
Comptroller-General of Customs v Lego Australia Pty Ltd [1997] FCA 329 (6 May 1997)

CATCHWORDS

CUSTOMS AND EXCISE - valuation of imported goods - goods imported by parent company - applicant received goods on consignment - goods bought by applicant after importation and sold to Australian buyers - whether transaction value is the appropriate customs value of the goods - whether there was an import sales transaction - whether deductive (contemporary sales) or deductive (later sales) value is the appropriate customs value of the goods - meaning of "at first trade level" whether fall-back value is the appropriate customs value of the goods

STATUTORY INTERPRETATION - *Customs Act 1901* (Cth) ss 159, 161, 161G, 161H

ADMINISTRATIVE LAW - Whether a failure to give reasons

Administrative Appeals Tribunal Act 1975 (Cth) ss 29, 43, 44

Customs Act 1901 (Cth) ss 8, 154, 159, 161, 161C, 161D, 161G, 161H

Customs and Excise Legislation Amendment Act (No.2) 1987

General Agreement on Tariffs and Trade, Article VII

Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade

Australian Telecommunications Commission v Barker [1990] FCA 489; (1990) 12 AAR 490

Collector of Customs v Pozzolanic Enterprises Pty Limited [1993] FCA 456; (1993) 43 FCR 280

Dornan v Riordan [1990] 24 FCR 564

Commissioner of Taxation v Osborne [1990] FCA 362; (1990) 26 FCR 63

Lego *Australia Pty Ltd v Paraggio* (1993) 44 FCR 151

Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259

Telescourt v Commonwealth [1991] FCA 205; (1991) 29 FCR 227

COMPTROLLER-GENERAL OF CUSTOMS v. LEGO AUSTRALIA PTY LIMITED

No. NG 591 of 1996

LOCKHART, BRANSON, EMMETT JJ

Sydney

6 May 1997

IN THE FEDERAL COURT OF AUSTRALIA	**)**
	)
NEW SOUTH WALES DISTRICT REGISTRY	**) No. NG 591 of 1996**
	)
GENERAL DIVISION	**)**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:	**COMPTROLLER-GENERAL OF CUSTOMS**
	Applicant
AND:	**LEGO AUSTRALIA PTY LIMITED**
	Respondent
CORAM:	**LOCKHART, BRANSON, EMMETT JJ**
PLACE:	**SYDNEY**
DATED:	**6 May 1997**

MINUTES OF ORDER

The Court orders that:

1. The decision of the Administrative Appeals Tribunal of 12 July 1996 be set aside.

2. There be substituted for that decision, a decision affirming the decision of the Applicant of 15 August 1990.

3. The Respondent pay the Applicant's costs.

NOTE: Settlement and entry of orders is dealt with in accordance with Order 36 of the Federal Court Rules.

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Applicant

AND: **LEGO AUSTRALIA LIMITED**

Respondent

CORAM: **LOCKHART, BRANSON, EMMETT JJ**
PLACE: **SYDNEY**
DATED: **6 MAY 1997**

REASONS FOR JUDGMENT

LOCKHART J.

I have had the benefit of reading the reasons for judgment of Emmett J with which I agree. I also agree with the orders proposed by his Honour.

I certify that this page is a true copy of the reasons for judgment herein of the Honourable Justice Lockhart.

Associate:

Dated: 6 May 1997

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PLACE: **SYDNEY**
DATED: **6 MAY 1997**

REASONS FOR JUDGMENT

BRANSON J.

I have had the benefit of reading the reasons for judgment of Emmett J with which I agree. I also agree with the orders proposed by his Honour.

I certify that this page is a true copy of the reasons for judgment herein of the Honourable Justice Branson.

Associate:

Dated: 6 May 1997

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NEW SOUTH WALES DISTRICT REGISTRY	)	**No. NG 591 of 1996**
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Respondent

CORAM: LOCKHART, BRANSON, EMMETT JJ
PLACE: SYDNEY
DATED: 6 May 1997

REASONS FOR JUDGMENT

EMMETT J

These proceedings arise out of a dispute between the Respondent ("Lego Australia") and the Chief Executive Officer of Customs ("the Applicant") concerning the manner in which customs duty should be charged on the importation from Denmark of goods described as scale model assembly kits, construction sets or constructional toys, toys representing animals and other toys in sets. The dispute relates specifically to the manner in which the goods should be valued.

