

UNITED STATES CUSTOMS SERVICE APPRAISALS: THE DUTIABILITY OF BUYING AGENT COMMISSIONS - AN APPLICATION OF THE TRADE AGREEMENTS ACT OF 1979

FACTS

In 1979, Congress passed the Trade Agreements Act of 1979,¹ which amended § 402 of the Tariff Act of 1930 to change the basis of United States Customs valuation from export value to transactional value.² The amendments defined the transactional value as the price actually paid or payable for imported merchandise and included selling commissions³ and payments made for the benefit of the seller as a

¹ The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1401(a) (1982)). The Trade Agreements Act of 1979 revises § 402 of the Tariff Act of 1930, which specified the statutory standards for appraising the value of imported merchandise. The amended version establishes five methods (one primary and four secondary) of determining customs value. The primary method, the transaction value of the merchandise (price actually paid or payable when sold for exportation to the United States, increased by certain adjustments), should be used whenever possible. The methods of valuation under amended § 402 of the Tariff Act of 1930 would make United States valuation methods consistent with those provided in the Customs Valuation Agreement and would add significantly more predictability regarding the value used for customs purposes. The Customs Valuation Agreement was achieved by the Multinational Trade Negotiations (United States, the EC, Japan, Canada, and the Nordics, and by some developing countries).

² The Tariff Act of 1930, ch. 497, § 402, 46 Stat. 590, 708-710 (1930) (added to by the Customs Simplification Act of 1956, ch. 887, 70 Stat. 943 (1956); as amended by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 201, 93 Stat. 194-201 (1979) (codified at 19 U.S.C. § 1401(a) (1982))). Section 402 of the Tariff Act of 1930 established four methods in a hierarchical order for determining customs value; the primary method involved determining and applying the higher of the export or foreign value. The export value is the market value at the time of exportation to the United States at which all purchasers in the principal markets of the country may purchase the merchandise for export to the United States. The foreign value is the market value at the time of exportation to the United States at which all purchasers in the principal markets of the country of origin may purchase the merchandise.

³ The Trade Agreements Act of 1979, § 201, states in 19 U.S.C. § 1401a(b)(1)(B) (1982) that the transactional value of imported merchandise is the price actually paid or payable for the merchandise sold for exportation to the United States, plus amounts equal to any selling commission incurred by the buyer with respect to the merchandise imported.

part of dutiable value.⁴ Consequently, there has been much debate concerning whether commissions paid by the buyer to a buying agent inure to the benefit of the seller and should be included in the transaction value.

Recently, importer Moss Manufacturing Company (buyer) filed suit against the United States Customs Service (defendant) in the United States Court of International Trade pursuant to 28 U.S.C. § 1581(a).⁵ The case arose when buyer contested the Custom Service's appraisal of 1,165 ceiling fans imported from Taiwan. Buyer paid for the fans by opening a letter of credit in favor of the seller, which required that \$41,555.50 be paid to seller and that seller pay buyer's agent \$1.50 per fan. The letter of credit did not indicate the nature of the payment from seller to buyer's agent.⁶ The buyer's agent was an independent entity who sourced merchandise and negotiated prices and freight rates for buyer in the Far East. Buyer contended that defendant improperly overstated the appraisal of buyer's imported merchandise by including as part of the dutiable transaction value monies paid to seller for disbursement as a buying commission to its buying agent. Buyer asserted that the dutiable value is the price actually paid or payable, exclusive of the alleged buying commission, even though such commission was paid to the buying agent indirectly by including it in the amount paid to seller. Defendant denied the allegations, stating that buyer failed to overcome the presumption of correctness which attaches to Customs appraisals⁷ and that the monies disbursed to the seller for remittance to buyer's agent were properly included in the transaction value because the disbursements were part of the total payment made to seller.⁸

⁴ The Trade Agreements Act of 1979, § 201, states in 19 U.S.C. § 1401a(b)(4)(A) (1982) that the term "price actually paid or payable" means the total payment made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

⁵ 28 U.S.C. § 1581(a) (1982) gives the Court of International Trade exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under § 515 of the Tariff Act of 1930.

⁶ The Court ruled that the buyer conclusively established the agency relationship with its bona fide buying agent.

⁷ 28 U.S.C. § 2639(a)(1) (1982). In any civil action commenced in the Court of International Trade under §§ 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct.

