CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, October 27, 1999

Appeal No. AP-98-085

IN THE MATTER OF an appeal heard on May 6, 1999, 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 November 9, 1998, with respect to a request for re-appraisal under section 63 of the *Customs Act*.

BETWEEN

UTEX CORPORATION **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Anita Szlazak
Anita Szlazak
Member

Pierre Gosselin
Pierre Gosselin
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-98-085

UTEX CORPORATION **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether commissions paid by the appellant to its agent should be added to the price paid or payable for imported garments pursuant to subparagraph 48(5)(*a*)(i) of the *Customs Act*.

HELD: The appeal is dismissed. The Tribunal is of the view that an agent has a fiduciary responsibility to the purchaser which requires, among other things, complete disclosure from the agent of any transactions undertaken on the purchaser's account by the agent or on behalf of the agent. It is doubtful, based on the evidence, whether the appellant was fully aware of the extent of another company's activities as a sub-agent for its agent or of the fact that the sub-agent, with which the appellant also was doing business, could be receiving commissions from Chinese factories. Some of the factories could have been doing business with the appellant or eventually could have been identified by the sub-agent as potential suppliers for the appellant. The Tribunal is not persuaded that the agent always acted in the interests of its principal. The Tribunal concludes that the appellant has not established that its agent was a *bona fide* buying agent in this matter.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	May 6, 1999
Date of Decision:	October 27, 1999
Tribunal Members:	Richard Lafontaine, Presiding Member Anita Szlazak, Member Pierre Gosselin, Member
Counsel for the Tribunal:	Gilles B. Legault
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Richard S. Gottlieb and J. Peter Jarosz, for the appellant Louis Sébastien and Claude Morissette, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-98-085

UTEX CORPORATION **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member
ANITA SZLAZAK, Member
PIERRE GOSSELIN, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] from three decisions of the Deputy Minister of National Revenue made on November 9, 1998.

The decisions under appeal concern the value for duty with respect to the importation of garments during the period from January 1996 to February 1998. The garments imported from the People's Republic of China (China) were sold to the appellant by different vendors.

The issue in this appeal is whether commissions paid by the appellant to its agent, Fabco Trading Corp. (Fabco), should be added to the price paid or payable for the imported garments pursuant to subparagraph 48(5)(*a*)(i) of the *Act*, as determined by the respondent. Subparagraph 48(5)(*a*)(i) reads as follows:

> (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.

Essentially, the appellant's position is that the amounts that it paid to Fabco are buying commissions that should not be added to the price paid or payable for the imported garments.

At the hearing, Mr. Abraham Weinstein, Vice-President of Utex Corporation, appeared as a witness for the appellant and adopted, as part of his evidence, the appellant's statement of facts contained in the appellant's brief. Mr. Weinstein's testimony is summarized below.

The appellant started its business as a men's outerwear (i.e. rainwear, windwear, down garments, cloth coats) corporation, which, over the years, expanded into women's outerwear and men's fine clothing (i.e. suits and sport jackets). Generally, the appellant does not purchase finished garments, but has goods produced for its account by Chinese factories based on its own designs. Through buying agents, the

1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter *Act*].

appellant's usual practice is to purchase, from different sources, the fabrics, the linings and the various components, including labels and tabs, that are required by the factories to produce the required garments.

By agreement dated March 20, 1975,[2] which was amended in February 1991,[3] the appellant engaged the services of Fabco to assist it in obtaining goods and to provide services related to buying in consideration of the payment of a percentage of the vendor's price to the appellant. According to the appellant's brief, since 1975, Fabco faithfully and effectively has been providing these services representing the appellant's interests in China, although it was not the appellant's exclusive agent in that country. In the appellant's view, in fulfilling its mandate, Fabco always acted in the appellant's best interests. Fabco's services included supervising the timely production of the garments, informing the appellant of any problems with the production and verifying that shipments were made in accordance with the contractual agreement. While the mandate also included the inspection of the shipments, Mr. Weinstein admitted that he had not seen an inspection certificate in recent years.

