-2020-002-04 at 108, 119-123.
5 *Ibid.* at 109, 117; Exhibit AP-2020-002-16A (protected) at 45, 46.
6 Exhibit AP-2020-002-016A (protected) at 44-78.

ruling that Delta did not qualify as a purchaser in Canada and that the relevant sale for export to Canada was between Delta and the Canadian retailers.[7]

[10] On May 4, 2020, Delta filed its notice of appeal with the Tribunal. An amended notice of appeal was filed on June 23, 2020.

[11] The Tribunal held a videoconference hearing on November 5 and 6, 2020. Delta called the following five witnesses to testify: Mr. Stephen Mastropietro, Mr. Gary Silverstein, Ms. Nancy Dickey, Ms. Diana Robinson, and Ms. Ambi Srithar. The CBSA did not call any witnesses.

PRELIMINARY MATTER

Goods with respect to which Delta withdraws its appeal

[12] Delta conceded that for a small number of transactions, the value for duty is properly based on the transactions between Delta and the Canadian retailers. These were goods that were exported to Canada from Delta's warehouse in the United States. Delta admitted that it did not purchase these goods in a sale for export to Canada, but rather that these goods were sold by foreign suppliers to Delta, intended for the U.S. market, and shipped to Delta's U.S. warehouse. However, due to an unanticipated demand in the Canadian market, these goods were used to fulfill Canadian orders. Delta withdrew its appeal in respect of these goods.

[13] As the CBSA has not contested Delta's submissions on this issue, the Tribunal infers that the goods which were imported directly from the U.S. warehouse are not at issue in this appeal.

LEGAL FRAMEWORK

[14] Pursuant to section 44 of the *Act*, a value must be attributed to goods imported to Canada to determine the applicable import duties. Section 46 specifies that the value for duty of imported goods is determined in accordance with sections 47 to 55.

[15] The *Act* sets out various methods of valuation for determining the value for duty. Subsection 47(1) sets out that the primary basis of appraisal is the transaction value. The subsection reads as follows:

> **47(1)** The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.

[16] A key condition of subsection 48(1) is that the goods are *sold for export* to Canada to a *purchaser in Canada*.

> **48 (1)** Subject to subsections (6) and (7), 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 . . .

[17] 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, as outlined in sections 49 to 53 of the *Act*, can be considered.

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7 Exhibit AP-2020-002-41A (protected) at 108-117.

Purchaser in Canada

[18] For the purposes of subsection 48(1) of the *Act*, the term "purchaser in Canada" is set out in section 2.1 of the *Regulations.* The relevant part of the provision reads as follows:

> **2.1** For the purposes of subsection 45(1) of the Act, ***purchaser in Canada*** means
>
> **(a)** a resident;
>
> **(b)** a person who is *not a resident* but who has a *permanent establishment in Canada*; or
>
> **(c)** a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,
>
> **(i)** for consumption, use or enjoyment by the person in Canada, but not for sale, or
>
> **(ii)** for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.
>
> [Emphasis added]

[19] The term "resident" is defined in section 2 of the *Regulations* as follows:

> **(a)** an individual who ordinarily resides in Canada;
>
> **(b)** a corporation that carries on business in Canada and of which the management and control is in Canada; and
>
> **(c)** a partnership or other unincorporated organization that carries on business in Canada, if the member that has the management and control of the partnership or organization, or a majority of such members, resides in Canada. (*résident*)

[20] The terms "permanent establishment" is defined in section 2 of the *Regulations* as follows:

> . . . a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business. (*établissement stable*)

ANALYSIS

[21] This appeal raises two key issues with respect to the applicability of the transaction value under subsection 48(1) of the *Act*:

a) for the purposes of subsection 48(1), whether the relevant sale for export was the transaction between the foreign suppliers and Delta, or the transaction between Delta and the Canadian retailers; and

b) insofar as the relevant sale for export was between the foreign suppliers and Delta, whether Delta qualified as a "purchaser in Canada" pursuant to paragraph 2.1(b) of the *Regulations*.

[22] Delta submitted that the relevant transaction for the purposes of subsection 48(1) of the *Act* was the sale from the foreign suppliers to Delta on the basis that it had title to the goods on importation to Canada, which were then held in inventory in its warehouse in Canada. Title was transferred to the Canadian retailers after the goods left the warehouse. According to Delta, the transaction between Delta and the Canadian retailers therefore constituted a domestic sale which cannot be the basis for determining the transaction value under subsection 48(1).

[23] For its part, the CBSA submitted that the sale for export was the transaction between Delta and the Canadian retailers. It argued that the transaction value must include the sale to the ultimate purchaser of the goods in Canada, which were the Canadian retailers.

[24] For the reasons below, the Tribunal finds that the CBSA erroneously identified the sale for export as being the transaction between Delta and the Canadian retailers based on its view that the sale for export required the sale to be made to the ultimate purchaser of the goods and that Delta did not qualify as a purchaser in Canada. Based on the totality of the evidence and the submissions of the parties, the sale for export was properly between the foreign suppliers and Delta.

[25] With respect to the issue of whether Delta qualified as a purchaser in Canada pursuant to paragraph 2.1(b) of the *Regulations*, Delta argued that it satisfied the conditions for a "permanent establishment". Delta submitted that it had a fixed place of business at the offices located at 7035 Ordan Drive in Mississauga, Ontario (the Premises). The office was subleased by its agent and related company, Dominion Hosiery Inc. (DHI), a New Brunswick corporation.[8] Delta argued that it conducted its business at the Premises through the activities of its employees and dependent agents, namely DHI and two employees of DHI.[9]

[26] For the reasons outlined below, the Tribunal agrees with Delta and finds that it met the conditions of a permanent establishment and therefore qualified as a purchaser in Canada. Accordingly, the transaction value method was applicable based on the price paid or payable by Delta to the foreign suppliers.

Sale for export to Canada

[27] In determining the transaction constituting the "sale for export" pursuant to section 48 of the *Customs Act*, the Tribunal has previously referred to *Mattel*[10] where the Supreme Court of Canada highlighted the passing of title as a key indicator. The Court stated as follows:

> For the purposes of valuation under s. 48 of the *Customs Act, the relevant sale for export is the sale by which title to the goods passes to the importer. The importer is the party who has title to the goods at the time the goods are transported into Canada*. The importer may be the intermediary or the ultimate purchaser, depending on which party actually imports the goods

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8 Exhibit AP-2020-002-04 at 159, 161-162. DHI is related to Delta, sharing the same ultimate corporate parent, Delta Galil Industries Ltd., based in Israel (Delta Industries). DHI is wholly owned by Delta Galil Holland BV, which is wholly owned by Delta Industries. Exhibit AP-2020-002-04 at 125.

9 DHI is wholly owned by Delta Galil Holland BV, which is wholly owned by Delta Industries. Exhibit AP-2020-002-04 at 125.

10 *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc*., 2001 SCC 36, [2001] 2 SCR 100 [*Mattel*].

> into the country. For the purposes of determining whether a sale is for export, the residency of the purchaser or of the party transporting the goods is not material.[11]
>
> [Emphasis added]

[28] Applying *Mattel,* the Tribunal in *Cherry Stix Ltd.* considered the terms of the contract of sale and the conduct of the parties in determining whether a sale for export had occurred.[12] In *Pampered Chef Canada,* as evidence of the transfer of title, the Tribunal considered whether the purchaser had responsibility for customs charges and the risk of damage, loss, non-delivery, returns, warranties and product liability during transit of the goods to Canada.[13]

[29] As discussed below, the CBSA argued that *Mattel* should be considered so as not to displace the meaning of "purchaser in Canada" which it contended was included to clarify the intent to capture the total value of the goods, i.e. capturing all transaction values from the sale of the goods from the manufacturer, through intermediaries, then to the *ultimate purchaser* in Canada.[14] Essentially, the CBSA argued that the emphasis on the transfer of title in *Mattel* should not prevent all transaction values from being captured in determining the value for duty.