Lego Australia is a distributor of the goods in Australia. A related corporation of Lego Australia ("Lego Overseas") exports the goods from Denmark and imports the goods into Australia. The goods are delivered to Lego Australia in Australia on a consignment basis and are stored at the premises of Lego Australia. At the time of importation, the goods are the property of Lego Overseas. They remain the property of Lego Overseas until they are bought by Lego Australia from Lego Overseas for the purpose of subsequent sale by Lego Australia to buyers in Australia.

The Legislative Framework

Section 159(1) of the Customs Act 1901 ("the Act") provides that the value of imported goods for the purposes of any act imposing customs duty is their "customs value". The Collector, as defined in section 8(1)(a) of the Act, is required to determine that customs value in accordance with the subsequent provisions of section 159.

Section 159 establishes a succession of alternative methods of determining customs value. The primary method is specified in section 159(2) which requires determination of "transaction value". Under section 159(3), where the Collector cannot determine transaction value, then "identical goods value" is to be adopted. If neither transaction value nor identical goods value can be determined then "similar goods value" is to be determined. The methods subsequently specified in section 159 are "deductive (contemporary sales) value", "deductive (later sales) value", "deductive (derived goods sales) value" and "computed value". Where none of those values can be determined, "the fall back value" is to be adopted. Sections 161 to 161G set out the detailed methods by which each of those values is to be determined.

The Applicant originally acknowledged that the transaction value could not be adopted and contended that the customs value should be determined as the fall back value by reference to the price actually charged for the goods by Lego Overseas to Lego Australia. The Applicant demanded payment of duty from Lego Australia in accordance with that contention.

Lego Australia disputed the Applicant's contention and, while conceding that the fall back value was appropriate, originally contended that the fall back value should be determined by reference to the price charged by it to buyers in Australia. The duty demanded was therefore paid by Lego Australia under protest. Lego Australia then applied, pursuant to section 29(1) of the Administrative Appeals Tribunal Act 1975, to have reviewed by the Administrative Appeals Tribunal, the decision of the Applicant to demand payment of duty in accordance with the Applicant's contention.

Before the Tribunal, the stance of both parties changed. Neither contended primarily for the fall back value. Rather, the Applicant contended for the transaction value and Lego Australia contended for the deductive (contemporary sales) value or the deductive (later sales) value. The Tribunal decided that the decision under review by it should be set aside and the customs duty of the goods in question should be determined as specified in section 161C or section 161D of the Act, namely, the deductive (contemporary sales) value or the deductive (later sales) value.

The Applicant, pursuant to section 44 of the Administrative Appeals Tribunal, appeals from that decision, seeking an order that the decision be set aside and a declaration that the appropriate value for customs value purposes is the transaction value under section 161(1) of the Act or, alternatively, an order affirming the original decision of the Applicant or, alternatively, an order that that the matter be remitted to the Tribunal for redetermination according to law.

Thus, the Applicant now contends that section 159(2), importing section 161(1), is the appropriate provision for the determination of customs value for the goods. Section 159(2) provides as follows:

"Where a Collector can determine the transaction value of imported goods, their customs value is their transaction value."

Under section 161(1) the transaction value of imported goods is an amount derived by reference to the price in their "import sales transaction" as defined. That term is defined in section 154(1), relevantly for present purposes, as meaning,:

"(a) where there was one, and only one, contract of sale for the importation of the goods into Australia entered into before they became subject to Customs control and it was also a contract for their exportation from a foreign country - that contract;

....

and include:

(e) any other contract, agreement or arrangement relating to the contract of sale referred to in paragraph (a)... that a Collector determines is so closely connected with that contract and to the goods of the subject of that contract that together they form a single transaction;"

Lego Australia, on the other hand, now contends that customs value of the goods should have been determined by the Collector in accordance with section 159(5) or section 159(6) which respectively import the provisions of sections 161C and 161D of the Act. Both sections require calculation of value by reference to the price of comparable goods sold in "the reference sale or sales". Reference sale is defined in terms of a "contemporary sale" (in the case of section 161C) or a "later sale" (in the case of section 161D).

