CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, September 3, 1997

Appeal No. AP-95-296

IN THE MATTER OF an appeal heard on March 3, 1997, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated December 19, 1995, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

MODA IMPORTS, INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

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

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-95-296

MODA IMPORTS, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* from a decision 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 footwear, handbags and small leather goods imported by the appellant into Canada. The appellant, carrying on business in New York City, is 90 percent owned by Salvatore Ferragamo Firenze spa (Ferragamo) of Italy, with the other 10 percent being owned by a member of the Ferragamo family. The appellant acts as a "non-resident importer" for similar goods shipped from Italy primarily to independent retailers in Canada, retaining title to the goods until after they have cleared customs. At issue in the appeal is whether the value for duty of the goods imported into Canada by the appellant should be based on the price at which the appellant buys the goods from Ferragamo, as claimed by the appellant, or whether the value for duty of the goods should be based on the price at which the appellant "resells" the goods to retailers in Canada, as determined by the respondent.

HELD: The appeal is allowed. The Tribunal is of the view that the transactions between Ferragamo and the appellant constitute true sales, wherein title to the goods in issue is passed from Ferragamo to the appellant. The Tribunal is not persuaded, on the facts, that the appellant acted as an agent for Ferragamo at the relevant time.

In considering whether an agency relationship exists, the courts have determined that "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 … by a broad consideration of the intention of the parties as evidenced by what the parties did, as well as by what they said."

The factors on which the Tribunal primarily relied in reaching this decision were that: (1) the appellant has a separate bank account from that of Ferragamo through which it finances its own business activities, including payment of its employees' salaries; (2) Ferragamo invoices the appellant for the sale of the goods and the appellant, in turn, invoices its customers for the goods, with payment being effected accordingly; (3) the appellant has its own consolidated financial statements as a limited company, separate and apart from those of Ferragamo; (4) even though the appellant has the same corporate directors as Ferragamo, they are not involved in the appellant's day-to-day operations; (5) with the exception of claims of inferior quality in the goods themselves, the appellant is responsible for the cost of any other claims in respect of sales; (6) any profits earned and losses sustained by the appellant are borne by the appellant; and (7) the appellant assumes the risk for and title to the goods in Italy.

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Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 3, 1997
Date of Decision:	September 3, 1997
Tribunal Members:	Lyle M. Russell, Presiding Member Robert C. Coates, Q.C., Member Charles A. Gracey, Member
Counsel for the Tribunal:	Heather A. Grant
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Michael Kaylor, for the appellant Janet Ozembloski, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP 95-296

MODA IMPORTS, INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ROBERT C. COATES, Q.C., Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from a decision 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 footwear, handbags and small leather goods imported by the appellant into Canada.

The appellant, carrying on business in New York City, is 90 percent owned by Salvatore Ferragamo Firenze spa (Ferragamo) of Italy, with the other 10 percent being owned by a member of the Ferragamo family. The appellant imports from Italy and stocks for sale in the United States goods bearing the Salvatore Ferragamo trademark. It also acts as a "non-resident importer" for similar goods shipped from Italy primarily to independent retailers in Canada, retaining title to the goods until after they have cleared customs. At issue in the appeal is whether the value for duty of the goods imported into Canada by the appellant should be based on the price at which the appellant buys the goods from Ferragamo, as claimed by the appellant, or whether the value for duty of the goods should be based on the price at which the appellant "resells" the goods to retailers in Canada, as determined by the respondent.

Appearing as a witness for the appellant was Mr. Arcangelo Rosato, a certified public accountant residing in New Jersey who provides financial and administrative counselling to the appellant. Mr. Rosato testified that the appellant was incorporated as a separate legal entity in the United States in the 1950s and is engaged in three different kinds of business: real estate ownership and operation; wholesale distribution of products bearing the Salvatore Ferragamo trademark (shoes, handbags, wearing apparel and accessories); and ownership and operation of a number of retail stores for such goods. The appellant is the exclusive distributor of Ferragamo products in North America.

Mr. Rosato testified that the same family members who control Ferragamo in Italy are officers of the appellant, but that they are not active in the appellant's day-to-day operations. The appellant maintains separate bank accounts in the United States, pays its employees from its own funds and files income tax returns with the US government. For the most part, the appellant has reinvested in US operations rather than pay dividends. He explained that the appellant has expanded substantially since 1985, with the number of employees increasing from 35 to 60. The appellant now operates two warehouses in the United States instead of one and six retail outlets (including one in Vancouver, British Columbia) instead of three. Sales have increased ninefold over the same time period.

