CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, February 16, 1995

Appeal Nos. AP-94-035, AP-94-042 and AP-94-165

IN THE MATTER OF appeals heard on October 19 and 20, 1994, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated March 3 and 18 and July 14, 1994, with respect to requests for re-determination made pursuant to section 63 of the *Customs Act*.

BETWEEN

MEXX CANADA INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Lise Bergeron
Lise Bergeron
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-94-035, AP-94-042 and AP-94-165

MEXX CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The issues in these appeals are: (1) whether certain commissions paid by the appellant in connection with its importation of Mexx ready-made apparel should be excluded pursuant to subparagraph 48(5)(a)(i) of the Customs Act in calculating the value for duty of the goods as being "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad;" and (2) whether payments made by the appellant with respect to excess fabric and quota charges constitute part of the price paid or payable for the Mexx ready-made apparel.

HELD: *The appeals are dismissed. It appears to the Tribunal that the garment makers chosen by Mexx Consolidated Far East Limited had none of the characteristics of vendors of the Mexx ready-made apparel. Orders for such apparel by the appellant could not be made directly to the garment makers nor did they provide the patterns for the apparel or some of the fabrics from which the apparel was made. The Tribunal believes that these garment makers were merely performing a contract for services for Mexx Consolidated Far East Limited, a contract that the appellant could not give them on its own behalf. In the Tribunal's opinion, Mexx Consolidated Far East Limited was not acting as a buying agent for the appellant. Rather, Mexx Consolidated Far East Limited was the vendor of the Mexx ready-made apparel. With regard to the payments made by the appellant with respect to the excess fabric and quota charges, the Tribunal believes that they were payments made directly to Mexx Consolidated Far East Limited in respect of the Mexx ready-made apparel. As Mexx Consolidated Far East Limited is properly seen as the vendor of the apparel, such payments constitute part of the price paid for the apparel for purposes of determining the transaction value of the apparel.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*October 19 and 20, 1994*
Date of Decision:	*February 16, 1995*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Lise Bergeron, Member* *Lyle M. Russell, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Michael Kaylor, for the appellant* *Stéphane Lilkoff, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-94-035, AP-94-042 and AP-94-165

MEXX CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
LISE BERGERON, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

These are three appeals, heard together, under section 67 of the *Customs Act*[1] (the Act) from three decisions of the Deputy Minister of National Revenue (the Deputy Minister) made under subsection 63(3) of the Act. The Deputy Minister determined that certain so-called buying commissions, quota charges and fees paid for excess fabric were part of the price paid or payable for the imported apparel and, thus, included in the transaction value of the apparel.

The issues in these appeals are: (1) whether certain commissions paid by the appellant in connection with its importation of Mexx ready-made apparel should be excluded pursuant to subparagraph 48(5)(*a*)(i) of the Act in calculating the value for duty of the goods as being "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad;" and (2) whether payments made by the appellant with respect to excess fabric and quota charges constitute part of the price paid or payable for the Mexx ready-made apparel.

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

> *45.(1) In this section and sections 46 to 55,*
> ...
> *"price paid or payable", in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor;*
>
> *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*

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

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> *(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,*
> *(iii) the value of any of the following goods and services, determined in the manner prescribed, that are supplied, directly or indirectly, by the purchaser of the goods free of charge or at a reduced cost for use in connection with the production and sale for export of the imported goods, apportioned to the imported goods in a reasonable manner and in accordance with generally accepted accounting principles:*
> *(A) materials, components, parts and other goods incorporated in the imported goods.*

The appellant's first witness was Mr. Arun Mehta, Financial Director and Chief Financial Officer of the Mexx group of companies. He is also Finance Director of Mexx International bv (Mexx International) of the Netherlands. In describing the corporate structure of the Mexx group of companies, Mr. Mehta explained that Mexx Group bv, a non-trading holding company, wholly owns Mexx International and Mexx Consolidated Far East Limited (Mexx Far East).[2] In addition, there are distributors of the Mexx line of apparel in approximately 35 countries. Approximately 15 of these distributors are wholly owned by one of the Mexx companies, with the balance, including the appellant, being independently owned distributors of Mexx apparel.

