CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, November 1, 1995

Appeal Nos. AP-94-190 and AP-94-191

IN THE MATTER OF appeals heard on February 16, 1995, 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 with respect to requests for re-appraisals under section 63 of the *Customs Act*.

BETWEEN

CHAPS-RALPH LAUREN, DIVISION OF 131384 CANADA INC. AND MODES ALTO REGAL **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

AND

CAULFEILD APPAREL GROUP LTD. **Intervener**

DECISION OF THE TRIBUNAL

The appeals are allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-94-190 and AP-94-191

CHAPS-RALPH LAUREN, DIVISION OF 131384 CANADA INC. AND MODES ALTO REGAL **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

CAULFEILD APPAREL GROUP LTD. **Intervener**

The issue in these appeals is whether the monies paid by the appellants to Mountain Rose (Singapore) Pte. Ltd., now named Polo Ralph Lauren Sourcing Pte. Ltd., located in Hong Kong and Singapore, are "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale," pursuant to subparagraph 48(5)(a)(i) of the Customs Act.

HELD: *The appeals are allowed. The evidence adduced before the Tribunal has shown that Mountain Rose (Singapore) Pte. Ltd., later named Polo Ralph Lauren Sourcing Pte. Ltd., has not exceeded the normal duties of a purchasing agent and has acted in the best interests of its principals.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 16, 1995*
Date of Decision:	*November 1, 1995*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Arthur B. Trudeau, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Robert Desjardins*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Richard G. Dearden and Randall J. Hofley, for the appellants* *Anne M. Turley, for the respondent* *Dalton Albrecht, for the intervener*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-94-190 and AP-94-191

CHAPS-RALPH LAUREN, DIVISION OF 131384 CANADA INC. AND MODES ALTO REGAL **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

and

CAULFEILD APPAREL GROUP LTD. **Intervener**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
ARTHUR B. TRUDEAU, Member
LISE BERGERON, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue. The issue in these appeals is whether the monies paid by the appellants to Mountain Rose (Singapore) Pte. Ltd. (Mountain Rose), now named Polo Ralph Lauren Sourcing Pte. Ltd. (Polo Sourcing), located in Hong Kong and Singapore, are "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale," pursuant to subparagraph 48(5)(*a*)(i) of the Act. Should the Tribunal conclude that the amounts paid by the appellants constitute such fees, these 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 respondent's re-appraisals upheld the valuation rulings of the Department of National Revenue (Revenue Canada) of February 26, 1993 (supplemented on August 26, 1993) which required the appellants to include the commissions paid to Mountain Rose/Polo Sourcing in the value for duty of the appellants' imports. Revenue Canada determined that these companies could not be considered as *bona fide* agents, primarily because of a corporate relationship with the licensor of the trademarks used on the appellants' goods. Revenue Canada took the view that Mountain Rose/Polo Sourcing had an interest in the transactions going beyond that which is contemplated by subparagraph 48(5)(*a*)(i) of the Act.

The appellants' first witness was Mr. Michael Belcourt, President and CEO of Modes Alto Regal (Modes) and of 131384 Canada Inc. He first explained that Modes is licensed to manufacture and distribute, in all of Canada, Polo-Ralph Lauren and Chaps-Ralph Lauren men's wear and Polo-Ralph Lauren boys' wear. The relevant trademarks "Polo" and "Chaps" are owned by Polo Ralph Lauren Corporation (Polo Corporation) of New York, New York. They were licensed by Polo Corporation to Modes in 1982 and 1984, respectively. In turn, Modes sublicenses the "Chaps" trademark to Chaps-Ralph Lauren, Division

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

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of 131384 Canada Inc. Modes' customers include major Canadian department stores such as Eaton's and The Bay, as well as specialty stores. Furthermore, Modes has independent Polo-Ralph Lauren stores.

