CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, September 16, 1993

Appeal Nos. AP-92-193 and AP-92-215

IN THE MATTER OF two appeals heard on March 25, 1993, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF two decisions of the Deputy Minister of National Revenue for Customs and Excise dated September 30, 1992, with respect to two requests for re-determination made under section 63 of the *Customs Act*.

BETWEEN

RADIO SHACK, A DIVISION OF InterTAN CANADA LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are allowed.

W. Roy Hines
W. Roy Hines
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-92-193 and AP-92-215

RADIO SHACK, A DIVISION OF InterTAN CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

The two appeals were heard together, as there was an issue common to both. One appeal involved goods imported from Japan, while the second appeal involved goods imported from Hong Kong. The issue common to both was whether the amounts paid by the appellant to its purchasing agent, A & A International, should be added to the transaction value of the imported goods, on which duty is to be paid. If the Tribunal determines that the amounts paid are properly characterized as "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale," such amounts should not be added to the price paid in the sale of the goods for purposes of determining the value for duty of those goods. The second issue, which was unique to the importation from Japan, was whether certain loading and shipping charges were properly deducted by the appellant from the transaction value of the goods.

HELD: *The appeals are allowed. Based on the evidence of the relationship between the parties and the activities of A & A International, the Tribunal concludes that a bona fide purchasing agency relationship existed. As to the loading and shipping charges, the evidence was conclusive that the place of direct shipment of the goods to Canada was Osaka, Japan, and that such charges were for consolidating the goods for ocean shipment to Canada.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*March 25, 1993*
Date of Decision:	*September 16, 1993*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Charles A. Gracey, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Michael A. Kelen, for the appellant* *Geoffrey S. Lester, for the respondent*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-92-193 and AP-92-215

RADIO SHACK, A DIVISION OF InterTAN CANADA LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This represents the reasons for decision on two appeals heard together, under section 67 of the *Customs Act*[1] (the Act). The two appeals flow from different importations into Canada by the appellant, one from Japan and the other from Hong Kong.

Goods in Issue

The goods imported from Japan included various quantities of VHS videocassette recorders, batteries, rechargeable battery packs for computers, 2-way speaker systems, compact disc (CD) changers, personal computer (PC) tape solder sets, project control system (PCS) needle file sets and certain computer owner's manuals. They were imported on August 24, 1990.

In total, the appellant paid $31,819.23 in customs duty and $27,625.68 in federal sales tax. It was determined by the Department of National Revenue (Revenue Canada) that the appellant must pay customs duty and tax on the "buying commission" paid to the appellant's purchasing agent, A & A International (A & A) and on the loading and shipping charges that had been initially excluded by the appellant from the transaction value of the imported goods, on which duty must be paid. As such, Revenue Canada determined that the moneys paid to A & A constituted part of the transaction value of the imported goods and that the loading and shipping charges could not be excluded from the transaction value of these goods. This decision was appealed to the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) without success and, hence, the subsequent appeal to the Tribunal.

The goods imported from Hong Kong included several thousand road racing sets and children's electronic digital drum sets. They were imported on October 15, 1990. The appellant paid $22,097.15 in customs duty and $37,245.28 in federal sales tax. On September 19, 1992, the appellant requested an adjustment of the duty and sales tax on the basis that the moneys paid to A & A should not be added to the transaction value of the imported goods. Revenue Canada denied this adjustment request. This denial was appealed without success to the Deputy Minister and, hence, the subsequent appeal to the Tribunal.

---

1. R.S.C. 1985, c. 1 (2nd Supp.).

Issues

The first issue to be addressed in these appeals, and common to both, was whether the amounts paid by the appellant to A & A should be added to the transaction value of the imported goods on which duty is to be paid. If the Tribunal determines that the amounts paid are properly characterized as "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale," such amounts should not be added to the price paid in the sale of the goods for purposes of determining the value for duty of those goods. The second issue, which was unique to the importation from Japan, was whether the loading and shipping charges were properly deducted by the appellant from the transaction value of the goods.