Mr. Mehta told the Tribunal that Mexx International is the owner of the Mexx trademark. As such, it is responsible for assigning the rights to distribute Mexx apparel. It also co-ordinates certain activities related to the design, production and ordering of Mexx apparel, as well as the advertising and promotion of the brand name. For these and other services contained in a service contract between Mexx International and the appellant, and for the right to distribute Mexx apparel in Canada, the appellant pays a fee equal to 8 percent of the value of its purchases bearing the Mexx trademark. This fee is not at issue in these appeals.

Mexx Far East is located in Hong Kong and has approximately 300 employees. Mr. Mehta explained that Mexx Far East designs the Mexx apparel and acts as a buying agent for the Mexx distributors. Of the 300 or so Mexx Far East employees, approximately 60 to 70 are dedicated to designing apparel. In this capacity, they create a sample collection of apparel for each fashion season,[3] which is provided to each of the distributors. Using women's apparel as an example, Mr. Mehta explained that a sample collection for a particular fashion season may consist of approximately 250 to 280 styles. From this collection, the appellant chooses approximately 160 to 200 styles that are suitable for the Canadian market.

During cross-examination, Mr. Mehta explained that, if the appellant or any other distributor found the sample collection deficient or otherwise wanting, it can request Mexx Far East to add to the collection or rework certain styles.

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2. During cross-examination, Mr. Mehta explained that Mr. K.R. Chadha, Director General and major shareholder of Mexx Group bv, is also a managing director of Mexx Far East.

3. Women's apparel has 10 fashion seasons, men's apparel has 8 fashion seasons and children's apparel has 6 fashion seasons per year. In total, approximately 2,000 styles of apparel are created each year.

The sales period for a fashion season may be as short as four to five weeks in duration. Mr. Mehta told the Tribunal that four or five days into the season, the appellant is required to give a pre-commitment for purchases from the sample collection. Mexx International is informed of the purchase decisions by all the distributors. It, in turn, consolidates the information and relays it to Mexx Far East. Based on the pre-commitments, Mexx Far East makes a decision as to the volume of fabric required and when it should be ordered. For those fabrics that must be ordered well in advance, such as from an offshore supplier, Mexx Far East provides a letter of credit to the fabric supplier and obtains the fabrics itself.[4] While in its possession and until delivery to the garment makers, these fabrics are insured by Mexx Far East. For the easily accessible fabrics, the garment makers supply the fabrics to produce the apparel.

During the sales period, the appellant continues to solicit orders from its customers. At the end of this period, the appellant must place its final order with Mexx International. Again, Mexx International consolidates the orders from all distributors and relays the information to Mexx Far East. Mr. Mehta said that it is typical for the final orders to differ from the pre-commitments.

If Mexx Far East is left with unused fabric because pre-commitments were greater than final orders, it sells the excess fabric in the market at the best available price.[5] This is typically less than what was paid for the fabric. The loss is then apportioned among the distributors proportional to their share of total purchases of apparel in that fashion season. A debit note is issued to the distributors and cashed against their letters of credit. This is one of the three charges at issue in these appeals.

Mexx Far East must determine which garment makers are best suited to produce the required apparel. Mr. Mehta told the Tribunal that up to 100 garment makers are used, depending on the fashion season. The small garment makers are preferred as they provide greater flexibility and allow Mexx Far East to exert greater control over the whole production process. After a program of production is determined by Mexx Far East, a purchase order is placed with a particular garment maker specifying the details of style, quantity, price and purchaser. A purchaser, such as the appellant, then receives a purchase order confirmation which commits it to purchase the apparel that is to be made on its behalf. Sample commercial invoices issued by a garment maker, found at tab 6 of Exhibit A-1, indicate that the "buyer/consignee" of the apparel was Mexx Far East. The corresponding purchase orders issued by Mexx Far East identify the appellant as the buyer of the apparel and Mexx Far East as the agent for the buyer. Mr. Mehta insisted that the contract of purchase and sale is between the appellant and the garment makers.

