CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, July 27, 2000

Appeal No. AP-98-099

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 requests 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 dismissed.

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

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-98-099

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. The issue in this appeal is the proper value for duty of certain shoes imported by the appellant under the Prevata and Repeat brand names. In particular, the issue is whether the 5 percent FOB factory cost fee paid by the appellant to Jils Consultants with respect to the Prevata shoes and the 3 percent FOB factory cost fee paid by the appellant to Jils Consultants with respect to the Repeat shoes should be added to the price paid or payable for the imported goods. The appellant claims that the 5 percent and 3 percent fees are non-dutiable buying commissions. The respondent determined that the 5 percent and 3 percent fees are dutiable design fees.

HELD: The appeal is dismissed. The Tribunal is not convinced that the 5 percent FOB factory cost fee paid on the Prevata shoes and the 3 percent FOB factory cost fee paid on the Repeat shoes is for design services. The Tribunal is of the view that the appellant and the factory's designer performed the necessary design functions and that there was no persuasive evidence that Jils Consultants performed any design functions. However, the Tribunal was not convinced by the evidence that the fees are paid by the appellant to Jils Consultants for the service of representing the appellant abroad in respect of the sale. Therefore, the Tribunal finds that the fees are dutiable commissions.

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

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-98-099

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. The issue in this appeal is the proper value for duty of certain shoes imported by the appellant under the Prevata and Repeat brand names. In particular, the issue is whether the 5 percent FOB factory cost fee paid by the appellant to Jils Consultants (Jils) with respect to the Prevata shoes and the 3 percent FOB factory cost fee paid by the appellant to Jils with respect to the Repeat shoes 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 5 percent and 3 percent fees are non-dutiable buying commissions. The respondent determined that the 5 percent and 3 percent fees are dutiable design fees. 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,
>
> (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 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:
>
> (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.[2]

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
2. As the Act read at the time of the relevant importations.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

EVIDENCE

Evidence in respect of this appeal and Appeal Nos. AP-98-002, AP-98-097 and AP-98-098 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.

Mr. Applebaum testified that the appellant had been importing shoes under the Andrew Geller brand name and had established a good business in high-quality, expensive footwear. Then, the U.S. company associated with the brand went bankrupt and disappeared from the market. One of the employees of the U.S. company opened up his own company, Jils. Jils introduced the appellant to the factory, Azimut s.r.l. (Azimut), that had been producing the Andrew Geller shoes. Between Jils and the appellant, they were able to generate enough production to keep the factory running. Jils had no financial or other proprietary interest in Azimut.

Mr. Applebaum testified that Azimut and the appellant jointly own the Prevata brand name. Mr. Applebaum testified that he went to Italy four times a year to design shoes for production. He would pick lasts and buy heels, heel lifts and sock linings and design the shoe from beginning to end. He would have the concepts drawn for him by Azimut's *modellista* (designer). He would inspect production and supervise the production of the samples.

Mr. Applebaum testified that Azimut would have the lasts made by a last factory and would own the lasts. He stated that any fees for the design services rendered by Azimut were included in the price of the shoes that was paid to Azimut.

Mr. Applebaum testified that Jils assisted the appellant by conducting follow-up inspections on the appellant's behalf, since Jils' officials were in Italy more often than Mr. Applebaum. Jils also performed test fits for the appellant in New York. Mr. Applebaum testified that the appellant was able to improve production economies because Jils would sometimes use the same lasts or materials. For these services, the appellant pays Jils a 5 percent FOB factory cost fee for Prevata shoes and a 3 percent FOB factory cost fee for Repeat shoes. Mr. Applebaum testified that there was no need for Jils to search out other merchandise for the appellant, locate other sources of supply or report on market conditions or prices. Mr. Applebaum testified that the arrangement between Jils and the appellant was a handshake deal that was formalized in a buying commission agreement. The agreement was backdated to 1986 and was a standard agreement put in place after an audit conducted by the Department of National Revenue (now the Canada Customs and Revenue Agency).

Mr. Gervais took the Tribunal through a number of documents, including purchase orders issued by the appellant to Azimut, invoices from Azimut to the appellant, copies of the appellant's request that the

TD Bank wire transfer the funds to Azimut, worksheets detailing the fee to be paid to Jils and evidence of payment of that fee. Mr. Gervais testified that the appellant would place its orders directly with Azimut and would pay Azimut directly. Mr. Applebaum and Mr. Gervais acknowledged that the appellant's documentation refers to the payments made to Jils as design fees. Mr. Applebaum testified that there are three copies of a purchase order: one copy goes to the appellant's customer, one copy goes to Azimut and one copy remains with the appellant.

