Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2018-065

Casa Cubana (Spike Marks Inc.)

v.

President of the Canada Border Services Agency

Decision issued
Wednesday, February 19, 2020

Reasons issued
Tuesday, March 10, 2020

Canada

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- DECISION 15

IN THE MATTER OF an appeal heard on October 22, 2019, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 17, 2019, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CASA CUBANA (SPIKE MARKS INC.) **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 22, 2019
Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Martin Goyette, Counsel Kalyn Eadie, Counsel Jessye Kilburn, Student-at-Law

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Casa Cubana (Spike Marks Inc.)	Paul Ryan Félix St-Vincent-Gagné

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	David Di Sante Luc Vaillancourt

WITNESSES:

Jacques Renaud Vice-President, General Manager Casa Cubana (Spike Marks Inc.)	Abel Gonzalez Ortego Specialist, *Premium* cigars Casa Cubana (Spike Marks Inc.)

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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal filed by Spike Marks Inc., doing business as Casa Cubana (hereinafter "Casa Cubana"), with the Canadian International Trade Tribunal pursuant to subsection 67(1) of the *Customs Act*[1] from a decision by the President of the Canada Border Services Agency (CBSA) dated January 17, 2019, made pursuant to subsection 60(4) of the *Act*.

[2] The goods in issue are Cuban cigars imported between December 2012 and April 2014. The issue in this appeal is whether certain payments made by Casa Cubana to "intermediaries" must be included in the value for duty of the goods in issue.

[3] The task of these intermediaries was to source Cuban cigars for Casa Cubana on the "grey market", outside of the distribution channels authorized by the Cuban government. The intermediaries also had to organize the transaction and the shipping of the goods, which was done through duty-free stores. They also inspected the goods before their shipment to Casa Cubana. In exchange for these services, Casa Cubana paid a fixed monthly amount to each intermediary.

[4] For the reasons below, the Tribunal concludes that the appellant's payments to the intermediaries are not to be included in the value for duty. The appeal is therefore allowed.

PROCEDURAL HISTORY

[5] On December 11, 2014, the CBSA informed the appellant that it had been selected for verification pursuant to subsection 42(2) and section 42.01 of the *Act*.[2] On August 25, 2016, the CBSA rendered its final verification report.[3] In its report, the CBSA raised several questions about the value for duty of the goods in issue. The only question relevant to this appeal is whether to include the payments to intermediaries. On that point, the CBSA concluded that Casa Cubana's payments to the intermediaries had to be added to the adjusted price paid or payable of the goods pursuant to subparagraph 48(5)(a)(i) of the *Act*.[4]

[6] On June 6, 2017, Casa Cubana requested a further re-determination pursuant to subsection 60(1) of the *Act*.

[7] Following Casa Cubana's request for a further re-determination, the CBSA upheld on January 17, 2019, its decision that the payments to intermediaries were to be included in the value for duty of the cigars on the basis that they were not exempt as fees paid by the purchaser to its agent for the service of representing the purchaser abroad in respect of the sale.[5]

[8] The CBSA held that the limited information on the record regarding the intermediaries suggested that they were acting as intermediaries or brokers rather than as agents for Casa Cubana. Accordingly, for the purposes of calculating the duties owed by the appellant, the CBSA added the

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1 R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2 Exhibit AP-2018-065-012A, Vol. 1 at 6.
3 Exhibit AP-2018-065-012B (protected), Vol. 2 at 48-67.
4 *Ibid.* at 62-64.
5 Exhibit AP-2018-065-01, Vol. 1 at 11-14.

total amount of the payments to the intermediaries during the period in issue to the adjusted total value of imports during that period.

[9] On February 22, 2019, Casa Cubana filed this appeal pursuant to subsection 67(1) of the *Act.*

[10] The Tribunal held a hearing on October 22, 2019. Two employees of Casa Cubana, Messrs. Jacques Renaud and Abel Ortego, testified.

LEGAL FRAMEWORK

[11] Pursuant to section 44 of the *Act*, a value must be assigned to goods imported to Canada to determine the applicable import duties. Section 46 of the *Act* specifies that the value for duty of imported goods is determined in accordance with sections 47 to 55 of the *Act*.

[12] The *Act* sets out various methods of valuation for determining the value for duty. Subsection 47(1) of the *Act* sets out that the primary basis of appraisal is the transaction value. The subsection reads 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.	**47 (1)** La valeur en douane des marchandises est déterminée d'après leur valeur transactionnelle dans les conditions prévues à l'article 48.

[13] Subsection 48(1) states that "the value for duty of goods is the transaction value of the goods if . . . the price paid or payable for the goods can be determined", and subsection 48(4) states that the "transaction value of goods shall be determined by ascertaining the price paid or payable for the goods . . . and adjusting the price paid or payable in accordance with subsection (5)":

Transaction value as primary basis of appraisal **48 (1)** Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined and if . . . . . . **Determination of transaction value** **(4)** The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the	**Valeur transactionnelle servant de base principale d'appréciation** **48 (1)** Sous réserve des paragraphes (6) et (7), la valeur en douane des marchandises est leur valeur transactionnelle si elles sont vendues pour exportation au Canada à un acheteur au Canada, si le prix payé ou à payer est déterminable et si les conditions suivantes sont réunies [...] [...] **Détermination de la valeur transactionnelle** **(4)** Dans le cas d'une vente de marchandises pour exportation au

goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).	Canada, la valeur transactionnelle est le prix payé ou à payer, ajusté conformément au paragraphe (5).