[30] It bears noting that in this appeal, the CBSA's position is that Delta did not qualify as a "purchaser in Canada", as it did not meet the requirements of a permanent establishment pursuant to paragraph 2.1(b) of the *Regulations.* The CBSA submitted that insofar as the Tribunal determines that Delta qualifies as a purchaser in Canada, then, as submitted by Delta, the sale for export would be between the foreign suppliers and Delta.

[31] The Tribunal does not agree with the CBSA's analysis of the conditions of subsection 48(1) of the *Act.* In the Tribunal's view, the issue of whether the importer is a "purchaser in Canada", as such term is defined in the *Regulations,* should not affect the identification of the appropriate transaction for the purposes of determining the value for duty, i.e. the "sale for export". The first task of the CBSA in determining whether the transaction value method is available, is to properly identify the sale for export. This requires determination of the person who purchased the goods in a sales transaction and had title to the goods *on importation*. Once the importer has been determined, the next question is whether that importer qualifies as a "purchaser in Canada". If the importer does not qualify as a "purchaser in Canada", then the value of duty cannot be determined using the transaction value pursuant to subsection 48(1).

Production and sale process

[32] For the Tribunal to properly identify the sale for export, it must consider the relevant facts surrounding the importation of the goods in issue during the relevant period.

[33] Delta contracted with unrelated overseas manufacturers to produce the apparel it intended to sell to the Canadian retailers. Delta's production orders to the foreign suppliers were based on either hard orders (i.e. confirmed sales of products to Canadian retailers based on an agreed quantity, price and delivery) or forecast orders under retailer replenishment programs (i.e. sales for which the

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11 *Mattel* at para. 45.

12 *Cherry Stix Ltd.* (10 May 2010) AP-2008-028 (CITT) at paras. 38, 46.

13 *Pampered Chef Canada* (13 February 2008) AP-2006-048 (CITT) [*Pampered Chef Canada*] at para. 36.

14 As noted in *Mattel* at paras. 50-51, subsection 48(1) of the *Act* was amended *after* the goods at issue in Mattel were imported, but *before* the case itself was decided.

retailer had not provided a firm commitment to purchase but Delta's forecasting permitted an inventory to be maintained in Canada from which purchase orders were filled).[15] With respect to goods ordered for production under the retailer replenishment programs, Delta assumed the risk of excess inventory. Delta purchased the products from overseas factories on an FOB basis and orders for Canada were made separately from products ordered for other markets, such as the United States.[16]

[34] Delta's products were sold as branded merchandise under intellectual property licences from third-party companies and under brand names owned by Delta. Delta also sold products under private labels for certain retailers. However, whether the products were branded or sold under private label, the production and sale process were the same. Products were sold to Canadian retailers through the efforts of both Delta's own employees, such as Mr. Silverstein, Vice-President of Sales, and employees of DHI, including Mr. Silver, Sales Director, and Ms. Srithar, Sales Associate, as well as a series of independent sales agents managed by DHI.[17] Retailers entered into master service vendor agreements or supply vendor agreements with Delta, and specific sales transactions were made pursuant to purchaser orders submitted either through Delta's electronic data interchange system or by email to DHI.[18]

[35] The goods purchased by Delta from the foreign factories were shipped to Delta's warehouse in Mississauga, Ontario, which was operated by Coles International (Coles).[19] Delta obtained title to the goods before the goods left the country of exportation, i.e. when they were loaded on the vessel at the port or otherwise received by the freight forwarder on leaving the foreign factory. Title remained with Delta when the goods were landed at the Port of Vancouver and shipped to the warehouse.[20] Delta assumed all of the risk of loss or damage to the goods and insured the goods for its own benefit.[21] Once the goods were delivered to the warehouse, Delta reviewed the receiving records and made payment to the foreign suppliers.[22]

[36] At the warehouse, Coles staff "reworked"[23] the products to fulfill the purchaser orders.[24] The products were then shipped to the retailers. Delta's staff in the United States performed accounts

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15 *Transcript of Public Hearing* at 139, 150.

16 *Ibid.* at 216.

17 *Ibid.* at 20-23, 49.

18 *Ibid.* at 31, 134.

19 Exhibit AP-2020-002-04A (protected) at 293-377; *Transcript of Public Hearing* at 22-23. The CBSA submitted that some goods were also shipped to the retailer directly, referring to the bill of lading. The Tribunal notes that the bill of lading confirms the goods were shipped to Delta's warehouse operated by Coles. Exhibit AP-2020-002-04A (protected) at 312, 341-346.

20 *Transcript of Public Hearing* at 177, 190. Cole's Terms and Conditions refer to Delta as the owner of the goods stored at the warehouse. Exhibit AP-2020-002-04 at 178, 179. Delta submitted two sample transactions from 2016 and 2017 showing Delta's purchase orders to overseas factories, shipment of the goods from the suppliers to Delta's warehouse in Mississauga, and shipment of the goods to retailers (sample transactions). See Exhibit AP-202-002-04A (protected) at 287-377.

21 Delta submitted its "Marine Cargo Policies" for the years 2014 to 2018 as evidence of its insurance. Exhibit AP-2020-002-04 at 181-240.

22 See sample transactions, Exhibit AP-202-002-04A (protected) at 287-377.

23 *Transcript of Public Hearing* at 192.

24 In the case that there was a shortage of inventory, the purchase order would be fulfilled by products imported from Delta's warehouses and distribution centres in the United States. *Transcript of Public Hearing* at 32-33. As noted above, Delta has withdrawn its appeal with respect to goods which were shipped to Canadian retailers in these circumstances.

receivable functions and invoicing related to the sale of the imported goods to the Canadian retailers. Payments from the retailers were made to Delta (GST/HST charges were reported to the Canada Revenue Agency) and Delta's profits from sales were reported as income in the United States.[25] After the goods left the warehouse, title to the goods was transferred from Delta to the retailers upon delivery to the retailer.

[37] Having considered the framework for the purchase and sale of goods by Delta outlined above, for the purposes of identifying the sale for export, the Tribunal finds that there are two transactions that it must consider. The first transaction is the sale of goods between the overseas suppliers and Delta. The second transaction is the sale of goods between Delta and the Canadian retailers. There were no submissions made by either party stating that DHI was a purchaser of the goods. With these transactions in mind, the Tribunal will consider which is the sale for export.

Relevant transaction

[38] As noted above, no evidence was submitted that put into question the fact that Delta held title to the goods at the time they were imported into Canada. This fact was uncontroverted.[26] Applying the principle in *Mattel*, this would render the sale for export under subsection 48(1) of the *Act* as the transaction between the foreign suppliers and Delta.

[39] However, according to the CBSA, the relevant sale for export is the transaction between Delta and the Canadian retailers, notwithstanding that Delta had title to the goods at the time of importation. The CBSA's position in this regard is driven by its view that the "purchaser in Canada" requirement in the *Act* was intended to capture the value of all transactions prior to the goods reaching its *final* purchaser (in Canada).[27]

[40] The CBSA referred to the Technical Committee's Commentary 22.1 entitled *Meaning of the expression "sold for export to the country of importation" in a series of sales*, which states that in a series of sales transactions, the "last sale", i.e. the sale to the buyer/retailer in the importing country, and not the first sale between the distributor and manufacturer, should be the sale used to determine the transaction value.[28] To illustrate this, the CBSA highlighted the scenario provided by the Committee:

> (1) Retailer A located in the country of importation ("I").
> (2) Distributor B is located in country Y.
> (3) Retailer A contracts with Distributor B for the purchase/sale of certain pens.
> (4) Distributor B contracts with manufacturer C in country X to purchase the pens.
> (5) The pens will be shipped directly from the country of manufacture to Retailer A.

