Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-006

Clothes Line Apparel, Division of 2810221 Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, July 14, 2008

Canada

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IN THE MATTER OF an appeal heard on December 3, 2007, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated March 29, 2007, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

CLOTHES LINE APPAREL, DIVISION OF 2810221 CANADA INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Diane Vincent
Diane Vincent
Member

Audrey Chapman
Audrey Chapman
Acting Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 3, 2007
Tribunal Members:	Ellen Fry, Presiding Member James A. Ogilvy, Member Diane Vincent, Member
Counsel for the Tribunal:	Georges Bujold
Research Officer:	Gabrielle Nadeau
Assistant Registrar:	Gillian Burnett
Registrar Support Officer:	Paul Moses

PARTICIPANTS:

Appellant	**Counsel/Representative**
Clothes Line Apparel, Division of 2810221 Canada Inc.	Michael Kaylor
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Philippe Lacasse Yannick Landry

WITNESSES:

Joelle Berdugo Adler President & C.E.O. Diesel Canada Inc.	Gabriella Dobozy Finance Director Diesel Canada Inc.
Antonella Gaudio Director of Purchasing and Procurement Diesel U.S.A. Inc.	Djamel Bouhabel Senior Advisor, Trade Compliance Canada Border Services Agency

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. This is an appeal under subsection 67(1) of the *Customs Act*[1] from a decision made on March 29, 2007, by the President of the Canada Border Services Agency (CBSA), under subsection 60(4), concerning the value for duty of certain goods imported by Clothes Line Apparel, Division of 2810221 Canada Inc. (CLA) (the goods in issue) between January 1 and December 31, 2003 (the relevant period).

2. The goods in issue consist of various articles of men's and women's apparel and accessories. They include articles of denim clothing (e.g. jeans, jackets), shirts, sweaters and other items (e.g. hats, belts). They all bear the trade-mark "Diesel" or "Diesel for Successful Living".[2]

3. Under the *Act*, a value must be attributed to goods that are imported into Canada to determine duty. Subsection 47(1) stipulates that the primary basis for appraising the value for duty of goods is the transaction value of the goods. Section 48 adds that the transaction value is determined by ascertaining the price paid or payable for the goods (i.e. their pre-adjustment value) and making the adjustments required by the *Act*. The parties agree that the transaction value method of valuation should be used to appraise the value for duty of the goods in issue. This appeal relates exclusively to upward adjustments made by the CBSA to the price paid or payable for the goods in issue in determining their transaction value.

4. Specifically, the issue in this appeal is whether certain commissions and royalties paid by CLA to Diesel U.S.A. Inc. (Diesel U.S.A.), in connection with the importation of the goods in issue during the relevant period, should be added to their pre-adjustment value and, therefore, included in their value for duty, under subsection 48(5) of the *Act*, as determined by the CBSA.

5. CLA claims that the commissions were fees paid to its agent for the services of representing it abroad in respect of the sale of goods, which fees should not be added to the price paid or payable for the goods in issue, pursuant to subparagraph 48(5)(*a*)(i) of the *Act*. It also claims that the royalties should not be added to the price paid or payable for the goods in issue because they were not paid as a condition of the sale of the goods for export to Canada within the meaning of subparagraph 48(5)(*a*)(iv).

PROCEDURAL HISTORY

6. On November 8, 2004, the CBSA notified CLA that it would conduct a verification of the value for duty in respect of the goods in issue pursuant to the relevant provisions of the *Act*. The CBSA requested that CLA provide information and documents relating to its import transactions during the relevant period and informed CLA that authorized officers would visit its premises to perform an on-site verification.[3]

7. On March 16, 2005, the CBSA advised CLA of the results of the verification. The verification officer determined that the commissions and royalties paid by CLA to Diesel U.S.A. were dutiable as adjustments to be added to the price paid or payable for the goods in application of subparagraphs 48(5)(*a*)(i) and (iv) of the *Act*.

8. CLA subsequently appealed this decision through the CBSA's internal appeal process.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. In its submission, CLA refers to the "Diesel" brand of clothing and accessories. However, the trade-mark which is registered in Canada is "Diesel for Successful Living". See Respondent's Book of Documents, tab 4.
3. Respondent's Book of Documents, tab 2.

9. On March 29, 2007, the CBSA made its final determination under section 60(4) of the *Act*, confirming the results of the verification and finding that the commissions and royalties were adjustments to be added to the price paid or payable for the goods in issue and, thus, to be included in their value for duty, as required by section 48.[4]

10. On May 15, 2007, CLA appealed the CBSA's decision to the Tribunal.

11. The Tribunal held a public hearing in Ottawa, Ontario, on December 3, 2007.

12. In addition to the documentary evidence on the record, the Tribunal heard testimony from Ms. Joelle Berdugo Adler, President and CEO of Diesel Canada Inc.; Ms. Gabriella Dobozy, Finance Director of Diesel Canada Inc.;[5] Ms. Antonella Gaudio, Director of Purchasing and Procurement for Diesel U.S.A.; and Mr. Djamel Bouhabel, Senior Advisor, Trade Compliance, at the CBSA.

ANALYSIS

Law

13. Section 48 of the *Act* sets out the conditions for determining the value for duty of imported goods if the primary basis of valuation, that is, the transaction value, is used. The primary focus of this method is the value attached to goods in an export transaction by a vendor and a purchaser in Canada who are not related persons within the meaning of the *Act*. The main component of the transaction value is the selling price in the export transaction. However, in certain cases, the price may be adjusted upwards or downwards to account for certain charges that are contemplated by the *Act*.

14. In particular, subsection 48(4) of the *Act* provides that "[t]he 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)*" [emphasis added].

15. Subsection 48(5) of the *Act* includes two subparagraphs that are relevant in this appeal, namely, subparagraphs 48(5)(*a*)(i) and (iv). They read as follows:

> (5) The price paid or payable in the sale of goods for export to Canada shall be adjusted
>
> (*a*) *by adding thereto amounts*, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to
>
> (i) commissions and brokerage in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale,
>
> (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 condition of the sale of the goods for export to Canada*, exclusive of charges for the right to reproduce the goods in Canada.
>
> [Emphasis added]

4. *Ibid*., tab 1.
5. According to the information on the record, Ms. Berdugo Adler and Ms. Dobozy are also, respectively, President and Controller of CLA. See Tribunal Exhibit AP-2007-006-10.

