Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2019-021

Scentsy Canada Enterprises ULC

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, October 4, 2022

Corrigendum issued
Thursday, May 4, 2023

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IN THE MATTER OF an appeal heard on February 4 and 5, 2021, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 17, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

SCENTSY CANADA ENTERPRISES ULC **Appellant**

AND

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

DECISION

The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

IN THE MATTER OF an appeal heard on February 4 and 5, 2021, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated June 17, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

SCENTSY CANADA ENTERPRISES ULC **Appellant**

AND

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

CORRIGENDUM

The second sentence of the ninth bullet of paragraph 52 of the Statement of Reasons should read as follows:

The payments from the customers were deposited into SCE's account, and SCE made monthly lump sum payments from that account to SI.

The first sentence of paragraph 102 of the Statement of Reasons should read as follows:

This analysis is unchanged when considering the French text of the Regulations, which contemplates a permanent establishment as a person's fixed place of business "par l'entremise duquel elle exerce son activité".

By order of the Tribunal,

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	By videoconference
Dates of Hearing:	February 4 and 5, 2021
Tribunal Panel:	Serge Fréchette, Presiding Member
Tribunal Secretariat Staff:	Kalyn Eadie, Counsel Michael Carfagnini, Counsel Julie Lescom, Senior Registrar Officer Kaitlin Fortier, Registrar Officer Geneviève Bruneau, Registrar Officer

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Scentsy Canada Enterprises ULC	Darrel H. Pearson Jessica B. Horwitz Ethan Gordon Kai Ling Wang
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Marshall Jeske Jennifer Bond Kirk Shannon

WITNESSES:

Cory Stewart
President
Smart Executive Centre Inc.

Thomas Laws
Vice President
Scentsy, Inc.

Ryan McFarland
General Counsel
Scentsy, Inc.

Paul Klassen
Vice President, Global Operations
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STATEMENT OF REASONS

[1] This is an appeal filed by Scentsy Canada Enterprises ULC (SCE) on September 12, 2019, pursuant to subsection 67(1) of the *Customs Act* (the Act)[1] from a further re-determination by the President of the Canada Border Services Agency (CBSA), dated June 17, 2019, made pursuant to subsection 60(4).

[2] The goods in issue are household fragrance products, including scented wax and ceramic wax warmers, air fresheners, bath products, cosmetics, laundry items and plush toys, sold in Canada under the Scentsy brand, imported into Canada between April 1, 2013, and September 30, 2016 (the Review Period).

[3] The issue in this appeal is whether, for the purpose of determining the value for duty of the goods in issue based on the transaction value method under section 48 of the Act, the sale for export of the goods in issue was from Scentsy, Inc. (SI), a United States (U.S.) corporation, to its Canadian affiliate SCE, or from SI to Canadian consumers, as found by the CBSA; and, if SCE is a purchaser in Canada, whether the price paid or payable for the goods should be adjusted by including any payments made by SCE to the vendor.

PROCEDURAL HISTORY

[4] On November 13, 2014, the CBSA commenced a verification of the tariff classification of goods imported by SCE during the period of January 1 to December 31, 2013. On September 25, 2015, the CBSA notified SCE that it was expanding the verification to include value for duty. The value for duty portion of the verification concluded on February 19, 2016, and the verification report was issued on March 31, 2017. The verification report concluded that there was no sale for export between SI and SCE, on the basis that SCE did not have a permanent establishment in Canada and that the value for duty would therefore be calculated using the price paid by the ultimate Canadian customers.

[5] As a result of the verification report, SCE submitted corrections covering entries made over the previous four years as required by section 32.2 of the Act. The CBSA accordingly issued re-determinations of the value for duty pursuant to paragraph 59(1)(a) of the Act.

[6] On September 29, 2017, SCE requested a further re-determination by the President, pursuant to subsection 60(1) of the Act.

[7] On June 17, 2019, the President denied the re-determination request and affirmed the original decision that SCE did not have a permanent establishment in Canada, that it therefore did not qualify as a purchaser in Canada, and that the actual sale for export was between SI and the Canadian customers.

[8] On September 12, 2019, SCE filed its notice of appeal with the Tribunal.

[9] The hearing of this matter was originally scheduled for March 24, 2020. On March 16, 2020, SCE requested a postponement of the hearing due to the emerging situation with the COVID-19 pandemic. SCE was planning to bring four witnesses from the U.S. to Canada to testify at the

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1 R.S.C., 1985, c. 1 (2nd Supp.).

in-person hearing and, at that time, nonessential U.S.-Canada travel was discouraged (the border was subsequently closed). SCE's position was that a hearing by way of written submissions or videoconference would be prejudicial to its ability to make its case and that postponing the hearing would not be prejudicial to either it or to the CBSA. The CBSA agreed to the postponement, and the Tribunal accordingly cancelled the hearing.

[10] The hearing was further postponed in July of 2020, as the Tribunal extended its cancellation of in-person hearings and SCE continued to take the position that a hearing by way of videoconference would be prejudicial to its ability to make its case. However, the parties agreed to proceed by way of videoconference in December 2020.

[11] The Tribunal held a videoconference hearing on February 4 and 5, 2021. SCE called the following witnesses to testify: Cory Stewart, Thomas Laws, Ryan McFarland, Paul Klassen and Jeff Dastrup. The CBSA did not call any witnesses.

[12] On February 17, 2021, the Tribunal notified the parties that no additional submissions would be required and closed the record accordingly.

PRELIMINARY MATTER

[13] On February 10, 2020, SCE filed a motion to strike paragraphs 79 to 92 from the CBSA's brief, on the grounds that they raised new issues but that the CBSA had filed no evidence in support of its new arguments and that SCE had not been provided adequate notice of the issues raised in the impugned paragraphs, which raised procedural fairness concerns. SCE also submitted that the CBSA's arguments in the impugned paragraphs had no reasonable prospect of success and should have been accordingly struck from the record in accordance with the principle of judicial economy.

[14] On February 18, 2020, the CBSA replied that the paragraphs at issue outlined the requirements of the legislation with respect to the calculation of the price paid or payable and that the fact that these arguments had been raised in its brief was not prejudicial to SCE, as it would be able to reply to the arguments at the hearing. The CBSA noted that the issues raised in the motion ultimately related to the sufficiency and characterization of the evidence on the record, which would properly form the subject of legal argument and not a motion to strike.

[15] On February 24, 2020, SCE responded that the CBSA had not addressed its point that the CBSA had not filed any evidence to support its allegations and that the late notice of these issues was prejudicial, as the issues had not been raised at any point during the re-determination process.

[16] On March 4, 2020, the Tribunal issued an order denying the motion to strike.[2] On March 12, 2020, the Tribunal issued a letter to the parties indicating that they should be prepared to address all the arguments raised in the impugned paragraphs of the respondent's brief, as well as the substantive issues raised in the appellant's motion to strike, at the hearing (which was then scheduled for March 24, 2020).

[17] On March 13, 2020, SCE requested leave to file a supplemental book of documents on the grounds that these were necessary to respond to the new issues raised in the CBSA's brief. On

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2 Exhibit AP-2019-021-19.

March 26, 2020, the request was granted and the supplemental book of documents was accepted onto the record.

Reasons for the Tribunal's decision to deny the motion to strike

[18] In *GFT Mode Canada Inc. v. the Deputy Minister of National Revenue*,[3] the Tribunal discussed the threshold for granting a motion to strike with reference to the (then) *Federal Courts Rules*:[4]

> Although the Tribunal is not bound by the Federal Court Rules, the Tribunal notes that the test applied by the Federal Court of Canada in such matters is very high. Case law indicates that the test on motions to strike out pleadings requires the moving party to demonstrate that the outcome of the case is "plain and obvious" or that it is "beyond doubt" that the pleadings disclose no reasonable cause of action, a standard that the Tribunal feels should apply in preliminary motions of this nature before the Tribunal.
>
> Rare are the circumstances in which it appears that it is "plain and obvious" or "beyond doubt" that a pleading discloses no reasonable cause of action. That said, from time to time, such cases do come before the Tribunal. Given the limited resources of all courts and tribunals, it is important that those resources be used wisely. When there is little doubt about the outcome of a case, it may well be appropriate to dispose of it before a full hearing is involved.
>
> [Footnote omitted]

[19] The Tribunal went on to opine that parties are not prohibited from raising new arguments with the Tribunal that had not been raised in the prior proceedings, reasoning that it "would be severely limited in exercising its jurisdiction in deciding appeals if, as the appellant argued, it were limited to considering the record before the respondent at the time of the re-determination."[5] It found that raising new arguments in the respondent's brief provided the appellant with adequate notice that those arguments would be made at the hearing and that permitting such arguments therefore did not deny the appellant natural justice.[6]

[20] Applying this framework to the present appeal, the Tribunal did not consider it "plain and obvious" that the CBSA's arguments regarding potential adjustments to the price paid or payable would fail; the provisions of the Act cited in the impugned paragraphs could at least potentially operate to affect the price paid or payable as argued by the CBSA. In the Tribunal's view, it was open to the CBSA to raise new arguments in its brief for the first time, as SCE would have a chance to address those arguments at the hearing.

