



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

---

## DECISION AND REASONS

Appeal AP-2019-033

GBG Spyder Canada Holdings  
ULC

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, August 2, 2022*

**TABLE OF CONTENTS**

DECISION.....	i
STATEMENT OF REASONS .....	1
INTRODUCTION .....	1
PROCEDURAL HISTORY .....	1
PRELIMINARY ISSUE .....	3
Revised briefs .....	3
LEGAL FRAMEWORK .....	4
Purchaser in Canada.....	5
ANALYSIS.....	6
Sale for export.....	8
Sale between related companies .....	8
Corporate structure of the Spyder companies.....	12
Documentary evidence relating import transactions.....	13
Importation of the goods in issue for sales to the Canadian retailers .....	14
Relationship between Spyder Canada and Spyder USA .....	16
Insufficient evidence that title transferred from Spyder USA to Spyder Canada on importation .....	21
Price paid or payable between related companies .....	22
Sale of export between Spyder USA and the Canadian retailers.....	23
Transactions not involving sales to Canadian retailers.....	24
Subsidiary method for appraising the value for duty .....	24
CONCLUSION .....	25
DECISION .....	25

IN THE MATTER OF an appeal heard on October 21, 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 July 19, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**GBG SPYDER CANADA HOLDINGS ULC**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is allowed in part.

Randolph W. Heggart

---

Randolph W. Heggart

Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 21, 2021  
Tribunal Panel: Randolph W. Heggart, Presiding Member  
Tribunal Secretariat Staff: Helen Byon, Counsel  
Zackery Shaver, Counsel  
Stephanie Blondeau, Registrar Officer

**PARTICIPANTS:****Appellant**

GBG Spyder Canada Holdings ULC

**Counsel/Representatives**Peter Kirby  
Paul Cabana**Respondent**

President of the Canada Border Services Agency

**Counsel/Representatives**Jean-Pierre Hachey  
Adam Lupinacci**WITNESSES:**Yvonne Whitley  
Director  
Fung Corporation ServicesGeri-Lynn Lidstone  
Manager, Regional Programs  
Canada Border Services Agency

Please address all communications to:

The Deputy Registrar  
Telephone: 613-993-3595  
Email: [citt-tcce@tribunal.gc.ca](mailto:citt-tcce@tribunal.gc.ca)

## STATEMENT OF REASONS

### INTRODUCTION

[1] This is an appeal filed by GBG Spyder Canada Holdings ULC (Spyder Canada) pursuant to subsection 67(1) of the *Customs Act* (Act)<sup>1</sup> from a decision, made on July 19, 2019, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

[2] This appeal concerns the value for duty of goods imported between January 1, 2014, and June 8, 2017 (the “relevant period”). The imported goods are Spyder-branded ski jackets, apparel items and accessories (the goods in issue).

[3] The main issue on appeal is whether, for the purposes of the transaction value method set out in subsection 48(1) of the Act, the value for duty of the goods in issue is the price paid in the sale between GBG Spyder USA LLC (Spyder USA) and Spyder Canada. To assess this, the Tribunal must determine if the “sale for export” as referred to in subsection 48(1) was between Spyder USA and Spyder Canada, as argued by Spyder Canada, or between Spyder USA and the Canadian retailers, as argued by the CBSA.

[4] If it is determined that the sale for export was between Spyder USA and Spyder Canada, the Tribunal must then determine whether Spyder Canada qualified as a “purchaser in Canada” pursuant to paragraph 2.1(b) of the *Value for Duty Regulations* (Regulations)<sup>2</sup>. In this regard, the CBSA submitted that Spyder Canada does not qualify as a “purchaser in Canada”.

[5] For the reasons below, the Tribunal concludes that there was no sale for export between Spyder USA and the Canadian retailers for the purposes of subsection 48(1) of the Act. However, there was also no sale for export between Spyder USA and Spyder Canada. Accordingly, the transaction value method under subsection 48(1) cannot be used to determine the value for duty of the goods in issue and a subsidiary method for appraising the value for duty must be applied, as determined pursuant to section 47.

### PROCEDURAL HISTORY

[6] The CBSA conducted a verification of the value for duty of goods imported by Spyder Canada from January 1 to December 31, 2014. The verification was carried out by the CBSA mostly in 2016, which included an on-site meeting by the CBSA at Spyder USA’s headquarters in Boulder, Colorado.<sup>3</sup>

[7] After issuing its interim report on January 4, 2017, the CBSA issued its final report on June 8, 2017. According to the report, the CBSA found that only two sales or agreements to sell existed, namely (i) a sale between the foreign manufacturers and Spyder USA; and (ii) a sale between Spyder USA and the Canadian retailers. The report concluded that “individual sale[s] between GBG Spyder

---

<sup>1</sup> R.S.C., 1985, c. 1 (2nd Supp.).

<sup>2</sup> SOR/86-792.

<sup>3</sup> *Transcript of Public Hearing* at 16, 17, 69.

USA and Canadian customer [are] identifiable as a ‘sale for export to Canada to a purchaser in Canada’”.<sup>4</sup>

[8] Spyder Canada filed corrections with respect to the value for duty of the goods in issue imported between January 1, 2014, and June 8, 2017, pursuant to section 32.2 of the Act. All self-corrections were treated as re-determinations pursuant to subsection 59(1) of the Act.<sup>5</sup> Spyder Canada made requests for further re-determinations pursuant to subsection 60(1) of the Act on December 14, 2017, January 22, 2018, and February 20, 2018.<sup>6</sup>

[9] The CBSA issued its decision on July 19, 2019, denying Spyder Canada’s request and confirming that the relevant sale for export was between Spyder USA and the Canadian retailers, and that Spyder Canada was not a “purchaser in Canada”.<sup>7</sup>

[10] Spyder Canada filed its appeal with the Tribunal on October 17, 2019.

[11] Spyder Canada’s appellant’s brief was filed on December 16, 2019.

[12] The CBSA filed its respondent’s brief on March 6, 2020.<sup>8</sup>

[13] On February 3, 2021, the Tribunal was advised that Spyder Canada had retained new counsel. Spyder Canada requested that the hearing be postponed, and that counsel be given six weeks to become familiarized with the pleadings and evidence. Counsel updated the Tribunal on March 17, 2021, with respect to a proposed timetable for the appeal. The Tribunal granted the request, giving the parties until March 17, 2021, to provide an update on the timetable for the appeal.

[14] On March 17, 2021, Spyder Canada requested an additional 45 days to submit a revised appellant’s brief, with a response from the CBSA to be filed 45 days after that. On the same day, the CBSA objected to Spyder Canada’s request on the basis that Spyder Canada would be given a second chance to perfect its brief and that the CBSA had already filed its respondent’s brief.

[15] On March 22, 2021, the Tribunal granted Spyder Canada’s request, allowing Spyder Canada until May 6, 2021, to file its revised submissions and the CBSA until July 5, 2021, to submit its revised response. The reasons for this decision are provided below.

[16] On May 6, 2021, Spyder Canada filed its revised appellant’s brief.

[17] On June 25, 2021, the CBSA filed its revised respondent’s brief.

[18] The Tribunal held a videoconference hearing on October 21, 2021.

---

<sup>4</sup> Exhibit AP-2019-033-34 at 18, 19; Exhibit AP-2019-033-34B (protected) at 700–721.

<sup>5</sup> Six detailed adjustment statements were issued by the CBSA dated October 5, 2017, December 20, 2017, and March 8, 2019. They can be found in Exhibit AP-2019-033-34B (protected) at 722–757.

<sup>6</sup> Exhibit AP-2019-033-35A (protected) at 97–105.

<sup>7</sup> Exhibit AP-2019-033-34B (protected) at 758–770.

<sup>8</sup> On January 13, 2020, the CBSA requested an extension to file its respondent’s brief. The Tribunal granted the CBSA’s request on January 17, 2020.

[19] At the hearing, Spyder Canada called Ms. Yvonne Whitley, Director of Customs Compliance at Fung Corporate Services of the parent company Fung Global Transactions Services Group, as a witness. Between 2014 and 2017, Ms. Whitley was employed by Spyder USA as Director of Customs Compliance.<sup>9</sup>

[20] The CBSA called Ms. Geri-Lynn Lidstone, Manager of Regional Programs, Trade Operations Division of the CBSA. At the time of the verification, Ms. Lidstone was a senior officer of Trade Compliance and was the lead officer for the value for duty verification of the imported goods by Spyder Canada.<sup>10</sup>

## PRELIMINARY ISSUE

### Revised briefs

[21] As noted above, subsequent to the filing of Spyder Canada and the CBSA's briefs, the Tribunal was advised that new counsel had been retained by Spyder Canada who requested an opportunity to file a revised appellant's brief and new evidence, including witness affidavits. Counsel for Spyder Canada cited issues between previous counsel and Spyder Canada which resulted in certain evidence not having been filed.<sup>11</sup> Spyder Canada requested the opportunity to file a revised brief, including additional evidence.