16. Thus, pursuant to subparagraph 48(5)(*a*)(i) of the *Act*, commissions in respect of goods incurred by the purchaser of those goods must be added to the price paid or payable for the purposes of determining their value for duty. The exception to this general rule is that fees paid or payable by the purchaser to an agent for the service of representing the purchaser abroad in respect of the sale are *not* added to the price paid or payable. Fees paid for these services, known as buying agent services, are often referred to as buying commissions.

17. The fact that a purchaser claims that it retained the services of a buying agent by virtue of an agency agreement and refers to the remuneration of the purported agent as buying commissions is not determinative of a valid buying agency relationship. It is important to bear in mind that an agency relationship exists only where one person, called the agent, has the authority to affect the legal position of another person, called the principal, vis-à-vis third parties. In other words, an agency relationship exists only when such action on another's behalf affects the latter's rights against, and liabilities towards, other people. Whether such a relationship exists in any given situation depends not on the terminology used by the parties but on the exact circumstances of the relationship.[6] In accordance with these principles, a review of the Tribunal's jurisprudence pertaining to subparagraph 48(5)(*a*)(i) of the *Act* reveals that determining the existence of a bona fide principal-agent relationship requires a substantive analysis of the relationship between the parties with all the pertinent facts to be weighed as a whole. Typically, the Tribunal considers factors such as the degree of control exercised over the supposed agent, the functions performed by the latter, including whether it takes a proprietary interest in the imported goods, the manner in which suppliers are selected and prices are negotiated, and the terms for the financing and shipping of the merchandise.[7]

18. Concerning subparagraph 48(5)(*a*)(iv) of the *Act*, which provides for the addition of royalties to the price paid or payable for imported goods to the extent that they are paid ". . . as a condition of the sale of the goods for export to Canada . . .", in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*,[8] the Supreme Court of Canada provided clear guidance on the meaning of this requirement. In summary, the Supreme Court of Canada held that royalties are only to be added to the price paid or payable for imported goods if they are in respect of the goods, and if the failure by the purchaser to pay the royalties entitles the vendor to refuse to sell the licensed goods or to repudiate the contract for their sale. In *Reebok Canada v. Canada (Deputy Minister of National Revenue for Customs and Excise)*,[9] the Federal Court of Appeal added that, when the same person is both the vendor of the goods and the licensor of the trademark, it does not necessarily follow that the payment of royalties by the purchaser to that person is a condition of the sale of the goods for the purposes of subparagraph 48(5)(*a*)(iv). According to the Federal Court of Appeal, in order to apply subparagraph 48(5)(*a*)(iv) in such cases, it is necessary to consider whether the payment of the royalties under the royalty agreement between the licensor (who is also the vendor) and another person is also a condition of the sale of the goods under the contract of sale between the same parties.

19. In this appeal, it is not disputed that, during the relevant period, CLA paid commissions to Diesel U.S.A. in an amount equal to 20 or 25 percent of the purchase price of the goods in issue. The amount of the commission was 20 percent of the purchase price in the case of Diesel brand jeans imported by CLA, and 25 percent of the purchase price in the case of other Diesel brand articles of clothing and accessories imported by CLA. The parties also agree that amounts identified as trademark royalties representing 8 percent of the purchase price of the goods in issue were paid to Diesel U.S.A. by CLA.

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6. G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 11-12.
7. *Chaps-Ralph Lauren, Division of 131384 Canada Inc. v. Deputy M.N.R.* (1 November 1995), AP-94-190 and AP-94-191 (CITT); *Mexx Canada Inc. v. Deputy M.N.R.* (16 February 1995), AP-94-035, AP-94-042 and AP-94-165 (CITT); and *Radio Shack, A Division of InterTAN Canada Ltd. v. Deputy M.N.R.C.E.* (16 September 1993), AP-92-193 and AP-92-215 (CITT).
8. [2001] 2 S.C.R. 100 [*Mattel Canada*].
9. 2002 FCA 133 [*Reebok Canada*].

20. Taking into consideration the applicable legal framework, as outlined above, in order to assess whether such commissions and royalties are dutiable under the *Act*, it is important to understand the business relationships between CLA, Diesel U.S.A. and other parties involved in the transactions relating to the importation of the goods in issue. It is also necessary to identify the vendor of the goods.

21. The Tribunal will review the relevant facts, including the relevant business relationships and the sequence of events leading to the importation of the goods in issue. It will then determine whether, in light of all the pertinent facts, Diesel U.S.A. acted on behalf of CLA as a buying agent or whether Diesel U.S.A. was the vendor of the goods. This determination will allow the Tribunal to assess whether the commissions paid to Diesel U.S.A. by CLA were ". . . fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale . . . ." Finally, the Tribunal will examine whether the royalties were paid ". . . as a condition of the sale of the goods for export to Canada . . . ."

Relevant Business Relationships

22. CLA was a distributor of the Diesel line of products in the Canadian market during the relevant period. The Diesel line of products was created by Diesel SpA,[10] an Italian corporation which owns and controls the use of the Diesel trade-mark worldwide.[11] According to the evidence, Diesel SpA is an international design company which manufactures and coordinates the production of jeans and casual clothing sold in over 80 countries. While the production of denim jeans is based in Italy, most of Diesel SpA's production is outsourced to numerous factories located around the world. The evidence adduced by the CBSA indicates that ". . . [a]ll international logistics operations (wholesale and retail) are centrally managed and carefully controlled . . . ."[12]

23. Ms. Berdugo Adler testified that Diesel SpA is the company which created the products and gave CLA the tools for marketing and distributing the products.[13] She confirmed that Diesel was the only brand that CLA sold during the relevant period.[14] The Tribunal notes that, even at times when CLA was not part of the Diesel group of companies, CLA identified itself as "Diesel Canada" on certain internal documents and correspondence.[15]

24. According to CLA, it held the rights for the importation and sale of Diesel brand goods in Canada from a U.S.-based subsidiary of Diesel SpA, Diesel U.S.A., which itself held the rights to the use of the trade-mark and the distribution of Diesel clothing in North America under a licence granted by Diesel SpA. While there was no written agreement between CLA and Diesel U.S.A. in this regard, Ms. Berdugo Adler agreed with a statement in CLA's brief that Diesel U.S.A. granted CLA a sub-licence for the use of the Diesel trade-mark in the Canadian market. She also referred to this arrangement as a mere

