

Ottawa, Tuesday, December 3, 1996

Appeal No. AP-95-074

IN THE MATTER OF an appeal heard on March 29, 1996, 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 May 11, 1995, with respect to requests for re-appraisal under section 63 of the *Customs Act*.

BETWEEN

SUPERFINE IMPORT CO. LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-95-074

SUPERFINE IMPORT CO. LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue dated May 11, 1995. The issue in this appeal is whether the respondent correctly added to the price paid or payable for certain imported scarves monies paid by the appellant to a company in the United States, on the basis that, pursuant to subparagraph 48(5)(a)(i) of the *Customs Act*, the monies were commissions and brokerage fees other than fees paid or payable by the purchaser to its agent for the service of representing the appellant abroad in respect of the sales.

HELD: The appeal is allowed in part. The Tribunal finds that the respondent incorrectly added to the price paid or payable for the imported plain, coloured scarves and the patterned, multicoloured ones bearing the “Careta” label, commissions or fees which the appellant paid to Paris Accessories, Inc. (Paris) for its services as an agent. The Tribunal observes that Paris performed various services for the appellant and represented the appellant’s interests in respect of the imported plain, coloured scarves and the patterned, multicoloured ones bearing the “Careta” label. Moreover, the appellant controlled the activities of Paris in all important respects.

The Tribunal further finds that the respondent correctly added, to the price paid or payable for the imported scarves bearing the trademark owned by Bill Blass, Ltd. (BBL), commissions or fees paid by the appellant to Paris. The Tribunal finds that the evidence shows that the colours and designs of these scarves were determined by BBL. The evidence also shows that Paris had the exclusive right to use the BBL trademark in connection with the manufacture, distribution and sale of women’s scarves, shawls and related neckwear items in the United States and Canada and had the right, under both written and oral agreements, to take away the distribution rights from the appellant at any time. On the basis of this evidence, the Tribunal concludes that the appellant’s control over Paris and BBL in respect of these scarves was very limited. The appellant could not have obtained these scarves were it not for the exclusive arrangement that it enjoyed with Paris. In addition, the Tribunal agrees with counsel for the respondent that the facts in this appeal relating to the imports of scarves bearing the BBL trademark are very similar to those in *Signature Plaza Sport Inc. v. Her Majesty the Queen* and finds that there were restrictions put upon the appellant by Paris in this appeal which, in light of the decision in *Signature Plaza*, are inconsistent with the existence of an agency relationship between the appellant and Paris.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 29, 1996
Date of Decision: December 3, 1996

Tribunal Member: Anthony T. Eyton, Presiding Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

Appearances: Suzanne Hidi, for the appellant
Ian McCowan, for the respondent

Appeal No. AP-95-074

SUPERFINE IMPORT CO. LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ANTHONY T. EYTON, Presiding Member

REASONS FOR DECISION

This is an appeal, heard by one member of the Tribunal,¹ under section 67 of the *Customs Act*² (the Act) from decisions of the Deputy Minister of National Revenue dated May 11, 1995. The issue in this appeal is whether the respondent correctly added to the price paid or payable for certain imported scarves monies paid by the appellant to Paris Accessories, Inc.³ (Paris). The monies were considered to be commissions and brokerage fees and added to the price paid or payable for the imported scarves pursuant to subparagraph 48(5)(a)(i) of the Act, which provides as follows:

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

The appellant is an importer and distributor of clothing and clothing accessories, such as scarves, belts and shawls, to large department stores, small boutiques and specialty shops. Only scarves imported from the Orient, including those bearing the trademark owned by Bill Blass, Ltd. (BBL), are in issue. As described by the appellant's representative, the production and purchase of scarves are very different from the production and purchase of garments. In particular, the representative pointed out that, unlike clothing where size and fabric are important factors, when purchasing scarves, the colour and design are of primary importance.

The appellant's representative explained that, initially, the appellant imported the majority of its scarves from Europe. However, in order to become more competitive, the appellant decided to start importing scarves from the Orient. Manufacturers in the Orient generally required a customer to purchase a

1. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the *Customs Act*.