According to Mr. Belcourt, Modes does not manufacture any garment. Rather, it contracts out the manufacture of the clothing to independent factories on a worldwide basis. The choice of the manufacturer rests entirely with the appellants. Thus, the latter do import garments manufactured in Southeast Asia. The list of Asian suppliers (Exhibit A-4) used by the appellants includes manufacturers in Hong Kong, Japan, Singapore, Thailand, Malaysia, Macau, Indonesia, Taiwan and Korea. Mr. Belcourt stated unequivocally that there was no corporate relationship between the appellants and any of their suppliers/manufacturers. At this point, the Tribunal notes that Mr. Belcourt told the Tribunal, later in his testimony, that there was no corporate link between the licensor of the trademarks (Polo Corporation) and the suppliers/manufacturers mentioned in Exhibit A-4. Mr. Belcourt also mentioned that the licensing agreements with Polo Corporation do not deal in any way with the issue of overseas buying agents. He also made clear that Modes and 131384 Canada Inc. were absolutely unrelated to Mr. Ralph Lauren and his business partner, Mr. Peter Strom, and to any of Mr. Lauren's affiliated companies, including Polo Sourcing. In addition, Mr. Belcourt stated that he was not a shareholder, a director or an officer of any Ralph Lauren company.

Using the striped knit shirt introduced as Exhibit A-2 as an example, Mr. Belcourt gave an overview of the appellants' businesses, from the planning stage to the delivery of the garments to Canadian retailers. Thus, for each season, from New York, the Polo-Ralph Lauren design department sends the appellants what is known as "concept boards." Such boards depict a number of styles which will be run in the men's wear collection for the next season. Mr. Belcourt and his partners then make a merchandise selection list, i.e. a list of the different products that they want to run for the next season. At this point, they also send the list to their agent in Hong Kong, with a request that it look for manufacturers to make such products. The agent's task is to supply Modes with some approximate prices and production capacities for each one of these manufacturers. Upon receipt of this information, Mr. Belcourt and his partners decide what garments should be manufactured in the Orient or elsewhere, such as in Canada or the United States. Since 1980, Mr. Belcourt and a colleague have travelled three times a year to the Orient. On such occasions, they meet with their agent and with the manufacturers with whom the agent has set up appointments. The purpose of the discussions with the suppliers is to go through the program of the different styles and make decisions with respect to the quantities of garments to be produced. Translators are provided by the agent. Mr. Belcourt told the Tribunal that he and his partners negotiate all the prices themselves directly with the manufacturers. Where the negotiations on prices are not completed, the agent is given target prices and acts as a conduit between the supplier and Modes. In all cases, according to Mr. Belcourt, Modes has the final say on prices.

On leaving the Orient, Mr. Belcourt and his partner instruct their agent to communicate with specified manufacturers. Back in Canada, both businessmen send purchase orders directly to the manufacturers. The appellants' agent follows up on all production requirements and the quality content of the garments. In addition, Polo Sourcing is involved in the testing of the fabrics and monitors the production. The agent is informed, in due course, as to the freight forwarder to be used for shipping the goods. As mentioned by Mr. Belcourt, the freight forwarder takes possession of the merchandise only after the agent has signed a quality inspection certificate and released the shipment. According to Mr. Belcourt, the exporter of record is the foreign supplier – it is never the agent. The payment by the appellants is done with a letter of credit opened directly with the foreign supplier.

After this overview, referring to documents contained at Tab A of Exhibit A-6, Mr. Belcourt took the Tribunal through all the procedures relating to an actual and specific garment procurement by Modes from a Hong Kong supplier, from the concept board to the Canadian broker's invoice. He also highlighted various examples of instructions given by Modes to Polo Sourcing (from Tabs 2 to 7). This exhibit also illustrates a garment procurement by Chaps-Ralph Lauren.

Mr. Belcourt told the Tribunal that he was aware, when he retained the services of Mountain Rose, that it was connected to Mr. Lauren. This did not cause him any concern. Furthermore, he stated that the appellants did not have to use Polo Sourcing. Thus, it was strictly a business decision, made on the basis of perceived advantages, such as the use of the same agent by other licensees. As to the garments bearing the "Chaps" trademark, Chaps-Ralph Lauren has stopped using Polo Sourcing in order to move its business to a new agent, i.e. Asco General Supplies (Far East) Limited (Asco). This change, which took place in April 1994, was a business decision. According to Mr. Belcourt, this new agent is not related to the appellants, nor to Mr. Lauren or any of his affiliated companies.

