Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2019-047

Pier 1 Imports (U.S.), Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, September 2, 2021

Canada

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DECISION 14

IN THE MATTER OF an appeal heard on March 15, 17, 18 and 19, 2021, 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 December 27, 2019, with respect to a request for re-determination pursuant to subsection 59(2) of the *Customs Act*.

BETWEEN

PIER 1 IMPORTS (U.S.), INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

The parties will have 60 days to make any additional representations concerning the amounts of general expenses and profit to be used in the mark-up percentage, with the Tribunal reserving the right to amend its evaluation of the final mark-up percentage contained in the reasons of this decision.

Following such determination the Tribunal may make, the matter is returned to the respondent for reappraisal of the value for duty of the goods at issue in a manner consistent with the reasons for this decision.

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	via videoconference
Dates of hearing:	March 15, 17, 18 and 19, 2021
Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Martin Goyette, Counsel Peter Jarosz, Counsel Zackery Shaver, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Pier 1 Imports (U.S.), Inc.	Joel Scheuerman Lauzanne Bernard Normand Adèle Desgagné

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Louis Sébastien Annie Laflamme

WITNESSES:

Carrie Egan Director of Global Procurement Services (April 2011 to April 2016) and Vice President of Global Services (May 2016 to March 2019) Pier 1 Imports (U.S.), Inc.	Bruno A. de Camargo Partner Deloitte LLP
Jean-François Bédard Manager, Commercial and Trade Branch Canada Border Services Agency	Marie-Pier Simard Senior Auditor, Commercial and Trade Branch Canada Border Services Agency

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STATEMENT OF REASONS

BACKGROUND

[1] This is an appeal filed with the Canadian International Trade Tribunal on March 26, 2020, by Pier 1 Imports (U.S.), Inc. (Pier 1) pursuant to subsection 67(1) of the *Customs Act*.[1] This appeal pertains to a decision of the President of the Canada Border Services Agency (CBSA), made pursuant to subsection 60(4) and dated December 27, 2019, concerning the value for duty (VFD) of decorative home furnishings and accessories imported by Pier 1 from March 1, 2014, to August 26, 2017, as detailed in seven Detailed Adjustment Statements (DAS) issued by the CBSA.[2]

[2] The first issue in this appeal is to determine which method for the determination of value for duty can be properly applied to the aforementioned importations and whether this method was properly applied by the CBSA. The CBSA has suggested that the deductive value method (DVM) or a flexible application of the deductive value method (FDVM) should apply. The alternative put forward by Pier 1 is a flexible application of the computed value method (FCVM).

[3] A second, subsidiary issue in this appeal involves the applicability of an agreement (Settlement Agreement) concluded in 2003 between Pier 1 and the Canada Customs and Revenue Agency (CCRA), the predecessor of the CBSA, settling a previous appeal to the Tribunal and elaborating the parties' preference to apply the computed value method, rather than the DVM, whenever possible.

PROCEDURAL HISTORY

[4] Pier 1 was a retailer of decorative home furnishings and accessories. It operated stores in the United States and Canada.[3] The Canadian stores were operated by Pier 1 as an unincorporated branch. Until the 2006 and 2007 fiscal years, Pier 1 operated both wholly owned and franchise stores in the United States.

[5] On October 24, 2003, Pier 1 entered into the Settlement Agreement with the Canada Customs and Revenue Agency, the predecessor to the CBSA, to settle an appeal by Pier 1 before the Tribunal (AP-2003-003). The Settlement Agreement provided that the CCRA would conduct a new customs audit/verification in consultation with Pier 1. The Settlement Agreement expressed the parties' desire to find a valuation method – other than the deductive method and preferably the computed value, if applicable – to determine the VFD of goods imported by Pier 1 for the 2002 fiscal year and for the future.[4]

[6] The ensuing verification (2004 Verification Report) concluded that Pier 1's imports would be valued pursuant to a "flexible computed value method" (FCVM), i.e. a residual method pursuant to section 53 of the *Act*, based on the computed valuation method (CVM) set forth under section 52. The 2004 Verification Report established that covered goods imported by Pier 1 would be valued according to the following formula: as a proxy for production costs, the value of the warehouse landed cost (WLC) of the goods at Pier 1's U.S. warehouses plus as a proxy for general expenses and

