TC04201

Appeal number: TC/2013/09386

CUSTOMS DUTY – Appellant appointed distributor of DKNY branded goods by related group company based in Malaysia – buying commission not shown separately on customs declaration – meaning of "buying commission" – **Overland** ***considered – whether buying commission paid to Malaysian company – whether*** **Secret Hotels2** ***a binding authority in the context of customs duties – whether*** **Vehicle Control Services** ***relevant – whether customs duty paid should be refunded based on amounts said to be buying commission and/or corporate support and global marketing fees – whether buying agreement and corporate support/marketing agreement were shams – appeal dismissed.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLUB 21 (UK) LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
MR DAVID E WILLIAMS CTA

Sitting in public at the Tribunal Centre, Bedford Square, London on 10 and 11 November 2014

Mr Timothy Brown of Counsel, instructed by The Customs People, for the Appellant

Mr John Brinsmead-Stockham of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. Club 21 (UK) Limited ("the company") imports goods bearing the DKNY trademark. The company was formerly known as Como Distributions Limited ("Como").

2. The company has appealed against a decision by HM Revenue & Customs ("HMRC") to refuse its application for a refund of customs duty ("the Claim") under Article 236 of the Community Customs Code ("CCC").

3. The company's case is that it overpaid customs duty of £31,846.37, in respect of 179 customs entries relating to the importation of goods ("the relevant goods") in the period from 29 November 2007 to 29 May 2008 ("the relevant period"). Its case is that the value on which duty has been charged should be adjusted to remove (a) buying commission and (b) a further amount for "corporate support and global marketing."

4. HMRC's case is that customs duty was correctly charged on the invoiced value of the goods, and no adjustment falls to be made.

5. We dismissed the company's appeal because we decided that:

(1) no buying commission had been paid by the company and thus the invoiced value on which customs duty had been paid should not be adjusted; and

(2) there was no legal or factual basis on which sums identified as being for corporate support and global marketing should be removed from the invoiced value.

6. Although the sums at issue in this appeal are relatively small, we were informed at the beginning of the hearing that a number of other cases engage similar arguments.

The evidence

7. The Tribunal was provided with a bundle of documents ("the Bundle"), which included:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) an "organisation structure table" for the company and certain related companies;

(3) a contract entitled "The Product Manufacturing, Distribution and Boutique Development Agreement" between Donna Karan Studio LLC ("DKS") and Club 21 International Distribution Ltd ("CID"), dated January 1 2007 ("the Licence");

(4) a document entitled "Buying Agency and Sourcing Service Agreement" between the company and CID, dated 1 October 2009 ("the BASS Agreement")

and a document entitled "Marketing & Corporate Support Services Agreement" also between the company and CID, and also dated 1 October 2009 ("the MCSS Agreement"), together "the Agreements";

(5) a schedule for Spring/Fall 2010 setting out the calculation of the "sourcing and buying agency fees" for 2010 ("the 2010 Schedule") and a similar schedule for 2011 ("the 2011 Schedule"), together "the Schedules";

(6) a document headed "Product Pricing Structure" for Spring 2010 ("PPS Schedule 1");

(7) a schedule for corporate/global marketing costs, undated but which we were told relates to 2010 ("the Marketing Costs Schedule");

(8) invoices for corporate support and global marketing for the quarters beginning October 2009, January 2010 and April 2010, each for $303,250, issued by CID to the company;

(9) an extract from the company's draft accounts for 2010; and

(10) an audit trail for one of the consignments in issue, showing purchase orders, invoices and other documents.

8. It was not in dispute that there was, at the relevant time and currently, a distribution agreement between the company and CID. No copy of that agreement was in the Bundle. We considered whether to adjourn and issue a direction that it be provided, but neither party wanted this. Mr Brown said that the company was not relying on that agreement, and Mr Brinsmead-Stockham that it was unnecessary to HMRC's case.

9. We took into account the fact that Clause 7.1(c) of the Licence specifies that "all Distribution Agreements and the obligations of the distributors thereunder shall be consistent in all material respects with the terms of this agreement [i.e., the Licence]." As we had been provided with the Licence, we decided, in the light of the overriding objective at Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), that no adjournment or direction was required.

10. Mrs Bharti Kara, currently the company's Group Financial Controller, provided a witness statement, was cross-examined by Mr Brinsmead-Stockham and answered questions from the Tribunal. Although some of her evidence conflicted with key documentation, she explained her understanding of the company's operations in a straightforward way.

The facts not in dispute

11. We now set out certain background information about the company and CID, as well as key clauses from the Licence and the Agreements. None of these facts are in dispute.

The company and CID

12. The company is resident in the UK and CID is resident in Labuan, Malaysia. Mrs Kara said that the two companies were related but that the group structure was "very complex" and that the company's immediate parent is Adobe Holdings Limited, a company resident in Gibraltar.

13. CID is a subsidiary of Club 21 Pte Limited, a company resident in Singapore. CID has three directors and no employees. Its operations and activities are outsourced to other companies, including:

(1) Club 21 Enterprises (S) Pte, a related company of both CID and the company, which identifies designs for each season's products;

(2) Club 21 Enterprises (HK) Ltd, a Hong Kong company and a wholly owned subsidiary of CID. Its role is to identify manufacturers who can produce the products;

(3) Club 21 (HK) Ltd, another group company related in some way to CID and the company, which arranges delivery and shipment of the products once manufactured.

The Licence

14. Gabrielle Studio Inc ("Gabrielle"), a New York corporation, has granted DKS the exclusive licence to use the DKNY JEANS trademark ("the Licensed Mark") throughout the world. Under that licence DKS can use the Licensed Mark and may also license others to use it. Another company referred to in the Licence is Donna Karen Company LLC ("DKCo").

15. On 1 January 2007, DKS (the Licensor) and CID (the Licensee) signed the Licence, under which DKS granted CID:

> "the non-transferable exclusive right and license (subject to [certain existing rights] and otherwise as hereinafter provided) to use the Licensed Mark in the Territory solely in connection with the manufacture, marketing, distribution and sale of seasonal Products approved by the Licensor ('Articles')."

16. Schedule B to the Licence says that "the Territory" is Asia, Europe and the Middle East. The main body of the text specifies some exclusions and limitations to the territorial scope, but none is relevant for the purposes of this decision.

17. Clause 1.2 requires that "All Articles shall bear the Licensed Mark and, except as required by law, no Articles shall bear any mark or designation other than the Licensed Mark." The Licence also allows the sale of "other products bearing the Licensed Mark", which are defined as "Other JEANS products"; these are to be purchased from DKCo or from certain "Product Licensees."

18. The Licence defines "Business" as "the business to be conducted by Licensee hereunder" and at Clause 6.2(a) provides that "the sole business of Licensee shall be the Business."

19. Clause 7.1(a) says "the Licensee may engage distributors for Articles" and those so engaged are "Distributors" as defined. CID is only allowed to have a single distributor for a portion of the Territory at any one time. The Clause also states that "the term 'Distributor' as used in this Agreement, includes Como [i.e., the company] and sub-distributors engaged by Como." Distributors, such as the company, which are related companies of CID, are sometimes referred to in the Licence as "Affiliated Distributors."

20. Clause 7.1(b) says that "Como is hereby approved as a Distributor for the European Countries and the Middle Eastern Countries for so long as it remains an affiliate of Licensee." The Clause continues:

> "No Distributor (including Como) may be engaged unless the Distribution Agreement has been fully executed and delivered to, and approved by, Licensor, and the Licensor's consent to the engagement of the Distributor on the terms set forth in the Distribution Agreement has been executed and delivered to the Licensee, and, where applicable, Como (such approval and consent not to be unreasonably withheld)."

21. Clause 7.1(c) specifies that "all Distribution Agreements and the obligations of the distributors thereunder shall be consistent in all material respects with the terms of this agreement." The Clause continues:

> "each Distribution Agreement shall require the Distributor to comply in its activities as a distributor with, and be bound by, all of the provisions of the Agreement applicable to Licensee. Further, Licensee shall work together with each of the Distributors to ensure that these Articles are advertised, marketed, promoted, distributed and sold in a manner that is co-ordinated and consistent with the manner in which the same articles are advertised, marketed, promoted, distributed and sold by Licensee. Also, Licensee shall ensure that the Distributors act in accordance with the terms and conditions of this Agreement."

22. CID is required to certify, on an annual basis, that each Distributor is in compliance with the Licence. Clause 7.1(g) makes CID liable for "any act or omission by a Distributor that would be a breach or default of this Agreement if done by Licensee" and such breach or default may entitle DKS to terminate CID's Licence. Clause 6.4(a) states that each Affiliated Distributor "shall engage a general manager for the business to be conducted by each…Distributor." If DKS "becomes dissatisfied with the performance of any such general manager" it will initially discuss this with CID and can ultimately require that the general manager be replaced.

23. As well as appointing distributors, CID also has the right to operate through "Boutiques", whether via related companies or otherwise (Clause 1.7), but where there is a distributor, that company is normally also the Boutique Operator (Clause 1.7(iv)). The "sole business" of the Boutiques is to sell Articles and Other JEANS products to consumers (Clause 1.3(a)(ii)).

24. The Licence also gives CID the right to operate "Outlets" through which end of season Articles and Other JEANS products are sold (Clauses 1.1(b) and 1.3(b)). Clause 4.1(c) states that, subject to DKS's approval:

> "the Licensee, either itself or through Como…may develop and operate up to an aggregate of six Outlets during the initial term of this Agreement."

25. Clause 3.1 requires CID to "produce and sell" two "seasonal collections" of Articles in 2007, and in subsequent years to "produce and sell" four seasonal collections. Clause 3.2(b) states that CID:

> "shall be responsible for designing and developing the seasonal collections of Articles, making all prototype and other samples and overseeing all aspects of the production of Articles and the Licensee shall bear all costs thereof."

26. CID must obtain approval for the prototypes from DKS, and once approval has been given, CID "shall not modify such Article unless requested to do so by Licensor." Once approval has been given for the "entire seasonal collection" CID "shall not modify any Article in such collection without the prior approval of Licensor" (Clause 3.3).

27. Clause 3.4 states that:

> "After Licensor finally approves an entire seasonal collection of Articles…Licensee shall diligently proceed with the completion of the development of and with the commercial production of such collection and shall show, offer for sale, sell and ship such collection in a timely manner in accordance with industry standards."

28. CID is allowed, by Clause 3.8, to appoint Contractors to produce the Articles, but "shall maintain an active social compliance program to monitor the Contractors" and can conduct its own factory audits to "determine whether the Contractors have satisfied the Licensor's then current standards." The Articles must be "at least equal in quality to the prototype samples approved by Licensee and shall maintain the integrity of the design/aesthetics of the approved samples" (Clause 5.1(a)).

29. By Clause 8.3, DKS has "complete control over all aspects of the design and development of all A&M [Advertising and Marketing] Activities and Marketing Material for the Business," all of which "shall be created and produced by Licensor's corporate marketing department or a third party advertising services provider designated by Licensor."

30. By Clause 8.1, CID is required to:

> "make expenditures for advertising activities…and for marketing activities…during each Annual Period in amounts appropriate to drive the Business and maximise the sales of Articles and consistent with the approved Business and Marketing Plan commencing with such Annual Period."

31. Clause 8.3(a)(i) requires CID to "ensure that the Articles and the Boutiques are supported by Advertising and Marketing activities…and that appropriate A&M Activities are conducted for Articles and the Boutiques throughout each Country…" A "Minimum Marketing Obligation" and a "Minimum Advertising Obligation" are imposed on CID by Clause 8.1 and Schedule J. For each accounting period, these are expressed as defined percentages of the net retail and wholesale sales for the period but subject in each case to specified minimum monetary amounts.