There is only one material difference between sections 161C and 161D. In the former, the value is calculated by reference to a sale of comparable goods made at about the same time (as that expression is defined in the Act) as the importation of the relevant goods. The latter involves a calculation of value by reference to a sale of comparable goods during the 90 days that began on the day of importation of the relevant goods. Otherwise, the scheme of sections 161C and 161D is the same. Accordingly, reference will be made hereafter only to the detailed provisions of sections 159(5) and 161 relating to "contemporary sale". The same observations will be applicable to the term "later sale".

The definition of "contemporary sale" requires that the sale must be a sale:

"(a) at about the same time as the time of importation of the imported goods;

(b) at the first trade level at which the comparable goods were sold after their importation;

(c) in circumstances where, in the opinion of the Collector, the purchaser of the comparable goods:

(i) was not, at the time of the sale, related to the vendor of the comparable goods; and

(ii) did not incur any production assist costs in relation to the comparable goods; and

(d) that was, in the opinion of the Collector, a sale of a sufficient number of units of comparable goods as to permit an appropriate determination of their price per unit."

Lego Australia relies upon sales of identical goods made to retailers by Lego Australia at about the same time as the time of importation of the goods in question. The Applicant contends, however, that, if section 159(2) and section 161(1) are not appropriate, sections 159(5) and 161C are equally inappropriate because criteria (b) and (c) set out above are not satisfied in relation to any sales sought to be relied upon by Lego Australia.

Both parties accepted before this Court that, if section 161 is held to be inappropriate (contrary to the Applicant's contentions) and sections 161C and 161D are held to be inappropriate (contrary to Lego Australia's contentions), customs value would be "fall back value", determined in accordance with section 159(10). Section 159(10) imports section 161G of the Act which provides that "the fall back value" is:

"such value as a Collector determines, having regard to the other methods of valuation under this Division in the order in which those methods would ordinarily be considered under section 159 and of (sic) such other matters as the Collector considers relevant ..."

The Tribunal's Reasons

The first basis upon which the Applicant seeks to impugn the decision of the Tribunal is that the Tribunal failed to satisfy the requirements of section 43(2B) of the Administrative Appeals Tribunal Act. That section provides that where the Tribunal gives in writing the reasons for its decision, the reasons must include its findings on material questions of fact and a reference to the evidence or other material on which those findings where based.

The Applicant acknowledged the restraint that has been urged in relation to the ground of failing to comply with Section 43(2B) (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 271-272 and *Collector of Customs v Pozzolanic Enterprises Pty Limited* [1993] FCA 456; (1993) 43 FCR 280 at 286-287). Reliance was placed, however, on the proposition that it is an error of law for the Tribunal to breach its duty under section 43(2B) (see *Dornan v Riordan* [1990] 24 FCR 564 at 573- 574, *Australian Telecommunications Commission v Barker* [1990] FCA 489; (1990) 12 AAR 490 at 492, *Telescourt v Commonwealth* [1991] FCA 205; (1991) 29 FCR 227 at 234 and *Commissioner of Taxation v Osborne* [1990] FCA 362; (1990) 26 FCR 63 at 65).

Before the Tribunal, the Applicant contended that the arrangement, whereby goods were exported from Denmark and imported into Australia by Lego Overseas and placed in Lego Australia's warehouse on consignment, was such that a contract of sale in respect of the goods existed prior to their importation and prior to their becoming subject to customs control. Accordingly, there was an "import sales transaction", within the meaning of the definition of that term in section 154 of the Act. The Applicant contended that the practice which applied as between Lego Australia and Lego Overseas indicated that there was an

obligation on the part of Lego Australia to buy the imported goods from Lego Overseas and an obligation on the part of Lego Overseas to sell those goods to Lego Australia.

The complaint by the Applicant before this Court is that, whereas the Tribunal accepted that there is a "contractual arrangement" between Lego Australia and Lego Overseas, the Tribunal did not explain its conclusion that the existence of that arrangement did not lead the Tribunal to conclude that there was a "contract of sale" for the importation of the goods into Australia. It was contended that that was a deficiency in the Tribunal's reasoning amounting to a failure to comply with section 43 (2B) of the Administrative Appeals Tribunal Act.

The Applicant's complaint is that the Tribunal, in its reasons, merely stated a series of facts but gave no reasons for concluding that those facts did not lead to a finding that there existed a contract for sale before the goods became subject to Customs control. Counsel for the Applicant contended that the facts found by the Tribunal were "intractably neutral" as to its conclusion that there was no import sales transaction within the meaning of that term as defined in the Act.

