



Ottawa, Tuesday, March 26, 1996

Appeal Nos. AP-94-359 and AP-94-360

IN THE MATTER OF appeals heard on October 4, 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 dated December 19, 1994, with respect to re-appraisals under section 61 of the *Customs Act*.

BETWEEN

**JEWELWAY INTERNATIONAL CANADA, INC. AND
JEWELWAY INTERNATIONAL, INC.**

Appellants

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Lise Bergeron
Lise Bergeron
Member

Anita Szlajak
Anita Szlajak
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-94-359 and AP-94-360

**JEWELWAY INTERNATIONAL CANADA, INC. AND
JEWELWAY INTERNATIONAL, INC.**

Appellants

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under section 67 of the Customs Act from two decisions of the Deputy Minister of National Revenue under subsection 63(3) of the Customs Act, affirming the re-appraisal of the value for duty of certain jewellery imported between September 1, 1992, and December 31, 1993. The value for duty claimed at the time of importation was based on the selling price for the jewellery between JewelWay International Canada, Inc. (JWC) and its parent company in the United States, JewelWay International, Inc. (JWUS). Upon a review of the operations of JWC and JWUS during the relevant period, it was found that JWC was under the management and control of JWUS in terms of administration, purchases and payments and did not, therefore, qualify as a purchaser in a sale for export to Canada for the purposes of the transaction value method of customs valuation under subsection 48(1) of the Customs Act. As a result, the value for duty of the imported jewellery was re-appraised based on the selling price between JWC and its independent distributor representatives (IRs) in Canada. The issue in these appeals is whether this is the appropriate transaction value on which to base the value for duty of the imported jewellery.

HELD: *The appeals are dismissed. The Tribunal has reviewed the jurisprudence dealing with the issue of agency and notes that various factors have been considered relevant for the purposes of determining whether there is an agency relationship. As identified by counsel for the appellants, the courts have considered such factors as the extent to which one party controls another and the risk assumed by the alleged agent. However, the Tribunal notes that no one factor has been considered by the courts to be determinative of the issue of agency, and the courts have, in making their determinations, considered the facts as a whole and weighed the relative importance of the factors as they may apply.*

The Tribunal examined the “paper trail” between JWC and JWUS and between JWC and the IRs and considered the significance of that trail in light of the agreement between JWC and JWUS, the conduct of the employees and directors of JWC and JWUS, and the oral testimony of the witnesses at the hearing. The Tribunal is of the view that, on balance, the facts show that JWC acted as the agent of JWUS during the relevant period. In reaching this conclusion, the Tribunal relies, in particular, on the following factors: (1) the terms, namely, the price and payment, for the sale of jewellery to IRs were determined by JWUS; (2) in certain circumstances, JWC used JWUS’s order forms for sales of jewellery to Canadian IRs, which included JWUS’s refund policy; (3) JWC held no inventory in Canada and had no choice of suppliers; (4) under certain circumstances, in order to service warranties, jewellery had to be returned to JWUS, which would, in turn, return it to the suppliers; (5) payments for jewellery and services were described and treated in JWC and JWUS’s accounting records as intercompany transfers; (6) the Director of Canadian Operations for JWC was, for most of the period at issue, employed and paid by JWUS; (7) directors and employees of JWUS were directly involved in negotiating and executing agreements between JWC and third parties and, in some instances, namely, the agreement with Purolator Courier Ltd., the agreement

was in the name of JWUS; and (8) directors of JWUS signed cheques for the withdrawal of funds from JWC's bank account. Finally, the Tribunal is not persuaded that the bill of lading showing JWC as consignee is conclusive evidence of a seller/buyer relationship, particularly since JWUS arranged and paid for all shipping expenses and was named as the insured.

Having determined that JWC was the agent for JWUS in respect of the sales to the Canadian IRs, the Tribunal concludes that the sales for export to Canada were the sales to the IRs and that the value for duty of the jewellery exported to Canada by JWUS should, therefore, be based on the value of those sales.

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 4, 1995
Date of Decision: March 26, 1996

Tribunal Members: Raynald Guay, Presiding Member
Lise Bergeron, Member
Anita Szlajak, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

Appearances: Robert G. Kreklewetz, for the appellants
Brian Tittlemore, for the respondent

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JEWELWAY INTERNATIONAL, INC.**

Appellants

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: RAYNALD GUAY, Presiding Member
LISE BERGERON, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

These are appeals under section 67 of the *Customs Act*¹ (the Act) from two decisions of the Deputy Minister of National Revenue under subsection 63(3) of the Act, affirming the re-appraisal of the value for duty of certain jewellery imported between September 1, 1992, and December 31, 1993. The value for duty claimed at the time of importation was based on the selling price for the jewellery between JewelWay International Canada, Inc. (JWC) and its parent company in the United States, JewelWay International, Inc. (JWUS). Upon a review of the operations of JWC and JWUS during the relevant period, it was found that JWC was under the management and control of JWUS in terms of administration, purchases and payments and did not, therefore, qualify as a purchaser in a sale for export to Canada for the purposes of the transaction value method of customs valuation under subsection 48(1) of the Act. As a result, the value for duty of the imported jewellery was re-appraised based on the selling price between JWC and its independent distributor representatives (IRs) in Canada. The issue in these appeals is whether this is the appropriate transaction value on which to base the value for duty of the imported jewellery.