10. In the documents submitted to the Tribunal, the name of the company also appears interchangeably as "Diesel SPA" and "Diesel S.p.a."
11. *Transcript of Public Hearing*, 3 December 2007, at 63-64.
12. Respondent's Book of Documents, tab 3.
13. *Transcript of Public Hearing*, 3 December 2007, at 10-11.
14. *Ibid*. at 87.
15. *Ibid*. at 158-59; Appellant's Book of Documents, tab 6. The relationship between CLA and Diesel SpA changed in 2006 when a stake of 70 percent of CLA's shares was purchased by Diesel SpA or one of its affiliates. Ms. Berdugo Adler's testimony (*Transcript of Public Hearing*, 3 December 2007, at 58) is that "Diesel" purchased a majority stake in CLA. She did not specify whether the purchaser was Diesel SpA, Diesel U.S.A. or another company owned or controlled by Diesel SpA. As a result, it appears that CLA is now doing business under the name Diesel Canada Inc. and is a related juridical person to either Diesel SpA or Diesel U.S.A.

"understanding".[16] However, the representative of Diesel U.S.A. who testified at the hearing, Ms. Gaudio, was not aware of the existence of a sub-licence between Diesel U.S.A. and CLA. She suggested that Diesel U.S.A.'s licence agreement with Diesel SpA covered only the United States (not the entire North American market) and that CLA's right to use the trade-mark in Canada resulted from a licence granted by Diesel SpA directly to CLA.[17] Thus, there is contradictory evidence on how CLA acquired the rights to use the Diesel brand on imported merchandise.

25. The relationship between CLA and the Diesel group of companies started in 1987. While no written agreement governed this relationship during the relevant period, a "buying agreement" between CLA and Diesel U.S.A., which was in force between July 1, 1995, and May 31, 1996, was filed in evidence. Under the terms of the agreement, CLA appointed Diesel U.S.A. to purchase products on its behalf from various manufacturers and agreed to pay ". . . a commission equal to ten (10%) percent of the net amount of each invoice solicited by [Diesel U.S.A.] on behalf of [CLA] . . . ."[18]

26. According to Ms. Berdugo Adler, the terms of the unwritten agreement that was in place during the relevant period were very similar to the terms of the expired "Buying Agreement". She indicated that the only change between the expired "buying agreement" and the arrangement that was in place during the relevant period was the amount of commission payable in 2003, which increased to 20 or 25 percent depending on the goods purchased.[19]

27. Ms. Berdugo Adler summarized the nature of the relationship, as it existed during the relevant period, in the following manner: (1) periodically, CLA was presented with Diesel SpA's vast collection and seasonal product lines; (2) CLA decided which products, within Diesel SpA's collection, it was going to market and sell in the Canadian market; (3) once CLA had sold its selected Diesel products to its customers (i.e. retailers), it sent a purchase order to Diesel U.S.A. for certain product lines (or, to use Ms. Berdugo Adler's words, CLA "placed production" through Diesel U.S.A.); (4) once Diesel U.S.A. had received CLA's orders, it sent them to Diesel SpA and arrangements for the production of the goods were made at that point; and (5) Diesel U.S.A. oversaw the production of the goods on CLA's behalf. [20]

28. According to Ms. Berdugo Adler, Diesel U.S.A.'s role was that of a facilitator responsible for putting certain goods into production for CLA. However, her testimony on the specific functions performed by Diesel U.S.A. was vague. She indicated that Diesel U.S.A. negotiated certain issues with the manufacturers of the goods and visited the factories on CLA's behalf, but admitted that she did not know the intricacies of what Diesel U.S.A. actually did.[21]

29. On this issue, Ms. Gaudio added certain details. The crux of her testimony was as follows:

> . . . Diesel U.S.A currently purchases all of the Diesel goods from the factories directly. And we already had all of our administrative systems, all of our computer systems, payment terms, everything already setup with the manufacturers. So Diesel U.S.A acted as an agent in the sense that [CLA] used Diesel U.S.A to piggyback their order onto ours and we would collect them and then pass them onto Diesel SpA and the appropriate manufacturers of the items.
>
> . . .

16. *Transcript of Public Hearing*, 3 December 2007, at 63, 80-81.
17. *Ibid*. at 132-34.
18. Appellant's Book of Documents, tab 1 (see sections 1 and 4).
19. *Transcript of Public Hearing*, 3 December 2007, at 39, 93.
20. *Ibid*. at 12-20.
21. *Ibid*. at 43-45, 89.

> We gathered all of [CLA's] production orders and entered the [purchase orders] for each manufacturer. Again, Diesel produces so many different items that it is a very heavy workload. Most of it was done . . . manually. We enter the purchase orders, we give the purchase orders to the suppliers, we follow deliveries, that they are on time, we follow any requests for discounts or any . . . price requests or anything filters through Diesel U.S.A to . . . the manufacturers or Diesel SpA.
>
> . . .
>
> In other words, I had to make sure that . . . whatever Canada wanted or asked for, I had to make sure that Diesel U.S.A. represented them . . . to the necessary party, probably being Diesel SpA.[22]

30. Ms. Gaudio also alluded to the fact that Diesel U.S.A. negotiated prices for CLA. In response to the Tribunal's questions, she clarified that Diesel SpA was always kept "in the loop" during those negotiations. Based on her testimony, it appears that, ultimately, Diesel SpA was the party that determined the best final price at which an item could be sold to either Diesel U.S.A. or CLA. This was because Diesel SpA had more negotiating power with the factories than did Diesel U.S.A. or CLA. According to Ms. Gaudio, both Diesel U.S.A. and CLA had the ability to decide that they would not purchase and resell a particular item if the best price available was not acceptable to them.[23]

31. Over 100 factories throughout the world were used to manufacture the goods ordered through Diesel U.S.A. by CLA. While Ms. Gaudio testified that all those factories were independent manufacturers that were not related to Diesel SpA,[24] on some of the invoices filed in evidence, Diesel SpA or Diesel Service SpA is identified as the original supplier of the goods.[25] Moreover, the evidence indicates that, while CLA or Diesel U.S.A. had the ability to propose certain suppliers to Diesel SpA, it was Diesel SpA that had the final word on the selection of the manufacturers.[26] Diesel SpA also determined whether a proposed product had the appropriate characteristics in terms of quality and style to be part of the collection and sold in Canada under the Diesel brand. Any proposal by CLA in this regard had to be approved by Diesel SpA.[27]