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

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Mr. Rosato explained that the appellant orders goods from Ferragamo on the basis of either expressions of interest or actual orders from its US and Canadian customers that would normally have visited the appellant's New York City showroom to determine what products are available for the season and at what price. The appellant demands payment in full 30 days following the date of shipment to its customers, but, on average, does not receive payment until about 50 days after shipment. The appellant pays Ferragamo only 120 days after shipment by transfer from the appellant's account to Ferragamo's account.

Except for adjustments based on claims by the retailers of defects in the merchandise, which are accepted by the manufacturer, Mr. Rosato testified that the appellant must bear the cost of any other claims concerning the goods. In settlement of such claims, goods destined for the US market may be returned to the New York City warehouse, but since Canadian customers are in a different customs jurisdiction, returns are discouraged and a credit is given instead. The appellant also offers to its customers, without compensation from Ferragamo, an advertising allowance if they participate in a co-operative advertising program designed by the appellant.

According to Mr. Rosato, the appellant decides which of the Ferragamo products will be offered for sale in North America each selling season. The price that the appellant pays to Ferragamo is established after extensive discussions with Ferragamo as to what volumes are likely to be sold at particular price points, but the price is ultimately decided by Ferragamo on the basis of what it will cost to manufacture the goods. He explained that manufacture is contracted out by Ferragamo to factories in Italy and that the appellant has no direct dealings with the factories in terms of the order. According to Mr. Rosato, the appellant assumes title to the goods as soon as they are released by the factory to the freight forwarder and carries insurance on all goods destined for North America from the time they leave the factory in Italy until they arrive at the customer's door. Ferragamo arranges and pays for the transportation of the goods to Canada, but the appellant is billed for this cost. The goods are shipped directly from Italy to the appellant's customers in Canada. The appellant, and not Ferragamo, decides what markup applies when reselling the goods to customers in Canada, and this is set at a level sufficient to cover all its costs (and presumably make a profit).

Mr. Rosato further testified that there is no written contract between the appellant and Ferragamo. The latter retains all rights to the trademark, and the former simply ensures that the goods are marketed in such a way as to maintain the desired image for the trademark. No separate payment is made to Ferragamo in respect of the trademark, and Ferragamo, not the appellant, is responsible for taking action against any counterfeit goods that might appear on the Canadian or US market.

In cross-examination, Mr. Rosato acknowledged that the appellant is referred to as a "society of distribution" in North America for Ferragamo in documentation obtained from Ferragamo's Web site and that the names "Moda" and "Ferragamo" are often used together or interchangeably by customers in correspondence, but ascribed this phenomenon to the fact that the appellant's customers associate the appellant with the Ferragamo product line. Mr. Rosato also acknowledged that an air cargo bill, pertaining to a shipment from Ferragamo to the appellant in 1992, indicates "C & F Toronto Airport,"[2] suggesting that cost and freight are paid by the shipper. Mr. Rosato explained that this is because Ferragamo initially pays the cost of shipping because of its preferred negotiating position with the shippers and that the appellant reimburses Ferragamo for the expense. In response to questions from the Tribunal, Mr. Rosato clarified that the appellant has the same pricing arrangements with its store in Vancouver as it does with independent companies, such as Browns Shoe Shops Inc. and Holt Renfrew & Co. Ltd.

2. Exhibit B-4.

Citing the Tribunal's decision in *Harbour Sales (Windsor) Limited* v. *The Deputy Minister of National Revenue*,[3] counsel for the appellant argued that, since there is no requirement in the Act that the sale for export to Canada be to a purchaser that is resident in Canada, the price paid by the appellant to Ferragamo should be used to determine the transaction value of the goods and, consequently, their value for duty. He submitted that the evidence is clear that, when the appellant buys goods for the Canadian market from Ferragamo, the latter is selling the goods for export to Canada. It is also clear, he argued, that these are real sales, not sham transactions. Although a subsidiary of Ferragamo, the appellant is not a mere agent of Ferragamo. The transactions between the two companies meet all the requirements established in the jurisprudence to constitute real sales.[4] He suggested that this is borne out, in part, by the fact that the appellant's purchase price has not been challenged by the respondent under subsection 48(2) of the Act as being influenced by the relationship between the two companies.

The fact that there was no written agreement between Ferragamo and the appellant in respect of the sales should not be held against the appellant, counsel for the appellant argued, as a number of recent decisions by the Tribunal involving royalty payments suggest that what the parties to a transaction really do is more important than what is written in a contract. In the present case, the parties clearly act independently, despite the fact that they are related companies. The existence of such a relationship does not invalidate the sale between them, he argued.