ARGUMENT

The appellant submitted that the 5 percent FOB factory cost fee paid on the Prevata shoes and the 3 percent FOB factory cost fee paid on the Repeat shoes are non-dutiable buying commissions. The appellant submitted that the fees paid related essentially to a finder's fee, with a very minor amount of additional services provided thereafter. The appellant submitted that, given the small amount of the fee, this arrangement was not unusual. The appellant submitted that there was no relationship between Jils and Azimut and that no design work was done by Jils. Therefore, the appellant submitted that the fees were buying commissions.

In response to a question from the Tribunal, the appellant acknowledged that Jils did not perform a service with respect to each and every shipment from Azimut.

The respondent submitted that the fees were dutiable design fees. The respondent submitted that the fees were called design fees in the appellant's documentation and that, in the appellant's brief, the appellant acknowledged that Jils performed some design functions. The respondent also submitted that Exhibit B-38, an invoice from Azimut to the appellant, directs the appellant to pay Jils the design fee. The respondent submitted that there is no documentary evidence that Jils performed any functions other than those of a designer. The respondent submitted that the appellant failed to discharge its onus and demonstrate that the fees were not design fees.

DECISION

The first issue which the Tribunal will address is whether the 5 percent FOB factory cost fee paid on the Prevata shoes and the 3 percent FOB factory cost fee paid on the Repeat shoes by the appellant to Jils are design fees. The Tribunal notes that, in its brief, the appellant seemed to acknowledge that Jils performed some design services and that fees for these services would be dutiable. However, at the hearing, the appellant's position and evidence were that Jils performed no design services. Mr. Applebaum testified that he and Azimut's designer performed all the design functions. The Tribunal does not accept the respondent's position that Exhibit B-38 is a direction by Azimut to the appellant to pay Jils a design fee. There is nothing in that document which refers to or calculates a fee payable to Jils. The calculation of the 3 percent and 5 percent fees is made in Exhibit B-39, which is the appellant's detailed worksheet. This fee is based on the invoice price set out in Exhibit B-38.

The only evidence before the Tribunal that the fees were design fees is the characterization of the fees as "design fees" in the appellant's internal documentation. Given Mr. Applebaum's evidence in Appeal No. AP-98-097 that no thought was given to how fees should be designated prior to the audit and the evidence as to the functions performed by the appellant and Jils, the Tribunal finds the characterization of the fees as "design fees" in the appellant's internal documentation to be of no assistance. The Tribunal finds that there is persuasive evidence that the appellant and Azimut's designer performed the necessary design functions and that there is no persuasive evidence that Jils performed any design functions. Therefore, the Tribunal finds that the fees are not design fees.

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 referred to as buying commissions.

The appellant's position is that the fees are "commissions" and that they are non-dutiable because they are buying commissions. The Tribunal must, therefore, determine whether the fees, or commissions, were paid "for the service of representing the purchaser abroad in respect of the sale". The Tribunal finds that they were not.

As a preliminary matter, after a thorough review of the evidence, the Tribunal finds that the buying commission agreement dated 1986 does not accurately reflect the relationship between the appellant and Jils at the time of the relevant importations. Mr. Applebaum testified that Jils introduced the appellant to Azimut and that Jils conducted inspections and test fits on the appellant's behalf. Mr. Applebaum also testified that the appellant was able to improve production economies because Jils would sometimes use the same lasts or materials. It was the appellant's position that the fees paid to Jils were for these services. The Tribunal finds that there is no persuasive evidence on the record that these services entailed representation by Jils on behalf of the appellant to Azimut. The introduction of the appellant to Azimut enabled the appellant and Azimut to transact business directly. There was no evidence of representation by Jils on the appellant's behalf in that respect. The ability of Jils and the appellant to combine their purchases or share lasts also does not imply any representation by Jils, on behalf of the appellant, to Azimut. Finally, the Tribunal finds that there was no persuasive evidence that Jils made any representation on the appellant's behalf to Azimut with respect to the test fits or the alleged inspections. There was no evidence that, if there was a problem with the test fits, Jils communicated those problems to Azimut on the appellant's behalf. Further, based on the evidence that Jils was performing inspections for its U.S. production and that copies of the appellant's purchase orders were provided only to the appellant's customers and Azimut, the Tribunal is not convinced that Jils effectively performed any follow-up inspections at the factory relating specifically to the appellant's sales.

The Tribunal finds that the 5 percent FOB factory cost fee paid on the Prevata shoes and the 3 percent FOB factory cost fee paid on the Repeat shoes by the appellant to Jils are commissions, but not buying commissions. Therefore, the fees are dutiable. Consequently, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member