Mexx Far East is responsible for quality control of the apparel. On questions from the Tribunal, it was explained that Mexx Far East developed and uses its own standards of quality. It is responsible for ensuring the quality of the fabrics that it sources offshore. In addition, for those fabrics supplied by the garment makers, it may specify the mill from which to source or the fabric or colour number to use. Mr. Mehta told the Tribunal that there are approximately 100 employees of Mexx Far East who spend their

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4. Physical delivery is taken for two reasons. The fabrics are inspected to ensure their quality. In addition, they are purchased in bulk for several distributing companies. They are then divided and delivered to the various garment makers. Mr. Mehta alleged that the fabrics are not owned by Mexx Far East. Rather, they belong to the various marketing companies on whose behalf they were ordered.

5. On questions from the Tribunal, Mr. Mehta said that the excess fabric typically represents between 2 and 3 percent of the value of the apparel.

time in the various factories inspecting the production process. Where necessary, they advise the garment makers on the scheduling of production to facilitate timely delivery. Before delivery of the apparel, it is inspected by Mexx Far East. If acceptable, Mexx Far East issues an inspection certificate to the factory, which then delivers the apparel to a shipping agent. Mr. Mehta told the Tribunal that the appellant appoints its shipping agent.

When the appellant rejects apparel for any reason, it must alert Mexx International, which then consults other marketing companies to determine whether they have experienced similar problems. If Mexx International determines that it is a legitimate claim, it advises Mexx Far East to negotiate with the garment maker on behalf of the appellant. Any moneys received from the garment maker are credited to the appellant. Mexx Far East makes the final decision of whether or not to continue to use a particular garment maker.

Once a bill of lading has been prepared by the garment maker, Mexx Far East is invoiced for the apparel. Mexx Far East then invoices the purchaser for the same amount.

Mr. Mehta explained that, within 10 days after the end of a sales period, the appellant should open a letter of credit with Mexx Far East. Commitments to have apparel produced are only made once a letter of credit has been received. Mexx Far East can draw on a purchaser's letter of credit when the conditions of the letter have been met. For instance, the appellant's letter specifies that there must be an inspection certificate, an invoice from the garment maker, a bill of lading and shipping documentation. The garment maker is then paid from these moneys. It was noted by Mr. Mehta that Mexx Far East opens a letter of credit with a fabric manufacturer up to one month prior to receiving a letter of credit from the purchaser of the apparel.

When the apparel is to be made from fabric already in the possession of Mexx Far East, the fabric is sold to the garment maker at cost.[6] A debit note is issued to the garment maker for the cost of the fabric. The garment maker invoices Mexx Far East for the full value of the apparel. Mexx Far East draws on the appellant's letter of credit to make payment to the garment maker for apparel made for shipment to the appellant.

Counsel for the appellant then guided Mr. Mehta through a series of documents asking him to comment thereon. Under the “Agreement for Designing,” Mexx Far East performs designing services for the appellant only if it enters into an “Agency Agreement” with Mexx Far East. Mr. Mehta stated, however, that the appellant was free to use any agent or garment maker that it desired, provided it was approved by Mexx Far East. For its agency services, Mexx Far East receives a commission of 10 percent of the F.O.B. value of all purchases by the appellant. This is one of the payments at issue in these appeals.

Mr. Mehta explained that, under the Agreement for Designing, Mexx Far East is responsible for all research and development, designing of new fashion styles, fabrication of new materials and sample lines, supervision of production, etc. For these services, Mexx Far East receives 12 percent of the F.O.B. value of all purchases by the appellant. Mr. Mehta told the Tribunal that the appellant pays duty on these fees.

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6. Mr. Mehta explained that the garment maker is responsible for insuring the fabric while it is in its possession and until the apparel is handed over to the forwarding agent appointed by the appellant.

