



Ottawa, Tuesday, May 27, 2003

Appeal No. AP-2001-016

IN THE MATTER OF an appeal heard on December 2, 2002,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of
the Canada Customs and Revenue Agency dated June 21, 2001,
with respect to a request for redetermination under
subsection 60(4) of the *Customs Act*.

BETWEEN

SIMMS SIGAL & CO. LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2001-016

SIMMS SIGAL & CO. LTD.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency concerning the value for duty of goods imported by Simms Sigal & Co. Ltd. (Simms Sigal) between January 1 and December 31, 1998. Simms Sigal is an importer and distributor in Canada of women's clothing produced by a company located in the United States. According to the transaction value method, the value for duty of goods is the price paid or payable for the goods when the goods are sold for export to Canada. Pursuant to a distribution agreement with the U.S.-based vendor, Simms Sigal obtained exclusive distribution rights in Canada and the use of trade names, trademarks and services. In exchange, Simms Sigal agreed to pay a distribution fee, calculated as a percentage of annual net sales. At issue in this appeal is whether this distribution fee forms part of the price paid or payable for the goods, thereby forming part of the value for duty of the goods or, alternatively, whether it is dutiable as part of the proceeds of the resale of the goods that accrue to the vendor.

HELD: The appeal is allowed. The distribution fee is not part of the "price paid or payable" for the goods, which is defined as "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 evidence indicates that the price that Simms Sigal paid for the imported goods includes all amounts in respect of the goods. The distribution fee is not a payment made in respect of the goods, as it relates to rights and services of value to Simms Sigal that are separate from the purchase price of the goods. Similarly, the distribution fee is not to be added to the transaction value of the goods according to subparagraph 48(5)(a)(v) of the *Customs Act*. The fact that the distribution fee is calculated as a percentage of net sales does not mean that the vendor has a right to receive any part of the proceeds of the resale of the goods as payment for these goods.

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 2, 2002
Date of Decision: May 27, 2003

Tribunal Members: Pierre Gosselin, Presiding Member
Richard Lafontaine, Member
Ellen Fry, Member

Counsel for the Tribunal: John Dodsworth

Clerk of the Tribunal: Anne Turcotte

Appearances: Richard S. Gottlieb, for the appellant
Louis Sébastien, for the respondent



Appeal No. AP-2001-016

SIMMS SIGAL & CO. LTD.

Appellant

AND

**THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY**

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member
RICHARD LAFONTAINE, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ from a redetermination by the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) dated June 21, 2001, which confirmed an assessment of duties for the period from January 1 to December 31, 1998. The Commissioner determined that payments made by Simms Sigal & Co. Ltd. (Simms Sigal) to Anne Klein & Company (Anne Klein) pursuant to a distribution agreement (Agreement) are “payments made or to be [made] directly or indirectly, in respect of the goods by the purchaser for the benefit of the vendor”. Therefore, the Commissioner determined that the payments were part of the transaction value of the goods for the purposes of determining their value for duty, given that they constituted a portion of the price paid or payable for the goods when the goods were sold for export to Canada.

The relevant sections of the *Act* are as follows:

45.(1) In this section and sections 46 to 55,

“price paid or payable”, in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor.

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.

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 and if

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

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

(a) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to

(iv) royalties and licence fees, including payments for patents, trade-marks and copyrights, in respect of the goods that the purchaser of the goods must pay, directly or indirectly, as a

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

condition of the sale of the goods for export to Canada, exclusive of charges for the right to reproduce the goods in Canada,

(v) the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor.

EVIDENCE

The witness for Simms Sigal was its president, Mr. Leslie Thomas Simms. Simms Sigal is an importer and distributor in Canada of women's clothing produced by Anne Klein. Simms Sigal and Anne Klein are not related to one another.

Mr. Simms testified regarding the terms of the Agreement between Simms Sigal and Anne Klein. He indicated that, in addition to the written text, there were several unwritten understandings that the parties considered to be part of the Agreement. According to the Agreement, Simms Sigal was granted the exclusive right to distribute specific lines of clothing produced by Anne Klein.² Simms Sigal was also granted the right to bring its Canadian customers to Anne Klein showrooms in New York, as well as certain limited rights with respect to the Anne Klein trade name and trademark. In addition, in accordance with the Agreement, Simms Sigal received services from Anne Klein, which Simms Sigal identified as samples, showrooms, models, showroom food, printed material and sales aids, and telephone, fax and photocopying at its New York location. Anne Klein also agreed to provide strategic information, information on trends and market research, staff training and sales clinics, line lists, the services of its international sales department, personal appearances by a design team in Canada, ad material, shop fixture sourcing, national ads in U.S. magazines, and other miscellaneous services.