Three witnesses appeared on behalf of the appellants: Mr. Bruce Caruth, President of both JWC and JWUS and a director of both companies; Mr. George A. LePrieur, Director of Canadian Operations of JWC; and Mr. Peter J. Williams, Chief Financial Officer of JWUS.

Mr. Caruth explained that JWUS and JWC are part of a multinational group of companies that are in the business of selling gold jewellery with precious gemstones through IRs that sell directly to the consumer. JWUS has its head office in Tucson, Arizona. JWC was incorporated under the *Canada Business Corporations Act*² and the *Alberta Business Corporations Act*³ in July 1992 and commenced business operations at its head office in Calgary, Alberta, in September 1992. Mr. Caruth, a U.S. resident, owns 50 percent of JWUS, and JWUS owns 100 percent of JWC. There are two other directors of JWC who are Canadian residents.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. C-44.
 3. R.S.A. 1980, c. B-15.

In describing the nature of the business of JWC, Mr. Caruth explained that an IR can earn money by retailing jewellery for a profit and/or sponsoring another IR and getting a percentage of the value of the sales. JWC enters into an agreement with all of its IRs, following which a letter of acceptance is sent by JWC to the IR. An example of an “Independent Representative Application and Agreement⁴” bearing the name JWC at the top and used by JWC during the relevant period was introduced as an exhibit. An IR sells jewellery to buyers using a catalogue produced by JWUS. According to Mr. Williams, the catalogue used by Canadian IRs is a Canadian version of JWUS’s catalogue and lists prices different from those offered in JWUS’s catalogue. Once an IR sells jewellery to a buyer, the latter completes an order form and sends it along with the requisite payment to JWC. Order forms used by Canadian IRs during the period at issue had JWUS’s name at the top and listed either a U.S. address and telephone number or both a U.S. and a Canadian address and telephone number under the name.⁵ Mr. Caruth stated that, initially, some IRs in Canada were sponsored by IRs in the United States and, as a result, the IRs used JWUS order forms to order jewellery.

Both Mr. Caruth and Mr. LePrieur described the process that takes place in order to fill an order for jewellery by a customer through an IR in Canada. Each order for jewellery received by JWC, for which JWC’s staff had received and verified the payment, would be listed on a daily batch reconciliation sheet⁶ and faxed to JWUS. The orders would be logged into JWUS’s computer sales log for Canadian orders and a pick list setting out a detailed listing of the orders would be generated from the sales log. JWUS would use the pick list to determine which items would be pulled from its inventory. The jewellery would then be placed in bags and, in turn, the bags would be packed in a box and shipped to JWC by JWUS, accompanied by a document, described as a commercial invoice, listing quantity, item number, description, origin, unit value and total value of the imported jewellery.⁷ The values listed on this document represented the declared values for duty for customs purposes.

According to Mr. Caruth, the jewellery would be shipped to JWC F.O.B. Tucson using Airborne Express.⁸ JWUS would pay the shipping invoices, which included the cost of insurance, and would be reimbursed by JWC. Mr. Williams indicated that the insurance for loss or damage caused during shipment of the jewellery is with Airborne Express under the name of JWUS, but that, if any of the jewellery were damaged, JWC would ultimately receive payment from the insurance company. The costs of importation of the goods, i.e. duties, provincial sales tax (PST) and Goods and Services Tax (GST) were paid directly by JWC, as indicated by the summary of payments made by JWC to Peace Bridge Brokerage Ltd.⁹ and an example of a cheque to Peace Bridge Brokerage Ltd. drawn on JWC’s account and signed by Mr. Caruth and Mr. Robert Charette, Jr.¹⁰

Upon receipt of the imported jewellery, JWC would package the individual orders and ship them to the IRs using Purolator Courier Ltd. (Purolator). A copy of a “Purolator Volume Discount Program:

4. Exhibit A-1, “Appellants’ Book of Exhibits,” Tab 26, “Independent Selling Agreement.”

5. *Ibid.*, Tab 27, “JC Order Form.”

6. Appellants’ Brief, Tab 15, “Sample Batch Reconciliation Sheet.”

7. *Supra*, note 4, Tab 30, “Commercial Invoice.”

8. See example of bill of lading dated November 22, 1993, enclosed in a letter from counsel for the appellants dated October 30, 1995.

9. *Supra*, note 4, Tab 37, “PeaceBridge Payments.”

10. *Ibid.*, Tab 38, “Cheques for PeaceBridge Payments.”

Proposed Courier Service Agreement¹¹” covering the period from January 1 to December 31, 1994, in the name of JWUS and signed by Mr. Travis Edge,¹² was introduced as an exhibit. Mr. LePrieur acknowledged that the agreement with Purolator was in the name of JWUS and signed by Mr. Edge, then an employee of JWUS, but stated that JWC was invoiced for the courier services of Purolator.

Mr. Williams explained that JWC would be invoiced by JWUS for the cost of the jewellery and entered, as an exhibit, a sample of a cheque from JWC to JWUS in the amount of CAN\$15,524.05¹³ in payment of the invoice dated December 12, 1992, for November 1992 “Transfers.”¹⁴ The cheque is signed by Mr. Shawn H. Scott and Mr. Caruth and states that it is for “Inter-Company Transfers.”

Mr. Caruth explained that, in the event of a problem with any of the jewellery, JWC provided for and serviced its own warranties and assumed the risk of loss. He referred to the JWUS catalogue used by JWC which, he stated, indicates that IRs in Canada are to return defective jewellery to JWC. Mr. Caruth explained that, if jewellery were returned to JWC, it would do one of the following things: refund the money paid for the jewellery; arrange for the repair of defective jewellery in Canada; or return it to JWUS which would, in turn, return it to the supplier for repair or replacement.