In 1987, Corin International (HK) Ltd. (Corin) started supplying the appellant with components for use in the manufacture of garments by the appellant's vendors. In addition to supplying components, Corin co-ordinated their delivery to the factories of the appellant's vendors in order to facilitate the timely production of the garments. These services relieved the appellant from the obligation of arranging for the purchase and delivery of the materials to many producers, thus resulting in considerable savings. This also eliminated the appellant's responsibility for over-shipment by the suppliers of the components. The appellant was unaware of where Corin sourced the merchandise. For its services, the appellant did not pay a commission to Corin but, in Mr. Weinstein's words, "a small premium over and above the price of the product or the component" that it purchased. Mr. Weinstein was not aware whether commissions ever were paid to Corin by any of the suppliers involved in the transactions subject to this appeal.

At all times, the appellant remained in control of the production, as it would approve samples of the garments produced by the various factories before ordering full production. In fact, the appellant made the final decisions on all aspects of its business, including the number of garments produced, the price paid to the factory, the type and quality of the merchandise, as well as the method and timing of production and shipment. With respect to the relationship between Fabco and Corin, Mr. Weinstein was aware that Corin provided services to Fabco, but could not specify them. He assumed, however, that Corin acted as a sub-agent for Fabco. Mr. Weinstein acknowledged that, on some occasions, Corin, while acting for Fabco, introduced the appellant's merchandisers or technicians to other factories. Mr. Weinstein did not have any knowledge of a specific arrangement concluded between the two companies in January 1975.[4] Regarding the payment of Fabco's commission, Mr. Weinstein explained that Fabco was paid a percentage of the appellant's "first cost", that is, the cost of the labour, including all the components of a garment, less the cost of any components supplied to the appellant by Corin.

The appellant was informed by a decision of a tariff valuation administrator of the Department of National Revenue (Revenue Canada), dated December 28, 1995,[5] that the commissions paid to Fabco were to be included in the value for duty of future importations of garments because, among other things, "Fabco is related to Corin who is himself [*sic*] the vendor of the trimmings and accessories" and "the agents [*sic*] relationship to the vendor precludes the agent from acting solely on behalf of, or in the best interest of the

2. Appellant's Non-confidential Brief, Tab 2.
3. Appellant's Non-confidential Brief, Tab 3.
4. Respondent's Non-confidential Brief, Tab 7.
5. Appellant's Non-confidential Brief, Tab 4.

purchaser". The appellant was informed that this conclusion was based on the consideration that Mr. Ron Reuben, a principal shareholder of Corin, is the son of Mr. Eli Reuben, a principal shareholder of Fabco, and that Mr. Ron Reuben was allegedly a principal shareholder of Statemount Company Limited (Statemount), one of the appellant's suppliers of garments. The appellant, however, was informed by Messrs. Ron Reuben and Eli Reuben that neither Fabco nor Mr. Eli Reuben had any financial interest in Corin or in any of the appellant's suppliers and that neither Corin nor Mr. Ron Reuben nor any such supplier had any interest in Fabco. Commenting on the above, Mr. Weinstein explained that Fabco did not act as an agent for the appellant nor did it receive any commissions on the accessories or trimmings that the appellant purchased from Corin. In fact, said Mr. Weinstein, the contractual relationship between Corin and the appellant had no impact whatsoever on the relationship between Fabco and the appellant. According to Mr. Weinstein, the appellant was fully aware of the family relationship between Mr. Ron Reuben and Mr. Eli Reuben and, if anything, this relationship enabled Fabco to better service the appellant's needs.

Finally, Mr. Weinstein stated that, prior to the respondent's decisions subject to this appeal, there had been two occasions, in 1991 and in 1994, where Revenue Canada had re-appraised the value for duty of garments imported by the appellant and had determined that the commissions paid by the appellant to Fabco were not dutiable, despite the fact that the parties, namely, the appellant, Corin and Fabco, were the same.