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3 (18 May 2000), AP-96-046 and AP-96-074 (CITT) [*GFT Mode*].

4 SOR/98-106. The Tribunal notes that the relevant portion of the *Federal Courts Rules* remain at the time of the present decision as they were when reviewed by the Tribunal in *GFT Mode*. See subsection 221(1) of the *Federal Courts Rules*; *GFT Mode* at 3, at note 10.

5 *GFT Mode* at 4.

6 *Ibid.* at 6–7.

[21] Based on the foregoing, the Tribunal denied SCE's motion to strike the impugned paragraphs from the CBSA's brief. The alternative arguments raised therein by the CBSA are addressed at the end of this decision.

LEGAL FRAMEWORK

[22] Under the Act, in order to impose customs duties on imported goods, a value must first be attributed to the goods. Section 46 of the Act specifies that the value for duty must be determined in accordance with sections 47 to 55.

[23] Subsection 47(1) of the Act provides as follows:

> 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.
>
> La valeur en douane des marchandises est déterminée d'après leur valeur transactionnelle dans les conditions prévues à l'article 48.

[24] Section 48 of the Act provides as follows:

> **(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 and if
>
> . . .
>
> **(c)** when any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser is to accrue, directly or indirectly, to the vendor, the price paid or payable for the goods includes the value of that part of the proceeds or the price is adjusted in accordance with paragraph (5)(a); and
>
> **(d)** the purchaser and the vendor of the goods are not related to each other at the time the goods are sold for export or, where the purchaser and the vendor are related to each other at that time,
>
> **(i)** their relationship did not influence the price paid or payable for the goods, or
>
> **(1)** Sous réserve des paragraphes (6) et (7), la valeur en douane des marchandises est leur valeur transactionnelle si elles sont vendues pour exportation au Canada à un acheteur au Canada, si le prix payé ou à payer est déterminable et si les conditions suivantes sont réunies :
>
> […]
>
> **c)** aucune partie du produit de toute revente, cession ou utilisation ultérieure des marchandises par l'acheteur ne revient directement ou indirectement au vendeur, sauf s'il a été tenu compte de cette ristourne dans le prix payé ou à payer ou si ce prix est ajusté conformément à l'alinéa (5)a);
>
> **d)** l'acheteur et le vendeur ne sont pas liés au moment de la vente des marchandises pour exportation ou, s'ils le sont :
>
> **(i)** ou bien le lien qui les unit n'a pas influé sur le prix payé ou à payer,

> **(ii)** the importer of the goods demonstrates that the transaction value of the goods meets the requirement set out in subsection (3).
>
> **(ii)** ou bien l'importateur démontre que la valeur transactionnelle des marchandises à apprécier répond aux exigences visées au paragraphe (3).

. . .

[…]

(3) For the purposes of subparagraph (1)(d)(ii), the transaction value of goods being appraised shall, taking into consideration any relevant factors including, without limiting the generality of the foregoing, such factors and differences as may be prescribed, closely approximate one of the following values that is in respect of identical goods or similar goods exported at the same or substantially the same time as the goods being appraised and is the value for duty of the goods to which it relates:

(3) Pour l'application du sous-alinéa (1)d)(ii), la valeur transactionnelle des marchandises à apprécier doit, compte tenu des facteurs pertinents, notamment des facteurs et différences réglementaires, être très proche de l'une des valeurs ci-après prise comme valeur en douane d'autres marchandises identiques ou semblables qui ont été exportées au même moment ou à peu près au même moment que les marchandises à apprécier :

> **(a)** the transaction value of identical goods or similar goods in a sale of those goods for export to Canada between a vendor and purchaser who are not related to each other at the time of the sale;
>
> **(b)** the deductive value of identical goods or similar goods; or
>
> **(c)** the computed value of identical goods or similar goods.
>
> **a)** la valeur transactionnelle de marchandises identiques ou semblables vendues pour l'exportation au Canada par un vendeur à un acheteur avec qui il n'est pas lié au moment de la vente;
>
> **b)** la valeur de référence de marchandises identiques ou semblables;
>
> **c)** la valeur reconstituée de marchandises identiques ou semblables.

(4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

(4) Dans le cas d'une vente de marchandises pour exportation au Canada, la valeur transactionnelle est le prix payé ou à payer, ajusté conformément au paragraphe (5).

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(5) Dans le cas d'une vente de marchandises pour exportation au Canada, le prix payé ou à payer est ajusté :

> **(a)** by adding thereto amounts, to the extent that each such amount is not

already included in the price paid or payable for the goods, equal to	**a)** par addition, dans la mesure où ils n'y ont pas déjà été inclus, des montants représentant :
. . .	[…]
(v) the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor, and . . .	**(v)** la valeur de toute partie du produit de toute revente, cession ou utilisation ultérieure par l'acheteur des marchandises, qui revient ou doit revenir, directement ou indirectement, au vendeur, […]

[25] Subsection 45(1) of the Act defines "price paid or payable" as follows:

45 (1) In this section and sections 46 to 55,	**45 (1)** Les définitions qui suivent s'appliquent au présent article et aux articles 46 à 55.
. . .	[…]
price paid or payable, in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor;	***prix payé ou à payer*** En cas de vente de marchandises pour exportation au Canada, la somme de tous les versements effectués ou à effectuer par l'acheteur directement ou indirectement au vendeur ou à son profit, en paiement des marchandises.

[26] In summary, section 47 of the Act provides that the primary basis for determining the value for duty is the "transaction value" of the imported goods. Subsection 48(1) confirms that this is the starting point for valuation under the Act; it is clear that the value for duty must be appraised on the basis of this method of valuation, subject to the conditions set out in section 48, which are as follows:

- there must be a *sale for export*;
- there must be a *purchaser in Canada*; and
- the *price paid or payable* must be ascertainable.

[27] If the sale for export is occurring between related parties, then the price paid or payable must not have been influenced by the relationship between them.

[28] Subsection 45(1) of the Act defines "purchaser in Canada" as follows:

purchaser in Canada has the meaning assigned by the regulations; (*acheteur au Canada*)	***acheteur au Canada*** S'entend au sens des règlements. (*purchaser in Canada*)

[29] The *Valuation for Duty Regulations* (Regulations) provide 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.

2.1 Pour l'application du paragraphe 45(1) de la Loi, ***acheteur au Canada*** s'entend :

a) d'un résident;

b) d'une personne, autre qu'un résident, qui a un établissement stable au Canada;

c) d'une personne, autre qu'un résident, qui n'a pas d'établissement stable au Canada et qui importe les marchandises faisant l'objet de la détermination de la valeur en douane :

(i) pour sa consommation ou son utilisation personnelles et qui ne les destinent pas à la vente,

(ii) pour les vendre au Canada pourvu que, avant leur achat, elle n'ait pas passé un accord visant leur vente à un résident.

[30] The Regulations define "permanent establishment" and "resident" as follows:

2 The definitions in this section apply in these Regulations.

. . .

permanent establishment, in respect of a person, means 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*)

resident means

(a) an individual who ordinarily resides in Canada;

(b) a corporation that carries on business in Canada and of which the

2 Les définitions qui suivent s'appliquent au présent règlement.

établissement stable Lieu d'affaires fixe d'une personne, y compris un siège de direction, une succursale, un bureau, une usine ou un atelier par l'intermédiaire duquel elle exerce son activité. (*permanent establishment*)

[…]

résident

a) une personne physique qui réside habituellement au Canada;

b) une personne morale qui exerce son activité au Canada et dont la gestion et le contrôle s'exercent au Canada;

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*)

c) une société de personnes ou autre organisme non constitué en personne morale qui exerce son activité au Canada, si le membre ou la majorité des membres qui en exercent la gestion et le contrôle résident au Canada. (*resident*)

OVERVIEW OF THE APPEAL

Background

[31] The facts in the appeal are largely not in dispute; rather, the parties disagree on the characterization and significance of the facts in the application of the appropriate legal test(s).

[32] SCE is a direct selling company that sells household fragrance products under the Scentsy brand through a network of independent consultants in Canada. SCE is a wholly owned subsidiary of Scentsy Canada Inc., which is a U.S. corporation headquartered in Meridian, Idaho. SCE and Scentsy Canada Inc. are related through common ownership to SI, another American corporation also headquartered in Meridian, Idaho. SCE was incorporated in British Columbia prior to the Review Period[7] but was not a resident, as defined by the Regulations, as its management and control were not in Canada.