[22] The CBSA opposed Spyder Canada's request on the basis that all the evidence Spyder Canada sought to add to the record was available at the time the appeal was filed and that engaging new counsel should not allow an appellant to restart the exchange of written submissions to reframe the case it sought to make. However, the CBSA noted that, if the Tribunal granted Spyder Canada's request, the CBSA would request 60 days to file an amended respondent's brief from the date it received Spyder Canada's appellant's brief.<sup>12</sup>

[23] The Tribunal found that it was appropriate to grant Spyder Canada's request to submit a revised brief and provide additional evidence as well as permit the CBSA to file a revised brief 60 days thereafter.<sup>13</sup> In the Tribunal's view, it was integral to a fair and expeditious decision-making process to ensure that Spyder Canada's case in these proceedings was properly represented by its new counsel. Insofar as there was evidence available at the time that Spyder Canada filed its appeal but was not submitted by previous counsel, this should not prejudice the new counsel's ability to represent Spyder Canada's interests in this matter. Furthermore, the CBSA would have had the

---

<sup>9</sup> According to her witness statement, Ms. Whitley stated that Fung Corporate Services provides "corporate services to companies within the GBG Group", including Spyder Canada, Spyder USA and GBG USA. Exhibit AP-2019-033-34 at 45; *Transcript of Public Hearing* at 12-13.

<sup>10</sup> *Transcript of Public Hearing* at 68, 69. Ms. Lidstone testified that during the verification she was assisted by another senior officer.

<sup>11</sup> Exhibit AP-2019-033-31.

<sup>12</sup> Exhibit AP-2019-033-32.

<sup>13</sup> This is consistent with the Tribunal's approach in past cases where it has postponed the hearing of a matter to accommodate preparation by new counsel. See, for example, *PricewaterhouseCoopers LLP v. Immigration and Refugee Board of Canada* (16 October 2020), PR-2020-035 (CITT) at para. 20; *Komatsu International (Canada) Inc. v. President of the Canada Border Services Agency* (10 April 2012), AP-2010-006 (CITT) at para. 11.

benefit of additional time, in advance of the hearing, to address any new submissions or evidence filed by Spyder Canada.

## LEGAL FRAMEWORK

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

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

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

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

**48(1)** Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined . . .

[27] Pursuant to paragraph 48(1)(d) of the Act, the transaction value method may apply to a sale of goods between related companies where certain conditions are met. The paragraph reads as follows:

**(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
- (ii)** the importer of the goods demonstrates that the transaction value of the goods meets the requirement set out in subsection (3)

[28] Subsection 48(3) of the Act reads as follows:

**(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:

- (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.



[29] The term “related” is defined as follows in subsection 45(3) of the Act:

(3) For the purposes of sections 46 to 55, persons are related to each other if

...

(b) one is an officer or director of the other;

(c) each such person is an officer or director of the same two corporations, associations, partnerships or other organizations;

...

(f) they directly or indirectly control or are controlled by the same person;

(g) one directly or indirectly controls or is controlled by the other;

(h) any other person directly or indirectly owns, holds or controls five per cent or more of the outstanding voting stock or shares of each such person; or

(i) one directly or indirectly owns, holds or controls five per cent or more of the outstanding voting stock or shares of the other.

[30] It is only to the extent that the value for duty of imported goods cannot be appraised on the basis of their transaction value that any subsidiary basis of appraisal, as outlined in sections 49 to 53 of the Act, can be considered.

### Purchaser in Canada

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

**2.1** For the purposes of subsection 45(1) of the Act, ***purchaser in Canada*** means

(a) a resident;

(b) a person who is not a resident but who has a permanent establishment in Canada; or

(c) a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,

(i) for consumption, use or enjoyment by the person in Canada, but not for sale, or

(ii) for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.

[Bold in original, emphasis added]

[32] The term “resident” is defined in section 2 of the Regulations as meaning:

(a) an individual who ordinarily resides in Canada;

(b) a corporation that carries on business in Canada and of which the management and control is in Canada; and

(c) a partnership or other unincorporated organization that carries on business in Canada, if the member that has the management and control of the partnership or organization, or a majority of such members, resides in Canada.

[33] The term “permanent establishment” is defined in section 2 of the Regulations as follows:

. . . a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business.

## ANALYSIS

[34] This appeal raises two key issues with respect to the applicability of the transaction value method under subsection 48(1) of the Act. The first issue is whether there was a sale for export between Spyder USA and Spyder Canada or, alternatively, if the sale for export occurred between Spyder USA and the Canadian retailers. Fundamental to this issue is whether Spyder USA and Spyder Canada were two related companies that were engaged in a valid sale between buyer and seller or whether they were instead in a principal-agent relationship, which would negate a finding of a sale for export between the two companies.

[35] Insofar as the Tribunal determines that the relevant sale for export was between Spyder USA and Spyder Canada, the second issue that arises is whether Spyder Canada qualified as a “purchaser in Canada” pursuant to paragraph 2.1(b) of the Regulations.

[36] In appeals filed pursuant to section 67 of the Act, the burden is on Spyder Canada to demonstrate that CBSA incorrectly determined that the sale for export was between Spyder USA and the Canadian retailers.<sup>14</sup>

[37] Spyder Canada argued that there was a valid sale between itself and Spyder USA on the basis that all of the elements of a sale, as articulated in the Tribunal’s decision in *Brunswick*, have been met, namely that (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 (c) there must be passage of title and consideration.<sup>15</sup> With respect to the first element, Spyder Canada argued that the books and records of Spyder US and Spyder Canada show a sale and that there was no evidence of agency between the companies to support piercing the corporate veil and ignoring the separate corporate identity of Spyder Canada. If Spyder Canada had been Spyder USA’s agent, it would not have recorded profits on the sales to retailers or paid income taxes on those profits. Rather, Spyder Canada would have received a commission from Spyder USA on the sales of the goods to the retailers in accordance with an agency agreement. Spyder Canada contended that the CBSA had not applied the law as written and had “cherry-picked” facts to support its preferred interpretation that Spyder Canada is not a separate company.<sup>16</sup>

[38] Spyder Canada also argued that the second and third elements had been met, as the sale was clearly documented in the accounting records of both entities as well as on purchase invoices.

---

<sup>14</sup> In appeals under subsection 67(1) of the Act, the burden of proof is well established pursuant to subsection 152(3) of the Act. See *Noble Drilling Services (Canada) Corporation v. President of the Canada Border Services Agency* (14 May 2019), AP-2018-004 (CITT) at para. 28; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII) at paras. 7, 21.

<sup>15</sup> *Brunswick International (Canada) Limited v. The Deputy Minister of National Revenue* (14 December 1999), AP-98-100 (CITT) [*Brunswick*] at 8, citing *Joe Ng Engineering v. Gerling Global General Insurance* (24 December 1997), SR-96-CU-112421 (Ont. Ct. Gen. Div.), 37 O.R. (3d) 359, which refers to the meaning of a “sale” as defined in *Black’s Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979), p. 1200.

<sup>16</sup> *Transcript of Public Hearing* at 109, 110.

Moreover, Spyder Canada made payment to Spyder USA for the goods and Spyder Canada had title to the goods on importation.

[39] On the issue of whether there was a sale for export between Spyder USA and the Canadian retailers, Spyder Canada submitted that the documentation clearly did not show such a transaction. The Canadian retailers did not take title of the goods until the goods were delivered by FedEx after they were imported into Canada.

[40] For its part, the CBSA argued that Spyder Canada was not a separate entity in law, as it was a dependent agent of related company Spyder USA. Spyder Canada's role was at most an agent facilitating the sale between Spyder USA and the Canadian retailers. Therefore, there could be no sales transaction between the two entities for the purpose of subsection 48(1). The CBSA submitted that the sale for export was instead between Spyder USA and the Canadian retailers, and there is insufficient evidence showing that title transferred from Spyder USA to Spyder Canada. Moreover, the CBSA submitted that, even if the Tribunal found there to be a sale between Spyder Canada and Spyder USA, Spyder Canada does not qualify as a purchaser in Canada.

[41] In addition to the issue of whether there was a sale for export to a purchaser in Canada, the CBSA submitted that it was also Spyder Canada's burden to establish that its relationship with Spyder USA did not influence the price paid for the goods under paragraph 48(1)(d) and subsection 48(3) of the Act. The CBSA argued that Spyder Canada failed to meet this burden.

[42] Alternatively, the CBSA submitted that, if the Tribunal finds that Spyder Canada is the purchaser in the sale for export of the goods in issue, it should require that the price paid or payable be adjusted, in accordance with subsection 45(1) or paragraph 48(5)(a) of the Act.<sup>17</sup>

[43] Both parties also made submissions with respect to the application of a subsidiary method for appraising the value for duty should the Tribunal determine that the transaction value method cannot apply in this case.

