CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, July 27, 2000

Appeal No. AP-98-098

IN THE MATTER OF an appeal heard on February 23 and 24, 2000, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated January 21, 1998, with respect to a request for redetermination under section 63 of the *Customs Act*.

BETWEEN

SHERSON MARKETING CORPORATION **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-98-098

SHERSON MARKETING CORPORATION **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 (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the *Customs Act* on January 21, 1998. This appeal deals with the proper value for duty of certain shoes imported by the appellant under the Plaza Suite and Enzo Angiolini brand names. With respect to the transactions concerning the Plaza Suite brand name, the issue is whether the 13 percent FOB factory cost fee paid by the appellant to Jervin, a company related to the Nine West Group Inc., should be added to the price paid or payable for the imported goods pursuant to subsection 48(5) of the *Customs Act*. The appellant claims that the fee is a buying commission and is not dutiable. The respondent determined that the fee is dutiable. With respect to the transactions concerning the Enzo Angiolini brand name, the issue is whether the 13.5 to 15 percent FOB factory cost fee paid by the appellant to Enzo Angiolini, Division of Nine West Group Inc. (Enzo) should be added to the price paid or payable for the imported goods pursuant to subsection 48(5) of the Act. The appellant claims that the 13.5 to 15 percent fee is composed of a 10 percent buying commission and a 3.5 to 5 percent royalty fee, neither of which is dutiable. The respondent determined that the 13.5 to 15 percent fee is dutiable.

HELD: The appeal is allowed in part. Given the agreement of the parties, the Tribunal determines that the 13 percent FOB factory cost fee paid by the appellant to Jervin is a buying commission. The Tribunal does not accept the proposition that an agent, simply by virtue of its size or, in this case, by virtue of the size of a related company, cannot act in the best interest of its principal. In any event, in the present case, the appellant knew the relationship between Jervin and Nine West Group Inc. and that the latter was a large footwear company. No convincing evidence was presented to the Tribunal indicating that, in any specific instance or transaction, Jervin did not act in the appellant's best interest. The Tribunal finds that the 13 percent FOB factory cost commission is a *bona fide* buying commission and is not dutiable.

Given the agreement of the parties, the Tribunal finds that the 10 percent FOB factory cost fee paid by the appellant to Enzo is a buying commission. The Tribunal does not accept the proposition that an agent, simply by virtue of its size, cannot act in the best interest of its principal. In any event, the appellant knew that Enzo was a division of Nine West Group Inc. and that the latter was a large footwear company. No convincing evidence was presented to the Tribunal indicating that, in any specific instance or transaction, Enzo did not act in the appellant's best interest. Consequently, the Tribunal finds that the 10 percent FOB factory cost fee is a *bona fide* buying commission. The Tribunal has not heard convincing evidence establishing that there was an agreement between Enzo and the appellant that the remaining 3.5 to 5 percent FOB factory cost fee would be paid as a royalty for the use of the name Enzo Angiolini. In reply, the appellant acknowledged that the evidence is not clear and that the 3.5 to 5 percent fee may have been a design fee. Therefore, the Tribunal will not disturb the respondent's determination to include this 3.5 to 5 percent FOB factory cost fee for the purpose of calculating the value for duty of the Enzo Angiolini shoes.

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Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	February 23 and 24, 2000
Date of Decision:	July 27, 2000
Tribunal Members:	Arthur B. Trudeau, Presiding Member Richard Lafontaine, Member James A. Ogilvy, Member
Counsel for the Tribunal:	Tamra Alexander Philippe Cellard
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Kaylor, for the appellant Patricia Johnston, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-98-098

SHERSON MARKETING CORPORATION **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RICHARD LAFONTAINE, Member
JAMES A. OGILVY, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the Act on January 21, 1998. This appeal deals with the proper value for duty of certain shoes imported by the appellant under the Plaza Suite and Enzo Angiolini brand names. With respect to the transactions concerning the Plaza Suite brand name, the issue is whether the 13 percent FOB factory cost fee paid by the appellant to Jervin, a company related to Nine West Group Inc., should be added to the price paid or payable for the imported goods pursuant to subsection 48(5) of the Act. The appellant claims that the fee is a buying commission and is not dutiable. The respondent determined that the fee is dutiable. With respect to the transactions concerning the Enzo Angiolini brand name, the issue is whether the 13.5 to 15 percent FOB factory cost fee paid by the appellant to Enzo Angiolini, Division of Nine West Group Inc.[2] should be added to the price paid or payable for the imported goods pursuant to subsection 48(5) of the Act. The appellant claims that the 13.5 to 15 percent fee is composed of a 10 percent buying commission and a 3.5 to 5 percent royalty fee, neither of which is dutiable. The respondent determined that the 13.5 to 15 percent fee is dutiable. The relevant provisions of the Act are as follows:

> 47.(1) The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.
>
> 48.(1) . . . 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 . . .
>
> (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,
>
> (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

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. In the rest of this statement of reasons, Enzo Angiolini, Division of Nine West Group Inc. will be referred to as Enzo and Nine West Group Inc. will be referred to as Nine West.