[14] The "price paid or payable" is defined as follows in subsection 45(1) of the *Act*:

45 (1) In this section and sections 46 to 55 . . .	**45 (1)** Les définitions qui suivent s'appliquent au présent article et aux articles 46 à 55 [...]
price paid or payable, in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor; (*prix payé ou à payer*)	***prix payé ou à payer*** En cas de vente de marchandises pour exportation au Canada, la somme de tous les versements effectués ou à effectuer par l'acheteur directement ou indirectement au vendeur ou à son profit, en paiement des marchandises. (*price paid or payable*)

[15] Subsection 48(5) sets out various adjustments that must be made to the "price paid or payable" to determine the transaction value and, thus, the value for duty. This appeal involves only the adjustment referred to in subparagraph 48(5)(a)(i), which reads as follows:

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted	**(5)** Dans le cas d'une vente de marchandises pour exportation au Canada, le prix payé ou à payer est ajusté :
(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	**a)** par addition, dans la mesure où ils n'y ont pas déjà été inclus, des montants représentant :
(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	**(i)** les commissions et les frais de courtage relatifs aux marchandises et supportés par l'acheteur, à l'exclusion des honoraires versés ou à verser par celui-ci à son mandataire à l'étranger à l'occasion de la vente

POSITIONS OF THE PARTIES

[16] The appellant submits that the payments to the intermediaries fall under the exception set out in subparagraph 48(5)(a)(i) of the *Act* as "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale."

[17] The appellant also argues that subparagraph 48(5)(a)(i) does not apply in this case. According to the appellant, subparagraph 48(5)(a)(i) applies on a "sale-by-sale basis" rather than applying in bulk to all imports made by an importer during a given period, and a connection must be established between the payments in question and one or more specific sales. As in this case the appellant paid a monthly flat fee to each intermediary, the payments were not associated with one or more specific transactions. They do not, therefore, constitute "commissions and brokerage" within the meaning of subparagraph 48(5)(a)(i) of the *Act*.[6]

[18] The CBSA submits that the intermediaries acted as brokers between the appellant and the foreign suppliers and that the appellant did not meet its burden of demonstrating that the intermediaries were acting as its agents. Accordingly, the CBSA argues, the payments to the intermediaries are "brokerage in respect of the goods" that must be added to the adjusted price paid or payable in respect of the goods in accordance with subparagraph 48(5)(a)(i) of the *Act.*

[19] In the alternative, the CBSA submits that the payments to the intermediaries must be included in the price paid or payable, as defined in subsection 45(1) of the *Act*, as indirect payments for the benefit of the vendors, since they enabled the latter to sell their excess inventory.

TRIBUNAL'S ANALYSIS

Issues

[20] This appeal raises two issues:

(a) Must the payments made by Casa Cubana to certain "intermediaries" be added to the adjusted "price paid or payable" pursuant to subparagraph 48(5)(a)(i) of the *Act*?

(b) Are the payments made by Casa Cubana to the "intermediaries" part of the "price paid or payable", as defined in subsection 45(1) of the *Act*?

Relevant facts

The "grey market" for Cuban cigars

[21] During the period in issue (from December 2012 to April 2014), Casa Cubana's primary activity was the distribution of Cuban cigars.

[22] According to the evidence presented by the parties, Habanos S.A. ("Habanos"), a company owned by the Cuban government, holds (and held at the time of the facts) a monopoly over the distribution of Cuban cigars throughout the world. Habanos distributes its cigars through a network of affiliated wholesalers established in several countries, which do business under the name "Havana House". According to the evidence, each Havana House is typically owned in part by Habanos and in part by a local partner.[7] Local distributors like Casa Cubana[8] may procure cigars only from the Havana House established in their country. Habanos prohibits the various Havana Houses from

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6 Exhibit AP-2018-065-03, Vol. 1 at 12-15.

7 *Transcript of Public Hearing* at 17, 19, 46.

8 The witnesses for Casa Cubana described it as essentially having acted as a sub-wholesaler of Havana House Toronto for the Quebec and Atlantic markets. *Transcript of Public Hearing* at 17-18.

selling Cuban cigars to a purchaser in another country, especially a country where another Havana House is present.[9] In Canada, the wholesaler affiliated with Habanos is Havana House Toronto.