[33] SCE had no employees of its own. It operated by subcontracting personnel from SI, on a time-spent basis for work performed in Canada pursuant to an Intercompany Staffing Agreement dated January 1, 2012,[8] and, with regard to administrative support, under a Service and Sales Agreement dated March 28, 2012.[9] SCE leased office space in the Smart Executive Centres business centre in Calgary, Alberta, premises which SI employees would use from time to time to conduct business for SCE under the Intercompany Staffing Agreement.

[34] For much of the Review Period, SCE acquired the goods in issue from SI under the 2012 Service and Sales Agreement. This agreement was superseded on January 1, 2016, by a Distribution Agreement[10] and a General Services Agreement,[11] which were in effect for the last nine months of the Review Period.

[35] SCE did not maintain inventory in Canada to fulfill customer orders. When SCE received an order from a customer through an independent consultant, SCE in turn placed an order with SI,

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7 Exhibit AP-2019-021-03B at 39.
8 *Ibid.* at 41; Exhibit AP-2019-021-03C (protected) at 41–49.
9 *Ibid.* at 45; Exhibit AP-2019-021-03C (protected) at 76–91.
10 *Ibid.* at 47; Exhibit AP-2019-021-03C (protected) at 93–105.
11 *Ibid.* at 49; Exhibit AP-2019-021-03C (protected) at 107–118.

which fulfilled the order out of U.S. inventory. This back-to-back ordering process was automated under the global Scentsy ordering system (SAP).[12]

[36] The goods in issue were shipped from SI in the U.S. as consolidated shipments to UPS distribution hubs in Alberta and Ontario,[13] where the orders were sorted and forwarded to individual customers. UPS acted as customs broker, and SCE never took possession of the goods.

[37] SCE had a Canadian bank account in which it deposited payments received from customers, and from which it paid Canadian consultant commissions and the rent for the Calgary office. Invoices from SI to SCE for the goods in issue were generated automatically through SAP when orders were placed through the website. SCE paid SI for the goods in issue, as well as for services, on a monthly basis out of a separate U.S. dollar-denominated bank account.

[38] SCE generated sales revenue and income on its business in Canada, which it reported to the Canada Revenue Agency, and paid income tax on its profits.

Positions of the parties

[39] The parties agree that the transaction value method is applicable to determine the value for duty of the goods in issue but differ in their positions as to which transaction is the proper basis for applying that method.

[40] SCE argued that the sale for export was between itself and SI, in which SCE qualified as a purchaser in Canada by virtue of having a permanent establishment in Canada as defined in the Regulations. SCE argued that it had purchased the goods in issue from SI on its own account and subsequently resold them to Canadian customers for a profit.

[41] The CBSA argued that the sale for export was between SI and the ultimate Canadian customers. It argued that the transfer of the goods in issue from SI to SCE does not qualify as a sale for export, because SCE acted merely as the agent of SI in sales to Canadian customers. The CBSA argued in the alternative that, if there was a sale between SI and SCE, SCE did not qualify as a purchaser in Canada because it did not have a permanent establishment in Canada that was a fixed place of business through which it carried on business.

[42] The CBSA argued in the further alternative that, should the Tribunal find SCE to be the purchaser in Canada in a sale for export to Canada of the goods in issue, the Tribunal should issue an order for the CBSA to redetermine the correct value for duty by assessing whether any adjustments should be made to the price paid or payable.

ANALYSIS

[43] In order to determine whether the transaction value between SI and SCE can be used as the basis for the value for duty of the goods in issue, the following criteria must be met:

(a) there must be a sale between SI and SCE;

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12 *Transcript of Public Hearing* at 49–50. SCE witnesses also referred to this system as Enterprise Resource Planning, or ERP.

13 *Ibid.* at 54.

(b) that sale must be "for export to Canada";

(c) SCE must be a "purchaser in Canada"; and

(d) there must be an ascertained price paid or payable by SCE to SI when the goods are sold for export to Canada.

[44] The Tribunal will address each of these elements in turn.

There was a sale between SI and SCE

SCE did not act as agent for SI

[45] At the hearing, the CBSA submitted that section 48 of the Act could not be used to calculate the value for duty based on the transaction between SI and SCE because there was no sale, and therefore no sale for export to Canada, between SCE and SI.

[46] SCE argued that title to the goods in issue transferred from SI to SCE in a manner satisfying these requirements and that this transaction constitutes the relevant sale for export for the purpose of subsection 48(1) of the Act. The CBSA submitted that section 48 of the Act cannot be used to calculate the value for duty based on the transaction between SI and SCE because there is no sale for export between SCE and SI, on the basis that SCE was acting as an agent for SI.

[47] The Tribunal has previously stated that there is no basis in law to conclude that one company is necessarily the agent of the other simply because the two companies are related. It recently confirmed this approach in *GBG Spyder Canada Holdings ULC v. President of the Canada Border Services Agency*, noting that the paragraph 48(1)(d) of the Act specifically contemplates the use of sales between related companies when applying the transaction value method, which lends support to the idea that the fact that companies are related does not necessarily mean that there can be no sale between them.[14]

[48] In *Brunswick International (Canada) Limited v. the Deputy Minister of National Revenue*, the Tribunal acknowledged that related companies are distinct legal entities and, therefore, there can be a sale between them but that there are circumstances where a sale cannot exist between two related entities, including where they are engaged in a principal-agent relationship: [15]

> [G]enerally, there can be a sale between a corporation and its parent, subsidiary or sister corporation. However, the presumption of separate legal identities 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.

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14 *GBG Spyder Canada Holdings ULC v. President of the Canada Border Services Agency* (2 August 2022), AP-2019-033 (CITT) [*Spyder*] at paras. 48–49.

15 *Brunswick International (Canada) Limited v. the Deputy Minister of National Revenue* (14 December 1999), AP-98-100 (CITT) [*Brunswick*] at 8–9.

. . .

> [E]ven though the appellant and BB&B are separate legal entities, there still may not be a sale between them if the appellant is acting as agent on behalf of BB&B, the principal.
>
> [Footnotes omitted]

[49] Accordingly, there can be no sale for the purposes of subsection 48(1) between companies that are in a principal-agent relationship, where the agent is completely dependent on its principal, as such companies cannot be said to be separate legal entities standing as buyer and seller. The agency relationship has been described by the Supreme Court of Canada as follows:

> Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [Emphasis in original.][16]
>
> [Footnotes omitted]

[50] The Tribunal has previously considered a variety of factors in assessing whether there is an agency relationship between two entities. Whether such a relationship exists does not depend on the terminology used by the parties but on the exact circumstances of the relationship.[17] As noted in *Brunswick*, no one factor may be determinative.[18] A key consideration has been the terms of any agreement between the entities. However, where there is no agreement, or where the intentions of the parties and the nature of their relationship are otherwise unclear, the Tribunal has looked to extrinsic evidence with respect to the conduct of the entities to determine the nature of their relationship and whether an implied agency relationship exists.[19]

[51] Additional factors that the Tribunal has considered in assessing whether an agency relationship exists have included the extent to which the alleged purchaser/importer:

- negotiates terms of sale (e.g. price, refund policies, warranties) with independent sales representatives or customers;
- is accountable to the other entity for profits;
- negotiates and executes agreements with third parties, including suppliers;

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16 *Brunswick* at 9, citing *R. v. Kelly*, [1992] 2 S.C.R. 170, citing with approval G.H.L. Fridman, *The Law of Agency*, 5th ed. (London: Butterworths, 1983) at 9. See also *Spyder* at para. 49.

17 *Clothes Line Apparel, Division of 2810221 Canada Inc. v. President of the Canada Border Services Agency* (14 July 2008), AP-2007-006 (CITT) [*Clothes Line*] at para. 17.

18 *Brunswick* at 12.

19 See *JewelWay International Canada Inc. and JewelWay International, Inc. v. the Deputy Minister of National Revenue* (26 March 1996), AP-94-359 and AP-94-360 (CITT) [*JewelWay*]. In *Clothes Line* at paras. 46–49, the Tribunal found that the terms of an expired "buying agreement" did not reflect the actual arrangements between the Canadian appellant and its foreign affiliate, looking carefully at the facts and nature of the relationship after finding that the appellant's witnesses did not appear knowledgeable regarding the legal structure of their day-to-day business relationship.