32. Ms. Berdugo Adler also testified that CLA was not bound to use the services of Diesel U.S.A. and also ordered certain goods carrying the Diesel brand (e.g. fragrances, watches, sunglasses) directly from other sources. However, she acknowledged in cross-examination that at least 80 percent of CLA's purchases were made through Diesel U.S.A. during the relevant period.[28]

Examination of Transactions

33. According to the witnesses for CLA, once the goods ordered through Diesel U.S.A. by CLA were manufactured, they were always shipped directly from the foreign factories to Canada.[29] This assertion is corroborated by the documentary evidence on the record pertaining to most transactions, as it clearly identifies CLA as the consignee. However, the Tribunal notes that the witness for the CBSA, who conducted the customs verification, testified that, in some instances, the goods were delivered in the

22. *Ibid*. at 107, 109, 118.
23. *Ibid*. at 128-31.
24. *Ibid*. at 110, 123.
25. Appellant's Book of Documents, tab 3; Respondent's Book of Documents, tab 6.
26. *Transcript of Public Hearing*, 3 December 2007, at 72-73, 119-20, 124-25.
27. *Ibid*. at 75-76, 104-105.
28. *Ibid*. at 70-71. It should be noted that this appeal relates exclusively to goods purchased and imported by CLA through Diesel U.S.A. during the relevant period.
29. *Transcript of Public Hearing*, 3 December 2007, at 18, 32-33, 37, 52-54.

United States.[30] In addition, on two invoices filed in evidence, Diesel U.S.A. is identified as the consignee.[31] According to the evidence, however, it was CLA, not Diesel U.S.A., which made the arrangements for the transportation of the goods from the foreign factories to CLA's place of business in Montréal, Quebec.[32]

34. Ms. Berdugo Adler testified that CLA owned the goods from the moment they left the foreign factories en route to Canada.[33] Ms. Dobozy added that CLA ensured that the goods cleared Canadian customs, and Ms. Gaudio confirmed that Diesel U.S.A. never dealt with CLA's customs broker, i.e. Milgram & Company Ltd. (Milgram).[34]

35. The witnesses for CLA also testified that the insurance policy which covered the goods while in transit to Canada belonged to CLA. The Tribunal notes however that the "List of Named Insured" on the memorandum of insurance filed in evidence includes both Diesel U.S.A. and Diesel SpA. At the hearing, other than suggesting that the names of the Diesel companies might have been added because the insurance policy included coverage for product liability, the witnesses for CLA could not provide a clear explanation for this situation. As further discussed below, the witnesses for CLA could not explain clearly why Diesel U.S.A. and Diesel SpA required this coverage, even though, in their view, these two companies never had title to the goods and CLA bore all risk after the goods left the factory. Ms. Berdugo Adler also acknowledged that she was not very knowledgeable of the insurance policy.[35]

36. With respect to the arrangements for the invoicing and the payments of the goods, the evidence indicates that the manufacturers of the goods issued an invoice to Diesel U.S.A. for an amount equal to their selling price and that, in turn, Diesel U.S.A. issued a separate invoice to CLA for the same base amount, plus royalties. The Tribunal notes that the invoices from the manufacturers to Diesel U.S.A. suggest that the latter, not CLA, is the purchaser of the goods from the manufacturers. On most of these invoices, CLA is merely referred to as the consignee. The Tribunal notes that the term within which Diesel U.S.A. had to pay the manufacturers varied depending on the invoice. On most invoices, it is either 60 or 90 days.

37. As for the corresponding invoices issued by Diesel U.S.A. and provided to CLA,[36] their subtotal is always the same as the total amount due that is shown on the original invoice issued by the manufacturers to Diesel U.S.A. However, they also indicate that a royalty equal to 8 percent of the subtotal is payable in addition to the original amount. CLA was also afforded a shorter payment term than was Diesel U.S.A., i.e. 55 days in all cases.[37] Accordingly, Diesel U.S.A. generally had between 5 and 35 days to pay the factory after CLA was required to pay Diesel U.S.A.

38. The Tribunal further notes that, on all customs documents filed in evidence by the parties (i.e. Canada Customs Invoices, B3 Forms), Diesel U.S.A. is identified as the vendor of the goods. Similarly, many CLA internal documents on the record, such as its "receiving slips", on which the delivery of the goods that were ordered is registered, explicitly refer to Diesel U.S.A. as the vendor of the goods.[38] On this issue, the witness for the CBSA testified that, during his verification, he noticed that, based on the documents that he examined in CLA's internal books and all other documents to which it had access, Diesel U.S.A. was always described as the vendor of the goods.[39]

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30. *Ibid*. at 165, 172, 207-208.
31. Respondent's Book of Documents, tab 6 (Invoice Nos. 664 and 697 from Uniforms Program SpA).
32. *Transcript of Public Hearing*, 3 December 2007, at 17-19, 78-79.
33. *Ibid*. at 57, 99, 103.
34. *Ibid*. at 33, 139-40.
35. Appellant's Book of Documents, tab 2; *Transcript of Public Hearing*, 3 December 2007, at 95-99, 140-41.
36. The witnesses for CLA stated that CLA also received a copy of the invoice issued to Diesel U.S.A. by the factories.
37. Respondent's Book of Documents, tab 6.
38. *Ibid*.
39. *Transcript of Public Hearing*, 3 December 2007, at 163, 166-67, 180-81, 208.

39. The invoices from Diesel U.S.A. direct CLA to "make all checks payable to Diesel U.S.A., Inc.". The evidence indicates that CLA did in fact pay Diesel U.S.A. for the goods, including royalties, within the 55-day time frame for payment.[40] According to Ms. Gaudio, once Diesel U.S.A. had received payments from CLA for the goods sold and invoiced, it would transfer the separately identified royalties to Diesel SpA and pay the amounts received for the actual purchase prices of the goods to the original suppliers.[41] The Tribunal notes that there is no documentary evidence on the record regarding the timing of such payments by Diesel U.S.A. to either Diesel SpA or the suppliers that provides confirmation that Diesel U.S.A. actually remitted the money that it received from CLA to the actual manufacturers or to Diesel SpA in the case of royalties.

