HQ H194998
July 24, 2014

OT:RR:CTF:VS H194998 RSD

CATEGORY: VALUATION

Port Director
U.S. Customs and Border Protection
6747 Engle Road
Middleburg Heights, Ohio 44130-7907

RE: Application for Further Review of Protest Number 4103-11-100115 concerning the Valuation of Women's Sport Tee-Shirts; Related Parties; Sale for Exportation; Circumstances of the Sale; All Costs Plus a Profit Test; Equivalent Profits

Dear Port Director:

This is in response to the Application for Further Review (AFR) of protest number 4103-11-100115, dated June 14, 2011, filed by counsel, on behalf of the Protestant, Radical Design, Ltd. Counsel made submissions on June 13, 2011, June 23, 2011, January 31, 2012, and July 23, 2012. The most recent submission was sent by email on June 23, 2014. A telephone conference was conducted with counsel on January 29, 2013. Your office forwarded a sample of an imported women's sports tee shirt for our consideration.

FACTS:

The Protestant, Radical Design, Ltd., (Radical) is a non-resident importer based in Toronto, Canada. In a series of entries made between May 25, 2010 and November 5, 2010, Radical imported women's polyester elastane knit pullover tee shirts into the United States through the Port of Columbus, Ohio. According to Radical's counsel, all of the subject entries contain substantially identical merchandise and are the result of materially identical transactions for purposes of this protest. A company related to Radical called Bangladesh, Radical Design BGD Ltd. ("BGD") manufactured the imported merchandise in Bangladesh. In turn, Radical sold the imported merchandise it purchased from BGD to one of the leading sellers of athletic apparel in the United States, Under Armour, Inc.

On September 30, 2010, Customs and Border Protection (CBP) issued a Request for Information (CF-28) inquiring whether the manufacturer and the importer were related parties and requesting supporting documentation for Radical's declared

value. Radical submitted a response to the requested information. The information submitted indicated that BGD and Radical are related parties, and it was further claimed that the price declared was adequate to recover the costs plus a profit. A corrected commercial invoice and proof payment was also provided to CBP.

On December 8, 2010, CBP issued a Notice of Action (CF 29), which indicated that the transaction value of the imported merchandise would be increased to $[ ] per piece not packed. The new total entered value for the entry was determined to be $[ ]. The CF 29 further advised that a bill in the amount of $[ ] plus accrued interest will be issued on this entry. No explanation was provided on the CF 29 for the value advance.

Following the liquidation of the entry, counsel was advised that your office had appraised the imported merchandise using a transaction value of similar merchandise. Your office further indicated on the CF 6445A that Radical had not provided documentation to substantiate that the relationship between Radical and BGD did not affect the price of the imported merchandise in the sales transaction between those two parties. The manufacturer did not sell to any other parties and a transaction value of identical merchandise could not be found. Your office analyzed ACS data and determined that an appropriate transaction value of similar merchandise was $[ ]. However, the specific entry of merchandise that was used to compute the transaction value of the similar merchandise was not identified.

The purchase order from Radical to BGD indicates that the price of the imported merchandise was $[ ] per unit. The commercial invoice for the relevant purchase order indicates the sales price of the merchandise was $[ ]. Radical's counsel explains that this discrepancy was an error and the invoice should have been for $[ ], a price consistent with the commercial invoice prices for women's tees in the other entries subject to this protest. The merchandise was sold by Radical to Under Armour. The customer purchase order from the buyer dated March 31, 2010, indicates Radical sold the merchandise to Under Armour for $[ ] per unit. The purchase order further indicates that the goods were to be shipped directly from BGD in Bangladesh to Under Armour's customer, Dicks Sporting Goods, in the United States. The protest record does not contain a copy of an invoice from Radical to Under Armour.

The record contains a sample commercial invoice, RDL/360F/10, dated February 9, 2010 from BGD in Bangladesh. The invoice shows that 1770 pieces were sold at $[ ] per piece to Radical located in Toronto, Ontario. The total amount charged for the merchandise was $[ ]. The terms of sale indicated on the invoice are "FOB Dhaka". The consignee shown on the commercial invoice was Under Armour, Inc. in Baltimore, Maryland. According to the invoice, the merchandise was to be shipped to Dicks Sporting Goods in Smithton, Pennsylvania. In addition, the record also contains a payment advice drawn on HBSC Bank, showing a series of transfers of funds from Radical to BGD in Bangladesh. The payment advice shows a transfer of $[ ] to satisfy invoice RDL360F/10 on September 2, 2010.