[41] The Committee indicated that the last sale in this series is the transaction between Distributor B and Retailer A. The CBSA submitted that this scenario differs from the present case insofar as Delta was the importer of record, held title at the time of importation, and paid for the

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25 Exhibit AP-2020-002-04 at para. 51.

26 Exhibit AP-2020-002-16 at paras. 43, 50.

27 The CBSA refers to the comments of the Technical Committee on Customs Valuation of the WCO ("Committee") with respect to the meaning of "sale" in the determination of transaction value. In particular the CBSA noted the Committee's opinion that "uniformity of interpretation and application [of transaction value] can be achieved by taking the term 'sale' *in the widest sense* . . ." [emphasis added]. Exhibit AP-2020-002-16 at 127.

28 Exhibit AP-2020-002-16 at 137.

duties and taxes at the time of import. However, the CBSA submitted that these facts are not relevant to the identification of the "last sale" that should be recognized as the appropriate "sale for export".

[42] The CBSA submitted that the Court's emphasis on the transfer of title in *Mattel* has been taken out of context. The facts of that case involved only one purchaser in Canada, *Mattel Canada Inc.*, that was seeking to use the first sale between the foreign vendor (Mattel U.S.) and the foreign supplier as the transaction value. As such, the CBSA contended that the Court focused on the fact that *Mattel Canada Inc.* held title at the time of importation. CBSA also pointed out that the Court in *Mattel* was mindful of the "last sale" approach and accounting for the entire transaction when determining the value of the goods for duties. In this regard, the Court stated as follows:

> Where goods are not transported into Canada, a sale between two foreign companies cannot generally constitute an export. It may be the first sale in a chain that ultimately leads to a sale for export but it cannot generally be a sale for export. . . .
>
> My analysis of the ordinary meaning of the word "export" is fortified by the potentially anomalous results that could occur if a sale between the foreign manufacturer and the intermediary constituted a sale for export to Canada. *If a sale between a foreign manufacturer and an intermediary was treated as a sale for export to Canada, importers would be tempted to adopt a "*more-the-merrier' approach" to importing (M.K. Neville, Jr., "First-Sale-For-Export' Rule Represents a Major Victory for Importers" (1996), 7 J. *Int'l Tax'n* 72, at p. 75). Rather than have a three-tiered distribution system, importers might seek to posit five, six or seven tiers, all beginning at correspondingly lower prices.[29]
>
> [Emphasis added]

[43] Both Delta and the CBSA submitted that subsection 48(1) of the *Act* was amended to add the condition "purchaser in Canada" so as to *clarify* the applicability of the transaction value method; it was not intended to change the existing practice. However, in the CBSA's opinion, the addition of "purchaser in Canada" was to ensure that the value to which duties applied was the value when all transactions have been incurred. In contrast, Delta argued that the mischief the amendment was intended to address was to prevent foreign companies from including in the value for duty transactions that took place entirely outside of Canada and did not entail the transportation of the goods to Canada.

[44] The Tribunal agrees with Delta's submissions with respect to the intended clarification of the provision made by the amendment. The addition of "purchaser in Canada" was to clarify that the value for duty in subsection 48(1) of the *Act* must involve a transaction pursuant to which the goods are transported into Canada. It follows then that the sale for export contemplated in subsection 48(1) must involve the importer that had title to the goods when they entered Canada. The fact that the importer may not be the ultimate purchaser of the goods was clearly contemplated by the Court in *Mattel.* It bears repeating that the Court affirmed that "[t]he importer is the party who has title to the goods at the time the goods are transported into Canada. The importer *may be the intermediary or the ultimate purchaser, depending on which party actually imports the goods into the country*"[30] [emphasis added]. In other words, if the intermediary is the importer, then the sale to the intermediary is determinative of the transaction value.

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29 *Mattel* at paras. 43, 47.

30 *Ibid.* at para. 45.

[45] The Tribunal is not persuaded that the principle of the "last sale" articulated by the Committee would mean that the sale between Delta and the Canadian retailers should be used for determining the value for duty. The Committee clearly indicated that the last sale must be *prior* to the importation.

> The Technical Committee concludes that in a series of sales situation, the price actually paid or payable for the imported goods when sold for export to the country of importation is the *price paid in the last sale occurring prior to the introduction of the goods into the country of importation*, instead of the first (or earlier) sale. This is consistent with the purpose and overall text of the Agreement.[31]

[Emphasis added]

[46] The sale from Delta to the Canadian retailers does not reflect the last sale that occurred prior to the introduction of the goods into Canada. Rather, based on the facts described above, the last sale occurred between the foreign suppliers and Delta, who had title to the goods as they entered Canada and arrived at Delta's warehouse in Mississauga. Title remained with Delta until such time as the goods left the warehouse for delivery to the Canadian retailers. Consequently, the transfer of title between Delta and the Canadian retailers occurred after the goods were already in Canada. It therefore did not constitute a "sale for export".

[47] Having found that the sale for export was between the foreign suppliers and Delta, the next question is whether Delta qualifies as a "purchaser in Canada" under the *Regulations.*

Purchaser in Canada

[48] The *Regulations* set out three contexts pursuant to which an entity will be considered a "purchaser in Canada". The first instance (paragraph 2.1(a)) requires the entity to be a "resident" of Canada as further defined in the *Regulations*. The parties agree that Delta is not a resident of Canada. Indeed, the evidence on the record confirms that Delta was incorporated in the state of Delaware in the United States.[32] The second and third instances (paragraphs 2.1(b) and (c)) define the conditions under which a non-resident may be considered a "purchaser in Canada".

[49] A non-resident may be considered a "purchaser in Canada" where it meets the criteria in either paragraph 2.1(b) which requires the person to have "permanent establishment" as defined in the *Regulations* or paragraph 2.1(c)(ii), which does not require a permanent establishment, but rather requires that the goods are imported for the purposes of selling by the non-resident in Canada, without a previous agreement to sell the goods to a resident in place. For the reasons below, the Tribunal finds that Delta qualifies as a purchaser in Canada on the basis of paragraph 2.1(b).

[50] For the purposes of a "permanent establishment", the *Regulations* require as a first condition that there must be in Canada "a fixed place of business of the person." This may include "a place of management, a branch, an office, a factory or a workshop." The second condition that must be satisfied is that the person "*carries on business*". However, the business that is carried on by the person must be "through" the fixed place of business. The existence of a permanent establishment in Canada is determined based upon the facts of the situation.

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31 Exhibit AP-2020-002-16 at 139.

32 Delta was first incorporated on January 28, 1985. Exhibit AP-2020-002-04 at 132-157.

[51] The concept of a "permanent establishment" has been rigorously reviewed in tax jurisprudence. Delta referred the Tribunal to the Tax Court of Canada case, *AIL*[33] for its consideration of the concept of a dependent agent and how this concept should be applied to the permanent establishment analysis. In contrast, the CBSA submitted that the jurisprudence interpreting this concept under the *Income Tax Act* is not helpful in interpreting the *Act* as these statutes have different purposes.