- carries inventory;
- is responsible for its employees (payment of wages/salaries, management of human resources, pensions, and health plans);
- maintains separate records and bank accounts;
- invests proceeds of the business;
- is responsible for shipping expenses; and
- assumes risk and title for the goods on importation.[20]

[52] The CBSA submitted that there was no sale for export between SCE and SI, on the basis that SCE was acting as an agent for SI, because of the following:

- SI, not SCE, established the terms and price at which the goods were sold to the Canadian customers;
- SCE was not directly involved in soliciting sales from Canadian customers, which was done through independent consultants;
- All the goods were sold to Canadian customers prior to them being imported into Canada;
- A Canadian customer's order for goods was a precondition to the goods being sourced from SI;
- The goods were shipped directly from SI to the Canadian customer using the same courier provider (UPS). SCE never took possession of the goods;
- There is no evidence demonstrating that SCE purchased goods from sources other than SI;
- SCE held no inventory in Canada;
- SCE was not responsible for processing refunds, returns or warranties;
- Payment for the goods was not remitted to SI until it was received from the Canadian customer. The payments from the customers were deposited into SCE's account, and SCE made monthly lump sum payments from that account to SI. However, the CBSA contended that only SI's employees had access to that account and it was therefore essentially paying itself through the account for all orders; accordingly, SCE incurred no risk in the transaction as the vendor, while SI incurred all risk in the sale with the

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20 In *Moda Imports Inc. v. the Deputy Minister of National Revenue* (3 September 1997), AP-95-296 (CITT) [*Moda*], in finding that the appellant was not an agent of the related foreign entity, the Tribunal noted that the appellant assumed risk and title for the goods imported into Canada. See *Moda* at 4, 5. See also *JewelWay*; *DMG Trading Co. Ltd. v. the Deputy Minister of National Revenue* (28 August 1997), AP-96-076 (CITT) [*DMG*]; *Brunswick* at 10.

Canadian customers. In addition, SI was not invoiced for specific goods, and the lump sum payments included other non-itemized expenses.

- SCE did not, and could not, mark up the price of the goods;
- SCE had no employees of its own; and
- All the decisions regarding SCE's business practices, including its day-to-day operations, as well as its assets, were exclusively controlled and managed by SI.

[53] At the hearing, SCE argued that there was a sale for export between it and SI and that it did not act as an agent for SI. SCE submitted that there is no evidence that SI and SCE intended for there to be an agency relationship, nor that SCE was endowed with the authority to affect SI's rights and obligations with respect to third parties. It argued that SCE undertook its activities to earn profits on sales in Canada for itself, and not to secure sales on behalf of another entity for commissions as an agent would do.

[54] The Tribunal begins by noting that the Intercompany Staffing Agreement and Service and Sales Agreement signed in 2012, and the 2016 agreements that superseded them (intercompany agreements), all state explicitly the intention of the companies not to engage in a principal-agent relationship.[21] Although not dispositive, in the Tribunal's view, this is compelling evidence against the existence of such a relationship and presents much less ambiguity regarding the parties' intentions than the documentary evidence did in the cases cited by the CBSA.

[55] In the Tribunal's view, the existence of such an unambiguous agreement between the parties distinguishes this appeal from the cases cited by the CBSA. In *JewelWay*, the agreement between the companies was considerably less explicit on the issue of agency, and order forms used by the independent sales representatives to order jewelry from JewelWay Canada were those of JewelWay US and referred to that company's return policy.[22] In the present appeal, the order forms used by SCE consultants clearly identify SCE (and only SCE), including with regard to returns.[23] In *DMG*, as noted by SCE, not only was there no written agreement defining the relationship between the parties, but the appellant admitted to acting as the agent of the exporter.[24]

[56] Regarding SCE not holding inventory in Canada, the Tribunal finds persuasive SCE's explanation that this is inherent in the particular nature of the direct selling business in which SCE is engaged and the back-to-back ordering system it employs. In terms of financial accounting for inventory, Thomas Laws testified that invoices would be created once customer orders were placed online, and the charge for the sale from SI to SCE would immediately be recorded by the latter as cost of goods sold.[25]

[57] Regarding the sharing of personnel between SI and SCE, the Tribunal agrees with SCE that shared management and control does not automatically indicate two companies being "bound hand

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21 Exhibit AP-2019-021-03C (protected) at 41–42, 78, 101, 113.

22 *JewelWay* at 11–12.

23 Exhibit AP-2019-021-03B at 169–170. The Tribunal finds the independent consultant agreements less persuasive in this regard but considers the broader definition of "Scentsy" in these documents to be ambiguous at best; see Exhibit AP-2019-021-03C (protected) at 120, 121.

24 *DMG* at 3.

25 *Transcript of Public Hearing* at 70.

and foot" such that they should be treated as one entity.[26] The issue of shared personnel, which much more closely implicates the day-to-day operational control considered in *Brunswick* and the other cases cited above, is more nuanced. Aside from the sales work performed by the independent consultants, all of SCE's business functions were performed by employees of SI.[27]

[58] Paul Klassen testified that the work performed by SI employees when in Canada focused on independent consultant development, training, and related events in various locations across Canada. Thomas Laws testified that this work was accounted for on a per-day basis, with salaries for these employees paid by SCE to SI for their time spent in Canada.[28] Paul Klassen testified that he travelled to Calgary several times a year, where he and other employees used the leased office space as a base of operations, mostly involving communication over telephone, email and social media under the context of consultant development. Paul Klassen would also meet with their contacts at UPS, another customs services provider, and the returns facility while in Calgary, and would travel elsewhere in Canada to meet high-level independent consultants ("tier one leaders") to gather market information and feedback. Jeff Dastrup confirmed that his role as country manager involved the same functions.[29]

[59] Thomas Laws further testified that administrative functions, including customer support, marketing support, research, logistics management, accounting and legal services, were performed for SCE by SI employees working in the latter's Idaho offices. Unlike the staffing fees paid by SCE for time spent by subcontracted SI employees in Canada, these services were provided in exchange for management fees under the 2012 Service and Sales Agreement and the 2016 General Services Agreement.[30] Paul Klassen testified that outsourcing these functions made the most business sense given SCE's direct sales business model, which focused on consultant development to drive sales, and that nothing about SCE's operations would have been different (aside from higher administration costs) if SCE had performed those services in-house.[31]

[60] The Tribunal acknowledges that the facts of this appeal contain many elements which it has previously found to militate in favour of finding an agency relationship. SCE carries no inventory, has no employees and appears to bear little risk in that it only orders products from SI following corresponding orders from independent consultants or their customers.[32] In practice, SCE depends heavily on the services provided by SI (on the administrative side) and on its independent consultants (on the sales side) to profitably conduct its business.

[61] On the other hand, SCE undertakes several functions which the Tribunal has previously found to weigh against a finding of agency. As in *Moda*, the alleged agent in this appeal (i.e. SCE)

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26 *Brunswick* at 9; see *Moda* at 1, where it was established that the importer and exporter, which the Tribunal found not to be in a principal-agent relationship, had the same officers.

27 Paul Klassen testified that approximately 45 SI staff members provided services to SCE during the Review Period. This included the position of country manager for Canada, which was always an executive of SI. Paul Klassen occupied this position until January 2014, when Jeff Dastrup took over the position for the remainder of the Review Period. *Transcript of Public Hearing* at 31, 78.

28 Thomas Laws testified that these wages earned in Canada were also recorded and reported to the Canada Revenue Agency for the purpose of withholding tax. *Transcript of Public Hearing* at 77–80, 83.

29 *Transcript of Public Hearing* at 84–87.

30 *Ibid.* at 81–82.

31 *Ibid.* at 82–83.

32 Thomas Laws testified, and the Tribunal accepts, that SCE does bear transit risk for the goods within Canada prior to their delivery to Canadian customers. See *Transcript of Public Hearing* at 72; Exhibit AP-2019-021-03C (protected) at 96–97.

maintained separate bank accounts and financial records from the alleged principal,[33] separate invoices were produced for intercompany transfers as opposed to sales to customers,[34] and the alleged agent earned and retained profits on the sale of the goods.[35] It contracted with UPS to provide transportation and customs brokerage services and was responsible for paying transportation costs, customs duties and taxes.[36] SCE also appears to have taken title to the goods upon their transportation into Canada, as testified by Thomas Laws and indicated in the intercompany agreements, as well as the sample commercial invoice and bill of lading submitted by SCE.[37] It paid for the time spent by subcontracted employees on its own account for their time spent in Canada working on consultant development and managing relationships with other third parties and paid Canadian withholding tax on these amounts, although the personnel in question was subcontracted from SI. All of these arrangements were provided for under the intercompany agreements.

[62] Ultimately, it is to those intercompany agreements that the Tribunal's focus is drawn, and the Tribunal simply cannot disregard the unambiguous language in the intercompany agreements that the parties did not intend for SCE to act as an agent to SI. The Tribunal emphasizes that it is not here "relying exclusively on documents and forms" without properly considering the reality of the situation[38] but rather weighing the documentary evidence of the parties' intentions as part of the totality of evidence. In this case, the Tribunal finds the unambiguous nature of the intercompany agreements to be highly persuasive that the parties did not intend to form an agency relationship and that the arrangements in those agreements are consistent with the conduct of the parties.

[63] The Tribunal therefore finds, on a balance of probabilities, that SCE was not acting merely as the agent of SI in the sale of the goods in issue to Canadian customers and that the two companies were separate legal entities for the purpose of assessing whether they were parties in a sale for export to Canada.