32. Clauses 5.2(b) and 8.3(a)(iii) provide that all packaging materials, marketing materials and advertising materials require the prior approval of DKS, which must also approve the medium or publication in which any marketing material is placed, as well as the timing of that placement (Clause 5.2(c)). CID must obtain DKS's approval for its seasonal media and marketing plan, and "no aspects" of the plan can be implemented until "finally approved" by DKS and CID (Clause 8.3(a)(iv)).

33. CID is required "regularly to undertake PR activities relating to Articles, the Boutiques and the Business" which "shall be undertaken in consultation with DKCo's public relations staff or such outside agency as Licensor may designate (the 'PR Staff')." CID "shall not engage in any media contacts with respect to the Licensed Mark, any Articles, any of the Boutiques or Outlets or the Business without first discussing the anticipated subject matter of the media contact and Licensor's policies with respect to those matters with the PR Staff." It is the PR staff who develop "the creative components" of the distributors' public relations events such as "trunk shows, fashion shows, special events and personal appearances" (Clause 8.4).

34. Clause 1.6 reads "Licensee shall set its wholesale prices and suggested retail prices at its sole discretion."

35. CID is required to pay DKS a royalty based on the "Net Sales," defined as "the invoiced or shipped (whichever is the earlier) amount for the Articles sold by the Licensee or any of the affiliates, including the Affiliated Distributors" but "calculated only once with respect to each individual Article sold" and is net of "returns for damaged or defective products" (Clause 10.1 and Sch M).

The BASS Agreement

36. The BASS Agreement is dated 1 October 2009 and is between the company ("the Company") and CID ("the Agent"). The Recital states that:

> "(a) The Company is engaged in the retail boutique operations and wholesale distribution of products bearing the licensed mark DKNY Jeans (the Articles) in Europe/United Kingdom/Middle East countries.
>
> (b) subject to the terms of this Agreement, the Company desires to formalise in writing the existing appointment of the Agent as its buying agent to arrange for and oversee various aspects of the manufacture of the Articles with an international sourcing base of third party Factories including Factories to be located in, but not limited to, Asia and the Agent and [sic] desires to obtain and continue such appointment."

37. Clause 1.1 reads:

"**Agency**

Subject to and pursuant to the terms in this Agreement the Company hereby appoints the Agent, and the Agent hereby accepts such appointment, to act as a buying agent for the Company."

38. Clause 3 sets out CID's "Duties" as including:

(1) Providing office space, office equipment and furniture to accommodate merchandising employees "who will work exclusively on matters pertaining to the Articles."

(2) Providing shared use of meeting rooms, equipment and staff for administration, office maintenance, shipping, quality control and "any other services required by the Company."

(3) Researching and recommending to the company "suitable fabric and accessories" and assisting in sourcing "promotional items" as requested by the company from time to time.

(4) Assisting the company with researching and locating suitable manufacturing Facilities ("the Factories"). The Factories are "subsequently to be approved" by DKS based on that company's guidelines.

(5) Carrying out regular inspections of the Factories on behalf of the company "to ensure compliance against the Company's and DKS's social compliance standard"; conducting "quality control inspection during production" and assisting "in maintenance of inventory control of goods issued to Factories, including fabric, trimmings and labels."

(6) Making the necessary arrangements for the Factories to enter into third party manufacturing agreements with CID which are "in form and substance acceptable to the Company."

(7) Assisting the company in placing orders for the purchase and administration of the fabric and accessories to be used by the Factories for the manufacture of the Articles; placing orders "as directed by the Company" among the various Factories and countersigning "orders and contracts in connection therewith as authorised by the Company."

(8) Providing the company with prototypes and production samples on a timely basis and to "sign off at the end of [production] to certify that the Articles shall be at least equal in quality to the prototype samples approved by DKS and shall maintain the integrity of the design/aesthetics of the samples approved by DKS."

(9) Buying the Articles on behalf of the company:

"but in its sole capacity as the company's buying agent. As such the Agent will receive FOB invoices for the Articles from the manufacturer and will raise corresponding CIF invoices to the Agent [sic] which will match the manufacturer's FOB price but with the addition, as appropriate, of insurance and freight."

(10) Arranging for shipment or routing of all Articles.

(11) Assisting the company "in co-ordinating with Factories on all financial business aspects including payment, establishing letters of credit etc with the Factories" and that in providing this assistance, CID will operate "solely as a representative and liaise to the best of their ability as an agent and to protect the best interest for and on behalf of the company."

39. Clause 4 is headed "Compensation," and Clause 4.1(a) says:

> "As compensation for all the services rendered by the Agent pursuant to this Agreement, the Agent shall receive…14% of the FOB factory price in US dollars of the Articles shipped for or on behalf of the Company by the Factories arranged by the Agent."

40. Clause 4.1(b) provides that the compensation percentage "shall be reviewed and may be adjusted on a seasonal basis" and shall be mutually agreed in advance of the first shipping date for each seasonal collection.

41. Clause 5 is headed "Expenses" and reads:

> "5.1 The Agent will not seek to reimburse from the Company expenses incurred to fulfil its duties which are required by Clause 3 of this Agreement, such as:
>
> (a) office rental…
>
> (f) All travel expenses incurred by the Agent in travel to any country…for the avoidance of doubt, the Agent shall seek the Company's approval on the reasonable travel expenses…for each trip other than Hong Kong, China and Macau prior to trip commencement, notwithstanding trips specifically requested by the Company. Determination of the reasonableness of all expenses shall be within the sole discretion of the Company..
>
> 5.2 Any other expenses incurred by the Agent in furtherance of the Agreement shall be reimbursed by the Company only if such expenses submitted and approved by the Company before they were incurred by the Agent."

42. Clause 6 is an entire agreement clause, stating that:

> "This Agreement constitutes the complete understanding between the parties with respect to the subject matter hereof, supersedes all prior oral and written understanding and agreements relating thereto…no party is acting on reliance [sic] upon any representation of guaranteed of the other, aside from those explicitly provided for in the Agreement."

43. Clause 7 is headed "Assignment and Transferability" and states that the agreement is personal to the parties, and that "no party hereto may be assigned [sic] its rights or delegate its obligations to any third party without the prior written consent of the other party", save that such assignment or delegation may be made to a company which is "more than 51% owned by the intermediate/ultimate holding company of either parties."

44. Clause 10 is headed "Miscellaneous" and contains subclauses about the governing jurisdiction (Singapore), arbitration, variation and severability. It also states that:

> "nothing in this Agreement shall constitute a partnership or establish a relationship of principal and agent or any other relationship of a similar nature between or among any of the Parties."

45. The Agreement is signed by Mr Bernard Heng for the company, and Mr Charles Ng for CID.

The MCSS Agreement

46. The MCSS Agreement has the same date as the BASS Agreement and is also between the company and CID, described in this agreement as "the Service Provider." The Recital to the agreement says that:

> "the Company wishes to formalise in writing the existing appointment of the Service Provider for the performance of certain marketing, merchandising, and administrative tasks and other services relating to the DKNY JEANS retail and wholesale distribution business in Europe. United Kingdom and Middle East ('the DKNY JEANS Business') as more particularly described in 1.1 hereto ('the Services') to enable it to carry on its business at the highest levels of efficiency and competitiveness."

47. Clause 2.1 requires CID to provide the Company with "assistance, advice and guidance" on the "Services" which are set out in detail in Clause 2.2 under the following headings: marketing, PR and advertising; merchandising; projects and visual merchandising; shipping and distribution centre services; IT support functions; brand development and commercial affairs and "others" – being "any other initiative and projects that will benefit the company's DKNY JEANS Business."

48. Those services include:

(1) Establishing and formulating global development strategy in alignment with the brand development strategy of Donna Karen Inc ("DKI"), and thereby seeking the necessary DKI support of the company's plans to promote the growth of the DKNY JEANS Business. DKI is described in the MCSS Agreement as "the DKNY JEANS brand principal."

(2) Establishing and executing global marketing strategies and campaigns for the DKNY JEANS trademark in alignment with the DKI's brand development strategy.

(3) Providing consultation in relation to the establishment of annual marketing plans in accordance with DKI's global brand directives, to be set out and agreed between the parties for approval by DKI.

(4) Liaising with DKI to maximise exposure ensuing from the DKNY JEANS global institutional image advertising campaigns for each seasonal collection (including the creation, production and placements of consumer media/print advertising).

(5) Co-ordination and liaison with design and product development divisions to ensure alignment with established merchandising line plans for each Seasonal Collection.

(6) Providing central inventory resource allocation to minimise inventory stock-out situations.

(7) Co-ordinating distribution of merchandise from point-of-purchase to appointed destination, including preparation of shipping documents

(8) Providing warehousing facilities for "back-up" inventories and co-ordination of pick/pack services for fulfilment of re-order requests by the company.

(9) Providing an online wholesale ordering system for order inputs by the company's customers to facilitate subsequent order fulfilment by the company;

(10) IT development support.

49. Clause 3 is headed "Cost and Fees" and states that, for the Services, the company will pay CID the sum of US$277,000 p.a. "based on the estimated global advertising and marketing costs allocated on a shared basis with other international markets" and US$936,000 p.a. "based on CID's estimated operating costs to provide the Services." The Clause provides for the Fees to be reviewed on an annual basis "based on the actual costs incurred." By Clause 3.2 the Fees are to be invoiced in advance on a quarterly basis.

50. Clause 4.1 says that:

> "…notwithstanding anything contained herein to the contrary, it is hereby expressly agreed that:
>
> (i) …
>
> (ii) the parties expressly acknowledge and agree that the Service Provider shall act only as an independent contractor in providing the Services to the company. The Service Provider shall not be entitled to hold itself out as an agent or representative of the company."

51. The document includes the same entire agreement clause and assignment clause as in the BASS Agreement, and it is signed by the same two individuals.

How the company obtained the relevant goods

52. Mrs Kara explained the process by which the company obtains stocks of goods for each of two sales seasons per year, spring/summer and autumn/winter. Unless otherwise stated, the following facts are taken from her evidence and are not in dispute. We consider the rest of her evidence later in this decision.

53. Well in advance of each season, Club 21 Enterprises (S) Pte, or other design companies, presents possible designs to the company. The company discusses these possible designs, and may suggest changes.

54. Once the designs have been agreed, the company informs CID. CID asks Club 21 (Enterprises) HK Ltd (the sourcing company) to identify possible manufacturers for the goods. Club 21 (Enterprises) HK Ltd then provides the company and Club 21 Pte (CID's parent company) with details of a number of possible manufacturers. The two companies' likely sales of particular goods are considered together, in order to obtain a greater volume discount from the manufacturers. The extent to which the company has the right to select the manufacturer is disputed and we return to it later in our decision.

55. Once selected, CID appoints the manufacturers who will produce the goods. Mrs Kara said that the contract is between the manufacturer and CID because "CID holds the worldwide manufacturing rights and have to ensure that the conditions of their agreement with DKNY is strictly adhered to."

56. The company decides how many of which goods to purchase, and enters the amounts required on a system which goes by the acronym WOC, operated by Club 21 (HK), which deals with logistics and distribution. The WOC system analyses the order and selects an appropriate supplier. After a number of individual orders have been entered onto WOC, they are formalised into a single purchase order from the company to CID.