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

3. Paris Accessories, Inc. purchased the assets and goodwill of Justin Accessories, Inc., formerly known as B & B Accessories, Inc., d.b.a. Baar & Beards.

substantial minimum quantity of scarves, and it was almost impossible for any Canadian importer to buy the requisite quantities. However, these requirements could easily be met by a US company. As a result, in the early 1980s, the appellant decided to enter into a business relationship with a US company, namely, Paris, formerly Baar & Beards (B & B), a manufacturer, importer and distributor of clothing and clothing accessories, including scarves, in the United States. The representative indicated that it would not have been possible for the appellant to acquire the goods in issue at the prices at which it did without the involvement of Paris.

The appellant's representative filed four documents with the Tribunal as evidence of the substance of the agreements between the appellant and Paris. One of the documents is a copy of a letter dated May 8, 1984, which sets out the intention of B & B and the appellant to enter into a sublicense agreement after the execution of a licence agreement between B & B and BBL. The letter states that the agreement between B & B and the appellant will be essentially the same as that between B & B and BBL, except that: (1) the appellant's territory will be Canada; (2) the appellant agrees to pay B & B royalties and fees based on net sales; (3) the appellant will pay to B & B a design fee in each annual period of a specified percentage of its FOB cost at place of manufacture of the BBL line merchandise; (4) the appellant shall have the same design input as in the last three years subject to the rights of BBL; and (5) the appellant may carry other signature lines.

At the hearing, the appellant's representative indicated that, notwithstanding what the aforementioned letter states, the appellant paid royalties to BBL and not to B & B, and the appellant paid agency fees to B & B based on manufacturers' invoices.

The second document is a copy of a sublicense agreement dated June 14, 1984, between B & B and the appellant relating to the rights to manufacture, distribute and sell women's scarves, shawls and related neckwear items in Canada. This agreement provides that the appellant obtains such rights on the terms and conditions of and subject to the obligations under the licence agreement between B & B and BBL.

The third document is a copy of a letter dated May 24, 1988, from Paris to the appellant. The letter provides that the appellant is "appointed [the] exclusive agent in Canada to distribute all articles of [women's] apparel manufactured or distributed by [Paris] under the names [B & B] and Bill Blass Scarf Collection." The letter further sets out the amounts that the appellant was required to pay to Paris in respect of the scarves bearing the BBL trademark, the scarves not bearing the BBL trademark and the plain scarves. The letter states that the appellant is to pay a certain specified percentage of the wholesale price of each of the scarves bearing the BBL trademark sold in Canada, a lower specified percentage of the wholesale price of each scarf not bearing the BBL trademark and an even lower specified percentage of the wholesale price for all plain scarves.

At the hearing, the appellant's representative testified that the 1988 letter does not accurately reflect the terms of the appellant's relationship with Paris. More specifically, the representative stated that the appellant did not act as Paris' exclusive agent and that the amounts paid to it were based on the prices on the manufacturers' invoices and not on the wholesale price.

Finally, the fourth document is a copy of a licence agreement dated August 21, 1985, between BBL, Justin Accessories, Inc. (Justin) and Paris. The agreement acknowledges that the assets and goodwill of Justin were sold to Paris and transfers the licence agreement to Paris. Paris also acknowledges the sublicense

agreement between Justin and the appellant dated March 1, 1984. The appellant's representative indicated that she was unable to obtain a copy of this sublicense agreement.

In describing the relationship between the appellant and Paris, formerly B & B, the appellant's representative testified that Paris arranged for the appellant's purchase of three types of scarves: (1) plain, coloured scarves; (2) patterned, multicoloured scarves bearing the "Careta" label (the appellant's own label); and (3) patterned, multicoloured scarves bearing the BBL trademark. In general, representatives of Paris would travel to the Orient five times a year, visit manufacturers, arrange for samples to be produced and, upon their return to the United States, would submit samples to the appellant. The appellant would then choose, from among those samples, the scarves that it wished to purchase. The samples chosen were frequently different from those chosen by Paris and, on occasion, the appellant would negotiate with the manufacturers, through Paris, to order a scarf that was not part of the range of samples offered. At the hearing, the representative agreed with counsel for the respondent that, had Paris not arranged for the production of samples, the opportunity to produce the samples would not have been open to the appellant and that Paris had relatively more input into the designs of those samples than did the appellant.