Applicable Legislation

For purposes of these appeals, the relevant provisions of the Act read as follows:

> *48.(1) Subject to subsection (6), the value for duty of goods is the transaction value of the goods ...*
> *(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*
> *(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,*
> *...*
> *(b) by deducting therefrom amounts, to the extent that each such amount is included in the price paid or payable for the goods, equal to*
> *(i) the cost of transportation of, the loading, unloading and handling charges ... of, the goods from the place within the country of export from which the goods are shipped directly to Canada.*

Evidence

The relationship between the various parties was described in detail by the appellant's fourth witness, Mr. Louis G. Newmann, Vice-President, Secretary and General Counsel of InterTAN Inc. and InterTAN Canada Ltd. He testified that, prior to 1987, InterTAN Inc. was a wholly owned subsidiary of Tandy Corporation (Tandy) of Fort Worth, Texas, which owned retail operations in the United Kingdom, Australia, France, Belgium, Holland, Canada and the United States.

It was decided to "spin off" the international retail operations and, to accomplish this, a distribution agreement (the Agreement) was prepared, to which Mr. Newmann was a signatory. A separate corporation, InterTAN Inc., was created, which owned the stock of InterTAN Canada Ltd. and InterTAN Australia Ltd. Certain Tandy-owned assets in Europe were sold to InterTAN Canada Ltd. in exchange for a promissory note, which was paid off in December 1989.

On December 31, 1986, Tandy declared a stock dividend of the stock of InterTAN Inc., and for every 10 shares of Tandy stock, a shareholder received 1 share of InterTAN Inc. As the public shares were sold, the shareholders of the two companies became separate. Mr. Newmann

testified that, by August 1990, there remained no legal relationship between the controlling interests of Tandy and InterTAN Inc. The Agreement provided for such matters as licence agreements, use of trademarks and the continued use by InterTAN Canada Ltd. of A & A as its purchasing agent. Thus, while no legal links remained between Tandy and InterTAN Canada Ltd., the two entities continued to use the same purchasing agent, which was wholly owned by Tandy. The witness further indicated that Tandy owns two manufacturers in the Orient and owns 50 percent of a third manufacturer in a joint venture with a Finnish company.

The appellant's third witness, Mr. Raymond E. Hodgson, Manager of the Import/Export Department of Radio Shack, A Division of InterTAN Canada Ltd. (Radio Shack), addressed several clauses in the Agreement, acknowledging that the actual intent of the parties is not truly reflected in the wording used. During cross-examination, he confirmed that, if there is a change in control of InterTAN Canada Ltd., the licence agreements that were granted by Tandy can be revoked. This was elaborated on by Mr. Newmann who indicated that this provision was designed to prevent a hostile takeover of InterTAN Inc.

The appellant 's first witness, Mr. Robert J. Mayes, was Chief Operating Officer of Radio Shack in Canada at the time of the importations in issue. He testified that the appellant is in the business of consumer electronics, retailing under many of its own trademarks. Most of the goods that it sells are manufactured in the Orient, including Japan, Hong Kong, Korea, Taiwan, China and Malaysia, with some sourced in Canada and the United States. When purchasing in North America, the appellant does not use a purchasing agent, but, when purchasing in the Orient, it uses an exclusive purchasing agent, A & A, which has five offices located throughout the Orient.

Mr. Mayes described A & A as the appellant's communication link to the many vendors that it uses in the Orient. When looking for a particular product, A & A would be informed, and each of its offices would survey the many manufacturers with which it is dealing, on behalf of the appellant. A & A also inspects manufacturers referred to it by the appellant and maintains contacts for purposes of keeping abreast of advancements in technology. Part of its function is to inspect the various factories to ensure that a manufacturer is competent and, if not, to recommend against using that manufacturer. A & A obtains quotes or offerings on particular products and forwards samples to the appellant when necessary. When several offerings have been received from various manufacturers, A & A schedules a meeting for the appellant with the manufacturers. A & A also prepares an agenda and records of the meetings, but the decision as to which products are to be purchased from which vendors and at what price is made by the appellant. The appellant is under no obligation to purchase from any particular vendor.

When the decision is made to purchase a particular product, a purchase order is prepared by the appellant in Canada and sent to A & A for delivery to the manufacturer. Before shipment of the goods to Canada, A & A conducts a factory inspection to ensure that the manufacturing line is up and running and to ensure the quality of the manufactured goods. A final inspection of the goods is conducted before their shipment to ensure that all standards stipulated by the appellant have been met. A & A serves to expedite delivery of the goods to a container consolidator for purposes of packing the goods for shipment and is involved in much of the paperwork needed by the carrier and the insurer. In all cases, it is executing the instructions of the appellant. During cross-examination, Mr. Mayes confirmed that A & A is not the exporter of the products. He acknowledged that, though the Agreement may suggest otherwise, such was never the intention of the parties.