⁸ The Trade Agreements Act of 1979, § 201, states in 19 U.S.C. § 1401a(b)(1)(B) (1982) that the transactional value of imported merchandise is the price actually paid or payable for the merchandise sold for exportation to the United States.

On appeal, *held*, affirmed. Where a payment for goods is made to a seller with instructions to disburse part of such funds to the buyer's agent, who assisted in bringing about the sale, such disbursement constitutes a disbursement for the benefit of the seller within the meaning of 19 U.S.C. § 1401a(b)⁹ and is properly included within the price paid for purposes of valuation. *Moss Mfg. Co. v. United States*, 714 F. Supp. 1223, 1227-28 (Ct. Int'l Trade May 22, 1989).

LEGAL BACKGROUND

Section 402 of the Tariff Act of 1930 set forth five standards in hierarchical order for determining the value of imported merchandise for assessment of Customs duty.¹⁰ The Customs Simplification Act of 1956 redesignated § 402 of the Tariff Act of 1930 as § 402a and added a new section 402 containing four additional standards.¹¹ These amendments meant that, as of 1956, there were nine possible standards for customs valuation, with the primary method of valuation being export value. Although the names describing the nine different standards of valuation under §§ 402 and 402a were either the same or almost the same, the substance of the individual standards differed significantly by reason of definition.¹² Application of the standards based on export value required interpretation and use of difficult definitions and concepts contained in the statutory language of the amended Tariff Act of 1930.¹³

⁹ The Trade Agreements Act of 1979, § 201, states in 19 U.S.C. § 1401a(b)(4)(A) (1982) that the term "price actually paid or payable" means the total payment made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

¹⁰ The Tariff Act of 1930, ch. 497, § 402a, 46 Stat. 590, 708 (1930). Section 402a provided for valuation on the basis of an article's export value or foreign value, whichever was higher. If neither value could be determined, then valuation was based upon the United States value. If the United States value could not be used, then a cost of production standard was applied. Where specifically required by law, the American selling price must be used.

¹¹ The Customs Simplification Act of 1956, ch. 887, § 2(a), 70 Stat. 943-46 (1956). Valuation under § 402 was based first upon export value, and if such was not ascertainable, then the United States value was used. If neither of these bases could be calculated, the constructed value was determined. Where specifically provided for by law, the American selling price of a domestic article must be used.

¹² S. Rep. No. 249, 96th Cong., 1st Sess. 114, 116, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 498.

¹³ S. Rep. No. 249, 96th Cong., 1st Sess. 114, 119, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 505.

The Trade Agreements Act of 1979 represents the current state of customs valuation of imported articles. Section 201 of the Trade Agreements Act repealed § 402a of the Tariff Act of 1930 as amended and revised § 402 of the Tariff Act of 1930 to make it consistent with the Customs Valuation Agreement achieved by the Multilateral Trade Negotiations.¹⁴ The amended version of § 402 established five methods of determining customs value, arranged in a hierarchical fashion, with transaction value being the primary method of valuation.¹⁵ The new methods of valuation were designed to simplify U.S. law and add significantly more predictability regarding the value which will be used for customs purposes.¹⁶

The most obvious change made by the Trade Agreements Act of 1979 to the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, was the change in the basis of valuation from export value¹⁷ to transaction value.¹⁸ The major differences between export value and transaction value relate to the elements of time and additions to price.¹⁹ The use of transaction value as the

¹⁴ The Customs Valuation Agreement was achieved by the Multinational Trade Negotiations (U.S., the EC, Japan, Canada, and the Nordics, and by some developing countries). This agreement established five alternative methods of valuation; the primary method was the transaction value of the imported goods. The Trade Agreements Act of 1979, § 201, 19 U.S.C. § 1401a(b) (1982), utilizes the same methods in the same hierarchical order.

¹⁵ The primary method of transaction value of the merchandise (price actually paid or payable with certain adjustments) would be used whenever possible. If the transaction value could not be used, the customs value would be determined by sequentially applying the second through fifth alternative methods: the transaction value of identical merchandise, the transaction value of similar merchandise, the deductive value, and the computed value.

¹⁶ S. Rep. No. 249, 96th Cong., 1st Sess. 114, 119, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 505.