[52] The Tribunal notes that the definition of "permanent establishment" in the *Regulations* closely mirrors the wording first developed under tax legislation. In interpreting the meaning of "permanent establishment" under the *Regulations*, the Tribunal finds it useful to examine the case law that has previously analyzed this concept. There is no additional language in either the *Act* or the *Regulations* that elaborates on the concepts contained in the definition of a permanent establishment, i.e. "a fixed place of business . . . through which the person carries on business". In a similar manner, the Federal Court of Appeal in *FosterGrant*[34] looked at established legal definitions in other contexts in its examination of the meaning of "carrying on business" under the *Regulations* stating as follows:

> There is a significant body of jurisprudence on the meaning of the phrase "carrying on business". . . . There is nothing in the *Customs Ac*t or the *Value for Duty Regulations* that would suggest that the meaning of the phrase "carries on business" should be interpreted in a manner that is not consistent with these established legal definitions. . . .[35]

[53] The Tribunal will therefore carefully consider the tax jurisprudence as further discussed below while keeping in mind the modern rule of statutory interpretation as it applies to the interpretation of the *Regulations*.[36]

[54] In determining whether a non-resident (U.S.) entity was liable to pay income tax in Canada, the Tax Court of Canada in *AIL* was required to consider whether the entity had a permanent establishment under the *Canada-United States Tax Treaty* (*Tax Treaty*).[37] The Court highlighted that there are two separate analyses that are to be undertaken for the assessment of "permanent establishment" under the *Tax Treaty* as set out below:

> 34. The *Treaty* provides a two-pronged analysis to the question of "permanent establishment": Article V(1) (fixed place of business) and Articles V(5) and (7) (dependent agent). If the fixed place of business analysis does not result in a finding of permanent establishment, then one turns to the dependent agent permanent establishment

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33 *American Income Life Insurance Company v. The Queen*, 2008 TCC 306 [*AIL*].

34 *AAi. FosterGrant of Canada Co. v. The Commissioner of the Canada Customs and Revenue Agency*, 2004 FCA 259 [*FosterGrant*].

35 *FosterGrant* at paras. 17, 18.

36 The modern rule of statutory interpretation requires ". . . the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 at para. 21. The "ordinary meaning" of a provision refers "to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context." R. Sullivan, Sullivan on the Construction of Statutes, 6th ed. at 30. It has also been described as the "natural meaning which appears when the provision is simply read through as a whole". *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724, 1993 CanLII 31 (SCC) at p. 735 (Gonthier J.); see also *Pharmascience Inc. v. Binet*, [2006] 2 SCR 513, 2006 SCC 48 (CanLII) at para. 30.

37 *AIL* at para. 33.

> analysis. While there is some overlap between the factors to consider in the two analyses, it is important, for clarity's sake, not to lose sight of which analysis is being undertaken. The key factors in the fixed place of business analysis are:
>
> (i) the existence of a place of business;
>
> (ii) a degree of permanence to such place; and
>
> (iii) the carrying on by AIL of business through this fixed place.
>
> 35. The key factors in the dependent agent permanent establishment analysis are:
>
> (a) an agent's authority to conclude contracts in Canada;
>
> (b) was the agent of independent status, both legally and economically; and
>
> (c) was the agent acting in the ordinary course of his or her business.
>
> 36. In both analyses, one issue to be determined is whose business is being carried on by the agents. The Appellant argues there are two businesses being carried on – AIL's business of the sale of insurance products and the agent's business of soliciting such sales as independent contractors. The Respondent's position is that the only business carried on is AIL's and the agents, in carrying out their responsibilities of soliciting sales, are in effect carrying on AIL's business. This may seem to some as splitting hairs, but for better or worse, that is what law oft times is. What follows is the hair-splitting analysis.[38]

[55] In contrast to the definition of "permanent establishment" set out in the *Regulations,* there is a broader and more fulsome definition of "permanent establishment" under the *Tax Treaty*.[39] In particular, in the absence of a fixed place of business (under Article V(1) of the *Tax Treaty*),[40] a permanent establishment may be found by the existence of a dependent agent (i.e. under Articles V(5)[41] as opposed to an independent agent which is expressly excluded under Article V(7)[42]). Comparatively, there is no option, under the *Regulations,* to satisfy the condition of a permanent establishment solely through a dependent agent in the case where there is no fixed place of business.

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38 *Ibid.* at paras. 34-36.

39 Subsection 400(2) of the *Income Tax Regulations.* See *AIL* at paras. 40, 41.

40 Article V(1) of the *Tax Treaty* reads as follows: "For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on." See *AIL,* Schedule A.

41 Article V(5) of the *Tax Treaty* reads as follows (*AIL,* Schedule A):

> A person acting in a Contracting State on behalf of a resident of the other Contracting State – other than an agent of an independent status to whom paragraph 7 applies – shall be deemed to be a permanent establishment in the first-mentioned State if such person has, and habitually exercises in that State, an authority to conclude contracts in the name of the resident.

42 Article V(7) of the *Canada-US Tax Treaty* reads as follows (*AIL,* Schedule A):

> A resident of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such resident carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

[56] The Tribunal finds that the analysis of the Tax Court of Canada relating to the first prong of the permanent establishment analysis should be applied to the definition of "permanent establishment" under the *Regulations*. The Tribunal does not find that these are factors that are specific to a particular objective relating to taxation, but stem naturally from the ordinary meaning of a fixed place of business and carrying on business.

[57] With consideration of the *Tax Treaty* provisions, the Organization for Economic Co-operation and Development's commentary and relevant jurisprudence, the Tax Court of Canada in *AIL* expanded on its "guidelines" for the determination of what constituted a permanent establishment under the first prong as follows:

1. A permanent establishment requires a fixed place of business meaning:

   (a) existence of a place of business;
   (b) degree of permanence to such place; and
   (c) the carrying on of the business of the enterprise through such fixed place.

2. The enterprise need not own or lease property for it to be a fixed place of business.

3. The premises need not be used exclusively by AIL.

4. To determine if AIL's business is being carried on from the fixed place of business, the following factors should be considered:

   - use of premises by AIL
   - control by AIL over premises
   - legal right to exercise control over premises
   - degree to which premises identified with AIL business
   - who paid for expenses of premises
   - who paid for equipment used at premises
   - who made management decisions
   - what contracts were concluded from premises
   - what AIL products were kept on premises
   - did AIL have any Canadian employees
   - who bore the risk of the operation from premises
   - how many principals were represented by the agent
   - were agents subject to detailed instructions or comprehensive control[43]

[58] With respect to its consideration of a dependent agent, the Tax Court of Canada noted that dependent agents are an indication that the enterprise carries on business from a fixed place. In effect, if the agents are dependent, they are carrying on the business of their principal, not their own.[44] The Tribunal sees no reason to find otherwise in the customs valuation context.[45] A non-resident

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43 *AIL* at para. 47.

44 *Ibid.* at para. 45.

45 The Supreme Court of Canada in *Sunbeam Corporation (Canada) Ltd. v. M.N.R.* [1963] SCR 45, 1962 CanLII 86 (SCC) at 50 interpreted the words "permanent establishment" in paragraph 411(1)(a) of the *Income Tax Regulations*. The provision reads as follows: "For the purpose of this Part, (a) 'permanent establishment' includes *branches*, mines, oil wells, farms, timberlands, factories, workshops, warehouses, office, *agencies* and other fixed places of business" [emphasis added]. The Court found that the term "establishment" contemplates a fixed place of business *of the corporation*, a local habitation of its own. The word "permanent"

importer may choose to carry on its business in Canada through a dependent agent. There are no words in the *Regulations* that would preclude this operational structure.