For purposes of illustrating the various activities of Mexx Far East, Mr. Mehta showed the Tribunal several other documents. They included a sales contract between a fabric supplier in Japan and Mexx Far East, an invoice for the fabric, a shipping invoice from Mexx Far East to a garment maker, a debit note from Mexx Far East to the garment maker for the delivered fabric, a purchase order for the apparel from Mexx Far East to the garment maker, an invoice for the apparel from the garment maker to Mexx Far East, an invoice for the apparel from Mexx Far East to the appellant showing the cost of the apparel from the garment maker, and separate invoices in respect of the same transactions for the 10 percent buying commissions and the 12 percent designing fees.

With regard to the quota charges at issue in these appeals, Mr. Mehta explained that, on agreement between the governments of Canada and Hong Kong, there are restrictions on the quantity of apparel that can be exported to Canada from Hong Kong. In regulating exports, the Government of Hong Kong allocates quotas to exporters based on past performance. The quotas can be bought and sold in the market and are required to export apparel from Hong Kong to Canada. For quotas held by Mexx Far East, it charges the appellant 35 percent of their prevailing market value for their use. For quotas that must be acquired in the market, Mexx Far East charges the appellant their purchase price plus 10 percent. During cross-examination, Mr. Mehta indicated that quota charges should be no more than 8 to 10 percent of the total purchase price of the apparel.

The appellant's second witness was Mr. Joseph Nezri, President and owner of Mexx Canada Inc. Mr. Nezri explained to the Tribunal that, because of different fashion trends in Canada, the appellant sells some styles that are exclusive to Canada. It also has certain apparel made in Canada. In addition, the appellant regularly advises Mexx Far East of its style, fabric and pricing needs. In this way, the appellant has contributed to building the Mexx line of apparel.

During cross-examination, Mr. Nezri told the Tribunal that for three months after the appellant signed the service contract with Mexx International it used an agent other than Mexx Far East. However, because Mexx Far East could provide better quality apparel at a lower price, the appellant started, and has continued, to use its services.

In argument, counsel for the appellant submitted that for there to be a principal-agent relationship, the agent must be independent of the vendor of the goods. The agent must also act in the best interests of its principal. Counsel contended that the garment makers are the vendors of the apparel and that Mexx Far East is independent of them. Furthermore, the evidence establishes that Mexx Far East acts in the best interests of the appellant.

In an attempt to demonstrate that Mexx Far East actually performs buying functions, counsel for the appellant referred to the Agency Agreement from Exhibit A-1 and to the evidence. At article 2a of the Agency Agreement, Mexx Far East is to select the garment makers; at article 2c, it is to place the appellant's orders with these garment makers; at article 2d, it is to prepare the export documents; and at article 3a, it is to represent the appellant in claims for damages for defective goods.

In an attempt to demonstrate that Mexx Far East is subject to the control of the appellant, counsel for the appellant noted that the appellant is the sole distributor of Mexx apparel in North America and that its apparel line differs from that in Europe and the Far East. Article 2a of the Agency Agreement, he claimed,

allows the appellant to reject certain garment makers if quality or other factors are not suitable to its needs. Article 2b, he said, requires the appellant to advise Mexx Far East of its styling needs, fabric requirements and retail pricing points of the apparel that it desires to sell. Though article 2e allows Mexx Far East to designate a clearing and forwarding agent, the appellant found the choice unacceptable and forced a change. Article 7 allows either party to cancel the agreement with six months' notice. Furthermore, the appellant purchases some Mexx apparel from Canadian manufacturers. Counsel stressed that the appellant has continued to use the services of Mexx Far East because it has achieved excellent results.

Counsel for the appellant submitted that Mexx Far East's status as a buying agent should not be denied merely because it also performs design functions and because it is related to Mexx International, the owner of the Mexx trademark. These other activities in no way affect Mexx Far East's ability to perform the functions described in the Agency Agreement or to act in the best interests of the appellant. It was submitted that neither the Act nor any case law prohibits an agent from acting in other capacities for the principal, provided an accurate value of each dutiable function is included in the value for duty of the imported goods.