Mr. Gaëtan Montpetit, a Revenue Canada officer who audited the appellant, testified at the hearing on behalf of the respondent. Mr. Montpetit's audit took place in October 1995 as part of a series of audits of textile importers in the Montréal, Quebec, area. During an audit at one of these importers, Mr. Montpetit discovered that commissions were being paid by that importer to Fabco and Corin. Mr. Montpetit found a letter stating that Fabco would be using Corin as an exclusive agent, which, in turn, would be paid by Chinese producers.[6] Based on that letter and Fabco's financial statements and revenue declarations, Mr. Montpetit then concluded that Fabco could not act as a *bona fide* agent, given his interpretation of a Revenue Canada memorandum[7] that an agent must act in the best interests of the importer, that there should be no relationship between the vendor and the agent and that all facts should be disclosed to the agent's principal. Mr. Montpetit also explained that Fabco's and Corin's offices in Montréal were adjacent.

While auditing the appellant, Mr. Montpetit found a letter dated January 11, 1994, from the appellant to Mr. Ron Reuben and Ms. Arpie Margorian, an employee of Fabco, expressing concerns with respect to Corin's performance on quality control.[8] He found another letter dated January 28, 1994, from Fabco in which it informed Mr. A. Browman of Utex Corporation that Corin would be assuming the cost of pressing specific garments.[9] There was also a debit note dated March 28, 1994, from the appellant to Corin in which the latter was charged with the cost of pressing a certain number of garments.[10] This, in his view, confirmed that Corin was not a true agent because a true agent does not assume these kinds of costs and responsibilities.

6. *Ibid.*
7. Memorandum D13-4-12, Department of National Revenue, Customs, Excise and Taxation, September 30, 1991.
8. Protected Exhibit B-2.
9. Protected Exhibit B-1A.
10. Respondent's Non-confidential Brief, Tab 8.

Further, Mr. Montpetit referred to a letter sent to Corin by a third party[11] recognizing that, in addition to commissions that it would pay to Corin, the latter would be entitled to receive commissions "from China" for the sales of the same merchandise.[12] Mr. Montpetit saw, in this situation, a conflict of interest.

Mr. Montpetit explained that he did a search on Corin and Statemount using the Dun & Bradstreet business information services. He found that Mr. Ronald Reuben was a director of both companies and that Fabco was an affiliated company. On the basis of all the information that he gathered, including his finding that Fabco did not communicate to the appellant all the information that it had, especially regarding its relationship with Corin, Mr. Montpetit concluded that Fabco was not acting as an agent for the appellant and that, on the contrary, Corin was doing the work outside Canada. He also concluded that, as neither Fabco nor the appellant was paying any commissions to Corin, the latter was, in fact, a re-seller that was getting paid for the accessories that it provided to the appellant's suppliers. During cross-examination, Mr. Montpetit was unable to explain how the arrangement between Corin and Fabco discussed earlier could have been made in 1975, since the Dun & Bradstreet report listed Corin as having started its activities in 1977. He also recognized that this 1975 arrangement between Corin and Fabco was signed by Mr. Herman Wong for Corin and not by Mr. Ron Reuben. Mr. Montpetit did not know how Mr. Ron Reuben became involved in Corin nor, apparently, that Mr. Reuben was reported as "inactive" in the same report.

Counsel for the appellant argued that the onus of proof rests with the respondent who has not fully disclosed the reasons for which the commissions are now dutiable following two re-appraisals which held that they were not. Counsel relied on the Supreme Court of Canada decision in *Johnston* v. *M.N.R.*[13] in putting forth this argument. Further, counsel argued that the doctrine of issue estoppel applies and that, unless new facts are introduced, the respondent lacks the jurisdiction to make a decision adverse to the appellant's interests. Counsel further argued that none of the paragraphs defining "related persons" for the purpose of sections 46 to 55 of the *Act* apply in this case, especially paragraph (*a*) which relates to individuals and not corporations, thus supporting the argument that there could not be any such relationship between Fabco and Corin and similarly between Fabco and Statemount, since they are corporations and not individuals. In any event, based on the Tribunal's decision in *Chaps-Ralph Lauren* v. *D.M.N.R.*,[14] counsel argued that, where the principal knows and accepts that the agent has a relationship with other relevant parties, there cannot be a conflict of interest.[15] Counsel also argued, in this regard, that there is a strong indication that the agent is a *bona fide* buying agent on the basis of the responses given by Mr. Montpetit to questions 7, 8 and 9 of the appendix to the Revenue Canada memorandum. Finally, counsel argued that it would be difficult to establish that the contractors were selling goods, as they were merely suppliers of services, thus not providing any legal nexus for the collection of duties on commissions.