57. The purchase order is issued by CID to whichever manufacturer has been selected. It states that the manufacturing company is the vendor of the goods and the company the consignee.

58. Club 21 Enterprises (HK) then liaises with the manufacturer about delivery dates, and once the goods are ready, Club 21 HK arranges for their despatch and delivery to the company.

59. Mrs Kara said that the goods are insured by CID until they are delivered to a bonded warehouse either in the UK or the Netherlands, where they are held for the account of the company. The insurance cost was not separately recharged to the company but borne by CID and formed part of the overall "global price."

60. The manufacturer invoices CID for the FoB cost of the goods and CID pays the manufacturer. CID invoices the company. For the relevant period, the invoice shows a "global price" which is significantly higher than the FoB price paid by CID. We discuss the quantum of this increase at §228.

61. After the Agreements were signed, the procedure changed. CID issued invoices for goods shipped based on the FoB price plus a mark-up. In addition, it issued:

(1) further invoices for amounts identified as "buying agency and sourcing fees", which the company says are "buying commission" within the meaning of the relevant provisions of the CCC, as discussed below. We were told that these invoices were issued on a number of occasions during each year, based on groups of invoices. This was unchallenged and we accept it, although no examples were provided to the Tribunal; and

(2) quarterly invoices for "a corporate services fee" and "shared marketing expense," which the company submits should also be excluded from the amount on which duty is charged. Copies of invoices for the quarters beginning October 2009, January 2010 and April 2010, each for $303,250, were in the Bundle. Each invoice represents one-quarter of the total corporate support and global marketing fees of $1,213,000 set out at Clause 3 of the MCSS Agreement.

62. However, at the time the relevant goods were imported, the "buying commission" and "corporate support and global marketing" amounts were not invoiced separately. The company paid import duty on the amount on the invoice from CID, including the "buying commission" and the amount identified as being for "corporate support and global marketing."

The application for repayment

63. On 7 October 2010 the company submitted an application for repayment to HMRC. This was on the basis that "buying commission" and "corporate support and global marketing" had been mistakenly included within the customs value of the relevant goods and that import duty had therefore been incorrectly paid on this amount.

64. The letter from The Customs People submitted with the Claim states that the quantum was arrived at as follows:

(1) The company has been informed that it pays an uplift of 68% on the FoB value "to incorporate non-specific product costs," so the FoB amount was calculated by dividing the invoiced amount by 1.68.

(2) Buying commission was 14% of that FoB value.

(3) Although corporate support and global marketing comprises "fixed costs per annum" which are "not product specific and not forming part of the actual price paid or payable for the imported goods, until October 2009 they were collected by way of prorata of the FoB value." The percentage "varies by season" but for the relevant period was 12.6% of the FoB cost.

(4) The dutiable amount has therefore been reduced by (a) 14% for buying commission and (b) 12.6% for corporate support and global marketing, and the duty recalculated on that lower figure.

(5) The Claim is the difference between the duty on the invoiced value and the duty on the new lower value.

65. On 24 February 2011, Officer Manton asked *inter alia* for "evidence to support the existence of a buying agency agreement prior to date the written agreement [was] entered into" and gave examples of the sort of material which would be helpful.

66. On 27 July 2012, he wrote to The Customs People advising that he would be recommending that the company's repayment claim be rejected. He later followed this up with his reasons. Correspondence ensued. On 24 May 2014 Mrs Jackie Smith of HMRC said that she intended to refuse the claim, giving her preliminary reasons

and ended by saying "if you have any further evidence or arguments that could change this decision, then please send them to me within 30 days…"

67. On 31 July 2013, HMRC issued a formal decision refusing the Claim. On 27 August 2013, the company asked for a review. However, on 8 November 2013, HMRC informed the company that as they had not carried out the review within the statutory time limit, the decision of 31 July 2013 was deemed upheld. The company appealed to the Tribunal on 6 December 2013.

Legislation, WCO explanatory notes/commentary and relevant case law

The Community Customs Code, jurisdiction and foreign law

68. HMRC's decision, against which the company has appealed, was made under Article 236 of the CCC. The Claim itself concerns Chapter 3 of Title II of the CCC, which determines "the customs value for the purposes of applying the Customs Tariff of the European Communities." The CCC was implemented by EC regulation and is therefore directly applicable in the United Kingdom. The relevant provisions are set out in full as Appendix 1 to this decision.

69. Finance Act 1994, section 16(5) gives the Tribunal a full appellate jurisdiction in this appeal.

70. Two of the contracts in issue, the BASS and MCSS Agreements, were both "governed by and constituted in accordance with the laws of Singapore" (see Clauses 10.4 and 9.4 respectively). The Licence is governed by the law of New York (Clause 26.9). In the absence of any evidence to the contrary, we have made the assumption that the law of contract in Singapore and the State of New York were both the same as in England and Wales.

The Valuation Agreement and the WCO

71. Articles 32 and 33 of the CCC are based on Article 8 of the World Trade Organisation ("WTO") Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade ("the Valuation Agreement").

72. The preamble to the Valuation Agreement includes statements that it is made "recognising the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values" and "recognising that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued."

73. The World Customs Organisation ("WCO") provides Explanatory Notes and Commentary on the Valuation Agreement. Both parties accepted that, although not legally binding, these formed "an important aid to the interpretation" of Articles 32 and 33, citing *Umbro International v HMRC* [2009] STC 1345 ("*Umbro*"). That case considered whether the appellant had paid buying commission to a related company in China. Proudman J said at [21] that

> "The World Customs Organisation has provided explanatory notes to, and commentary on, Art 8 of the WTO Agreement…While not legally binding, I find that they do however constitute an important aid to

> interpretation: see *BVBA Van Landeghem v Belgische Staat* [2007] ECR I-10661["*BVBA*"], para 25 of the judgment."

74. We note that this passage relies on *BVBA*, a case which considers the WCO's Explanatory Notes on the combined nomenclature and the harmonised system for classifying customs goods, rather than those on the Valuation Agreement.

75. *BVBA* reflects the consistent position of the CJEU, that, while not binding, the WCO Explanatory Notes and Commentary are important aids to the interpretation of the nomenclature provisions: see also *BAS Trucks* [2007] ECR I-311 Case C-400/05 at [29] and *Kawasaki Motors* [2006] C-15/05 at [36] as well as *BVBA*.

76. There is no similar weight of authority in relation to the WCO Explanatory Notes and Commentary on the Valuation Agreement. However, at [22]-[25] of *Hauptzollamt Karlsruhe v Gebrüder Hepp GmbH & Co* Case C-299/90 ("*Hepp*"), which was not cited to us, Advocate General Mischo said that his opinion in that case was supported by Explanatory Note 2.1 which he thought "should carry a lot of weight" in the context of the WCO Explanatory Notes and Commentary on buying commission. He went on to explain why:

> "The Technical Committee was set up by Article 18 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, signed at Geneva on 12 April 1979 and approved by the Decision of the Council of the European Communities of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (Official Journal 1980 L 71, p. 1). The Technical Committee on Customs Valuation is placed under the auspices of the Customs Cooperation Council and includes representatives of all the countries which are parties to the abovementioned Geneva Agreement. Pursuant to Annex II to that agreement the Technical Committee was established 'with a view, at the technical level, towards uniformity in interpretation and application' of the agreement. Its opinions, which may take various forms including explanatory notes, are adopted by a majority of at least two thirds of the members present. Even if the opinions are only of an advisory nature, nevertheless they represent the opinion of the experts of the majority of countries engaged in world trade. If the Community were to adopt an interpretation contrary to such an opinion, it would risk creating quite considerable problems and the Community should do so only for very serious reasons."

77. On the basis of that analysis, together with Proudman J's reliance on *BVBA* in *Umbro,* we have taken it that the same approach should be taken to the WCO Explanatory Notes and Commentary on the Valuation Agreement as to the Explanatory Notes and Commentary on the nomenclature provisions, namely that while not binding, they are important interpretative aids. We have set out relevant extracts at Appendix 2 to this decision.

The law on "the customs value" generally

78. The starting point is Article 29(1) of the CCC, which says:

> "The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33."

79. The phrase "the price actually paid or payable" is defined at Article 29(3)(a) as:

> "the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller…"

80. Article 29(2) deals with imports from related parties. These only apply if HMRC "have grounds for considering that the relationship influenced the price" and have "communicated their grounds" to the person making the customs declaration. This provision was not in issue before us.

81. Article 32(1) reads:

> "In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:
>
> (a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
>
> (i) commissions and brokerage, except buying commissions…"

82. Article 33(1) provides for buying commissions to be excluded from the customs value "provided that they are shown separately from the price actually paid or payable."

83. Articles 32(1) and 33(1) reflect Article 8 of the Valuation Agreement, which states:

> "In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods
>
> (a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
>
> …
>
> (i) commissions and brokerage, except buying commissions…"

84. Article 29(3)(b) of the CCC reads:

> "Activities, including marketing activities, undertaken by the buyer on his own account, other than those for which an adjustment is provided in Article 32, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller or have been undertaken by agreement with the seller, and their cost shall not be added to the price actually paid or payable in determining the customs value of imported goods."

THE FIRST ISSUE: BUYING COMMISSION

85. It is clear from Articles 32(1) that if "buying commissions" are "shown separately from" and "not included in the price actually paid or payable" for the goods, they are not subject to duty.

86. In order to decide whether or not buying commission has been paid by the company to CID, we first explore the meaning of the term "buying commission," by considering the CCC, the WCO Explanatory Notes and Commentary, and the case law.

What is "buying commission"?

87. Article 32(4) says that "for this Chapter" – and thus for the purpose of Articles 28-36 – the term "buying commissions" means "fees paid by an importer to his agent for the service of representing him in the purchase of the goods being valued."

WCO Explanatory Notes and Commentary

88. WCO Explanatory Note 2.1(4) says that a buying or selling agent is:

> "a person who buys or sells goods possibly in his own name, but always for the account of a principal. He participates in the conclusion of a contract of sale, representing either the seller or the buyer."

89. Explanatory Note 2.1(5) states that "the agent's remuneration takes the form of a commission, generally expressed as a percentage of the price of the goods" and 2.1(1) says that buying commission is "paid by the importer, apart from the payment for the goods."

90. Explanatory Note 2.1(9) says:

> "A buying agent is 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."

91. In order to establish whether a person is acting as a buying agent, the WCO Commentary at 17.1(6) advises that the agency contract and all other documents should be examined, and at (9) warns:

> "Sometimes, the contracts or documents do not clearly represent or reflect the nature of the activities of the so-called agent. In such circumstances, it is essential that the actual facts of the case be determined and various factors, as explained below, be examined."

92. The Commentary continues by saying:

> "10. One of the questions which could be the subject of an enquiry is whether the so-called buying agent assumes any risk or performs additional services other than those which are indicated in para 9 of Capital Explanatory Note 2.1 and would normally be carried out by a buying agent. The extent of these additional services could affect the

> treatment of the buying commission. An example could be where the agent uses his own funds for the payment of the imported goods. This opens the possibility of the so-called buying agent sustaining a loss or gaining a profit arising from ownership of the goods rather than receiving an agreed fee from acting as a buying agent. In this situation, the totality of the circumstances which apparently establishes a buying agency arrangement may be examined.
>
> 11. The result of this enquiry could indicate that the agent is acting on his own account and/or that he has proprietary interest in the goods…
>
> 12. Another factor to be examined is the relationship, within the meaning of art 15.4, of the parties involved in the transaction. For instance, the relationship of the agent with the seller or with the person related to the seller has a bearing on the ability of the alleged agent to represent the buyer's interest. Despite the existence of an agency contract, the Customs is entitled to examine the totality of the circumstances to determine whether the so-called agent is in fact acting on behalf of the buyer and not on the account of the seller or even on his own account."