[23] The business relationship between Casa Cubana and Havana House Toronto deteriorated over the years for reasons unimportant to this appeal. Havana House Toronto stopped supplying Casa Cubana with Cuban cigars in 2007.[10] Casa Cubana's witnesses explained that this event finally led Casa Cubana, once it had exhausted its inventory, to use intermediaries to find other sources of Cuban cigars outside of the distribution channels authorized by the Cuban government, on the "grey market".[11]

[24] Casa Cubana retained the services of these intermediaries to facilitate the procurement of cigars on the grey market between 2012 and 2014. More specifically, the role of the intermediaries was to find Havana Houses outside Canada that had an excess inventory of cigars and were willing to sell their excess inventory to Casa Cubana. The intermediaries also organized the transaction and the logistics of shipping the goods to the appellant.[12]

[25] The sales had to be discreet given the risks to the suppliers, as the Havana Houses involved in these transactions risked losing their Habanos licences if the latter learned that they were circumventing its prohibition against exporting cigars to other markets.[13] For this reason, the intermediaries did not disclose to Casa Cubana from which Havana House the grey market cigars were sourced, and the sales were transited through a duty-free store to protect the identities of the Havana Houses involved.[14]

[26] Mr. Ortego, an employee of Casa Cubana, testified that Casa Cubana retained the services of intermediaries because the individuals in question were trusted by the suppliers (foreign Havana Houses) and because they could reassure the suppliers that Casa Cubana was a serious purchaser. According to Mr. Ortego, the intermediaries also faced a risk of reprisals from the Cuban government.

The role of and payments to the intermediaries

[27] In a business context, the nature of the contractual relationship between two parties can often be determined by reviewing the written agreement between them. The evidence shows that, in this case, the relationships between Casa Cubana and the intermediaries were not set down in writing.[15]

[28] The CBSA argues that the Tribunal must interpret the absence of written contracts against the appellant.[16] However, the fact that the agreement between the parties is not in writing does not mean that no properly formed contract exists between them. The lack of written contracts is understandable in the specific circumstances described by the appellant's witness.

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9 *Transcript of Public Hearing* at 57-58.

10 *Transcript of Public Hearing* at 20, 23.

11 *Transcript of Public Hearing* at 29-35, 56-57. Between 2007 and 2010, Casa Cubana sourced its products from another supplier of Cuban cigars. Casa Cubana then spent until 2012 clearing its inventory. *Transcript of Public Hearing* at 34-37.

12 *Transcript of Public Hearing* at 65, 67.

13 *Transcript of Public Hearing* at 57-58, 86.

14 *Transcript of Public Hearing* at 76, 85.

15 At the hearing, Casa Cubana explained that written contracts were entered into *a posteriori* and that these contracts did not exist at the time of the facts. *Transcript of Public Hearing* at 9-10.

16 *Transcript of Public Hearing* at 167.

[29] In the absence of written contracts, the Tribunal must rely on other evidence to determine the nature of the relationship between the parties. Even when a written contract exists, the Tribunal does not limit its analysis to the terminology used in it by the parties. The Tribunal attempts instead to identify the precise terms of the relationship though "a substantive analysis of the relationship between the parties with all the pertinent facts to be weighed as a whole."[17]

[30] Most of the relevant evidence came from Mr. Ortego's testimony at the hearing, supported by documentary evidence of limited scope. Mr. Ortego, a witness for Casa Cubana, explained that he had sometimes communicated with the intermediaries by email, but mainly by telephone, to hide the intermediaries' identity and protect them and their families from the risk of reprisals by the Cuban government.[18] Sometimes the intermediaries were in countries in which they did not want to take the risk of sending emails.[19]

[31] The Tribunal considers Mr. Ortego's testimony to be very credible in the circumstances. No evidence was presented to the Tribunal that undermined his credibility or his description of the relationships between the appellant and the intermediaries.

[32] Mr. Ortego, a specialist in premium cigars, has been employed by Casa Cubana since 2005.[20] He had previously worked for Habanos and Havana House Toronto.[21] Mr. Ortego described the relationship between Casa Cubana and the intermediaries, whom he knew and had recruited himself.[22]

[33] Mr. Ortego described the intermediaries' role and his interactions with them as follows. Mr. Ortego regularly gave the intermediaries a list of cigars that Casa Cubana wished to purchase and the maximum price it was willing to pay for them.[23] The intermediaries then attempted to locate the cigars sought by Casa Cubana.

[34] The intermediaries periodically informed Casa Cubana of the cigar stocks available in Havana Houses. Mr. Ortego would select the products that Casa Cubana wished to purchase from among those available and inform the relevant intermediary of his selections. It seems that a price negotiation followed in some cases. The intermediary then undertook, on behalf of Casa Cubana, to buy the cigars and finalized their purchase.