The criteria for a sale were otherwise met

[64] As outlined above, in *Brunswick*, the Tribunal set out the three elements of a sale as follows:

(a) there must be two parties, standing in relation of buyer and seller to one another;

(b) both parties must agree to the same proposition; and

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33 *Transcript of Public Hearing* at 52–53, 66–67, 68, 69–70, 102, 103; Exhibit AP-2019-021-03C (protected) at 866–883.

34 *Ibid.* at 49–50, 69; Exhibit AP-2019-021-03C (protected) at 542; Exhibit AP-2019-021-24C (protected) at 34–38, 47. The Tribunal accepts SCE's explanation that the company name originally associated with company number 1510 in these documents was the result of error in the data entry, as well as the resulting corrigendum identifying this company as SCE. See *Transcript of Public Hearing* at 51–52; Exhibit AP-2019-021-03C (protected) at 543; Exhibit AP-2019-021-24C (protected) at 47.

35 *Ibid.* at 65, 67, 99. Although not determinative of the issue of agency, the Tribunal accepts the probative value of the income tax information submitted by SCE as support for its position that it earned income on the sale of the goods; Exhibit AP-2019-021-03C (protected) at 180–188, 195, 209–217, 224, 243–250, 252.

36 *Ibid.* at 54–55; Exhibit AP-2019-021-03E (protected).

37 *Ibid.* at 55–56, 71–72; Exhibit AP-2019-021-03C (protected) at 76, 86, 94–95, 96–97, 535–536. In finding that the appellant in *Moda* was not an agent of the related foreign entity, the Tribunal noted that the appellant assumed risk and title for the goods imported into Canada. See *Moda* at 4, 5; *Brunswick* at 10; *JewelWay*; *DMG*.

38 *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 at para. 20.

(c) there must be a passage of title and consideration.[39]

[65] As discussed directly above, SI and SCE are separate legal entities standing in relation of buyer and seller to one another. Furthermore, the Service and Sales Agreement executed between SI and SCE in 2012, and the Distribution Agreement which replaced it in 2016, provide strong support for SCE's position that it and SI agreed to the same proposition governing the passage of title to the goods in issue between them for consideration.[40]

[66] Based on these findings, the Tribunal finds that the criteria for a sale outlined in *Brunswick* were met. SI sold the goods in issue to SCE.

[67] Having found that SI sold the goods in issue to SCE, the Tribunal will next consider whether these sales constituted sales "for export to Canada" for the purposes of section 48 of the Act.

The sale between SCE and SI was a "sale for export to Canada"

[68] In determining the transaction constituting the "sale for export" pursuant to section 48 of the Act, the Tribunal has previously referred to *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*,[41] 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 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.[42]
>
> [Bold added for emphasis]

[69] As noted above, the evidence indicates that title to the goods in issue passed to SCE upon their entry into Canada and only passes to Canadian customers upon delivery to them. The Tribunal accepts as credible the testimony of Thomas Laws to this effect, which is consistent with the intercompany agreements and sample commercial invoice and bill of lading submitted by SCE.[43]

[70] The Tribunal therefore finds that SCE was the relevant importer in the sale for export to Canada for the purpose of section 48 of the Act.

[71] Further, the Tribunal finds that the Canadian customers cannot have been the importers in the sale for export to Canada, as there is no indication that they held title to the goods in issue at the time of importation. As such, even if the Tribunal had found that SCE was merely acting as the agent of SI

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39 *Brunswick* at 8.

40 Exhibit AP-2019-021-03C (protected) at 76, 86, 93–96.

41 2001 SCC 36, [2001] 2 SCR 100 [*Mattel*]. See *Delta Galil USA Inc. v. President of the Canada Border Services Agency* (25 March 2021), AP-2020-002 (CITT) [*Delta Galil*] at para. 27.

42 *Mattel* at para. 45.

43 *Transcript of Public Hearing* at 55–56, 71–72; Exhibit AP-2019-021-03C (protected) at 76, 86, 94–95, 96–97, 535–536.

in a sale to Canadian customers, the transaction value method would not be applicable to determine the value for duty of the goods in issue because the transaction would not constitute a sale for export to Canada, as that term is defined under section 48 of the Act and interpreted by the Supreme Court of Canada in *Mattel*.

[72] Having found that SCE was not acting as the agent of SI, and that the relevant sale for export to Canada was between those two entities, the Tribunal will now turn to the issue of whether SCE qualified as a "purchaser in Canada", as that term is defined in the Regulations.

SCE was a "purchaser in Canada" in the sale for export to Canada

[73] The parties both accept that SCE is not a "resident" of Canada as defined in the Regulations. Pursuant to section 2.1, for a non-resident to qualify as a "purchaser in Canada", it must have a "permanent establishment in Canada" within the meaning of section 2 of the Regulations, i.e. "a fixed place of business of the person" including "a place of management, a branch, an office, a factory or a workshop through which the person carries on business."

[74] SCE submitted that the legislative history of section 48 of the Act demonstrates that the addition of the phrase "purchaser in Canada" to that section and the definition of "permanent establishment" in the Regulations were not meant to impose a residency requirement on importers. Specifically, SCE submitted that the amendment to section 48 was introduced to prevent foreign companies from trying to claim that transactions that took place entirely outside of Canada, and did not entail the transportation of the goods to Canada, were "sales for export". According to SCE, during the third reading debate, legislators expressly stated that the addition of "purchaser in Canada" was not designed to impose an effective Canadian residence requirement on importers, noting that this would be inconsistent with the practice of Canada's trading partners.[44] SCE submitted that this is why the "permanent establishment" alternative was included in the Regulations.

[75] SCE submitted that the CBSA misinterpreted the phrase "through which the person carries on business" in the definition of "permanent establishment" as requiring employees/dependent agents, as evidenced by the wording of Memorandum D13-1-3, *Customs Valuation – Purchaser in Canada*, and that this interpretation improperly broadens the scope of the provision to something akin to a residency requirement. Alternatively, SCE submitted that the CBSA misconstrued the meaning of "dependent agent".

[76] SCE also submitted that the CBSA applied an erroneous legal test in interpreting the phrase "fixed place of business" and misinterpreted the evidence concerning the lease arrangement for the Calgary office space.

Fixed place of business

[77] SCE submitted that the Calgary office space it leased should be viewed as its fixed place of business because of the following:

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44 Canada, Parliament, House of Commons Debates, 35th Parl, 1st Sess, Vol. 133 (31 October 1995), online: <https://www.ourcommons.ca/DocumentViewer/en/35-1/house/sitting-251/hansard#15990>.

- SCE had a fixed-term commercial lease for a designated, private office. SCE had exclusive access to and control of, and right of disposal to, its assigned office.

- The initial term of SCE's lease was one year, and SCE maintained its tenancy at the Smart Executive Centre for more than four years. It moved offices within the suite once within that period due to renovations but could have declined to do so under the terms of its lease. SCE remained in the same facility at all times, with the same reception, and its mailing address never changed.

- The office was objectively identified with SCE's business. During SCE's tenancy, its corporate logo was etched in the glass in the front of the Smart Executive Centre's reception. SCE's Calgary office address was printed on customer order forms, Canadian product packaging and consultant provincial direct selling licence ID cards.

- The Calgary office was SCE's registered office and base of operations for personnel in Canada. Personnel contracted to work on behalf of SCE travelled to the Calgary office periodically and used the space to perform work to grow the Canadian consultant network and drive sales, such as phone calls and teleconferences, email correspondence with consultants, receiving and paying invoices from service providers, and responding to correspondence from Canadian provincial governments on direct selling licence matters.

[78] At the hearing, the CBSA conceded that SCE's Calgary office constituted a fixed place of business and noted that, although this had been an issue in the proceedings before the President, it had never made any argument on this issue in the proceedings before the Tribunal.[45]

[79] Therefore, for reasons of judicial economy, the Tribunal accepts that SCE's Calgary office constituted a fixed place of business for the purposes of the definition of "permanent establishment" in the Regulations.

Carrying on business

[80] In *Canada v. Dudney*,[46] the Federal Court of Appeal (FCA) considered the following description of "carrying on business" in the Organisation for Economic Co-operation and Development (OECD) commentary on the OECD Model Tax Convention on Income and on Capital:

> [T]he carrying on of the business of the enterprise through this fixed place of business . . . means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.

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45 *Transcript of Public Argument* at 97–98.

46 54 DTC 6169, [2000] 2 CTC 56, 2000 CanLII 14932 (FCA) [*Dudney*] at para. 15.

[81] SCE noted that the passage of the OECD commentary cited in *Dudney* and reproduced above appeared in the 1977 version[47], although it does not appear in the 2017 version.[48] However SCE further noted that the following passage appears in both versions:[49]

> 39. There are different ways in which an enterprise may carry on its business. In most cases, the business of an enterprise is carried on by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (e.g. dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business of the enterprise. . .

