CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, August 28, 1997

Appeal No. AP-96-076

IN THE MATTER OF an appeal heard on February 10, 1997, 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 July 23, 1996, with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

DMG TRADING CO. LTD. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Dr. Patricia M. Close
Dr. Patricia M. Close
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-96-076

DMG TRADING CO. LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 67 of the *Customs Act* of decisions of the Deputy Minister of National Revenue made under section 63 of the *Customs Act*. The respondent determined that, while the appellant was the importer of the goods in issue, it was not "a valid purchaser in sales for export to Canada." Rather, according to the respondent, the appellant was a selling agent acting for the vendor, OFA Oy Ab. Accordingly, the issue in this appeal is whether selling commissions of 5.0 to 6.5 percent were properly added to the price paid or payable for the goods in issue pursuant to subparagraph 48(5)(*a*)(i) of the *Customs Act*. The Tribunal must also determine whether the finance or interest charge of 4.0 percent, which was included in the invoice price in consideration of a possible delay in payment of up to four months, was properly added to the price paid or payable for the goods in issue in calculating the value for duty.

HELD: The appeal is dismissed. The Tribunal acknowledges that there are some factors which may suggest that it was intended that the relationship between OFA Oy Ab and the appellant be that of seller and buyer. However, the Tribunal is of the view that, on balance, the facts show that the appellant acted as the selling agent for OFA Oy Ab during the relevant period and for purposes of calculating the value for duty.

The evidence shows that OFA Oy Ab, the foreign supplier, delivered the goods to Arbrobec Parts Canada Ltd. in pursuance of orders placed through the appellant. The price quoted on the invoice sent to the appellant, which then relayed it to Arbrobec Parts Canada Ltd., included an amount for the appellant's services. This trade discount or selling commission would, therefore, already have been included in the price paid or payable for the goods and, consequently, should not have been deducted by the appellant when calculating the value for duty. In the Tribunal's view, it properly formed part of the price paid or payable for the goods by the purchaser to or for the benefit of the vendor in calculating the value for duty.

The conditions in Memorandum D13-3-13 of the Department of National Revenue not having been met, the Tribunal finds that the finance charge of 4.0 percent also properly formed part of the price paid or payable of the goods in calculating the value for duty.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 10, 1997
Date of Decision:	August 28, 1997
Tribunal Members:	Charles A. Gracey, Presiding Member Raynald Guay, Member Dr. Patricia M. Close, Member

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Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Donald Peterson, for the appellant Stéphane Lilkoff, for the respondent

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Appeal No. AP-96-076

DMG TRADING CO. LTD. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
DR. PATRICIA M. CLOSE, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) of decisions of the Deputy Minister of National Revenue dated July 23, 1996, made under section 63 of the Act.

The appellant is a company engaged in the importation of various types of tire chains used primarily in the forest industry. The appellant is wholly owned by Mr. John J. von Hunnius of Montréal, Quebec. The goods in issue were imported in 24 shipments between June 25, 1993, and June 23, 1995, from OFA Oy Ab (OFA), a manufacturing firm in Finland. They were then sold by the appellant to a distributor, Arbrobec Parts Canada Ltd. (Arbrobec).

The respondent determined that, while the appellant was the importer of the goods in issue, it was not "a valid purchaser in sales for export to Canada." Rather, according to the respondent, the appellant was a selling agent acting for the vendor, OFA. Accordingly, the issue in this appeal is whether selling commissions of 5.0 to 6.5 percent were properly added to the price paid or payable for the goods in issue pursuant to subparagraph 48(5)(*a*)(i) of the Act. The Tribunal must also determine whether the finance or interest charge of 4.0 percent, which was included in the invoice price in consideration of a possible delay in payment of up to four months, was properly added to the price paid or payable for the goods in issue in calculating the value for duty.