[35] The intermediary identified a duty-free store (located in the same country or elsewhere) to buy the cigars from the Havana House concerned and then sell them to Casa Cubana, to prevent Habanos from discovering that the Havana House was making unauthorized exports.[24]

[36] The intermediary took care of the logistics of the transaction, including the inspection of the cigars and their transportation to the duty-free store and on to Canada. The intermediary verified the

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17 *Clothes Line Apparel, Division of 2810221 Canada Inc. v. President of the Canada Border Services Agency* (14 July 2008), AP-2007-006 (CITT) [*Clothes Line Apparel*] at para. 17.
18 *Transcript of Public Hearing* at 61, 93.
19 *Transcript of Public Hearing* at 83.
20 *Transcript of Public Hearing* at 50.
21 *Transcript of Public Hearing* at 18, 44-48.
22 *Transcript of Public Hearing* at 31.
23 *Transcript of Public Hearing* at 62-63, 73.
24 *Transcript of Public Hearing* at 64-65.

authenticity of the cigars and their quality and that of their packaging and applied customs stickers and the required health warnings.[25]

[37] Casa Cubana paid the costs of transportation to Canada, and its customs broker took care of the customs formalities.[26]

[38] Mr. Ortego stated that the intermediaries acted at all times under his instructions and assumed no financial risk in connection with the transaction.[27]

[39] Mr. Ortego testified that Casa Cubana paid each intermediary a fixed monthly fee consistent with market rates, regardless of the volume or value of the cigars sourced by the intermediary and whether or not any transactions occurred.[28] Casa Cubana could, however, terminate the relationship at any time if an intermediary failed to find cigar suppliers.[29]

[40] The total amount of the payments to the intermediaries during the period in issue approached the total value of the cigars imported by Casa Cubana during that period.[30] Casa Cubana's witnesses explained that the intermediaries were paid such large amounts because the survival of the business was at stake and they represented the sole source of supply of Cuban cigars during that period. They also stated that this supply model had turned out to be a poor one and that it had ultimately been abandoned.

The payments must not be added to the "price paid or payable" pursuant to subparagraph 48(5)(a)(i) of the *Act*

> The payments do not constitute commissions and brokerage in respect of the goods within the meaning of subparagraph 48(5)(a)(i)

[41] The Tribunal will begin its analysis by considering the issue of whether the payments must be added to the "price paid or payable" pursuant to subparagraph 48(5)(a)(i) of the *Act*.

[42] The Tribunal's first task is to interpret subparagraph 48(5)(a)(i) of the *Act* to determine whether it applies to the amounts paid by the appellant to the intermediaries. In other words, the Tribunal must determine whether the payments constituted "commissions [or] brokerage in respect of the goods incurred by the purchaser thereof" and whether, in this case, they fall under the exception set out in the subparagraph as "fees paid by the purchaser to its agent abroad in respect of the sale."

[43] The Tribunal will therefore begin its analysis by reviewing the scope of subparagraph 48(5)(a)(i) of the *Act*. To this end, the Tribunal will apply the "modern rule" of statutory interpretation, which requires "the words of an Act . . . to be read in their entire context and in their

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25 *Transcript of Public Hearing* at 66-67.
26 *Transcript of Public Hearing* at 65, 89, 94.
27 *Transcript of Public Hearing* at 66, 96-97.
28 *Transcript of Public Hearing* at 60, 94-95. Mr. Ortego explained that the intermediaries were responsible for covering their various costs (travel, protection, etc.) with the amount paid to them. *Transcript of Public Hearing* at 68.
29 *Transcript of Public Hearing* at 60.
30 Exhibit AP-2018-065-01, Vol. 1 at 13.

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[31]

[44] As for the terms "commissions and brokerage" ("*commissions*" and "*frais de courtage*" in French), the Tribunal notes that in the context in which it is used in subparagraph 48(5)(a)(i), the word "*commission*", in French, refers, in its ordinary sense, to a "*pourcentage qu'un intermédiaire perçoit pour sa rémunération*".[32] In English, the word "commission" is defined similarly: "a percentage paid to the agent or sales representative from the profits of goods etc. sold, or business obtained".[33]

[45] Considering the ordinary meaning of the words composing it, the French term "*frais de courtage*" (brokerage) means the expense engaged for the services of a person acting as an intermediary between two parties. The word "*frais*" is defined as, among other things, "*dépenses occasionnées par une opération quelconque*" and "*courtage*" means "*profession du courtier*", a "*courtier*" being the "*personne qui sert d'intermédiaire entre deux parties contractantes*".[34] In English, the word "brokerage" is defined, among other things, as "a broker's fee or commission", while a "broker" is defined as "an agent who buys and sells for others; an intermediary".[35]

[46] As for the phrase "in respect of the goods incurred by the purchaser thereof", the Tribunal notes that subparagraph 48(5)(a)(i) of the *Act* is part of the mechanism adopted by Parliament for the application of customs tariffs to goods imported to Canada—sections 44 to 57 of the *Act*—and must be interpreted in its immediate legislative context.

[47] These provisions state that one must first determine the "price paid or payable", as defined in subsection 45(1) of the *Act*, before making any necessary adjustments pursuant to subsection 48(5), in order to determine the transaction value, and therefore the value for duty.[36]

[48] Subparagraph 48(5)(a)(i) of the *Act* provides that one of the circumstances in which the price paid or payable must be adjusted is in the case—to the extent that they are not already included in the price paid or payable—of "commissions and brokerage in respect of the goods incurred by the purchaser thereof". This subparagraph contains, however, one important exception for "fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale".

[49] The "price paid or payable" is defined in subsection 45(1) of the *Act* as "the aggregate of all payments made or to be made, *directly or indirectly*, in respect of the goods by the purchaser *to or for the benefit of the vendor*" [emphasis added].