According to Mr. Caruth, when JWC commenced business operations, it had no sales, and it was not, therefore, financially feasible for it to maintain an inventory or to perform administrative services. As a result, it entered into an “Agreement for Services¹⁵” with JWUS on September 18, 1992. This agreement was signed by Mr. Scott, then Vice President of Operations of JWC, and Mr. Caruth, President of JWUS. The “Summary” portion of the agreement provides, among other things, that JWC is “willing to pay a fair and equitable price for services to be rendered by [JWUS]” and that JWC and JWUS “desire such price to be consistent with a price which would be paid under a negotiated arms length transaction.” The “Summary” portion also provides that JWC would purchase its jewellery directly from the same suppliers used by JWUS and at the same price paid by JWUS. It states that it would be more cost-effective to provide the services as outlined in the agreement if JWUS purchased the jewellery directly from the suppliers on JWC’s behalf and then shipped the jewellery to JWC. The “Summary” portion further states that JWC is “desirous of purchasing its [jewellery] from [JWUS] at the same price paid by [JWUS] to its suppliers.” Finally, the “Summary” portion states the following in respect of JWC’s liabilities and responsibilities:

[JWC] and [JWUS] understand that this Agreement for Services shall not limit [JWC’s] responsibilities and liabilities nor shall [JWC’s] liabilities inure to [JWUS] as a result of this Agreement. [JWC] is a separate, legal Canadian Corporation which is responsible for its own decision making, liabilities, warranties, obligations, licensing, bonding, income taxes, GST and PST, customs excise taxes, custom duties, fulfillment of [jewellery] orders from Representatives and customers, hiring and firing of employees, payment of employee wages and taxes and any and all other responsibilities and liabilities which may arise from time to time.

11. *Ibid.*, Tab 20, Purolator Courier Agreement.”

12. Mr. Edge was Director of Operations of JWC from September 1993 to June 1994.

13. *Supra*, note 4, Tab 36, “Cheque for November 1992 Goods Sold.”

14. *Ibid.*, Tab 35, “November 1992 Invoice for Goods Sold.”

15. *Ibid.*, Tab 5, “1992 Services Agreement.”

The “Agreement” portion provides that JWUS shall provide data entry services for all jewellery purchase orders, calculate sales bonus amounts due to IRs by JWC, prepare bonus cheques, ship to JWC all jewellery ordered by JWC, maintain certain general accounting records and print cheques for purchases made by JWC.

The “Remuneration” portion provides that, for services rendered by JWUS, JWUS shall “bill [JWC] monthly ... by allocating to [JWC] a portion of [JWUS’s] operating expenses ... based on the ratio that [JWC’s] sales revenue bears to [JWUS’s] sales revenue” and that “[JWC] shall pay [JWUS] weekly an estimate equal to one [fourth] of the monthly amount” and pay any balance owed by the end of the following month. For jewellery shipped to JWC by JWUS, JWUS is required to “bill [JWC] monthly for all [jewellery] shipped to [JWC] during the previous month ... at the same cost [JWUS] pays for the [jewellery]” and JWC is required to “pay [JWUS] weekly an estimate equal to one [fourth] of the monthly amount” and pay any balance owed by the end of the following month.

Witnesses stated that, each month, JWUS would prepare an invoice for JWC for the administrative services provided. The amount charged was derived by prorating the total service costs based on the relative sales volume of JWC and JWUS. JWUS would be paid by cheque drawn on JWC’s bank account in Calgary. According to Mr. Caruth, included in this service fee was a proportion of the compensation for officers of JWUS, including himself.

This agreement was revised on October 1, 1993, and the revised “Management Agreement¹⁶” went into effect on January 1, 1994. The revised agreement provides that JWUS will provide the same types of administrative services to JWC for similar remuneration, but that JWC will purchase jewellery directly from suppliers rather than through JWUS. Mr. Caruth stated that it had been indicated to him by officials of the Department of National Revenue (Revenue Canada) that such a change would have a material impact on the value for duty of the imported jewellery if JWC purchased jewellery directly from suppliers. In a letter dated April 25, 1994, from Mr. Gary S. Fioretti of Revenue Canada to counsel for the appellants, it was found that, commencing January 1, 1994, JWC maintained financial and management control over the buying and selling operations of the company in Canada and that the value for duty would, therefore, be based on the transaction value between the suppliers and JWC.¹⁷

Mr. Caruth referred to two invoices from the same jewellery supplier, one dated October 27, 1993, and the other, February 16, 1994,¹⁸ to show that the price paid to the suppliers was the same regardless of whether JWC purchased the jewellery directly from suppliers or did so through JWUS.

With respect to JWC’s accounting procedures, Mr. Caruth explained that JWC’s accounting was performed by JWUS’s accounting representatives and that JWC’s books and, in particular, the general ledger were kept by JWUS. However, he further stated that many of the source documents were kept at JWC’s premises and that JWC did have an accountant in Canada who prepared its provincial and federal income tax returns.

16. *Ibid.*, Tab 8, “October 1993 Management Agreement.”

17. *Supra*, note 4, Tab 9, “National Customs Ruling.”