[82] SCE submitted that the use of the qualifiers "usually" and "in most cases" indicate that business may not necessarily be carried on by persons dependent on the enterprise in all cases. SCE further submitted that the OECD commentary contemplates that the business of an enterprise can be "carried on" by either individuals or companies and that individuals may carry on business for multiple related companies at the same time.[50] On this basis, SCE argued that the fact that SCE's activities were performed by employees of another entity contracted to work on behalf of SCE is not relevant for the purposes of the carrying on business test.

[83] SCE further submitted that, in *American Income Life Insurance Company v. The Queen*,[51] the Tax Court of Canada established an illustrative list of factors to be considered in determining whether business is being carried on:

> 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

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47 < https://read.oecd-ilibrary.org/taxation/model-double-taxation-convention-on-income-and-capital_9789264055919-en#page1>. See also Exhibit AP-2019-021-03D at 43.

48 < https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1>. See Exhibit AP-2019-021-03 at para. 74, FN 119.

49 Exhibit AP-2019-021-03D at 54.

50 *Ibid.* at 75, 82, 85.

51 2008 TCC 306 [*AIL*] at para. 47.

- were agents subject to detailed instructions or comprehensive control

[84] In the customs context, in considering whether the non-resident purchaser "carries on business" from its fixed place of business, in *AAi. Fostergrant of Canada Co. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*, the FCA indicated that a corporation that buys and sells goods for profit is "carrying on business".[52] Moreover, the *de facto* control of a corporation exercised by another entity does not preclude the corporation from satisfying the condition of "carrying on business".

> . . . In essence, the CITT adopted the principle that a corporation is not carrying on business if its affairs are subject to significant *de facto* control by the parent corporation. There is no authority for that proposition, and in my view it is wrong in law. There is nothing in the *Customs Act* that requires or permits that approach.[53]

[85] SCE submitted that it met the *Fostergrant* test for "carrying on business" during the Review Period because it bought and sold goods on its own account for a profit, as evidenced by the commercial and accounting documentation on the record. SCE further submitted that it made profits between 2012 and 2016 and reported the income to the Canada Revenue Agency. It argued that the contracted personnel who used the Calgary office was "carrying on business" at its fixed place of business and that there is no prescribed minimum amount of time during which business must be carried on at the fixed place to meet the requirements of the test.

[86] The CBSA submitted that SCE did not carry on business through its Calgary office, as the activity carried out there was not connected to the buying and selling of the goods. The CBSA submitted that the evidence demonstrates that SCE did not have any of the infrastructure or resources necessary at the Calgary office to effectively conduct the buying and selling of the imported goods. The buying and selling of the goods were done by the independent consultants, who did not work out of the Calgary office.

[87] In *Brunswick*, the Tribunal concluded that the appellant had a permanent establishment in Canada on the basis of the following five factors:

> (1) the appellant's employees solicit customers for orders in Canada;
>
> (2) the appellant's employees have the authority to negotiate the terms of sale of the bowling capital equipment without seeking confirmation from BB&B and to enter into contracts on behalf of the appellant;
>
> (3) invoices are issued in the appellant's name, and all payments by the Canadian customers are received by the appellant in its Canadian bank accounts;
>
> (4) the Canadian customers deal with the appellant in respect of warranty claims; and

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52 In this case, the FCA found that the Tribunal should not have found that the Canadian entity was not a purchaser in Canada on the basis that it was controlled by a foreign entity, i.e. the subsidiary could not sell goods without the approval of its foreign parent and did not show "some control" over its profits. Such a finding would be based on an "unexpressed legislative intention". *AAi. Fostergrant of Canada Co. v. Canada (Commissioner of the Canada Customs and Revenue Agency)*, 2004 FCA 259 [*Fostergrant*] at paras. 18, 19.

53 *Fostergrant* at para. 19.

(5) the appellant files Canadian income tax returns.[54]

[88] The CBSA submitted that the main distinction between that case and the present appeal is that the appellant in *Brunswick* had employees of its own who performed key business activities on its behalf that were directly connected to the sale for export in issue. In the present appeal, SCE's subcontracted employees did not solicit any orders in Canada; they did not negotiate prices with the vendor of the goods; were not involved in the ordering, invoicing or payment collection; and were not involved in processing refunds or warranty claims.

[89] Applying the principles set out above to the facts of this case, the Tribunal finds that the evidence demonstrates that SCE was indeed "carrying on business through" the fixed place of business for the following reasons.

[90] First, SCE employees (subcontracted or otherwise) did not directly solicit any orders in Canada through the leased Calgary office or any other place; the independent consultants did that. However, SCE employees, subcontracted from SI under the Intercompany Staffing Agreement, did use the office when in Canada, primarily for the purpose of consultant development and management as well as maintaining relationships with service providers in Canada. Paul Klassen and Jeff Dastrup testified to these facts.[55] In the Tribunal's view, this presents a clear nexus between the work done in the leased Calgary office and the business being carried on by SCE in Canada, in terms of both the importation and delivery of the goods and the crucial work of building and maintaining the network of independent consultants fundamental to the profitability of SCE's business model.

[91] It must be acknowledged that only a small proportion of SCE's work in Canada was conducted in presence through the office, by only a small proportion of its subcontracted personnel: two employees (Jeff Dastrup and Paul Klassen) testified that they, and only they, each used the Calgary office for approximately ten days during the Review Period.[56] The evidence reveals that not a lot of business was performed by SCE at its fixed place of business during the Review Period. This raises the question as to what volume of business is required to be carried on through a fixed place of business to satisfy the definition of a "permanent establishment" in the Regulations.

[92] The Tribunal finds that the text of the provision does not allow the CBSA to impose the kind of requirements that it did for determining whether SCE was carrying on business in conformity with section 2.1 of the Regulations. The text imposes no specific requirements either in terms of the form under which the business activities must be conducted or the actual volume or importance of activity that must be conducted through the place of business.

[93] The requirements are for the "person" to be carrying on business through the fixed place of business. This indicates clearly that there must be a control exercised by that person over the conduct of the business. Central to the decision of the CBSA to deny SCE the status of a purchaser in Canada is the fact that most business tasks, including those that were key to the conduct of that business, were performed in the U.S. by employees of SI who were subcontracted to, but not formally employed by, SCE.

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54 *Brunswick* at 11.
55 *Transcript of Public Hearing* at 84–87.
56 *Ibid.* at 125–127.

[94] There is no doubt that SCE was carrying on business. Its activities consisted of buying and selling goods in Canada for profit. It imported products from SI and sold them across Canada through independent consultants. It paid taxes in Canada.[57] It identified the Calgary office with its business through physical signage at the premises,[58] order forms,[59] product packaging[60] and ID cards[61]. It selected, paid for and had exclusive use of the premises.[62] All of this suggests carrying on business, as this was recognized by the Court in *AIL*.

[95] The fact that the vast majority of the affairs of SCE were actually performed by persons that were not formal employees of SCE changes nothing about the fact that the affairs were those of SCE. SCE had commercial arrangements in place whereby it contracted out the execution of most of its business. The management and administrative functions were performed by SI employees that were assigned to SCE specifically for that purpose under the intercompany agreements. For all intents and purposes, those functions were legally related to the buying and selling activities of SCE. When performing those functions for SCE, SI personnel were actually performing those functions legally, under contract, for SCE. Nothing in the evidence contradicts that this was the case.

[96] Nor is there evidence establishing that management and administrative decisions or actions in respect of SCE's business were made or executed outside the parameters established under the intercompany agreements. The Tribunal is not aware of anything in those agreements that removes the control of those activities from the separate legal entity in Canada that constitutes SCE. Admittedly, there may be confusion when considering the identity of persons that take decisions and perform functions in that those individuals may also act in a similar capacity for SI. But that does not establish that, when acting on behalf of SCE, they are in fact acting for SI as suggested by the CBSA.

[97] The same applies for other important business functions of SCE. The shipping, customs clearance and logistics functions are performed by parties that are not under the employment of SCE. Those functions are again contracted out to parties that provide those services to SCE. UPS acts under the terms of arrangements, set out under SCE's authority, that set the parameters of the relationship between UPS and SCE for the delivery of those services.[63]

[98] A similar logic applies to sales activities. SCE does not have direct relationship with the ultimate purchasers of the goods in issue. SCE enters into arrangements with independent consultants who market and sell Scentsy products through person-to-person sales networks in exchange for a commission. Those independent consultants organize their own affairs, but they operate within general parameters that are set by SCE.[64] Regular control and meetings ensured that SCE managed

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57 As noted in *Delta Galil*, whether an importer pays income taxes relating to the goods in issue is not determinative of where it carries on business. The Tribunal must consider the totality of the evidence on the record in this appeal in assessing whether SCE carried on business through its fixed place of business. In this case, the Tribunal finds the fact that SCE paid income tax in Canada—though not determinative—to support the position that it carries on business in Canada; see *Delta Galil* at para. 78. Even stronger support for this position is provided by the fact that SCE paid withholding tax on the remuneration for services provided by subcontracted employees while in Canada; *Transcript of Public Hearing* at 77; Exhibit AP-2019-021-47B.