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31 *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 SCR 559, at para. 26; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), at para. 117, all three citing E. Driedger, *Construction of Statutes* (2nd ed., 1983), at 87.

32 *Le Nouveau Petit Robert de la langue française*, 2009.

33 *Canadian Oxford Dictionary*, 2nd ed.

34 *Le Nouveau Petit Robert de la langue française*, 2009.

35 *Canadian Oxford Dictionary*, 2nd ed.

36 *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc*., 2001 SCC 36 (CanLII), [2001] 2 SCR 100 [*Mattel*] at paras. 2-3.

[50] The Tribunal is of the view that this definition puts in context the text of subparagraph 48(5)(a)(i) of the *Act* and in particular the phrase "in respect of the goods incurred by the purchaser thereof" in that subparagraph. In the Tribunal's view, the commissions and brokerage "in respect of the goods incurred by the purchaser thereof" must have a sufficient nexus with what is paid directly or indirectly, to or for the benefit of the vendor, for the goods acquired.

[51] Similarly, the scheme of subsections 47(1) and 48(4) and (5) of the *Act* sheds light on the interpretation to be given to subparagraph 48(5)(a)(i). A reading of subsections 47(1) and 48(4) and (5) shows that their purpose is to determine the *actual price* of the imported goods.[37]

[52] In this respect, authors Sherman and Glashoff explain as follows the reasons why Article 8.1(a)(i) of the WTO's *Customs Valuation Agreement*—which subparagraph 48(5)(a)(i) implements[38]—requires that commissions and brokerage, except for payments made to the purchaser's agent, be included in the value for duty:

> These provisions deal with the compensation of middlemen. *A selling commission is paid to an agent of the seller commissioned by the seller to locate a buyer or negotiate a sale. Typically, he would be paid by the seller, who would include this fee as a cost in calculating the selling price. If the buyer pays this commission, separate and apart from the agreed price, he is in effect relieving the seller of an obligation, and the payment is an indirect payment to the seller and thus a part of the price . . . .*
>
> Only fees paid by the buyer to his own representative are excluded. It is obvious that if the buyer himself goes abroad to negotiate the purchase, or if he sends a salaried employee, their travel expenses and salaries are costs of the buyer and are not to be added to the price as an indirect payment for the goods. There is no more reason to include the cost of hiring an outside agent to perform the same function. Hence the exclusion from customs value of buying commissions.[39]
>
> [Emphasis added]

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37 See also Article VII.2 of *GATT 1994*, which, in the relevant parts, provides that "[t]he value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise." In its interpretation of the provisions of the *Act*, the Tribunal must look to the external context created by Canada's international obligations. Canadian legislation will be presumed, and thus construed, to conform with international law obligations unless the wording of the statute clearly compels a different result. See *Polyethylene Terephthalate Resin* (16 March 2018), NQ-2017-003 (CITT) at para. 37, citing *R. v. Hape*, 2007 CSC 26 (CanLII), [2007] 2 SCR 292, at para. 53 and *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 SCR 1324. Sections 45, 47 and 48 of the *Act* form part of the implementation mechanism for Canada's obligations under two World Trade Organization (WTO) agreements, Article VII of *GATT 1994* and the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* [*Customs Valuation Agreement*]. These two agreements are therefore relevant to the interpretation of the provisions in issue.

38 Like subparagraph 48(5)(a)(i), Article 8 of the *Customs Valuation Agreement* provides for, *inter alia*, adjustments to the price actually paid or payable, where certain specific elements considered part of the value for duty are incurred by the buyer but are not included in the price actually paid or payable in respect of the imported goods.

39 Saul L. Sherman and Hinrich Glashoff, *Customs Valuation: Commentary on the GATT Customs Valuation Code*, Kluwer Law and Taxation Publishers, 1988, at 109.

[53] Accordingly, the object and purpose of subsections 47(1) and 48(4) and (5) of the *Act* is to determine the price actually paid (directly or indirectly) to or for the benefit of the vendor.[40] It is clear from what precedes that the mechanism set out in these subsections is not meant to include all expenses incurred by the purchaser to acquire the goods; it is not sufficient for a payment to be vaguely associated with the transaction for it to be automatically included in the value for duty of the goods in issue. In the Tribunal's view, because the purpose of the mechanism provided for in subsections 47(1) and 48(4) and (5) is to determine the price actually paid by the purchaser to the vendor, only payments that are closely connected to the price or value of the goods are to be included in the value for duty.

[54] In this respect, in considering the nexus between the payment and the price of the goods, it is recalled that, in a normal commercial context, the price will generally reflect three considerations: the vendor's cost of production or acquisition, its administrative overhead and marketing expenses, and a profit margin.[41]

[55] Therefore, the Tribunal is of the view that, generally, payments are to be included in the value for duty only if they are closely connected with one of the components of the price of the goods in a normal commercial context, i.e. a context in which the purchaser pays the vendor a price that reflects the normal components of the sale price, namely, the actual cost to the vendor plus the vendor's profit.[42]

[56] Accordingly, the payments that must be added pursuant to the subparagraph are the commissions and brokerage that the vendor would have had to pay itself, in whole or in part, if the purchaser had not paid them (so those that, normally, are reflected in the price asked for a good by the vendor). The same logic explains why the fees paid by the purchaser to its agent are not included pursuant to subparagraph 48(5)(a)(i) of the *Act*.