[44] For the reasons below, having considered all the evidence on the record, the Tribunal finds that, on balance, there was an agency relationship between Spyder Canada and Spyder USA. Accordingly, there was no sale for export between Spyder USA and Spyder Canada for the purposes of subsection 48(1), and the transaction value method, based on the price paid or payable between Spyder Canada to Spyder USA, cannot be applied in determining the value for duty of the goods in issue. The issue of whether Spyder Canada qualified as a purchaser in Canada pursuant to paragraph 2.1(b) of the Regulations is therefore moot.

[45] With respect to transactions involving sales to Canadian retailers, the Tribunal finds that the evidence does not indicate that the Canadian retailers obtained title to the goods on importation. Title was acquired by the Canadian retailers subsequent to the importation of the goods. Accordingly, there could be no sale for export between Spyder USA and the Canadian retailers.

---

<sup>17</sup> Subsection 45(1) of the Act defines the "price paid or payable" as follows: "*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". The CBSA submitted that the proceeds from Spyder Canada's sales to the retailers, which were taken from its bank account, should be reflected in the value for duty.

[46] Furthermore, the Tribunal is also of the view that, even if it could be said that there was a sale for export between Spyder USA and Spyder Canada, which are related companies, the conditions for applying the transaction value method set out in paragraph 48(1)(d) of the Act have not been met.<sup>18</sup> Pursuant to this provision, it must be established that the relationship between the related companies did not influence the price paid or payable for the goods *or* that the transaction value meets the requirements set out in subsection 48(3).<sup>19</sup>

[47] With respect to the Scenario 2 and Scenario 3 transactions discussed below, the Tribunal finds that, on balance, the evidence indicates that they did not involve sales to Canadian retailers and the purchases were made directly with Spyder USA. Moreover, Spyder USA had title to the goods on importation. Consequently, there was no sale for export to a purchaser in Canada for the purposes of subsection 48(1) of the Act for the goods in issue associated with these transactions.

## Sale for export

### Sale between related companies

[48] The Act provides that the transaction value method for determining the value for duty is permitted for sales between related companies. In circumstances involving a transaction between related companies, paragraph 48(1)(d) sets out the conditions that must be satisfied in respect of the sale for export. These conditions include that the relationship between the related companies does not influence the price paid or payable for the goods or that the transaction value of the goods meets the requirements set out in subsection 48(3).

[49] However, in *Brunswick*, a decision that both parties have relied on in these proceedings as to the meaning of a sale, the Tribunal previously established that it is a fundamental element of a sale that there must be two parties “standing in relation of buyer and seller to one another”. This element remains intact even where there is a sale between related companies.<sup>20</sup> Notably, the Tribunal acknowledged that related companies are distinct legal entities and, therefore, there can be a sale between them. However, there are circumstances where a sale cannot exist between two related entities.

[G]enerally, there can be a sale between a corporation and its parent, subsidiary or sister corporation. However, the presumption of separate legal identity can be rebutted in exceptional circumstances. Where the corporate structure was established as a sham, *where one corporation is completely dependent on the other or is its puppet*, or where a subsidiary is ‘bound hand and foot to the parent company and must do just what the parent company

---

<sup>18</sup> *Jockey Canada Company v. President of the Canada Border Services Agency* (20 December 2012) AP-2011-008 (CITT) [*Jockey*] at paras. 94, 195.

<sup>19</sup> In *Skechers USA Canada, Inc. v. President of the Canada Border Services Agency* (13 December 2013), AP-2012-073 (CITT) at footnote 33, with respect to subsection 48(3), the Tribunal noted, “subsection 48(3) requires the importer to demonstrate that the transaction value of the goods sold to it by a related party closely approximates a surrogate value, for example, the transaction value of identical or similar goods in a sale for export between parties that are not related to each other.”

<sup>20</sup> *Brunswick* at 8.

says', Canadian courts have 'pierced the corporate veil' and found that the two corporations are but one entity.<sup>21</sup>

[Footnotes omitted, emphasis added]

[50] Accordingly, there can be no sale for the purposes of subsection 48(1) between companies in a relationship of agency, 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.<sup>22</sup>

[Emphasis in original]

[51] Importantly, the Tribunal has also previously stated that there is no basis in law to conclude that, simply because two companies are related, one is necessarily the agent of the other. Indeed, the Tribunal has recognized that related companies may "[coordinate] their efforts to a great extent" and these arrangements, "designed for the mutual advantage of each company, are to be expected" and "they do not, of themselves, make the participating corporations a single entity."<sup>23</sup> The Act clearly envisages, for instance, using the transaction price between related companies as the basis for determining the value for duty where the relationship between the companies is considered not to have influenced the price.<sup>24</sup>

[52] The Tribunal has, in past cases, considered a variety of factors in assessing whether there is an agency relationship between two entities. A key consideration has been the terms of the agreement between the entities. However, where the intention of the parties and the nature of their agreement are not clear, or that there is no agreement, 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 exists. As previously noted by the Tribunal, the courts have considered such factors as the extent to which one party controls the other and the risk assumed by the alleged agent. However, no one factor has been considered determinative of the issue of agency; the facts should be considered as a whole, with factors weighed with relative importance as they may apply. Factors that the Tribunal has considered in assessing whether an agency relationship exists have included, for example, the extent to which the alleged purchaser/importer:<sup>25</sup>

---

<sup>21</sup> *Brunswick* at 8, 9.

<sup>22</sup> *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.

<sup>23</sup> *Brunswick* at 9. In *Brunswick*, the Tribunal found that the appellant in that case maintained sufficient direction and control over its operations to make it "more than a mere puppet" of the vendor of the goods.

<sup>24</sup> *Moda Imports Inc. v. The Deputy Minister of National Revenue* (3 September 1997), AP-95-296 (CITT) [*Moda*] at 5.

<sup>25</sup> See, for example, *JewelWay International Canada, Inc. and JewelWay International, Inc. v. The Deputy Minister of National Revenue* (26 March 1996), AP-94-360 (CITT) [*JewelWay*] at 12; *Brunswick* at 9, 10, citing G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 13; *Moda* at 4, 5; *DMG Trading Co. Ltd. v. The Deputy Minister of National Revenue* (28 August 1997), AP-96-076 (CITT) [*DMG*]; In *Patagonia*

- solicits sales and 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;
  - 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; and
  - invests proceeds of the business.
- Transfer of title

[53] In this appeal, Spyder Canada submitted that insofar as there has been a transfer of title, there cannot be a finding that the transfer price is simply a “bookkeeping entry” and that there was no sale, in “direct contradiction” of contracts between the parties. The “legal consequences of transactions” should not simply be ignored.<sup>26</sup>

[54] Indeed, applying the Supreme Court’s decision in *Mattel*, the Tribunal has confirmed that the transfer of title on importation is a key indicator in identifying the correct sales transaction for determining the value for duty. The Court stated the following:<sup>27</sup>

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.

[55] However, the transfer of title and its relevance in identifying the “sale for export” where there has been a series of sale transactions (the issue before the Court in *Mattel*<sup>28</sup>) should not be conflated with the question of whether there has been a valid sale between the parties. The Court did not opine on this latter issue in *Mattel*. As such, the Court’s finding that the sale for export is dependent on identifying the person who had title to the goods on importation addresses an issue distinct from

---

*International, Inc.* (28 September 2000), AP-99-014 (CITT) [*Patagonia*] at 6, the Tribunal found a relationship of agency based on the significant degree of control exercised over the appellant in that case by the other entity.

<sup>26</sup> *Transcript of Public Hearing* at 109.

<sup>27</sup> *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII) [*Mattel*] at para. 45 cited in *Delta Galil USA Inc. v. President of the Canada Border Services Agency* (5 March 2021), AP-2020-002 (CITT) [*Delta Galil*] at paras. 27–28.

<sup>28</sup> In *Mattel*, the issue before the Court was whether a sale between the foreign manufacturers and an intermediary rather than a sale between the second intermediary and the ultimate purchaser constituted the “sale for export” *Mattel* at paras. 35, 36.

whether a purported sale transaction meets the key elements of a sale, including that there are two persons standing as buyer and seller in relation to each other. As discussed above, insofar as there is an agency relationship between the purported vendor and purchaser, there can be no sale between them, and by extension no sale for export for the purposes of subsection 48(1) of the Act.

- Piercing the corporate veil

[56] Also, in this appeal, Spyder Canada questioned the possible outcome of piercing the corporate veil, in other words, treating the related companies as though they are but one entity, suggesting that such an outcome may not be consistent with the legislation. In this regard, Spyder Canada cited the excerpt below from the Federal Court of Appeal's decision in *Canada v. Quinco Financial*, which discussed the principles of interpretation articulated by the Supreme Court in *Canada Trustco Mortgage Co. v. Canada*.<sup>29</sup> The relevant excerpt is as follows:

[5] In *Canada Trustco*, the Supreme Court held that in interpreting provisions in taxation statutes one must look to the text, context and purpose of the provision. However, where the particular words of a provision are precisely-worded and unequivocal, the ordinary meaning of those words plays a "dominant role" in the process. The Supreme Court expressed this at paragraph 10 of *Canada Trustco*:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": [citation omitted]. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play [sic] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[6] The Supreme Court in *Canada Trustco* (at paragraph 13) also noted that the *Income Tax Act* is "an instrument dominated by explicit provisions dictating specific consequences," and this invites "a largely textual interpretation". . .