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1 R.S.C., 1985, c.1 (2nd Supp.) [*Act*].
2 Exhibit AP-2019-047-18 at 91-116.
3 Pier 1 and its subsidiaries are currently engaged in bankruptcy proceedings in the United States.
4 Exhibit AP-2019-047-07 at 94-96.

profit, an 18.75 percent mark-up. The mark-up was calculated by the CBSA on the basis of an 8 percent franchise fee charged by Pier 1 to its U.S. franchisees at the time, which was regarded as a reasonable proxy for profit in an arm's-length transaction, in addition to distribution centre handling fees, freight fees, customs drawbacks and a reserve adjustment to account for short-supplied and damaged goods, which were used as general expenses for sales for export to Canada under section 52.[5] The 2004 Verification Report required Pier 1 to notify the CBSA of any material change to its operations that would affect the agreement.[6]

[7] As a result of an audit completed in 2015 concerning imports made during the period between March 1, 2014 and February 28, 2015, it came to light that Pier 1 had phased out its U.S. franchise structure in the 2007-2008 fiscal year and had based its customs valuations since that time on an "export broker cost" and "export duty cost" calculation that was intended to replace, and approximate, the 8 percent franchise fee.[7] The CBSA viewed the phasing out of Pier 1's franchise operations as a material change in the agreement and considered that Pier 1 should have notified the CBSA promptly of such a change. Lacking an arm's-length transaction to base its valuation upon, the CBSA concluded that, going forward, it was justified in changing the valuation method set forth in its 2004 Verification Report.[8] The CBSA later conducted a follow-up review of Pier 1's self-adjusted declarations to the final report.[9]

[8] Attached to the seven DASs were the results of the CBSA's audit, as summarized in its Trade Compliance Verification Final Report of July 10, 2017 (Final Report). In the report, the CBSA concluded that for all relevant years leading up to July 10, 2017, Pier 1 should have included, in the calculation of the mark-up to be added to the WLC, all relevant expenses related to the production and sale of the goods for export, including Pier 1's U.S.-based marketing expenses, its foreign-exchange losses and its net profit from its profit and loss statement.[10] For imports taking place after July 10, 2017, the CBSA was of the view that Pier 1 possessed adequate information to use the DVM, as set out in section 51 of the *Act*.[11] In its respondent's brief, the CBSA similarly argues that Pier 1 may use the DVM strictly, but also argues, subsidiarily, that should the Tribunal find that Pier 1's business model does not permit the use of the DVM on the basis that goods are not sold within the timeframes provided in subsection 51(2), a FDVM, where the timelines were relaxed, should be applied, as doing so would require fewer deviations than the FCVM proposed by Pier 1.[12]

[9] On October 30, 2017, Pier 1 filed a request for judicial review and declaratory judgment with the Federal Court of Canada, seeking to enforce the Settlement Agreement and to invalidate the findings in the Final Report.

[10] On December 18, 2017, the CBSA informed Pier 1 that it had reviewed Pier 1's self-adjustments following the Final Report and advised Pier 1 that it had not complied with the

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5 *Ibid.* at 109-110.
6 *Ibid.* at 112.
7 Exhibit AP-2019-047-18 at 71.
8 *Ibid.* at 71-74.
9 *Ibid.* at 91.
10 *Ibid.* at 73-74.
11 *Ibid.* at 77.
12 *Ibid.* at 29.

CBSA's decision in the Final Report. The CBSA issued seven DASs in response, covering goods imported in successive periods ranging from March 1, 2014, to August 27, 2017.[13]

[11] On March 16, 2018, Pier 1 requested a redetermination of the VFD of the seven DASs under subsection 60(1) of the *Act*.

[12] On September 28, 2018, the Federal Court dismissed Pier 1's application for judicial review, finding that the appropriate forum was before the Tribunal, while transferring the motion to stay proceedings to the Federal Court of Appeal (FCA), as it lacked jurisdiction in this respect.

[13] On October 5, 2018, Pier 1 appealed the Federal Court's decision to the FCA.

[14] On October 18, 2019, the FCA denied Pier 1's appeal, having found that the Federal Court had committed no error, as jurisdiction over the questions put to the FCA should have been directed to the Tribunal. The FCA denied Pier 1's request for a stay of proceedings, as no appeal was yet before the Tribunal.

[15] On December 27, 2019, the CBSA made its final redetermination, pursuant to subsection 60(4) of the *Act*, upholding its previous conclusions with respect to the VFD and the validity of the DASs in question.

