CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, April 29, 1997

Appeal Nos. AP-95-261 and AP-95-263

IN THE MATTER OF appeals heard on November 26, 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 October 18, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

CHARLEY ORIGINALS LTD., DIVISION OF ALGO GROUP INC. AND MR. JUMP INC., DIVISION OF ALGO GROUP INC. **Appellants**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are allowed in part.

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

Desmond Hallissey
Desmond Hallissey
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal Nos. AP-95-261 and AP-95-263

**CHARLEY ORIGINALS LTD., DIVISION OF ALGO GROUP INC.
AND MR. JUMP INC., DIVISION OF ALGO GROUP INC.** **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

These are appeals under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue dated October 18, 1995. The issue in these appeals is whether the respondent, pursuant to section 48 of the *Customs Act*, correctly added to the price paid or payable for certain imported ladies' clothing: (i) monies paid by the appellants to other companies as buying commissions; (ii) the value of unused fabric leftover from the manufacture of finished garments; and (iii) monies paid by the appellants in order to acquire quota entitlement and obtain an export licence from the government of the country of export.

HELD: The appeals are allowed in part. The Tribunal observes that, pursuant to subparagraph 48(5)(*a*)(i) of the *Customs Act*, commissions and brokerage, "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," are to be added to the "price paid or payable for the goods." The evidence in these appeals shows that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. performed, on the appellants' behalf, various functions which were necessary for the manufacture and export of the clothing in issue. As a result, the Tribunal is persuaded that the monies paid to Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. were for the purpose of having those companies represent the appellants abroad, as agents, in respect of the importation of the clothing in issue. The monies were, therefore, incorrectly included in the price paid or payable for that clothing.

With respect to the unused fabric, the Tribunal observes that clause 48(5)(*a*)(iii)(C) of the *Customs Act* provides, in part, that "any materials consumed in the production of the imported goods" are to be included in the price paid or payable for those goods. In the Tribunal's view, the unused fabric falls within the description of "materials"; however, the evidence indicates that the unused fabric was not waste and was not "consumed in the production of the imported goods" nor incorporated into the imported clothing. Moreover, the monies paid to purchase the unused fabric were paid to or for the benefit of the appellants, not the manufacturers/vendors.

Regarding the treatment of the quota payments, the Tribunal observes that the definition of "price paid or payable" under subsection 45(1) of the *Customs Act* means "the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor." In the Tribunal's view, it is clear in the case of the exports from Taiwan, where the quota was purchased from the factories producing the apparel and the value of the quota was included in the price of the apparel, that the quota payment was for the benefit of the vendor and should, therefore, have been included in the price paid or payable for the apparel.

However, the Tribunal is not persuaded that the quota payment to export clothing from Hong Kong should have been included in the price paid or payable for the goods. The evidence indicates that the quota

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payments obtained for exports from Hong Kong were made by Colby & Staton Fashions Ltd., on the appellants' behalf, to the owners of the quota that, based on the evidence, were unrelated to the manufacturers/vendors of the clothing. Moreover, the evidence indicates that the purchases of such quota were sometimes made in advance of the purchase of clothing. Based on this evidence, the Tribunal concludes that the payments to quota holders to purchase quota to export clothing from Hong Kong were independent of and, in some cases, not even related to the payments to the manufacturers/vendors to purchase the clothing. The Tribunal is, therefore, of the view that the payments for quota were not "made ... in respect of the [clothing in issue] ... for the benefit of the vendor [of the clothing in issue]" and should not have been included in the "price paid or payable" for the clothing.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	November 26, 1996
Date of Decision:	April 29, 1997
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Desmond Hallissey, Member Charles A. Gracey, Member
Counsel for the Tribunal:	Shelley Rowe
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Michael Kaylor, for the appellants Stéphane Lilkoff, for the respondent

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Appeal Nos. AP-95-261 and AP-95-263