Counsel for the appellant reviewed the facts in arguing that Mexx Far East was not the vendor of the Mexx apparel. It was noted that the appellant is designated as the buyer of fabrics ordered by Mexx Far East;[7] Mexx Far East does not mark up the price of the fabrics that it sells to the garment makers; the garment maker is shown as the vendor on the commercial invoices that it issues to Mexx Far East; the garment makers do not mark up the price of the fabrics supplied by Mexx Far East in the sale price of the apparel; the appellant is invoiced the same amount for the apparel for which Mexx Far East is invoiced by the garment makers; financing for the apparel is provided by the appellant's letter of credit; Mexx Far East does not take possession of the apparel; any refund from a garment maker is given in whole to the appellant; and additional transportation costs because of the late delivery of apparel are borne by the garment maker. Though Mexx Far East finances the purchase of some fabrics and insures the fabrics while in its possession, it is acting as an agent for, and in the best interests of, the appellant.[8]

With regard to the unused fabric, counsel for the appellant argued that it does not enter into the production of the apparel, nor is it imported into Canada. Referring to clause 48(5)(*a*)(iii)(A) of the Act, counsel submitted that only raw materials that are sourced in Canada or abroad and incorporated into goods that are imported into Canada must have duty paid thereon. This provision does not require the value for duty of imported goods to include the cost of raw materials not incorporated into those goods.

Counsel for the appellant also submitted that the cost of the unused fabric does not represent part of the "price paid or payable" for the goods that are exported to Canada. Referring to the definition of "price paid or payable" at subsection 45(1) of the Act,[9] counsel submitted that the payment made by the appellant

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7. However, the invoices from the fabric makers, found at tab 5 of Exhibit A-1, make no mention of a marketing company such as the appellant. Rather, they indicate that Mexx Far East is the buyer or, alternatively, the consignee of the goods.

8. See *Radio Shack, A Division of InterTAN Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*, Canadian International Trade Tribunal, Appeal Nos. AP-92-193 and AP-92-215, September 16, 1993, where the Tribunal recognized a principal-agent relationship where the agent financed the purchase of the finished goods for up to 45 days.

9. Made relevant by subsection 48(4) of the Act.

for unused fabric was not made in respect of the apparel. Rather, the price paid for the apparel only included the cost of raw materials used in its production, a cut, make and trim charge and an element of profit for the garment maker.

"Benefit," counsel for the appellant asserted, must be interpreted to mean a financial benefit, and "indirectly" implies that, because of a relationship between the vendor and a third party, a payment to the third party indirectly provides a financial benefit to the vendor. Counsel noted that payment for the unused fabric goes from the appellant to Mexx Far East. It cannot be said, therefore, that it is a payment directly to the garment makers or indirectly for their benefit, as payment or financial benefit never flows from Mexx Far East to the garment makers.

As to the quota charges, counsel for the appellant submitted that they are not specifically identified in paragraph 48(5)(*a*) of the Act as an amount that must be added to the price paid or payable for the apparel. For quota charges to be dutiable, therefore, they would have to be deemed to be included within the definition of "price paid or payable." Payment for quotas, he argued, is not made in respect of the apparel as the availability of quotas is not a condition of the sale of the apparel from the garment makers to the appellant. Furthermore, the appellant's payment for quotas is made to Mexx Far East in a separate contract involving parties other than the garment makers.

In addition, the payment for quotas was not made directly or indirectly to or for the benefit of the garment makers. Payment was made either directly or indirectly to or for the benefit of Mexx Far East or the quota brokers. There is no relationship between the garment makers and Mexx Far East or the quota brokers, nor any financial benefit flowing to the garment makers.