[16] On March 26, 2020, Pier 1 filed the present appeal pursuant to subsection 67(1) of the *Act*.

[17] The Tribunal heard the parties' evidence and argument over four days of hearings on May 15 and May 17 to 19, 2021, via videoconference.

LEGAL FRAMEWORK

[18] Section 46 of the *Act* stipulates that the VFD of imported goods is to be determined in accordance with sections 47 to 55. These provisions set out four methods pursuant to which the VFD of imported goods can be determined and one residual method that flexibly applies one of the four methods. Subsection 47(2) stipulates that the methods must be considered in the order in which they appear in the *Act*.

[19] Sections 47 and 48 of the *Act* set out the transaction value method (TVM) as the first method for consideration with regard to the determination of the VFD of imported goods. The parties are in agreement and the Tribunal does not dispute that neither the TVM nor the two subsequent TVM-based methods using identical or similar goods are applicable to the importations of the goods at issue.

[20] The next methods under the *Act* are the DVM, as set out in section 51 and then the CVM, as set out in section 52. Subsection 47(3) provides that the order of consideration of these two methods may be reversed at the written request of an importer.

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[13] In its Appeal Notice, Pier 1 states that it has filed other requests for further re-determination pursuant to section 60 of the *Act* with the CBSA, with respect to six DASs for imports between August 27, 2017, and December 1, 2018, (the "DASs under review"). Pier 1 alleges that the DASs under review raise the same issues as the DAS under appeal, and notes that the President of the CBSA has not yet rendered a decision with respect to the DASs under review; Exhibit AP-2019-047-01 at 20.

[21] The deductive value method consists of taking the price at which the goods are sold at arm's length in Canada following importation, and deducting a number of fees and costs (commissions, profit, and where applicable, transportation costs, taxes and assembly or transformation costs). This estimates the value of the goods at the time of importation by deducting all the costs and fees incurred in reselling them. Pursuant to section 51 of the *Act*, the deductive value is applied as follows to determine the VFD:

> **Deductive value as value for duty**
>
> **51 (1)** Subject to subsections (5) and 47(3), where the value for duty of goods is not appraised under sections 48 to 50, the value for duty of the goods is the deductive value of the goods if it can be determined.
>
> **Determination of deductive value**
>
> **(2)** The deductive value of goods being appraised is
>
> > **(a)** where the goods being appraised, identical goods or similar goods are sold in Canada in the condition in which they were imported at the same or substantially the same time as the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold;
> >
> > **(b)** where the goods being appraised, identical goods or similar goods are not sold in Canada in the circumstances described in paragraph (a) but are sold in Canada in the condition in which they were imported before the expiration of ninety days after the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold at the earliest date after the time of importation of the goods being appraised; or
> >
> > **(c)** where the goods being appraised, identical goods or similar goods are not sold in Canada in the circumstances described in paragraph (a) or (b) but the goods being appraised, after being assembled, packaged or further processed in Canada, are sold in Canada before the expiration of one hundred and eighty days after the time of importation thereof and the importer of the goods being appraised requests that this paragraph be applied in the determination of the value for duty of those goods, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised are so sold.
>
> **Price per unit**
>
> **(3)** For the purposes of subsection (2), the price per unit, in respect of goods being appraised, identical goods or similar goods, shall be determined by ascertaining the unit price, in respect of sales of the goods at the first trade level after importation thereof to persons who

(a) are not related to the persons from whom they buy the goods at the time the goods are sold to them, and

(b) have not supplied, directly or indirectly, free of charge or at a reduced cost for use in connection with the production and sale for export of the goods any of the goods or services referred to in subparagraph 48(5)(a)(iii), at which the greatest number of units of the goods is sold where, in the opinion of the Minister or any person authorized by him, a sufficient number of such sales have been made to permit a determination of the price per unit of the goods.