18. *Ibid.*, Tab 10, “Comparative Invoices” and Exhibit A-2 (protected), “Appellants’ Book of Protected Exhibits,” Tab 2, “Comparative Invoices.”

Examples of general journal entry sheets with the header “JewelWay International, Inc.” used for both JWUS and JWC were introduced by Mr. Williams as exhibits. The example of the JWUS general journal entry sheet¹⁹ has hand-written on it “Inter Company Transfers” and the date “Mar ‘93” and provides in the reference column “Transfer to Can.” This entry sheet represents the shipments of jewellery from JWUS to JWC and shows a debit in the receivables’ column and a credit in the inventory. The example of the JWC general journal entry sheet²⁰ has hand-written on it “Canada,” “Inter Company Transfers” and the date “Mar ‘93” and provides in the reference column “Trnsfrs from US.” Mr. Williams described the JWC general journal entry sheet as the record of shipments of jewellery from JWUS and accounts payable by JWC. Accordingly, the entry sheets show a debit in the inventory and a credit in the accounts payable column.

A copy of the balance sheet for JWC for March 1993²¹ was introduced as an exhibit. Under the current liabilities, accounts payable, there is an amount described as “Intercomp. payable” which, Mr. Williams stated, represented the accounts due and payable to JWUS for jewellery shipped to JWC, shipping expenses and services rendered by JWUS. A cheque for that amount was also introduced as an exhibit.²² The cheque is in JWUS’s name, is issued on JWC’s Canadian bank account, is signed by Mr. Caruth and Mr. Robert Charette, Jr. and is for “Intercompany.”

When questioned concerning a business plan for JWC, Mr. Caruth explained that JWC did not have and does not now have a formal, lengthy business plan. He likened JWC to a franchise of JWUS relying on the expertise and experience of JWUS. The expansion of JWUS into Canada was, however, in the business plan for JWUS and was approved by the Board of Directors for JWUS.

Mr. Caruth explained that when JWC commenced its business, Mr. Scott was appointed Vice President of Operations of JWC pursuant to a “Resolution of the Board of Directors” of JWC dated August 28, 1992. The resolution provides that his duties “shall include negotiating office premises ... management of office staff, bank set up procedures, accepting responsibility of deposits, hold a signature on the corporate bank account, together with the day to day management of the Alberta offices of [JWC].” Mr. Scott is a U.S. citizen who previously worked for JWUS. He was paid by JWUS; however, JWUS was reimbursed this amount through the “Agreement for Services.” Mr. Caruth stated that Mr. Scott’s salary was not paid directly by JWC, since it was never intended that Mr. Scott remain in Canada.

Reference was made to a Royal Bank of Canada “Resolution Regarding Banking and Security²³” of JWC signed on September 1, 1992, by Mr. Caruth, Ms. Donilyn Walden and Mr. Robert Charette, Jr., all of whom were Directors of JWUS, as well as by Mr. Scott. This resolution provides, in part, that any one of the President, Mr. Caruth, Vice President, Mr. Charette, Vice President, Ms. Walden and Vice President of Operations, Mr. Scott, may sign cheques for a value up to \$500, and any two may sign cheques for a value

19. *Ibid.*, Exhibit A-2 (protected), Tab 4, “JI Journal Entries, March 1993.”

20. *Ibid.*, Tab 5, “JC Journal Entries, March 1993.”

21. *Ibid.*, Tab 6, “JC Balance Sheet as at March 1993.”

22. *Ibid.*, Tab 7, “Journal Entry & Cheque for Inter-Company Transaction, April 1993.”

23. Respondent’s Brief and Authorities, Tab 2, “Canadian JIC Bank Resolution Statement dated September 1, 1992.”

over \$500. According to Mr. Caruth, Mr. Charette and Ms. Walden were secondary cheque signers and did not regularly sign cheques for JWC.

Mr. Scott left JWC in December 1992 and was replaced as Director of Operations of JWC by Mr. Edge, also a U.S. citizen, by a resolution of the Board of Directors of JWC dated September 6, 1993. According to Mr. Caruth, since it was also never intended that Mr. Edge remain in Canada, he too was paid by JWUS. However, once Mr. Edge decided that he wanted to stay in Canada and became the permanent Director of Operations of JWC in late 1993, he was then paid directly by JWC and given signing authority on JWC's bank account.

A copy of an offer to lease dated August 18, 1993, between Barbican Properties Inc. and JWC²⁴ for the premises at 809 Manning Road N.E., Calgary, Alberta, was introduced as an exhibit. The lease is addressed to JWC at the U.S. address, is to the attention of Mr. David Charette, Director of Operations of JWUS, and was signed on August 25, 1993, by Mr. Caruth as President of JWC. Mr. Caruth explained that the lease was addressed to Mr. Charette as he was the Director of Operations for JWUS and had been assisting Mr. Edge who had never before negotiated a lease. Also introduced as an exhibit was a copy of a lease amending agreement with respect to the renewal of the 28th floor, Bow Valley Square 2 premises, and a storage area agreement, dated March 12, 1993, and signed by Mr. Caruth, President, and Mr. Edge for JWC.²⁵

Copies of cheque requisitions authorized by Mr. Edge for the purchase of a printer and a fax machine were also introduced as exhibits²⁶ at the hearing. The requisition for the printer stated as the reason, "HP LaserJet 4L Printer for Canada office" and was authorized by Mr. Edge. The cheque that was issued to the supplier of the printer was signed by Mr. Caruth and Mr. Robert Charette, Jr.