In the event that the Tribunal were inclined to distinguish between the facts in this case and the facts in *Harbour Sales* on the basis that the appellant in this appeal, unlike the appellant in *Harbour Sales*, has no physical presence whatsoever in Canada, counsel for the appellant submitted that the Tribunal should be guided by US jurisprudence which accepts transactions between non-resident companies as a basis for calculating value for duty. US decisions, based on US legislation identical in most respects to Canadian provisions in respect of value for duty, also make it clear that it is not appropriate to apply a "proximate cause" test to decide which of several back-to-back sales for export should be used for customs valuation purposes. In such cases, he argued, it is open to the importer to choose the most favourable transaction value.

Counsel for the respondent argued that there is only one sale for export, with Ferragamo as seller, and the Canadian independent retailers as purchasers. She submitted that the appellant is simply an agent of Ferragamo, acting as a conduit through which Canadian customers can place orders with Ferragamo. She argued that the appellant had not discharged the onus of giving a clear and full picture of the transactions at issue. Furthermore, the appellant has not submitted sufficient documentation to show that title to the goods was transferred to the appellant in Italy. In her view, it is not clear that the insurance agreement entered into evidence covered the import transactions at issue. Furthermore, the fact that Ferragamo paid for the transportation costs suggests that Ferragamo may bear some of the risks for and costs of the shipping until the goods reach customers in Canada.

The absence of a written agreement between Ferragamo and the appellant, especially in relation to how the trademark is used or represented by the appellant in North America, is, according to counsel for the respondent, evidence of such a close connection between the two companies as to make it impossible to

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

4. In support of this view, counsel referred to the following decisions: *Firestone Tire and Rubber Company of Canada, Limited* v. *Commissioner of Income Tax*, [1942] S.C.R. 476; *His Majesty the King* v. *Leon L. Plotkins*, [1938-39] C.T.C. 138 (Ex. Ct.) at 146; and *His Majesty the King* v. *B.C. Brick and Tile Company*, [1935] C.T.C. 110 (Ex. Ct.).

conclude that there was a true sale between them. Citing the prominence of the Salvatore Ferragamo trademark on documents submitted in evidence, she argued that the appellant presented itself as simply the North American presence of Ferragamo and that the appellant's customers also see it that way, again suggesting that it is simply an agent of Ferragamo. Among the case law cited to support this view was the Tribunal's decision in *JewelWay International Canada, Inc. and JewelWay International, Inc.* v. *The Deputy Minister of National Revenue*,[5] which was also cited at length by counsel for the appellant to support the opposite point of view. Counsel for the respondent alleged that the business relations in those appeals were quite similar to those in the present case, whereas counsel for the appellant argued that the relationship between the appellant and Ferragamo did not meet any of the tests of agency set out in *JewelWay*, except the one suggesting that the failure of an intermediary company to hold inventory might imply an agency relationship. Counsel for the respondent also cited the Tribunal's decision in *Mattel Canada Inc.* v. *The Deputy Minister of National Revenue*[6] as authority for looking at the chain of events leading to the importation of the goods in issue as a single transaction.

Counsel for the respondent distinguished the facts in the present case from those in *Harbour Sales* on the basis that, in the latter case, there was no corporate relationship between the several links in the chain and, specifically, no relationship between the manufacturer and the intermediary. Moreover, the issue of agency was not argued in that case and was not determinative of the appeal. Counsel further submitted that the two US cases, cited by counsel for the appellant, similarly did not apply because they dealt with transactions between unrelated parties. She suggested that, in the present case, it was likely that the relationship between Ferragamo and the appellant affected the price paid by the latter to the former.

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. In this case, it is for the Tribunal to determine whether the goods in issue were shipped to Canada, with the appellant as the buyer and Ferragamo as the seller, or whether the goods were shipped to Canada with the appellant as Ferragamo's agent to fulfil sales to independent retailers in Canada on Ferragamo's behalf.

In reviewing the facts of this case, taking into account the applicable legislation and relevant jurisprudence, the Tribunal is of the view that the transactions between Ferragamo and the appellant constitute true sales, wherein title to the goods in issue is passed from Ferragamo to the appellant. The Tribunal is not persuaded, on the facts, that the appellant acted as an agent for Ferragamo at the relevant time and notes that it finds the testimony of the witness for the appellant to be both reliable and helpful in this regard.