Adjustment of price per unit

(4) For the purposes of subsection (2), the price per unit, in respect of goods being appraised, identical goods or similar goods, shall be adjusted by deducting therefrom an amount equal to the aggregate of

(a) an amount, determined in the manner prescribed, equal to

> **(i)** the amount of commission generally earned on a unit basis, or
>
> **(ii)** the amount for profit and general expenses, including all costs of marketing the goods, considered together as a whole, that is generally reflected on a unit basis in connection with sales in Canada of goods of the same class or kind as those goods,

(b) the costs, charges and expenses in respect of the transportation and insurance of the goods within Canada and the costs, charges and expenses associated therewith that are generally incurred in connection with sales in Canada of the goods being appraised, identical goods or similar goods, to the extent that an amount for such costs, charges and expenses is not deducted in respect of general expenses under paragraph (a),

(c) the costs, charges and expenses referred to in subparagraph 48(5)(b)(i), incurred in respect of the goods, to the extent that an amount for such costs, charges and expenses is not deducted in respect of general expenses under paragraph (a),

(d) any duties and taxes referred to in clause 48(5)(b)(ii)(B) in respect of the goods, to the extent that an amount for such duties and taxes is not deducted in respect of general expenses under paragraph (a), and

(e) where paragraph (2)(c) applies, the amount of the value added to the goods that is attributable to the assembly, packaging or further processing in Canada of the goods.

Rejection of deductive value

(5) Where there is not sufficient information to determine an amount referred to in paragraph (4)(e) in respect of any goods being appraised, the value for duty of the goods shall not be appraised under paragraph (2)(c).

Definition of *time of importation*

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

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

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

[22] Pursuant to section 52 of the *Act*[14] the computed value is calculated based upon an aggregate of the costs of production and an amount for profit and general expenses, considered as a whole, that reflects the sale for export of the goods of the same class or kind to Canada. Generally, the CVM would be applied in cases where a producer is importing goods. Paragraphs 1 and 2 read as follows:

Computed value as value for duty

52 (1) Subject to subsection 47(3), where the value for duty of goods is not appraised under sections 48 to 51, the value for duty of the goods is the computed value of the goods if it can be determined.

Determination of computed value

(2) The computed value of goods being appraised is the aggregate amount equal to

(a) subject to subsection (3), the costs, charges and expenses incurred in respect of, or the value of,

(i) materials employed in producing the goods being appraised, and

(ii) the production or other processing of the goods being appraised, determined in the manner prescribed; and

(b) the amount, determined in the manner prescribed, for profit and general expenses considered together as a whole, that is generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised made by producers in the country of export.

[23] Further, with respect to the application of the CVM under section 52 of the *Act*, section 6 of the *Valuation for Duty Regulations* provides as follows, with respect to the kinds of information required to apply the CVM:

6 (1) For the purposes of paragraph 52(2)(a) of the Act, the costs, charges and expenses, or the value, referred to therein in respect of goods being appraised shall be determined on the basis of the following accounts or information supplied by or on behalf of the producer of the goods and prepared in a manner consistent with generally accepted accounting principles of the country of production of the goods being appraised:

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14 As well as subsection 6(1) of the *Valuation for Duty Regulations*, SOR/86-792.

> **(a)** the commercial accounts of the producer of the goods being appraised; or
>
> **(b)** other sufficient information relating to the production of the goods being appraised.
>
> **(2)** For the purposes of paragraph 52(2)(b) of the Act, the amount for profit and general expenses referred to therein in respect of goods being appraised shall be calculated on a percentage basis and determined from sufficient information that is prepared in a manner consistent with generally accepted accounting principles of the country of production of the goods being appraised and, subject to subsection (3), is supplied by or on behalf of the producer of the goods being appraised.
>
> **(3)** Where the amount determined from sufficient information supplied by or on behalf of a producer pursuant to subsection (2) is not consistent with the amount generally reflected in sales for export to Canada by producers of goods of the same class or kind who deal with importers in a manner consistent with that of persons who are not related, the sufficient information shall be based on an examination of sales for export to Canada
>
> **(a)** of the narrowest group or range of goods of the same class or kind as the goods being appraised, including the goods being appraised;
>
> **(b)** by producers dealing with importers in a manner consistent with that of persons who are not related; and
>
> **(c)** from which sufficient information can be obtained.

[24] The final method for valuing goods is the residual method contained at section 53 of the *Act*. Section 53 provides for the flexible application of one of the methods set out in sections 48 to 52, with a preference for the method that requires the fewest deviations to the original method and based on information available in Canada:

> **53** Where the value for duty of goods is not appraised under sections 48 to 52, it shall be appraised on the basis of
>
> **(a)** a value derived from the method, from among the methods of valuation set out in sections 48 to 52, that, when applied in a flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and
>
> **(b)** information available in Canada.