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> condition of the sale of the goods for export to Canada, exclusive of charges for the right to reproduce the goods in Canada.[3]

EVIDENCE

Evidence in respect of this appeal and Appeal Nos. AP-98-002, AP-98-097 and AP-98-099 was heard concurrently. Prior to proceeding with the testimony of the witnesses in Appeal No. AP-98-002, the Tribunal asked counsel for the parties to confirm that evidence presented in respect of one appeal can be referred to and used in the other appeals where it is of a general nature.

Messrs. Stephen Applebaum, President and CEO of Sherson Marketing Corporation, Al Gervais, Director of Operations, Europe – Retail, Nine West Group Inc., and Eric H. Lakien, Controller and Director of Operations, Sherson Marketing Corporation, testified on behalf of the appellant. Mr. Applebaum has held the position of President and CEO since 1989. Mr. Gervais was with the appellant from 1994 to 1998. Mr. Lakien has been with the appellant since 1998. Mr. Applebaum stated that the appellant has existed since 1984 and that, during the relevant time period, the appellant was an importer and distributor of footwear and some handbags. The appellant distributed to retailers across Canada. Mr. Applebaum stated that the appellant imported shoes under its own brand names and under other brand names in order to permit diversification.

With respect to the Plaza Suite footwear, Mr. Applebaum testified that the appellant began to import this footwear around 1987 or 1988. The appellant owned the Plaza Suite trademark. It imported these goods through its relationship with Jervin. Mr. Applebaum testified that Jervin was the appellant's buying agent for Plaza Suite footwear, for which the appellant paid Jervin a commission of 13 percent of the FOB factory cost. Mr. Applebaum stated that the original arrangement was a handshake deal, which is common in the shoe industry. Mr. Applebaum testified that this arrangement was formalized in a buying agency agreement dated June 1993. Mr. Gervais referred to a letter from Jervin's Senior Vice-president – Operations of to the Department of National Revenue (now the Canada Customs and Revenue Agency) that indicated that, at all relevant times, Jervin acted as a buying agent on behalf of the appellant with respect to the sourcing of footwear under the Plaza Suite brand name and charged 13 percent for its services. The letter also indicated that at no time did Jervin do any design work for the appellant.

Mr. Applebaum testified that Jervin performed the following services for the appellant: (1) connected the appellant with the factories; (2) sent to different factories the samples that the appellant wanted to have copied; (3) approved confirmation samples; (4) negotiated prices on the appellant's behalf; (5) processed orders for the appellant; and (6) advised the appellant on the delivery schedule. The final decisions for the selection of the factory and the pricing were made by the appellant. Mr. Applebaum testified that the payments were made to the factories and that the commissions were paid to Jervin. He also testified that Jervin did not own nor control the factories.

Mr. Gervais took the Tribunal through a number of documents, including purchase orders issued by the appellant to Jervin, proforma factory invoices from a factory to the appellant, a letter of credit from the appellant's bank in favour of the factory, a commission invoice from Jervin to the appellant and a cheque from the appellant to Jervin. During cross-examination, the appellant's witnesses were shown, for two specific transactions, documents indicating that the appellant paid commissions to Jervin which were based on a footwear price $0.25 higher than the actual FOB factory cost. Mr. Applebaum commented that it was a clerical error.

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3. As the Act read at the time of the relevant importations.

With respect to the Enzo Angiolini footwear, Mr. Applebaum testified that the appellant began to import this footwear, under another brand name, in 1984. The Enzo Angiolini brand was owned by Nine West, which was also designing that line of footwear. Mr. Applebaum stated that the Enzo Angiolini name was a valuable name. The appellant imported the Enzo Angiolini footwear through its relationship with Enzo. Mr. Applebaum testified that Enzo was the appellant's buying agent for Enzo Angiolini footwear, for which the appellant paid Enzo a 10 percent of the FOB factory cost commission. In addition, Mr. Applebaum testified that the appellant paid Enzo a 3.5 to 5 percent of the FOB factory cost royalty. Mr. Applebaum stated that the original arrangement was a handshake deal, which is common in the shoe industry. Mr. Applebaum testified that this arrangement was formalized in a buying agency agreement dated February 1994.