At the hearing, Mr. von Hunnius testified on behalf of the appellant. He explained that he has had a 25-year association with OFA and its predecessor firms,[2] but that there is no corporate relationship of any kind between OFA and the appellant. At one time, there was a written agreement between the appellant and one of OFA's predecessors, whereby the appellant simply acted as an agent for the Finnish company, but that agreement lapsed and was not replaced. According to Mr. von Hunnius, the agreement that now exists between the appellant and OFA is verbal and bound by a handshake. Mr. von Hunnius explained that the appellant acts both as an agent for OFA and as the exclusive importer and distributor in Canada of the goods that it imports from OFA. To that end, the appellant has four regional distributors in Canada. The only one of these four firms in respect of which evidence was adduced at the hearing was Arbrobec, which has the

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. OFA was first established in 1976, at which time it was called Fiskars. It then changed its name to Ovako and eventually to Imatra Steel Oy Ab, which was sold to the employees of OFA at some time in 1992 or 1993.

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exclusive rights to distribute the goods in issue in the province of Quebec. According to Mr. von Hunnius, there is presently no corporate or contractual relationship between Arbrobec and OFA.

Mr. von Hunnius explained that, from August 1990 to November 1992, the appellant acted solely as an agent for OFA. During this time, goods were shipped by OFA directly to Arbrobec on a consignment basis. The appellant never obtained title to the goods. The payments were made by Arbrobec directly to OFA. When it became apparent that Arbrobec could not continue to meet its payment obligations, the appellant purchased the remaining inventory of consigned goods from Arbrobec and worked out a monthly payment schedule with Arbrobec. Thus, the appellant assumed ownership of inventory valued at approximately $400,000 and reverted back to the arrangement that exited prior to 1991, whereby the appellant began purchasing the goods from OFA and selling them to Arbrobec.

Regarding the appellant's current operations, Mr. von Hunnius explained that it is his practice to solicit orders from the appellant's distributors and then to pass them on to OFA. Delivery dates are agreed to by Mr. von Hunnius and the appellant's customers. However, OFA is sometimes unable to meet these deadlines, and deliveries are delayed. Normally, the price is determined by OFA. However, on certain occasions, Mr. von Hunnius has negotiated a lower price or a higher discount when one of the appellant's distributors has said that the price set by OFA was too high in light of prevailing market conditions. When the order is ready, the goods are shipped directly to Arbrobec from OFA on a CIF basis. The invoice, however, is sent to the appellant. The appellant pays the brokerage, the Goods and Services Tax (GST) and the duty at the time of importation, and then sends an invoice to Arbrobec for the full price of the goods, including an amount representing the trade discount, the brokerage, the GST and the duty. Mr. von Hunnius explained that the appellant must pay OFA whether or not it is paid by Arbrobec. The warranty is offered by OFA; however, the appellant determines whether a claim is covered by the warranty. If it is, then OFA repairs the goods. If it is not, then the appellant determines whether the customer is entitled to compensation. If it is, then the appellant pays the customer to protect its goodwill in the marketplace.

In order to get a better understanding of the pricing arrangements between the appellant, OFA and Arbrobec, the Tribunal, with the assistance of Mr. von Hunnius, considered the following hypothetical example. The appellant receives an invoice from OFA in the amount of $100. It sends Arbrobec an invoice for the same amount. Mr. von Hunnius explained that the $100 invoice from OFA would consist of the following three components: the price of the goods; an amount varying from 5.0 to 6.5 percent of the final price, referred to by Mr. von Hunnius as a trade discount and by the respondent as a selling commission; and an amount of 4.0 percent of the invoiced price representing a finance or interest charge in consideration of a possible delay in payment by the appellant's distributors of up to four months. Accordingly, the price structure in the above example would be $90 for the goods, $6 for the trade discount and $4 for the finance charge. The value for duty of the goods would be $90 minus freight, insurance, etc. This is the amount on which the appellant would calculate the duty. The position of the Department of National Revenue (Revenue Canada) is that duty should be paid on $100 minus freight, insurance, etc. Mr. von Hunnius explained that OFA would get $100 minus the trade discount.