It was suggested that there were three possibilities, namely:

(a) the Tribunal took the view that because there was a consignment, that is the end of the matter

(b) the Tribunal failed to accept the distinction between an agreement to sell and a sale

(c) the Tribunal read the documents and gave them a particular interpretation.

It was conceded that, in the last case, there would have been no error. On the other hand, it was contended that, in the first two cases there would have been error which would have been capable of review.

Counsel for the Applicant referred to evidence given before the Tribunal concerning the practice which had applied as between Lego Overseas and Lego Australia for some time. The contention was that, notwithstanding the terms of the correspondence between those companies, on all of the evidence as to the continuous course of dealing between Lego Overseas and Lego Australia, there was a pre- existing obligation on the part of Lego Australia to buy and on the part of Lego Overseas to sell prior to the importation of the goods into Australia.

The Tribunal made findings of fact concerning the exchanges of correspondence between Lego Overseas and Lego Australia and the practice which had been adopted between Lego Australia and Lego Overseas for some time. The correspondence does not support in any manner a conclusion that there was a contract of sale in existence between Lego Australia and Lego Overseas before goods became subject to customs control. Moreover, there is no finding by the Tribunal to the effect the "arrangement" was as contended for by the Applicant.

The correspondence makes clear that the goods are received in Australia by Lego Australia as bailee and that property in the goods remains at all times vested in Lego Overseas. Lego Overseas is entitled to remove any quantity of the goods from the warehouse of Lego Australia and agrees to pay fees for the storage of the consignment. The exchange of correspondence refers to the possibility that Lego Australia may wish to purchase goods from Lego Overseas and provides that if Lego Overseas agrees to sell any goods certain terms and conditions will apply to that purchase and sale.

The difficulty with the Applicant's contention is that it would have been necessary for the Tribunal to make findings as to the effect of the course of conduct which would have rendered the written correspondence a sham. The contention was never put to the

Tribunal and there was certainly no finding to that effect.

It was said by the Applicant that the Act recognises the distinction between a "sale" and a "contract of sale", as is evident from a comparison of the expression "contract of sale" in the definition of "import sale transaction" in section 154 and the words "sale" or "sold" in section 161C. Reference was made to a number of texts (for example Helmore, *Commercial Law and Personal Property in NSW*, 10th ed., (Law Book Company, Sydney, 1992) at page 141 and *Halsbury's Laws of England* , 4th ed., vol.12 (Butterworths, London, 1975) at paragraphs 636-638 in support of the distinction. It was contended that the reasons given by the Tribunal left open the possibility that the Tribunal may not have accepted the distinction. If not, that would have been an error of law which would be reviewable by this Court.

The Applicant relied on the proposition that the fact that the goods in question were imported on consignment is not inconsistent with the existence with a pre-importation contract of sale. It was said that goods delivered to another "on approval" (with a view to the other purchasing the goods if satisfactory) are delivered on consignment. So are goods delivered to another on "sale or return" (with a view to the other selling the goods in the course of trade or returning them to the consignor if not sold within a given period). Reference was made to the definition of "consignment" in *Butterworths Australian Legal Dictionary* (Butterworths, Sydney, 1997).

There is, however, nothing in the reasons of the Tribunal to suggest that the Tribunal failed to recognise the distinction between a "contract of sale" and "sale". The question is not whether one could have, at the same time, a contract of sale and an importation on consignment but whether there was, as a matter of fact and law, a contract of sale in existence prior to importation.

In the absence of a finding that the correspondence did not represent the true arrangement between the parties, it is apparent that the Tribunal's conclusion was that the arrangement between the parties was governed by the correspondence. The findings of fact set out in the Tribunal's reasons are consistent only with a conclusion that there was no contract of sale in existence before the importation of the goods into Australia. The findings made by the Tribunal demonstrate that the only meaning which can be given to the Tribunal's reasons is that the Applicant's contention concerning any pre-existing obligations was rejected.

Accordingly, the Tribunal found that there was no import sales transaction as defined in section 154. The first basis upon which the Tribunal's decision is impugned must therefore be rejected.