Mr. Applebaum testified that Enzo performed the following services for the appellant: (1) processed orders for the appellant; (2) transmitted information on delivery to the appellant; and (3) permitted the appellant to choose styles from the line that Nine West designed and marketed in the United States under the Enzo Angiolini brand name. Mr. Applebaum stated that the appellant chose its styles from Nine West's samples for the U.S. market. The appellant chose the styles that it felt would work for the Canadian market. Mr. Applebaum testified that the appellant did not choose the factories, given that Nine West already produced shoes in good factories and for good prices and that it made more sense for the appellant to piggyback on what Nine West was already doing. The prices were negotiated by Nine West for itself. The appellant would pay the same price. Given the clout of Nine West, Mr. Applebaum explained that this benefited the appellant. Mr. Gervais also took the Tribunal through a number of documents, including purchase orders issued by the appellant to Nine West, proforma factory invoices from the factories to the appellant, a letter of credit from the appellant's bank in favour of a factory, commission invoices from Enzo to the appellant and a cheque from the appellant to Enzo.

ARGUMENT

With respect to the Plaza Suite footwear transactions, the appellant submitted that Jervin was acting as a *bona fide* buying agent. In this context, the appellant recalled that: (1) the appellant owned the Plaza Suite brand name; (2) Jervin was not related to the factories; (3) the design was done by the appellant; and (4) Jervin performed the normal functions of a buying agent. The appellant also referred to the letter from Jervin confirming that no design work was done by Jervin and that the 13 percent FOB factory cost fee was a buying commission.

With respect to the Enzo Angiolini footwear transactions, the appellant submitted that the parties to the sales were the factories and the appellant. The appellant submitted that the 10 percent FOB factory cost fee was a buying commission paid to Enzo, which performed legitimate buying agent services. The appellant referred to *Chaps-Ralph Lauren* v. *DMNR*[4] to support its contention that the fact that Nine West was the owner of the Enzo Angiolini brand name did not prevent Enzo, a division of Nine West, from performing legitimate buying agent services. As regards the payment of the extra 3.5 to 5 percent FOB factory cost fee, the appellant submitted that this fee was a royalty and that it was non-dutiable. The appellant submitted that it acquired a licence from Nine West to use the Enzo Angiolini brand name. However, in reply, the appellant acknowledged that the evidence is not clear and that this fee may have been a design fee.

4. (1 November 1995), AP-94-190 and AP-94-191 (CITT) [hereinafter *Chaps-Ralph Lauren*].

With respect to the Plaza Suite footwear transactions, the respondent submitted that the buying commission of 13 percent of the FOB factory cost is not a commission paid to a *bona fide* agent and that, therefore, it is dutiable. To support its contention that Jervin was not a *bona fide* agent, the respondent referred to documents that showed that, on two separate transactions, the appellant paid Jervin commissions on a footwear price $0.25 higher than the actual FOB factory cost. The respondent also submitted that, given that Jervin is related to Nine West and that Nine West is much bigger than the appellant, Jervin cannot operate in the appellant's best interest.

With respect to the Enzo Angiolini footwear transactions, the respondent also submitted that, given the relative size of Nine West and the appellant, Enzo, a division of Nine West, cannot operate in the appellant's best interest. The respondent submitted that the appellant cannot control Nine West. Therefore, the buying commission of 10 percent of the FOB factory cost is not a buying commission paid to a *bona fide* agent and is dutiable. As regards the 3.5 to 5 percent FOB factory cost fee, the respondent argued that it was not a royalty. The respondent pointed out that there was no royalty agreement between Nine West and the appellant and that documents were filed that indicated that, internally, the appellant did not refer to the 3.5 to 5 percent fee as a royalty, but rather as a design fee.

DECISION

There are two sets of transactions in this appeal, namely, the Plaza Suite footwear transactions and the Enzo Angiolini footwear transactions. The Tribunal will deal with them in turn.

Pursuant to subparagraph 48(5)(*a*)(i) of the Act, commissions and brokerage in respect of goods incurred by the purchaser of those goods must be added to the price paid or payable for the purposes of determining their value for duty. The exception to this general rule is that fees paid or payable by the purchaser to an agent for the service of representing the purchaser abroad in respect of the sale are not added to the price paid or payable. Fees paid for these services, known as buying agent services, are often called buying commissions.