Mr. LePrieur replaced Mr. Edge as Director of Operations of JWC on June 22, 1994, pursuant to a resolution of JWC's Board of Directors. He stated that his duties as Director of Operations of JWC were relatively unchanged from those of his predecessors, Messrs. Scott and Edge, and included hiring, firing and supervising employees, setting pay rates and increases, authorizing overtime and doing performance appraisals. He explained that employee timecards would be forwarded to JWUS, which would then issue pay cheques drawn on JWC's account pursuant to the services agreement between JWC and JWUS. He further stated that the Director of Operations also has the authority to bind JWC and referred to the fact that the Director of Operations can approve employment contracts and, in particular, the contract entered into with Purolator by Mr. Edge on behalf of JWC. Mr. LePrieur agreed that the prices for the jewellery that JWC sold to its IRs were set by JWUS.²⁷ However, he stated that he could influence the pricing decisions.

The respondent's witness, Mr. Fioretti, was an auditor with Revenue Canada's Alberta Region Compliance Verification Section during the time at issue. Mr. Fioretti explained that he was one of the auditors involved in the audit of JWC and visited both JWC's offices in Calgary and JWUS's offices in

24. *Ibid.*, "Lease signed on August 25, 1993."

25. *Supra*, note 4, Tab 21, "Hammerson Properties Lease Amendment."

26. *Ibid.*, Tab 22, "Documents Relating to Mr. Edge's Purchase of Laser Printer (\$1000)"; and Tab 23, "Documents Relating to Mr. Edge's Purchase of Minolta Fax Machine (\$800)."

27. See, as an example, the letter dated August 9, 1993, on JWUS letterhead from Mr. Caruth to IRs setting out price increases in Canadian dollars, *supra*, note 23, Tab 6.

Tucson. He confirmed that, at the time of the audit, Revenue Canada auditors were not aware of the services agreement between JWC and JWUS. He testified that Mr. Edge informed him that he had no authority to acquire goods, or to bind JWC, and did not have signing authority on JWC's bank account. He also testified that he learned from telephone conversations with Mr. David Charette that JWUS was responsible for all pricing decisions and warranting of jewellery and that this information was confirmed by Messrs. Edge and Williams.

With respect to the books and records that he reviewed, Mr. Fioretti testified that the accounts payable by JWC to JWUS were cleared each month in the early part of the assessment period until approximately April 1993. However, in the latter part of the assessment period, the balance was not cleared each month, and cheques for even amounts with no supporting documentation were issued on the decision of Mr. Caruth and Mr. Robert Charette, Jr. as signing authorities. Mr. Williams confirmed that, during the latter part of the assessment period, there were times when JWC carried a balance in its accounts payable to JWUS.²⁸

Counsel for the appellants submitted that, in determining whether there was a sale for export within the meaning of section 48 of the Act, the Tribunal must determine, based on the facts, whether JWUS intended to sell the imported jewellery in issue to JWC, as required by the *Alberta Sale of Goods Act*²⁹ in order to effect a sale or whether JWC was JWUS's agent, as submitted by the respondent, in which case he agreed that there would be no sale for export from JWUS to JWC. Counsel argued that there was a sale of the jewellery from JWUS to JWC and that the value for duty of the jewellery in issue should, therefore, be based on the selling price for the jewellery between JWUS and JWC.

In addressing the issue of whether there was a sale of the jewellery from JWUS to JWC, counsel for the appellants referred to the following definition of "sale":

*A contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property. Transfer of property for consideration either in money or its equivalent.*³⁰

Counsel for the appellants also relied on section 20 of the *Alberta Sale of Goods Act* which provides that "[w]hen there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at the time that the parties to the contract intend it to be transferred." In counsel's view, when the jewellery was exported by JWUS F.O.B. Tucson, there was a transfer of title to, possession of and risk in that jewellery. This is indicated by the fact that: (1) JWC reimbursed JWUS for the cost of shipping and paid for the costs of importation, such as, customs duties, taxes and brokerage fees; (2) JWC was invoiced by JWUS for the jewellery; and (3) JWC paid JWUS for the jewellery by cheques drawn on its Canadian bank account.

28. See Transcript of in camera hearing, at p. 19, in camera testimony of Mr. Williams.

29. R.S.A. 1980, c. S-2.

30. *Anthes Equipment Ltd. v. Minister of National Revenue*, [1987] 1 C.T.C. 2117 at 2120, taken from Black's Law Dictionary, 5th ed. (Minnesota: West Publishing Co., 1979).

Having determined that there was a sale of the jewellery in issue from JWUS to JWC, counsel for the appellants submitted that it must be further determined whether there was a sale “for export to Canada.” In counsel’s view, what that phrase means is that goods must be sent without possibility of diversion. Counsel submitted that this concept of “no possibility of diversion” was adopted in the decision of the United States Court of Appeals, Federal Circuit, in *Nissho Iwai American Corp. v. United States*³¹ in its consideration of U.S. customs legislation which provides, similarly to the Canadian legislation, that the value for duty of goods is the transaction value when the goods are sold for export to the United States.³² Counsel submitted that the jewellery in issue was sold for export to Canada when it was shipped directly to JWC by JWUS.