In exchange, Simms Sigal paid a distribution fee, which was calculated as a percentage of Simms Sigal's net sales in Canada. "Net sales" are defined in the Agreement as being the aggregate invoiced amount for all goods shipped by the distributor, less returns for damaged or defective merchandise. The distribution fee was paid on a quarterly basis and did not appear on the commercial invoice when the goods were imported. The Agreement also stipulated a minimum amount that Simms Sigal was required to pay as the distribution fee. Mr. Simms testified that the distribution fee was separate from the purchase price of the goods.

Mr. Simms testified that Simms Sigal was not obliged to sign the Agreement as a condition of purchasing Anne Klein garments. The Tribunal was told that, in the event that Anne Klein was unable to provide a specific service at any time, the understanding was that Simms Sigal was not obliged to pay the distribution fee. The Tribunal was also told that, in the United States, Anne Klein sells directly to retailers, not through a distributor as it does in Canada. According to Mr. Simms, the price of the goods to Simms Sigal is set at a discount from the price paid by retailers located in the United States, in order to permit Simms Sigal a profit margin when it sells to Canadian retailers.

According to Mr. Simms, Simms Sigal is not constrained in the resale of the garments, except to the extent that it is required to sell to retailers that reflect the image that Anne Klein wishes to have identified with its product. Anne Klein does not control marketing or pricing in Canada.

Mr. Simms testified that the clause in the Agreement that required Simms Sigal to pay a minimum amount as the distribution fee was intended to ensure that Anne Klein was entering into an agreement with a distributor that would actively promote, sell and service the product in Canada. The Agreement also

2. The Agreement contemplates certain limited exceptions to the exclusivity of Simms Sigal's distribution rights.

recognized that it was made on the basis that the parties would use their reasonable best efforts in performing their obligations. In this regard, it was understood that Simms Sigal's ability to sell the imported goods depended upon the saleability of Anne Klein garments. If Anne Klein garments were not selling well in other markets, Anne Klein would not necessarily enforce the minimum sales requirements of the Agreement. Further, Mr. Simms testified regarding a circumstance in which it did not pay the full distribution fee, given that Anne Klein failed to deliver the services provided for in the Agreement.

Mr. Simms testified that, in his view, the exclusive right to distribute Anne Klein garments was the most valuable part of the Agreement. This allowed Simms Sigal to standardize prices and service across the country and prevented the undercutting of price and services by weaker Canadian distributors, a situation that might have occurred in the absence of such an agreement.

The Tribunal was told that the services provided to Simms Sigal by Anne Klein pursuant to the Agreement were essential to Simms Sigal's ability to generate reasonable sales in Canada. Simms Sigal required these services, whether provided by Anne Klein or not. Mr. Simms testified that the estimated dollar value provided for each of the services obtained from Anne Klein, as provided in Simms Sigal's brief, is based on his own personal experience in the industry.

Mr. Simms testified that Anne Klein, not Simms Sigal, provided sketches and designs of the goods to the manufacturer of the goods and that their value was included in the price of the goods. He also testified that Anne Klein billed Simms Sigal separately for certain costs in addition to the distribution fee, for example, the cost of purchasing additional samples of clothing. Mr. Simms testified that, although posted as a royalty in Simms Sigal's financial statements, from an accounting standpoint, the distribution fee was considered a marketing expense, not a cost of goods sold.

ARGUMENT

According to Simms Sigal, the issue in this appeal is whether the selling price, as established by the parties according to a formula, reflects the entire value for duty or whether some part or all of the distribution fee should be added to the selling price.

Simms Sigal argued that the evidence is clear regarding how the selling price is determined and that it is not subject to any modification arising out of the Agreement or otherwise. The invoice price wholly and exclusively reflects the transaction value. According to Simms Sigal, there is no evidence in support of the Commissioner's position that the distribution fee is part of the price of the goods and therefore should be added to the price paid or payable for the goods. Simms Sigal referred to Mr. Simms' testimony that it considered the distribution fee to be separate from the price that it paid and that the distribution fee, called royalties by its accountant, was treated as a marketing expense and not a cost of sales.