EU law and/or English law of agency?

93. It is clear from the WCO Notes and Commentary set out in the previous section, that "buying commission" is paid to a "buying agent." For the company to succeed in its appeal, it must show that CID is acting as its buying agent. When deciding that question, we considered whether we needed to have regard to EU law, to English law, or to both.

94. In *De Danske Bilimportører v Skatteministeriet* [2006] ECR I-4945 Case C-98/05 ("*De Danske*"), Advocate General Kokott considered whether vehicle registration duty paid by a dealer formed part of the price of the vehicle for VAT purposes. At [39] he set out "the matter which is decisive for categorising the operation, that is, whether the vendor has paid the registration duty in his own name or in the name and for the account of the customer" and continued:

> "[40] In law, that question must be answered by reference to Article 11(A)(3)(c) of the Sixth Directive, that is to say, the Community law notion of acting in the name and for the account of another and not by reference to civil law provisions concerning agency and mandate which vary from one legal system to another.
>
> [41] Moreover, the operation must be categorised by reference to objective criteria and not solely to contractual provisions agreed between the dealer and the purchaser. Otherwise the parties could determine which elements are included in the taxable amount."

95. In *Umbro* at [23], Proudman J cited [40] of *De Danske*, and said that although the CCC contains no definition of a buying agent, "the court must be careful to avoid applying technical English law agency concepts."

96. At [25] she discussed *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288 ("*Chuan Soon Huat*") and *AMB*

Imballaggi Plastici SRL v Pacflex Ltd [1999] 2 All ER Comm 249 ("*Imballaggi*"), both of which consider the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053. She said that "although the legislative provisions are different, the issue was a similar one to that in [*Umbro*]" and went on to say:

> "[26] It was held in *Imballaggi* that if a person bought or sold as principal he was outside the scope of the Regulations because he was acting on his own behalf, not on behalf of another. The Court of Appeal found that the words 'on behalf of' fell to be interpreted to mean what an English court would naturally construe them as meaning. The Court of Appeal in *Chuan Soon Huat* appears to have proceeded on the same basis. In the present case the tribunal did not expressly analyse how the Customs Code should be interpreted. Nevertheless it is to be inferred from its reasons that the tribunal believed that the expressions used in the definition of 'buying commission' in art 32(4) must be ascribed their natural meaning as understood by an English court, bearing the Explanatory Note and Commentary in mind. I find that was the correct approach."

97. It seems to us that there may be some tension between the final sentence of that extract, and the warning at [23] of the same decision that "the court must be careful to avoid applying technical English law agency concepts." However, on the facts of this case, neither party identified any conflict between the English law of agency and the EU concept of a buying agent and neither did the Tribunal. We refer again to the English law agency concepts at §187.

Other guidance from Umbro

98. At [15] of *Umbro* Proudman J said that it was a "common-sense proposition" that the characterisation employed by the parties cannot control the true nature of the relationship at law; that this was supported by Explanatory Note 2.1(15), and at [29] said that this "has even more force when the characterisation is employed in retrospect."

99. At [27] of the judgment she relied on [41] of *De Danske*, cited above, saying that the relationship between the parties "must be categorised by reference to objective criteria." She also said that "the parties' course of dealings has to be considered, with the aid of the Explanatory Notes and the Commentary to the WTO Agreement, to see whether [the seller] is an 'agent' performing the service of representing [the buyer] in the purchase within the definition in art 32(4)."

100. In *Umbro* the putative buying agent was a related company of the appellant. Proudman J said at [30] that in that context the First–tier Tribunal's refusal to accept the appellant's own characterisation of the matter "makes particular sense" and "a finding that [the related company] was the buying agent on its own say-so would potentially allow [the two companies] to divide the purchase moneys between them, escaping duty on part of that price."

Buying commission which is not "shown separately from the price"

101. As we have already seen, Article 33(1) requires that buying commissions be excluded from the customs value "provided that they are shown separately from the price actually paid or payable."

102. However, in *Overland Footwear Ltd v CCE* [2005] Case C-468/03 ("*Overland*")[1] the appellant paid 4% buying commission to its agent, Wolverine Far East ("Wolverine"), but this commission had mistakenly been included in the invoiced price. Duty was therefore paid on the total sum, including the buying commission. HMRC accepted that the 4% paid to Wolverine was "bona fide buying commission, which could have been properly deducted at importation."

103. Overland applied to revise the customs declaration under Article 78. That Article allows HMRC to "amend the declaration" either on their own initiative or at the request of the declarant. The CJEU held at [46] that HMRC had then to "examine the application" to see "whether or not there is cause to carry out such a revision." The decision continues:

> "[52] If the revision indicates that the provisions governing the customs procedure in question were applied on the basis of incorrect or incomplete information, the customs authorities must, in accordance with Article 78(3) of the Customs Code, take the measures necessary to regularise the situation, taking account of the new information available to them.
>
> [53] Where it finally becomes apparent that the import duties paid by the declarant exceed those that were legally owed at the time of their payment, the measure necessary to regularise the situation can consist only in reimbursement of the overpaid amount.
>
> [54] That reimbursement is made in accordance with Article 236 of the Customs Code if the conditions laid down by that provision are fulfilled, in particular that there has been no manipulation by the declarant and that the application for reimbursement has been submitted within the time-limit, which is in principle three years."

104. At [63], the CJEU said that "the words 'incorrect or incomplete information' must be interpreted as covering both technical errors or omissions and errors of interpretation of the applicable law." They went on to say:

> "[67] Moreover, the fact that, as a matter of form, a customs declaration does not contain separate reference to a buying commission, which is nevertheless distinct from the price of the goods, can only mean that that commission is validly regarded as dutiable and that, consequently, import duties applied to it are legally owed.
>
> [68] That fact, where there is a possibility of subsequently revising a customs declaration at the declarant's request, cannot have as its consequence that duties legally charged by reason of simple rules of evidence are subsequently assimilated to duties legally owed within the

[1] This is the second of two CJEU customs cases involving Overland, the first being *Overland Footwear Limited v C&E Commrs* [2002] C-379/00.

> meaning of Article 236(1) of the Customs Code, despite the production of sufficient evidence…
>
> [71] where [HMRC] find…that the declared customs value erroneously included a buying commission, they are required to regularise the situation by reimbursing the import duties applied to that commission."

Outline of the parties' submissions on buying commission

105. The company's case is that it had paid buying commission to CID and that HMRC should have accepted its application to amend its customs declarations so as to remove the buying commission from the amount subject to duty, in accordance with the CJEU's decision in *Overland.*

106. HMRC's case is that CID acted as principal in its dealings with the company, and not as buying agent.

107. The parties' submissions are summarised here, and considered in more detail in the following sections of this decision.

(1) *Lack of contemporaneous evidence:* Mr Brinsmead-Stockham, for HMRC, submitted that there was no contemporaneous evidence that the company had paid buying commission related to the relevant goods, and that the appeal should be dismissed on that basis alone. Mr Brown, for the company, said that the Schedules, the BASS Agreement and Mrs Kara's evidence were sufficient to prove the company's case, despite the lack of contemporaneous evidence.

(2) *The Schedules:* Mr Brown submitted that the Schedules supported the company's case; Mr Brinsmead-Stockham contended that they did not.

(3) *The Secret Hotels2 approach:* Mr Brown submitted that the approach set out in *Secret Hotels2 Limited v HMRC* [2014] UKSC 16 ("*Secret Hotels2*") and in *HMRC v Newey* [2013] STC 2432 Case C-653/11 ("*Newey*") should be followed by the Tribunal; Mr Brinsmead-Stockham argued that customs law required a different approach.

(4) *The BASS Agreement, Mrs Kara's evidence and the Licence:* Mr Brown submitted that the BASS Agreement, together with Mrs Kara's evidence, showed that CID was operating as a buying agent for the company; Mr Brinsmead-Stockham contended that the contrary was the case and this was clear from the Licence.

(5) *The purchase orders and invoices:* Mr Brinsmead-Stockham submitted that these were consistent with his case that CID acted as principal; Mr Brown said they were neutral factors.

(6) *CID's mark-up*: When calculating the "buying commission," CID had included a mark-up. Mr Brinsmead-Stockham said that this was consistent with the CID acting as principal. Mr Brown said it simply showed that the parties were transparent with each other in relation to CID's charges.

(7) *The "conduit" argument*: In correspondence prior to the hearing, the company had argued that CID was a "conduit" or a "shell company" which

subcontracted the buying agency role to another group company and that this was a relevant factor.

(8) *Overland:* Mr Brown submitted that the company's case was on all fours with *Overland*; Mr Brinsmead-Stockham disagreed.

(9) *Vehicle Control Services*: in the alternative to his main submission, Mr Brown argued, in reliance on *Vehicle Control Services v HMRC* [2013] STC 892, that even if the BASS Agreement could not be enforced because of CID's prior obligations under the Licence, that Agreement was nevertheless valid for customs duty purposes.

The lack of contemporaneous evidence

108. Mr Brinsmead-Stockham relied on the WCO Commentary at 17.1. He submitted that the only documentation which was contemporaneous with the relevant period was the purchase orders and invoices provided as an "audit trail" for some of the relevant goods. Those invoices did not show the buying commission separately. The company had accepted that (a) it paid a "global price" for the relevant goods; (b) duty had been charged on the amount shown on the company's invoice from CID, including the putative "buying commission," and (c) the BASS Agreement had been made on 1 October 2009, well over a year after the end of the relevant period. Furthermore, the Schedules were for 2010 and 2011, not for 2008 and 2009, so also post-dated the relevant period.

109. Mr Brown said that the Schedules, the BASS Agreement and Mrs Kara's oral evidence constituted "sufficient evidence" of what had occurred in the relevant period. The BASS Agreement explicitly stated that it "formalised in writing" the existing appointment of CID as its buying agent, and Mrs Kara's evidence was that:

(1) the company and CID were aware of the elements which had gone to make up the buying commission at the relevant period, so that there was "full transparency";

(2) although only the 2010 and 2011 Schedules had been provided to the Tribunal, similar documents relating to the relevant period (29 November 2007 to 29 May 2008) "may exist in Singapore";

(3) the 2010 Schedule demonstrated that CID had charged the company a buying commission of 14% of the FoB price in 2010 and the same had been true in the relevant period; and

(4) the terms of the BASS Agreement were the same as those which were in operation between the parties during the relevant period.

110. Mr Brown said that the company's case was that "nothing had changed at all" and so the absence of contemporaneous evidence made no difference.

Discussion

111. The WCO Commentary provides guidelines on "the evidence necessary to establish under what circumstances fees paid by a buyer to an intermediary can be considered as a buying commission," see 17(4).

112. The absence of a written agency contract does not itself decide the question against the importer: 17.1(7) reads "In cases where written agency contracts do not exist, alternative documentary evidence, such as mentioned in para 6 above, which clearly establishes the existence of an agency relationship is to be produced..." Para 6 says that the alternative documentary evidence is "purchase orders, telexes, letters of credit, correspondence, etc., which clearly supports the bona fides of the agency contract."

113. Although not expressly stated, we infer from these examples that at least some of the "alternative documentary evidence" would normally be contemporaneous with, and relate to, the specific importations in question. Here there is no contemporaneous documentation at all.