**CHARLEY ORIGINALS LTD., DIVISION OF ALGO GROUP INC.
AND MR. JUMP INC., DIVISION OF ALGO GROUP INC.** **Appellants**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
DESMOND HALLISSEY, Member
CHARLES A. GRACEY, 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 dated October 18, 1995. Those decisions provide, in part, that "the buying commission fee paid to Colby [&] Staton, the agent, which performs design work, artwork, etc. is to be included in the value of the goods.... The payments for quota charges and assists such as embroidery, printing, Mr. Zeman's salary etc. made to Colby [&] Staton are in respect of the imported apparel and are to be included in the price paid or payable for the goods." The issue in these appeals is whether the respondent, pursuant to section 48 of the Act, correctly added to the price paid or payable for certain imported ladies' clothing: (i) monies paid by the appellants to other companies as buying commissions; (ii) the value of unused fabric leftover from the manufacture of finished garments; and (iii) monies paid by the appellants in order to acquire quota entitlement and obtain an export licence from the government of the country of export. The relevant provisions of section 48 of the Act are as follows:

> 48.(1) Subject to subsection (6), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada and the price paid or payable for the goods can be determined and if
>
> (*a*) there are no restrictions respecting the disposition or use of the goods by the purchaser thereof, other than restrictions that
>
> (i) are imposed by law,
>
> (ii) limit the geographical area in which the goods may be resold, or
>
> (iii) do not substantially affect the value of the goods;
>
> …
>
> (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,
>
> ...
>
> (iii) the value of any of the following goods and services, determined in the manner prescribed, that are supplied, directly or indirectly, by the purchaser of the goods free of charge or at a

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

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> reduced cost for use in connection with the production and sale for export of the imported goods, apportioned to the imported goods in a reasonable manner and in accordance with generally accepted accounting principles:
>
> (A) materials, components, parts and other goods incorporated in the imported goods,
>
> (B) tools, dies, moulds and other goods utilized in the production of the imported goods,
>
> (C) any materials consumed in the production of the imported goods, and
>
> (D) engineering, development work, art work, design work, plans and sketches undertaken elsewhere than in Canada and necessary for the production of the imported goods,
>
> (iv) royalties and licence fees, including payments for patents, trade-marks and copyrights, in respect of the goods that the purchaser of the goods must pay, directly or indirectly, as a condition of the sale of the goods for export to Canada, exclusive of charges for the right to reproduce the goods in Canada.

The phrase "price paid or payable" is defined as follows under subsection 45(1) of the Act:

> "price paid or payable", in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor.

As described by the appellants' first witness, Mr. Jack Wiltzer, previously Vice-President and now President of Algo Group Inc. (Algo), Algo is in the business of manufacturing and importing apparel. The appellants, which do not operate today, were divisions of Algo. Mr. Jump Inc. merchandised men's apparel, mostly knitted or woven, and Charley Originals Ltd. merchandised women's apparel, mostly knitted.

Four buying agency agreements, all dated December 19, 1989, were introduced as exhibits by Mr. Wiltzer. They were between: (i) Charley Originals Ltd. and Colby & Staton (Eastern) Ltd.; (ii) Charley Originals Ltd. and Colby & Staton Fashions Ltd.; (iii) Mr. Jump Inc. and Colby & Staton (Eastern) Ltd.; and (iv) Mr. Jump Inc. and Colby & Staton Fashions Ltd. The agreements with Colby & Staton (Eastern) Ltd. related to purchases of wearing apparel in Taiwan, and the agreements with Colby & Staton Fashions Ltd. related to purchases of wearing apparel in Hong Kong. The agreements provide, in part, that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd., as appropriate, were to perform the following services for the appellants:

> a) ... requisite market research ... in the Countries covered by [the agreements];
>
> b) Upon instructions from [the appellants], ... place orders ..., carry out inspections at various stages of production and otherwise perform the tasks required for successful conclusion of business on behalf of [the appellants];
>
> c) Upon instructions from [the appellants], ... administer payments, from funds provided by [the appellants], for the Merchandise for the account of [the appellants];
>
> d) ... ensure that shipping instructions from [the appellants] are adhered to and shall inspect customs and commercial invoices to make certain that they accurately reflect the contents of the shipment and the requirements of [the appellants];
>
> e) ... assure that all documents relative to shipment of the goods to [the appellants] are:
>
> i) properly prepared;
>
> ii) satisfy the requirements of the Government of the country of importation, and
>
> iii) dispatched expeditiously and via the safest possible channels.