With respect to the terms of sale of the scarves, the appellant's representative testified that representatives of Paris would assist in the negotiations with manufacturers, including the negotiation of the purchase price, but always based upon the appellant's instructions and almost always based upon written orders for scarves. Representatives of Paris would inspect merchandise to ensure compliance with the appellant's quality requirements. All costs associated with the imported scarves, including the purchase price, duties, insurance and transportation, were paid directly by the appellant. The invoice prices for the imported scarves were paid through an open letter of credit from the appellant to the manufacturers. The representative indicated that Paris was not affiliated with any of the manufacturers in the Orient, that Paris never had any ownership interest in the scarves imported by the appellant and that the appellant paid the same purchase price as that paid by Paris.

The appellant's representative stated that Paris also acted on the appellant's behalf in arranging for the shipment of the scarves. Paris sometimes assisted in choosing shipping agents/forwarders, instructed manufacturers on the preparation of the necessary documentation, such as export forms and invoices, verified such invoices and monitored the manufacturers' compliance with the appellant's shipping and production requirements as specified in the appellant's orders.

With respect to the purchase of the plain, coloured scarves, the appellant's representative would advise Paris as to the colours that the appellant wished to purchase from among the swatches of colours provided by the manufacturer, as well as of those colours added by the appellant. The appellant's choices of colours were not necessarily the same as those of Paris.

With respect to the patterned, multicoloured scarves bearing the "Careta" label, the appellant's representative indicated that Paris and the appellant negotiated which designs would be chosen and, thus, each company had equal input into the choice of designs. Representatives of Paris would arrange for the preparation and attachment of the "Careta" label to scarves ordered by the appellant.

With respect to the patterned, multicoloured scarves bearing the BBL trademark, the appellant's representative indicated that, at the beginning of the season, BBL would establish its design offerings.

In addition, the appellant or B & B could submit design proposals to BBL, which had ultimate control over the designs of scarves bearing its trademark.

In argument, the appellant's representative submitted that, in deciding this appeal, the Tribunal should analyze the actual rights and obligations of the appellant and Paris in their business relationship, as opposed to simply focusing on the formal provisions in the documents filed with the Tribunal. In support of this submission, she referred to the following excerpt from the decision of the Federal Court of Appeal in *Signature Plaza Sport Inc. v. Her Majesty the Queen*:⁴

[I]t is [not] possible to properly determine the legal nature of a contractual relationship between parties based solely on the legal language they have used in their written agreements, or on what they claim to have intended to accomplish in legal terms, let alone on mere recognition of the wisdom of the business agreements that [they] were trying to establish. In our opinion, only an analysis of the rights and obligations created by the agreements they entered into will enable us to determine what they accomplished.⁵

In the view of the appellant's representative, such an analysis of the rights and obligations of the appellant and Paris reveals that Paris acted as a bona fide agent for the appellant. The representative submitted that all of the duties performed by Paris with regard to the arrangements for the production of scarves in the Orient and the negotiation of the terms of sale of those scarves were clearly those duties of an agent. Moreover, the representative highlighted the fact that Paris never had any control over the appellant's purchases, the payment for scarves purchased or the terms of shipment of the scarves.

The appellant's representative submitted that, rather than focusing on the decision in *Signature Plaza*, which she submitted concerned facts dissimilar to those in this appeal, the Tribunal should focus on its decision in *Chaps-Ralph Lauren, Division of 131384 Canada Inc. and Modes Alto Regal v. The Deputy Minister of National Revenue*.⁶ The representative submitted that, in *Chaps-Ralph Lauren*, the Tribunal found the existence of a bona fide agency relationship, notwithstanding that there was a relationship with the licensee of a trademark. She submitted, based on this appeal, that there is nothing in Canadian law forbidding the appellant from using Paris as its agent, even though it has a licensee relationship with BBL, the owner of the BBL trademark.

Counsel for the respondent referred to the provisions of subparagraph 48(5)(a)(i) of the Act and submitted that the general principle is that commissions paid by a purchaser are to be added to the price paid or payable for imported goods and that an exception to this general principle is that fees paid by the purchaser to an agent for the services of representing that purchaser abroad in respect of the sale of the goods for export to Canada are not to be added to the price paid or payable. In counsel's view, this so-called exception does not cover situations where an agent acts in its own best interests with respect to the transaction at issue, nor does it cover commissions paid for tangible financial benefits, unrelated to the agency, such as trademark usage, bulk buying power and product development costs.