¹⁷ Export value is generally defined as the price at the time of exportation to the United States at which such or similar merchandise, packed ready for shipment to the United States, is freely sold or offered for sale, in the usual wholesale quantities and in the ordinary course of trade, in the principal markets of the exporting country for export to the United States. The Tariff Act of 1930, ch. 497 § 402(a), 46 Stat. 590, 708 (1930).

¹⁸ Transaction value is the price actually paid or payable for the merchandise when sold for exportation to the United States plus amounts equal to packing costs, selling commissions incurred by the buyer, assists, royalties and license fees, and the proceeds of a subsequent resale, disposal, or use of the imported merchandise that accrue to seller. The Trade Agreements Act of 1979, § 201, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 1401(a) (1982)).

¹⁹ As for time, export value takes price at the date of export while the transaction value takes the price of the merchandise when sold regardless of the time of export. With regard to adjustments to price, the export value has no facility for adjusting

primary basis for customs valuation allows use of the price which the buyer and the seller agreed to in their transaction as the basis for valuation rather than customs having to resort to the more difficult task of interpreting the language contained in the amended Tariff Act of 1930.²⁰

The Trade Agreements Act of 1979 made two important additions to the prior statute. The definition of transaction value explicitly included selling commissions as a part of dutiable value, and payments made for the benefit of the seller were expressly included in the definition of the price paid or payable for the merchandise and therefore subject to duties.²¹ These amendments were consistent with prior judicial construction concerning the dutiability of commissions and appear to be the statutory incorporation of years of Customs Court holdings involving customs appraisals.²²

In any civil action which contests the Customs Service valuation of imported merchandise commenced in the Court of International Trade under §§ 515, 516, or 516A of the Tariff Act of 1930, the decision of the administering authority is presumed to be correct.²³ A presumption of correctness also attaches to a classification by the Customs Service, and the importer has the burden of proving that the classification is incorrect.²⁴

To give effect to this presumption, the courts imposed a dual burden of proof requiring the importer to demonstrate both that the government's classification was incorrect and that the importer's proposed classification was correct.²⁵ The purposes of this dual burden were to ensure that the government could consider the alternative and ascertain facts sufficient to accept or refute the importer's classification²⁶ and to facilitate the orderly administration of customs

prices for certain elements of value involved in the transaction but not included in the price, thereby forcing the valuation process under the amended Tariff Act of 1930 to move to the alternative methods. Transaction value, however, allows for additions to the price actually paid or payable to arrive at the acceptable customs valuation.

²⁰ S. Rep. No. 249, 96th Cong., 1st Sess. 114, 118, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 504.

²¹ 28 U.S.C. §§ 1401a(b)(1), 1401a(b)(4)(A) (1982).

²² See S. Rep. No. 249, 96th Cong., 1st Sess. 114-123, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 500-509.

²³ 28 U.S.C. § 2639(a)(1) (Supp. V 1981).

²⁴ *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984).

²⁵ See *United States v. A. Johnson & Co.*, 588 F.2d 297, 301 (C.C.P.A. 1978); *United States v. New York Merchandise Co.*, 435 F.2d 1315, 1318 (C.C.P.A. 1970).

²⁶ *Bliven v. United States*, 1 Ct. Cust. App. 205, 208 (1911).

law.²⁷ However, the dual burden sometimes led to unfair results since it required the court to affirm incorrect government decisions when the importer had failed to establish the correctness of an alternative.²⁸ After Congress reaffirmed the presumption of correctness attaching to a Customs Service decision in 1982,²⁹ the court in *Jarvis Clark Co.* held that Congress clearly intended to change the operation of the dual burden by requiring the Court of International Trade to determine the correct classification after the importer has shown the government's classification erroneous.³⁰ Consequently, the importer now has to prove only that the government's appraisal is incorrect and not that the importer's classification is correct.

Bona fide buying commissions are excludable from dutiable value while selling commissions are not.³¹ Whether a commission is a bona fide buying commission depends in each instance on the facts of each particular case.³² Recent decisions require that the importer not only prove the existence of a bona fide buying agency but also that the charges paid were in fact bona fide buying commissions and non-dutiable.³³ Factors to be considered in deciding whether a bona fide agency relationship exists include (1) the right of the principal to control the agent's conduct, (2) the content of transaction documents, (3) whether the importer could have purchased directly from manufacturers without employing the agent, (4) whether the agent was operating independently for his own benefit, and (5) the existence of a buying agency agreement.³⁴ Primary consideration is given to the principal's right to control the agent's conduct.³⁵ Since the agent must represent the buyer only, the agent's relationship to the seller or manufacturer is a critical factor in determining whether a buying agency exists.³⁶

²⁷ *New York Merchandise Co.*, 435 F.2d at 1318.