Simms Sigal noted that, according to the terms of the Agreement, the payment is referred to as a distribution fee and is paid in consideration for the distribution rights, which include the right to use the trade name and trademark. Therefore, the payment made in accordance with the Agreement is separate from the price paid for the goods. Simms Sigal argued that, as such, the distribution fee paid pursuant to the Agreement should not form part of the "price paid or payable" for the purposes of determining the value for duty of the goods imported by Simms Sigal.

Simms Sigal argued that, if the Tribunal determines that these amounts are to be included in the price of the goods, then the transaction value method cannot be applied. In order to use this method, the transaction value must be capable of being determined at the time of importation. Since the amount of the

distribution fee is based on future import volumes, Simms Sigal argued that the transaction value cannot be determined at the time of importation. Therefore, Simms Sigal argued that the valuation should be remitted to the Commissioner for determination of value for duty in accordance with one of the other methods of determining value for duty.

The Commissioner argued that the fee paid pursuant to the Agreement should form part of the “price paid or payable” for the goods, since it is a payment that Simms Sigal makes “directly . . . in respect of the goods by the purchaser to or for the benefit of the vendor”. According to the Commissioner, the definition of “price paid or payable”, as contained in the *Act*, aims to ensure that all payments that a purchaser makes to or for the benefit of a vendor are included in the transaction value. Referring to *Memorandum D13-4-3*,³ the Commissioner argued that all payments that a purchaser makes to or for the benefit of a vendor are included in the transaction value, even when they are not included in the price shown on the commercial invoice or contract covering the imported goods.

The Commissioner argued that the services provided by Anne Klein were in furtherance of its own business. They were services already rendered, since they were being provided primarily in New York in relation to Anne Klein’s own retail customers, and did not entail additional costs incurred by Anne Klein with respect to Simms Sigal. Further, the distribution rights granted to Simms Sigal and the services to be provided pursuant to the Agreement were necessary to Anne Klein’s business in Canada. In the absence of the Agreement appointing Simms Sigal as Canadian distributor, Anne Klein would be required to provide the services portion directly to the retailers and recover its cost in the price of the goods when sold in Canada.

According to the Commissioner, Simms Sigal would not have been able to purchase the imported goods from Anne Klein in the absence of the Agreement and, hence, the payment of the fee is a condition of sale that is inseparable from the agreement to purchase the goods. The Commissioner argued that the services and rights under the Agreement enhanced Simms Sigal’s sales opportunities. If the distribution fee had not been made payable pursuant to the Agreement, the Commissioner alleges that the fee would have been included in the price paid or payable at the time of importation of the goods. The Commissioner relied on the Tribunal’s decision in Appeal Nos. AP-89-151 and AP-89-165,⁴ which the Commissioner asserts stands for the proposition that the payment of an “all-in fee” is a condition of the sale of the goods for export to Canada. In that case, the Tribunal found that, without an agreement and the corresponding obligation to pay a fee, Polygram Inc. would not have been able to purchase the imported goods.

In the alternative, the Commissioner argued that the distribution fee paid by Simms Sigal to Anne Klein constitutes proceeds of a subsequent resale of the goods and must therefore be added to the “price paid or payable” in accordance with subparagraph 48(5)(a)(v) of the *Act*. The Commissioner also argued that the part of the distribution fee pertaining to sketches and designs is dutiable in accordance with clause 48(5)(a)(iii)(D).

DECISION

Pursuant to section 46 of the *Act*, the value for duty of imported goods shall be determined in accordance with sections 47 to 55. Subsection 47(1) provides that the value for duty of goods shall be appraised on the basis of the transaction value in accordance with the conditions set out in section 48.

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3. Canada Customs and Revenue Agency, “Customs Valuation: Price Paid or Payable (Customs Act, Section 48)”, (17 April 2001).
 4. *Polygram Inc. v. Deputy M.N.R.* (7 May 1992) (CITT), [*Polygram*].

Subsection 48(4) states: “The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).” According to section 45, “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”.