To put it simply, counsel for the respondent argued that the true vendor of the apparel is the combination of both Mexx Far East and Mexx International. Under this scenario, these two companies constitute a single business entity, while the garment makers are mere subcontractors to this entity. In support of this proposition, counsel insisted that only Mexx International can grant the right to have Mexx apparel produced and that the appellant can only obtain the apparel through Mexx Far East.[10]

Citing *Signature Plaza Sport Inc. v. Her Majesty the Queen*,[11] counsel for the respondent also challenged the appellant's assertion that a principal-agent relationship existed between the appellant and Mexx Far East. It was noted that an "agent acts to achieve the same results that would have been obtained if the principal had acted on his or her own account.[12]" Counsel submitted, however, that the appellant cannot do what Mexx Far East can do. For instance, the appellant cannot go directly to a garment maker and have Mexx apparel produced. In addition, the appellant did not freely enter into a relationship with Mexx Far East. Rather, its services were imposed on the appellant as a term of the "Service Contract.[13]"

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10. Service Contract, article 3c, "Purchase of products bearing the MEXX Marks."
11. (1994), 54 C.P.R. (3d) 526 (F.C.A.), Federal Court of Appeal, Court File No. A-453-90, February 28, 1994.
12. *William Thomas Kelly v. Her Majesty the Queen*, [1992] 2 S.C.R. 170 at 183.
13. *Supra*, note 10.

Furthermore, as the payments for excess fabric and quota charges are made in respect of the apparel to Mexx Far East as the vendor of the apparel, they represent part of the price paid for the apparel.

As acknowledged by the Tribunal in the *Radio Shack* decision, under subparagraph 48(5)(*a*)(i) of the Act, commissions and brokerage in respect of goods incurred by the purchaser of those goods must be added to the price paid or payable for those goods for purposes of determining their value for duty. However, as an exception to the general rule, fees paid or payable by the purchaser to its agent for the service of representing the purchaser abroad in respect of the sale are not added to the price paid or payable for the goods. Thus, to paraphrase the Tribunal in the *Radio Shack* decision, the focus of the Tribunal's deliberations is to determine, in the context of the overall relationship, whether Mexx Far East performed services beyond those that would normally be associated with "representing the purchaser abroad in respect of the sale." In considering the overall relationship of the players in this business relationship, the Tribunal commenced with an analysis of the contractual relationship between these players.

To highlight some of the salient points, under the Service Contract between Mexx International and the appellant, Mexx International, as the owner of the Mexx trademark, granted a licence to the appellant to distribute apparel bearing the Mexx marks or fonts. In addition, Mexx International is to provide services to the appellant such as marketing support and guidance on retail architecture, advertising and promotion. The appellant agreed to use the services of a so-called buying agent approved by Mexx International for the purchase of all apparel bearing the Mexx marks or fonts. In addition, the appellant agreed not to manufacture, or cause to be manufactured, any apparel bearing the Mexx marks or fonts.

Under the Agreement for Designing, Mexx Far East provides services to the appellant with respect to the design and production of samples of Mexx ready-made apparel. However, Mexx Far East will only enter into the Agreement for Designing if the appellant has entered, or will enter within three months, into an Agency Agreement with Mexx Far East. Under the Agency Agreement between Mexx Far East and the appellant, Mexx Far East is appointed as the sole agent for purposes of procuring Mexx ready-made apparel. The services to be performed by Mexx Far East include selecting suppliers of Mexx apparel for the appellant.

It is clear to the Tribunal that the parties to these contracts intended to give the appellant the right to sell Mexx ready-made apparel and the means of securing the necessary apparel to exercise this right. Only Mexx International could grant the right to make apparel bearing the Mexx marks or fonts, which it possessively guarded by denying the appellant the right to manufacture, or cause to be manufactured, products bearing the Mexx marks or fonts. The appellant was only granted a limited licence to distribute Mexx ready-made apparel. In addition, Mexx International required the appellant to use the services of a so-called buying agent of its approval for purposes of accessing the Mexx ready-made apparel.

Though Mr. Nezri testified that the appellant had certain apparel made in Canada, he indicated that the manufacture was based on samples made by Mexx Far East. Mr. Mehta testified that the appellant could use any garment maker that was approved by Mexx Far East.