When the goods arrive in Canada, 5 to 10 percent of them are inspected by the appellant. If there is more than a 3-percent rejection rate, A & A must inspect 100 percent of the goods. It is also responsible for correcting any problem, either through the use of the appellant's

facilities or with outside assistance. Costs are charged back to the vendor, and A & A is responsible for administering this function and for communicating with the vendor for this purpose. Another witness for the appellant, Mr. Francis McClure, Comptroller of A & A in Fort Worth, Texas, testified that all debit and credit notes associated with reworking the goods are funnelled through the A & A office in Fort Worth.

To facilitate A & A's duties, it has two people located at the Barrie, Ontario, offices of Radio Shack. One person is an engineer and the other, a communication officer. Both people are on the appellant's payroll for convenience and taxation purposes and, at the end of each month, all associated expenses are charged back to A & A.

For its services, A & A receives a commission on all goods purchased by the appellant. The commission structure is based on the cost of the goods and not on their source. If an item (stock number) costs less than $1, it carries a commission of 7 percent, while all other items carry a commission of 5 percent. However, the commission earned on some goods, such as videocassette recorders (VCRs) and cellular telephones, is only 3.5 percent.

Mr. Mayes was asked to address many of the allegations contained in the respondent's brief. He indicated that A & A always dealt at arm's length with the Oriental vendors and in a completely independent fashion; that the appellant has total control over A & A; that there is no special inducement or contractual obligation for A & A to deal with the Tandy-owned manufacturers; that A & A does not initiate purchase orders with Tandy-owned manufacturers for InterTAN companies or Tandy; that only 3 of 622 manufacturers used by the appellant in the Orient are owned or partially owned by Tandy;[2] that the commission received by A & A is not dependent on the supplier, but on the value of the product; that commencing in 1988 or 1989, the appellant began assuming its share of any product design or tooling costs associated with a product shared with Tandy; that the appellant takes title to the goods from the vendor; that the appellant negotiates the insurance for the goods in transit; and that these goods are insured in the name of InterTAN Inc., which is an American holding company of the appellant.

During cross-examination, Mr. Mayes confirmed that Tandy does not initiate or establish the deals between the appellant and the Oriental manufacturers. He also acknowledged that A & A is similarly used by Tandy in the Orient. Though the appellant typically meets with the manufacturers subsequent to Tandy, and may purchase similar goods, any decision to purchase those goods is completely independent of Tandy's decision to purchase particular goods. The two companies are marketing under the same brand names, and customers expect to see the same products. However, even if the goods are similar, it is typical for changes to be made in the product, such as brand name, cosmetics and packaging. If similar goods are purchased, the tooling costs are shared, and the appellant must pay for use of a Tandy brand name. In addressing a question from the Tribunal, Mr. Mayes testified that the appellant could discontinue the services of A & A with one year's notice to it.

The appellant's second witness, Mr. Francis McClure, reiterated much of what was stated by Mr. Mayes on the role of A & A in assisting the appellant to source goods in the Orient and on the relationship between the various parties. He emphasized that the appellant has complete control over A & A and that A & A does not direct the appellant to purchase Tandy-owned

---

2. The appellant's third witness, Mr. Raymond E. Hodgson, later filed Exhibit A-7 in support of this contention. It indicated that, on January 31, 1993, there were approximately $25 million in outstanding orders to these vendors, of which approximately $2.5 million were with the associated manufacturers. However, none of the goods in issue were supplied by these manufacturers.

manufacturers' goods. In 1990, except for a company called Microsoft, all of A & A's clients were, in some way, related to Tandy.