Mr. Wiltzer elaborated on the role of Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. He indicated that the appellants engaged the services of these companies to perform, among other duties, the following: (i) going to the manufacturers' premises to check the quality of the apparel; (ii) arranging for the expediting of the clothing; (iii) negotiating the prices; (iv) sourcing fabric; and

(v) signing the inspection certificates for the apparel. In choosing a factory, the following factors were generally taken into account: price, delivery and quality of the apparel produced by the factory. The appellants would determine a price and delivery time acceptable to them and give Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. a mandate to go out into the marketplace and find a manufacturer that was prepared to produce the apparel at that price and within the stipulated delivery time. Mr. Wiltzer indicated that, for the two major apparel seasons, spring and fall, the appellants' managers would go to Hong Kong to finalize negotiations.

With respect to payment for the apparel, quota and fabric, Mr. Wiltzer, with the aid of the appellants' bookkeeper, Ms. Louise Bousejour, referred to several physical exhibits, including internal accounting sheets, invoices, customs documents, freight forwarding documents, packing slips, letters of credit, invoices and cheques, to show the chain of events of certain select transactions, from the purchase of fabric, apparel or quota, as the case may be, to the delivery and payment, including commission payments.

In particular, Mr. Wiltzer referred to an application for a letter of credit from Mr. Jump Inc. to Colby & Staton Fashions Ltd. as beneficiary. Mr. Wiltzer explained that this was done for administrative purposes. He pointed out that a letter of credit may have covered several thousand units of apparel in various styles to be produced by various manufacturers. He suggested that it would have been unwieldy from a cost point of view and from a control point of view to open a letter of credit for every style. Rather, the appellants would open blanket letters of credit which gave Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. the ability to transfer parts of the letters of credit to the various manufacturers as production was completed.

With the aid of factory invoices, receiving or packing slips, commercial invoices (B3) and bills of lading, Mr. Wiltzer traced certain of the apparel paid for by a portion of the open letter of credit and indicated that he could, with some effort, produce these documents for all of the apparel paid for using the letter of credit. Mr. Wiltzer also introduced an application for a letter of credit by Mr. Jump Inc. for the benefit of Colby & Staton Fashions Ltd. which contains a "60% red clause." He described this clause as giving Colby & Staton Fashions Ltd. the discretion to draw on the letter of credit to purchase all those items that were not provided by the manufacturers, including fabric. This type of clause was generally only used for importation of woven products. The appellants would ultimately be credited on the commercial invoices for having paid for the items not provided by the manufacturers.

Mr. Wiltzer also referred, by way of example, to an application for documentary credit by Mr. Jump Inc. in favour of Colby & Staton International Co. Ltd. for the purchase of quota to export apparel from Hong Kong.

In terms of the design of sample apparel, Mr. Wiltzer indicated that this was the appellants' responsibility and that the appellants employed persons to do the design work. These persons would educate themselves concerning current fashion trends by travelling, reading and visiting retailers. From this process, they would obtain ideas, and sometimes samples, for apparel that could be produced and sold commercially. A manufacturer would then be approached by Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. to produce a sample under the supervision of the designer, and the sample would be sent to the appellants and production orders solicited. In order to have the apparel produced by a factory in either Taiwan or Hong Kong, the appellants would provide Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. with a specification sheet. Designers or the appellants' representatives would approve the yarns for knitted apparel and choose the fabrics for other apparel based on samples shown to them by fabric suppliers. According to Mr. Wiltzer, the fabrics would be chosen based on samples shown to the appellants

by representatives of the fabric suppliers in Canada or at foreign fabric shows. The payments to manufacturers were made directly by the appellants by way of letter of credit from those companies in favour of the manufacturers.

Mr. Wiltzer indicated that Mr. Allan Zeman, the founder of Colby & Staton and a significant shareholder of Colby International Ltd.,[2] is a director, officer and principal shareholder of Algo Group Inc. However, to Mr. Wiltzer's knowledge, Mr. Zeman has not been involved in the day-to-day business of any of the Colby & Staton companies in any significant way for at least five or six years. Mr. Wiltzer confirmed that Mr. Zeman is also Co-Chairman of the Board and Chief Operating Officer of Algo International. Counsel for the respondent referred Mr. Wiltzer to copies of inspection certificates with Mr. Zeman's signature on them, to which Mr. Wiltzer commented that, for convenience, Mr. Zeman had pre-signed certificates, but that he was not personally involved in the inspection of the apparel.