²⁸ *Jarvis Clark Co.*, 733 F.2d at 876.

²⁹ 28 U.S.C. § 2639(a)(1) (Supp. V. 1981).

³⁰ *Jarvis Clark Co.*, 733 F.2d at 881.

³¹ *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21 (Ct. Int'l Trade 1988), *aff'd*, 861 F.2d 261 (Fed. Cir. 1988); *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875 (Ct. Int'l Trade 1988).

³² *J.C. Penney Purchasing Corp. v. United States*, 451 F.2d 973, 983 (Cust. Ct. 1978).

³³ *Rosenthal-Netter, Inc.*, 679 F. Supp. at 23; *New Trends, Inc. v. United States*, 645 F. Supp. 957, 960 (Ct. Int'l Trade 1986).

³⁴ *Rosenthal-Netter, Inc.*, 679 F. Supp. at 23.

³⁵ *Id.*

³⁶ *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 879 (Ct. Int'l Trade 1988).

The criteria for determining whether the commissions paid were actually buying commissions are less certain. The problem is in the application of the amended § 402(b). Specifically, the valuation method of the Trade Agreements Act of 1979, the transaction value of imported merchandise, is the price actually paid or payable when the goods are sold for exportation to the United States.³⁷ The price actually paid or payable is determined by the total payment made, or to be made, for the imported merchandise by the buyer to, or for the benefit of, the seller.³⁸ Consequently, the determination of the dutiability of a commission depends on whether the commission inured to the benefit of the seller or was retained exclusively by the buying agent.³⁹ If any of the commissions were retained directly or indirectly by the seller, then the bona fide agency and buying commission are suspect.⁴⁰ However, standing alone, profits earned by an agent which may ultimately benefit the manufacturer do not warrant inclusion of commissions paid to the agent in dutiable cost as commissions paid to a buying agent.⁴¹

In determining the dutiability of commission fees, some courts have considered whether the expense is associated with selling or producing the merchandise rather than with some nondutiable ministerial function in procuring the goods.⁴² Thus, a commission paid by the purchaser to an agent for services rendered in procuring the merchandise, inspecting it, arranging for shipment and payment for account of the buyer, no part of which inures to the seller, is a buying commission.⁴³ In the final analysis, the bedrock upon which a determination of a bona fide buying commission is based is the establishment of the buying agency with respect to the subject transaction.⁴⁴

A typical case in which the Customs Service appraisal was held erroneous and the buying commissions nondutiable is *United States v. Knit Wits*.⁴⁵ In *Knit Wits*, the parties reduced the buying agency to writing. The buying agent took the importer to various manufac-

³⁷ 28 U.S.C. §§ 1401a(b)(1), 1401a(b)(4)(A) (1982).

³⁸ *Id.*

³⁹ *New Trends, Inc. v. United States*, 645 F. Supp. 957, 962 (Ct. Int'l Trade 1986); *United States v. Knit Wits*, 296 F. Supp. 949 (Cust. Ct. 1978).

⁴⁰ *United States v. Nelson Bead Co.*, 42 C.C.P.A. 175, 176 (1955).

⁴¹ *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 879 (Ct. Int'l Trade 1988).

⁴² *Id.* at 878.

⁴³ *United States v. Manhattan Novelty Corp.*, 63 Cust. Ct. 699, 702 (1969).

⁴⁴ *Id.*

⁴⁵ 296 F. Supp. 949 (Cust. Ct. 1978).

turers, served as interpreter, and prepared the contracts after the importer had negotiated for the merchandise. The parties' buying agents computed commissions as a percentage of the export price and included the commissions in the total invoiced export price by the manufacturers. The importer's invoice payments were made by letters of credit to the buying agent, who remitted the total amounts, less five percent commission, to the manufacturers. The court in *Knit Wits* held that the plaintiff importer successfully showed the existence of a bona fide buying agency and that the commissions paid to the buying agent did not inure to the benefit of the seller even though the buying commission was included in the export price by the manufacturer.⁴⁶ The court emphasized that the agent performed the usual duties of a buying agent and not those of an independent seller, that the importer never paid commissions to the manufacturers, and that there was no difficulty in determining the exact amount of the commissions.⁴⁷ Thus, where the importer establishes the agency relationship with the buying agent, the commissions are easily determined, and the commissions were never paid to the seller, the buying commissions are nondutiable.⁴⁸