POSITIONS OF THE PARTIES

[25] Pier 1 argues that the DVM is inapplicable in the case at issue, as the preponderance of goods at Pier 1 stores are sold more than 90 days after importation, and most often for less than the suggested retail price. Accordingly, the importations would not satisfy the requirements of

section 51. Pier 1 also added that the different systems it used to manage accounting and inventory were not designed to compile the information necessary to apply the DVM.[15]

[26] With respect to the terms of the Settlement Agreement, Pier 1 has indicated that during the period under review, there had been no material changes to its business operations in Canada that would have required notifying the CBSA.[16] Similarly, Pier 1 believes that the intent of the Settlement Agreement should continue to apply, regardless of the exact value used for the mark-up of its WLC.[17] Pier 1 maintains that the FCVM, as it has been used to date, represents a fair approximation of the VFD of the goods at issue at the time of importation.[18]

[27] The CBSA argues that the CVM is not a reliable method for valuing the goods at issue as Pier 1 is not the producer of the goods and would not have access to the relevant information on the cost of producing or processing the goods.[19] The CBSA suggests that Pier 1 maintains data that would allow it to apply a strict version of the DVM or, at a minimum, an FDVM, using Pier 1's retail sales price as the basis for valuing goods and proceeding to request adjustments as the imported items were sold.[20] The CBSA further submits that a FDVM would require fewer modifications than a FCVM and should therefore be preferred.

ANALYSIS

Application of section 53 of the *Act* and Pier 1's agreement with the CCRA

[28] Contrary to some of the assertions made by the CBSA, and based on its own admission, the Tribunal finds that the evidence presented in the Agreed Statement of Facts does not permit a strict application of either the DVM or the CVM to the goods at issue.[21] The evidence tendered by Pier 1 before the Tribunal, and uncontroverted by the CBSA, is that Pier 1 stores carried between 7,000 and 10,000 unique, imported products during the period under review and that, among a sample of products taken, it took, at minimum, between 112 and 143 days to sell those products, most often at a price below the suggested retail sales price.[22]

[29] As Pier 1 is not the producer of the goods at issue, a strict application of the CVM would not be possible in the circumstances. Similarly, as the goods are unique, are not appraised upon entry into Canada and are not generally sold within 90 days of importation, a strict application of the DVM would not be applicable either.

[30] Given that neither the CVM nor the DVM, as they are set out under the *Act*, may be applied in the circumstances, it would follow that recourse to the residual method of valuation contained at section 53 must apply. As discussed above, this residual method requires that goods be appraised based on:

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15 Pier 1 explains that since it "... has historically used the Residual CVM based on the 2004 Report, Pier 1 never had an IT system in place that was able to receive and aggregate data for the purposes of tracking the initial suggested price of goods at the time of their import to Canada." Exhibit AP-2019-047-07 at para. 36.

16 *Transcript of Public Hearing* at 80-82.

17 *Ibid.* at 512-513.

18 *Ibid.* at 513-515.

19 Exhibit AP-2019-047-18 at para. 49.

20 *Transcript of Public Hearing* at 566-569.

21 Exhibit AP-2019-047-38.

22 Exhibit AP-2019-047-07 at paras. 58-62.

> **(a)** a value derived from the method, from among the methods of valuation set out in sections 48 to 52, that, when applied in a flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and
>
> **(b)** information available in Canada.[23]

[31] Further to the consideration of the method of valuation, the Tribunal must also consider the agreement made between Pier 1 and the CCRA. The duty of the Tribunal in this appeal is to determine the proper VFD of the subject goods and the valuation method that should be used in making that determination. Whereas the agreement provides clarity with respect to the intentions of the parties to prefer the CVM over the DVM, the Tribunal does not have the statutory authority to read these considerations into the law as they do not form part of the method of valuation of a good under the *Act*. The *Act* may allow importers to reverse the order of precedence concerning the application of the DVM and CVM, but no such consideration applies with respect to the residual method contained at section 53 and described above.

[32] As stated in *John Draganiuk*, ". . . the residual method calls for the flexible use of whichever method described in sections 48 to 52 conforms more closely to the requirements of that method."[24] Accordingly, the Tribunal must determine whether the FCVM or the DVM would most closely conform to the requirements of that method in light of the factual circumstances under examination.

Application of the FDVM to the goods at issue

[33] In its pleadings, the CBSA has suggested that while a strict application of the DVM is possible, it has subsidiarily argued that if the Tribunal finds that the residual method applies, an FDVM would conform the closest to the requirements set out at section 53 of the *Act*.