In cross-examination, Mr. von Hunnius confirmed that he visits the OFA factory in Finland regularly to discuss new products and any problems that may exist, for instance, with respect to quality, pricing and market conditions. These trips are always made at the expense of the appellant. Personnel from OFA also come to Canada on occasion to visit him and some of the appellant's distributors. Mr. von Hunnius explained that the appellant is responsible for the selection of distributors. OFA is not involved in this process. Mr. von Hunnius reiterated that, in his view, the appellant is the buyer of the goods and that OFA is

the seller. He explained that Arbrobec does not sell any products that compete with the products that it purchases from the appellant, but that some of the appellant's other distributors do. Mr. von Hunnius also testified that, normally, the appellant waits until Arbrobec pays it before it pays OFA. If Arbrobec does not pay on time, Mr. von Hunnius may give OFA a call to ask whether it can wait until the appellant gets paid by Arbrobec. If it cannot wait, then the appellant pays OFA.

Mr. Alain Proulx, President of Arbrobec, also testified on behalf of the appellant. He explained that Arbrobec orders its goods from the appellant and was not, at the relevant time, the importer of record. He indicated that, from 1991 to 1993, Arbrobec did buy the goods directly from Imatra Steel Oy Ab, now OFA, and that, at that time, it was the importer of record.

The appellant's representative argued that the appellant is a valid purchaser of the goods imported from OFA into Canada. The fact that the appellant is also an agent should not preclude it from being considered "a valid purchaser in sales for export to Canada." He compared the appellant's situation to that of automobile dealers. The representative argued that, contrary to the respondent's assertions, the appellant did much more than merely find buyers for the goods. It also assumed the risk associated with ownership, provided customer services and selected distributors, independently of OFA. The representative argued that the appellant's practice of finding buyers before it imported the goods into the country or of selling the goods to its distributors at prices based on the manufacturer's price lists was not unusual, nor was its practice of shipping the goods directly to Arbrobec. He referred to the definition of "price paid or payable" in the Act, which is "the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods … to or for the benefit of the vendor." In his view, this meant payments by the appellant to OFA, not by Arbrobec to the appellant. The representative argued that the payment from the appellant to OFA did not include the trade allowance, as this amount was not for the benefit of the vendor. He pointed out that Arbrobec did not place its orders with OFA, but with the appellant.

In further support of the argument that the appellant is a valid purchaser in Canada, the appellant's representative relied on proposed amendments to the *Valuation for Duty Regulations*.[3] More particularly, he argued that the appellant is a purchaser in Canada because it is a Canadian business establishment domiciled in Canada, which obtains title to goods transferred to it by a vendor in exchange for some monetary consideration.

As to the finance charge, the appellant's representative referred to Memorandum D13-3-13,[4] which provides that finance charges shall not be regarded as part of the Customs value provided certain conditions are met. He argued that such memoranda, although instructive, are not binding. With respect to the first condition, the representative argued that the finance charge could be distinguished from the price actually paid or payable even if it did not appear as a separate item on the invoices. The second condition could not be met, since there was no written contract or agreement between the parties. Nonetheless, it was argued that the financing arrangement between the appellant and OFA was well understood, even by Revenue Canada, as the matter had been discussed with its officials when the amount of the finance charge was adjusted from 18 percent per annum to, effectively, 1 percent per month. Finally, the representative argued that the third condition was met, that is, that the rate of interest not exceed the prevailing rate of interest for such transactions at the time when and in the country where the financing was provided.

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3. SOR/86-792, July 24, 1986, *Canada Gazette* Part II, Vol. 120, No. 16 at 3130.
4. *Customs Valuation: Interest Charges for Deferred Payment for Imported Goods (Customs Act, Sections 48 to 53)*, Department of National Revenue, Customs and Excise, June 1, 1986.

Counsel for the respondent argued that a sale for export of the goods in issue did occur in the present matter, but that the appellant was not the purchaser of the goods. Rather, OFA was the foreign vendor, Arbrobec was the buyer, and the appellant was the selling agent for OFA. Counsel argued that this was the true nature of the relationship between the parties involved in the transactions at issue. He argued that a party cannot be both agent and purchaser. Counsel argued that the appellant had obligations towards OFA which had to be met when goods were imported into Canada. The relevant price is, therefore, the price paid by Arbrobec and not the price paid by the appellant to OFA. Though the earlier written agreement between the appellant and the manufacturer lapsed before the goods in issue were imported, counsel argued that the spirit and intent of the agreement continued to apply.