[59] In the Tribunal's view, the consideration of a dependent agent is consistent with the wording of paragraph 2.1(b) of the *Regulations* which requires that the importer *has* a permanent establishment. As submitted by Delta, the Tribunal need not ascertain whether Delta *is* a permanent establishment in Canada, it must simply *have* one. Accordingly, there is nothing in the *Act* or the *Regulations* that would preclude a non-resident importer from structuring its permanent establishment through, among other things, a *separate* corporate entity that is dependent on it. An approach that would otherwise restrict the form in which the non-resident importer *has* a fixed place of business through which it carries on business is not an interpretation that, in the Tribunal's view, is supported by the words of the definition read in their entire context and in their grammatical and ordinary sense. In this context, the Tribunal finds relevant the comments of the Supreme Court of Canada in *Shell* which the Federal Court of Appeal found appropriate to apply to the *Act*:

> [40] . . . it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied . . .
>
> . . .
>
> [43] . . . This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention . . . Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.[46]

[60] The Tribunal therefore declines to impose additional restrictions on the meaning of "carries on business", such as the requirement that the business of the non-resident importer must be carried out by itself and not by a separate legal entity. The recognition of a dependent agent as it pertains to the determination of whether the principal non-resident importer carries on business, is also consistent with principles laid out by the Tribunal in *Brunswick,* in which it stated as follows:

> However, the *presumption of separate legal identity can be rebutted* in exceptional circumstances. . . .Where the corporate structure was established as a sham, *where one corporation is completely dependent on the other* or is its puppet, or where a subsidiary is "bound hand and foot to the parent company and must do just what the parent company says", Canadian courts have "pierced the corporate veil" and found that the two corporations are but one entity.[47]
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> [Emphasis added, footnote omitted]

[61] Furthermore, there is no reason to limit the finding of a dependent agent to that of natural persons. In this regard, Delta submitted that the CBSA's D-memorandum explicitly acknowledges

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meant a stable establishment and not of a temporary or tentative character. Cited from *AIL* at para. 42. See also *Canada v. Dudney* 2000 DTC 6169 (FCA) at paras. 19, 20.

46 *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 [*Shell*] at paras. 40, 43; see *FosterGrant* at paras. 20, 21.

47 *Brunswick International (Canada) Limited* (14 December 1999), AP-98-100 (CITT) [*Brunswick*].

that a non-resident importer may carry on business through the activities of dependent agents but these are limited to natural persons rather than separate legal entities from the non-resident. The relevant part of the CBSA's D-memorandum states as follows:

> To determine if the business of the purchaser in Canada is wholly or partly carried on through a fixed place of business in Canada, the activities of its employees in Canada must bear some evident relationship to the purchaser in Canada's business. If so, the purchaser will be considered to have met this requirement of the "permanent establishment" definition.
>
> **Note:** An employer/employee relationship is understood to mean that an employer exercises control over its employees through the ability, authority, or right of a payer to direct their personnel concerning the manner in which the work is done and what work will be done. Dependent agents working at the fixed place of business of a purchaser in Canada would also be considered to meet this requirement. *Dependent agents are defined as an individual(s) authorized by the purchaser to work for them at the purchaser's fixed place of business in much the same way as an employee would.*[48]
>
> [Emphasis added]

[62] For the reasons above, the Tribunal agrees that there is no basis to limit dependent agents to natural persons and that such an interpretation would introduce limitations on the non-resident's ability to organize its business affairs in a manner that is not supported by the language of the *Regulations.* An agent may include a legal person such as a corporation.

[63] Having determined that business carried on by a dependent agent may be assessed as part of the permanent establishment analysis under the *Regulations,* the Tribunal must ultimately determine whether the non-resident importer carries on business through its fixed place of business. In this regard, the Tribunal finds no reason in this case to depart from the definition provided by the Federal Court of Appeal in *FosterGrant*. That is, it is axiomatic that a corporation that buys and sells goods on its own account for a profit is carrying on business.[49]

Fixed place of business

[64] Delta submitted that it has a fixed place of business in Canada at the Premises subleased by DHI.[50] Noting the examples provided in the *Regulations* of a fixed place of business, i.e. "a place of management, branch, an office a factory or workshop", Delta argued that the Premises should be considered a branch, office or division of Delta. The offices served as a meeting place, showroom and working space through which Delta operated its Delta Socks division in Canada.[51] The office

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48 Exhibit AP-2020-002-04 at para. 115. As the Tribunal has stated previously, it does not consider the CBSA's D-Memoranda as binding on the decisions of the Tribunal. *Tenneco Automotive Operating Company* (12 March 2020), AP-2019-019 (CITT) at para. 23; *Costco Wholesale Canada Ltd.* (12 January 2018), AP- 2017-003 (CITT) at para. 33; *R. S. Abrams* (20 January 2017), AP-2016-004 (CITT) at para. 25; *La Sagesse de l'Eau* (13 November 2012), AP-2011-040 and AP-2011-041 (CITT) at para. 56.

49 *FosterGrant* at para. 18.

50 Exhibit AP-2020-002-04 at 171-175, 242.

51 Mr. Mastropietro noted in his oral testimony, that the Delta Socks division relates to the business that was previously conducted by Auburn Hosiery Inc., which was acquired by Delta. *Transcript of Public Hearing* at 26, 27, 218-219.

space was used and occupied by full-time DHI employees who conducted Delta's business in Canada as well as, on occasion, employees of Delta.

[65] For its part, the CBSA submitted that Delta had no permanent establishment in Canada as it did not have a legal interest in the fixed premises from which it conducts business. In other words, the Premises were a fixed place of business, but it was DHI's and not Delta's fixed place of business. The CBSA argued that as the *Regulations* refer to a fixed place of business "of" the person and that Delta must have a legal right in the property. The Tribunal does not agree. The fact that Delta does not own or lease the premises, or have an express right of exclusive use, will not preclude it from having a fixed place of business. The Tribunal agrees with Delta's submission that the *Regulations*, which refers simply to "fixed place of business of the person" does not impose a specific legal requirement of ownership or leasehold interest in the property. To impose such a requirement would require an interpretation of the word "of" that goes beyond its ordinary meaning. In the Tribunal's view, it is sufficient that there is a relationship between the premises and the non-resident importer which supports the second part of the definition of permanent establishment, that is, that the business of the person is carried on *through* the fixed place of business.

[66] Having considered the evidence on the record, the Tribunal finds that Delta has established that it has a fixed place of business. Firstly, the office space had permanence by virtue of DHI's sub-lease agreement for the Premises. The fact that Delta did not directly lease the property is not, in the Tribunal's view, a sufficient reason to find that the Premises were not Delta's fixed place of business. While Delta was not the sub-lessee, the evidence is clear that Delta had control over the Premises. For instance, any changes to the agreement, including the lease rate, required approval from Delta.[52] Although lease payments were made by DHI, the funds to pay for these costs, as well as other office expenses such as telephone bills and information technology services, were transferred to DHI from Delta under, as described in further detail below, an incorporate agreement between the related parties.[53]

[67] Delta also held property insurance for the Premises.[54] All expenses for DHI and the Premises were reviewed and approved by Mr. Mastropietro, the Senior Vice-President of Finance for Delta.[55]

[68] All areas of the Premises, including the office, showroom and meeting facilities, were used exclusively to further Delta's business by DHI employees[56] and on occasion, by Delta employees.[57] To facilitate the sale of Delta's products, DHI maintained a showroom and displayed Delta's products at the Premises. The boardrooms were used to facilitate meetings and sales presentations

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52 For instance, in an email dated June 10, 2016, Mr. Silver of DHI requested that Mr. Ohad Cohn, Managing Director of the Delta Socks Division of Delta, approve the terms of the lease agreement. Exhibit AP-2020-002-04 at 424, 425. Mr. Cohn also acted as the Managing Director of DHI and signed the sublease renewal on behalf of DHI in 2016. Exhibit AP-2020-002-04 at 175.

53 *Transcript of Public Hearing* at 44.

54 Excerpt of Statement of Values for the Premises signed by Mr. Mastropietro. Exhibit AP-2020-002-04 at 246.

55 *Transcript of Public Hearing* at 27, 45, 213.