Mr. McClure noted that A & A arranges for payment for the goods to the vendor. Vendors determine the method of payment, whether by telegraphic transfer, letter of credit or cheque. With regard to the actual shipments in issue, the witness testified that the goods from Japan were paid for by telegraphic transfer, while some of the goods from Hong Kong were paid for by letter of credit and the balance, by telegraphic transfer. Mr. Hodgson added that, because there are hundreds of vendors being dealt with in the Orient, each requiring a different means of payment, A & A facilitates payment for the appellant by consolidating the bills and issuing a single invoice to the appellant. When the goods have been loaded for shipment, A & A advises its head office in Fort Worth, which raises an invoice to the appellant for the goods being shipped, plus its commission. Mr. McClure acknowledged that A & A is at financial risk as an unsecured creditor, as it uses its money for the goods and subsequently invoices the appellant. Under the terms of the Agreement, the appellant must honour that invoice within 45 days.

In some cases, A & A arranges for the vendor to ship the goods to a container consolidator, referred to as a godown, in the Orient. Mr. Hodgson added that a container consolidator weighs, measures, counts and loads a mix of commodities into a marine container and then delivers the container to port for loading onto a vessel. He indicated that the goods from Japan were purchased on an ex-godown basis, meaning that the vendor's obligations ended when the goods were delivered to the godown. In contrast, the goods from Hong Kong were purchased on an F.O.B. basis, meaning that the appellant took possession of the goods when they were loaded on board the ocean vessel.

Mr. Hodgson explained that goods imported from the Orient are insured from "warehouse to warehouse" in the name of InterTAN Inc. and that the appellant pays the premiums. It is the appellant that takes title to the goods from the vendor.

Mr. Hodgson reviewed many of the documents associated with the two shipments in issue. For example, the purchase order from Funai Electronic Co. Ltd. of Japan for the VCRs in issue indicated that A & A of Japan was the purchasing agent. The unit price was listed under the ex-godown column as $157.36, which is the price that the appellant paid to the vendor for each VCR. The corresponding invoice for the VCRs prepared by the vendor also indicated an ex-godown price of $157.36. It was addressed to A & A Japan, Ltd., as purchasing agent for the buyer. The invoice indicated that the goods were to be shipped to Barrie, Ontario. On the corresponding Canada Customs invoice documents, the various costs per unit to the appellant were indicated, showing an ex-godown price of $157.36, a commission of $5.79, and a shipping cost of $0.66, which represents the consolidator's charges at the godown. With regard to the shipping charges, counsel for the appellant referred the Tribunal to the last page of the Customs invoice where it stated:

> *We hereby certify that the shipping charges invoiced separately were incurred after the point of direct shipment to Canada and consist of the following items: insurance, customs clearance and inspection, forwarders charges including handling and storage, and drayage to container yard.*

Mr. Hodgson confirmed that the shipping charges were incurred after the vendor delivered the goods to the godown.

The ocean bill of lading issued by the ocean carrier American President Lines, Ltd. documented the movement of the goods from Japan. The place of receipt of the goods was indicated as Osaka, Japan, which is located inland. The witness testified that the godown is

located in Osaka and that this is where the containers were tendered to the ocean carrier. Counsel for the appellant argued that Osaka is the place of direct shipment because that is where the goods were put in the container for shipment to Canada. The port of loading is indicated as Kobe, Japan, with a destination of Toronto, Ontario. The appellant is indicated as the consignee of the goods.

Counsel for the respondent called Mr. Brian Brimble as the respondent's only witness. Mr. Brimble is currently Director General of Assessment Programs, Anti-dumping and Countervail Division, Revenue Canada, and was Director of the International Evaluation Task Force, which was responsible for implementing the current customs valuation system in Canada. After strenuous objection by counsel for the appellant, the Tribunal curtailed counsel's line of questioning as being irrelevant and questionably admissible.

Issue with Respect to Loading Charges

Counsel for the respondent argued that the Tribunal lacked the jurisdiction to address the issue of the loading and shipping charges, which the appellant claimed do not form part of the transaction value of the imported goods. In support of this proposition, counsel argued that the appellant did not raise this issue with the Deputy Minister, and it has, therefore, not been the subject of a decision by the Deputy Minister pursuant to either section 63 or 64 of the Act, the conditions precedent to vesting the Tribunal with jurisdiction to hear an appeal under section 67 of the Act.

Consistent with its ruling during the hearing, and contrary to arguments by counsel for the respondent, the Tribunal concluded that it was seized with the jurisdiction to address the issue of the loading and shipping charges. In response to the argument that the issue was not raised with the Deputy Minister, counsel for the appellant, through its third witness, Mr. Hodgson, introduced into evidence the request for a re-determination made under subsection 63(1) of the Act, which clearly raised the issue. However, this issue was apparently overlooked by the Deputy Minister in his decision made under subsection 63(3) of the Act.