Applicability of Sections 161C and 161D

The second basis on which the Tribunal's decision is impugned relates to its conclusion as to the applicability of sections 161C and 161D. A question arises as to the meaning of paragraph (b) of the definition of " comparable sale". The Tribunal concluded, in relation to the question, that:

"the first trade level sale is the first sale by an importer, whether or not that person is identical with the exporter, or by a trader taking title from the exporter/importer, to an unrelated buyer after importation" (emphasis added)

Before this court, Lego contended that the expression "at the first trade level" signified a transaction which had a "trading" character. Since the "internal" sale between Lego Overseas and Lego Australia was not of that character, it was not a transaction which was relevant to paragraph (b) of the definition of "contemporary sale" in section 161C(2). Accordingly, it was permissible to have regard to the next sale which occurred after importation, namely, the sale by Lego Australia to a buyer in Australia.

Reliance was placed by the Tribunal on an observation made by Wilcox J. in *Lego Australia Pty Ltd v Paraggio* (1993) 44 FCR

151 at 158 that:

"the initial step is to take the price obtained for the goods at the first arm's length trade sale after importation."(emphasis added)

The Tribunal concluded that the insertion of the emphasised words "arm's length" had the effect of reflecting the true meaning to be given to the phrase "sale at the first trade level". In essence that conclusion was adopted by Lego Australia before this court.

In supporting that conclusion, Lego Australia attached significance to the explanatory memorandum to the Customs and Excise Legislation Amendment Bill (No. 2) 1987 which inserted the relevant provisions into the Act. The memorandum contains a statement to the effect that the new provisions were designed to give effect to Australia's obligations under the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade ("the GATT Valuation Agreement") to which Australia is a signatory.

Article VII of the General Agreement on Tariffs and Trade provides that the value for customs purposes of imported merchandise should be based on the "actual value" of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of notional origin or on arbitrary or fictitious values. It provides that "actual value" should be the price at which such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. However, when the actual value is not ascertainable in accordance with those principles, the value for customs purposes should be based on the nearest ascertainable equivalent of such value (see paragraphs 2(a), 2(b) and 2(c) of Article VII).

Article 5 of Part I of the GATT Valuation Agreement was also relied on by Lego Australia in support of the conclusion reached by the Tribunal. Article 5 relevantly provides as follows:

"1(a) If the imported goods or identical or similar imported goods are sold in the country of importation ....., the customs value of the imported goods under the provision of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold ..... at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods ....."

A note to article 5 provides that the term "unit price at which .... goods are sold....." means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods "at the first commercial level after importation at which such sales take place".

Those provisions support a contention that the object of the exercise in determining customs value is to ascertain, not the highest possible value so as to maximise duty, but the actual value of goods. Lego Australia argued that the provisions indicate that the phrase "sale at the first trade level" was intended to signify a transaction at arm's length. It was said that that supports the contention that the sale to Lego Australia by Lego Overseas should be ignored and the next sale adopted.

The contention of Lego Australia was that, because of the relationship between Lego Overseas and Lego Australia, the price agreed as between those parties was not a reliable indication of the price at which the goods or like goods are sold or offered for sale in the ordinary course of trade under fully competitive conditions. The best evidence of that value, it was argued, was the price for which goods were actually sold by Lego Australia in transactions entered into at arm's length.

Having regard to the requirements of paragraph (c) of the definition of "comparable sale", it is unlikely that the word "trade"

was intended to refer to the relationship between the vendor and the purchaser. It is not possible to justify the insertion of words of qualification such as those emphasised in the extract from the Tribunal's reasons set out above, particularly when there follows immediately an express reference to transactions between related parties. The comment by Wilcox J was made in a totally different context from, and could not be taken to be a considered observation in relation to, the question presently under consideration. No reasons were given by him to justify the insertion of the words "arms length".

It is by no means clear what is intended by the phrase "at the first commercial level" used in the GATT Valuation Agreement which became "at the first trade level" in the definition of "contemporary sale". It is curious why the word "trade" was substituted for the word "commercial" when giving effect, in the definition of "contemporary sale", to the note to Article 5 to which reference is made above. A trade level, however, is likely to signify the level in the distribution process involving goods. There are different levels at which transactions involving the sale of goods take place. The most obvious distinction is between a sale at wholesale level and a sale at retail level. There will, however, be other levels in many cases.