Counsel for the respondent submitted that the facts in this appeal are very similar to the facts in *Signature Plaza*. In that case, Signature Plaza Sports Inc. imported from various suppliers, all of which were

4. (1994), 54 C.P.R. (3d) 526 (F.C.A.), File No. A-453-90, February 28, 1994.

5. *Ibid.* at 12.

6. Appeal Nos. AP-94-190 and AP-94-191, November 1, 1995.

sourced through a US company, the purported agent, women's garments bearing the Anne Klein trademark. The US company had sole authority to contract for the manufacture of the garments with overseas suppliers and had been granted the rights to manufacture, design, import, distribute and/or sell the licensed goods within Canada. The US company provided the suppliers with patterns and fabrics to be used in the production and sale for export of the imported garments. Pursuant to a contract, Signature Plaza Sports Inc. was allowed to import the licensed garments into Canada and, in return, was charged several fees by the US company: 15 percent commission, 5 percent royalty/service fee and 5 percent for trademark royalties. The Federal Court of Appeal found that the US company did not act as a bona fide agent, but was, in fact, the actual vendor of the goods. It concluded that the overseas suppliers could not be considered the vendors because the suppliers were, in reality, merely performing a contract for services which only the US company could have given them, since the US company had the exclusive production rights to the Anne Klein trademark.

Reference was also made to the following passage in the Tribunal's decision in *Mexx Canada Inc. v. The Deputy Minister of National Revenue*:⁷

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.... 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.⁸

Finally, counsel for the respondent referred to the following commentary of the GATT Technical Committee on Customs Valuation concerning agents:

- in determining whether a *bona fide* buying agency relationship exists between an importer and an alleged buying agent, the primary consideration is the right of the principal to control the agent's conduct with respect to matters entrusted to the agent.⁹

Counsel for the respondent submitted that, while some of the traditional indices of agency were present, namely, Paris did not appear to finance the appellant or incur risk of ownership, Paris was not a bona fide agent of the appellant and the commission charged by Paris went beyond a simple agency fee. In support of his submissions, counsel referred to the fact that Paris represents its own line of goods, that Paris had an interest in the transactions beyond that solely of representing the appellant and that the appellant could not have ordered the goods in issue at the stated price unless its orders were combined with those, more numerous, of Paris. Moreover, counsel submitted that the appellant had very limited control over the conduct of Paris.

7. Appeal Nos. AP-94-035, AP-94-042 and AP-94-165, February 16, 1995.

8. *Ibid.* at 9. See, also, *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 6, 1993.

9. *GATT Agreement and Texts of the Technical Committee on Customs Valuation*, "Index of Valuation Rulings and Conclusions and of GATT Documents Containing National Valuation Legislations" at A1.

As it has done in other appeals concerning agency commissions and fees,¹⁰ in considering whether Paris represented the appellant abroad in respect of the importations of the scarves in issue, the Tribunal focused on the specific facts at issue, with a view towards determining, among other things, (a) the respective roles of Paris and the appellant in importing the scarves in issue, (b) the extent to which the appellant controlled the activities of Paris, if at all, and (c) the interest of Paris, if any, in those imported scarves.

Having reviewed all of the evidence, the Tribunal is of the view that Paris acted as the appellant's agent in representing it abroad in respect of the sales of the plain, coloured scarves and the patterned, multicoloured ones bearing the appellant's label. In particular, the Tribunal observes that Paris performed the following services and represented the appellant's interests in the following ways: (1) representatives of Paris travelled to the Orient five times a year, visited suppliers, arranged for samples and submitted them to the appellant; (2) Paris placed orders with chosen manufacturers in the Orient based on the appellant's instructions; (3) Paris arranged for inspection of the appellant's shipments; (4) Paris arranged for the appellant's label to be attached to certain goods; (5) Paris arranged the shipments of the scarves based on the appellant's instructions; (6) Paris assisted the manufacturers in the preparation of customs documents and invoices, etc.; (7) Paris monitored the manufacturers' compliance with the appellant's shipping and production requests; and (8) Paris assisted the appellant with any problems arising from defective merchandise (credit notes, returns, etc.).