56 *Ibid.* at 28.

57 Mr. Silverstein indicated he usually visited three to four times a year to meet customers to discuss strategy and business opportunities, as well as to meet DHI employees to discuss the state of business in Canada, and inventory and budget issues. *Transcript of Public Hearing* at 101-104.

with Delta's customers as well as to provide workspace for Delta employees when they attended the office.[58]

[69] Delta had full access and use of the Premises; in essence the office was at its disposal. Although Delta employees did not hold keys for the premises, the Tribunal finds that this was not necessary given the relationship between Delta and DHI. For instance, Mr. Silverstein indicated that he was always able to communicate with DHI staff regarding entry into the offices during his visits.[59]

[70] Furthermore, the evidence indicates that the Premises were known as Delta's place of business in Canada among its customers. The address of the Premises was included on Delta's sales agreements with Canadian retailers.[60] DHI employees represented themselves to customers as a subdivision of Delta, i.e. Delta Socks, a division of Delta.[61]

[71] The Tribunal's finding that the activities that took place at the Premises constituted Delta's business is further confirmed by the Tribunal's analysis below regarding the dependent agency relationship between Delta and DHI, as well as the dependent agency relationship between Delta and the two employees, Mr. Silver and Ms. Srithar.

[72] As the Tribunal has determined that Delta had a fixed place of business, it will now consider whether the second requirement has been met. Specifically, whether Delta carried on business through its fixed place of business.

Carries on business

[73] Delta submitted that it qualifies as a purchaser in Canada because it carries on its business of buying and selling goods for a profit through the acts of its employees and its dependent agents, namely, DHI and its employees, Mr. Silver (Sales Director) and Ms. Srithar (Sales Assistant). Through its control of DHI and the two employees, Delta submitted that DHI was not a separate entity conducting its own business but was carrying on Delta's business in Canada; DHI was an "extension of Delta".[62] Essentially, Delta contended that its decision to structure its Canadian operations through its dependent agents was a legitimate business practice that should not preclude it from qualifying as a "purchaser in Canada".

[74] The CBSA argued that Delta did not buy and sell goods for a profit in Canada. Although the CBSA did not dispute that Delta carries on a business, it argued that its business was not conducted in Canada at the offices of DHI, but rather at its office in the United States. The fact that Delta employees occasionally visited the offices did not amount to sales being made from the Canadian office. Delta merely performed oversight functions, providing guidance and instructions, with respect to its agent, DHI. Moreover, as the sales contracts were made between Delta and the retailers, the sales did not occur in Canada. In this regard, the CBSA noted that invoicing and accounts receivable also occurred through the U.S. office and profits were reported for income taxes in the United States. Production orders to Delta's overseas suppliers were also issued from Delta's U.S. office.

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58 *Transcript of Public Hearing* at 137.
59 *Ibid.* at 105, 106.
60 Exhibit AP-2020-002-04 at 265, 270, 291, 411; *Transcript of Public Hearing* at 42, 43.
61 See the business card of Mr. Silver and email signature of both Mr. Silver and Ms. Srithar. Exhibit AP-2020-002-04 at 253, 443, 444.
62 *Transcript of Public Hearing* at 24-25.

[75] With respect to the activities of DHI and its employees, the CBSA argued DHI is a separate legal entity and as such, its activities cannot be attributed to Delta. According to the CBSA, the facts in this case do not warrant the Tribunal to pierce the corporate veil and ignore the manner in which the companies were set up, as distinct legal entities.[63] The CBSA argued that DHI was not conducting business as defined in *FosterGrant*, i.e. it did not buy and sell goods on its own account for a profit. DHI was simply performing the services of a sales agent paid on a commission basis according to the terms of the Sales Agency Agreement between the parties. DHI earned no profits from the sales and incurred no liability or risk in respect of the sale. The CBSA maintained that DHI had no authority to contract on behalf of Delta, noting that this was a key feature of a "dependent agent" for income tax purposes. The CBSA argued that the activities of DHI employees were limited to supporting sales and were not involved in purchase orders for products to be sold by Delta.

[76] As discussed above, the Tribunal is of the view that a non-resident importer may establish that it carries on business through its fixed place of business through a dependent agent. Accordingly, insofar as Delta can demonstrate that DHI and its employees are dependent agents, it is assumed that the business activities of the dependent agents are that of Delta's. Moreover, the issue before the Tribunal is whether Delta's business is being carried on through the fixed place of business by virtue of the acts of its employees and its agents, namely DHI and the two employees. The totality of the evidence surrounding each of these elements must be considered to determine whether Delta satisfied the "carries on business" requirement.

[77] Although Delta submitted that DHI entered into sales contracts on behalf of Delta with Canadian retailers, based on the evidence on the record, the Tribunal agrees with the CBSA that it was Delta that was party to these contracts and not DHI.[64] However, while the issue of whether the agent has authority to contract on behalf of its principal may be a relevant factor, it is not determinative of DHI's status as dependent agent in the context of a permanent establishment analysis under the *Regulations* (i.e. carrying on business through a fixed place of business analysis). As discussed above, the Tribunal distinguishes the second-prong permanent establishment analysis in *AIL* from the one pursuant to the *Regulations.* The permanent establishment analysis under Article V(5) of the *Tax Treaty* (a dependent agent analysis) expressly required the agent to have the authority to conclude contracts. There is no such provision or requirement under the *Regulations*.

[78] With respect to the CBSA's arguments concerning the fact that Delta's income taxes were not paid in Canada, the Tribunal is not persuaded that this is determinative of where Delta conducts its business. There is no evidence on the record for the Tribunal to assess whether Delta is liable to pay income taxes in Canada, and indeed such an inquiry would be outside the scope of the Tribunal's jurisdiction. The Tribunal therefore cannot draw an adverse inference based on the fact that Delta reports its income for tax purposes in the United States.[65] The Tribunal must consider the totality of the evidence on the record in this appeal in assessing whether Delta carries on business through its fixed place of business under the *Regulations.*

[79] For the reasons below, the Tribunal finds that during the relevant period, DHI and the two employees were dependent agents of Delta. As such, all of their activities were conducted on

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63 *Ibid.* at 291.

64 Exhibit AP-2020-002-04 at 265-292.

65 The Tribunal notes that Delta indicated it would be reviewing these issues with its advisors. *Transcript of Public Hearing* at 47.

Delta's behalf. Furthermore, through the activities of its dependent agents and its own employees, Delta carried on business through its fixed place of business.

Dependent agent status

[80] According to the Sales Agency Agreement between Delta[66] and DHI entered into in 2006 and amended in 2013,[67] DHI was authorized, subject to Delta's approval, to sell Delta's products in Canada.[68] The agreement also contemplated the provision of various services provided by DHI including market analysis, customer service, order (purchasing) processing, sales forecast, and inventory control. Essentially, as described by Mr. Mastropietro in his oral testimony, the agreement was for DHI to perform services that allowed Delta to conduct business in Canada. DHI received compensation in the form of a commission income based on a percentage of sales in Canada.[69]

[81] With respect to Delta's responsibilities, the agreement stated that Delta would establish prices, terms and conditions of sale, and provide quotes. Delta was also responsible for providing DHI with administrative support, including, for instance, computerized systems for purchasing, order processing and perpetual inventory.[70]

[82] The CBSA pointed to a clause (Article VIII) in the agreement to refute the dependency.

> It is understood that the agency may present itself as being in association with the wholesaler, but hereby acknowledges full responsibility for representations made if not sanctioned or authorized by the wholesaler or the wholesaler[']s designated representative.[71]

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66 The original party to the Sales Agency Agreement was Auburn Hosiery Mills Inc. (Autumn), which amalgamated with Delta in and around January 1, 2010. See Certificate of Ownership Merging Auburn into Delta in Exhibit AP-2020-002-04 at 127-130. *Transcript of Public Hearing* at 17, 18.