During cross-examination, Mr. Belcourt told the Tribunal that at least 80 percent of the prices are negotiated and confirmed during his annual visits to the Orient. With respect to the remaining prices, he reiterated that the agent is given instructions and that the agent's task is to relay the information given by the various suppliers to the appellants. Mr. Belcourt also explained the business reasons which caused the appellants, in the 1980s, to leave an agency called Addison Ltd. and to use Mountain Rose. Mr. Belcourt admitted to having no knowledge as to whether Polo Corporation uses Polo Sourcing to inspect the appellants' garments. He acknowledged that some charges, such as laboratory testing charges, could have been paid by the agent on the appellants' behalf. However, the agent is subsequently reimbursed by the appellants. With respect to sample charges, Mr. Belcourt noted that: (1) they represent small amounts when compared to the amount of the letters of credit; and (2) the procurement of samples is an urgent matter and that the easiest way is for the small suppliers to ship the samples to the appellants by air and to invoice the local agent, which, in turn, invoices the appellants.

In reply to a further question from counsel for the respondent, Mr. Belcourt stated that the appellants' agent represents a number of other companies in the Orient that are not related to Mr. Lauren. For instance, there are agency agreements between Mountain Rose and The Timberland Company in the United States (Exhibit A-8) and between Mountain Rose and Fred Perry Sportswear (UK) Ltd. (Exhibit A-9).

The appellants' second witness was Mr. Edward Kable, who works in New York as Associate General Counsel for Polo Corporation. Mr. Kable testified that his work includes giving advice, on occasion, to Polo Sourcing. Thus, Mr. Kable has worked in the past on Polo Sourcing's agency agreements. Mr. Kable represented Polo Sourcing in the negotiations regarding the buying agency agreement between Modes and Polo Sourcing (Exhibit A-7). This agreement was signed on November 29, 1994. In response to a question from counsel for the appellants as to whether this agreement accurately reflects the relationship between Modes and its buying agent prior to this signature, Mr. Kable answered in the affirmative. Mr. Kable also indicated that some licensees, such as the Polo Australia licensee, still do not have a written agreement with Polo Sourcing.

The absence of any corporate relationship between Mr. Lauren, Mr. Strom or any of their companies and the appellants or Mr. Belcourt, as well as the absence of any such relationship between Ralph Lauren

companies and the foreign suppliers used by the appellants, were again underlined by Mr. Kable. He also told the Tribunal that the licensing agreements between Polo Corporation and Modes did not require the latter to use Polo Sourcing as its agent.

During cross-examination, Mr. Kable explained the reason behind the agent's name change, from Mountain Rose to Polo Sourcing, that took place in 1992. He also informed the Tribunal of a buying agency agreement between Polo Corporation and Polo Sourcing.

In argument, counsel for the appellants made reference to the Tribunal's decision in *Radio Shack, A Division of InterTAN Canada Ltd.*[2] More particularly, they quoted an excerpt relating to the Explanatory Notes[3] to the Agreement on the Customs Valuation Code[4] (the GATT Agreement), which defines a buying agent, 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.[5]" In essence, counsel asserted that the evidence adduced before the Tribunal clearly matches this definition. Counsel also made reference to Commentary 17.1 of the GATT Agreement entitled "Buying Commissions" which describes the kind of evidence necessary to establish the nature of the relationship between the importer and the agent and provides examples of activities or practices carried out by an agent which may bring into question the existence of a true importer/buyer agency relationship. These practices include instances where the agent: (1) uses its own funds for, and assumes risk in respect of, the payment of the imported goods; (2) acts on its own account and/or assumes a proprietary interest in the goods; (3) has a relationship with the seller; and (4) concludes a contract and reinvoices the importer, distinguishing the price of the goods and its fee.[6] As further pointed out by counsel, this list of instances is not exhaustive nor does it imply that any of these activities would invalidate the agency relationship. In counsel's view, the evidence before the Tribunal clearly establishes an agency relationship.

Furthermore, counsel for the appellants argued that the relationship between the agent and the licensor of the trademarks, Polo Corporation, has no impact on the relationship between the appellants, as principals, and their agent.

As to the payment of some charges by Mountain Rose/Polo Sourcing, counsel for the appellants took the view that these charges had been paid for reasons of expediency and convenience and had been reimbursed to the agent. In particular, with respect to the sample charges, counsel stated that the agent never paid for the stock items and that the agent took no risk in respect of the payment of the imported garments. Furthermore, payment of small charges is to be expected in the normal course of an importer/buyer agency relationship.