114. Mrs Kara said that documents providing a similar analysis to those in the Schedules "may exist in Singapore," that she did not have copies but that she could try to obtain them. Mr Brinsmead-Stockham said, and we agree, that this is difficult to reconcile with her statement that there was "full transparency" as between the company and CID as to the payments being made: had there been "full transparency" it is reasonable to assume that the company would have been provided with this analysis as a matter of course.

115. We nevertheless considered whether we should adjourn our decision to allow the company time to provide any such contemporaneous schedules. We took into account that:

(1) the burden of proof is on the company;

(2) on 24 February 2011, Mr Manton asked for "evidence to support the existence of a buying agency agreement prior to date the written agreement [was] entered into" and gave examples of the sort of material which would be helpful;

(3) On 24 May 2013 Mrs Jackie Smith of HMRC asked for "any further evidence that could change this decision," and

(4) Mr Brinsmead-Stockham's skeleton argument at [27] says that "the company has not produced a written agency agreement with CID (or indeed any other documentary evidence in support of its claim) relating to the relevant period. He went on to say that where there is insufficient evidence, the WCO Commentary at 17.1 allows HMRC to conclude that there is no agency relationship.

116. The company has therefore been on notice since February 2011 that contemporaneous evidence was required, was given opportunities to provide such evidence, and was not taken by surprise at the hearing.

117. Moreover, its case was not put on the basis of contemporaneous evidence, but on the basis that (a) the BASS Agreement documented the previous arrangement and (b) the Schedules also reflected that earlier arrangement.

118. We decided not to adjourn the appeal, but to go on to consider whether the Schedules and the BASS Agreement supported the company's case. If they did not, there would be no point in an adjournment, even assuming that could be justified under Rule 2 of the Tribunal Rules.

The Schedules and buying commission

The information in the Schedules

119. The 2010 Schedule states that CID's total staff costs totalled $1,550,000. To this were added the following "office overheads":

Sample costs	300,000
Fit models	50,000
Travel costs	60,000
Office rent/utilities	400,000
Internet/admin/office supplies	80,000
Depreciation	120,000
Total	$2,560,000

120. This figure was then marked up by 5% or $128,000, giving "total sourcing and buying agency fees" of $2,688,000. This is 14% of CID's total FoB cost of $19,167,500 for all its sales, not only those to the company.

121. The 2011 Schedule followed the same process and the percentage so derived was 13.8%. Mrs Kara said that:

> "if the following year the cost base goes down then the percentage could increase or decrease; the [BASS] agreement allows it to be less. The 14% is not cast in stone; we compare to actuals [and] we will be credited for any up or down movements in costs."

The parties' submissions

122. Mr Brown's submission, based on Mrs Kara's evidence, was that (a) the 2010 Schedule demonstrated that a 14% buying agency fee had been charged in that year and (b) the same fee had been charged in the relevant period and thus (c) the 2010 Schedule could be relied upon as evidence in relation to the relevant goods.

123. Mr Brinsmead-Stockham said that even if contemporaneous documentation equivalent to the 2010 Schedule could be produced for the relevant goods, that document did not support the company's case, for the following reasons:

(1) The amount stated to be a "buying commission" was demonstrably a calculated amount, made up of various costs borne by CID, which were then marked up: 14% was the relationship between these costs and CID's total sales of $19,167,500. The "buying commission" percentage had thus been "reverse engineered" as a percentage of CID's costs. Had the "buying commission" simply been a percentage of the FoB cost, there would be no need for the

Schedule at all: CID would simply have charged the company 14% of the FoB cost.

(2) The 2011 Schedule showed that CID's costs (including a mark-up) were 13.8% of the FoB cost, and Mrs Kara's evidence was that the "buying commission" had been adjusted in consequence. This too demonstrated that the company was simply being charged a percentage of CID's costs (including a mark-up).

Discussion

124. The WCO Explanatory Note at 2.1(5) says that "the agent's remuneration takes the form of a commission, generally expressed as a percentage of the price of the goods." We agree with Mr Brinsmead-Stockham that this is not what is happening here. Instead, the Schedules show that the process for setting the "buying commission" is (a) to work out what share of CID's costs are borne by the company, and (b) to calculate how that share relates to the total FoB costs of the goods. As Mr Brinsmead-Stockham said, if the "buying commission" was simply 14% of the FoB cost, all that would be needed to establish the amount payable would be that FoB cost.

125. Clause 4.1(b) of the BASS Agreement states that the percentages "may be adjusted on a seasonal basis based on the corresponding costs relating to the required services." This is what has happened in 2011: CID's overhead costs reduced slightly in relation to the FoB costs of the goods and so the recharge reduced to 13.8%. The wording of the Clause 4.1(b) underlines the fact that the company is paying a pro-rata share of CID's overall costs; again, this is not "commission" based on a percentage of the FoB cost of the goods purchased from the manufacturer.

126. The Schedules therefore do not provide evidence that the company pays CID 14% of the FoB cost of the goods, but rather that the company is bearing a pro-rata share of certain of CID's costs, plus a mark-up.

127. Thus, even had the company provided a similar schedule for the relevant period, produced on the same basis, as Mrs Kara said might be possible, it would not have assisted the company's appeal.

The *Secret Hotels2 approach*

128. Before we consider the BASS Agreement, we first set out the parties' submissions as to how we should construe the contractual relationships between CID and the company, together with our findings.

Mr Brown's submissions

129. Mr Brown relied on *Secret Hotels2*, in which Lord Neuberger gave the unanimous judgment of the Court. Mr Brown took the Tribunal first to [25]-[30], which is headed "the correct approach to Article 306 [of the PVD]." At [29] Lord Neuberger cited the following passages from *HMRC v Newey*:

> "[42] As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration

> of economic and commercial realities is a fundamental criterion for the application of the common system of VAT…
>
> [43] Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> [44] It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> [45] That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

130. Under the same heading, Lord Neuberger went on to say at [30]:

> "Where the question at issue involves more than one contractual arrangement between different parties, this court has emphasised that, when assessing the issue of who supplies what services to whom for VAT purposes, "regard must be had to all the circumstances in which the transaction or combination of transactions takes place" - per Lord Reed in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] 2 All ER 719, para 38, [2013] STC 784. As he went on to explain, this requires the whole of the relationships between the various parties being considered."

131. The next heading is "the correct approach in domestic law," which begins:

> "[31] Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> [32] When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight…"

132. Mr Brown submitted that, although *Newey* and *Secret Hotels2* were both VAT cases, the same approach applies to customs duties. He said that the BASS Agreement sets out the terms of the relationship between the company and CID in respect of the purchase of the relevant goods, that it accorded with the economic reality and that HMRC have not argued that it is a sham.

Mr Brinsmead-Stockham's submissions

133. Mr Brinsmead-Stockham disagreed with Mr Brown that the *Secret Hotels2* approach applied to customs duties. He said that Chapter 3 of Title II to the CCC contained prescriptive rules. It opens by saying at Article 28 that "the provisions of this Chapter shall determine the customs value for the purposes of applying the Customs Tariff of the European Communities" and at Article 29 that "the customs value of imported goods shall be the transaction value." It is these rules, not the PVD or its related case law, which apply to the company's appeal.

134. He went on to say that the recent Upper Tribunal decision in *HMRC v Asda* [2013] STC 2086 showed that the concept of "economic reality" did not apply to customs duties. Asda had paid its clothing suppliers a single price for both the clothes and the hangers on which the clothes were delivered. However, under a separate agreement with the hanger company, Asda received a rebate for the hangers. Asda argued that its customs duty should be based on the net figure after the rebate was taken into account.

135. Mr Brinsmead-Stockham said that as a matter of economic reality, the price paid by Asda for the goods *was* that net figure. However, the Upper Tribunal had held that this interpretation was inconsistent with Article 29 and that duty was payable on the figure before the rebate.

Discussion

136. We agree with Mr Brinsmead-Stockham that our starting point must be Article 29, so that the "customs value" is "the transaction value." This cannot be determined by considering the "economic reality" of a transaction between two parties, in a situation similar to that described in *Asda*.

137. However, as we understand Mr Brown, he is making a different submission. He is addressing the question of whether, when deciding whether or not CID is the company's buying agent, the Tribunal must follow the contractual terms, because these "normally reflects the economic and commercial reality," as the CJEU put it in *Newey* at [43], and that we can divert from those terms only if those terms "do not wholly reflect the economic and commercial reality of the transactions," in particular if the contract is "a sham" see *Newey* at [44] and *Secret Hotels2* at [31].

138. We accept that there is a significant degree of overlap between the *Secret Hotels2/Newey* approach and that required by the CCC. The WCO Commentary at 17.1(6) says that the agency contract should be provided to the customs authority so as to establish the existence and precise nature of the services in question, unless those terms:

> "do not clearly represent or reflect the nature of the activities of the so-called agent. In such circumstances, it is essential that the actual facts of the case be determined…"

139. This is similar to the approach taken in *Newey* and *Secret Hotels2*. Furthermore, both *Secret Hotels2* and the WCO Commentary take the same approach to the parties' characterisation of their relationship. Lord Neuberger says at [32] of

Secret Hotels2 that "the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight." The WCO Explanatory Note at 2.1(15) says that it is not enough to look at "the term ('agent' or 'broker') by which [the person] is known"; in reliance on that Note, Proudman J said in *Umbro* that "the characterisation employed by the parties cannot control the true nature of the relationship at law."

140. But it seems to us that there are also differences between the *Secret Hotels2* approach and that taken by the WCO Explanatory Notes and Commentary, as can be seen from the following (our emphases).

(1) Explanatory Note 2.1(15), says that whether or not a payment is "buying commission" depends "on the *role played* by the intermediary."

(2) The WCO Commentary at 17.1(2) states that "while the provisions of the Agreement are clear and raise no particular question of principle, the treatment of commissions for Customs valuation purposes *depends on the exact nature of services rendered* by the intermediaries."

(3) 17.1(3) says that Note 2.1 concludes that "since the nature of the services rendered by intermediaries *are often not apparent from the commercial documents*, national administrations will need to take necessary reasonable measure to ensure the proper application of this provision of the Agreement."

(4) 17.1(6) refers to the agency contract as *one* of the documents which must be provided to the customs authority in order to determine the nature of the arrangement.

(5) Finally 17.1(15) says:

> "*Despite the existence of an agency contract*, the Customs is entitled to examine *the totality of the circumstances* to determine whether the so-called agent is in fact acting on behalf of the buyer and not on the account of the seller or even on his own account."

141. The WCO Commentary therefore directs us to consider the totality of the circumstances and not only the agency contract, while *Secret Hotels2* and *Newey* only allow us to diverge from the agency contract if its terms do not correspond with the economic and commercial reality of the transactions, and in particular if it is a sham. Often, these two approaches will give the same answer, so there is considerable overlap. However, they are not identical. If they give different answers, which must the Tribunal follow?

142. As discussed at §73-76 above, although the WCO Explanatory Notes and Commentary are an important aid to the interpretation of the CCC, they are not binding. *Secret Hotels2* is a decision of the Supreme Court and *Newey* a judgment of the CJEU, but both concerned the PVD. Are they binding on us in the context of an appeal relating to customs duties?