Counsel provided a cost breakdown sheet for the tee shirts' production. In support of the information contained on the cost breakdown sheet, counsel also provided invoices which correlate to the cost breakdown sheet during the time period the articles in question were manufactured. These invoices are for materials, items and services involved in the manufacture of the women's sport tee shirts. After all the monetary and assorted conversions are computed, the total fabric cost was determined to be $[ ] per tee shirt. The knitting cost involved in making a tee shirt was $[ ]. The cost breakdown sheet indicates that the cost for cutting and sewing of one shirt was $[ ]. This means that the manufacturing costs in making a tee shirt was $[ ]. The overhead costs of the factory were shown to be $[ ]. The cost of the trim, which includes labels and thread, was $[ ]. The packaging of a tee shirt cost $[ ]. When everything was added up to make a tee shirt, the total cost of production was determined to be $[ ]. The selling price in Canadian dollars from BGD to Radical was shown to be $[ ]. The resulting gross profit per unit for the tee shirts was $[ ]. This meant that the gross profit earned on each tee shirt was [ ] percent.

Counsel has furnished income statements for Radical for the years 2010 and 2011 prepared by the Chartered Accountants of Bench & Donath on August 12, 2011. For the year 2010, Radical had sales of $[ ], with the cost of goods sold at $[ ] leaving a gross profit of $[ ]. Calculating in terms of percentages, for the year 2010, Radical made a gross profit of about [ ] percent. After the repairs and maintenance, selling, administrative, financial expenses are deducted, the net income before taxes was determined to be $[ ]. In year 2011, Radical had sales of $[ ]. During that year, the cost of goods sold was determined to be $[ ] leaving a gross profit of $[ ]. Using these figures, in the year 2011, Radical made a gross profit of about [ ] percent. The costs that the company incurred for repairs and maintenance, selling, administrative, and financial expenditures were $[ ] resulting in a net income of $[ ] before taxes in 2011.

ISSUE:

Whether the transaction value between a non-resident Canadian importer and its related manufacturer located in Bangladesh can serve as the basis of appraisement for the imported women's sport tee shirts?

LAW AND ANALYSIS:

Merchandise imported into the United States is appraised in accordance with Section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a). The preferred method of appraisement is transaction value, which is defined as the "price actually paid or payable for the merchandise when sold for exportation to the United States" plus certain statutory additions. 19 U.S.C. § 1401a(b)(1).

In Nissho Iwai American Corp. v. United States, 16 C.I.T. 86, 786 F. Supp. 1002, reversed in part, 982 F. 2d 505 (Fed. Cir. 1992), the Court of Appeals for the Federal Circuit reviewed the standard for determining transaction value when there is more than one sale which may be considered as being for exportation to the United States. The case involved a foreign manufacturer, a middleman, and a United States purchaser. The court held that the price paid by the middleman/importer to the manufacturer was the proper basis for transaction value. The court further stated that in order for a transaction to be viable under the valuation statute, it must be a sale negotiated at arm's length, free from any non-market influences, and involving goods clearly destined for the United States. See also, Synergy Sport International, Ltd. v. United States (Ct. of Int'l Trade, 1993).

It is the importer's responsibility to show that the "first sale" price is acceptable under the standard set forth in Nissho Iwai. That is, the importer must present sufficient evidence that the alleged sale was a bona fide "arm's length sale," and that it was "a sale for export to the United States" within the meaning of 19 U.S.C. § 1401a.

In Treasury Decision (T.D.) 96-87, dated January 2, 1997, the Customs Service (now Customs and Border Protection (CBP)) advised that the importer must provide a description of the roles of the parties involved and must supply relevant documentation addressing each transaction that was involved in the exportation of the merchandise to the United States. The documents may include, but are not limited to purchase orders, invoices, proof of payment, contracts, and any additional documents (e.g. correspondence) that establishes how the parties deal with one another. The objective is to provide CBP with "a complete paper trail of the imported merchandise showing the structure of the entire transaction." T.D. 96-87 further provides that the importer must also inform CBP of any statutory additions and their amounts. T.D. 96-87 in part states as follows:

> ... If there is more than one possible sale for exportation, information and documentation about each of them should be provided. Relevant documents include, purchase orders, invoices, proof of payment, contracts and any additional documents (e.g. correspondence), which demonstrate how the parties dealt with one another and which support the claim that the merchandise was clearly destined to the United States

Bona Fide Sale for Exportation to the U.S.

