Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

ORDER AND REASONS

Appeal AP-2019-047

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

v.

President of the Canada Border Services Agency

Order and reasons issued
Thursday, December 16, 2021

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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 FURTHER TO a decision rendered by the Canadian International Trade Tribunal on September 2, 2021, pursuant to subsection 67(3) of the *Customs Act*, concerning the filing of additional submissions with respect to the amounts of general expenses and profit to be used in the calculation of a final mark-up percentage.

BETWEEN

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

AND

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

ORDER

The Tribunal hereby adopts the methodology and proposed mark-up percentages contained in Pier 1 Imports (U.S.), Inc.'s submission of November 1, 2021, as contemplated in the Tribunal's decision of September 2, 2021.

Serge Fréchette

Serge Fréchette
Presiding Member

STATEMENT OF REASONS

BACKGROUND

[1] In its decision of September 2, 2021, the Tribunal found that a modified version of the computed value method applied to Pier 1 Imports (U.S.), Inc.'s (Pier 1) goods for the period under review and requested that the parties provide additional submissions with respect to relevant expenses that the Tribunal found lacking in Pier 1's comparability study.

[2] On October 5, 2021, the Canada Border Services Agency (CBSA) requested permission for both parties to submit new expert comparability reports in order to capture the relevant expenses of comparable companies selling wholesale goods into the Canadian market. The CBSA requested an additional 60 days from the date that the request was allowed and an indeterminate amount of time to provide relevant commentary on its own submissions and Pier 1's new submissions.

[3] On October 6, 2021, the Tribunal invited the parties' comments on the CBSA's request.

[4] On October 8, 2021, Pier 1 communicated its objection to the submission of new evidence in the case and to the lateness of the CBSA's inquiry. In Pier 1's view, the record contained all of the relevant information required for the parties to provide an appropriate mark-up percentage for its goods, and the CBSA's request was prohibited by the *Canadian International Trade Tribunal Rules*[1] (CITT Rules) and violated basic principles of natural justice.

[5] On October 13, 2021, the CBSA noted that the evidence it was proposing to submit was necessary, was provided for in the CITT Rules, was contemplated as a direct result of the Tribunal's decision and that both parties would have the same opportunity to file new evidence in the case.

[6] On October 19, 2021, in a letter to the parties, the Tribunal indicated that it would allow Pier 1, and the CBSA if it so chose, to make submissions concerning the mark-up percentage of Pier 1's profits and general expenses by November 1, 2021, and provide opposing comments on these submissions by November 16, 2021. In the event that the information provided was insufficient, the Tribunal reserved the option to accept additional expert evidence on Pier 1's likely profits and general expenses.

[7] Pier 1 filed its submission on November 1, 2021.

[8] The CBSA filed its comments on November 16, 2021.

POSITIONS OF THE PARTIES

Pier 1

[9] Pier 1's submissions identify and break down the different classes of expenses from the Tribunal's decision of September 2, 2021, applying the same methodology it had used in its expert report to come up with what Pier 1 views as an appropriate mark-up percentage. Pier 1 identified the following additional activities from the Tribunal's decision to be included in the markup:

a) buying;
b) global logistics;

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1 SOR/91-499, at 22, 24, 24.1.

c) inventory planning and product allocation;
d) foreign exchange; and
e) related marketing expenses.[2]

[10] Among the expenses listed, Pier 1 noted that all expenses related to buying, inventory planning and product allocation had been included in either the warehouse landed cost (WLC) of goods sold or as an allocation of relevant home office expenses. Subsequently, Pier 1 added the entire amount of foreign exchange expenses to the WLC of the imported goods. With respect to global logistics and related marketing expenses, Pier 1 identified additional relevant accounts and added an allocation of their expenses based upon the formula used to allocate Pier 1's other home office expenses.

[11] Pier 1 suggested that the likely profits of a wholesaler providing services similar to Pier 1's would be marginally higher than those suggested in its expert report but would still perform relative to "the lower quartile of the profit margins of the wholesale company comparables".[3] The following revised profit margins and profits, as a percentage of WLC of goods, were suggested:

Year	Profit of lower quartile of comparable businesses	Pier 1 revised profit (% of WLC)
2015	1.56%	1.87%
2016	2.31%	2.91%
2017	1.68%	2.04%
2018	2.52%	3.07%

[12] Pier 1 submitted the following revised amounts with respect to its general expenses, likely profits and the subsequent mark-up percentage to be added to its WLC of goods:

Year	General expenses	Profits		Total markup
		Distribution centre	Other value-adding activities	
2015	13.39%	1.25%	0.62%	15.26%
2016	19.12%	1.59%	1.32%	22.03%
2017	16.89%	0.73%	1.31%	18.94%
2018	16.94%	1.46%	1.61%	20.01%

CBSA

[13] The CBSA's comments with respect to Pier 1's submission are general in nature and focus on how the mark-up percentage to be calculated should include profits and general expenses that are

2 Exhibit AP-2019-047-74A at para. 2.
3 *Ibid.* at para. 35.

"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", as contemplated in subsection 52(2) of the *Customs Act*.[4] As Pier 1 is not a wholesaler exporting into the Canadian market, the CBSA submits that a comparability analysis is necessary to capture the range of expenses and profits that would take place at the appropriate trade level.[5]