Relying on the Tribunal's decision in *Radio Shack* v. *D.M.N.R.C.E.*,[16] counsel for the respondent argued that the onus of proof rests with the appellant, as it is claiming an exception under the *Act*. They further argued that Fabco is not a *bona fide* buying agent, as it is affiliated with vendors and is in conflict of interest. Additionally, they argued that Fabco claimed, in its 1992-93 income tax return, that it is a sales

11. The name of that company was designated confidential information under subsection 46(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47.
12. Protected Exhibit B-3.
13. [1948] S.C.R. 486 [hereinafter *Johnston*].
14. (1 November 1995), AP-94-190 and AP-94-191 [hereinafter *Chaps-Ralph Lauren*].
15. *Ibid.* at 7.
16. (16 September 1993), AP-92-193 and AP-92-215 [hereinafter *Radio Shack*].

agent.[17] They also argued that Corin is an exclusive agent for Fabco in China and that Fabco is not paying any commissions to Corin, which is to arrange for its own commissions with Chinese resources. They argued, moreover, that the two prior re-appraisals made by Revenue Canada clearly were stated as being "in this instance only" and, thus, were not precedent setting. As for the application of the doctrine of issue estoppel, counsel argued that these are new importations and that these transactions took place in a different year from those which were subject to the two prior re-appraisals.

The Tribunal is of the view that the appeal should be dismissed. With respect to the application of the doctrine of *res judicata*/issue estoppel to this case, the Tribunal is of the view that the expression "in this instance only" in the two prior re-appraisals made by Revenue Canada is not a "clause de style",[18] as contended by counsel for the appellant. Clearly, this expression is intended to give Revenue Canada some flexibility, should, for example, an audit affecting future importations reveal facts or circumstances which were unknown at the time of previous importations. But, more importantly in this case, the Tribunal does not have the jurisdiction to determine whether Revenue Canada's tariff valuation administrator was estopped from making the decision that he made because of these two previous decisions. In an appeal under section 67 of the *Act*, as in this case, the Tribunal must determine, on the basis of the evidence and the law, whether the Deputy Minister properly found that the commissions are dutiable. Except in particular circumstances, for instance in the case of a decision by the Deputy Minister that clearly would fall outside the time limits provided in the *Act*, the Tribunal has no jurisdiction to determine whether the Deputy Minister himself had jurisdiction to make his decision, including a decision to uphold earlier rulings made by departmental staff.[19]

Furthermore, contrary to the appellant's position on the doctrine of *res judicata*/issue estoppel, this is not a case where the Tribunal is confronted with an issue with which it has dealt in a previous appeal. The Tribunal notes that, in *I.D. Foods Superior* v. *D.M.N.R.*,[20] which the appellant cited in support of its position, the Tribunal was asked to decide an issue that it already had decided between the two parties with respect to previous importations. Clearly, this is not the case here, since the matter was never adjudicated by the Tribunal.

With respect to the onus of proof, the Tribunal is of the view that it rests with the appellant. The Tribunal notes that, further to his audit of the appellant's activities, Mr. Montpetit's letter of December 28, 1995,[21] to Mr. Weinstein outlines the manner in which the appellant's future importations are to be valued. When this letter is read together with the respondent's decisions subsequently sent to the appellant, in the Tribunal's view, it is clear that the respondent has met the minimum requirements of disclosure, as set out in *Johnston*.