Counsel for the appellants agreed that, if the Tribunal found, in fact, that JWC was acting as JWUS’s agent, then there would be no sale for export. In addressing the issue of agency, counsel submitted that, in the absence of a written agency agreement, one is to look to the course of conduct of the parties to determine if there were factors which would suggest and imply an agency relationship³³ and that “very clear evidence should be required” in order to find an agency relationship.³⁴ Counsel submitted that the threshold for finding an agency relationship is very high and requires complete control by the principal over all aspects of the agent’s actions and that the agent not be capable of acting independently.³⁵ Counsel further submitted that taking risk in the goods, which may result in either a loss or a gain in relation to the goods, is inconsistent with an agency relationship.³⁶ Finally, counsel submitted that, in order for there to be an agency, the agent must, in “acting within the scope of his mandate and with the knowledge of the parties with whom he contracts, [bind] his principal only; if he binds himself as well he is to that extent not an agent but a principal.”³⁷

Counsel for the appellants referred to the specific fact situations in a number of judicial decisions and findings as to whether or not there was an agency relationship based on those facts. In particular, he referred

31. 982 F.2d 505 (Fed. Cir. 1992).

32. In this case, a Japanese subway car manufacturer, Kawasaki Heavy Industries Ltd. (KHI), produced and sold subway cars to Nissho Iwai Corporation (NIC), an unrelated Japanese company, which in turn sold them to the Metropolitan Transportation Authority of New York City (MTA). U.S. Customs had determined that the most direct cause of exportation of the goods was the prior purchase of the cars by the MTA and that the value for duty was the price paid by the MTA. The court held that the sale from KHI to NIC was the legally controlling transaction and that the sales price paid by NIC to KHI should serve as the basis for determining the transaction value, provided it was a bona fide sale for export to the United States and was at an arm’s length price.

33. *Firestone Tire and Rubber Company of Canada, Limited v. Commissioner of Income Tax*, [1942] S.C.R. 476.

34. *His Majesty the King v. Leon L. Plotkins*, [1938-39] C.T.C. 138 (Ex. Ct.) at 146.

35. *Ibid.* and *His Majesty the King v. B.C. Brick and Tile Company*, [1935] C.T.C. 110 (Ex. Ct.).

36. *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. Counsel pointed out that the Tribunal, in finding an agency relationship, relied on the fact that the principal made all decisions relating to the imported goods, took title to the goods and was listed on the insurance and shipping documents and at no time took a proprietary interest in the imported goods.

37. *Alberta Gas Ethylene Company Ltd. v. Her Majesty the Queen*, 90 D.T.C. 6419 (F.C.A.) at 6420.

to the decision of the Exchequer Court of Canada in *His Majesty the King v. Leon L. Plotkins*. The court, in that case, had to determine whether the distributor was acting as the agent for the manufacturer, in which case the manufacturer and distributor would be treated as one business entity and the federal sales tax (FST) would be imposed on the distributor's sale price. Counsel noted the following factual similarities to the facts in these appeals: the distributor was incorporated to help market the manufacturer's products, the manufacturer owned a portion of the distributor, the accounting and clerical work of both companies was carried out by the staff of the distributor pursuant to a services agreement, and the distributor and manufacturer had separate books and records. Counsel also noted that, in that case, the distributor and manufacturer did not have separate bank accounts, and accounts payable and wages were paid out of the same bank account. The court found that these facts did not support a finding of agency and stated the following:

*Their business relations were of course intimate and probably so designed for their mutual advantage, but that does not of itself constitute them a single business enterprise for the purposes of the tax, or otherwise. That requires a state of facts that indubitably points to a business arrangement made to evade the tax, or, that one so dominated and controlled the business of the other that one is obliged to say that the existence of that other was apparent only and not real.*³⁸

Counsel for the appellants also referred to the decision of the Exchequer Court of Canada in *His Majesty the King v. B.C. Brick and Tile Company* which, like *Plotkins*, involved the issue of whether a manufacturer and distributor should be treated as a single business entity for the purposes of the imposition of FST. The court found that there was no agency relationship, although the same persons controlled both the manufacturer and distributor, since each company financed and conducted its own operations, hired and paid its own employees and maintained separate business records, and there was no division of profits or sharing of losses. The court stated that “[i]t would be going to dangerous limits to say, that because the officers and shareholders of the two companies were much the same, and because the companies had business relations the one with the other, that therefore the one was the mere agent of the other.”³⁹

It was submitted by counsel for the appellants that the facts in these appeals do not support a finding of an agency relationship between JWUS and JWC. With respect to the issue of control, counsel noted that JWC's senior executives are in Canada, JWC hires and fires its employees independent of JWUS, JWC conducts its own employee performance appraisals and wage adjustments, JWC has independent powers to contract and the day-to-day management and control of JWC is exercised in Canada. In addressing the issue of risk in the goods, counsel referred to the fact that JWC bears the risk of loss at all times, contracts for the repair of the imported jewellery, enjoys the chance for profits, declares the income from sales and does not account for profits to JWUS. Counsel submitted that JWUS did not bear any of the risk, since IR agreements did not mention nor bind JWUS, the agreements entered into by JWC did not bind JWUS and JWC's insurance was separate from JWUS's insurance. Finally, counsel referred to the following other facts: JWC and JWUS maintained separate books and records, bank accounts, employees and income tax returns, and there was an economically reasonable services agreement between JWC and JWUS.

38. *Supra*, note 34 at 147.

39. *Supra*, note 35 at 113.