In order for transaction value to be used as a method of appraisement, we must determine if indeed a "sale" between the parties had occurred. In VWP of America, Inc. v. United States, 175 F.3d 1327 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit found that the term "sold" for purposes of 19 U.S.C. § 1401a(b)(1) means a transfer of title from one party to another for consideration, (citing J.L. Wood v. United States, 62 C.C.P.A. 25, 33, C.A.D. 1139, 505 F.2d 1400, 1406 (1974)). No single factor is decisive in determining whether a bona fide sale has occurred. See Headquarters Ruling Letter ("HQ") 548239, dated June 5, 2003. CBP will consider such factors as to

whether the purported buyer assumed the risk of loss for, and acquired title to, the imported merchandise. Evidence to establish that consideration has passed includes payment by check, bank transfer, or payment by any other commercially acceptable means. Payment must be made for the imported merchandise at issue; a general transfer of money from one corporate entity to another, which cannot be linked to a specific import transaction, does not demonstrate passage of consideration. See HQ 545705, dated January 27, 1995.

In addition, CBP may examine whether the purported buyer paid for the goods, and whether, in general, the roles of the parties and the circumstances of the transaction indicate that the parties are functioning as buyer and seller. See HQ H005222, dated June 13, 2007.

Finally, pursuant to the CBP's Informed Compliance Publication, entitled "Bona Fide Sales and Sales for Exportation," CBP will consider whether the buyer provides or could provide instructions to the seller, is free to sell the transferred item at any price he or she desires, selects or could select its own downstream customers without consulting with the seller, and could order the imported merchandise and have it delivered for its own inventory.

A determination of when title and risk of loss pass from the seller to the buyer in a particular transaction depends on whether the applicable contract is a "shipment" or "destination" contract.... FOB point of shipment contracts and all CIF and C&F contracts are "shipment" contracts, while FOB place of destination contracts are "destination" contracts.... Unless otherwise agreed by the parties, title and risk of loss pass from the seller to the buyer in "shipment" contracts when the merchandise is delivered to the carrier for shipment, and in "destination" contracts when the merchandise is delivered to the named destination.

In this case, under an FOB sale, the risk of loss transfers when the goods pass the ship's rail. See HQ H097035 dated November 15, 2011. In this regard, the submitted sample documentation, including the commercial invoice between Radical and BGD shows that the terms of sale for the transaction was "FOB Dhaka". An FOB port of export term of sale means that risk of loss transfers from the seller to the buyer upon lading on the outgoing carrier. In the absence of a written instruction to the contrary, it is commonly accepted that title passes simultaneously with the assumption of risk of loss. In this case, Radical assumed title and risk of loss from the point the tee shirts were loaded on board the vessel in Dhaka, Bangladesh. Finally, the statement of payment advice drawn on HBSC Bank indicates that a payment or consideration was made for the imported merchandise from Radical to its related company in Bangladesh for the same amount shown on the commercial invoice.

The purchase order and the commercial invoice submitted indicate that the merchandise was to be shipped to "Dicks" in Smithton, Pennsylvania, USA. The invoice further shows that the consignee for the merchandise was Under Armour, Inc. in the Baltimore, Maryland. The tag on the sample garment further indicates that the

merchandise will be sold in U.S. dollars and was labeled for the U.S. market in accordance with U.S. laws. The description of the products, quantities of the products shipped, price, and further details regarding the merchandise contained in the documents presented correspond with each other and were consistent with each other. Consequently, the documentation submitted supports the existence of a *bona fide* sale for the imported merchandise between Radical and BGD and that the merchandise was clearly destined to the United States when it was sold to Radical.

Arm's Length Transactions

If the parties are related, then it is necessary to provide CBP with information which demonstrates that transaction value may be based on the related party sale as provided in 19 U.S.C. § 1401a(b)(2)(B) (stating that the circumstances of the sale indicate that the relationship did not influence the price or that the transaction value closely approximates certain test values). See T.D. 96-87, supra. "Test values" refer to values previously determined pursuant to actual appraisements of imported merchandise. Furthermore, transaction value between a related buyer and seller may be acceptable if an examination of the circumstances of the sale indicates that although related, their relationship did not influence the price actually paid or payable. The CBP Regulations in 19 C.F.R. Part 152 set forth illustrative examples of how to determine if the relationship between the buyer and the seller influences the price. See also HQ H029658, dated December 8, 2009; H037375, dated December 11, 2009; and, HQ H032883, dated March 31, 2010. In this respect, CBP will examine the manner in which the buyer and seller organize their commercial relations and the way in which the price in question was derived in order to determine whether the relationship influenced the price. If it can be shown that the price was settled in a manner consistent with the normal pricing practices of the industry in question, or with the way in which the seller settles prices with unrelated buyers, this will demonstrate that the price has not been influenced by the relationship. See 19 C.F.R. § 152.103(l)(1)(i)-(ii). In addition, CBP will consider the price not to have been influenced if the price was adequate to ensure recovery of all costs plus a profit equivalent to the firm's overall profit realized over a representative period of time. 19 C.F.R. § 152.103(l)(1)(iii). These are examples to illustrate that the relationship has not influenced the price, but other factors may be relevant as well.