A recent application involving the necessity of the buying agent's financial detachment from the seller is *Jay-Arr Slimwear Inc. v. United States*.⁴⁹ In that case, an importer challenged the inclusion of commissions paid to an agent who also owned the manufacturing company. The alleged buying agent secured a sufficient percentage of Haiti's export quota for buyer's goods, expedited the Haitian Customs process, and promised to minimize closings of the manufacturing plant. In holding that there was no bona fide buying agency and, therefore, no possibility of exclusion of the commissions from the dutiable cost of the imported merchandise, the court emphasized the fact that the evidence failed to prove conclusively that the commissions did not inure to the benefit of the seller (manufacturer).⁵⁰ Furthermore, the court did not find adequate proof of the agent's financial detachment from the seller, which meant that there was a possibility of the seller retaining some or all of the commissions

⁴⁶ *Id.*

⁴⁷ *Id.* at 954.

⁴⁸ *Id.*

⁴⁹ 681 F. Supp. 875 (Ct. Int'l Trade 1988).

⁵⁰ *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 880 (Ct. Int'l Trade 1988).

directly or indirectly.⁵¹ Thus, although profits earned by an agent which may ultimately benefit the manufacturer or seller do not alone warrant inclusion of commissions paid to the agent in dutiable cost, the buyer must show proof of the agent's financial detachment from the seller/manufacturer in reference to the commissions paid to the agent in order to show a bona fide buying agency and have commissions paid to the agent classified as nondutiable.⁵²

In amending the Tariff Act of 1930 and passing the Trade Agreements Act of 1979, Congress intended to simplify the United States law and add significantly more predictability regarding the value to be used for customs purposes.⁵³ Although the language of the statute defining transaction value⁵⁴ appeared to be unambiguous, application by the courts has shown that ambiguities exist regarding when and how a buying commission inures to the benefit of a seller.

ANALYSIS

In *Moss Mfg. Co. v. United States*, the court addressed the issue of whether monies which were disbursed by the buyer to the seller with directions to remit the monies to the buyer's agent who assisted in bringing about the sale were properly included in the transaction value for the purposes of Customs appraisal under 19 U.S.C. § 1401a.⁵⁵ The court held that although the buyer conclusively established its bona fide buying agency, the buyer did not show that none

⁵¹ *Id.* at 879. Similarly, in *New Trends, Inc. v. United States*, 645 F. Supp. 957, 962 (Ct. Int'l Trade 1986), the record did not show whether the commissions paid to alleged buyer's agent were shared with manufacturers or solely retained by the alleged buying agent. The court in *New Trends, Inc.* held that the plaintiff importer did not establish the alleged buying agent's financial detachment from the manufacturer, a condition necessary to establish a buying agency, and did not show the requisite condition that none of the commissions paid to the alleged buying agent inured to the benefit of the manufacturer.

⁵² *Jay-Arr Slimwear, Inc.*, 681 F. Supp. at 875.

⁵³ S. Rep. No. 249, 96th Cong., 1st Sess. 114, 119 reprinted in U.S. Code Cong. & Admin. News 381, 505.

⁵⁴ The Trade Agreements Act of 1979, § 201, 19 U.S.C. § 1401a(b)(1) (1982).

⁵⁵ At issue was Customs' interpretation of § 402(b). Customs contended that the monies disbursed to the seller for remittance to the buyer's agent were properly included in the transaction value because the disbursements were part of the total payment made to the seller. The buyer alleged that the monies it dispersed to the seller for later payment to the buying agent constituted a bona fide commission and were not for the benefit of the seller even though the buying commission was included in the total amount paid to the seller. *Moss Mfg. Co. v. United States*, 714 F. Supp. 1223, 1225 (Ct. Int'l Trade 1989).

of the commission inured to the benefit of the seller. Consequently, the indirect payment constituted a disbursement for the benefit of the seller within the meaning of 19 U.S.C. § 1401a(b) and was properly included as part of the dutiable transaction value.⁵⁶