143. That question was answered in *Dolland & Aitchison v CCE* [2006] Case C-491-04 ("*Dolland & Aitchison*"), where the appellant had submitted that the approach for customs duties should follow the principles established in the VAT case of *Card*

Protection Plan v CEE [1999] ECR I-973 Case C-349/96 ("*CPP*"). In *Dolland & Aitchison* the CJEU held that:

> "[17] As a preliminary point, it should be borne in mind that the Island of Jersey is an integral part of the Community customs territory but constitutes a third territory as regards the rules established by the Sixth Directive. Consequently, the supply of goods by a company established in Jersey to a customer resident in the United Kingdom constitutes an importation within the meaning of Article 2(2) of the Sixth Directive. The taxable amount is thus defined by Article 11B(1) of that directive as 'the value for customs purposes, determined' in accordance with Article 29 of the Customs Code.
>
> [18] Accordingly, the questions referred by the national court must be answered solely by reference to Article 29 of the Customs Code…
>
> [21] For the reasons set out in paragraph 17 of this judgment, that judgment [ie *CPP*], and in particular paragraph 27 thereof, which relates to the scope of a transaction subject to VAT within a Member State, cannot be interpreted as giving guidance capable of being used directly in applying the provisions of Article 29 of the Customs Code."

144. In reliance on *Dolland & Aitchison* we find that, when interpreting the CCC, we should follow the approach of the WCO Explanatory Notes and Commentary and not the case law relating to VAT. As AG Mischo said in *Hepp*, the Notes and Commentary "represent the opinion of the experts of the majority of countries engaged in world trade. If the Community were to adopt an interpretation contrary to such an opinion, it would risk creating quite considerable problems and the Community should do so only for very serious reasons."

145. However, in case we are wrong in this, we discuss at §197 whether or not the "economic reality" test has been satisfied by the company, and at §200 whether or not the BASS Agreement is a sham. But first we consider the Bass Agreement and the Licence in the light of the analysis set out in this section of our decision.

The BASS Agreement and the Licence

The company's case

146. The BASS agreement, together with Mrs Kara's evidence, formed the heart of the company's case that CID acted as its buying agent.

147. Particular points raised in reliance on the BASS Agreement were that:

(1) CID is identified at the inception of the BASS Agreement as "the Agent"; the Recital says that the Company "desires to formalise in writing the existing appointment of the Agent as its buying agent" and at clause 1.1 CID accepted appointment as the company's buying agent.

(2) Clause 3 says that CID will buy the Articles on behalf of the company "in its sole capacity as the company's buying agent."

148. Mrs Kara's evidence was that :

(1) the company "was buying from the manufacturers and CID was adding other costs to that price";

(2) the decision as to which manufacturers were appointed was a joint one between the company and Club 21 Pte. However, under cross-examination Mrs Kara accepted that if CID rejected a manufacturer (for example because it did not meet the standards set by DKS) the company and Club 21 Pte would "suggest another five manufacturers and find one which met the requirements." She said that "it was very important that [CID] took on what we said to them" and that CID "could not come and select someone else."

(3) Although CID made the contract with the manufacturers and paid them this was because "the contracts had to be with the Licensee [CID] who had the trademark rights" and because it acted as "a central co-ordinating point."

(4) The company often communicated directly with Club 21(HK) Limited and Club 21Enterprises (HK) Limited and not with CID;

(5) Although CID organised and paid for the insurance of the relevant goods, if there was an uninsured loss during transit – for example, if goods had accidentally not been insured, or the insurer became insolvent – that loss would be borne by the company and not by CID, and this was consistent with it acting as principal.

149. The Tribunal asked Mr Brown for his observations on Clause 10 of the BASS Agreement, which states that "nothing in this Agreement shall constitute a partnership or establish a relationship of principal and agent." He said that the BASS Agreement was, as its title declared, a "Buying Agency" agreement and that Clause 10 should be ignored, because if it were given effect, the Agreement would be "null and void."

HMRC's case

150. Mr Brinsmead-Stockham said that:

(1) CID was bound by the terms of the Licence, and under its terms CID acted as principal when purchasing goods.

(2) CID had appointed the company as a distributor, and the terms of that distribution agreement must be consistent with the terms of the Licence (Clause 7.1(c)). The true nature of the relationship between the parties was that the company was a distributor of goods supplied by CID as principal.

(3) Mrs Kara's submission that the company was bearing the insurance risk in relation to goods not yet delivered was inconsistent with the facts;

(4) Her submission that the company selected the manufacturers was inconsistent with the terms of the Licence.

(5) For the most part, the BASS Agreement simply set outs obligations which CID already had to bear under the terms of the Licence.

(6) It is clear from *Umbro* at [29] that the label attached to the relationship is not determinative.

(7) Clause 10 of the BASS Agreement expressly states that CID was not acting the company's agent.

Discussion: relationship between the Licence and the BASS Agreement

151. We first consider the Licence, which pre-dates the BASS Agreement. Under Clause 3.1 and 3.2(a), CID undertook to "produce and sell" two "seasonal collections" of Articles in 2007, and four seasonal collections in subsequent years. Under Clause 3.2(b) it is CID who must design and develop the seasonal collections and "shall bear all costs thereof." Clause 3.4 requires CID to "proceed with the completion of the development of and with the commercial production of such collection." Clause 3.8 allows CID to appoint Contractors to produce the Articles.

152. There is no doubt that these terms support HMRC's case that CID is acting as principal when contracting for the production of the DKNY branded goods which comprise the seasonal collections, and when selling those goods to the company.

153. However, some of the responsibilities CID contracted to perform for DKS under the terms of the Licence, are now stated to arise under the BASS Agreement, and to constitute obligations owed to the company. For example:

(1) By clause 3.2(b) of the Licence CID has undertaken to make "all prototype and other samples" and by Clause 3.3 it is DKS which approves these prototypes, which cannot then be modified without DKS's explicit permission; under Clause 5.1(a) CID is required to ensure that the Articles are at least equal in quality to those prototypes. The BASS Agreement says that CID's duties *to the company* include providing the company with prototypes and production samples on a timely basis and certifying that the Articles shall be at least equal in quality to the prototype samples approved by DKS and shall maintain the integrity of the design/aesthetics of the samples approved by DKS.

(2) Clause 3.2(b) of the Licence also requires CID to oversee "all aspects of the production of Articles"; Clause 3.8 allows it to appoint Contractors to produce the Articles but obliges it to "maintain an active social compliance program" to monitor the third party Contractors who have been engaged to produce the Articles and can conduct its own factory audits to "determine whether the Contractors have satisfied the Licensor's then current standards." The BASS Agreement says (emphases added) that CID will:

> (a) assist *the company* with researching and locating suitable Factories which are "subsequently to be approved" by DKS based on that company's guidelines;
>
> (b) make the necessary arrangements for the Factories to enter into third party manufacturing agreements with CID which are "in form and substance acceptable *to the Company*"; and
>
> (c) carry out regular inspections of the Factories *on behalf of the company*.

(3) CID is required under the Licence to "show, offer for sale, sell and ship" each season's collection in a timely manner (Clause 3.4); the BASS Agreement

obliges CID "to buy articles *on behalf of the company but in its sole capacity as the company's buying agent*", and to arrange for shipment or routing of the Articles to the company.

154. We considered the following questions:

(1) whether the BASS Agreement supplanted the Licence;

(2) if both agreements subsist, whether CID was both a Licensee of DKS and the company's buying agent; and

(3) if not, which had priority.

155. In relation to the first question – whether the BASS Agreement supplanted the Licence – we note that Clause 6 of the BASS Agreement says:

> "This Agreement constitutes the complete understanding between the parties with respect to the subject matter hereof, supersedes all prior oral and written understanding and agreements relating thereto."

156. The Licence clearly contains some of the same "subject matter" as the BASS Agreement. However, Clause 7.1(c) of the Licence requires CID to "ensure that the Distributors act in accordance with the terms and conditions of this Agreement" and must certify this on an annual basis. Mrs Kara was clear that the company was still a Distributor, and that an extant distribution agreement exists. We find that the BASS Agreement has not supplanted the Distribution Agreement which was signed under and in consequence of that Licence, and so the terms of the Licence continue in force.

157. As a result, the BASS Agreement cannot constitute "the complete understanding between the parties with respect to the subject matter hereof, supersedes all prior oral and written understanding and agreements…" as is stated to be the case in Clause 6 of that agreement.

158. The second question is whether it is possible for CID to be *both* a Licensee of DKS and the company's buying agent. Clause 6.2(a) of the Licence provides that "the sole business of Licensee shall be the Business," so CID would have breached its contract with DKS had it taken on a separate business of being a buying agent for the company. More fundamentally, it is not possible for CID to be both a buying agent, and a principal, in relation to the purchase of the self-same goods.

159. The third question is which agreement has priority. Clause 7.1(c) of the Licence specifies that:

> "all Distribution Agreements and the obligations of the distributors thereunder shall be consistent in all material respects with the terms of this agreement...each Distribution Agreement shall require the Distributor to comply in its activities as a distributor with, and be bound by, all of the provisions of the Agreement applicable to Licensee…Licensee shall ensure that the Distributors act in accordance with the terms and conditions of this Agreement."

160. CID is therefore required under the Licence to ensure that the company (a distributor) complies with the terms of that Licence. The terms of the Licence (and the distribution agreement made under and in consequence of that Licence) therefore take priority over the BASS Agreement.

161. As a result, CID's obligation to purchase the DKNY branded products and to sell them to its distributors derives from the Licence, not the BASS Agreement. And as we have already seen at §151-152, under the terms of the Licence CID acted as principal and not as agent in its dealings with the company.

Mrs Kara's evidence on selecting manufacturers and insurance.

162. Mrs Kara's evidence was that "the decision as to which manufacturers were appointed was a joint one between [the company] and Club 21 Pte." This conflicts with the terms in the Licence, which make it clear that the decision as to which factory to use rests with CID, see Clauses 3.2(b), 3.4 and 3.8 set out above. We note that even Mrs Kara accepted that if CID rejected a manufacturer, the company and Club 21 Pte would "suggest another five manufacturers and find one which met the requirements." This is, in terms, to accept that CID was able to veto the company's suggested manufacturer. We therefore do not accept that the company had the right to select the manufacturers; that right lay with CID and is consistent with that company acting as principal. .

163. Mrs Kara also said that CID insures the goods as far as the bonded warehouse in the UK or the Netherlands and that the insurance cost was not separately recharged to the company but borne by CID and formed part of the overall "global price." However, she also said that if there was an uninsured loss during transit, that loss would be borne by the company and not by CID. We found it difficult to reconcile these two statements. CID insures the goods, and bears the cost of that insurance. From that it is reasonable to infer that the obligation to insure the goods rests with CID which would bear the cost of any failure to insure the goods, even though it would then seek to recover that loss, along with all other costs, as part of the global price. It follows that we do not accept that the company bore the risk in relation to DKNY goods ordered from the manufacturers.

164. We next considered whether the insurance position was consistent with CID acting as principal. The WCO Explanatory Note 2.1(9) says that a buying agent "in some cases, arranges the insurance" for its principal. However, CID is not "arranging the insurance" on behalf of a third party, but on its own account. It seeks to recover those costs as part of the global price charged for the goods. In *Umbro* at [46] the fact that the putative agent "was liable, at its own cost, to provide product liability insurance for the goods" was described as an obligation "which pointed towards a liability as principal." The insurance position is consistent with CID acting as principal.

Other responsibilities under the BASS Agreement

165. Mr Brown accepted that the BASS Agreement covered a number of different services, but said that the WCO Explanatory Note at 2.1(9) showed that the buying

agent's responsibilities can extend to "inspecting goods and, in some cases, arranging the insurance, transport, storage and delivery of the goods."