40. With respect to the payments of commission, there is evidence indicating that they were not made at the same time as the payments for the goods and the royalties. The witnesses for CLA stated that commissions were invoiced to CLA separately, on a monthly basis, by Diesel U.S.A.[42] The documentary evidence filed by CLA supports this statement, as it indicates that invoices for commissions were for an amount representing 20 or 25 percent of the total purchases made by CLA in a given month.[43] However, the witness for the CBSA contradicted the witnesses for CLA in this regard and stated that, in certain instances, the commissions and the actual goods were invoiced by Diesel U.S.A. at the same time on a single invoice. In this connection, the CBSA filed in evidence an invoice on which the total amount due includes both the cost of the goods purchased by CLA and a commission equal to 25 percent of that cost.[44] Finally, according to the evidence, the invoices for the commissions and the invoices for the actual goods were denominated in the same currency, in U.S. dollars or euros, depending on the invoice, and CLA paid Diesel U.S.A. in U.S. dollars or euros, as required.[45]

Who Was the Vendor of the Goods?

41. CLA argued that the oral evidence provided by its witnesses demonstrates the existence of a vendor-purchaser relationship between CLA and the manufacturers of the goods. It submitted that the vendors of the goods to CLA are the actual factories which manufactured the goods, since purchase orders were merely channelled through Diesel U.S.A. for the sake of administrative convenience, given that Diesel U.S.A. also acted as a purchaser and importer of similar goods destined for the U.S. market. In CLA's view, each time that it decided to purchase merchandise, it entered into a new contract of sale with the manufacturers of the goods. CLA's argument implies that the sale for export was a sale by the factory to CLA.

42. As a result, CLA's position is that Diesel U.S.A. was merely its buying agent, by virtue of an unwritten agreement. The witnesses for CLA were of the view that this unwritten agreement was very similar to the "buying agreement" that expired in May 1996, that is, seven years before the importations in issue, differing primarily in the amount of commission payable. Relying on the testimony of its witnesses, CLA argued that Diesel U.S.A. did not buy and resell the goods in issue, but rather simply acted as a

40. *Ibid*. at 30-31, 113, 128; Respondent's Book of Documents, tab 6.
41. *Transcript of Public Hearing*, 3 December 2007, at 111-12, 134.
42. *Ibid*. at 138-39. See also Appellant's Book of Documents, tab 3.
43. Appellant's Book of Documents, tab 3. See Invoice No. 416592 from Diesel U.S.A. to CLA dated August 1, 2003, in the amount of US$112,640.45 representing commissions due on CLA's purchases for the month of July 2003. The sum of US$112,640.45 is equal to 25 percent of a total of US$450,561.79 invoiced by Diesel U.S.A. for CLA's total purchases in July 2003.
44. *Transcript of Public Hearing*, 3 December 2007, at 177-78; Respondent's Book of Documents, tab 7 (Invoice No. CA 2003335, dated October 21, 2003).
45. *Transcript of Public Hearing*, 3 December 2007, at 90-93, 137-39.

"facilitator", in that (1) it merely passed on the cost of the goods to CLA; (2) it did not take a proprietary interest in the goods, since CLA bore all the risks regarding the goods once they left the factories; and (3) it performed all the functions that are traditionally those of buying agents (e.g. placing orders, following up on the orders, negotiating on behalf of CLA, paying the manufacturers with money received in advance from CLA). CLA also argued that the fact that it arranged for the transportation of the goods and received a copy of the original invoices from the manufacturers supported the existence of a true principal-agent relationship.

43. The CBSA argued that Diesel U.S.A. purchased the imported goods, paid for them and, consequently, assumed the responsibility that a purchaser would normally assume before reselling them to CLA. The CBSA submitted that there were two sale contracts, the first between Diesel U.S.A. and the manufacturers, and the second between Diesel U.S.A. and CLA. It argued that the vendor of the goods to CLA was Diesel U.S.A. because the evidence demonstrated that Diesel U.S.A. took a proprietary interest in the goods and then sold them to CLA. In the CBSA's view, the sale for export was therefore the sale from Diesel U.S.A. to CLA.

44. In support of this argument, the CBSA referred to (1) the customs documentation, the commercial invoices and CLA's internal documents, which clearly identify Diesel U.S.A. as the vendor of the goods; (2) the testimony of its auditor, Mr. Bouhabel, who explained the basis for his findings, during the course of his customs audit, that Diesel U.S.A. took title to the goods and was not a bona fide buying agent; and (3) the fact that Diesel U.S.A. is known as and describes itself as a wholesaler, not as a buying agent. In response to CLA's argument that Diesel U.S.A. performed the functions of a typical buying agent, the CBSA submitted that, in view of the evidence presented, important decisions relating to the purchase of the goods were not made by CLA and that Diesel U.S.A. was managing the interests of Diesel SpA at the same time as it was allegedly managing the interests of CLA. In this regard, it submitted that CLA did not control, in any way, Diesel U.S.A., as all production processes, suppliers' contacts and distribution logistics were managed by Diesel SpA. According to the CBSA, the only decisions that CLA could make were with regard to the selection of items from possible choices. It had to accept decisions of Diesel SpA on the sources, prices, design and style of the goods. In such circumstances, the CBSA maintained that Diesel U.S.A. did not act as an agent on behalf of CLA.

45. Having considered the parties' arguments and weighed all the evidence before it, the Tribunal concludes that Diesel U.S.A. was the vendor of the goods in issue and that the sales for export were sales from Diesel U.S.A. to CLA.

46. First, the Tribunal made a comparison between the expired "Buying Agreement" and the business arrangements in effect during the relevant period, as per the testimony and the documentary evidence on the record. The Tribunal is of the view that the witnesses for CLA are incorrect in considering the expired "Buying Agreement" to be a good indication of the agreement that was in force in 2003. The Tribunal notes that the arrangements in place in 2003 were significantly different from the terms of the expired "Buying Agreement". These terms that did not apply during the relevant period include the following:

- Section 2(c), according to which Diesel U.S.A., under no circumstances, was to have any obligation with respect to the payment of invoices. In contrast, the evidence indicates that, during the relevant period, it was Diesel U.S.A. that paid all invoices issued by the manufacturers and that CLA only paid for the goods once invoiced by Diesel U.S.A. There is no evidence that CLA had any obligation with respect to the payment of the invoices issued by the manufacturers and that the latter expected payments from CLA. In fact, Ms. Gaudio's testimony suggests that the manufacturers viewed Diesel U.S.A. as their purchaser. It is thus reasonable to conclude that Diesel U.S.A. had obligations with respect to the payment of such invoices.