The appellant's position with respect to the Plaza Suite footwear transactions is that the 13 percent FOB factory cost fee is a "commission", but that it is non-dutiable because it is a buying commission. The respondent agreed that it is a buying commission. Given this agreement, the Tribunal determines that the 13 percent FOB factory cost fee is a buying commission.[5]

The respondent alleged, however, that the buying commission is dutiable because it was not paid to a *bona fide* buying agent. Nine West, which was related to Jervin, was much larger than the appellant. According to the respondent, this would prevent Jervin from acting in the appellant's best interest. The Tribunal does not accept the proposition that an agent, simply by virtue of its size or, in this case, by virtue of the size of a related company, cannot act in the best interest of its principal. In any event, in the present case, the appellant knew of the relationship between Jervin and Nine West and that the latter was a large footwear company.[6] No convincing evidence was presented to the Tribunal indicating that, in any specific

5. The Tribunal notes that this determination is not a finding of fact by the Tribunal nor a considered application of the law to the facts by the Tribunal. It merely gives effect to an agreement. See *Uppal* v. *Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565 at 575-76 (FCA).
6. The Tribunal notes that it is a well-established principle of agency law that an agent owes a fiduciary duty to its principal to make full disclosure of any interest, which the agent may have, which may affect the agent's performance of its duty to its principal. However, once full disclosure is made, the principal may nonetheless choose the agent to act on the principal's behalf. This is completely within the principal's discretion. See G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 175. See, also, *Chaps-Ralph Lauren*.

instance or transaction, Jervin did not act in the appellant's best interest. In the Tribunal's view, the two transactions highlighted by the respondent where the appellant paid commissions on a footwear price $0.25, or 2 percent, higher than the actual FOB factory cost do not suffice to demonstrate that Jervin did not act in the appellant's best interest. The Tribunal accepts that this may well have been due to a clerical error.

After determining that Jervin was a *bona fide* buying agent, the Tribunal must also determine whether Jervin was performing functions, beyond those of a buying agent, for which it was being paid as part of the 13 percent FOB factory cost commission. Payment for those functions would not be exempt from duty, as they would not relate to a buying agent's functions. In its brief, the appellant seemed to acknowledge that 3 percent of the 13 percent FOB factory cost commission could be attributable to a dutiable design fee. However, the Tribunal is convinced by the testimony of Mr. Applebaum and by the letter from Jervin to the Department of National Revenue that Jervin did not perform any design functions for the appellant. Therefore, the Tribunal declines to find that a portion of the commission should be attributed to a dutiable design fee. The Tribunal finds that the 13 percent FOB factory cost commission is a *bona fide* buying commission and is not dutiable.

With respect to the Enzo Angiolini footwear transactions, the appellant's position is that 10 percent of the 13.5 to 15 percent FOB factory cost fee constitutes a commission, but that it is non-dutiable because it is a buying commission. The respondent agreed that this fee is a buying commission. Given this agreement, the Tribunal finds that the 10 percent FOB factory cost fee is a buying commission.[7]

The respondent alleged, however, that the buying commission is dutiable because it was not paid to a *bona fide* buying agent. The respondent argued that Enzo could not be a *bona fide* buying agent because Nine West, the company of which Enzo was a division, was much larger than the appellant. According to the respondent, this would prevent Jervin from acting in the appellant's best interest. As indicated earlier, the Tribunal does not accept the proposition that an agent, simply by virtue of its size, cannot act in the best interest of its principal. In any event, the appellant knew that Enzo was a division of Nine West and that the latter was a large footwear company.[8] No convincing evidence was presented to the Tribunal that indicated that, in any specific instance or transaction, Enzo did not act in the appellant's best interest. Consequently, the Tribunal finds that the 10 percent FOB factory cost fee is a *bona fide* buying commission.

Finally, the Tribunal will deal with the treatment to be given to the remaining 3.5 to 5 percent FOB factory cost fee paid by the appellant to Enzo. The appellant argued that it is a royalty and that it is non-dutiable, while the respondent has determined that this amount represents a design fee.

The Tribunal is not satisfied that the 3.5 to 5 percent fee constitutes a royalty. The Tribunal has not heard convincing evidence that established that there was an agreement between Enzo and the appellant that the 3.5 to 5 percent FOB factory cost fee would be paid as a royalty for the use of the Enzo Angiolini brand name. In reply, the appellant acknowledged that the evidence is not clear and that the 3.5 to 5 percent fee may have been a design fee. Therefore, the Tribunal will not disturb the respondent's determination to include this 3.5 to 5 percent FOB factory cost fee for the purpose of calculating the value for duty of the Enzo Angiolini shoes.

In conclusion, the Tribunal finds that the 13 percent FOB factory cost fee paid by the appellant to Jervin with respect to the Plaza Suite footwear transactions is a *bona fide* buying commission and is not dutiable. With respect to the Enzo Angiolini footwear transactions, the Tribunal finds that the 10 percent

7. *Supra* note 5.
8. *Supra* note 6.

FOB factory cost fee paid by the appellant to Enzo is a *bona fide* buying commission and is not dutiable. As for the remaining 3.5 to 5 percent FOB factory cost fee paid by the appellant to Enzo, the Tribunal finds that the respondent's determination should stand. Consequently, the appeal is allowed in part.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member