In considering whether an agency relationship exists, the courts have determined that this is a question of fact. While the courts have taken a variety of factors into account in order to answer this question, including the extent to which one party controls the other and the degree of risk assumed by the alleged agent, no one factor has been considered by the courts to be determinative of the issue of agency. The courts have considered the evidence as a whole and "weighed the relative importance of the factors as they may apply.[7]" They have also stated that, "where the evidence does not make entirely clear the intention of the

5. Appeal Nos. AP-94-359 and AP-94-360, March 26, 1996.
6. Appeal Nos. AP-95-126 and AP-95-255, January 15, 1997.
7. *Supra* note 5 at 12.

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[8]" 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.[9]"

The factors on which the Tribunal primarily relied in reaching this decision were the following, and of which it was persuaded by the evidence, particularly the testimony of the witness: (1) the appellant has a separate bank account from that of Ferragamo through which it finances its own business activities, including payment of its employees' salaries; (2) Ferragamo invoices the appellant for the sale of the goods and the appellant, in turn, invoices its customers for the goods, with payment being effected accordingly; (3) the appellant has its own consolidated financial statements as a limited company, separate and apart from those of Ferragamo; (4) even though the appellant has the same corporate directors as Ferragamo, they are not involved in the appellant's day-to-day operations; (5) with the exception of claims of inferior quality in the goods themselves, the appellant is responsible for the cost of any other claims in respect of sales; (6) any profits earned and losses sustained by the appellant are borne by the appellant; and (7) the appellant assumes the risk for and title to the goods in Italy. The Tribunal finds that, in spite of certain documents suggesting that title to the goods passes to the appellant in Toronto, Ontario, the appellant in fact assumes risk and title in Italy, based on the testimony of Mr. Rosato regarding the conduct of the appellant and Ferragamo in respect of shipping and insurance coverage.

While the Tribunal acknowledges the existence of other facts that might support a finding of an agency relationship, such as the absence of inventory held in Canada, the fact that arrangements for shipping were sometimes made by Ferragamo, with the appellant reimbursing Ferragamo for the expense, and the absence of written contracts between Ferragamo and the appellant, as indicated earlier, it is as a result of weighing various factors in this case that the Tribunal has decided that, on balance, an agency relationship does not exist. The Tribunal would add that there is no basis in law to conclude that, simply because two companies are related, one is necessarily the agent of the other. In fact, the Act clearly envisages using the transaction price between related companies as the basis for determining the value for duty where the relationship between the companies is considered not to have influenced the price.

With respect to the relevance of the fact that the appellant is an non-resident importer to the disposition of this appeal, the Tribunal notes that its decision in *Harbour Sales*, for which leave to appeal was denied by the Federal Court of Appeal, determined, in part, that there was no statutory requirement that a purchaser in a sale for export need be a Canadian resident or purchaser in Canada for valuation purposes.[10] Accordingly, the Tribunal finds that the fact that the appellant is a non-resident importer and also a purchaser outside of Canada does not have a bearing on its conclusion that the transaction between Ferragamo and the appellant constitutes an appropriate transaction for the purposes of determining the value for duty of the goods in issue under the Act.

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8. *B & M Readers' Service Limited* v. *Anglo Canadian Publishers Limited*, [1950] O.R. 159 at 164, and cited, with approval, by the Tribunal in *JewelWay*, *ibid.*

9. *Ibid.*

10. Subsequent to the Tribunal's decision in *Harbour Sales*, subsection 48(1) of the Act was to be amended, by introducing a Canadian residency requirement, by *An Act to amend the Customs Act and the Customs Tariff and to make related and consequential amendments to other Acts*, S.C. 1995, c. 41, s. 18. As of the date of hearing of this appeal, the amendment had not been proclaimed in force.

The Tribunal notes that it does not consider the transaction between the appellant and the Canadian retailers the "sale for export" for valuation purposes. Although the appellant is a resident of the United States and not Canada, it purchases goods for the Canadian market from Ferragamo on the condition that Ferragamo exports the goods to Canada. It is this transaction that, in the Tribunal's view, constitutes the sale "for export to Canada" for valuation purposes under section 48 of the Act. The fact that, when the sale is made, the purchaser has already entered into an agreement to sell the goods to another purchaser resident in Canada and to have the goods delivered to that purchaser does not make the latter sale a sale "for export to Canada."

For the foregoing reasons, the Tribunal allows the appeal.

Lyle M. Russell
Lyle M. Russell
Presiding Member

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

Charles A. Gracey
Charles A. Gracey
Member