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2. Appeal Nos. AP-92-193 and AP-92-215, September 16, 1993.
3. GATT Agreement and Texts of the Technical Committee on Customs Valuation, Customs Co-operation Council, Brussels.
4. *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979.
5. *Supra*, note 3, art. 9 of Explanatory Note 2.1, "Commissions and Brokerage in the Context of Article 8 of the Agreement."
6. *Supra*, note 3, Commentary 17.1, "Buying Commissions."

Counsel for the appellants argued that the evidence before the Tribunal has clearly established that Polo Sourcing and the other agents mentioned in these appeals have carried out their primary obligation of acting with the authority given to them by the appellants. There has never been a breach of their fiduciary duty to the appellants.

Counsel for the intervener insisted on the necessary requirements to establish an agency relationship. In this connection, he underlined three essential criteria: (1) the consent, expressed or implied, about the agent and principal, whether such consent is oral or written; (2) the authority given to the agent by the principal, where the agent acts on behalf of the principal, and the principal does not contradict that authority has been given; and (3) the principal's control over the agent. In counsel's view, there is no principle of law to the effect that an agency relationship is obliterated simply because the agent is related to the trademark holder/licensor. The latter, according to counsel, is a stranger to the contract between the manufacturer of the goods and the appellants. With respect to the departmental memorandum[7] on which the respondent relies, counsel argued that the appellants clearly fall within the ambit of such document. In particular, he pointed out that the relationship between Polo Sourcing and the appellants is totally unrelated to the relationship between the purchaser and the vendor of the manufactured garments. The second point argued by counsel relates to some specific points put in evidence. Thus, he dismissed as having no relevance in law the fact that the agent paid certain expenses, such as laboratory fees, on behalf of the appellants. In his view, there is an elemental principle of the law of agency that an agent can pay for goods or services on behalf of the principal, expenses for which the agent has the right to be reimbursed by the principal. Counsel urged the Tribunal to find, taking into account the totality of the evidence, as well as the legal requirements, that the law of agency must be applied to the particular circumstances of these two appeals.

Counsel for the respondent, referring to paragraph 48(5) of the Act, noted that, as a general rule, commissions must be added to the price paid or payable unless it is a fee "paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale." She argued that this exception had to be construed narrowly. Referring to the departmental memorandum, she particularly mentioned two criteria, namely, that the agent must, at all times, act in the interests of the purchaser and that there must be no impediments preventing the agent from acting in the interests of the principal. She also referred to the GATT Agreement, to Explanatory Note 2.1 and to Commentary 17.1 previously mentioned. In her view, these sources indicate that one must look at the specific circumstances of the case at bar. In this regard, she raised the potentiality of a conflict of interest between the buying agent and the appellants. The source of such potential conflict would lie, in counsel's view, in the relationship between the appellants and Polo Corporation. As an example of a potential conflict of interest, she pointed out that it would be in the agent's interest to see a higher price on the goods bought by the appellants in order to get a higher commission. As a result, the agent's parent company, Polo Corporation, would also stand to gain higher royalty fees.

Counsel for the respondent also submitted that there is no agent in law in the present situation, since Polo Corporation and Mountain Rose/Polo Sourcing are, in effect, one and the same entity. Thus, she argued that Polo Sourcing is merely Polo Corporation's buying department in the Orient. Finally, she argued that the fees paid by the appellants are dutiable, as they do not fall within the exception.

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7. Memorandum D13-4-12, Commissions and Brokerage, Department of National Revenue, Customs and Excise, September 30, 1991.

In reply, counsel for the appellants stated that the only evidence before the Tribunal is to the effect that the agent acted in the best interests of the principals. Counsel also considered as speculation the potentiality of a conflict of interest mentioned by counsel for the respondent. They added that an agency relationship is not lost because of a potential conflict of interest. In the case at bar, as the evidence has shown, the appellants chose to use their agent in the Orient with the full knowledge of the connection between Polo Sourcing and Polo Corporation. In the view of counsel for the appellants, such disclosure removed any potential conflict.