Moreover, the Tribunal finds that the appellant, for its part, controlled the activities of Paris in all important respects. The appellant had input into the choices of colours and designs, often influenced by its attendance at shows in Europe each year, which enabled it to forecast likely trends in North America (which lag Europe) and to seek the inclusion of certain designs and colours. The appellant had choices of which colours and designs to order from the Orient based on samples provided by the manufacturers through Paris. Finally, the appellant placed its orders directly with the manufacturers, opened letters of credit in the names of the manufacturers and arranged its own financing.

The Tribunal acknowledges that Paris, itself, had most of the input in deciding the range of colours and designs and that Paris acted on its own behalf, since it sold and distributed the full range of scarves in the US market. However, in the Tribunal's view, the fact that Paris acted on its own behalf does not preclude Paris from also acting on the appellant's behalf. Indeed, the appellant benefited from the arrangement since, presumably, Paris was able to arrange competitive pricing with manufacturers in the Orient on the basis of the combined estimated purchases of both it and the appellant. Moreover, the appellant was in full control of its purchases of plain, coloured scarves, as well as the patterned, multicoloured ones bearing the "Careta" label, and was the mandator of Paris which, as outlined above, provided the full range of agency services for these purchases. Nothing in the documents filed, or in the oral arrangements testified to, indicates that the appellant was prevented from negotiating with another agent to manage its purchases of these two classes of scarves from the Orient.

The Tribunal accepts that the commission rates for agents may be higher for purchases from the Orient than for purchases from Europe, mainly because the costs of travelling to Europe are lower than those of travelling to the Orient and because the appellant's representative travels to Europe herself on a regular

10. *Mexx Canada*, *supra* note 7; *Radio Shack*, *supra* note 8; and *Chaps Ralph-Lauren*, *supra* note 6.

basis, thus limiting the duties of her agent in Europe. The Tribunal also accepts that commission rates for agents charged for high-priced brand-name apparel, such as “Ralph Lauren” and “Anne Klein,” should logically be lower than for low-priced scarves carrying the “Careta” label, and no conclusions can be drawn from the different scales.

The Tribunal, therefore, finds that the respondent incorrectly added to the price paid or payable for the imported plain, coloured scarves and the patterned, multicoloured ones bearing the “Careta” label, commissions or fees which the appellant paid to Paris for its services as an agent.

With respect to those scarves bearing the BBL trademark, the Tribunal finds that the evidence shows that the colours and designs of these scarves were determined by BBL. Paris had the exclusive right to use the BBL trademark in connection with the manufacture, distribution and sale of women’s scarves, shawls and related neckwear items in the United States and Canada and had the right, under both written and oral agreements, to take away the distribution rights from the appellant at any time. On the basis of this evidence, the Tribunal concludes that the appellant’s control over Paris and BBL in respect of these scarves was very limited. The appellant could not have obtained these scarves were it not for the exclusive arrangement that it enjoyed with Paris.

The Tribunal agrees with counsel for the respondent that the facts in this appeal relating to the imports of scarves bearing the BBL trademark are very similar to those in *Signature Plaza*. In that case, the Federal Court of Appeal found it difficult to see how the Canadian importer, Signature Plaza Sports Inc., could have become the mandator of the purported US agent given the “regulated and circumscribed nature of the right of importation conferred on Plaza ... particularly in relation to protection of the trademark, to the various grounds of unilateral termination by [the US company], to advertising and to the sale of the products.” It found that these facts were inconsistent with the existence of an agency relationship in which Signature Plaza Sports Inc. was the principal or mandator. The Tribunal finds that there were similar restrictions put upon the appellant by Paris in this appeal which, in light of the decision in *Signature Plaza*, the Tribunal finds to be inconsistent with the existence of an agency relationship between the appellant and Paris.

The Tribunal, therefore, finds that the commissions or fees paid by the appellant to Paris in respect of the imported scarves bearing the BBL trademark were correctly added to the price paid or payable for those scarves.

Accordingly, the appeal is allowed in part.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member