Pursuant to subsection 67(1) of the Act, "[a] person who deems himself aggrieved by a decision of the Deputy Minister made pursuant to section 63 or 64 may appeal from the decision to the Canadian International Trade Tribunal." Under both sections 63 and 64 of the Act, the Deputy Minister is to "re-determine the tariff classification or re-appraise the value for duty" of imported goods. In this case, the Deputy Minister re-appraised the value for duty of the goods to the dissatisfaction of the appellant, which decision was appealed to the Tribunal. In this appeal, therefore, the Tribunal must determine the correct value for duty of the imported goods. In doing so, it is the Tribunal's opinion that the appellant may raise any argument in that regard, notwithstanding that it has not been previously raised with the Deputy Minister, though, in this case, the issue was raised. In support of its interpretation of section 67, the Tribunal notes that "[a] person ... may appeal from the decision" of the Deputy Minister and is not restricted to appeal the decision of the Deputy Minister, which may have been quite limited.

With regard to the loading and shipping charges, counsel for the respondent maintained that his client did not have sufficient evidence to render a decision on whether they should be deductible in calculating the value for duty of the imported goods. Specifically, counsel noted that there were two elements involved, namely, the costs involved at the godown and the actual place of direct shipment. However, counsel was not in a position to lead evidence on either point, but did concede that the appellant had placed uncontradicted evidence before the Tribunal which would enable a decision to be made on this issue.

The legislation is clear and unambiguous in providing that the costs of the shipping and loading charges incurred in respect of transporting the goods directly from the place within the

country of export to Canada are to be deducted from the value for duty of the imported goods to the extent that such charges were included in the price paid or payable for the goods. It is, therefore, a question of establishing the relevant facts.

In this particular case, the documentary evidence, especially the bill of lading, before the Tribunal establishes that the point of direct shipment to Canada was Osaka, Japan. It is there that Neptune Enterprises Ltd., the consolidator operating the godown, tendered the full containers to the ocean carrier, American President Lines, Ltd. With respect to the shipping and loading charges, the evidence before the Tribunal establishes that title to the goods passed to the appellant from the vendors when the latter delivered the goods to the godown in Osaka. The charges in issue related directly to the consolidation of the goods in preparation for ocean shipment, all of which were marked for delivery to Barrie, Ontario. Accordingly, the Tribunal concurs with the appellant's submissions that these charges do not constitute part of the value for duty.

Issue with Respect to Agency Commissions

In summarizing the approach of the Federal Court of Appeal and the Tariff Board to cases involving alleged purchasing agents, counsel for the appellant explained that the Tribunal must look to the true nature of the transaction between the parties.[3]

In summary, counsel for the appellant argued that, because his client issued the purchase orders directly to the vendors, there was privity of contract between those two parties and that A & A was not a party to that contract. A & A appeared as the exporter of record for purposes of convenience when the shipment included the consolidation of many goods from different vendors. Regardless, it did not matter that A & A appeared as the exporter of record.[4] Counsel referred to general principles of agency law and the fiduciary relationship that exists between principal and agent.[5] He argued that, though A & A is indirectly related to three of the vendors, there was no breach in the duty owed by A & A to the appellant, as there was full disclosure of that relationship. As such, a *bona fide* purchasing agency relationship did exist, even though there is a relationship between A & A and some of the vendors. With regard to the 45-day financing provided by A & A, counsel argued that this is within the normal scope of a purchasing agent's role. There is little risk to A & A based on its long-term relationship with the appellant, which has assets of $200 million. Counsel also referred to the Explanatory Notes[6] to the Agreement on the Customs Valuation Code[7] (the GATT Agreement), which shall be addressed in greater detail by the Tribunal.

Counsel for the respondent noted that, under subparagraph 48(5)(*a*)(i) of the Act, certain commissions and brokerages are to be added to the price paid for the imported goods for purposes of determining the transaction value of those goods. As an exception to this general

---

3. See, e.g. *The Queen v. Kay Silver Inc.*, [1981] 2 F.C. 436 at 445 (T.D.).

4. In support of this proposition, counsel for the appellant referred to *Woodward Stores Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1974), 6 T.B.R. 184.