Adopting a reasoning similar to that employed in *Knit Wits*,⁵⁷ the court determined that the buyer had met the burden of proving the existence of a bona fide principal-agent relationship with the buying agent.⁵⁸ In reaching its conclusion, the court examined all relevant factors: the right of the principal to control the agent's conduct; the transaction documents; whether the importer could have purchased directly from the manufacturers without employing the buying agent; whether the buying agent was operating an independent business primarily for his own benefit; and the existence of a buying agency agreement.⁵⁹ The court emphasized the buyer's complete control of the buying agent's conduct, the buyer's filing of a buying agency agreement with Customs, and the fact that the buying agent was an independent entity retained solely to source merchandise and negotiate prices and freight rates in the Far East.⁶⁰

However, as the court found in *Jay-Arr Slimwear, Inc.*,⁶¹ the court in *Moss Mfg. Co.* held that the buyer failed to show that no commission fees inured to the benefit of the seller.⁶² The court strictly interpreted and applied the Trade Agreement Act of 1979's definition of transaction value,⁶³ concluding that all payments made to the seller by the buyer for the benefit of the seller must be included in the transaction value for the purpose of valuation.⁶⁴ Accentuating the

⁵⁶ *Id.*

⁵⁷ In *United States v. Knit Wits*, 296 F. Supp. 949 (Cust. Ct. 1978), plaintiff importer successfully showed the existence of a bona fide buying agency and that the commissions paid to the buying agent did not inure to the benefit of the seller even though the buying commission was included in the export price by the manufacturers.

⁵⁸ *Moss Mfg. Co.*, 714 F. Supp. at 1229.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1226.

⁶¹ *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 880 (Ct. Int'l Trade 1988). In holding that there was no bona fide buying agency and, therefore, no possibility of exclusion of the commissions from the dutiable cost of the imported merchandise, the court in *Jay-Arr Slimwear, Inc.* emphasized the fact that the evidence did not conclusively prove that the commissions did not inure to the benefit of the seller.

⁶² *Moss Mfg. Co.*, 714 F. Supp. at 1229.

⁶³ The Trade Agreements Act of 1979, § 201, 19 U.S.C. § 1401a(b)(1) (1982).

⁶⁴ *Moss Mfg. Co.*, 714 F. Supp. at 1227.

fact that the total amount on the commercial invoice, including the commissions, was paid to the seller, the court held that the indirect payment of buying commissions benefitted the seller and therefore was properly included within the price paid for purposes of valuation.⁶⁵ The court also stated that the benefit of the disbursement to the buyer did not detract from the benefit to the seller.⁶⁶ Thus, even though the seller remitted to the buying agent all monies that the buyer and seller delegated to the payment of buying agent commissions and the transaction amounted to an indirect payment from the buyer to his buying agent, the court ruled that the seller received some benefit from such transfer of funds.⁶⁷

Although not stated expressly, the court apparently placed much emphasis on the transaction papers and the provisions of the buying agency agreement. The commercial invoice did not adhere to guidelines set forth in the buying agency agreement which required that buying commissions be listed separately on the commercial and Customs invoices. The commercial invoice listed quantity, price, and total amount of the purchase price, but failed to specify any breakdown for buying commission fees.⁶⁸ Similarly, buyer paid for the fans by opening a letter of credit in favor of the seller which required that seller pay buying agent \$1.50 per fan, but the letter of credit did not indicate the nature of the \$1.50 payment from seller to buying agent. Although a receipt acknowledged seller's payment to buying agent, the receipt did not specify the source of the funds.⁶⁹ The only formal documentation specifying the seller's payment of \$1.50 per fan as a buying commission was a pro forma invoice prepared by buyer, also submitted to Customs as part of the entry documentation. This invoice indicated the total amount paid to seller, with a breakdown of \$1.50 per fan denominated as brokerage fees required to be remitted to buying agent.⁷⁰ Despite the fact that the pro forma invoice showed that seller had transferred all buying commission funds received from buyer to buying agent, the court held that some benefit inured to the seller. In reaching its decision, the court neither determined nor specified what the benefit was and how it inured to the seller. In effect, the court ruled that the buyer failed to prove that no benefit

⁶⁵ *Id.* at 1229.

⁶⁶ *Id.* at 1228.

⁶⁷ *Id.* at 1229.

⁶⁸ *Id.* at 1227.