166. However, CID's stated responsibilities under the BASS Agreement cover not only those matters, but also extend to assisting "in maintenance of inventory control of *goods issued to Factories*" and assisting the company "in co-ordinating with Factories *on all financial business aspects* including payment, establishing letters of credit etc with the Factories" and even to "any other services required by the Company."

167. These Clauses provide further evidence that CID is not acting as a buying agent, which is a more limited role.

The extent of the relationship between the company and CID

168. In addition to deciding whether the BASS Agreement covers areas beyond the limited role of a buying agent, we also considered the extent and nature of the relationship between the parties, in the context of the Licence and in accordance with the WCO Commentary at 12. This is repeated here for ease of reference:

> "Another factor to be examined is the relationship, within the meaning of art 15.4 of the parties involved in the transaction. For instance, the relationship of the agent with the seller or with the person related to the seller has a bearing on the ability of the alleged agent to represent the buyer's interest. Despite the existence of an agency contract, the Customs is entitled to examine the totality of the circumstances to determine whether the so-called agent is in fact acting on behalf of the buyer and not on the account of the seller or even on his own account."

169. We find that the Licence demonstrates that CID's relationship with the company goes beyond and is inconsistent with it being the company's buying agent. For example, Clause 6.4(a) allows CID and DKS to remove the company's general manager if dissatisfied with its performance; Clause 1.6 says that CID not only has "sole discretion" over its wholesale prices but can also suggest retail prices and Clause 10.1 requires CID to pay a royalty based on the company's sales.

170. Even on the company's case, CID has three contractual relationships with the company: it is purportedly acting as "buying agent" in order to source the goods; as "Service Provider" supplying corporate support and global marketing services, and as distributor of the goods under the distribution agreement.

Clause 10

171. Finally, Clause 10 of the BASS Agreement provides that "nothing in this Agreement shall…establish a relationship of principal and agent or any other relationship of a similar nature between or among any of the Parties. It is therefore inconsistent with the stated purpose of that Agreement.

172. Mr Brown made brief oral submissions inviting the Tribunal to ignore this Clause as to do otherwise would be to undermine the purpose of the agreement. Although he cited no case law, there are important authorities on the approach which

should be taken when the language of a contractual provision is unambiguous and results in an improbable or odd commercial result, namely *Investors Compensation Scheme Ltd v West Bromwich Building Society and others* [1998] 1 All ER 98 at pages 114-115; *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 at [17] and *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50.

173. The relevant passages from these authorities were set out in *Blumenthal v HMRC* [2012] UKFTT 497 at [129]-[131]. We do not repeat those paragraphs here, but import them by reference. That tribunal then continued:

> "[132] There is, in our view, a divergence in approach revealed by these authorities where the language of the contractual provision is unambiguous and results in an improbable or odd commercial result. Lord Hoffmann in the *Investors Compensation Scheme* case considers that if 'something has gone wrong with the language' a court need not construe contractual language in a way which attributes to the parties an intention they could not have had. On the other hand, in *Rainy Sky* Lord Clarke considers that unambiguous language must be applied even if it leads to a most improbable commercial result.
>
> [133] In our view, where contractual language is unambiguous, even though it leads to a strange or improbable result, that language can only be changed in an action for rectification. If it were otherwise it would effectively mean that that there was little or no scope for rectification. This would go beyond the authorities: see Lord Hoffman in *Investors Compensation Scheme* (para 128 above, point 3) and Lord Neuberger in *Rainy Sky* (para 129 above at [19]). In our judgment, to construe unambiguous language in a way which cannot be supported by the meaning of the words goes beyond the construction of a contract and involves re-writing its provisions."

174. We concur with that analysis. The wording of Clause 10 is unambiguous and has the effect of contradicting the express purpose of the contract. This provides a further reason why the BASS Agreement is not to be relied upon. We return to Clause 10 again at §200 when we consider whether that Agreement is a sham.

Conclusions on the BASS Agreement

175. In summary we find that the Licence takes priority over the BASS Agreement; that under the Licence CID is acting as principal; that the BASS Agreement contains responsibilities wider than those of a buying agent; that the company has a relationship with CID which is inconsistent with the latter being a buying agent, and that Clause 10 of the BASS Agreement undermines that contract's stated purpose.

176. Therefore, even if the BASS Agreement does document the position at the relevant time, this does not avail the company.

177. We move on to considering the parties' other submissions.

Purchase orders and invoices

178. The company issued purchase orders to CID, which in turn issued purchase orders to the manufacturers; the manufacturers invoiced CID, and CID invoiced the company. In Mr Brown's submission, the fact that the goods were purchased by CID was "neutral" when deciding whether or not it was acting as agent for the company.

179. Our starting point is that a person acting as principal will normally buy in his own name: we do not agree with Mr Brown that it is neutral. However, we accept that it is not decisive: the WCO Explanatory Note 2.1(4) says (emphasis added) that the agent "is a person who buys and sells goods, *possibly in his own name*, but always for the account of a principal."

180. We also considered Advocate General Mischo's Opinion in *Hepp* at [22]-[25], in which he said that if an agent buys in his own name as undisclosed agent for its principal, that does not prevent him being a buying agent. However, that conclusion was preceded by [21], where AG Mischo said:

> "it is necessary above all to establish what was the real function of the agent. If he acted solely on behalf of the buyer he participated in the conclusion of the contract of sale by representing the buyer and the contract is concluded in substance between the manufacturer/supplier."

181. The CJEU confirmed AG Mischo's opinion, with the proviso at [13] that the agent's function be "limited to participation as indirect representative in a contract of sale concluded in fact between his principal and the supplier."

182. Given our findings on the Licence and the BASS Agreement, CID's function is not so limited. It was not acting as undisclosed agent, but rather as principal, and the purchase order/invoice process is entirely consistent with that role.

Mark-ups

183. As already set out at §119, the 2010 Schedule adds together CID's total staff costs and office overheads, and then adds a 5% mark-up before calculating the buying commission. .

184. Mr Brinsmead-Stockham said that taking a profit is a negative indicator in the WCO Commentary, which at 17.1(10) says that the company's use of its own funds "opens the possibility of the so-called buying agent sustaining a loss or gaining a profit arising from ownership of the goods rather than receiving an agreed fee from acting as a buying agent." Mr Brown said the company's knowledge of CID's mark-up simply showed that the parties were transparent with each other in relation to CID's charges.

185. In *Chuan Soon Huat*, a case relied on by Proudman J in *Umbro* but not directly cited to us, the appellant was rewarded by way of mark-up, but the Court of Appeal nevertheless found that the former was a "commercial agent" within the scope of the Commercial Agents (Council Directive) Regulations 1993. As we have already seen, Proudman J said at [26]-[27] that the approach taken in *Chuan Soon Huat* to deciding whether a party was a commercial agent was similar to that to be used to establish

whether a person was a buying agent. However, at [31] of *Chuan Soon Huat* the Court found that Smith J, at first instance, had:

> "considered all the material, not only the documents but also the evidence of many witnesses, and has concluded both that the 1985, 1989 and 1994 agreements authorised MIG to negotiate and conclude contracts in CSH's name and on its behalf and that the contracts and confirmations of contract used consistently throughout the period of over twenty years in question reflected the agency relationship which had been originally defined in the 1985 agreement [between the parties]."

186. In other words, if the other evidence supports an agency relationship, the existence of a mark-up does not prevent that finding.

187. We also considered English law, noting that it has long been held that the existence of a mark-up is not inconsistent with agency, see *ex parte Bright, re Smith* (1879) 10 Ch D 566 ("*Bright*") at page 570. But it remains the case that a principal will typically makes his profit by applying a mark-up to the goods he has purchased. When assessing whether a mark-up is indicative of the person acting as principal, the court must consider the other factors; if they indicate an agency relationship the existence of a mark-up will not prevent that finding. This can be seen from *Bright,* where there were also "a great number of other circumstances which shew that it was intended to be an agency." That is not the case here. Rather, the existence of the mark-up provides further evidence that CID is acting as principal.

The conduit argument

188. In correspondence between the parties before the hearing, The Customs People argued that CID acted as a mere conduit for sourcing suppliers. The letter attached to the Claim said that:

> "CID is a shell company [which] acts as a conduit for sourcing suppliers, arranging for the manufacture of the jeans and shipping them to its subsidiary companies[2] for worldwide distribution. Under the arrangements in place it therefore both buys and sells the jeans although it acts purely as an agent in the purchasing and sale of the jeans."

189. Mrs Kara said that the company often communicated directly with employees of Club 21 Enterprises (HK) and that CID had passed on its buying agency responsibilities to Club 21 Enterprises (HK) under Clause 7 of the BASS Agreement, which allowed CID to delegate its duties to a company which is "more than 51% owned by the intermediate/ultimate holding company of either parties."

190. We do not think that the conduit/shell argument assists the company. CID has only three directors and operates by outsourcing, so as a practical matter, the company will often communicate directly with Club 21 Enterprises (HK), as Mrs Kara says.

[2] At the time of the Claim, The Customs People understood that the company was a subsidiary of CID rather than a related company, but this was corrected by Mrs Kara at the hearing.

But CID nevertheless has obligations under the Licence, and it is those obligations – to "proceed with…commercial production" per Clause 3.4 and to appoint Contractors to produce the Articles under Clause 8 – which are outsourced to Club 21 Enterprises (HK) Ltd. The "totality of the circumstances," including in particular the terms of the Licence, show that CID is operating as principal when it does so.

Overland

191. Mr Brown said that the company's case was on all fours with *Overland*, in that the buying commission had been mistakenly included in the price shown on the invoices from CID, and HMRC are now "required to regularise the situation by reimbursing the import duties applied to that commission" as the CJEU decided in that case.

192. Mr Brinsmead-Stockham accepted that, if the company had erroneously paid customs duty on buying commission, HMRC would be liable to repay that duty. However, he drew the Tribunal's attention to [68] of *Overland*, which referred to the importer providing "sufficient evidence" that buying commission had in fact been paid. He said that in *Overland* there was no dispute that buying commission of 4% had been paid to Wolverine, see [4] of the judgment. In contrast, the company had not produced "sufficient evidence" that buying commission had been paid to CID. It was not on all fours with *Overland* but instead easily distinguished.

193. We agree with Mr Brinsmead-Stockham. As we have already found, there is no contemporaneous evidence that buying commission was paid to CID by the company during the relevant period. The BASS Agreement and the Schedules do not assist. As a result, there was no "involuntary omission" as the CJEU put it in *Overland*. Rather, the transaction value for the relevant goods was "the price actually paid or payable" i.e., the amount shown on the invoices.

The *Vehicle Control Services* argument

194. Mr Brown argued in the alternative to his main argument, in reliance on the Court of Appeal's judgment in *Vehicle Control Services v HMRC* [2013] STC 892 ("*VCS*"), that even if the Tribunal agreed with Mr Brinsmead-Stockham that the company had no power to contract with CID so as to require it to undertake the obligations in the BASS Agreement, because CID already owed those obligations to DKS under the terms of the Licence, the BASS Agreement was nevertheless valid as a matter of law.

195. In *VCS* the Upper Tribunal had held that the appellant could not have contracted with motorists to grant a licence to park, because its own agreement with the landowner did not give it such a right. The Court of Appeal decided that this did not prevent VCS from making the contract. At [22] Lewison J, giving the judgment of the court, said:

> "The flaw in the [Upper Tribunal's] reasoning is that it confuses the making of a contract with the power to perform it. There is no legal impediment to my contracting to sell you Buckingham Palace. If (inevitably) I fail to honour my contract then I can be sued for damages."