Thus, there may be different levels of distributor interposed in the process between sale by manufacturer and sale to the ultimate consumer. Each might be considered a level at which a sale takes place. That suggests that the expression trade level was intended to be descriptive of the level of commerce at which the transaction of sale takes place. Thus, the first level at which comparable goods are sold after importation might be from importer to distributor. Alternatively, it might be from distributor to retailer. Which is relevant in any case might depend upon who is the owner of the goods at the time of their importation.

In the present case, the first level at which the goods in question are sold is from importer to distributor, namely, from Lego Overseas to Lego Australia. That is the first trade level at which comparable goods are sold after their importation. However, the requirement in paragraph (c) of the definition of contemporary sale is not satisfied in this case because the purchaser of the comparable goods, namely, Lego Australia, is related to the vendor of the comparable goods, namely, Lego Overseas. Accordingly, section 161C would not be applicable.

It was also suggested by Lego Australia that the desired result would be achieved by reading each of paragraphs (a), (b), (c) and (d) of the definition of comparable sale together. The result would be that one looks for a sale:

"at the first trade level ... in circumstances where ... the purchaser ... was not ... related to the vendor ...".

It was argued that such a construction is supported by the "and" separating paragraphs (c) and (d). However, that does not follow. The word "and" is quite equivocal in the position in which it appears and the reading suggested by Lego Australia is not open on the language used in the section.

In addition it was said by Lego Australia that the approach of reading "sale" in the preamble of the definitions as being qualified separately and independently by each of paragraphs (a), (b), (c) and (d) cannot be implemented in respect of section 161D (2)(d) because of the omission of the word "that" at the beginning of the paragraph. As a matter of syntax, the word "that" should appear at the beginning of paragraph (d) of the definition in section 161D if each paragraph is to be read separately and independently. In fact, it has been omitted from paragraph (d) of the definition of "later sale" in section 161D(2).

The difficulty for this contention is that the word "that" must then be ignored in the definition of "contemporary sale" in section 161C(2), since it is clear that the two definitions should be symmetrical. Thus, the argument is based on attaching significance to what is clearly a clerical error in the legislation and it should be rejected.

It follows from all of the above that neither section 161C nor section 161D is directly applicable in the present case.

Fall Back Value

It is therefore necessary for value to be determined in accordance with section 161G. The contention of the Applicant was that under section 161G the Collector should have regard first to section 161 and there was no reason why the adoption of section 161 by analogy would not lead to an appropriate value. The Applicant contended, therefore, that it was appropriate to look at the price payable for the goods by Lego Australia to Lego Overseas. Lego Australia, on the other hand, contended that regard should be had to the method of valuation in sections 161C and 161D and that regard should accordingly be had to the price payable by Australian buyers to Lego Australia.

The Tribunal did not need to decide the question because of the view which it adopted in relation to section 161C and section 161D. Nevertheless, it indicated that, if it were to decide the matter under section 161G, for "the same reasons that render the transaction value method inapplicable on the first traverse of the sections, section 161 is not appropriate in applying section 161G". The Tribunal also indicated that sections 161C and 161D "would be apposite and would enable the [Applicant] to determine a fall back value of goods having regard to those methods of valuation".

Section 161G provides that the fall back value of imported goods is to be such value as a Collector determines having regard to the matters referred to in the section. The Collector must have regard to "the other methods of valuation under this division in the order in which those methods would ordinarily be considered under section 159". Section 159(2) requires that the transaction value method be adopted if the Collector can determine the transaction value. Thus, in effect, section 161G requires regard to be had first to the transaction value method of valuation.

The Tribunal did not state any reasons for concluding that the Collector would have been in error in having regard to the transaction value method of valuation in determining a value under section 161G, other than to say that, for the reasons which it had earlier detailed, it did not consider that the transaction value method was appropriate in the circumstances. If that was meant to indicate that the transaction value could not be determined in the circumstances of the present case, that is correct. The transaction value method cannot be determined because there is no import sales transaction involved as that term is defined in section 154. By definition, the transaction value method is not applicable where section 161G is being applied.

However, no reason was stated by the Tribunal as to why the Collector could not determine a value having regard to that method. In the absence of the application of section 161H, to which reference is made below, no reason has been advanced as to why the Collector should not have had regard to the transaction value method in determining a value under section 161G. In so far as it concluded that it was not open to the Collector to determine the value under section 161G by having regard to the transaction value method, the Tribunal erred. As indicated above, that is, in effect, what the Collector originally did although, in the Tribunal and before this Court, the Applicant advanced different contentions based on the primary applicability of section 161.