Counsel for the appellants submitted that JWC was more akin to a franchisee of JWUS, which, in his view, does not constitute JWC an agent of JWUS. In support, he referred to the following excerpt from G.H.L. Fridman's book entitled The Law of Agency:⁴⁰

As regards possible confusion of agents and buyers, this may arise where the function of the 'agent' is really as a 'middleman', eg, a retail dealer or supplier of goods, who obtains goods from a wholesale supplier or a manufacturer, for subsequent resale to retail customers or suppliers who, in turn, will be dealing with retail dealers or shopkeepers. Such 'middleman' are sometimes referred to as 'agents', when in fact they are franchisees of the manufacturer or supplier, or distributor of the manufacturer's goods, perhaps with a 'sole agency' or special dealership in his goods.... Such 'agents', however they are termed, are really buyers, acting as principals on their own behalf. Consequently, they are not liable to the manufacturer or supplier, in the way an agent might be for failure of duty: nor do their contracts with other parties, whether suppliers, retail dealers or individual customers, involve the party who sold to them in any form of liability, for example, for misrepresentations, or defective goods.... Any money received by such 'agents' from their customers will belong to the 'agent' not to the party who sold to him, and will be part of such 'agent's' property in the event of his bankruptcy or liquidation.⁴¹

With respect to the Tribunal's decision in *Harbour Sales (Windsor) Limited v. The Deputy Minister of National Revenue*,⁴² counsel for the appellants submitted that, given the similarity between *Harbour Sales* and these appeals and that the fact no agency relationship was found to have existed in *Harbour Sales*, the Tribunal should also find that no agency relationship existed between JWC and JWUS. In particular, he pointed out that, in *Harbour Sales*, there were two related companies: Harbor Sales Company (HSUS) and Harbour Sales (Windsor) Limited (HSC). HSC was 50 percent owned by a Canadian resident and 50 percent owned by two U.S. residents. HSC did not have its own office or telephone number, and HSUS was providing a whole range of services to permit HSC to function.

Finally, counsel for the appellants argued that there was a fundamental inconsistency in Revenue Canada's position when it decided that, as of January 1, 1994, the value for duty should be based on the transaction value between JWC and suppliers, since the relationship between JWC and JWUS was essentially unchanged.

Counsel for the respondent argued that the relationship between JWUS and JWC was one of principal and agent and that the sales by JWC, as agent of JWUS, to the IRs constitute sales "for export to Canada" for the purpose of determining the value for duty of the jewellery under section 48 of the Act. Counsel agreed that one of the primary indicia of an agency relationship is control, but not necessarily complete domination, as suggested by counsel for the appellants. Counsel submitted that, in order to determine the extent to which one party exercises control over another, it is necessary to look at the conduct of the parties in each individual case. Counsel pointed to the following factors as evidence that JWUS exercised substantial control over JWC: (1) JWUS wholly owned JWC; (2) the officers common to both

40. Sixth ed. (Toronto: Butterworths, 1990).

41. *Ibid.* at 24-25.

42. Appeal No. AP-93-322, November 4, 1994; Leave to appeal dismissed, February 2, 1995 (F.C.T.D.).

JWC and JWUS exercised financial control over JWC, particularly during the time when Mr. Edge was Director of Operations of JWC and did not have any signing authority; (3) the pricing and warranty programs; (4) JWC did not hold any inventory; (5) JWC's functions were essentially limited to processing orders for and distributing merchandise to IRs on behalf of JWUS; and (6) the transactions between JWUS and JWC were not characterized by the usual features of sales between buyers and sellers, but rather constituted "inter-company transfers" of assets within a single operation owned and controlled by JWUS.

In counsel for the respondent's view, the Tribunal's decision in *Harbour Sales* states that "sold for export" within the meaning of section 48 of the Act requires the following: (1) evidence that the goods were sold, for example, invoices identifying the buyer and indicating that the goods were at the risk of the buyer and payment by the buyer of the price of the goods by such means as a bank debit; and (2) the goods sold must be exported directly to Canada without entering the commerce of any other country or the title to the goods being transferred to any other person.

Counsel for the respondent submitted that JWUS sold the jewellery in issue to the Canadian IRs, through JWC as its agent, and that the export of the goods from the United States to Canada resulted from the sales of the goods from JWUS to the IRs. Therefore, the determinative price for establishing what was "sold for export to Canada" for customs valuation purposes was the price that the IRs paid for the jewellery.

Subsection 48(1) of the Act provides that the value for duty of goods is the transaction value of the goods if the goods are "sold for export to Canada." In the Tribunal's view, the transaction value used for the purposes of determining value for duty must, therefore, be in respect of a sale of goods and those goods must have been sold for the purpose of export to Canada. Counsel for the appellants has argued that the transaction value when the jewellery in issue was sold for export to Canada is the value of the jewellery when it was shipped from JWUS to JWC. It is not in dispute that the jewellery in issue was exported by JWUS to JWC. However, the Tribunal must determine whether the jewellery was shipped to JWC, as a buyer, from JWUS as a seller, or whether it was shipped to JWC as an agent of JWUS to fulfil sales to Canadian IRs on JWUS's behalf.

Pursuant to subsection 3(1) of the *Alberta Sale of Goods Act*, "[a] contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price." Subsection 6(1) of that act further provides that a contract of sale may be in writing and/or oral or may be implied from the conduct of the parties. The documentary exhibits referred to at the hearing and, in particular, the daily batch reconciliation sheet and the detailed listing of jewellery accompanying shipments of jewellery to JWC are not sufficient to show, in the Tribunal's view, that JWUS transferred or agreed to transfer the property in the jewellery to JWC for a price. This is unlike the purchase of the jewellery by IRs for which an order form is used that sets out the cost, insurance, taxes, form of payment and refund policy and that is signed by the buyer. Each order form is accompanied by the requisite payment.