5. Counsel for the appellant referred to M.P. Furmston, Cheshire and Fifoot's Law of Contract, 9th ed. (London: Butterworths, 1976); and to the Ontario Court of Appeal's decision in *Advanced Realty Funding Corp. v. Bannink* (1979), 27 O.R. (2d) 193.

6. GATT Agreement and Texts of the Technical Committee on Customs Valuation, Customs Co-operation Council, Brussels.

7. *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979.

rule, fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale are not to be added to the price paid for the goods.

Counsel acknowledged that the Tribunal must focus on the totality of the relationship between the parties and that the formal legal arrangements themselves are not determinative. He argued that an agent that actually finances the purchase of goods does not fall within the exception. Similarly, because of the complicated invoicing arrangements, A & A is more properly characterized as the exporter of record than as a purchasing agent.

Counsel for the respondent reminded the Tribunal of the corporate relationship between Tandy, the Tandy-owned manufacturers and A & A, and the indirect relationship between Tandy and the appellant in the form of licensing agreements. He noted that Tandy is first to the Orient to source its goods, while the appellant "piggy-backs" behind, and that A & A is in attendance during negotiations between the appellant and the various Oriental vendors. He suggested that there was an element of divided loyalties and concluded that this raises severe doubts as to the *bona fides* of the agency relationship between A & A and the appellant. Counsel further argued that the cases cited by opposing counsel could be distinguished and had little relevance in resolving the issues in these appeals.

Put simply, the matter before the Tribunal is whether the fees paid by the appellant to A & A should be added to the price paid or payable for the goods in determining their value for duty. The legislation provides that they should not be added if A & A acted as the purchasing agent for the appellant, since such costs would normally have nothing to do with the transaction price for the goods, i.e. the true selling price between the buyer and the seller. This provision is consistent with the GATT Agreement. However, given the difficulty in distinguishing between buying or purchasing commissions on the one hand and brokerage or selling commissions on the other, the Technical Committee on Customs Valuation of the Customs Co-operation Council has concluded that the treatment of commissions "depends upon the exact nature of services rendered by the intermediaries,[8]" and the issue has been the subject of explanatory notes and commentary by the committee.

In this regard, paragraph 9 of Explanatory Note 2.1 to the GATT Agreement defines a buying agent, which is usually paid by the importer apart from the payment for the goods, as a "person who acts for the account of a buyer, rendering him services in connection with finding suppliers, informing the seller of the desires of the importer, collecting samples, inspecting goods and, in some cases, arranging the insurance, transport, storage and delivery of the goods." In elaborating this definition, Commentary 17.1 of the GATT Agreement provides guidelines on the question of the kind of evidence necessary to establish the totality of the relationship between the importer and the agent. These guidelines suggest examples of activities or practices carried out by an agent, beyond those mentioned in the above definition, that may bring into question the existence of a true importer/buyer agency relationship. These include situations where the agent: (a) uses its own funds for, and assumes risk in respect of, the payment of the imported goods; (b) acts for its own account and/or assumes a proprietary interest in the goods; (c) has a relationship with the seller; and (d) concludes a contract and reinvoices the importer, distinguishing the price of the goods and its fee. This list is not exhaustive nor does it imply that any of these practices would invalidate the importer/buyer agency relationship.

The Tribunal concurs with counsel for both parties and the Technical Committee on Customs Valuation that a decision concerning the existence of an agency relationship and the treatment of purchasing agent fees must reflect the facts of the case at hand. In argument,

---

8. *Supra*, note 6, "Amending Supplement No. 9 - October 1991," Commentary 19.1, paragraph 2 at 1.

counsel for the respondent accepted that an agency agreement existed between the parties in this case, but argued that the services provided by A & A exceeded those that would normally be carried out by an agent. Accordingly, the Tribunal was particularly mindful of the evidence placed before it regarding the specific nature of the services rendered by A & A and the relationships between the appellant, A & A and the other corporate entities identified in this appeal.