In the Tribunal’s opinion, the distribution fee paid by Simms Sigal to Anne Klein in accordance with the Agreement does not form part of the transaction value, since it does not constitute a payment made in respect of the goods purchased by Simms Sigal. The Tribunal does not accept the proposition advanced by the Commissioner that all payments made by a purchaser to or for the benefit of a vendor are to be included in the transaction value. The definition of “price paid or payable” provided in the *Act* makes clear that only those payments made in respect of the goods are included. Although the expression “in respect of” is quite broad, the Tribunal is of the view that, given the context relating to the sale of goods for export, this does not cover the distribution fee paid to Anne Klein for exclusive distribution rights or services.

In the Tribunal’s opinion, the distribution fee is not a payment in respect of the goods, as it constitutes a payment for exclusive Canadian distribution rights and services, not a payment to purchase the goods. The rights and services provided under the Agreement have significant value in relation to Simms Sigal’s sales activities in Canada. In particular, the exclusive distribution rights provided Simms Sigal a significant advantage in its sales activities in Canada, since they allowed the standardization of prices and services and prevented prices from being undercut by weaker Canadian distributors. Similarly, the services provided to Simms Sigal by Anne Klein pursuant to the Agreement were very beneficial in supporting Simms Sigal’s ability to generate reasonable sales in Canada. The fact that some of the services provided by Anne Klein in accordance with the Agreement were provided outside Canada by the manufacturer of the goods does not change this situation.

The evidence did not support the Commissioner’s position that, in the absence of the Agreement, Anne Klein would need to recover the cost of the services in the price of the goods. The price of the goods was established separately from the cost of the services, as a percentage reduction from the price paid by retailers located in the United States. The percentage reduction from the sale price of the same goods to U.S. retailers permitted Simms Sigal to realize its profit margin. Simms Sigal provided credible evidence of the value of the exclusive distribution rights and the services that it was provided, and the Tribunal notes that Mr. Simms testified that Simms Sigal was very satisfied with the value received for the distribution fee under the Agreement. The evidence does not indicate that the distribution fee represented anything other than the value to Simms Sigal of the exclusive Canadian distribution rights and services.

The Tribunal is of the view that *Polygram* does not assist the Commissioner in this case. It is significant that, in *Polygram*, the Tribunal was considering whether the “all-in fee” was dutiable as a royalty according to subparagraph 48(5)(a)(iv) of the *Act* and that, consequently, the context of the Tribunal’s analysis is different from the present circumstances. In the present case, even if the payment of a distribution fee for the use of the Anne Klein trademark and trade name were to be considered a royalty or a licence fee, the Tribunal is not convinced that it was a condition of the sale of the goods for export to Canada as contemplated by subparagraph 48(5)(a)(iv).

With respect to the Commissioner’s argument that the distribution fee is dutiable according to subparagraph 48(5)(a)(v) of the *Act*, it is the Tribunal’s view that the distribution fee that Simms Sigal pays does not fall under this subparagraph, since it applies to the value of any part of the proceeds of any subsequent resale of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor. It is clear in this case that, while the distribution fee paid to Anne Klein is normally calculated on

the basis of sales volume, this does not mean that the vendor has a right to receive part of the proceeds of any resale as payment for the goods. This is clearly demonstrated by the fact that the fee can be and was withheld when Simms Sigal considered that Anne Klein failed to perform its obligations under the Agreement. As discussed above, the Tribunal is satisfied by the evidence put forward by Simms Sigal that the value of the services and exclusive distribution rights covered by the distribution fee is over and above the purchase value of the goods themselves. Consequently, the Tribunal is of the view that the distribution fee is separate from the price paid or payable in respect of the goods and is not to be added to the purchase price of those goods pursuant to subparagraph 48(5)(a)(v) of the *Act*.

The Commissioner made an additional argument that a part of the distribution fee is dutiable pursuant to clause 48(5)(a)(iii)(D) of the *Act*. However, the Tribunal notes that, pursuant to that clause, the value of certain goods and services, including sketches and designs, are dutiable insofar as they “are supplied, directly or indirectly, by the **purchaser** of the goods free of charge . . . in connection with the production and sale for export of the imported goods” [emphasis added]. The evidence indicates that Simms Sigal did not provide any sketches or designs free of charge or otherwise. Instead, Anne Klein provided sketches or designs to the factories and included their value in the price of the goods. Therefore, no part of the distribution fee is dutiable in accordance with this clause.

Therefore, the appeal is allowed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Ellen Fry
Ellen Fry
Member