Regarding quotas, Mr. Wiltzer indicated that, on the appellants' instructions, Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. would purchase the requisite quota on the appellants' behalf. Mr. Wiltzer indicated that, in Hong Kong, quota is purchased in the open market at a price which fluctuates in accordance with demand and supply. Quota purchased in Hong Kong was generally paid for by way of a cable transfer of funds from the appellants. Unlike exports from Hong Kong, for which quota may be purchased in the open market, in the case of exports from Taiwan, purchasers have to purchase quota from the factories producing the apparel, and the value of quota is included in the price of the apparel.

Mr. Wiltzer clarified the fact that the unused fabric related to fabric purchased outside of Canada for making apparel samples and was not waste fabric. Designers source all kinds of different sample fabrics. However, the suppliers of the fabrics sell in minimum quantities. The fabric which was not used to produce samples would be sold by Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. at the appellants' instructions, and the appellants would be credited with the amounts paid to purchase the unused fabric.

The appellants' second witness, Mr. Martin Leder, the North American representative for Colby International Ltd., confirmed that Mr. Zeman is Chairman of the Board and a principal owner of Colby International Ltd. and that he has not taken an active role in that corporation, as far as being instrumental in helping the company source merchandise and perform other functions of a buying agent, for many years. He also confirmed that Mr. Zeman pre-signed the inspection certificates as a matter of convenience. In discussing the relationship between the appellants and Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd., Mr. Leder confirmed that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. performed, on the appellants' behalf, all of the necessary services of a buying agent, including sourcing factories, inspecting goods and arranging and monitoring shipment to the customer. With respect to quotas, Mr. Leder testified that these were not owned by Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd.

Commissions

Counsel for the appellants referred to *Radio Shack, A Division of InterTAN Canada Ltd.* v. *The Deputy Minister of National Revenue for Customs and Excise*[3] and submitted that the Tribunal ruled that, in determining whether a legitimate, non-dutiable buying agency relationship exists, all of the facts surrounding

2. Formerly Colby & Staton International Co. Ltd. and, prior to that, Colby & Staton Fashions Limited.
3. Canadian International Trade Tribunal, Appeal Nos. AP-92-193 and AP-92-215, September 16, 1993.

the transaction must be carefully scrutinized and that, even in the face of one or more factors which might dictate against the acceptance of the buying agency, the relationship might still be an agency, given the overall consideration of the facts. Turning to the specific facts of these appeals, counsel submitted that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. performed all of the functions which are typical of a buying agent and not of a vendor of the clothing. In particular, counsel pointed out that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. did not own any of the manufacturers from which the appellants purchased garments nor did these manufacturers own Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. did not take title to the clothing and were not at risk for loss of or damage to the clothing. Rather, it was the appellants that were at risk for the clothing, took title to the clothing and financed, with their own funds, the purchase of the clothing.

Counsel for the respondent argued that the methods and practices of parties to a contract tell more about their rights and obligations than solely "the legal language they have used in their written agreements, or what they claim to have intended to accomplish in legal terms."[4] In addition, counsel argued that many factors must be taken into consideration when determining whether a relationship of principal and agent exists.[5] Relying on the decision of the Supreme Court of Canada in *R.* v. *Kelly*,[6] counsel argued that, for a principal and agent relationship to exist, "the agent acts to achieve the same results that would have been obtained if the principal had acted on his or her own account"[7] and the agent must always be in a position to act in the best interests of the principal and must not let its own interests conflict with the interests of its principal.[8]

In his brief, counsel for the respondent put forth several factual allegations in support of the respondent's position that there was no principal and agent relationship between the appellants and Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. Several of these allegations were withdrawn at the hearing, and counsel relied mainly on the fact that the appellants and Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. were controlled by the same administrators and owners to the extent that these entities could not be considered to be "independent" of one another. As a result, counsel argued, the appellants were not free to choose to deal with companies other than Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. and other manufacturers.