The Tribunal acknowledges that the agreement between JWC and JWUS does contain some language which may suggest that it was intended that the relationship between JWC and JWUS be that of seller and buyer and that the transfers of jewellery from JWUS to JWC be sales from JWUS to JWC. The Tribunal notes, in particular, the summary portion of that agreement which provides that JWC would purchase its jewellery directly from suppliers used by JWUS and at the same price, but that it would be more cost-effective if JWUS purchased the jewellery directly from the suppliers on JWC's behalf and then shipped

the jewellery to JWC. The summary portion further provides that JWC is “desirous of purchasing its [jewellery] from [JWUS] at the same price paid by [JWUS] to its suppliers.” However, it is clear from the jurisprudence concerning the issue of agency that it is a question of fact whether or not an agency had been constituted,⁴³ that “where the evidence does not make entirely clear the intention of the parties and the nature of their contract, importance is to be attached to the conduct of the parties when they come to carry out their contract” and that “[the] question is to be determined, not by giving a strict legal interpretation to an expression used by a layman in forming the contract, but rather by a broad consideration of the intention of the parties as evidenced by what the parties did, as well as by what they said.”⁴⁴

The Tribunal has reviewed the jurisprudence dealing with the issue of agency and notes that various factors have been considered relevant for the purposes of determining whether there is an agency relationship. As identified by counsel for the appellants, the courts have considered such factors as the extent to which one party controls another and the risk assumed by the alleged agent. However, the Tribunal notes that no one factor has been considered by the courts to be determinative of the issue of agency, and the courts have, in making their determinations, considered the facts as a whole and weighed the relative importance of the factors as they may apply.

The Tribunal examined the “paper trail” between JWC and JWUS and between JWC and the IRs and considered the significance of that trail in light of the agreement between JWC and JWUS, the conduct of the employees and directors of JWC and JWUS, and the oral testimony of the witnesses at the hearing. The Tribunal is of the view that, on balance, the facts show that JWC acted as the agent of JWUS during the relevant period. In reaching this conclusion, the Tribunal relies, in particular, on the following factors: (1) the terms, namely, the price and payment, for the sale of jewellery to IRs were determined by JWUS; (2) in certain circumstances, JWC used JWUS’s order forms for sales of jewellery to Canadian IRs, which included JWUS’s refund policy;⁴⁵ (3) JWC held no inventory in Canada and had no choice of suppliers; (4) under certain circumstances, in order to service warranties, jewellery had to be returned to JWUS, which would, in turn, return it to the suppliers; (5) payments for jewellery and services were described and treated in JWC and JWUS’s accounting records as intercompany transfers; (6) the Director of Canadian Operations for JWC was, for most of the period at issue, employed and paid by JWUS; (7) directors and employees of JWUS were directly involved in negotiating and executing agreements between JWC and third parties and, in some instances, namely, the agreement with Purolator, the agreement was in the name of JWUS; and (8) directors of JWUS signed cheques for the withdrawal of funds from JWC’s bank account. Finally, the Tribunal is not persuaded that the bill of lading showing JWC as consignee is conclusive evidence of a seller/buyer relationship, particularly since JWUS arranged and paid for all shipping expenses and was named as the insured.

Counsel for the appellants submitted that the facts in *Harbour Sales* were similar to the facts in these appeals and that, for that reason, the Tribunal should find in these appeals, as it did in *Harbour Sales*, that there was no agency relationship between the U.S. company and the Canadian subsidiary. The Tribunal cannot agree with this position. The issue of agency was not argued before the Tribunal in *Harbour Sales*, nor did the Tribunal make a specific finding in that regard. Moreover, the facts in *Harbour Sales* are

43. *John Towle and Co. v. White* (1873), 29 L.T. 78; and *supra*, note 33.

44. *B & M Readers’ Service Limited v. Anglo Canadian Publishers Limited*, [1950] O.R. 159 at 164.

45. See, for example, *supra*, note 23, Tab 7, “Various ISR purchase orders from April 1993.”

significantly different from those in these appeals in terms of the Canadian subsidiaries' direct involvement, as opposed to that of the U.S. parent, in the purchase and importation of goods from foreign manufacturers or suppliers. In particular, with respect to the sales for which the value for duty was at issue in *Harbour Sales*, the Tribunal noted the following: (1) the foreign manufacturer in Taiwan had issued pro forma invoices to the Canadian subsidiary; (2) the letter of credit was issued in the Canadian subsidiary's name by its bank in respect of the goods purchased from the foreign manufacturer in Taiwan; (3) the foreign manufacturer issued an invoice to the Canadian subsidiary indicating that the goods were "for account and risk of" the Canadian subsidiary; and (4) the goods were shipped from Taiwan to Toronto, Ontario pursuant to a through bill of lading issued to the Canadian subsidiary.

Having determined that JWC was the agent for JWUS in respect of the sales to the Canadian IRs, the Tribunal concludes that the sales for export to Canada were the sales to the IRs and that the value for duty of the jewellery exported to Canada by JWUS should, therefore, be based on the value of those sales.

Accordingly, the appeals are dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Lise Bergeron
Lise Bergeron
Member

Anita Szlajak
Anita Szlajak
Member