- Section 2(d), according to which Diesel U.S.A. was to assist in arranging for shipment of the goods. In contrast, the evidence indicates that, during the relevant period, Diesel U.S.A. was not involved in any aspects relating to the shipment of the goods. Ms. Gaudio confirmed that Diesel U.S.A. never dealt with freight forwarders.[46]
- Section 2(e), according to which Diesel U.S.A. was to assist CLA in arranging for payment of the goods and incidental charges relating to the shipment of the goods. As discussed above, during the relevant period, Diesel U.S.A. had nothing to do with the shipment of the goods and CLA did not make any arrangements for the payment of the goods to the manufacturers. Consequently, Diesel U.S.A. did not "assist" CLA in respect of such arrangements.
- Section 4, according to which the commission of 10 percent was to be paid in U.S. dollars at the time that the importer (CLA) made payment with respect to each invoice. In contrast, during the relevant period, the evidence demonstrates that the payments of the commission could be either in U.S. dollars or in euros and were generally not made at the time that CLA made its payments for the substantive cost of the goods. As discussed above, the witnesses for CLA and the documentary evidence filed by CLA indicated that commissions were invoiced separately by Diesel U.S.A. at a subsequent date.

47. Moreover, the Tribunal notes that section 6 of the expired "buying agreement" included the following provision: ". . . nothing contained in this Agreement shall be construed to . . . allow either party to create any obligations on behalf of the other." This provision is inconsistent with CLA's argument that there was a principal-agent relationship between CLA and Diesel U.S.A. It is well established that an 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 by, *inter alia*, the making of contracts.[47]

48. Ms. Berdugo Adler stated that she did not "believe" that this provision represented the "spirit of [CLA's] agreement" with Diesel U.S.A. and that, in the transactions at issue, Diesel U.S.A. created an obligation on behalf of CLA.[48] Ms. Gaudio also disagreed that this provision described the relationship between the parties as it existed during the relevant period and stated that Diesel U.S.A. had an obligation to act as an agent for CLA.[49]

49. The Tribunal considers that the witnesses for CLA did not appear to be highly knowledgeable about the legal structure of their day-to-day business relationship. As discussed above, their testimony on the particulars of the agreement that was in place during the relevant period was unclear and, in certain respects, inconsistent with other evidence. In the Tribunal's opinion, these considerations undermine the credibility and, hence, the probative value of their testimony on the existence of a principal-agent relationship between Diesel U.S.A. and CLA.

50. Given the absence of a written agreement, the Tribunal needed to base its decision on other types of evidence of CLA's business relationships. The Tribunal notes that there are two different sets of invoices: one from manufacturers to Diesel U.S.A. as the buyer; and one from Diesel U.S.A. to CLA where royalties are included as part of the total due on the invoice. The payments from CLA to Diesel U.S.A. proceed from the total of Diesel U.S.A.'s invoice to CLA. This structure is consistent with a relationship where Diesel

46. *Ibid*. at 140.
47. *R. v. Kelly*, [1992] 2 S.C.R. 170 at 183.
48. *Transcript of Public Hearing*, 3 December 2007, at 77-79, 103.
49. *Ibid*. at 112-13.

U.S.A. took title to the goods before selling them to CLA. The Tribunal is of the view that if there were an agency relationship, the transactions could have been structured much more simply, with a single invoice, from the factory to CLA, with CLA paying the factory directly. The fact that Diesel U.S.A. re-invoiced CLA suggests that it was not acting as a buying agent but was, rather, the vendor of the goods.

51. The Tribunal also observes that Diesel U.S.A. did more than simply re-invoice CLA for the purchase price of the goods. The evidence clearly indicates that CLA's payments to Diesel U.S.A. were always due in 55 days, but the invoices on the record show that Diesel U.S.A. had additional time to pay the factory, which was sometimes significant, e.g. 90 days. Thus, the two sets of invoices had different payment terms. The Tribunal is of the view that this confirms that there were two sale contracts, each involving different parties and having different terms and conditions.

52. If a bona fide principal-agent relationship between CLA and Diesel U.S.A. had existed, CLA would have benefited from the longer payment terms because, in such a legal relationship, there would have been only one sale contract between CLA (through Diesel U.S.A. as its agent) and the manufacturers. In an agency relationship, the agent acts for the account of the principal and has the authority to bind the principal vis-à-vis third parties. It necessarily follows that *all* the terms of the contracts negotiated by the agent with third parties on behalf of the principal are binding on the principal. In this hypothetical scenario, CLA would be the purchaser and have all the rights and incur all the obligations agreed upon in the contract between its agent and the vendor. In the Tribunal's opinion, this means that, if Diesel U.S.A. truly created obligations affecting CLA's legal position in its transactions with the manufacturers, the rights or privileges that it obtained from manufacturers in such transactions should have been those of CLA. The fact that it was not the case supports the Tribunal's view that Diesel U.S.A. acted on its own account and was not acting as a buying agent on CLA's behalf, but was, rather, the purchaser of the goods from the manufacturers, and the vendor of the goods to CLA.

53. On this issue, the Tribunal also notes that the evidence does not indicate that Diesel U.S.A. credited CLA with the interest or financial benefits that it potentially earned on CLA's payments during the period after CLA paid Diesel U.S.A. but before Diesel U.S.A. was required to pay the manufacturers. Although it is true that Diesel U.S.A. passed on the cost of the goods to CLA without any additional amount referred to by the parties as a markup, Diesel U.S.A. still received an additional 20 or 25 percent of the price paid through commission charges according to the documentary evidence on the record. Accordingly, there was ample scope for Diesel U.S.A., as seller of the goods, to make a profit on the sale, even though the parties did not refer to this profit as a markup per se.

54. The Tribunal further notes that most of the invoices, whether from the manufacturer or otherwise, show Diesel U.S.A. as the purchaser from the factory and/or the seller to CLA. CLA is merely shown as the consignee (i.e. the "ship to" address) on most of the documents. As well, the expression "Canada was the consignee" was used by the representative of Diesel U.S.A. during the course of the hearing.[50] A number of documents refer to both Diesel U.S.A. and CLA, making a clear distinction between their roles.

55. It is true that the fact that CLA made the freight arrangements and dealt with the customs broker, if viewed in isolation, could be interpreted as an indication that CLA purchased the goods from the manufacturers. However, the documents in evidence concerning shipping and importation indicate that Diesel U.S.A. is the vendor and that CLA is merely the consignee. The witnesses for CLA testified that the information on the customs invoices and the transaction records issued by the Department of Foreign

50. *Ibid*. at 128, 135.