In this case, Protestant's counsel acknowledges that Radical and BGD are related parties for purposes of section 402(g) of the TAA. Because sales were made between these related parties, it is necessary to show the relationship between those parties did not influence the sales price for the imported merchandise. As evidence that the relationship did not influence the sales price of the imported merchandise, Protestant submitted a cost breakdown sheet showing the costs that BGD incurred in making the imported women's sports tee shirts and the income statements of the parent company, Radical, for two successive years (2010 and 2011) encompassing the time frame of the entries at issue. The income statements were submitted to show that the price the manufacturer, BGD, charged the related buyer, Radical, met the all costs plus

a profit test as set forth in 19 C.F.R. § 152.103(l)(1)(iii). The applicable regulation states:

> If it is shown that the price is adequate to ensure recovery of all costs plus a profit which is equivalent to the firm's overall profit realized over a representative period of time (*e.g.*, on an annual basis), in sales of merchandise of the same class or kind, this would demonstrate that the price has not been influenced.

In other words, the CBP regulations require the profit to meet specific criteria, *i.e.*, the profit must be equivalent to the firm's overall profit realized over a representative period of time, in sales of merchandise of the same class or kind.

In applying the all costs plus a profit test, CBP normally considers the "firm's" overall profit to be the profit of the parent company. Thus, if the seller of the imported goods is a subsidiary of the parent company, the price must be adequate to ensure recovery of all the seller's costs plus a profit that is equivalent to the parent company's overall profit. See HQ 546998, dated January 19, 2000. The regulations do not give us the definition of "equivalent" profit; however, if the profit of the seller is equal to or higher on the goods sold for export to the U.S. than the firm's overall profit, the sales price would not be artificially low for Customs purposes. See HQ H106603, dated July 25, 2011.

Counsel submits that BGD, realized a gross profit of [ ] percent per tee shirt, when it sold the merchandise to Radical in January 2010. For the year 2010, Radical made a gross profit of about [ ] percent and in year 2011 Radical made a gross profit of about [ ] percent. CBP is of the view that the operating profit margin is generally a more accurate measure of a company's real profitability because it reveals what the company actually earns on its sales once all associated expenses have been paid. Nevertheless, in certain circumstances, gross profit can be considered. See HQ H037375, dated December 11, 2009. Although we generally find it preferable to compare the operating profit margins for the manufacturer with the operating profit margins of its related parent, Protestant's counsel has not furnished any net income information for BGD, and thus we are unable to compare the operating profit information from BGD with Radical's operating profit information. Thus, we consider the gross profit figures available to see if the all costs plus a profit test specified in 19 C.F.R. § 152.103(l)(1)(iii) has been met. Counsel contends that the manufacturer's profits and its parent profits are comparable, and thus they should be considered equivalent in applying 19 C.F.R. § 152.103(l)(1)(iii).

While the gross profit percentages that Radical and BGD earn in selling merchandise appear to be relatively close, we have previously held in applying the all cost plus a profit test, that differences in profits even smaller than in this case would not be considered equivalent. For example, in HQ H097035 dated November 7, 2011, a related party manufacturer realized an operating profit of 1.83 percent in 2007, while in the same year the related middleman (its parent) realized an operating profit of 2.39 percent. In the same case, for the following year, the related party manufacturer realized an operating profit of 3.41 percent, while the related middleman (its parent)

realized an operating profit of 4.3 percent. In considering this information, we found that these differences in profits, during the applicable time period, while seemingly small, were not equivalent since the related party manufacturer earned operating profits less than that of the related parent, and thus we held that the all costs plus a profit equivalent to the parent firm's profit was not satisfied.

In another case, HQ H016585, dated December 30, 2008, a similar comparison was submitted regarding the operating profits of related parties. In that case, the related party manufacturer realized an operating profit of 1.2 percent (2004), 1.5 percent (2005) and 1.4 percent (2006). However, the related party middleman (the parent) realized an operating profit ranging from 5.4 percent to 6.3 percent for the same time frame. CBP stated in the decision:

> . . . Since TWT did not realize an operating profit equivalent to the parent firms' (sic) profit over the same period of time, we find that Tumi has not shown that the transaction between TWT Thailand and WWT was an arm's length transaction. . .