67 Exhibit AP-2020-0020-04 at 164-167. The copy provided to the Tribunal was undated and unsigned although the agreement does reference a date of 2006 on the signing page. It is not known when exactly this agreement was entered into between the parties. The only signed and dated agreement is an amendment to the Sales Agency Agreement dated January 1, 2013, whereby the parties agreed to amend the commission rate payable. Based on this evidence, the Tribunal is of the view the original agreement was entered into before the importation of the goods.

68 Exhibit AP-2020-002-04 at 169. Although the corporate resolution is undated, it is signed by the Chief Financial Officer of Delta Industries and the Tribunal infers from the language that it was signed prior to the creation of the Sales Agency Agreement.

69 *Transcript of Public Hearing* at 27. As evidence of DHI's income, Delta submitted copies of DHI's corporate tax returns (2014-2018). Exhibit AP-2020-002-04A (protected) at 10-246. The evidence also indicates that a portion of income generated from denim retail stores accrued to DHI; this income was not related to the Delta Socks division but to other business units of Delta. Exhibit AP-2020-002-04 at footnotes 29, 52.

70 Exhibit AP-2020-0020-04 at 164-167.

71 *Ibid.* at 165.

[83] The Tribunal does not find Article VIII of the agreement probative of the true relationship between the parties. In the Tribunal's view, the Sales Agency Agreement served as an intercorporate agreement between two related corporate entities under common management and control.[72] Article VIII is a provision that attempts to limit certain liability of one party to the contract for representations made by the other party. It is not *de facto* evidence of the independence of the agent from its principal. To assess the nature of the agency relationship, the Tribunal may look beyond the provisions of the agreement. In this regard, Mr. Mastropietro indicated that while the relationship "was structured as just a service agreement [DHI] actually operated as an extension of Delta".[73] The Tribunal agrees based on the evidence before it.

[84] The evidence indicates that DHI's Sales Director, Mr. Silver, and Sales Associate, Ms. Srithar were directly and regularly supervised by Delta's management, specifically Mr. Silverstein, Delta's Vice-President of Sales.[74] Throughout all of the activities carried out by DHI employees as described below, there was frequent communication and reporting to Delta's management.

[85] The evidence also indicates that Mr. Silver and Ms. Srithar were treated as though they were employees of Delta.[75] All employment- and compensation-related decisions in respect of the two DHI employees were made by Delta in accordance with Delta's human resources policies. For instance, salary increases and bonuses were made in accordance with Delta's policies and financial performance.[76]

[86] DHI did not operate as an independent entity. Delta's approval was required for any contracts entered into by DHI and for the assumption of all of its liabilities and expenditures. Delta had co-signing authority over DHI's bank accounts. Expenses incurred by DHI, such as those related to sales activities and office expenditures, were funded by the commission payments made by Delta to DHI based upon a percentage of Canadian sales pursuant to the Sales Agency Agreement.[77] Additionally, Delta's finance team coordinated with a Canadian third-party accountant to file required tax forms documenting the financial statements of DHI. DHI made no profits from the sale of the goods.

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72 Additionally, other officer and director positions of both DHI and Delta were held by the same people. Mr. Mastropietro was both an officer and director of DHI, while also being the Senior Vice-President of Finance for Delta. *Transcript of Public Hearing* at 25. Mr. Mastropietro certified the 2016 and 2017 income tax filings of DHI as a director of DHI. Mr. Cohn, the Managing Director of the Delta Socks division of Delta was also an officer and director of DHI, executing the sublease, employment agreements for DHI employees, tax filings and independent sales agreements. See Exhibit AP-2020-002-04 at 175, 250, 298, 299; Exhibit AP-2020-002-04A (protected) at 18, 108, 379, 380.

73 *Transcript of Public Hearing* at 40.

74 For instance, Mr. Silverstein received reports from the sales director regarding sales-related issues raised during the sales director's meetings with customers. Exhibit AP-2020-002-04 at 415, 421, 422; *Transcript of Public Hearing* at 46, 47, 53-55.

75 *Transcript of Public Hearing* at 28, 54-59. Mr. Cohn and Mr. Silverstein were directly involved with employment matters regarding Ms. Srithar, as evidenced by correspondence from Mr. Cohn to Mr. Silver and Ms. Srithar in February 2016. Mr. Cohn's title in his signature line notes that he is the Managing Director of various entities and divisions of Delta, including Auburn Hosiery US, Dominion Hosiery Canada, Delta Galil Brands Europe - UK Socks. See Exhibit AP-2020-002-04 at 298-299.

76 See paragraph 3(a) of Mr. Silver's employment contract; Exhibit AP-2020-002-04 at 248, 298, 299. *Transcript of Public Hearing* at 60, 211-212.

77 *Transcript of Public Hearing* at 27, 44, 47, 213; Exhibit AP-2020-002-04 at 340-360.

[87] The evidence also indicates that all sales transactions were between Delta and its customers.[78] Delta established prices of the goods and approved all new customers and credit limits.[79] The CBSA took issue with the fact that Delta's parent company, Delta Industries, also played a role in approving new customer accounts. In the Tribunal's view, the role of the parent company did not displace Delta as the vendor of the goods to the Canadian retailers. Similarly to many multinational corporate families, certain financial services are outsourced to one corporate entity to perform on the behalf of all related entities. This was the case in this instance where Delta Industries performed certain treasury services such as approving credit limits for customers of Delta.[80] All sales contracts were with Delta, including master supplier/vendor agreements with retailers.[81]

[88] Based on the evidence, the Tribunal is convinced that Delta assumed all risk related to DHI's operations. It was the decision of Delta's management whether revenues from Canadian sales were best supported by the expenses being incurred by its office in Canada or allocated to the U.S. entity. The overall business operational risks were borne by Delta. Whether DHI contributed to losses or profits of the business would be borne and felt by Delta, as it was Delta that funded DHI's operations through the intercorporate agreement.

[89] As indicated by the facts described above, DHI's very existence was limited to activities that furthered Delta's business in Canada, and DHI and the two employees, Mr. Silver and Ms. Srithar, were fully controlled and integrated with Delta. Put otherwise, DHI and its employees were not carrying on business of their own account and were not independent of Delta. Delta's business strategy was to structure DHI for the purposes of employing Canadian personnel and securing office space in Canada for Delta's business and to facilitate Delta's expenses and liabilities with respect to these assets. As noted in Delta's corporate resolution, to "realize certain efficiencies and economies of scale," the management of Delta Industries made the decision to consolidate the business operations of Delta and DHI by transferring operations to Delta and reducing DHI to a Canadian sales office for Delta.[82] Delta was entitled to set up an organizational structure that maximized its business strategy, both from an operational and financial perspective. The fact that DHI was a distinct corporate entity does not vitiate its role in Delta's operations. DHI was clearly distinguishable from Delta's other independent sales agents, as further described below.

[90] Based on previous findings of the Tribunal in *JewelWay*[83] and *DMG*,[84] the CBSA submitted that a Canadian entity that was an agent of a foreign principal could not, at the same time, be a purchaser of the goods. The CBSA has conflated the issues of this case with those in *Jewelway* and *DMG*. In those cases, the issue before the Tribunal was whether the foreign vendor could sell goods to the purchaser where there was a relationship of agency between the two parties. The Tribunal determined that as the appellants were agents of the vendors, there was no sale for export between the parties; the relevant transaction was therefore between the foreign vendor and the distributors in Canada. The present case does not raise the same question of whether the Canadian entity is properly the purchaser of the goods in Canada. The question here is whether a non-resident importer may

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78 Exhibit AP-2020-002-04 at 265-292; Exhibit AP-2020-002-04A (protected) at 314, 315, 367-375.