As the appellant could not manufacture, or cause to be manufactured, Mexx apparel without approval, it was dependent on a source presumably approved by Mexx International, as the owner of the Mexx trademark. In this regard, the appellant entered into the agreement with Mexx Far East, which had the

right to design apparel bearing Mexx marks or fonts and to manufacture samples of all Mexx ready-made apparel. However, to secure these services and, thus, Mexx ready-made apparel, the appellant was required to enter into a further agreement with Mexx Far East, appointing the latter as the appellant's so-called buying agent.

Under the circumstances, the Tribunal has grave difficulties in accepting that the appellant is the principal or mandator of Mexx Far East for the production of Mexx ready-made apparel.[14] The rights and obligations created by the contracts strongly suggest that Mexx Far East was acting well beyond merely representing the appellant abroad in respect of the sale of Mexx ready-made apparel. No sale of Mexx ready-made apparel to the appellant would occur without the services of Mexx Far East or another agent approved by Mexx International. As such, Mexx Far East had authority well beyond what the appellant could grant, specifically, access to Mexx ready-made apparel.

Furthermore, much of the testimony received by the Tribunal suggests that Mexx Far East did not act as an agent in its relationship with the appellant. For instance, Mexx Far East designs and creates the sample collections of apparel from which the appellant may choose. It determines the volume and timing of fabric purchases with long lead times. Mexx Far East provides a letter of credit to the fabric makers, sometimes up to one month prior to receiving a letter of credit from the purchaser of the apparel. Mexx Far East takes physical delivery of the fabric, insures the fabric while in its possession and sells the necessary volume of fabric to a garment maker at the price at which it acquired the fabric. Mexx Far East may choose to use a particular garment maker regardless of whether the appellant has voiced dissatisfaction with that garment maker. In fact, the appellant must direct its complaints to Mexx International, which ultimately determines whether the complaint is legitimate and whether Mexx Far East should take action on behalf of the appellant. Mexx Far East exerts tremendous direction and control over the garment makers to the extent that it may specify the mills from which to source their fabrics. In addition, it has developed and uses its own standards of quality in controlling the production of the apparel.

It appears to the Tribunal that the garment makers chosen by Mexx Far East had none of the characteristics of vendors of the Mexx ready-made apparel. Orders for such apparel by the appellant could not be made directly to them. The garment makers did not have an independent right to make Mexx ready-made apparel, nor did they provide the patterns for the apparel or some of the fabrics from which the apparel was made. The Tribunal believes that these garment makers were merely performing a contract for services for Mexx Far East, a contract that the appellant could not give them on its own behalf. In the Tribunal's opinion, Mexx Far East was not acting as a buying agent for the appellant. Rather, Mexx Far East was the vendor of the Mexx ready-made apparel. Consequently, the 10 percent commission payable by the appellant pursuant to its Agency Agreement with Mexx Far East is properly included in the transaction value of the imported apparel pursuant to subparagraph 48(5)(*a*)(i) of the Act.

With regard to the payments made by the appellant with respect to the excess fabric and quota charges, the Tribunal believes that they are payments made directly to Mexx Far East in respect of the Mexx ready-made apparel. It is clear from the evidence that the provision of quotas was necessary for the apparel to be exported, and Mexx Far East had an obligation to obtain the necessary quotas. The fabric charge is “in respect of the goods” in the sense that it is apportioned among the various Mexx distributors on the basis

14. *Supra*, note 11.

of their participation in the product line for which the unused fabric was bought, and the appellant clearly accepted, in purchasing the apparel from Mexx Far East, that the price paid or payable might be subject to retroactive adjustment in this fashion. As Mexx Far East is properly seen as the vendor of the apparel, such payments constitute part of the price paid for the apparel for purposes of determining the transaction value of the apparel.

Accordingly, the appeals are dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Lise Bergeron
Lise Bergeron
Member

Lyle M. Russell
Lyle M. Russell
Member