[7] On the dominant role that the particular words of taxation statutes play in the statutory interpretation process, *Canada Trustco* does not stand alone. A few years earlier, the Supreme Court emphasized that where a provision in a taxation statute is "clear and unambiguous," its words "must simply be applied": *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622 at paragraph 40. And one year after *Canada Trustco*, the Supreme Court emphasized that in cases where the language is precise one cannot posit a purpose behind a provision and then use it "to create an unexpressed exception to clear

---

<sup>29</sup> See 2014 FCA 108 [*Quinco*] at paras. 5–7, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*].

language” or “supplant” clear language: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at paragraph 23.

[57] The meaning of a “sale” as the term is found in subsection 48(1) of the Act, a term that is not defined in the Act, has been well established by the Tribunal. As articulated in *Brunswick*, a case relied on by both parties in this appeal, there must be (a) two parties, standing in relation of buyer and seller to one another; (b) both parties must agree to the same proposition; and (c) there must be passage of title and consideration. No submissions that these elements are inconsistent with the text, context and purpose of the provision or the Act itself, or more particularly, that the term “sale” is a term that is precise and unambiguous, were made in these proceedings.

[58] In the Tribunal’s view, in the exceptional circumstances where a purported buyer is completely dependent on the vendor, there cannot be a sale. In addition to not meeting the first element of a sale, in these circumstances, how does the buyer agree to the same proposition as the seller (i.e., the second element of a sale)?

[59] As submitted by the CBSA, the relevant lens to view the issue of a sale for export is that this relates to the assessment of duties for customs purposes and “the question of whether an exporter can set-up a purely dependent entity to sell to itself for customs purposes”.<sup>30</sup> This is a question essential to whether the transaction value method is appropriate for appraising the value of the goods for assessing duties or whether a different method should be used. This is the objective of the provision, as evidenced more clearly by the condition expressed in paragraph 48(1)(d) of the Act. The transaction value method is contingent on the purchaser and vendor not being related to each other and in the case that they are, it must be demonstrated that their relationship did not influence the price paid or payable, or the transaction price meets the requirements of subsection 48(3).<sup>31</sup>

[60] For these reasons, the Tribunal is of the view that its interpretation of a “sale” from *Brunswick*, and as applied in this case, is consistent with a textual, contextual and purposive analysis that remains harmonious with the Act as a whole.<sup>32</sup>

### **Corporate structure of the Spyder companies**

[61] Spyder Canada is a company incorporated under the laws of British Columbia with its principal place of business located in Calgary, Alberta. Spyder Canada was previously known as Spyder Canada Company. Its principal place of business is a rented facility located at 2832 Morley Trail NW in Calgary, Alberta.<sup>33</sup> The evidence indicates that the facility is periodically used as a

---

<sup>30</sup> *Transcript of Public Hearing* at 147.

<sup>31</sup> The consideration of a transaction value associated with a sale between non-related parties is contemplated in paragraph 48(3)(a) of the Act.

<sup>32</sup> Also, the consideration of agency in assessing whether a sale had occurred was previously considered by the Tribunal in *Brunswick*, *Moda*, *Jewelway*, *DMG* and *Patagonia*. In addition, in *Delta*, the Tribunal acknowledged that a non-resident importer could have a permanent establishment as defined in the Regulations through its dependent agent.

<sup>33</sup> See lease in Exhibit AP-2019-033-034B (protected) at 626–639.



showroom and office space, with storage capacity for inventory consisting of returned goods or samples. Currently, there is one employee who works at the Calgary office.<sup>34</sup>

[62] Spyder USA is a company affiliated with Spyder Canada and incorporated under the laws of Delaware. It is located in Boulder, Colorado. Spyder USA was previously known as Spyder Active Sports, Inc.<sup>35</sup> The parties agree that the goods in issue were exported by Spyder USA.

[63] Spyder Canada and Spyder USA are related companies as defined under the Act. Both Spyder Canada and Spyder USA are wholly owned subsidiaries of Jimlar Corporation, which is incorporated in the State of New York. Jimlar Corporation is a wholly owned subsidiary of GBG USA Inc. (GBG USA), a Delaware corporation.<sup>36</sup> The evidence on the record also refers to the Fung Global Transaction Services Group, which is part of the Fung Group, the parent company of GBG USA.<sup>37</sup>

### **Documentary evidence relating import transactions**

[64] In this appeal, as evidence of the related party transactions, Spyder Canada submitted sample invoices, accounting entries and shipping documents for imports between 2014 and 2017.

[65] The CBSA submitted evidence relating to 2014 import transactions arising from its verification process that was conducted in 2016. These transactions were categorized according to three different importation scenarios.

[66] Transactions referred to as “Scenario 1” represented the related party transactions and reflected the majority of the transactions. There were 241 transactions from 2014. Almost all the submissions of the parties made in this appeal concerned these types of transactions. Furthermore, the majority of the 10 samples that were selected by the CBSA to assess different importing scenarios from 2014 were consistent with scenario 1 type transactions. The CBSA’s evidence also included a series of documents related to Sample 7 that were described in Ms. Lidstone’s testimony as representative of transactions between Spyder Canada and Spyder USA.<sup>38</sup>

[67] Transactions referred to as “Scenario 2”, involved imports shipped directly from the manufacturer. There were 22 such transactions. The CBSA submitted that in one case, during the verification period, citing to a sample for Scenario 2, a retailer placed its order directly in Spyder USA’s ordering system and Spyder Canada was not involved with the transaction. Spyder Canada submitted at the hearing that it was not aware of any direct transactions between a Canadian retailer and Spyder USA.

[68] However, having examined the CBSA meeting notes and correspondence from the 2016 verification related to the sample transaction for Scenario 2,<sup>39</sup> the Tribunal finds that, in light of the uncontroverted evidence, this purchase order was not made through an independent sales

---

<sup>34</sup> *Transcript of Public Hearing* at 49, 82; Exhibit AP-2019-033-34 at 48; Exhibit AP-2019-033-51 at 21. See photos of premises in Exhibit AP-2019-033-34B (protected) at 640–643.

<sup>35</sup> *Transcript of Public Hearing* at 36; Exhibit AP-2019-033-34 at 45.

<sup>36</sup> Exhibit AP-2019-033-34 at 45; *Transcript of Public Hearing* at 15.

<sup>37</sup> *Transcript of Public Hearing* at 12.

<sup>38</sup> *Transcript of Public Hearing* at 69, 72, 77–79; Exhibit AP-2019-033-35A (protected) at 12–14, 18, 23–27.

<sup>39</sup> *Ibid.*

representative (ISR) or Spyder Canada, but instead directly with Spyder USA. Furthermore, based on the evidence, this was not a purchase made by a Canadian retailer, but instead by a sports team account. No copies of the actual invoices were on the record, but the evidence indicates that there was no invoice between Spyder USA and Spyder Canada reflecting an inter-company transfer of goods.

[69] Finally, transactions referred to as “Scenario 3” involved goods shipped from an embroidery company. There were only three of these transactions in 2014.<sup>40</sup> The meeting notes and correspondence from the 2016 verification concerning the relevant samples also indicate that purchases were made directly with Spyder USA. Additionally, although there were no copies of the actual invoices on the record, the evidence indicates that there were invoices directly between Spyder USA and the team account in addition to an invoice between Spyder USA and Spyder Canada.

[70] While the submissions almost entirely concerned related party transactions as illustrated by the Scenario 1-type import transactions, the Tribunal has considered the totality of the evidence including the evidence related to the import transactions illustrated by scenarios 2 and 3 described above, as these were transactions that also emerged from the 2014 verification process which formed the basis for the CBSA’s determination in respect of the goods in issue.

### **Importation of the goods in issue for sales to the Canadian retailers**

[71] The parties agree that Spyder Canada contracted with various independent sales representatives (ISRs) that were responsible for soliciting and collecting purchase orders from Canadian retailers for commissions.<sup>41</sup> The Tribunal notes that Spyder Canada (as it was then Spyder Canada Company) entered into ISR agreements with four different companies, each covering a particular territory in Canada, with the earliest agreement dating back to November 1, 2010.<sup>42</sup>

[72] These purchase orders were entered into a centralized electronic data interchange (EDI) system by the ISRs.<sup>43</sup> The EDI system is managed by Spyder USA but was shared between the companies.<sup>44</sup>

[73] Once purchase orders were entered into the EDI system by the ISRs, this would generate a purchase order within the EDI system between Spyder Canada and Spyder USA with respect to the goods.<sup>45</sup> An order acknowledgement would then be sent from Spyder USA to the ISRs, with any discrepancies with respect to the order reported to Spyder USA’s sales representative.<sup>46</sup> Order

---

<sup>40</sup> *Ibid.*

<sup>41</sup> *Transcript of Public Hearing* at 15, 16. See, for example, ISR’s obligations under section E of the ISR agreement in Exhibit AP-2020-013-51 at 2, 3.