58 *Transcript of Public Hearing* at 12–14.

59 *Ibid.* at 44–45; Exhibit AP-2019-021-03B at 169–170.

60 *Ibid.* at 96; Exhibit AP-2019-021-03B at 156–167.

61 *Ibid.* at 90–91.

62 *Ibid.* at 92–96.

63 *Ibid.* at 46, 60, 85, 87–88; Exhibit AP-2019-021-03C (protected) at 65.

64 See especially Exhibit AP-2019-021-03C (protected) at 122–123, clauses 10–13.

that relationship in a manner satisfying its business requirements and standards.[65] Although Paul Klassen testified that they never physically met with independent consultants at the Calgary office, Paul Klassen also testified that the office was chosen specifically because it provided facilities to do so if necessary.[66] In any case, the testimony of SCE's witnesses made clear that the office was used for activity relating to the relationship, including communicating directly, with these service providers.[67]

[99] Although an employment or dependent relationship between the individual performing a given business function and the party claiming to be carrying on the business can help establish that that party is in fact carrying on that business, it is not an absolute requirement of the Regulations. It is sufficient that the facts establish that the business is actually carried on by the party that claims to be doing so; no particular business model is imposed under the regulatory scheme. Persons and entities are free to arrange their business in the manner they see fit from a commercial perspective as long as they can establish that they are carrying on the business they claim they do through a fixed place of business in Canada.

[100] In this case, the Tribunal is satisfied that the work conducted out of the Calgary office had a sufficient nexus to the business that SCE carried on in Canada to satisfy the meaning of a permanent establishment as that term is defined in the Regulations. SCE personnel, subcontracted from SI, used the office to communicate with Canadian service providers and independent consultants regarding its business of buying and selling the goods in issue. It consistently identified the office with the business it carried on, both through physical signage at the office itself as well as in materials distributed to independent consultants and customers such as order forms, consultant ID cards and product packaging.

[101] The Regulations do not set out a minimum amount of time during which business must be carried on through a fixed place of business, or any type or volume of work that must occur there, to satisfy the definition of a "permanent establishment". The Tribunal acknowledges that the scope and volume of activity conducted by SCE at the Calgary office were not extensive, and the Tribunal emphasizes that this finding is specific to the facts of this appeal and the particular business model pursued by SCE. That business model allows SCE to operate without direct employees but did involve subcontracted employees performing certain activities in support of its business in Canada through the Calgary office during the Review Period. In conducting those activities in that place, the subcontracted employees (and through them, SCE) were carrying on SCE's business through its fixed place of business.

[102] This analysis is unchanged when considering the French text of the Regulations, which contemplates a permanent establishment as a person's fixed place of business "par l'entremise duquel elle exerce son activité". The CBSA framed the French text as meaning a fixed place of business "from which" the person carries on business, as opposed to "through which" in the English version. While not discounting the possibility that such a nuance could be relevant in other appeals with other facts, in this case, the Tribunal considers it to be a distinction without a difference; the activities conducted at the Calgary office and their nexus to SCE's Canadian business are in the Tribunal's

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65 *Transcript of Public Hearing* at 60–62, 64, 84, 85–86.
66 *Ibid.* at 96.
67 *Ibid.* at 84–85, 95, 97, 127–129.

view sufficient to find that it was carrying on business "from" that place and therefore to satisfy the meaning of "permanent establishment" in either official language.

[103] The CBSA also argued that SCE's interpretation of "permanent establishment" is not supported by the text of the rest of the definition of "purchaser in Canada", in particular paragraph 2.1(c) of the Regulations, which provides that that term includes the following:

> 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.

[104] The CBSA submitted that this provision clearly establishes Parliament's intent to ensure that a foreign entity cannot qualify as a purchaser in Canada using a sale between itself and another foreign or non-resident entity, where an agreement to sell with a Canadian resident already exists. The CBSA submitted that, by logical extension, this would also prevent foreign entities, particularly related entities, from using paper-based transactions that are not bona fide sales for export, or non-arm's length transactions, for the purpose of valuing imported goods under the transaction value method in the place of an existing sale or agreement to sell with a Canadian resident. The CBSA submitted that such an interpretation would render paragraph 2.1(c) of the Regulations meaningless.

[105] The Tribunal finds the CBSA's reasoning circular. Paragraph 2.1(c) of the Regulations sets out the circumstances in which a person may be considered a purchaser in Canada where that person is neither a resident nor has a permanent establishment in Canada. If Parliament had intended to preclude, under any circumstances, non-resident entities from qualifying as purchasers in Canada of goods in respect of which an agreement to sell to Canadian residents already exists, it would not have provided them a clear means of doing so through having a permanent establishment under paragraph 2.1(b). There is no basis for inferring that Parliament intended for subparagraphs 2.1(c)(i) and 2.1(c)(ii) to be "read in" to paragraph 2.1(a) or (b) or the meaning of "permanent establishment" as defined under section 2.

[106] The CBSA's argument that "2.1(c)(ii) stipulates that an agreement to sell goods to a resident prior to the goods being purchased by the non-resident importer is sufficient to disqualify the non-resident importer as the purchaser in Canada" is simply wrong. Paragraph 2.1(c) only so disqualifies a non-resident importer *without a permanent establishment in Canada* and has no effect on the definition of permanent establishment itself. To read it otherwise would be to render paragraph 2.1(b), as well as the definition of "permanent establishment" under section 2, meaningless. This analysis is supported by the failure, outlined earlier in these reasons, of the CBSA's related argument that the relevant sales for export were those between the foreign vendor and Canadian customers.

[107] As stated in *Mattel*, for the purposes of valuation under section 48 of the Act, the relevant sale for export is the transaction by which title to the goods passes to the importer, and the importer is the party who has title to the goods at the time the goods are transported into Canada. As discussed above, the Canadian customers cannot have been the importer in the sale for export to Canada, as

there is no indication that they held title to the goods in issue at the time of importation.[68] As such, the CBSA's interpretation of the Regulations appears to directly contradict the meaning of the Act as interpreted by the Supreme Court of Canada. The Tribunal sees no basis whatsoever to adopt it.

[108] For the reasons outlined above, the Tribunal finds that SCE had a fixed place of business in Canada through which it carried on the business of importing and selling the goods in issue, satisfying the definition of a permanent establishment set out in section 2 of the Regulations. SCE therefore qualified as a purchaser in Canada in the sale for export to Canada of the goods in issue.

The price paid or payable is determinable

[109] The CBSA argued that, should the Tribunal find SCE to be the purchaser in Canada in a sale for export to Canada of the goods in issue, the Tribunal should issue an order for the CBSA to re-determine the correct value for duty by assessing whether any adjustments should be made to the price paid or payable for the goods. Specifically, the CBSA questioned whether certain payments made by SCE to SI, as identified in SCE's Canadian corporate income tax declarations,[69] should possibly be included in the price paid or payable either pursuant to the definition of that term under subsection 45(1) of the Act or as an adjustment under subparagraph 48(5)(a)(v); and, more generally, whether the parties' relationship influenced the price paid or payable as contemplated in paragraph 48(1)(d).

[110] The CBSA submitted that it did not previously challenge the transfer pricing methodology because it had determined that there was no sale for export between SI and SCE and that SCE did not qualify as a purchaser in Canada. It also submitted that the OECD documentation was prepared for income tax purposes and may be insufficient to demonstrate the arm's length nature of the transactions for customs purposes. Finally, it noted that the documents pertain to the years 2015 and 2016 and that there is no documentation about the transactions occurring in 2013 and 2014.

[111] In its motion to strike this argument from the CBSA's brief, SCE argued that these payments are service fee payments and are thus not directly related to the imported goods. SCE noted that the tax returns differentiate between payments for goods ("stock in trade/raw materials") and other payments not related to goods, i.e. services and reimbursement of expenses.[70] Further, SCE submitted that the nature and terms of the services purchased from SI are specified in the Sales and Service Agreement and General Services Agreement, which demonstrate that the services were not in relation to the imported goods.[71]

[112] SCE also pointed to additional evidence on the record that it argued suggests that the relationship between SCE and SI did not influence the price of the goods:

- a 2011 transfer pricing analysis that sets out a methodology for SCE and SI to establish arm's length transfer prices;[72]

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68 *Mattel* at para. 45.
69 Exhibit AP-2019-021-03C (protected) at 180–321.
70 Exhibit AP-2019-021-09; Exhibit AP-2019-021-03C (protected) at 204, 238, 279, 318.
71 Exhibit AP-2019-021-03C (protected) at 84-85, 108-109.
72 *Ibid.* (protected) at 396–418.