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[40] See *Radio Shack, A Division of Intertan Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* (16 September 1993), AP-92-193 and AP-92-215 (CITT) [*Radio Shack*] at 8:

> Put simply, the matter before the Tribunal is whether the fees paid by the appellant to A & A should be added to the price paid or payable for the goods in determining their value for duty. The legislation provides that they should not be added if A & A acted as the purchasing agent for the appellant, *since such costs would normally have nothing to do with the transaction price for the goods, i.e. the true selling price between the buyer and the seller*. This provision is consistent with the GATT.
>
> [Emphasis added]

[41] See, by analogy, Article 6.1 of the *Customs Valuation Agreement* as well as subsection 52(2) of the *Act*. The *Agreement* recognizes, in its introduction, "that customs value should be based on simple and equitable criteria consistent with commercial practices".

[42] It is entirely reasonable to believe that standard price setting practices in a normal commercial context were among the considerations taken into account by Parliament when it adopted the provisions for establishing the transaction value. According to Ruth Sullivan, "[t]he meaning of legislation must be gathered from reading the words in context, and this includes the external context. The external context of a provision is the setting in which the provision was enacted, its historical background, and the setting in which it operates from time to time" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th edition, at 643). Furthermore, "[t]he legislature is presumed to know all that is necessary to produce rational and effective legislation" (*Id.* at 205). The legislature is presumed to know not only the law, but also commercial trade practices and the operation of public institutions. It is also aware of the problems that the legislation is intended to address. In short, "the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation" (*Id.* at 205).

[57] The Tribunal concludes from the above that the payments that must be added to the price paid or payable pursuant to subsection 48(5)(a)(i) are commissions and brokerage in respect of the goods that have a sufficiently close connection with the goods, i.e. those that would have been part of the price in question in a normal commercial context, in the sense that they are costs in respect of the imported goods connected with the production or marketing of the goods by the vendor. If they were not included in the price paid or payable and were nevertheless incurred by the purchaser, subparagraph 48(5)(a)(i) provides that the price paid or payable must be adjusted by adding these costs to determine the actual value of the imported goods.

[58] In applying the above to the facts of this appeal, the Tribunal has no difficulty in concluding that the payments made by Casa Cubana to the intermediaries at least constitute "brokerage". Because the payments in question constitute brokerage, the Tribunal need not decide whether they constitute "commissions".

[59] In this case, the amounts and expenses generally incurred by the purchaser in connection with the acquisition of the cigars, but having no connection with the vendor's activities relating to the production, purchase or marketing of the goods, are not part of the actual value of the goods and should not be included in the value for duty.

[60] The payments at the heart of this appeal were made in consideration for services rendered by intermediaries or agents tasked with certain duties related to sourcing, purchasing and importing the goods. The testimony of Mr. Ortego, a witness for the appellant, established that the intermediaries had a contractual relationship with Casa Cubana and not with the vendors. The CBSA has not demonstrated any connection between these intermediaries and the vendors apart from establishing the bases of the transaction and at the moment of its materialization.

[61] The evidence shows that at all the relevant times, the intermediaries were acting under Mr. Ortego's instructions on behalf of Casa Cubana. The payments to the intermediaries are expenses incurred for services that could just as easily have been performed by employees of Casa Cubana, and the intermediaries acted on Mr. Ortego's instructions.

[62] The Tribunal cannot see how the payments made by Casa Cubana to the intermediaries can in any way be associated with sales costs that should normally have been incurred by the vendors, especially given that the payments corresponded to the value of the services provided independently of whether or not a transaction occurred or the value or volume of the goods acquired.

[63] For these reasons, the amounts paid to the intermediaries are not "brokerage in respect of the goods incurred by the purchaser thereof" within the meaning of subparagraph 48(5)(a)(i) and must not be factored into an adjustment of the price paid or payable for the imported goods.

> <u>If they did fall within the scope of subparagraph 48(5)(a)(i), the payments would be covered by the exception relating to fees paid by the purchaser to his agent</u>

[64] Despite its finding that the payments to the intermediaries do not fall within the scope of subparagraph 48(5)(a)(i) of the *Act*, the Tribunal considers it useful to review the arguments presented by the parties on the issue of whether these payments constitute payments made by the appellant to its agents, thereby benefitting from the exception set out within the same subparagraph.