[34] To recap, the DVM is determined based on a unit price established either: i) upon an appraisal of the goods at the time of importation; ii) at the goods' unit selling price,[25] provided the goods are sold within 90 days of importation; or iii) at its unit selling price, provided the goods are sold within 180 days of importation and upon the written request of the importer. To this unit selling price, adjustments are permitted for certain listed expenses, including commissions, profit and general expenses, transportation, packing, duty or brokerage fees.[26]

[35] The CBSA submitted in its brief and in its testimony that Pier 1 possesses all the relevant information to calculate the VFD. To begin, the CBSA suggested that Pier 1 use its suggested retail sales price as a proxy for the appraised value of the goods upon importation, to which deductions for expenses could be subtracted. Subsequently, Pier 1 could file adjustments to this amount as goods are sold and once a more accurate price per unit is known.[27] The CBSA added that commentary on the DVM under the CBSA's "Memorandum D13-9-1 Residual Basis of Appraisal Method,"

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23 Section 53 of the *Act*.

24 *John Draganiuk v. President of the Canada Border Services Agency* (27 September 2006), AP-2005-040 (CITT) [*John Draganiuk*] at para. 18.

25 Subsection 51(2)(b) of the *Act* states that the unit selling price is the price at which the greatest number of units of goods being appraised, identical goods or similar goods are sold.

26 Subsection 51(4) of the *Act*.

27 Exhibit AP-2019-047-18 at paras. 60-76.

contemplates this very method, extending the 90-day requirement to 100 days in order to give more time for items to be sold.

[36] The CBSA supported its position with excerpts from the decisions contained in *Bluestein*,[28] *Tootsie Roll*,[29] and *Armstrong*,[30] where catalogue and sales list prices were used to establish the VFD of goods using the DVM. Of note is that three different methods were used in these decisions, with *Bluestein* establishing a price per unit based on selling prices indicated in the price lists it used in the United States, *Tootsie Roll* using the price at which the greatest number of units was sold, subject to appropriate deductions, and *Armstrong*, using the appellant's catalogue list prices, less standard distributor discounts of 50 and 10 percent, as required, applied to orders.

[37] As discussed above, Pier 1 disputes the logic of this approach, given the significant number of unique products Pier 1 stocks, the variability of its pricing model and the slow pace at which goods were sold once they reached stores in Canada. While Pier 1 conceded that some of its products were seasonal and could be expected to sell within predictable periods of time (i.e. Christmas trees were generally sold well before the actual holiday), these considerations are not material when considering that the goods at issue represent the preponderance of the goods imported by Pier 1 during the period under review.

[38] Perhaps more illustrative of Pier 1's reasoning for disagreeing with the FDVM is the relative complexity of this suggested method. Following the CBSA's suggested method would force Pier 1 to systematically overpay taxes and duties on its goods and then to request refunds at some unknown time in the future when a subject number of the goods have been sold or a unit value can be obtained. As suggested by Pier 1's witness, while this data may exist in some form at Pier 1, it would require allocating significant resources to cross-checking sales and pricing data with the amounts that were paid in taxes and duties.[31] As most of the goods that Pier 1 sells are unique and track across a significant number of product segments, there would be no economies of scale in applying this method unless Pier 1 developed systems to track all of this required information.

Application of the FCVM to the goods at issue

[39] As has been discussed above, Pier 1 does not produce the goods that it sells. Pier 1 does suggest, however, that it employs a significant contingent of buyers and supply chain management personnel to acquire the goods that it sells from around the world. The cost and logistics related to the importing of all these goods were well known to Pier 1 and represented one of its strengths in seeking to provide highly differentiated products in a "bazaar-like" atmosphere to its customers. Pier 1 has steadfastly held that the FCVM represents a much simpler and more predictable method of valuing goods, as the value is ascertainable at the time of importation and would not be subject to ongoing amendment in the same way as would be required under the CBSA's suggested application of the FDVM.

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28 *Bluestein Enterprises Inc. v. President of the Canada Border and Services Agency* (31 March 2014), AP-2013-028 (CITT) [*Bluestein*] at para. 16.

29 *Tootsie Roll of Canada Ltd. v. Canada (National Revenue)* (16 September 1997), AP-96-114 (CITT) [*Tootsie Roll*].

30 *Armstrong Bros. Tool Co. v. Canada (National Revenue)* (15 August 1997), AP-96-105 (CITT) [*Armstrong*].