- a 2013 internal tax memorandum that describes the intercompany sales structure between SI and SCE including its use of arm's length transfer prices;[73]

- a 2015 internal tax memorandum containing a comprehensive analysis of the management fees charged by SI to SCE for transfer pricing purposes;[74]

- a 2016 transfer benchmarking and management fee analysis by Deloitte;[75]

- executive summaries of transfer pricing reports from Deloitte for fiscal years 2015 and 2016, benchmarking SI's intercompany transfer pricing methodology to the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines).[76]

[113] At the hearing, counsel for SCE contested the CBSA's request that the Tribunal should return the matter to the CBSA, on the basis that doing so would be an abdication of the Tribunal's jurisdiction to determine the value for duty.

[114] Subsection 45(1) of the Act provides that the price paid or payable is "the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor".

[115] Subparagraph 48(5)(a)(v) provides as follows:

> **(5)** The price paid or payable in the sale of goods for export to Canada shall be adjusted
>
> > **(a)** by adding thereto amounts, *to the extent that each such amount is not already included in the price paid or payable for the goods*, equal to
> >
> > . . .
> >
> > > **(v)** the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor
> >
> > [Emphasis added]

[116] The CBSA's Memorandum D13-4-5, *Transaction Value Method for Related Persons,* provides, in relevant part, as follows:

> 4. . . . Paragraph 48(1)(*d*) of the Act provides two options for establishing the acceptability of the transaction value:
>
> > *(a)* by examining the circumstances surrounding the sale to determine whether the relationship influenced the price; or

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73 *Ibid.* (protected) at 420–425.
74 *Ibid.* (protected) at 427–440.
75 *Ibid.* (protected) at 442–510.
76 *Ibid.* (protected) at 512–516, 518–523.

(b) by the importer demonstrating that the price closely approximates a "test value".

5. In other words, the importer must satisfy themselves that the relationship between the vendor and the purchaser had no effect on the selling price of the goods. To do so, the importer must examine how the price was determined between the related parties and maintain evidence to support their decision to use the transaction value method. The object of the self-examination is to establish that the selling price is not significantly different from the price that would have been charged to an unrelated purchaser, given otherwise identical circumstances.

Circumstances Surrounding the Sale

6. Neither the Act nor the international customs valuation agreement adopted by the World Trade Organization (WTO), upon which the valuation provisions of the Act are based, detail the information to be used in establishing that a relationship has not influenced the price in a sale of goods for export. Regardless of how an importer chooses to establish the acceptability of the price, the importer's conclusion that the price is acceptable should be supported by factual evidence. For example, showing that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time in sales of goods of the same class or kind, would demonstrate that the price had not been influenced.

. . .

8. A transfer price agreement submitted by the importer may be a good source of information if it contains relevant information about the circumstances surrounding the sale. A transfer price (i.e., a price charged for the goods by the related entity) is an acceptable starting point for determining the value for duty of imported goods.

. . .

Transfer Price Adjustments

20. When a transfer price agreement between a vendor and a related purchaser exists in writing and is in effect at time of importation, the transfer price is considered by the CBSA to be the "uninfluenced" price paid or payable for imported goods.[77]

. . .

[117] The corresponding provision in the *Customs Valuation Agreement* is as follows:

Article 8

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

. . .

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77 Exhibit AP-2019-021-07 at 55–56, 58.

> (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.
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> . . .
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> Annex I: Interpretative Notes
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> . . .
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> Note to Article 1: Price Actually Paid or Payable
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> . . .
>
> 4. The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or *other payments from the buyer to the seller that do not relate to the imported goods* are not part of the customs value.[78]
>
> [Emphasis added]

[118] The Tribunal disagrees with SCE that the nature of its jurisdiction is such that it cannot return to the CBSA certain matters or issues raised by an appeal for determination if it is believed that the CBSA would be better positioned to make such a determination. Subsection 67(3) of the Act provides that the Tribunal "may make such order, finding or declaration as the nature of the matter may require" on an appeal under section 67, while subparagraph 61(1)(a)(iii) allows the CBSA to further re-determine the value for duty of imported goods at any time, if doing so would give effect to a decision of the Tribunal made in respect of the goods. In the present case, however, the Tribunal finds no reason to remand the matter to the CBSA.

[119] The CBSA has argued that the relationship between SI and SCE may have influenced the price paid or payable and that the nature or origin of the information provided by SCE in respect of certain amounts paid to SI may be questionable when considered in the context of customs valuation. The CBSA did not provide any concrete indication or evidence specific to this case on how the relationship may have had an influence on the price paid or payable or why the information provided may not be reliable.

[120] The mere existence of a non-arms' length relationship between two parties does not mean *ipso facto* that their business dealings are not conducted on commercial terms. In other words, in and of itself, such a relationship does not raise questions as to whether it influenced the terms of a transaction between the parties. In that respect, the CBSA is doing nothing but making vague allegations of possible influence. This is not sufficient.

[121] As to whether certain payments by SCE to SI should be added to the price paid or payable, either as subsequent proceeds under subparagraph 48(5)(a)(v) of the Act or otherwise under paragraph 48(5)(a), the Tribunal sees no basis for questioning SCE's explanation that those payments were unrelated to the value of goods and are instead related to inter-company administrative and/or management services provided under the inter-company agreements. Further, the fact that information submitted by SCE to justify its position is contained in documents prepared mainly for

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78 WTO, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 <https://www.wto.org/english/docs_e/legal_e/20-val_01_e.htm>. See also Exhibit AP-2019-021-07 at 47–48.

income tax purposes does not, in itself, raise concerns as to the probative nature of that evidence in demonstrating that these payments are not related to the value of the goods or are not based on purely commercial considerations.[79]

[122] Moreover, in its written submissions, the CBSA itself seems to suggest that its request to re-examine possible adjustments to the price paid or payable is based on a vague impression that there may be more that could be discovered once a detailed examination is undertaken, stating the following:

> It may be that there are further adjustments that could be made pursuant to paragraph 48(5)(a) of the Act, but there is insufficient evidence on the current record to make such a determination. Similarly, there is insufficient evidence to determine whether the purchaser and vendor's relationship influenced the [price paid or payable] of the goods, as described in paragraph 48(1)(d) of the Act . . .[80]
>
> [Footnotes omitted]

[123] SCE referred to extensive documentary evidence[81] and provided witness testimony (mainly Thomas Laws' confidential testimony)[82] of how it determined the transfer price and management fees, none of which was contested by the CBSA. The Tribunal has seen nothing to suggest that these fees were established other than in conformity with the intercompany agreements or applicable transfer pricing methodologies, that they were in respect of the goods as contemplated under the definition of "price paid or payable" in subsection 45(1) of the Act, or that they should otherwise be added to the price paid or payable pursuant to subsection 48(5).

[124] The parties disagreed as to who bears the burden of proof for the CBSA's arguments in this regard, as they were raised for the first time in this appeal. The Tribunal considers it sufficient to note that it considers SCE to have met the burden of proof set out at subsection 152(3) of the Act, based on the documentary evidence and witness testimony regarding how transfer pricing and management services between SI and SCE were determined and paid for. There is ultimately nothing concrete in the evidence before the Tribunal or arguments by the CBSA that raises questions as to whether the price paid or payable is determinable or should be adjusted, either as a result of the relationship between SCE and SI or of any amounts paid by SCE to SI.

[125] The Tribunal therefore finds that the price paid or payable by SCE for the goods in issue is determinable. For the reasons outlined in the previous sections of this decision, that price paid or payable was the sale price between SI and SCE.

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79 See *Jockey Canada Copmany v. President of the Canada Border Services Agency* (20 December 2012), AP-2011-008 (CITT). The Tribunal accepted that the appellant's income tax filings, including transfer pricing documentation, as reflecting the commercial reality of the transactions in question, noting (at para. 160) "a peculiar submission by JCC to the effect that, by and large, its accounting books and records should somehow be disregarded for customs valuation purposes because they are internal documents of a privately held corporation that focus on compliance with income tax obligations. The Tribunal finds that this argument has no merit. In order to accept it, the Tribunal would have to conclude that JCC's books and records do not reflect commercial reality. This is not credible."

80 Exhibit AP-2019-021-07 at para. 80.

81 See Exhibit AP-2019-021-03C (protected) at 180–321, 396–523.

82 *Transcript of In Camera Hearing* at 5–13, 33–34.

Conclusion

[126] For the reasons outlined above, the Tribunal finds that the value for duty of the goods is properly determined using the transaction value method under subsection 48(1) of the Act. The goods in issue were sold for export to Canada by SI to SCE, which qualified as a purchaser in Canada pursuant to paragraph 2.1(b) of the Regulations. The price paid or payable for the goods can be determined as having been the transfer price paid by SCE to SI.

DECISION

[127] The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member