<sup>42</sup> Exhibit AP-2020-013-34B (protected) at 1–94. At the hearing, Ms. Whitley stated that ISRs were not exclusive to representing the Spyder brand but also represented other brands and manufacturers. *Transcript of Public Hearing* at 24.

<sup>43</sup> Exhibit AP-2019-033-34 at 46; *Transcript of Public Hearing* at 28, 29. *Transcript of Public Hearing* at 77, 78; 135; Exhibit AP-2019-033-035A (protected) at 12–14, 18, 23–27.

<sup>44</sup> *Transcript of Public Hearing* at 29.

<sup>45</sup> Exhibit AP-2019-033-34 at 46.

<sup>46</sup> See the Sample 7 order acknowledgement in Exhibit AP-2019-033-35A (protected) at 49–50.

confirmations were then issued from Spyder Canada to the retailer (generated automatically through the EDI system).<sup>47</sup>

[74] Based on the aggregate orders from both American and Canadian retailers, Spyder USA would place its order with its manufacturers. The goods would be received into inventory at Spyder USA's distribution centre in Kent, Washington.

[75] To fulfill orders for the Canadian retailers, the goods were selected for shipment based on a "pick order sheet", which was produced at the distribution centre.<sup>48</sup> According to Ms. Whitley's witness statement, Spyder USA shipped the goods to the Canadian retailer using a FedEx distribution centre and generated an invoice between Spyder USA and Spyder Canada.<sup>49</sup> However, the Tribunal notes that in two of the bills of lading provided by Spyder Canada, one shows the goods being shipped to the location of a different carrier and, the other shows the goods being shipped directly to a Canadian retailer. This is also consistent with the relevant commercial invoices.<sup>50</sup>

[76] Various documents were submitted by Spyder Canada as evidence of sale transactions between Spyder USA and Spyder Canada, as well as transactions between Spyder Canada and Canadian retailers for the years 2014 to 2017. This included, for example, sample invoices from Spyder USA showing the sale of goods to Spyder Canada (although no purchase order number appears on the invoice); Spyder USA's inventory ledgers showing entries with respect to the goods indicated in the invoice to Spyder Canada; commercial invoices between Spyder USA and Spyder Canada showing that the goods were to be shipped to the FedEx warehouse in Mississauga (however, as noted above, some of the shipments were to a different carrier location or to the customer retailer directly); invoices for the sale of the goods between Spyder Canada and the Canadian retailers; Spyder Canada's accounting and inventory general ledgers showing entries for the goods sold to the Canadian retailers; and Spyder Canada's supplier ledgers to record amounts payable to Spyder USA as well as amounts paid and customer ledger to account for payment by the customer invoiced by Spyder Canada.<sup>51</sup> Additionally, with respect to the shipment of the goods from Spyder USA's distribution centre in Kent, Washington, Spyder Canada provided sample bills of lading<sup>52</sup> as well as copies of customs accounting forms showing Spyder Canada as the importer of record.<sup>53</sup>

---

<sup>47</sup> See the Sample 7 order confirmation in Exhibit AP-2019-033-35A (protected) at 51. *Transcript of Public Hearing* at 90.

<sup>48</sup> See the Sample 7 pick order sheet (includes the same customer purchase order number which appears on the sample 7 order confirmation) in Exhibit AP-2019-033-35A (protected) at 52–66.

<sup>49</sup> Exhibit AP-2019-033-34 at 46.

<sup>50</sup> Exhibit AP-2019-033-34B (protected) at 343-345, 361-362, 386, 433-435.

<sup>51</sup> See Exhibit AP-2019-033-34B (protected) at 256–435. See also the Sample 7 invoice from Spyder USA to Spyder Canada and Sample 7 invoice from Spyder Canada to the retailer (refers to the same customer purchaser order number which appears on the Sample 7 order confirmation) in Exhibit AP-2019-033-35A (protected) at 7, 67.

<sup>52</sup> See Exhibit AP-2019-033-34B (protected) at 264–265 (this bill of lading refers to the same customer purchase order number which appears on the Sample 7 order confirmation), 302–303, 361–362.

<sup>53</sup> *Ibid.* at 259–261, 298–299, 326–342.

[77] Retailers could pay for the imported Spyder-brand apparel by cheque or wire transfer to a secure “lockbox” bank account registered to Spyder Canada held at Citibank in Toronto, Ontario.<sup>54</sup>

### **Relationship between Spyder Canada and Spyder USA**

[78] As discussed above, a threshold issue in this appeal is whether there was a valid sale between Spyder Canada and Spyder USA. The Tribunal has previously established that, for the purposes of subsection 48(1) of the Act, there can be no sale between a principal and its dependent agent. For the reasons below, having assessed the factors that the Tribunal has previously considered in determining the nature of the relationship between an alleged vendor (exporter) and purchaser (importer), and while there are factors which may indicate that Spyder USA and Spyder Canada were separate entities, on balance, the Tribunal finds that the preponderance of evidence militates to a finding of agency between the two companies. Accordingly, there was no valid sale for export.

[79] The evidence indicates that there are many roles performed by Spyder USA vis-à-vis Spyder Canada. According to the 2006 support agreement between the two entities, Spyder USA provides Spyder Canada support services including in administration, sales, marketing, merchandizing, and management information systems. The support agreement also provides that Spyder USA is paid a fee for services it renders to Spyder Canada.<sup>55</sup> The details of these services were expanded on in a document which, according to Ms. Lidstone, was provided to the CBSA during the on-site visit as well as in a response to the valuation questionnaire.<sup>56</sup>

[80] Spyder USA was highly involved with all aspects of the sales of the goods to Canadian retailers. The evidence indicates that, in addition to the ISRs visiting Canadian retailers, the Vice-President of Sales for Spyder USA would travel to meet larger Canadian clients. A significant amount of resources was spent by Spyder USA on Canadian marketing. Retailers and ISRs would also attend trade shows and sales meetings at Spyder USA’s showroom in Boulder, Colorado, although Ms. Whitley testified that such meetings could also take place in Calgary.<sup>57</sup> Moreover, Spyder USA’s customer service representatives located in Boulder, Colorado, also assisted with Canadian sales and answered questions from the ISRs and Canadian retailers.<sup>58</sup> All notices and other communications were to be sent to Spyder USA’s office under the terms of the ISR agreements.<sup>59</sup>

[81] However, for the reasons discussed below, the Tribunal finds that Spyder USA’s role in relation to Spyder Canada extended beyond supplying support services under the support agreement and that such an agreement is not probative of the true relationship between the parties. In this case,

---

<sup>54</sup> Exhibit AP-2019-033-34 at 46. See also the bank account statement in Exhibit AP-2019-033-35A (protected) at 70–73.

<sup>55</sup> Exhibit AP-2019-033-34 at 50; Exhibit AP-2019-033-34B (protected) at 697–699; *Transcript of Public Hearing* at 80, 81.

<sup>56</sup> Exhibit AP-2019-033-35A (protected) at 74, 48.

<sup>57</sup> *Transcript of Public Hearing* at 26, 80–85.

<sup>58</sup> Ms. Lidstone also testified that it was her understanding that there was to be one full-time customer service representative to support Canadian sales in Boulder, Colorado. *Transcript of Public Hearing* at 81.

<sup>59</sup> See, for example, section R of the ISR agreement, Exhibit AP-2019-033-51 at 10.

the Tribunal has carefully assessed the extrinsic evidence to determine the true nature of the relationship between the two entities.<sup>60</sup>

[82] Spyder USA and Spyder Canada did not fully conduct themselves as distinct entities. In her testimony in respect of the ISR agreements, Ms. Whitley stated that references to “Spyder”, notably in the recitals of the agreements, e.g. “Spyder designs and manufactures skiwear, sportswear, related accessories and apparel that it sells for resale through dealers and distributors”, referred to “Spyder” as in the Spyder “brand” as opposed to strictly Spyder Canada.<sup>61</sup> Moreover, the Tribunal notes that Spyder USA (under its former name) was the actual signatory of an agreement between Spyder Canada and a third party.<sup>62</sup>

[83] Under the terms of the ISR agreements, the ISRs were responsible for promoting the sale of the goods by, among other things, accurately representing and stating Spyder’s policies to all customers and soliciting orders using only the prices and terms established by Spyder.<sup>63</sup> Ms. Whitley’s witness statement provides that it was Spyder Canada that maintained a separate price list for Canadian products and had separate order forms for Canadian sales.<sup>64</sup>

[84] However, having considered the evidence, the Tribunal is not convinced that Spyder Canada established prices and terms for sales of the goods in issue sold to customers in Canada. Rather, as submitted by the CBSA, these were fixed by Spyder USA, and Spyder Canada had no discretion in this regard.<sup>65</sup> Spyder USA’s Winter 2014 terms and policies, based on the wording of the terms and policies as well as a response to the valuation questionnaire, applied to orders from Canadian customers.<sup>66</sup> There is no reference to Spyder Canada on the 2014 price list and its 2015 and 2016 order forms.<sup>67</sup> Furthermore, Spyder Canada provided no explanation as to how it was involved in the construction of the price list.