31 *Transcript of Public Hearing* at 95-96. While perhaps not directly relevant to the determination before the Tribunal, the fact remains that Pier 1 is no longer a going concern, having shuttered its stores in Canada and requested bankruptcy protection on February 17, 2020. As such, the availability of information and potential solutions may be more limited than had Pier 1 still been in business. Exhibit AP-2019-047-38 at footnote 1.

[40] Not insignificantly, the CBSA and Pier 1 have also agreed in their agreed statement of facts to several components of the FCVM, including the WLC of the goods at issue, a proxy for the production cost of the goods, the general expenses directly attributable to the U.S. distribution centres for the purposes of calculating the mark-up on its imports and those general expenses indirectly attributable to the distribution centres, such as home office expenses, information technology and human resources functions.[32]

[41] As discussed above, Pier 1 and the CCRA had previously negotiated a settlement agreement that set out the manner in which they would calculate the mark-up applicable on Pier 1's WLC of goods.[33] This mark-up made use of similar data sets, but substituted an allowance for profit and back-office expenses with an 8 percent franchise fee that had been charged to Pier 1's remaining franchise operators in the United States, at the time the agreement and subsequent customs valuation audit had been concluded.[34] Based on testimony from Pier 1, it was not entirely clear exactly what percentage of the franchise fee was used to offset back-office expenses and what percentage constituted profit, but it had been concluded that this amount appeared to be appropriate in the circumstances and Pier 1 continued to use similar amounts when calculating its mark-up.[35] Following the winding down of franchise operations in 2007-2008, this amount was broken into an export duty and export brokerage account that represented the duties and brokerage fees paid by Pier 1. Pier 1's witness also confirmed that no profit amount had been included in these accounts.[36]

[42] In its pleadings and through the submissions of its expert witness, Mr. de Camargo, Pier 1 attempted to evaluate what a "reasonable" arm's-length mark-up for general expenses and profit would be. Through Mr. de Camargo's benchmarking analysis, Pier 1 suggested a range of between -0.27 percent and 2.65 percent as being a reasonable profit for a business engaging in the distribution centre functions of Pier 1's operations.[37] Over the period under review, this analysis arrived at a total suggested mark-up of between 13.60 percent and 20.24 percent, taking into account minimum and maximum allocations for profit and general expenses over the period under review.[38]

[43] Contrary to this view, the CBSA suggested that without an arm's-length transaction upon which to base its valuation, it was not fully confident that the values Pier 1 provided for profit and general expenses were accurate.[39] The CBSA added that Pier 1's calculation of general expenses lacked foreign exchange expenses, as well as various marketing expenses incurred in the United States for the benefit of the Canadian market that should have been included.[40] The CBSA also suggested that barring better information, the net profit figure from Pier 1's Canadian Profit and Loss Statement would provide a figure for the merchandise imported into Canada that made use of Canadian data.[41]

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32 Exhibit AP-2019-047-38 at paras. 71-75.
33 Exhibit AP-2019-047-07 at 94-96.
34 *Ibid.* at 94-96, 104-112.
35 *Transcript of Public Hearing* at 112-113.
36 *Ibid.* at 116-118.
37 Exhibit AP-2019-047-22 at 41-42.
38 *Ibid*.
39 Exhibit AP-2019-047-18 at para. 105.
40 *Ibid.* at para 54.
41 *Ibid.* at 53.

FCVM is the most appropriate method of valuation

[44] Both Pier 1 and the CBSA provided extensive witness testimony and cross-examination on the mechanics of Pier 1's business operations, the facts related to the settlement agreement and the process by which the CBSA determines how to apply the different valuation methods when considering the residual method. This testimony was particularly helpful in understanding what value-added processes were undertaken prior to Pier 1's goods being imported into Canada.

[45] In coming to a conclusion on a methodology for fairly capturing the value created by Pier 1 in importing its assortment of unique goods, the Tribunal concludes that the FCVM represents the most appropriate method for valuing Pier 1's goods, as it requires the fewest deviations from a strict application of the CVM and would provide greater certainty with respect to quickly and accurately ascertaining a value for Pier 1's goods.