The issue in these appeals is whether the monies paid by the appellants to Mountain Rose/Polo Sourcing are "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale," pursuant to subparagraph 48(5)(*a*)(i) of the Act. As stated by the Tribunal in *Radio Shack*, 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 this regard, the Tribunal agrees with counsel for the appellants and counsel for the respondent that it has to look at the totality of the evidence.

The evidence adduced before the Tribunal has shown that the role of Mountain Rose/Polo Sourcing, as well as that of Asco, is circumscribed to that of a buying agent representing the appellants abroad. The testimony of Mr. Belcourt has left no doubt in the Tribunal's mind as to the various functions carried out on the appellants' behalf by the agents. As stated by Mr. Belcourt, "[t]he agent's responsibility is really to be our eyes and ears and messengers for our needs.[8]" This is well supported by the evidence. Suffice it to note, at this point, that the agent visits potential manufacturers on behalf of the appellants, examines samples, assists employees of the appellants during work visits to the Orient, acts as a conduit for information between the appellants and the garment makers, inspects finished merchandise and arranges for shipments. Indeed, these activities are typical of what one would expect of a buying agent and, incidentally, correspond to what is described in the departmental memorandum.[9] These activities or services are formally depicted in the buying agency agreement signed in November 1994 between Modes and Polo Sourcing (Exhibit A-7). As was underlined by Mr. Kable during his testimony, this agreement accurately reflects the previous relationship between both parties prior to the signature of this written accord (i.e. from 1985 to 1994).

The Tribunal agrees with counsel for the appellants that Mountain Rose/Polo Sourcing has not exceeded the normal duties of a purchasing agent. The Tribunal is satisfied that the agent has acted in the best interests of its principals. No evidence has been adduced to show the contrary or that the agent was in breach of its fiduciary duty owed to the appellants.

It has also been shown during the hearing that the agent, which is unrelated to the overseas vendors/manufacturers used by the appellants, does not acquire any proprietary interest, or assume risk of ownership, in the garments and does not assume risk for damaged or lost goods. The evidence has also revealed that the appellants purchase the goods from unrelated manufacturers overseas and pay the latter by opening letters of credit in their names. The Tribunal is of the view that the appellants control the activities of their agent. As Mr. Belcourt made clear, the appellants have the final word on the choice of manufacturers,

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8. Transcript of Public Session, February 16, 1995, at 34.

9. The Tribunal notes that the departmental memorandum describes the duties of a buying agent as normally including "finding suppliers, informing the vendor of the desires of the purchaser, placing orders, collecting samples, inspecting goods and, in some cases, arranging for the insurance, transport, storage or delivery of the goods."

as well as on the type and quality of merchandise, on the price to be paid for the garments and on the aspects relating to the shipping of such merchandise. With respect to the payment by Mountain Rose/Polo Sourcing of some expenses such as laboratory charges, the Tribunal notes that these small expenses were reimbursed to the agent. Furthermore, the Tribunal considers that these payments were made for the sake of convenience and expediency and do not amount, in the circumstances of these appeals, to a practice able to bring into question the existence of a true importer/buyer agency relationship.

On the question of the relationship between Mountain Rose/Polo Sourcing and the licensor of the trademarks used by the appellants, the Tribunal agrees with counsel for the appellants that it has no impact on the relationship between the appellants, as principals, and their agent. As rightly pointed out by counsel for the intervener, the licensor, Polo Corporation, is a stranger to the contracts between the Canadian purchasers and the garment makers. The potentiality of any conflict of interest between Mountain Rose/Polo Sourcing and Modes is, in light of the totality of evidence, quite remote. Furthermore, it has been shown to the satisfaction of the Tribunal that Modes chose Mountain Rose as its agent with the clear knowledge of the corporate link between the latter and Polo Corporation. As explained by Mr. Belcourt, the switch from its former buying agent, Addison Ltd., to Mountain Rose in 1985 was essentially dictated by reasons of business efficiencies. In this connection, the Tribunal notes that the choice of a buying agent is entirely at the appellants' discretion. As Mr. Kable testified, there is nothing in the trademark licence that requires Modes to use Polo Sourcing as its agent.

In light of the foregoing, the Tribunal concludes that Mountain Rose/Polo Sourcing is a *bona fide* buying agent and that the commissions paid or payable by the appellants are, pursuant to subparagraph 48(5)(*a*)(i) of the Act, "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 appeals are allowed.

Desmond Hallissey
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