[65] The CBSA argues that the evidence provided by the appellant fails to satisfy the various conditions in the Tribunal's case law that may establish the existence of a principal-agent relationship. According to the CBSA, the intermediaries acted on behalf of both Casa Cubana and the Havana House suppliers. Furthermore, according to the CBSA, the evidence provided by the appellant does not demonstrate that the suppliers filled roles normally filled by the purchaser's "agent". More specifically, according to the CBSA, the appellant did not present evidence to the effect that the intermediaries:

(a) negotiated on its behalf—the evidence shows instead that the intermediaries simply kept the appellant informed of any excess inventory held by the suppliers and the prices asked;

(b) verified the authenticity of the cigars purchased—it was Mr. Ortego himself who performed this task;

(c) were involved in the handling of payments between the appellant and the foreign suppliers, the shipping of goods and the associated logistics—the invoices and import documentation bore the name and coordinates of the duty-free stores through which the goods transited, and the evidence shows that the appellant itself paid the duty-free stores and handled the transport and logistics (including insurance) with the assistance of a Canadian customs broker.

[66] The CBSA also submits an argument regarding the accounting treatment of the payments in the appellant's financial statements, which indicates, in the CBSA's view, that Casa Cubana itself considered the intermediary fees to be directly connected to the price paid or payable.

[67] The CBSA recognizes that the main issue in the Tribunal's prior decisions on which it relies was whether the alleged agent was, in fact, the vendor of the goods in issue. This issue does not arise in this case, as the CBSA's argument is that the alleged agent was in fact acting as a *broker*. The CBSA submits that the Tribunal's reasoning in these prior decisions is still useful, by analogy, to its analysis of the relationship between the parties in this appeal.[43]

[68] In the Tribunal's view, the CBSA is trying to apply too mechanically certain passages of the Tribunal's reasons in the prior decisions, which, again, addressed a different issue. Moreover, the evidence contradicts the CBSA's depiction of the role played by the intermediaries in this case.

[69] The prior decisions show that the principal criterion applied by the Tribunal was that of the relationship of subordination between the principal and the agent and the degree of control exercised by the former over the activities of the latter.[44] That criterion is easily satisfied in this case. The appellant, through Mr. Ortego, controlled the relationship and selected which products to purchase. The appellant had the last word regarding the purchases to be made by the intermediaries on its behalf.[45]

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43 Moreover, the CBSA recognizes that no one of the factors or criteria established by the Tribunal in its previous decisions is determinative. *Transcript of Public Hearing* at 151.

44 See, *inter alia*, *Clothes Line Apparel* at para. 17; *Browns Shoe Shops Inc. v. The Commissioner of the Canada Customs and Revenue Agency* (11 February 2004), AP-2002-096 (CITT).

45 *Transcript of Public Hearing* at 96.

[70] Moreover, the acts performed by the intermediaries (finding suppliers, negotiating sales according to the needs of Casa Cubana, organizing the transport of the goods and inspecting them) are practically identical to those described in the prior decisions of the Tribunal (serving as the link between the principal and the vendor, processing orders,[46] inspecting the goods,[47] managing transport and the logistics of importation)[48] as well as those described in the World Customs Organization's explanatory note to Article 8 of the *Customs Valuation Agreement*.[49]

[71] The Tribunal stated that an "agency relationship exists only where one person, called the agent, has the authority to affect the legal position of another person, called the principal, vis-à-vis third parties."[50] Within the parameters defined by Mr. Ortego, the intermediaries were authorized to commit Casa Cubana to doing business with the suppliers.[51]

[72] The CBSA submits that the intermediaries were not mandataries of Casa Cubana, given their lack of transparency regarding their possible former or ongoing relationships with the Havana Houses with which they were doing business, the identity of the Havana Houses involved in the transactions and other details of the transactions. A lack of transparency by the agent vis-à-vis the mandatory is not sufficient on its own to establish that there is no principal-agent relationship.[52] The Tribunal also notes the factual circumstances of this appeal, especially the risks faced by the intermediaries and Mr. Ortego and the fact that, given these risks, Mr. Ortego preferred not to know the real origin of the goods.[53]

[73] For these reasons, the intermediaries' lack of transparency regarding certain aspects of the transactions does not persuade the Tribunal that they were not acting as the appellant's agents.

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46 *Sherson Marketing Corporation v. The Deputy Minister of National Revenue* (27 July 2000), AP-98-098 (CITT) [*Sherson I*].

47 *Chaps-Ralph Lauren, Division de 131384 Canada Inc. and Modes Alto Regal v. The Deputy Minister of National Revenue v. Caulfeild Apparel Group Ltd.* (1 November 1995), AP-94-190 and AP-94-191 (CITT) [*Chaps-Ralph Lauren*].

48 *Charley Originals Ltd., Division of Groupe Algo Inc. and Mr. Jump Inc., Division of Groupe Algo Inc.* (29 April 1997), AP-95-261 and AP-95-263 (CITT).

49 The explanatory note describes the role of the buyer's agent as "a person who acts for the account of a buyer, rendering him services in connection with finding suppliers, informing the seller of the desires of the importer, collecting samples, inspecting goods and, in some cases, arranging the insurance, transport, storage and delivery of the goods." Explanatory note 2.1 of the Technical Committee on Customs Valuation, World Customs Organization (23 March 1982), cited by the Tribunal in *Chaps-Ralph Lauren* and *Radio Shack*. The role of the intermediaries is also consistent with Sherman and Glashoff's description of the role of the buyer's agent. See Saul L. Sherman and Hinrich Glashoff, *Customs Valuation: Commentary on the GATT Customs Valuation Code*, Kluwer Law and Taxation Publishers, 1988, at 109-110.