[85] According to the terms of the ISR agreements, while ISRs were required to solicit orders, Spyder USA had the *sole* authority to approve sales orders from Canada. With respect to purchase orders solicited by the ISR, the ISR agreements expressly state that “all of such orders being subject to written acceptance by Spyder from its Boulder, Colorado headquarters.”<sup>68</sup> This is also consistent with the Spyder Winter 2014 terms and policies.<sup>69</sup>

---

<sup>60</sup> A similar approach was taken by the Tribunal in assessing whether there was a dependent agency relationship between the non-resident importer and a Canadian entity which the importer alleged to be its dependent agent. See *Delta Galil* at para. 83.

<sup>61</sup> *Transcript of Public Hearing* at 22, 23.

<sup>62</sup> Exhibit AP-2019-033-34B (protected) at 75, 76.

<sup>63</sup> See, for example, clause 1(b) and clause 2 of section E of the ISR agreement; see Exhibit AP-2019-033-51 at 2, 3.

<sup>64</sup> Exhibit AP-2019-033-34 at 46.

<sup>65</sup> In its finding that the appellant in *Moda* was not an agent of the related foreign vendor, the Tribunal noted that the appellant, and not the vendor, decided what markup applied when reselling the goods to customers in Canada, and this was set at a level sufficient to cover its costs. *Moda* at 2.

<sup>66</sup> Exhibit AP-2019-033-35A (protected) at 44, 86–89.

<sup>67</sup> Exhibit AP-2019-033-34B (protected) at 95–176.

<sup>68</sup> See, for example, clause 2 of Section E in the ISR agreement in Exhibit AP-2019-033-51 at 3; *Transcript of Public Hearing* at 31.

<sup>69</sup> Exhibit AP-2019-033-35A (protected) at 87.

[86] With respect to returns, while Spyder Canada processed returns from retailers at its facility in Calgary, Alberta,<sup>70</sup> as noted by the CBSA, all returns required authorization from Spyder USA.<sup>71</sup> Moreover, as discussed below, in 2014, Spyder Canada had no employees. During this period, risks in respect of the goods, such as the provision of warranty services, would have been borne by Spyder USA. With respect to this period in which Spyder Canada had no employees, Ms. Whitley testified that, to her knowledge, “there was no hindrance for them to be able to continue to do what they were doing.”<sup>72</sup>

[87] ISRs did not report to Spyder Canada but were obligated to report instead to Spyder USA. In this regard, the ISR agreements referred to the ISR’s obligation to inform “Spyder’s Director of Sales of all problems concerning Customers . . .”<sup>73</sup> However, Spyder Canada had no Director of Sales and, as confirmed by Ms. Whitley’s oral testimony, the Director of Sales, as referenced in the ISR agreement, is located at Spyder USA, in Boulder, Colorado.<sup>74</sup>

[88] With respect to revenue that was generated from the sale of the goods in Canada, as stated above, retailers would pay by cheque or wire transfer to Spyder Canada’s bank account held at Citibank in Toronto, Ontario.<sup>75</sup> The CBSA submitted that Spyder Canada had no access to its profits and the account was emptied, at will, by GBG USA officials who had signing authority over the account.

[89] However, Ms. Whitley explained in her written statement that these funds were “periodically transferred to a GBG US account . . . pursuant to a GBG Group cash pooling arrangement . . .”<sup>76</sup> This arrangement allowed centralized treasury management of the parent company’s resources, with amounts owing by Spyder Canada or other subsidiaries, to third parties paid through this account. Amounts transferred by GBG USA from Spyder Canada’s account were recorded as liabilities of GBG USA owing to Spyder Canada; amounts paid by GBG USA on behalf of Spyder Canada in excess of cash transfers from Spyder Canada were recorded as liabilities of GBG USA to Spyder Canada. Spyder Canada argued that, in the context of a global business, it was normal for there to be a treasury function where cash floating among subsidiaries was pooled. Moreover, Spyder Canada’s funds were not lost; they were properly accounted for in its account books as well as those of the global brand.

[90] In the Tribunal’s view, the management of Spyder Canada’s funds using a pooling arrangement coordinated by the parent company does not render Spyder Canada’s activities as dependent on Spyder USA. However, within the context of the various factors which indicate that

---

<sup>70</sup> *Transcript of Public Hearing* at 49. See also an email from Spyder Canada’s consultant sent to Ms. Lidstone on October 7, 2016, in Exhibit AP-2019-033-35A (protected) at 23.

<sup>71</sup> Exhibit AP-2019-033-35A (protected) at 88.

<sup>72</sup> *Transcript of Public Hearing* at 60.

<sup>73</sup> See, for example, clause 1(d) of section E of the ISR agreement in Exhibit AP-2019-033-51 at 3.

<sup>74</sup> *Transcript of Public Hearing* at 29, 30.

<sup>75</sup> In Ms. Whitley’s testimony at the hearing, she indicated that some of Spyder Canada’s invoices were factored to CIT Group/Commercial Services Inc. It was explained that factoring describes an arrangement whereby a finance company lends money to a business and in return gets the right to take that business’s payment into its accounts receivable. Payment to the factor, the CIT Group, would be logged as a receipt from Spyder Canada. See *Transcript of Public Hearing* at 54–57.

<sup>76</sup> Exhibit AP-2019-033-34 at 46. See also the bank account statement in Exhibit AP-2019-033-35A (protected) at 70–73.

Spyder Canada's operations were nearly entirely controlled and managed by Spyder USA, the fact that Spyder Canada had no control over its funds and bank account is, in the Tribunal's view, further indication that Spyder Canada did not have any control of its operations

[91] Spyder Canada's history of employment is also compelling evidence of Spyder USA's control over Spyder Canada's operations. Spyder Canada submitted that between August 1, 2013, and January 31, 2014, it employed an operations manager and sales coordinator who was responsible for, among other things, responding to customer questions, maintaining customer relations and coordinates within the Spyder group, conducting warranty evaluations of returns, processing requests for credit and refunds, scheduling ISR showroom appointments, and organizing the office and samples. The CBSA submitted that the associated job description for this employee referred to duties that were at the customer service representative level and did not refer to any function with respect to decisions regarding any Canadian operations.<sup>77</sup>

[92] Having reviewed the confidential letter of employment offer and job description, the Tribunal agrees with the CBSA and finds that Spyder USA had full control and authority over the Operations Manager.<sup>78</sup>

[93] Following the resignation of the Operations Manager, Spyder Canada had no employees for 11 months in 2014. According to Ms. Whitley's written statement and testimony, the Calgary employment market in 2014 was highly competitive, and Spyder Canada was unable to hire a replacement for that period. With respect to Spyder Canada's operations during this period, Ms. Whitley's testimony suggests that operations could continue without an employee. For instance, the order placement system could still "flow and function". However, Ms. Whitley noted that, while there may have been "some deficiencies", she could not discuss what could not be accomplished in 2014 due to the absence of the person at the location.<sup>79</sup> In the Tribunal's view, insofar as Spyder Canada had no employees, and sales to Canadian retailers continued, this is further indication that Spyder Canada was fully dependent on Spyder USA with no control over its sales operations to the Canadian retailers.

[94] In February 2015, Spyder Canada hired its Assistant Manager, Operations, who has since continued to work for Spyder Canada. The employee's responsibilities included, among other things, general office management, receiving and organizing displays of samples, shipping samples as requested to ISRs and retailers, acting as the first point of contact for invoicing and order issues, accepting orders not placed by customers via the ISRs, reviewing orders, monitoring shipments, processing returns and managing inventory.<sup>80</sup> In October 2015, Spyder Canada hired a second employee to hold the position of Account Executive, Resort and Corporate Sales, who, working remotely from Ontario, was responsible for securing new accounts in resorts and corporate sales. This second employee held this position until January 2021.<sup>81</sup>

---

<sup>77</sup> Ms. Lidstone testified that she was advised by Spyder Canada's consultant during the verification that the functions for the Operations Manager were essentially the same as the Assistant Manager job description provided by Spyder Canada. *Transcript of Public Hearing* at 93.

<sup>78</sup> Exhibit AP-2019-033-35A (protected) at 82–85; Exhibit AP-2019-033-34B (protected) at 645–647.

<sup>79</sup> *Transcript of Public Hearing* at 60, 61.

<sup>80</sup> Exhibit AP-2019-033-34 at 49; Exhibit AP-2019-033-34B (protected) at 648–649.

<sup>81</sup> Exhibit AP-2019-033-34 at 49, 50; Exhibit AP-2019-033-34B (protected) at 651–652.