In this connection, the Tribunal agrees with counsel for the respondent that the use of the expression "other than" in subparagraph 48(5)(*a*)(i) of the Act establishes an exception to the general rule set out in this provision of the Act. Counsel suggested that the Tribunal must recognize the principle on which the distinction should be made and must decide which costs or charges were to be included and which were not to be included in the value for duty of the imported goods. Thus, the focus of its deliberations was to determine, in the context of the overall relationship, whether A & A carried out services beyond those that would normally be associated with "representing the purchaser abroad in respect of the sale." In this regard, counsel for the respondent noted that A & A financed the actual purchases, which entailed some risk, and that A & A reinvoiced the goods such that it effectively became the exporter, and noted the nature of the relationship and licensing arrangements between A & A and Tandy.

With respect to the last point, the uncontroverted evidence before the Tribunal was that there is no legal relationship between A & A, InterTAN Inc. and InterTAN Canada Ltd. However, A & A is wholly owned by Tandy which, in turn, owns two manufacturers and a 50-percent share of another manufacturer in the Orient. These three firms were not suppliers of the goods covered by this appeal. Prior to 1987, these firms were all related. At that time, InterTAN Inc. was created to take over the international retail operations of Tandy and, in the interim, as public shares were sold, the shareholders of the two companies have become separate and distinct. Thus, while there is an historical association between these firms, the Tribunal received no evidence that would indicate any legal relationship presently existing between them or at the time of importation.

On the question of licensing arrangements and the use of A & A as the exclusive purchasing agent in the Orient, these matters are covered by the Agreement put in place by the parties at the time of the spin-off of Tandy's international retail operations. In this regard, the evidence is that A & A is paid a commission based on the sales price of the goods, which covers all of its services, including any interest expenses that may be involved, that A & A always deals at arm's length with suppliers in the Orient, that the appellant is under no obligation to purchase from any particular buyer and that the appellant pays its portion of any product design or tooling costs associated with a product shared with Tandy. The Tribunal received detailed evidence from the witnesses as to the functions and responsibilities of A & A in its dealings with the appellant. This has been elaborated above and need not be repeated here. The Tribunal's conclusion, however, is that there is nothing to indicate that the arrangements covering licensing and purchasing activities between A & A and the appellant were anything other than what one would normally expect to find in an importer/buyer agency relationship.

With regard to the question of financing and the risk associated with that activity, the evidence, as the Tribunal understands it, is that A & A facilitates payments for the appellant by arranging and consolidating bills for payment to the vendors. Under this arrangement, A & A is at financial risk as an unsecured creditor until the appellant pays A & A's invoice, which can be outstanding for as long as 45 days. Counsel for the respondent argued that, while the risk involved in this practice may be minimal, it violates the principles underlying an agency relationship. Counsel suggested that this, together with the unique billing and invoicing practices that exist between A & A and its parent company in Fort Worth, Texas, by which A & A becomes the exporter to the appellant, indicated that the totality of the relationship between A & A and the appellant was more than that of principal and agent. Clearly, this is

one element of the situation which would be questionable in a normal purchasing agency relationship.

In arriving at its decision, the Tribunal examined the evidence as a whole, taking into account both the legal precedents before it and the guidelines established in relation to the GATT Agreement. In this regard, the Tribunal's first conclusion is that no single rule or principle can be enunciated to encompass all situations that can arise since the activities of a buying agent may go further than those contemplated in a legal agreement, and these must be open to review by customs authorities. Its second conclusion is that a legitimate purchasing agency relationship can involve activities that are substantially broader than those that might be accomplished by merely establishing an office abroad or sending an employee as a representative of the importer. The commissions paid to buying agents can and do reflect not only the specific activities that the agent may undertake for the importer but also, and perhaps more importantly, the experience of the agent and its knowledge and intelligence of the markets in question, the local business customs and language, contacts, sources of supply, etc.

The problem, as suggested above, is where to draw the line. In this case, the Tribunal notes that at no time did A & A take a proprietary interest in the imported goods. All decisions relating to the purchase of the goods remained in the hands of the appellant. The appellant took title to the goods from the vendor, and insurance and shipping documents were in the name of the appellant and addressed to its place of business in Barrie, Ontario.

The Tribunal is concerned that the reinvoicing and financing arrangement involved is, in its view, approaching the outer limit of what is acceptable in a purchasing agency relationship. On balance, however, the Tribunal believes that the overall arrangement can be characterized as a purchasing agency relationship, since all of the evidence directly circumscribes the role of A & A to that of a purchasing agent.

Accordingly, the appeals are allowed.

W. Roy Hines
W. Roy Hines
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member