79 Mr. Silver was authorized to offer discounts on sales of excess inventory within a certain rate, without approval from Delta. Exhibit AP-2020-002-04 at 362-363; *Transcript of Public Hearing* at 46, 47, 73, 74, 199-200.

80 *Transcript of Public Hearing* at 135.

81 Exhibit AP-2020-002-04 at 265, 267-268, 291-292, 287-289.

82 *Ibid.* at 169.

83 *JewelWay International Canada, Inc. and JewelWay International, Inc. v. the Deputy Minister of National Revenue* (1 January 1980), AP-94-360 (CITT) [*JewelWay*].

84 *DMG Trading Co. Ltd. v. the Deputy Minister of National Revenue* (1 January 1980), AP-96-076 (CITT) [*DMG*].

qualify as a purchaser in Canada by virtue of, at least in part, the business conducted by it in Canada as well as that of its dependent Canadian agent.

Buying and selling goods for a profit

[91] Mr. Silver and Ms. Srithar were dedicated in their employment at DHI to the furtherance of Delta's business in Canada. As sales director, Mr. Silver was responsible for soliciting and servicing orders from Canadian customers, advising on costing issues (i.e. the determination of Delta's wholesale pricing to retailers and the manufactured retail sales pricing for its products), and negotiating prices with customers (which would be approved by Mr. Silverstein).[85] As a result of Mr. Silver's efforts, Delta was able to secure numerous additional accounts in the Canadian market.[86] Ms. Srithar was responsible for day-to-day interfaces with Delta's customers regarding their orders.

[92] DHI's employees were also engaged in a significant amount of purchasing related activities for Delta. As noted by Mr. Mastropietro, these activities of merchandizing, production and product development went beyond the functions covered by the Sales Agency Agreement.[87] Mr. Silver was responsible for preparing demand forecasts and inputting them into Delta's forecast system (Movex). The forecasts would ultimately be approved by Mr. Silverstein and were sent to Delta's Production Director, Ms. Robinson to formulate a production planning report that would form the basis for Delta's factory production orders.[88] Mr. Silver was also integral to Delta's product development. In this regard, he prepared product development requests from retailers that were sent to Delta for design and production and was key to the expansion of Delta's private label program in Canada.[89] He provided input on products specialized for the Canadian market.[90] Mr. Silver also participated on Delta's brand development committees and attended product development and brand meetings at Delta's New Jersey office in the United States.[91] Additionally, Mr. Silver reviewed production samples for quality control purposes and reported any issues to Delta.[92] Mr. Silverstein indicated in his oral testimony that Mr. Silver's role went beyond the sales related responsibilities outlined in his employment contract.[93] Having considered Mr. Silver's scope of activities, the Tribunal agrees.

[93] Ms. Srithar provided product packing instructions to the factory, tracked all shipments from the factory[94] and managed inbound logistics with Ms. Robinson and Mr. Silver for the transportation of the goods to the Canadian market. She also provided "re-work" instructions to Delta's warehouse

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85 *Transcript of Public Hearing* at 66-73. Exhibit AP-2020-002-04 at 374-377, 421-422.

86 *Ibid.* at 60, 61.

87 *Ibid.* at 38.

88 According to Ms. Robinson, demand forecasts and production orders could be issued on a monthly basis. *Transcript of Public Hearing* at 35, 36, 39, 40, 140, 147, 148, 149; Exhibit AP-2020-002-04 at 381-382, 405, 406.

89 "Requests for Development" detailed new styles or modifications to products based on discussions with Canadian retailers. These new or modified styles would be approved by Mr. Gary Silverstein and provided to Delta design and production staff to produce samples and eventually production. Exhibit AP-2020-002-04 at 365-372, 415-419; *Transcript of Public Hearing* at 39, 59, 60, 131-133.

90 *Transcript of Public Hearing* at 38, 59, 120, 126-127.

91 *Ibid.* at 79-83, 118-127.

92 *Ibid.* at 64; Exhibit AP-2020-002-04 at 396-397.

93 *Transcript of Public Hearing* at 58, 59; Exhibit AP-2020-002-04 at 248-251.

94 *Transcript of Public Hearing* at 177, 181-184.

operated by Coles to prepare or pack the products for shipment to the retailers.[95] Ms. Srithar also monitored inventory levels at the warehouse.[96]

[94] Furthermore, Mr. Silver was also responsible for managing the accounts assigned to Delta's external independent sales agents in Canada. With respect to these external sales agents, Mr. Silverstein explained in his testimony that they were paid through commissions from DHI that were approved by Delta. According to Mr. Silverstein, the external agents were independent insofar as neither Delta nor DHI had control over how the agents spent their time or accrued expenses. Conversely, the external agents had no visibility into Delta's costing or margins. The independent sales agents were not involved with purchasing related activities such as product development. Demand forecasting for accounts managed by external sales agents were inputted into Delta's demand forecasting systems by Mr. Silver.[97]

[95] In addition to the activities of Delta's dependent agents, Delta submitted that the visits of its own employees, such as Mr. Silverstein, was indicative of Delta conducting business in Canada. In this regard, Mr. Silverstein explained he visited DHI's office three or four times a year to have meetings with DHI staff and customers, to discuss business strategies and to gather market-related intelligence from retailers.[98]

[96] The activities of Mr. Silverstein would not be, on their own, sufficient to conclude that Delta carried on business through its fixed place of business. However, the Tribunal finds it appropriate to consider these activities together with the activities carried on by DHI and its employees. His presence in Canada from time to time and frequent oversight of DHI's activities was indicative of the integration between Delta and DHI in carrying out various operational tasks underlying Delta's business of procuring products from overseas suppliers and selling them to Canadian retailers.

[97] The Tribunal finds that, on balance, Delta's activities in Canada satisfied the meaning of "carries on business" under the *Regulations*. These activities covered a wide spectrum of tasks that were fundamental to Delta's purchases of apparel products from overseas suppliers and sales of imported goods to the Canadian retailers. From the leased offices in Mississauga, Mr. Silver and Ms. Srithar, working with Mr. Silverstein, engaged in numerous purchase and sales related activities, including merchandizing, product development, demand forecasting, logistics management with both foreign suppliers and the warehouse operator, purchase order placement, inventory control, and customer service.[99] In a highly integrated structure with its dependent agents, Delta carried on business in Canada through the Premises during the relevant period.

DECISION

[98] Having reviewed all the evidence and jurisprudence, for the reasons above, the Tribunal finds that Delta has a fixed place of business through which it carries on business satisfying the definition of a permanent establishment set out in section 2 of the *Regulations.*

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95 *Ibid.* at 170, 171, 182.

96 *Ibid.* at 34, 35.

97 *Ibid.* at 51, 52, 84-91, 95, 96.

98 *Ibid.* at 101-104, 106, 107.

99 Exhibit AP-2020-002-04 at 14, 15, 24, 300, 301, 304-307, 309, 310, 312, 315-321, 323, 324, 429. According to Delta, it retained Cole to provide logistics services in Canada to facilitate Delta's sales to Canadian customers. The evidence shows that Delta paid invoices from Cole for services in 2016. Exhibit AP-2020-002-04 at 255-261.

[99] Accordingly, as a non-resident importer who has a permanent establishment in Canada, Delta qualifies as a "purchaser in Canada" pursuant to paragraph 2.1(b) of the *Regulations* and, therefore, the transaction value pursuant to subsection 48(1) of the *Act* may be applied in determining the value for duty of the goods.

[100] The appeal is allowed.

Cheryl Beckett

Cheryl Beckett
Presiding Member