HQ H016585 is directly on point with the information provided here. The difference in the profit percentages between the manufacturer and the middleman in this case, 4.04 percent (2010) and 3.34 percent (2011), as in HQ H016585, demonstrate that the related party manufacturer did not realize a profit equivalent to Radical's profit over the same period of time. While counsel contends the percentages of profits may be comparable, it is apparent that for the years 2010 and 2011, BGD's gross profit was less than the gross profit earned by the related parent company in selling merchandise of the same class or kind. This indicates that the price charged by the seller was not sufficient to recover all costs associated with production of the goods plus a profit equivalent to the parent firm's overall profit over a representative period of time. Consequently, after considering counsel's arguments, we find that the related party transactions do not meet the circumstances of the sale as required by 19 U.S.C. § 1401a(b)(2)(B). Therefore, the sales transaction between the related parties cannot be used for purposes of appraisement of the imported merchandise because it fails to meet the requirements for transaction value to be acceptable.

Since the sale between Radical and BGD cannot be used as the basis of appraisement in valuing the imported merchandise, we must consider if there are any alternate sales for exportation available which can be used as the basis of appraisement for the imported merchandise. If there is another viable sale for exportation available on which to base the transaction value of the merchandise, it is not necessary to go through any of the other valuation methods set forth in the hierarchy of 402(b) through (f) of the TAA, which your office did in appraising the merchandise using the transaction value of similar merchandise. Indeed, we note in this case there is another sale of the imported merchandise to consider, that is, the sale between Radical and Under Armour, the U.S. consignee. The protest record contains a purchase order between Radical and Under Armour, which indicates that the terms of sale for the transaction was DDP and that the order for the merchandise was placed on March 31,

2010. The documentary evidence indicates that the merchandise was shipped directly from Bangladesh to Under Armour's customer, Dicks Sporting Goods, in the United States. Moreover, the sample tee shirt bears the Under Armour logo and has a hang tag attached to it, also indicating that it is Under Armour merchandise. As such, there is no doubt that the tee shirts were sold to Under Armour for sale in the United States. The only question is if the sale to Under Armour took place before the importation of the merchandise into the United States. The date of entry for the merchandise was September 12, 2010. Although Radical is a non-resident importer, since the order for the merchandise between Radical and the U.S. consignee, Under Armour, was placed on March 31, 2010, before the merchandise was imported into the United States, the sale between those two parties occurred before the merchandise was imported into the United States. This means that the transaction between Radical and Under Armour constitutes a valid sale for exportation to the United States rather than just a domestic sale in the United States, and thus it can be used as the basis of transaction value for the imported merchandise. Consequently, we find that the imported merchandise should be appraised under transaction value using the price that the U.S. consignee, Under Armour, paid the Canadian non-resident importer, Radical. To the extent that the Protestant can supply the port with information and proof of the actual international freight costs allegedly included in the price paid by Under Armour, in accordance with the DDP terms of sale, within 30 days from the date this decision is provided to the Protestant by the Port, the international freight cost may be deducted.

HOLDING:

Although the transaction between the related parties constitutes a valid sale for exportation to the United States, the documentation submitted by the protestant did not substantiate that the price the manufacturer charged the related non-resident importer for the imported women's sport tee shirts was adequate to ensure the recovery of all costs plus a profit equivalent to the firm's overall profit realized over a representative period of time. Therefore, there is insufficient evidence to substantiate that the transfer price between the related parties in the "first" sale of the merchandise meets the arm's length requirement of 19 U.S.C. § 1401a(b)(2)(B). Thus, we find the merchandise cannot be appraised based on transaction value of the sale between the related manufacturer and non-resident importer. The imported merchandise is to be appraised based on the transaction value in the sale between the Canadian non-resident importer and the U.S. consignee. Therefore, the Protest is DENIED.

In accordance with the Protest/Petition Processing Handbook (CIS HB 3500-08A, December 2007, pp. 24 and 26), you are to mail this decision, together with the CBP Form 19, to the protestant no later than sixty days from the date of this letter. Sixty days from the date of the decision Regulations and Rulings of the Office of International

Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of

Information Act, and other methods of public distribution.

Sincerely,

Myles B. Harmon, Director
Commercial and Trade Facilitation Division