[14] Additionally, the CBSA does not view Pier 1's actual expenses as relevant, as they do not represent goods that were sold at the appropriate trade level and, in its view, the evidence on the record does not provide sufficient clarity with respect to the nature of these expenses to know whether they are specifically relevant to the goods exported to Canada.[6]

[15] The CBSA closed its argument by suggesting that, pursuant to paragraph 52(2)(b) of the *Customs Act*, the Tribunal was foreclosed from determining the "other value adding activities" relevant in determining the value for duty of Pier 1's goods, because Pier 1 does not sell goods for export to Canada and no comparators were offered.[7] Accordingly, the CBSA recommended that the Tribunal allow for the submission of new comparison reports in order to fully discharge its responsibility for determining the value for duty.

ANALYSIS

[16] The Tribunal's reasons of September 2, 2021, concluded that a flexible application of the computed value method represented the most appropriate method for valuing Pier 1's goods. For the reasons that follow, the Tribunal concludes that Pier 1's suggested methodology to calculate its general expenses and likely profits fairly represents and accurately translates the Tribunal's instructions into an appropriate and quantifiable mark-up percentage.

[17] As described by the CBSA, "all of the valuation methods aim to arrive at the transactions value of the imported goods."[8] This, however, is only partly true, as all the valuation methods, apart from the transaction value method, seek to *approximate* an arm's-length transaction between two unrelated parties. The legislator, cognizant of the trade-offs apparent in each of these methods, adopted a hierarchical approach to the method, as evidenced in section 47 of the *Customs Act*, with the primary basis of appraisal being the transaction value of the goods.

[18] The CBSA was offered the opportunity to provide its own expert report and analysis following the late submission of Mr. Bruno A. de Camargo's transfer pricing study. However, it submitted a rebuttal expert report that illustrated that Pier 1's expert report was missing relevant value-creating activities but did not provide any quantitative or qualitative analysis with respect to a plausible value for duty.[9] The Tribunal is satisfied that both parties have had ample opportunity, between the filing of the notice of appeal on March 26, 2020, and the issuance of the final decision on September 2, 2021, to provide the evidence they required to make their case. The Tribunal has actively solicited the parties' views at every stage of the proceeding and sees no reason to admit new

4 R.S.C., 1985, c. 1 (2nd Supp.).
5 Exhibit AP-2019-047-75 at 1–2.
6 *Ibid.*
7 *Ibid.* at 4.
8 *Ibid.* at 1.
9 *Transcript of Public Hearing* at 500–502.

expert evidence when the evidence that was received has been accepted by both parties and has received the benefit of thorough examination and cross-examination by the parties.

[19] The Tribunal agrees with the CBSA that there is not necessarily an issue of procedural fairness with respect to the submission of new expert reports and argument; however, the issue does raise questions with respect to the finality of the Tribunal's decision and the Tribunal's legislated objective to conduct proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit."[10] The Tribunal often provides the parties with a degree of latitude in providing additional written submissions, commentary and clarifications. That being said, at some point, for the Tribunal to make a final decision, the record must be closed, with the evidence and argument either standing or falling on its own merits.

[20] The additional submissions of Pier 1 appear reasonable and provide a thorough accounting of the costs undertaken to bring its products to market. The Tribunal accepted Mr. de Camargo's expert report and testimony as they stood in its reasons. The fact that the Tribunal characterized Pier 1 as being more than simply a warehousing operation was echoed by the CBSA's expert witness[11] and should not be construed as invalidating the analysis completed in Pier 1's expert report. If anything, it simply moves the function, risk and asset profile of Pier 1's operations to somewhere between what was categorized as a "Service Provider with Working Capital" and a "Wholesale Distributor".[12]

[21] As mentioned above, Pier 1 submitted that all of its buying, inventory planning and product allocation expenses have already been accounted for in its previous general expenses calculation. With respect to Pier 1's foreign exchange expenses, the full amount of this account was allocated to Pier 1's WLC of goods. Regarding global logistics and marketing expenses, Pier 1 reviewed the expenses at issue, including those relevant to the matter at issue, and then used the same allocation key that was used for other home office expenses. Global logistics expenses were *de minimis* adding hundredths of a percent to the general expenses calculation, whereas marketing spend was far more significant, adding between 0.61 percent and 1.19 percent to general expenses.

[22] Pier 1 provided the following summary of general expense additions:

Year	Global logistics	Foreign exchange	Marketing	Additional general expense inclusions
2015	0.02%	0.14%	0.61%	**0.78%**
2016	0.04%	0.13%	1.19%	**1.35%**
2017	0.04%	-0.05%	1.06%	**1.04%**
2018	0.03%	0.01%	1.15%	**1.19%**

[23] As described above, the Tribunal believes that these values are fair and, given the lack of opposing commentary, the Tribunal accepts Pier 1's submissions with respect to the relevant mark-up percentages.

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10 Section 35, *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).
11 *Transcript of Public Hearing* at 500–502.
12 Exhibit AP-2019-047-22 at 20.

[24] As stated above, the mark-up percentages are as follows:

Year	Mark-up percentage
2015	15.26%
2016	22.03%
2017	18.94%
2018	20.01%

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