⁶⁹ *Id.*

⁷⁰ *Id.*

inured to the seller; therefore, the seller received some benefit.⁷¹

While affirming the existing rule that buying commissions paid directly to the agent are nondutiable,⁷² the court's holding in *Moss Mfg. Co.* has created a presumption that, when indirect payments are made, some benefit is retained by the seller, and the buying agent does not have the requisite financial detachment from the seller to establish a bona fide buying agency. Consequently, the importer's burden of proving that no benefit inured to the seller is practically insurmountable. Further, the court need not show in its analysis what benefit inured to the seller. Thus, to avoid a higher duty, a buyer should not include the buying agent's commissions in the total amount paid to seller, regardless of any planned further disbursement of all such proceeds from seller to buying agent.

Similarly, the court's holding that indirect buying commission payments are included in dutiable transaction value indicates that the court considers the form of the transaction more indicative of the underlying purpose of the buying agent's commissions than the substance of the actual proceedings. In reaching its decision, the court placed great emphasis on the fact that the buying commissions were not paid directly to the buying agent but were included in the buyer's total payment to the seller. Conversely, the court gave little consideration to the fact that, pursuant to the pro forma invoice, the seller did not retain any of the buying commission funds but remitted all such funds to buying agent. Thus, the manner in which buying commissions were made to the buying agent was considered more important in determining whether the seller retained some benefit than an economic analysis of the ultimate result of such payment. Consequently, where the form does not accurately reflect the substance of the transaction, the court's rationale may lead to an inaccurate result which frustrates the intent of the parties.

When ruling that the buyer has not shown that no benefit inured to the seller and, therefore, the seller received some benefit within the meaning of 19 U.S.C. § 1401a(b)(4), the courts generally have not indicated what they perceive to be the actual benefit received.⁷³ This practice has not provided potential buyers and sellers with the

⁷¹ *Id.* at 1229.

⁷² *Rosenthal Netter Inc. v. United States*, 679 F. Supp. 21 (Ct. Int'l Trade 1988), *aff'd*, 861 F.2d 261 (Fed. Cir. 1988).

⁷³ *Moss Mfg. Co.*, 714 F. Supp. at 1229; *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 882 (Ct. Int'l Trade 1988).

information necessary to conduct their transactions without fear that bona fide buying commissions might be deemed dutiable due to some oversight in their transaction papers or conduct.

Consequently, judicial requirements should be changed to lend more predictability to applications of 19 U.S.C. § 1401a(b). Since the Court of International Trade routinely has considered form over substance when ruling on the dutiability of buying commissions, and apparently has ruled solely upon an inquiry of form, the stability of the customs laws would better be served by the requirement that the court analyze the substance of the transaction. Specifically, once the buyer has established a bona fide buying agency, the United States Court of Appeals should require the Court of International Trade, when ruling that the seller retained some benefit from the buying commissions because the buyer failed to prove that no benefit inured to the seller, to delineate how the seller benefitted and to define such benefit. Future importers should know the rationale behind the determination that some benefit has inured to the seller. An analysis of the substance of the transactions will enable future buyers and sellers to conduct their transaction in a form which will more accurately reflect the substance of their proceedings and result in only the proper payments being determined dutiable.

CONCLUSION

Although the court in *Moss Mfg. Co.* reached the proper conclusion based on *stare decisis* and the buyer's inability to prove that no benefit inured to the seller, the failure of the court to define the seller's benefit perpetuates a trend in court rulings which does not alleviate ambiguities regarding when and how a buying commission inures to the benefit of a seller. Since the passage of the Trade Agreements Act of 1979, the courts have had ample opportunity to interpret and apply the present valuation method of transaction value and fulfill Congress' intent to add to the predictability of Customs appraisals. Unfortunately, the courts have affirmed Custom's inclusion of buying commissions in the transaction value without indicating what the benefit was and how the benefit inured to the seller. This method of ruling fulfills neither Congressional intent nor one of the fundamental purposes of the court system—to apply the law in a manner which will explain the existing law and define the limitations of liability. Consequently, when the court rules that a bona fide buying agency exists and the seller has received some benefit from the payment of buying commissions, the court should be required to

define the benefit and state how the seller was benefitted. Only when the courts are required to fulfill this duty will the buyers, sellers, and buying agents be adequately informed to conduct their transactions and will Congress' intent to add to the predictability of the Customs valuation procedure be realized.

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