In support of his contention that the appellant was only an agent, counsel for the respondent noted that OFA set the price for the goods, which was then paid by Arbrobec. Furthermore, the appellant, in being paid by commission, gave up the chance to raise prices and, therefore, to have control over its profit. He noted that the product literature belonged to OFA, as did the product warranty. In support of his argument that the appellant was the selling agent for OFA, counsel referred to the Tribunal's decision in *JewelWay International Canada, Inc. and JewelWay International, Inc.* v. *The Deputy Minister of National Revenue*.[5] Finally, counsel argued that, since the conditions in Memorandum D13-3-13 had not been met, the interest or finance charges properly formed part of the price paid or payable for the goods in issue.

In the present case, the value for duty was appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48 of the Act. Subsection 48(4) provides that "[t]he transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5)." Subparagraph 48(5)(*a*)(i) provides the following:

> (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.

As noted at the outset, the respondent determined that, while the appellant was the importer of the goods in issue, it was not "a valid purchaser in sales for export to Canada." Rather, according to the respondent, the appellant was a selling agent acting for the vendor, OFA. The valid purchaser in the transactions at issue was Arbrobec. Accordingly, the price paid or payable was the price paid by Arbrobec to the appellant, which was eventually remitted to OFA. In accordance with subparagraph 48(5)(*a*)(i) of the Act, the respondent ruled that an amount of 5.0 to 6.5 percent representing a trade discount offered to the appellant by OFA or, in the respondent's words, "a selling commission" must be added to the price paid or payable in calculating the value for duty. The respondent also included an amount of 4.0 percent representing the interest charge for deferred payment.

The appellant's representative argued that not only did the appellant act as OFA's selling agent in Canada but it also purchased the goods in issue from OFA and then resold them to Arbrobec. The Tribunal does not accept the representative's argument that a person can be both a selling agent and a purchaser in a

5. Appeal Nos. AP-94-359 and AP-94-360, March 26, 1996.

single transaction. It is important, for purposes of this appeal, to determine whether the appellant acted as a selling agent or whether it actually purchased the goods in issue from OFA.

To determine whether the appellant was a selling agent or the actual purchaser of the goods in issue, the Tribunal must consider the true nature of the transaction between the parties.[6] In *JewelWay*, the decision referred to by counsel for the respondent, the Tribunal reviewed the jurisprudence dealing with the issue of agency and noted that various factors had been considered relevant for the purposes of determining whether there was an agency relationship, such as the extent to which one party controls another and the risk assumed by the alleged agent. The Tribunal noted that no one factor had been considered by the courts to be determinative of the issue of agency and that the courts had, in making their determinations, considered the facts as a whole and weighed the relative importance of the factors as they may apply.[7]

Similarly, the Tribunal, in this case, examined the "trail" between OFA and the appellant, the appellant and Arbrobec, and Arbrobec and OFA in order to determine the exact nature of the relationships. In particular, the Tribunal considered the conduct of Mr. von Hunnius and his dealings with OFA and Arbrobec. The Tribunal acknowledges that there are some factors which may suggest that it was intended that the relationship between OFA and the appellant be that of seller and buyer. However, the Tribunal is of the view that, on balance, the facts show that the appellant acted as the selling agent for OFA during the relevant period and for purposes of calculating the value for duty. In reaching its conclusion, the Tribunal relies, in particular, on the following factors: (1) the terms, namely, the price and payment, for the sale of the goods in issue were determined by OFA; (2) in most cases, the appellant secured customers and orders before importing the goods from OFA; (3) the goods were shipped directly to Arbrobec; (4) the appellant had no choice of suppliers; (5) under certain circumstances, in order to service warranties, goods had to be returned to the appellant, which would, in turn, return them to OFA; (6) in most circumstances, the appellant did not remit payment to OFA until it had received payment from Arbrobec, the terms of payment between OFA and the appellant and between the appellant and Arbrobec being the same; and, finally (7) the appellant did not, and could not, mark up the price charged to Arbrobec for the goods in issue after having been set by OFA.