Affairs and International Trade was provided by Milgram, the customs broker.[51] The witnesses for CLA also testified that only CLA (not Diesel U.S.A.) dealt with Milgram. Therefore, it is reasonable to conclude that the reason that Milgram identified Diesel U.S.A. as the vendor to CLA on these documents is because this information was provided to Milgram by CLA.

56. Moreover, CLA's insurance policy designates Diesel U.S.A. as an insured party. This suggests that Diesel U.S.A. had an insurable interest in the goods and bore some of the risk concerning the goods if they were damaged, lost, etc. Neither the representatives of CLA nor the representative of Diesel U.S.A. who testified at the hearing were sure of why this was the case, but the former offered as a possible explanation that the name of Diesel U.S.A. was included because the policy covered product liability claims. The Tribunal fails to understand why this coverage would be required if Diesel U.S.A. never took title to the goods and CLA bore all risk after the goods left the factories, as indicated by the witnesses for CLA. In view of the foregoing, the Tribunal considers that the insurance policy casts further doubts on the statements of the witnesses for CLA that CLA was the owner of the goods once they left the factories.

57. CLA also argued that, in past cases, the Tribunal has found a buying commission to be a non-dutiable legitimate commission in situations where the importer, as the principal in the transaction, has a fair amount of independence and flexibility and that, in the context of this appeal, CLA has demonstrated sufficient indicia of independence and control over the activities of Diesel U.S.A. The Tribunal is unable to accept this argument. In the Tribunal's opinion, on balance, the evidence presented shows otherwise. As discussed previously in the outline of the relevant business relationships and transactions, key decisions relating to the purchase of the goods were not in the hands of CLA. For example, CLA did not have the final word on the choice of manufacturers, the type and quality of merchandise or the price to be paid. Diesel SpA had the ultimate control over such issues. Also, the fact that Diesel U.S.A. secured more advantageous payment terms vis-à-vis the manufacturers than the payment terms afforded to CLA by Diesel U.S.A. is fundamentally inconsistent with the view that CLA exercised significant control over Diesel U.S.A.

58. Accordingly, in the Tribunal's view, the testimony of the witnesses for CLA that Diesel U.S.A. was only a buying agent is not credible in view of the other evidence discussed above. Notwithstanding CLA's contention that Diesel U.S.A. provided buying agent services and its characterization of the relationship as a principal-agent relationship, the Tribunal finds that, on the facts of this appeal, their relationship is a vendor-purchaser relationship.

Should the Commissions Be Added to the Price Paid or Payable?

59. For the reasons discussed above, the Tribunal concludes that Diesel U.S.A. took title to the goods and sold them to CLA. Therefore, Diesel U.S.A., by definition, cannot be CLA's buying agent and the commissions cannot be ". . . fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale . . . ." Accordingly, the Tribunal concludes that, pursuant to subparagraph 48(5)(*a*)(i) of the *Act*, the commissions shall be added to the price paid or payable for the goods, as was determined by the CBSA.

Should the Royalties Be Added to the Price Paid or Payable?

60. CLA emphasized that the royalties that it paid to Diesel U.S.A. were remitted by Diesel U.S.A. to Diesel SpA. In line with its argument that the vendor of the goods is, in each case, the factory which manufactured the goods, CLA argued that the manufacturers have no interest in the payment of the royalties

51. *Ibid*. at 100.

because the manufacturers of the garments do not hold the licence rights for the use of the Diesel brand. CLA submitted that the manufacturers of the goods have no right to demand the payment of royalties before delivering the goods to CLA because they are not party to the licence arrangement. The licence rights are owned by Diesel SpA, and the arrangement is strictly between CLA and Diesel SpA. For these reasons and relying on the interpretation of subparagraph 48(5)(*a*)(iv) of the *Act* by the Supreme Court of Canada in *Mattel Canada* and by the Federal Court of Appeal in *Reebok Canada*, CLA contended that the royalties paid by CLA to Diesel U.S.A. were not paid as a condition of the sale of the goods for export to Canada.

61. The CBSA argued that the amounts of the royalties were identified on most commercial invoices provided by CLA during the customs audit. It submitted that such royalties were related to the imported goods, as CLA could not purchase Diesel brand goods without paying the royalties. In this regard, it further submitted that, based on the commercial documents, it was apparent that CLA was not able to purchase the goods without paying the royalties, as the cost for the goods and the royalties were calculated on the same invoice and added. In the CBSA's view, CLA was required to pay the total of the invoice, and the royalties were therefore a condition of the sale of the goods for export to Canada.

62. Based on the wording of subparagraph 48(5)(*a*)(iv) of the *Act* and the decision of the Supreme Court of Canada in *Mattel Canada*, in order for the Tribunal to conclude that the royalties are dutiable, the following three conditions must be met: (1) the payments must in fact be royalties or licence fees; (2) the payments must be in respect of the imported goods; and (3) the payments must be made by the purchaser as a condition of the sale of the goods for export to Canada. In this appeal, it is not disputed that the payments in question are royalties. The parties have not made detailed submissions with respect to the second condition and appear to agree that the royalties paid by CLA to Diesel U.S.A. are "in respect of" the imported goods. In any event, in view of the fact that the payments are calculated as a percentage of the price at which the goods are sold to CLA, the Tribunal considers that it cannot be seriously disputed that the royalties are "in respect of" the imported goods. However, the parties held different views on the issue of whether the royalties were paid as a condition of the sale of the goods for export to Canada.

63. As indicated above, the Tribunal concludes that Diesel U.S.A. owned the goods before it sold them to CLA. Thus, CLA's argument that the royalties were not paid as a condition of the sale, which is premised on its view that the manufacturer, not Diesel U.S.A., was the vendor of the goods in each individual transaction, is inapposite. The issue is not whether the manufacturers have an interest in the royalties or what would have happened to specific shipments had CLA failed to pay the royalties, it is whether the payment of the royalties was a condition of the sale of the goods by Diesel U.S.A. to CLA.

64. According to the witnesses for CLA, there was no written agreement on royalties, although CLA argued in its brief that there was a sub-licence agreement between Diesel U.S.A. and CLA. During the course of its audit, the CBSA also requested copies of any royalty agreements in existence during the relevant period, but received none. In the absence of any written agreement, the Tribunal can only consider other types of evidence to determine whether the royalties were a condition of sale. This distinguishes this appeal from the situations that were at issue in both *Mattel Canada* and *Reebok Canada*.