The dispute under consideration involves, in a sense, an anomalous reversal of roles between Lego Australia and the Applicant. So much was conceded by counsel for the Applicant. Section 161H provides a mechanism whereby transaction value is not to be the basis for determining customs value under section 161 where a Collector is satisfied that the purchaser and the vendor of imported goods were related persons and considers that the relationship may have influenced the price of the goods. Ordinarily, therefore, one might expect that the Applicant would reject section 161 in circumstances where an importer would be contending for the application of section 161.

Section 161H(2) provides that where a Collector is satisfied that the purchaser and the vendor of imported goods were, at the time of a relevant import sales transaction, related persons and the Collector considers that that relationship may have influenced the price of the goods, the Collector is required, by notice to the purchaser, to advise the purchaser of the view that the Collector has formed of the possible effect on the price of the goods of the relationship and the fact that, because of that view, the

Collector may be required to decide that the transaction value of the goods cannot be determined.

Section 161H(3) provides that, on the expiration of the period specified in such a notice, the Collector is to be taken, unless the purchaser has satisfied the Collector that a relationship between the purchaser and the vendor did not influence the price of the goods, to be unable to determine the transaction value of the goods. Under section 161H(1) a Collector must not determine the transaction value of imported goods if the Collector has, in accordance with section 161H(3) decided that the transaction value of the goods cannot be determined.

It may be significant that the touchstone for exclusion of the transaction value under section 161H(3) is that the Collector is satisfied that the relationship between vendor and purchaser has influenced the price of the goods. There is no requirement that the Collector be satisfied that the price has been influenced downwards rather than upwards.

In contrast, the subsequent provisions of section 161H are concerned with exclusion of the transaction value where the price at which goods are sold or the price for which services in respect of the goods were provided is different from the price which would normally be paid. The transaction value method is excluded in such a case unless the Collector is satisfied that the price difference was not designed to obtain a reduction of, or to avoid, duty.

Thus, it may be that if the price agreed as between a related vendor and purchaser is artificially high, it would be appropriate for the Collector to take steps under section 161H(2). Had such steps been taken in the present case, it is possible that Lego Australia may have wished to satisfy the Collector that the relationship between Lego Australia and Lego Overseas did in fact influence the price of the goods, albeit by influencing the price upwards. In such circumstances, it may be possible that section 161H(1) would operate to prevent a Collector from determining the transaction value of goods.

By analogy, one would expect that regard could be had to the possible operation of section 161H in having regard to the transaction value method even in circumstances where there was not, as there was not in this case, an import sales transaction in relation to the goods. Those considerations may suggest that it would be inappropriate to have regard to the price payable by Lego Australia to Lego Overseas and that, accordingly, the transaction value method may not have been the appropriate method to apply, with modification, under section 161G. On that basis, it may have been arguable that, by the application of section 161H, reliance on the transaction method should have been excluded.

That, however, was not the basis upon which the matter has been approached by Lego Australia. Lego Australia has contended simply that section 161C or section 161D should be applied directly or that, in the application of section 161G, the methods specified in those sections should be had regard to for the purposes of determining fall back value. Those contentions do not answer the Applicant's argument that regard could be had to the transaction value method in determining a value under section 161G.

Conclusion

In the circumstances, the appropriate relief appears to be to set aside the decision of the Tribunal and substitute for it a decision affirming the original decision of the Applicant. That decision was to determine a value as customs value by having regard to the transaction value method. That method assumes that the "actual value" of the goods is the price charged for the goods by the importer. In the absence of the application of section 161H, that assumption cannot be shown to be inappropriate.

I certify that this and the preceding twenty one pages are a true copy of the Reasons for Judgment of his Honour Justice Emmett.

Associate:

Dated: 6 May 1997

Heard: 28 February 1997

Place: Sydney

Decision: 6 May 1997

Appearances:

Counsel for the applicant: M.S. Weinberg QC

G.T. Johnson

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Counsel for the respondent: A.J.L. Bannon SC

S.J. Gageler

Solicitor for the respondent: Blake Dawson Waldron