Similarly to the approach that has been taken in other appeals concerning agency commissions and fees,[9] in considering whether Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. represented the appellants abroad in respect of the importations of the clothing in issue, the Tribunal focused on the

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4. *Signature Plaza Sport Inc.* v. *Her Majesty the Queen* (1994), 54 C.P.R. (3d) 526 (F.C.A.), Federal Court of Appeal, File No. A-453-90, February 28, 1994; *Mexx Canada Inc.* v. *The Deputy Minister of National Revenue*, Canadian International Trade Tribunal, Appeal Nos. AP-94-035, AP-94-042 and AP-94-165, February 16, 1995; and *Firestone Tire and Rubber Company of Canada, Limited* v. *Commissioner of Income Tax*, [1942] S.C.R 476 at 482.
5. *Supra* note 3; and *R.* v. *Kelly*, [1992] 2 S.C.R. 170 at 183.
6. *Ibid.*
7. *Kelly*, *supra* note 5 at 183; and Memorandum D13-4-12, *Commissions and Brokerage*, Department of National Revenue, Customs and Excise, September 30, 1991, paragraph 12.
8. *Kelly*, *supra* note 5 at 184.
9. *Mexx Canada*, *supra* note 4; *Radio Shack*, *supra* note 3; and *Chaps-Ralph Lauren, Division of 131384 Canada Inc. and Modes Alto Regal*, Canadian International Trade Tribunal, Appeal Nos. AP-94-190 and AP-94-191, November 1, 1995.

specific facts at issue, with a view towards determining, among other things: (i) the respective roles of the appellants and Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. in importing the clothing in issue; (ii) the extent to which the appellants controlled the activities of Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd., if at all; and (iii) the interests of Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. in the imported clothing, if any.

Having reviewed the evidence, the Tribunal is of the view that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd., in accordance with the appellants' instructions and on the appellants' behalf, performed the majority of the activities necessary for the manufacture and export of the clothing in issue. Moreover, the Tribunal finds, based on the evidence, that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. did not have any interests in the clothing outside of their capacity as the appellants' representatives in respect of the sales of the clothing in issue. In particular, the Tribunal observes that Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. performed the following services and represented the appellants' interests, upon the appellants' instructions, in the following ways: (1) performance of requisite market research in Taiwan and Hong Kong; (2) sourcing of raw materials, such as fabric; (3) negotiation of prices and placement of orders with manufacturers in Taiwan and Hong Kong; (4) carrying out of inspections at various stages of production; (5) administration of payments for the fabric, quota and clothing on the appellants' account from funds provided by the appellants; (6) confirmation of shipping instructions from the appellants and inspection of customs and commercial invoices to assure that all documents relative to shipment (i) were properly prepared, (ii) satisfied the requirements of the government of the country of importation, and (iii) were dispatched expeditiously and via the safest possible channels; (7) inspection of shipment to determine that the shipment documents accurately reflected the contents of the shipment; and (8) signing of the inspection certificate. Accordingly, the Tribunal is of the view that, pursuant to subparagraph 48(5)(*a*)(i) of the Act, the fees paid to Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. were incorrectly included in the price paid or payable for the imported clothing.

Unused Fabric

Counsel for the appellants submitted that, pursuant to subparagraph 48(5)(*a*)(iii) of the Act, only the goods and services which are described in clauses (A), (B), (C) and (D) were to be added to the price paid or payable for the imported clothing. In counsel's view, the unused fabrics were materials. However, the unused fabrics were not incorporated into the imported garments nor were they consumed in the production of the imported garments. Consequently, these fabrics did not fall within the wording of either clause 48(5)(*a*)(iii)(A) or (C). Counsel submitted that clauses 48(5)(*a*)(iii)(B) and (D) are irrelevant to the treatment of unused fabric. Counsel submitted that the items listed in subparagraph 48(5)(*a*)(iii) are specific and exhaustive and that the absence of reference to a category of goods that would include the unused fabric is indicative that the unused fabric was not to be added to the price paid or payable for the imported clothing.

To support the respondent's contention that the value of the unused fabric should have been included in the price paid or payable for the imported clothing, counsel for the respondent submitted that it was necessary for the Tribunal to make a distinction between "fabric loss" and "excess fabric" or bulk purchasing of fabric which, in counsel's view, would be accounted for in the books and records of the manufacturers/vendors. Fabric loss, counsel submitted, is a direct consequence of the production of the

goods, and the cost for fabric loss must be amortized against the imported goods. Counsel submitted that the payment for the fabric loss is to or for the benefit of the manufacturers/vendors.[10]

The Tribunal observes that clause 48(5)(*a*)(iii)(C) provides that "any materials consumed in the production of the imported goods" are to be included in the price paid or payable for those goods. In the Tribunal's view, the unused fabric falls within the description of "materials"; however, the unused fabric was not "consumed in the production of the imported goods." This was confirmed by Mr. Wiltzer, in his testimony, when he stated that the unused fabric in issue, which was purchased by Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd., on the appellants' behalf, not by the vendor, was not waste and was not consumed in the production of, nor incorporated into, the imported clothing. Moreover, Mr. Wiltzer testified that the unused fabric was not retained by the manufacturers, but was resold by Colby & Staton (Eastern) Ltd. and Colby & Staton Fashions Ltd. and that the appellants were credited for the amounts received in respect of those sales. The manufacturers/vendors did not, therefore, "benefit" from the payments for the sales of the unused fabric. The Tribunal concludes, therefore, that the value of the unused fabric was incorrectly included in the price paid or payable for the imported clothing and allows the appeals in this respect.