65. Based on Ms. Berdugo Adler's testimony, the Tribunal is the view that Diesel U.S.A. held, under licence, the North American rights to the Diesel trade-mark for the goods in issue and agreed to permit CLA to use the trade-mark for purposes of its sales in Canada (although there was no written agreement in this regard). While Ms. Gaudio testified that, in her opinion, Diesel U.S.A.'s rights were limited to the U.S. market and that it was Diesel SpA that licensed the rights to Canada because there was "not really a sub-licence" from Diesel U.S.A., the Tribunal considers that this testimony is not credible due to her apparent lack of personal knowledge on these legal matters. The Tribunal is of the view that her testimony

on this issue is in the nature of the expression of an opinion as opposed to a statement of actual facts. Other than Ms. Gaudio's statements, there is no evidence demonstrating that CLA dealt with Diesel SpA (and not Diesel U.S.A.) regarding intellectual property issues. Thus, the Tribunal is unable to find that CLA had an agreement with Diesel SpA regarding royalties. However, the Tribunal accepts the testimony indicating that the business relationship between CLA and Diesel U.S.A. did not permit Diesel U.S.A. to sell Diesel brand goods in Canada.[52]

66. In order to make its determination on the issue of whether the royalties were dutiable, the Tribunal carefully examined the circumstances surrounding such payments and finds that the payment of the royalties was an integral part of the business arrangements between Diesel U.S.A. and CLA. In particular, (1) the royalties were billed to CLA on the same invoices from Diesel U.S.A. as the cost of the goods themselves; (2) all the invoices filed in evidence, which refer to Diesel brand goods, included royalties, with the exception of invoices from Diesel SpA for advertising purposes and promotional material; (3) there was a significant amount of documentary evidence to confirm the payment of royalties and, as well, that the royalty payments were part of the same financial transactions as the payment of the goods bought from Diesel U.S.A.;[53] and (4) it was clear from the testimony that it was routine to pay the royalties. According to Ms. Gaudio, CLA had never missed a royalty payment. The parties could not contemplate circumstances in which the royalties were not paid.

67. The Tribunal also considered the evidence on the nature of the business relationship between the parties. Given the fact that Diesel U.S.A. owned the goods and held, under licence, the intellectual property rights for the North American market and had agreed not to sell in Canada, in the Tribunal's view, it would not have been commercially reasonable for Diesel U.S.A. to sell goods to CLA unless the payment of the royalties was a condition of sale. The evidence on invoicing and payment of royalties supports this conclusion.

68. As submitted by the CBSA, the Tribunal notes that, in the absence of a written contract governing the payment of royalties (unlike the situation in *Mattel Canada* and *Reebok*), it is necessary to examine the terms of commercial invoices to assess whether the payment of a royalty is a condition of sale. In this case, the invoices between Diesel U.S.A. and CLA identify amounts of royalties equal to 8 percent of the invoiced cost for the goods themselves as charges to be paid by CLA. Since these amounts were included on most of the invoices filed in evidence and, in the absence of persuasive evidence that the terms of the invoices did not reflect the conditions of the sale between Diesel U.S.A. and CLA, the Tribunal finds that the royalties paid were a condition of sale of the goods for export to Canada. The Tribunal is of the view that without paying these amounts which were part of the "Total Due" on the invoice, CLA could not have purchased the goods from Diesel U.S.A. The Tribunal accepts the CBSA's argument that, in order to purchase the goods, it was not sufficient for CLA to pay the subtotal of the invoices.

69. The Tribunal also notes that, in *Reebok Canada*, the Federal Court of Appeal concluded that the payment of royalties under the royalty agreement between the parties was *not* a condition of the sale of the goods, because the contract of sale between the same parties (which took the form of a purchase order) did not include as an express condition that the royalties be paid.[54] In contrast, in this appeal, most of the invoices issued by Diesel U.S.A., which, in the absence of a written agreement, as discussed above, must be taken to reflect the conditions of the sales between Diesel U.S.A. and CLA, expressly indicate that the royalties are payable. Thus, when examined in light of the facts of this appeal, the decision of the Federal

52. *Ibid*. at 141-43.
53. Appellant's Book of Documents, tab 3; Respondent's Book of Documents, tab 6.
54. *Reebok Canada*, paras. 4-5, 12.

Court of Appeal in *Reebok Canada* does not support CLA's contention that the payment of the royalties is not a condition of the sale of the goods in application of paragraph 48(5)(*a*)(iv) of the *Act*.

70. Moreover, the Tribunal is of the view that the fact that the royalty payments were remitted by Diesel U.S.A. to Diesel SpA (i.e. the payments were a "flow through") does not affect the above conclusion. While Diesel U.S.A. might have had an agreement with Diesel SpA in this regard, this does not make the payment of the royalties any less a condition of the sale of the goods by Diesel U.S.A. to CLA. What matters is that CLA's obligation to make the royalty payments is an integral part of the commercial arrangements between CLA and Diesel U.S.A.

71. Finally, the Tribunal notes the testimony that, once a particular shipment had left the factory on its way to CLA as the consignee, Diesel U.S.A. could not stop the shipment if it learned that CLA was not going to pay the royalties. Although this might have been the case, in the Tribunal's view, this is germane to Diesel U.S.A.'s ability to enforce its right to collect the royalties, rather than to whether the royalties are a condition of sale. In the Tribunal's opinion, this does not affect the fact that, based on the evidence, Diesel U.S.A. and CLA have agreed that royalties are a condition of sale. If CLA failed to pay the royalties on a particular shipment, CLA would be in violation of its agreement with Diesel U.S.A. concerning royalties (i.e. it would breach its sales contract with Diesel U.S.A.). Diesel U.S.A. might need to seek a financial remedy if it wished to enforce its rights, rather than being in a position to stop the shipment. However, this does not mean that Diesel U.S.A. accepts to sell the goods in this scenario nor does it make the royalties any less a condition of sale.

72. Accordingly, the Tribunal concludes that the royalty payments were a condition of the sales and that, pursuant to subparagraph 48(5)(*a*)(iv) of the *Act*, they shall be added to the price paid or payable for the goods, as was determined by the CBSA.

CONCLUSION

73. For the above reasons, the appeal is dismissed.

Ellen Fry
Ellen Fry
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Diane Vincent
Diane Vincent
Member