[46] In the agreed statement of facts, Pier 1 and the CBSA agreed that "Pier 1's warehouse landed cost represents the total amount that Pier 1 paid to purchase, import and transport its goods to its U.S. distribution centres."[42] While Pier 1 may not have directly contracted the production of its goods, like in *Patagonia*,[43] Pier 1 can be seen to exert a high level of control over the goods it imports from overseas. In effect, Pier 1 operates in many similar respects to a contract manufacturer of goods in order to create the unique shopping environment it seeks in its stores. Accordingly, the Tribunal concludes that the WLC is an accurate value of the cost of acquisition of the goods (a proxy in this case for the cost of production) upon which other values that contribute to the composition of the VFD are added.

[47] To this value Pier 1 should allocate a proportionate amount of the expenses Pier 1 incurs in the process of bringing the goods to market in Canada for sale in its stores. As described in its own testimony, Pier 1 is not simply a distribution company and the Tribunal finds that any value generating activities that occurred prior to importation should be included in the VFD of the goods. These expenses would include those related to buying, global logistics, inventory planning, product allocation, foreign exchange and related marketing expenses incurred prior goods being shipped to stores. The Tribunal finds these expenses reflect the value generated by Pier 1 at the time of importation.[44] With respect to the other home office expenses that have been allocated to the distribution centre in Mr. de Camargo's analysis, the amounts appear to be reasonable.[45]

[48] Concerning Pier 1's suggested allocation for profit, the Tribunal disagrees that the comparators presented provide an accurate depiction of Pier 1's likely profit. Four of the six comparators were in the market of selling home building products, which in the Tribunal's view, do not resemble the product mix or business reality of Pier 1. Similarly, the other two comparators, Hooker Furniture Corporation and Nova Lifestyle, Inc. are primarily distributors of furniture, whereas Pier 1 is primarily in the business of selling home furnishings.

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42 Exhibit AP-2019-047-38 at paras. 71-75.

43 *Patagonia International, Inc. v. Deputy Minister of National Revenue* (28 September 2000), AP-99-014 (CITT) [*Patagonia*] at 9.

44 To be more specific, foreign exchange expenses related to currency hedging would be included in this amount.

45 Exhibit AP-2019-047-22 at paras. 96-99.

[49] Conversely, the CBSA did not provide a competing benchmarking analysis. In discussing its rebuttal expert report and commentary, the CBSA also admitted that the financial data available to it was less than perfect and did not reflect Pier 1's business operations in the United States.[46]

[50] Given the relatively incomplete picture provided by the parties, the Tribunal accepts Pier 1's analysis, as it related to the profit and expenses of Pier 1's distribution centres. In the table below, the Tribunal has identified the values making up the total mark-up percentage for the fiscal years at issue and would request that the parties within 60 days following the release of this determination, identify the general expenses and profit mentioned above not already included in the mark-up calculation.

Fiscal Year	**General Expenses***	**Profits**		**Total Mark-up**
		Distribution Centre	**Other value-adding activities**	
2015	12.61%	1.25%		13.86%+
2016	17.77%	1.59%		19.36%+
2017	15.85%	0.73%		16.58%+
2018	15.75%	1.46%		17.21%+

* As discussed above, general expenses should include amounts for all value-creating activities that took place prior to the importation of the goods at issue.

[51] In deliberating on the components of these additional profits, the Tribunal would draw the parties' attention to Mr. de Camargo's expert report that states:

> 135. Given that these wholesalers are generally expected to earn higher profits than the Distribution Centre due to their enhanced functions, assets, and risks as discussed in the previous sections, it would not be appropriate to target a point above the lower quartile of the range established based on these returns. . . .[47]
>
> [Footnote omitted]

[52] While the Tribunal will not pronounce on the exact quantum of additional expenses and profit to be included, a review of the comparison analysis, with a view to the "wholesaler" functions performed by Pier 1 may be appropriate.

[53] For the foregoing reasons, the Tribunal concludes that the VFD of the goods at issue should be calculated based upon a flexible applicable of the computed value method using Pier 1's WLC of goods as the base price and to which a mark-up, as described above, should be applied.

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46 *Transcript of Public Hearing* at 437-439.

47 Exhibit AP-2019-047-22 at para. 135.

DECISION

[54] The appeal is allowed.

[55] The parties will have 60 days to make any additional representations concerning the amounts of general expenses and profit to be used in the mark-up percentage, with the Tribunal reserving the right to amend its evaluation of the final mark-up percentage contained in the reasons of this decision.

[56] Following such determination the Tribunal may make, the matter is returned to the respondent for reappraisal of the VFD of the goods at issue in a manner consistent with the reasons for this decision.

Serge Fréchette

Serge Fréchette
Presiding Member