Quotas

Counsel for the appellants referred to the definition of "price paid or payable" under subsection 45(1) of the Act and submitted that the payments for quota entitlement do not fall within the definition, since the payments were: (i) not related to the price paid or payable for the imported clothing; (ii) not paid to the manufacturer/vendor of the clothing; and (iii) not made for the benefit of the vendor, in that the appellants had a contractual commitment to the manufacturer/vendor to purchase the clothing regardless of whether the appellants were able to secure quota entitlement. In further support of the appellants' position that third-party quota payments were not to be included in the price paid or payable for the imported clothing, counsel relied on a decision of the Court of Justice of the European Communities[11] and two decisions of US courts.[12]

Counsel for the respondent referred to the general information concerning export quotas in Memorandum D13-3-14[13] and pointed out that the appellants could not import the clothing into Canada without obtaining quota. Counsel submitted that, pursuant to the definition of "price paid or payable" under subsection 45(1) of the Act, all payments made for the "benefit" of the vendor are part of the price paid or payable. In counsel's view, the word "benefit" is an ordinary word and is to be liberally interpreted as meaning "an advantage of whatever kind.[14]" It was submitted by counsel that, when the appellants obtained quota to purchase clothing from manufacturers/vendors, the appellants were paying that quota in respect of that clothing and for the benefit of the manufacturers/vendors because the appellants were then able to purchase clothing from them and import it into Canada.

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10. *Mexx Canada*, *supra* note 4.
11. *Ospig Textilgesellschaft KG W. Ahlers* v. *Hauptzollamt Bremen-Ost*, [1985] 1 C.M.L.R. 469.
12. *Generra Sportswear Company* v. *The United States*, 905 F.2d 377 (Fed. Cir. 1990), rev'g 715 F.Supp. 1101 (1989); and *Murjani International Ltd.* v. *United States*, United States Court of International Trade, Slip Opinion 93-152.
13. *Quota Payments*, Department of National Revenue, Customs and Excise, June 1, 1986.
14. *Transcript of Public Hearing and Argument*, November 26, 1996, at 219.

The Tribunal observes that the definition of "price paid or payable" under subsection 45(1) of the Act means "the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor." In the Tribunal's view, it is clear in the case of the exports from Taiwan, where quota was purchased from the factories producing the apparel and the value of quota was included in the price of the apparel, that the quota payment was for the benefit of the vendor and should, therefore, have been included in the price paid or payable for the apparel. However, the Tribunal is not persuaded that the quota payment to export clothing from Hong Kong should have been included in the price paid or payable for the goods.

The evidence indicates that the quota payments obtained for exports from Hong Kong were made by Colby & Staton Fashions Ltd., on the appellants' behalf, to the owners of the quota that, based on the evidence, were unrelated to the manufacturers/vendors of the clothing. Moreover, the evidence indicates that the purchases of such quota were sometimes made in advance of the purchase of clothing. Based on this evidence, the Tribunal concludes that the payments to quota holders to purchase quota to export clothing from Hong Kong were independent of the payments to the manufacturers/vendors to purchase the clothing and were not, therefore, for the benefit of those manufacturers/vendors. The Tribunal is, therefore, of the view that the quota payments to export goods from Hong Kong should not have been included in the "price paid or payable" for the clothing.

Thus, the Tribunal finds that the quota payments made in respect of exports of clothing from Taiwan were correctly included in the price paid or payable for that clothing upon importation and that the quota payments made in respect of exports of clothing from Hong Kong were incorrectly included in the price paid or payable for that clothing.

Accordingly, the appeals are allowed in part.

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

Desmond Hallissey
Desmond Hallissey
Member

Charles A. Gracey
Charles A. Gracey
Member