[95] The duties of the Assistant Manager, Operations are consistent with the evidence on the record pertaining to activities that took place at the Calgary office, including the receipt of samples of the products for ISRs located in Alberta<sup>82</sup> and handling of inventory consisting of returned goods<sup>83</sup> (from either the retailer or the ISRs), samples and overages.<sup>84</sup> From this limited inventory, Spyder Canada made sales to Canadian customers or to outlet stores.<sup>85</sup>

[96] In the Tribunal's view, the responsibilities carried out by the employees hired in 2015, including sales from the limited inventory of samples and returns, supported the overall business of selling Spyder products in Canada. However, these activities do not convince the Tribunal that Spyder Canada operated independently of Spyder USA. As discussed above, Spyder USA had total authority over all sales of Spyder products to Canadian customers including in respect of orders, prices, terms of sale, warranties and returns.

[97] Spyder Canada also submitted that it incurred liabilities, namely lease payments, payroll to employees, payments to the ISRs as well as the payment of income taxes in Canada on the revenue earned from the resale of goods to the retailers as well as sales taxes on the goods.<sup>86</sup> These facts were undisputed. However, the Tribunal does not find that Spyder Canada's acts in respect of its liabilities as conclusive of the nature of its relationship with Spyder USA. The preponderance of the evidence shows that Spyder USA controlled Spyder Canada's operations in Canada.<sup>87</sup>

[98] For the reasons above, the Tribunal concludes that there was no sale of export between Spyder USA and Spyder Canada, as they did not stand in a buyer-seller relationship. Spyder Canada was a dependent agent of Spyder USA. The preponderance of the evidence shows that Spyder USA was not merely a supplier of sales support services to Spyder Canada as those were defined by the 2016 support agreement. Spyder USA controlled Spyder Canada's operations and sales of Spyder products to Canadian retailers. Only Spyder USA had the authority to approve orders from Canadian retailers, fix all prices and policies with respect to the sale of the goods in issue, oversee the activities of the ISRs, and authorize warranties, guarantees or returns in respect of the goods in issue.<sup>88</sup> The

---

<sup>82</sup> See, for example, the invoice in Exhibit AP-2019-033-34B (protected) at 180–189; *Transcript of Public Hearing* at 48, 49; Exhibit AP-2019-033-34 at 47. ISRs purchased samples of Spyder products from Spyder Canada from time to time which could be returned. Exhibit AP-2019-033-34 at 46, 47. See for example, section F of the ISR agreement in Exhibit AP-2019-033-51 at 4.

<sup>83</sup> See, for example, credit memos in Exhibit AP-2019-033-34B (protected) at 190–212.

<sup>84</sup> *Transcript of Public Hearing* at 49, 50.

<sup>85</sup> See sample pick slip #983172 from Spyder Canada regarding a sale to an outlet store and various sample invoices from Spyder Canada to Canadian customers in Exhibit AP-2019-033-34B (protected) at 218–255. See, for example, a periodic inventory count prepared by Spyder Canada staff in 2016 in Exhibit AP-2019-033-34B (protected) at 213–217.

<sup>86</sup> Exhibit AP-2019-033-34B (protected) at 436–625.

<sup>87</sup> Similarly, in *Delta Galil*, the Tribunal did not find the non-resident importer's tax liabilities to be conclusive evidence of its business model. See *Delta Galil* at para. 78.

<sup>88</sup> Spyder Canada argued that it would have been earning a commission for services rendered to it by its principal if there had been an agency arrangement between Spyder USA and Spyder Canada. The Tribunal does not agree. The absence of an agency agreement between the entities does not preclude the possibility that a relationship of agency existed between parties. On the contrary, the absence of an agreement compels the Tribunal to carefully examine the facts. In the Tribunal's view, the payment of a commission would have been an *indicator* of an agency relationship; however, the lack of such payments does not preclude a finding of agency.



evidence concerning the employees and the almost one-year period in which Spyder Canada had no employees further confirms Spyder USA's control over Spyder Canada.

### **Insufficient evidence that title transferred from Spyder USA to Spyder Canada on importation**

[99] While the Tribunal is of the view that the finding of agency is determinative of the question of whether there can be a sale for export between Spyder Canada and Spyder USA, the Tribunal also determines that there can be no sale for export as, having considered the entirety of the evidence on the record, that on balance, title to the goods did not transfer from Spyder USA to Spyder Canada.

[100] To determine whether title for the goods was transferred, the Tribunal has considered the terms of the contract of sale and the conduct of the parties.<sup>89</sup> In *Pampered Chef*, as evidence of the transfer of title, the Tribunal considered whether the purchaser had responsibility for customs charges and the risk of damage, loss, non-delivery, returns, warranties and product liability during transit of the goods to Canada.<sup>90</sup>

[101] For its part, Spyder Canada submitted that while no terms of sale existed for the transaction between the related companies, title to the goods transferred from Spyder USA to Spyder Canada as soon as the goods left Spyder USA's warehouse in Kent, Washington. This was also stated in Ms. Whitley's written testimony. Moreover, Spyder Canada appeared as the importer on the B3 customs forms and, according to Ms. Whitley, Spyder Canada paid all customs duties and import taxes relating to the importation of the goods purchased from the United States.<sup>91</sup>

[102] The CBSA submitted that Spyder Canada has not demonstrated that title for the goods was transferred to it from Spyder USA, noting that Spyder Canada had not filed any terms of purchase or agreement for the sale between the related companies. Moreover, Spyder Canada's status as importer of record on customs forms was also not determinative of whether it held title. In this regard, the CBSA cited the Tribunal's decision in *Landmark*, in which it was found that that for the purposes of the Act, customs forms and documentation provide an indication of the identity of the importer and, in fact, that the totality of the matter should be considered to make this determination.<sup>92</sup>

[103] In the absence of any terms of sale between the related companies as it relates to the transfer of title, the Tribunal relies on extrinsic evidence to assess whether Spyder USA or Spyder Canada had responsibility for the goods on importation as indicated by payment of customs charges and assumption of risk in respect of the goods.

[104] Having considered all of the evidence, the Tribunal finds, for the reasons below, that title to the goods remained with Spyder USA on importation.

[105] According to Ms. Whitley's witness statement, Spyder Canada paid duties and import taxes. However, the Tribunal finds this evidence to be inconsistent with the Incoterm referenced in the

---

<sup>89</sup> *Cherry Stix Ltd. v. President of the Canada Border Services Agency* (10 May 2010), AP-2008-028 (CITT) at paras. 38, 46.

<sup>90</sup> *The Pampered Chef, Canada Corporation v. President of the Canada Border Services Agency* (13 February 2008), AP-2006-048 (CITT) [*Pampered Chef*] at para. 36.

<sup>91</sup> Exhibit AP-2019-033-34 at 46.

<sup>92</sup> *Landmark Trade Services v. President of the Canada Border Services Agency* (13 January 2020), AP-2019-002 (CITT) at para. 43 [*Landmark*].

commercial invoice issued by Spyder USA to Spyder Canada in respect of goods that were shipped to the FedEx warehouse in Mississauga.<sup>93</sup> In light of this evidence, it was necessary for Spyder Canada to provide cogent evidence to support Spyder Canada's claim that it had paid applicable duties and import taxes, including, for instance, how such payments were made through the GBG Group cash pooling arrangement administered by GBG USA described above. However, no such submissions or supporting documentation was provided.

[106] The Tribunal also notes that the confidential information in the commercial invoices issued by Spyder USA and the bills of lading, including the information contained in the "ship to" section of these documents, indicate that Spyder USA remained responsible for the goods while transiting to Canada. In this regard, the Tribunal also considered the terms applicable to the freight charges set out in the bill of lading.<sup>94</sup> Insofar as Spyder Canada contracted with the carrier, no evidence in that regard was submitted by Spyder Canada.

[107] Finally, the sequencing of the events leading to the purported sale of goods between Spyder USA and Spyder Canada further confirms that the goods were indeed in Spyder USA's control in transit. According to Ms. Whitley's witness statement, "Spyder US shipped the merchandise to the Canadian retailer using a FedEx distribution centre and generated an invoice between Spyder US and Spyder Canada".<sup>95</sup> Spyder USA's confidential response to the valuation questionnaire concerning the procurement process also described the timing of the transactions between Spyder USA and Spyder Canada.<sup>96</sup> Insofar as Spyder Canada was invoiced subsequent to shipment of the goods from Spyder USA's warehouse, this, together with the commercial invoices and bills of lading, indicate that Spyder USA was responsible for charges relating to the shipment of the goods to Canada at the time of importation

[108] At the hearing, Spyder Canada submitted that "Incoterms do not deal with the transfer of title; they deal with the transfer of risk" and "risk and title are not the same thing and title and possession is not the same thing".<sup>97</sup> In the Tribunal's view, to the extent that there is no sale agreement or terms of sale in respect of the goods, as in the case here concerning transactions between Spyder USA and Spyder Canada, as in past decisions discussed above, the Tribunal may look to the person who assumed risk in respect of the goods while such goods were imported into Canada. In terms of risk, although Spyder Canada submitted that it is becoming less common to see individual companies holding insurance policies in respect of individual shipment, but rather, in the case of a global group of companies, there will be one global insurance policy for all of its insurance needs, no evidence was submitted to establish that Spyder Canada indeed benefitted from any such comprehensive insurance.