50 *Clothes Line Apparel* at 17.

51 These elements seem to have little relevance in a situation where it is claimed that the alleged agents were in fact acting as brokers, but the Tribunal nevertheless notes that the intermediaries did not run any commercial risk or acquire ownership in the goods. *Transcript of Public Hearing* at 66.

52 See *Utex Corp. v. Canada (Deputy Minister of National Revenue)*, 2001 FCA 54 (CanLII) at para. 8. In that case (*Utex Corporation v. The Deputy Minister of National Revenue* (27 October 1999), AP-98-085 (CITT) at 7), the Tribunal concluded that the alleged agent had breached his fiduciary duty to the purchaser by failing to inform it of potential conflicts of interest. The Federal Court of Appeal set aside the Tribunal's decision, holding that there was no evidence that the alleged agent had failed to act in the interest of its alleged principal and that even if that had been the case, it would not have been enough in itself to prove that the fees paid to the alleged agent were not covered by the exception set out in subparagraph 48(5)(a)(i) of the *Act*.

53 *Transcript of Public Hearing* at 76.

[74] Moreover, the CBSA argues that for an intermediary to be an agent, it must be freely chosen by the purchaser.[54] The CBSA submits that this was not true in this case because the appellant was forced to use the intermediaries' services because the foreign suppliers would only have sold cigars on the grey market through intermediaries they trusted. According to the CBSA, this factor limited the choice of intermediaries with whom the appellant could do business.

[75] In the Tribunal's view, Casa Cubana needed to use *somebody's* services to find cigars—like any company needs to use the services of employees or agents in the context of its commercial activities. It does not follow from this that Casa Cubana was forced by the vendors to use the services of certain *specific intermediaries*. The choice of intermediary "was not imposed by the vendor or vendors"[55] [translation].

[76] Furthermore, according to his testimony, Mr. Ortego could choose among dozens of individuals who could have acted as intermediaries.[56] Mr. Ortego also testified that it was within his power to terminate the oral contract between the appellant and an intermediary at any time.

[77] It is apparent from the above that even if it were admitted that the payments made by Casa Cubana to the intermediaries fell within the scope of 48(5)(a)(i) of the *Act*, they are covered by the exception set out in the same subparagraph.

[78] In short, for the reasons set out above, the Tribunal is of the view that the amounts paid by Casa Cubana to the intermediaries must not be added to the price paid or payable in respect of the goods in issue and, accordingly, must not be included in the value for duty.

The payments do not form part of the "price paid or payable" as defined in subsection 45(1) of the *Act*

[79] The CBSA's alternative argument is that the payments to the intermediaries form part of the "price paid or payable", as defined in subsection 45(1) of the *Act*, because these payments were made indirectly for the benefit of the vendors. According to the CBSA, the payments were made indirectly for the benefit of the vendors because they made the grey market sales possible, enabling them to sell their excess inventory of cigars. Accordingly, the CBSA submits, these payments must be included in the adjusted value for duty, in accordance with subsections 48(1) and (4).

[80] The Tribunal has already found that although they were generally connected or associated with the importation of the goods, these payments were not included in what was—or should have been—paid to the vendor at the time of the purchase. Accordingly, the payments to the intermediaries are not included in the definition of the "price paid or payable".

[81] More fundamentally, the interpretation proposed by the CBSA seems to lead to the conclusion that any payment, to anyone, by a purchaser, in connection with its importation activity, must be included in the transaction value declared when importing goods. Any payment made in connection with a sale benefits the vendor indirectly because it allows the vendor to make the sale in

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54 The CBSA refers to *Mexx Canada Inc. v. The Deputy Minister of National Revenue* (16 February 1995), AP-94-035, AP-94-042 and AP-94-165 (CITT).

55 *Transcript of Public Hearing* at 136.

56 *Transcript of Public Hearing* at 76.

question. This interpretation is not supported by the wording of subsection 45(1) and has already been rejected by the Federal Court of Appeal.[57]

[82] The CBSA's alternative argument to the effect that the payments should already have been included in the price paid or payable pursuant to subsection 45(1) of the *Act* is therefore rejected.

[83] Finally, the CBSA seems to suggest that if paragraph 48(5)(a)(i) is inapplicable, another valuation method should be used so that the payments may be included in the value for duty.[58] However, the CBSA has not demonstrated that the transaction value method cannot be used in this case. This argument is therefore without merit.

DECISION

[84] The appeal is allowed.

Serge Fréchette

Serge Fréchette
Presiding Member

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57 *Deputy Canada (Minister of National Revenue) v. Charley Originals Ltd.*, 2000 CanLII 15307 (FCA) at paras. 8-9. See also *Mattel* at paras. 65-66.

58 Exhibit AP-2018-065-12A, Vol. 1 at para. 54 of 18-19.