Regarding the merits of this case, the Tribunal is not persuaded, on balance, that Fabco is a *bona fide* buying agent for the appellant. The Tribunal concurs with the approach adopted in *Radio Shack*, where

17. Respondent's Confidential Brief, Tab 5.
18. *Transcript of Public Argument*, May 6, 1999, at 8.
19. On the question of the Tribunal's jurisdiction, see *Richards Packaging* v. *D.M.N.R.* (10 February 1999), AP-98-007 and AP-98-010 (C.I.T.T.) at 5 and 6.
20. (12 December 1996), AP-95-252 (C.I.T.T.).
21. *Supra* note 5.

it stated that a decision concerning the existence of an agency relationship and the treatment of purchasing agent fees must reflect the facts of the case at hand.[22]

Having said that, no evidence was provided by Mr. Weinstein as to how Fabco actually performs the services outlined in its letter to the appellant dated March 20, 1975, which followed an agreement between the two companies. For example, while Mr. Weinstein confirmed that one of the responsibilities of an agent would be to inspect a shipment before sailing, his evidence was that he had not seen an inspection certificate in recent years. On the other hand, Mr. Weinstein acknowledged that Fabco used Corin as a sub-agent, including for market research and factory referrals.[23] The fact that both Fabco and Corin provided services to the appellant is corroborated by Protected Exhibit B-2, in which the appellant listed three major problems concerning Corin's difficulties with quality control in China. There is no doubt, in the Tribunal's view, that the appellant was aware of the fact that Corin was Fabco's sub-agent and, thus, that the appellant, to some extent, accepted Corin as part of its agency arrangement with Fabco. This knowledge on the part of the appellant is evidenced by the communications exchanged among the three companies.[24]

Contrary to one of the factors considered in *Chaps-Ralph Lauren*, namely, that the agent does not assume risk for damaged or lost goods,[25] Corin (the appellant's agent through Fabco[26]) was to bear the cost of pressing raincoats.[27] More importantly, however, the Tribunal has difficulty with the Fabco/Corin *modus operandi* regarding commissions, which is set out in the January 6, 1975,[28] letter from Fabco to Corin as well as in the August 22, 1991, letter[29] from a third company[30] to Corin. From that correspondence, it appears that Corin, the exclusive agent for Fabco in China, could have been receiving commissions from Chinese vendors for the services that it was providing to Fabco for the appellant. There is no evidence before the Tribunal that the appellant was made aware of that situation, although it had knowledge of some of Corin's activities with Fabco. In fact, Mr. Weinstein could not even confirm whether Fabco had a contract with Corin nor had he knowledge as to how Fabco itself functioned overseas.

The Tribunal is of the view that an agent has a fiduciary responsibility to the purchaser which requires, among other things, complete disclosure from the agent of any transactions undertaken on the purchaser's account by the agent or on behalf of the agent. It is doubtful, based on the evidence, whether the appellant was fully aware of the extent of Corin's activities as Fabco's exclusive agent in China or of the fact that Corin was expected to receive commissions from Chinese factories. Some of these factories conceivably could have been doing business with the appellant or eventually could have been referred to the appellant by Corin as potential suppliers. As a *bona fide* buying agent, Fabco had a duty to advise the appellant of any such possibility of conflict of interest. Therefore, in keeping with its analysis in *Chaps-Ralph Lauren* regarding an agent's fiduciary duty to its principal, the Tribunal is not persuaded that the agent always acted in the interests of its principal.[31]

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22. *Supra* note 16 at 8.
23. *Transcript of Public Hearing*, May 6, 1999, at 48.
24. *Supra* notes 8, 9 and 10.
25. *Supra* note 14 at 6.
26. *Supra* note 4.
27. *Supra* note 9.
28. *Supra* note 4.
29. *Supra* note 12.
30. *Supra* note 11.
31. *Supra* note 14 at 6.

Taking into consideration all of the above-noted elements, the Tribunal concludes that the appellant has not established that Fabco was a *bona fide* buying agent in this matter.

Finally, the Tribunal is not persuaded by the appellant's argument that it would be difficult to establish that there is a sale of goods in the matter at hand, given that the contractors are merely supplying services. Once sewn, these garments become goods that are delivered to the purchaser. It is true that the contractors are providing a service, but it is paid for upon delivery of the finished goods. Ultimately, in the Tribunal's view, the contractors are selling a finished product, which undoubtedly is dutiable under the *Act*.

For all these reasons, the appeal is dismissed. The commissions paid to Fabco by the appellant were correctly added to the price paid or payable for the imported garments.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Anita Szlazak
Anita Szlazak
Member

Pierre Gosselin
Pierre Gosselin
Member