In addition, the Tribunal referred to Memorandum D13-4-12[8] and the definition of "selling agent" provided therein. The Tribunal notes that it is a well-established principle that "administrative policy and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation.[9]" "Selling agent" is defined in Memorandum D13-4-12 as follows:

> 5. Selling agents are persons who act for the account of a vendor; they seek customers and collect orders and, in some cases, may arrange for storage and delivery of the goods. The remuneration they receive for services rendered in the conclusion of a contract is usually termed "selling commission".

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6. See, for example, *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.
7. *Supra* note 5 at 12.
8. *Commissions and Brokerage (Customs Act, Section 48)*, Department of National Revenue, Customs and Excise, September 30, 1991.
9. *Gene A. Nowegijick* v. *Her Majesty the Queen*, [1983] 1 S.C.R. 29 at 37; and *Smed Manufacturing Inc*. v. *The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-081, May 17, 1994, at 5.

> Goods sold through a selling agent cannot usually be purchased without payment of the selling agent's commission. These payments can be made in the following ways:
>
> *(a)* foreign suppliers who deliver their goods in pursuance of orders placed through a selling agent usually pay for the latter's services themselves, and quote inclusive prices to their customers. In such cases, the invoice price is not to be adjusted to take account of these services;
>
> *(b)* if the terms of the sale require the purchaser to pay, either directly or separately to the agent, a commission that is additional to the price invoiced for the goods, this commission must be added to the price paid or payable when determining the value for duty.[10]

In the present case, the evidence shows that the appellant acted for the account of the vendor, OFA, by seeking customers and by securing orders. Accordingly, this supports the Tribunal's above conclusion that the appellant acted as a selling agent for OFA in Canada. The evidence also shows that OFA, the foreign supplier, delivered the goods to Arbrobec in pursuance of orders placed through the appellant. The price quoted on the invoice sent to the appellant, which then relayed it to Arbrobec, included an amount for the appellant's services. This trade discount or selling commission would, therefore, already have been included in the price paid or payable for the goods and, consequently, should not have been deducted by the appellant when calculating the value for duty. In the Tribunal's view, it properly formed part of the price paid or payable for the goods by the purchaser, Arbrobec, to or for the benefit of the vendor, OFA, in calculating the value for duty.

With respect to the finance charge, as noted above, it is a well-established principle that "administrative policy and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation." In this regard, the Tribunal referred to Memorandum D13-3-13, which provides the following:

> 1. Charges for interest under a financing arrangement entered into by a purchaser and relating to the purchase of imported goods shall not be regarded as part of the Customs value provided that:
>
> *(a)* the charges are distinguished from the price actually paid or payable for the goods;
>
> *(b)* the financing arrangement was made in writing; and
>
> *(c)* when required by Customs the purchaser can demonstrate that:
>
> (1) the price paid or payable for identical or similar goods sold without a financing arrangement closely approximates the price paid or payable for the goods being appraised or imported, and/or
>
> (2) the claimed rate of interest does not exceed the prevailing rate of interest for such transactions at the time when and in the country where the financing was provided.
>
> 2. These guidelines apply regardless of whether the financing is provided by the seller, a bank or another natural or legal person.[11]

The evidence shows that the appellant met none of the above conditions, which, in the Tribunal's view, are reasonable conditions. The appellant's representative argued that there was an implicit acquiescence by Revenue Canada that the finance charge could be excluded when the 18 percent interest charge was reduced to 4 percent. The Tribunal does not accept this argument. In the Tribunal's view, the appellant had every opportunity to arrange its affairs to show the interest charge on the invoice as a separate

10. *Supra* note 8 at 4.
11. *Supra* note 4 at 1.

item and to put the financing arrangement in writing. As such, the Tribunal finds that the finance charge of 4 percent properly formed part of the price paid or payable of the goods in calculating the value for duty.

Accordingly, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Dr. Patricia M. Close
Dr. Patricia M. Close
Member