### **Price paid or payable between related companies**

[109] Pursuant to paragraph 48(1)(d) of the Act, as a condition of the transaction value method for a sale between related companies, it must be demonstrated that either the parties' relationship did not influence the price paid or payable for the goods or that the transaction value meets the requirements

---

<sup>93</sup> Exhibit AP-2019-033-34B (protected) at 258, 300.

<sup>94</sup> Exhibit AP-2019-033-34B (protected) at 258, 264, 300, 302, 361.

<sup>95</sup> Exhibit AP-2019-033-34 at 46.

<sup>96</sup> *Transcript of Public Hearing* at 71; Exhibit AP-2019-033-35A (protected) at 47.

<sup>97</sup> *Transcript of Public Hearing* at 130, 132.

set out in subsection 48(3). As described above, Spyder Canada and Spyder USA are related companies, as defined in the Act.

[110] The CBSA submitted that Spyder Canada failed to establish that its relationship with Spyder USA did not influence the price paid or payable for the goods under paragraph 48(1)(d) of the Act. The CBSA noted that during the verification, Spyder Canada provided a transfer price breakdown of one particular item of clothing and a general indication of how Spyder Canada said the transfer price should be calculated. Spyder Canada also indicated that no formal transfer pricing study existed.<sup>98</sup>

[111] The Tribunal agrees with CBSA. Spyder Canada made no submissions and filed no evidence in these proceedings with respect to the requirement set out in paragraph 48(1)(d) of the Act. While the evidence in these proceedings, including invoices and accounting documents, reflects a transaction price for the goods in issue, there were no documents outlining the terms and conditions of the purported sale between Spyder Canada and Spyder USA. Commenting on the lack of written terms in respect of the transaction between Spyder Canada and Spyder USA, counsel for Spyder Canada stated at the hearing that “the terms of sale between the two companies was not documented because of perhaps the relationship between the two companies. It was unnecessary.”<sup>99</sup> However, in the Tribunal’s view, it is indeed the unique relationship between related parties which the Act seeks to take into account where the transaction value is to be applied for determining the value for goods. As such, in a purported sale between related companies, it was necessary that an importer have evidence from which to establish that the transaction price was not influenced by the relationship between buyer and seller or that the transaction value meets the requirements set out in subsection 48(3).<sup>100</sup>

[112] For the reasons above, notwithstanding the Tribunal’s determination that there was no sale for export between Spyder Canada and Spyder USA, the Tribunal also finds that the transaction value method cannot apply, as the conditions set out in paragraph 48(1)(d) of the Act have not been met.

### **Sale of export between Spyder USA and the Canadian retailers**

[113] As noted above, in these proceedings, the CBSA has argued that, for the purposes of subsection 48(1) of the Act, the sale of export is between Spyder USA and the Canadian retailers.

[114] There is no evidence on the record that title transferred between Spyder USA and the Canadian retailers on importation. As discussed above, on balance, the evidence indicates that Spyder USA had title to the goods on importation. Whether such legal title was subsequently transferred to Spyder Canada either at the carrier’s warehouse in Canada or on delivery to the retailer (for goods which were not shipped to the carrier’s warehouse), or whether Spyder USA retained title, an issue which it is not necessary for the Tribunal to decide, in either case, title to the goods

---

<sup>98</sup> Exhibit AP-2019-033-35A (protected) at 19, 34, 119.

<sup>99</sup> *Transcript of Public Hearing* at 128, 129.

<sup>100</sup> In *Jockey*, the Tribunal noted that the CBSA typically accepts, as the transaction value of goods sold between related parties, a price paid or payable which is derived from a transfer pricing method that maintains the arm’s length principle, e.g. the Transactional Net Margin Method recommended by the Organisation for Economic Co-operation and Development. The Tribunal also noted that JCC and JII used a transfer pricing methodology which provides for the possibility of year-end adjustments to the transfer price in order to maintain JCC’s profitability within an appropriate percentage range. See *Jockey* at paras. 195–202.

transferred to the Canadian retailers after the goods had been imported into Canada. Consequently, the Canadian retailers purchased the goods pursuant to a domestic sale and there was no sale for export between Spyder USA and the Canadian retailers. As the Tribunal clearly established in *Delta Galil*, the transfer of title from an intermediary to the ultimate purchaser, i.e. the Canadian retailer, that occurs after the goods have already been imported into Canada, does not constitute a sale for export.<sup>101</sup>

### **Transactions not involving sales to Canadian retailers**

[115] As discussed above, with respect to the Scenario 2 and Scenario 3 transactions, the Tribunal finds that these sales were not to Canadian retailers but instead to team accounts. Furthermore, the purchases were made directly with Spyder USA and not through an ISR.

[116] The Tribunal is also of the view that Spyder USA retained title to the goods imported in the transactions for scenarios 2 and 3. In this regard, in the absence of any evidence with respect to the terms of sale for these transactions, the Tribunal considered the uncontroverted evidence with respect to the terms in relation to freight applicable to shipments to Canada described in Spyder USA's 2014 terms and policies.<sup>102</sup> The freight terms confirm that Spyder USA retains responsibility for the goods in transit to Canada.

[117] As there was no purchaser in Canada with title to the goods on importation, there can be no sale for export in relation to the transactions associated with scenarios 2 and 3 for the purposes of subsection 48(1) of the Act.

### **Subsidiary method for appraising the value for duty**

[118] As the Tribunal has determined that the transaction value method cannot be used to assess the value for duty of the goods in issue, the Tribunal now turns to the question of the appropriate subsidiary method for valuation.

[119] Subsection 47(2) of the Act sets out the order in which the subsidiary methods must be considered. This order, however, is subject to an importer's right to choose between deductive value and computed value under certain conditions as set out in subsection 47(3), which reads as follows:

(3) Notwithstanding subsection (2), on the written request of the importer of any goods being appraised made prior to the commencement of the appraisal of those goods, the order of consideration of the values referred to in paragraphs (2)(c) and (d) shall be reversed.

[120] Spyder Canada submitted that, if the Tribunal finds that the transaction value cannot be used to determine the value for duty of the goods, the value for duty should be determined in accordance with either section 51 (deductive value method) or section 52 (computed value method) of the Act, the only available alternative methods, at Spyder Canada's discretion, in accordance with subsection 47(3) of the Act.<sup>103</sup>

---

<sup>101</sup> *Delta Galil* at para. 46.

<sup>102</sup> Exhibit AP-2019-033-35A (protected) at 88.

<sup>103</sup> Subsection 47(3) of the Act permits the importer to request that the order of the methods set out in paragraphs 47(2)(c), the deductive value, and 47(2)(d), the computed value, be reversed.

[121] For its part, the CBSA submitted that the election pursuant to subsection 47(3) is not available to Spyder Canada at this stage. The CBSA also made submissions with respect to how the deductive value method would apply in this case, noting that few deductions would be available. The CBSA requested that if the transaction value method cannot apply, the Tribunal order the CBSA to re-determine the correct value for duty in light of the Tribunal's finding and to permit the CBSA to gather any necessary information to assess the value for duty of the goods pursuant to section 51 of the Act.

[122] Based on the submissions of the parties, the only possible subsidiary methods for valuation applicable to the goods in issue are the deductive value method and computed value method.

[123] The issue raised by the parties is whether Spyder Canada may, pursuant to subsection 47(3), make a request to reverse the order in respect of these two valuation methods. If Spyder Canada cannot make such a request, then the valuation methods must be applied in the order that they are set out in subsection 47(2) applies.

[124] The importer's right to make a written request to reverse the order of the relevant valuation methods is subject to the condition that the appraisal of the goods has not commenced. In the Tribunal's view, Spyder Canada is not excluded by this condition based on the appraisal that the CBSA previously conducted using the transaction value method. CBSA's appraisal using the transaction value method was the subject of this appeal and the Tribunal has determined that the transaction value method cannot be used in respect of the goods in issue. Accordingly, in remitting the matter back to the CBSA, there will be a *new* valuation or appraisal process conducted by the CBSA under the applicable procedures. Spyder Canada is entitled, prior to the commencement of that process, to request a reversal of the order of the deductive value and computed value methods pursuant to subsection 47(3) of the Act.

## CONCLUSION

[125] For the reasons above, the Tribunal finds that there is no sale for export either between Spyder USA and the Canadian retailers or between Spyder USA and Spyder Canada. The valuation method set out under subsection 48(1) of the Act is therefore not applicable.

[126] This matter is therefore remitted back to the CBSA to determine the value for duty based on a subsidiary method as determined pursuant to subsections 47(2) and (3).

## DECISION

[127] The appeal is allowed in part.

---

Randolph W. Heggart  
Randolph W. Heggart  
Presiding Member