196. In our judgment, *VCS* does not assist the company. We agree that the parties are able to make the BASS Agreement, under which CID agree to carry out for the company duties which they are already obliged to perform for DKS. But that is not the question we have to decide. That question is whether, when considering "the totality of the circumstances," as well as "the exact nature of services rendered" by CID to the company, and "the actual facts of the case", per 17.1(15), (2) and (6) of the WCO Commentary, the company has paid "buying commission" to CID for acting as its "buying agent." For the reasons set out in the previous sections, we have found that CID was acting as principal and was not the company's buying agent.

Economic reality?

197. We have already found that the approach to be taken when considering the CCC is not identical to that required for the PVD. In case we are wrong in that, we have briefly considered whether the BASS Agreement reflects the "economic reality" of the relationship between the parties.

198. Mr Brown's primary submission was that *Secret Hotels2* at [31] required us to determine the legal and commercial nature of the relationship between the company and CID by interpreting the BASS Agreement. Further, he submitted that the BASS Agreement reflected the economic reality of the relationship between the parties in the context of the buying commission and thus its terms could not be displaced. Mr Brinsmead-Stockham said that, even if it was right to take a *Secret Hotels2* approach, as a matter of "economic reality" CID was operating as principal and not as buying agent.

199. At [30] of *Secret Hotels2,* Lord Neuberger, citing Lord Reed in *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, said that "where the question at issue involves more than one contractual arrangement between different parties…regard must be had to all the circumstances in which the transaction or combination of transactions takes place… this requires the whole of the relationships between the various parties being considered." In the context of this case, the BASS Agreement is not the only relevant contract. When we consider both the Licence and the BASS Agreement, it is clear that the economic reality of the relationship between the parties is not as set out in the BASS Agreement, for the reasons already given.

Is the BASS Agreement a sham?

200. Although Mr Brinsmead-Stockham did not argue that the BASS Agreement was a sham, it was part of Mr Brown's case that it could only be disregarded if it was a sham, and we have thus briefly considered that issue.

201. The classic definition of a sham is found in *Snook v London and West Riding Investments Ltd* ("*Snook*") [1967] 2 QB 786, where Diplock LJ said at p 802:

> "I apprehend that, if it [ie the concept of sham] has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal

> principle, morality and the authorities…that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

202. The BASS Agreement purports to give rise to obligations owed by CID to the company, when CID already owes these obligations to DKS. The agreement therefore does have "the appearance of creating between the parties legal rights and obligations different from [their] actual legal rights and obligations." It also includes at Clause 6 an "entire agreement clause" even though (as we have already found), given the existence of the distribution agreement, the BASS Agreement does not constitute "the complete understanding between the parties with respect to the subject matter hereof" and does not supersede "all prior oral and written understanding and agreements relating thereto." Rather, the distribution agreement subsists and takes priority.

203. There are other indicators that the BASS Agreement may not have been intended to create genuine legal rights or obligations. As we have already seen, Clause 10 states that the contract does not constitute an agency relationship, even though this was the whole purpose of the contract. Clause 4.1(ii) of the MCSS Agreement, signed on the same day as the BASS Agreement, states that CID "shall not be entitled to hold itself out as an agent or representative of the company" – so contradicting the very purpose of the BASS Agreement.

204. In addition, there are the following difficulties:

(1) the inconsistencies in Clause 5, which opens by saying that CID "will not seek to reimburse from the Company, expenses incurred to fulfil its duties" but 5.1(f) and 5.2 say that the company shall approve CID's expenses before payment;

(2) the requirement that CID "receive FOB invoices for the Articles from the manufacturer and will raise corresponding CIF invoices to *the Agent*," when the CIF invoices are in fact raised to the company; and

(3) the absence of provisions specifying what would constitute a breach of the agreement.

205. However, as can be seen from *Snook*, we also need to decide whether CID and the company intended to give a false impression to HMRC. In cross-examination, Mr Brinsmead-Stockham asked Mrs Kara about the reasons for making the BASS and MCSS Agreements. This was the exchange between them:

> Mr Brinsmead-Stockham : Did you make these agreements with a view to supporting this claim and the future treatment of the goods for customs purposes?

206. Mrs Kara: we made them to record what was happening, to ensure that there was clarity and to ensure that we do not unnecessarily pay duty.

207. This is not sufficient to support a finding that the parties intended, by concluding the BASS Agreement, to give a false impression to HMRC.

208. As a result, although the BASS Agreement has "the appearance of creating between the parties legal rights and obligations different from [their] actual legal rights and obligations," we had insufficient evidence about the intention of the parties to decide that the BASS Agreement was a sham and we do not do so.

Decision on buying commission

209. In summary, we find that the company did not pay buying commission to CID in the relevant period because:

(1) there is no contemporaneous evidence that buying commission was paid;

(2) the Schedules show that for 2010 and 2011, the amount of "buying commission" was not a percentage of the FoB value but a calculated share of certain costs borne by CID, which were then re-engineered to give a figure of 14%;

(3) the terms of the Licence show that CID is acting as principal when purchasing items which are then sold on to the company;

(4) most of the obligations purportedly owed by CID to the company under the BASS Agreement are already owed by CID to DKS under the Licence;

(5) the BASS Agreement explicitly states at Clause 10 that CID is not an agent of the company;

(6) the purchase orders and invoices are consistent with CID acting as principal, and so too is CID's mark-up on costs;

(7) the facts are easily distinguishable from *Overland;*

(8) the *Secret Hotels2* approach does not apply to customs duties, but even if it did, the economic reality of the relationship between the parties, taking the Licence into account, is that CID is not the buying agent for the company but is rather acting as principal.

210. We therefore find that the company's appeal fails in so far as it relates to buying commission. We move on to considering the part of the Claim relating to corporate support and global marketing.

THE SECOND ISSUE: CORPORATE SUPPORT AND GLOBAL MARKETING

211. We first consider the parties' submissions on Article 29(3)(b) and our findings, and then their other submissions and our findings .

Article 29(3)(b)

212. Mr Brown relied on Article 29(3)(b), set out earlier in this decision, but repeated here for ease of reference:

> "Activities, including marketing activities, undertaken by the buyer on his own account, other than those for which an adjustment is provided in Article 32, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller or have been undertaken by agreement with the seller, and their cost shall not be added to the price actually paid or payable in determining the customs value of imported goods."

213. He submitted that, when this Article is read together with *Overland*, it requires HMRC to reimburse the duty on any payment mistakenly included in the sale price, whether or not it was shown separately on the invoice. The amounts payable by the company to CID for corporate support and global marketing were just such amounts. Mr Brown also relied on *Secret Hotels2* for the reasons set out above in relation to the BASS Agreement.

214. Mr Brinsmead-Stockham said that these arguments were "simply wrong" because:

(1) Article 29(3)(b) refers to "activities, including marketing activities, undertaken *by the buyer on his own account.*" It is clear from the Marketing Schedule that the marketing and corporate service costs are incurred by CID and then charged to the company, so they are incurred on behalf of CID, not on behalf of the company. Even the MCSS Agreement itself states explicitly at Clause 3 that the marketing costs are incurred by CID and then "allocated on a shared basis" to the company. Article 29(3)(b) does not apply.

(2) In *Dolland & Aitchison* the CJEU decided at [35] that where there was "a global offer for which a single payment is made" covering both contact lenses and "specified services, such as examination, consultation or aftercare," these together constituted "the transaction value." There was no basis for distinguishing the company's case from *Dolland & Aitchison*, because at the relevant time, the company made a single global payment to CID which included corporate support and global marketing.

(3) Even had the corporate support and global marketing been separately invoiced (as happened in 2010 and which the company argued represented the true position), Article 29(3)(b) does not allow a buyer to split off, from the price paid for the goods, the part of that price which reflects the marketing and other costs borne by the seller and recharged to the buyer. Rather, these amounts fell within the definition of "the price actually paid or payable" i.e., "the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and *includes all payments made or to be made as a condition of sale of the imported goods* by the buyer to the seller" *per* Article 29(3)(a).

(4) The approach put forward by the company undermined the "transaction value" requirement laid down by the CCC, which the preamble to the Valuation Agreement said should apply "to the greatest extent possible." Mr Brinsmead-Stockham said it was a "simple and easy to apply system" suitable for the huge number of importations which occur every day, or as Vos LJ put it in *Asda* at [23]:

> "Article 29 is plainly intended to provide a straightforward and easily applicable method of ascertaining the customs value in a wide variety of cases. It will avoid wherever possible the need for complex or detailed investigations by the importer or the customs authorities."

(5) Finally, there is no parallel with buying commission, so Mr Brown was wrong to seek to extend the *ratio* of *Overland* to these other costs. All that *Overland* decided was that if an importer had genuinely paid buying commission which was then accidentally included in the invoiced amount, HMRC had to allow that error to be corrected. The same analysis could not be extended to these other costs, because there is no provision similar to the Article 32(1)(i) exception for buying commission. As Vos LJ said in *Asda* at [24]:

> "The regime expressly provides for additions that must be made to the price, ascertained under art 29, in art 32 of the Code, and for deductions of certain separately itemised charges in art 33 of the Code. It is now common ground that the rebate does not fall within any of the categories of additions or deductions contained in these articles of the Code…In my judgment, the very specificity of arts 32 and 33 make it clear that other deductions are not to be made, when considering 'the price paid or payable', in order to ascertain the transaction value under art 29 of the Code."

215. We agree with Mr Brinsmead-Stockham, for the reasons he gives, and find that Article 29(3)(b) does not apply to the corporate support and marketing payments.

216. Because we have found that the company fails in its main argument we deal only briefly with the other points.

Secret Hotels2

217. We have already set out the parties' submissions and our analysis of *Secret Hotels2* in the context of the BASS Agreement, and the same submissions and analysis apply to the MCSS Agreement.

The lack of contemporaneous documentation

218. The parties made similar submissions on this issue as in relation to the BASS Agreement, and our approach is the same. Had the company been required to pay a sum to CID in the relevant period for corporate support and global marketing, we would have expected the company to provide some contemporaneous evidence of that obligation. Mrs Kara again said that relevant documents may exist in Singapore and if needed she could ask for them.

219. Our analysis is essentially the same as in relation to the BASS Agreement. Given our conclusions on the company's other submissions relating to corporate support and global marketing, there is no need for us to consider whether we should grant an adjournment to allow it to provide further evidence. Even if contemporaneous evidence consistent with the MCSS Agreement were to be produced, it would not assist the company.

The MCSS Agreement

220. Mr Brown submitted that the Recital to the MCSS Agreement was correct in that the Agreement "formalise[d] in writing the existing appointment of the Service Provider," ie CID, to perform the Services therein set out.

221. Mr Brinsmead-Stockham submitted that the MCSS Agreement provides for the company to pay fixed annual sums "based on the estimated global advertising and marketing costs allocated on a shared basis with other international markets" and CID's "estimated operating costs" respectively. These fixed sums form part of the "price paid or payable" for the goods and have simply been disaggregated. Further, for the most part the Agreement simply set out obligations which CID already bears under the terms of the Licence, or which are the normal costs of any principal selling goods to a distributor.

222. Again, we agree with Mr Brinsmead-Stockham. Specifically:

(1) Clause 8.3 of the Licence gives DKS "complete control over all aspects of the design and development" of all advertising and marketing, and "no aspects" of the plan can be implemented until "finally approved" by DKS and CID. . By Schedule J to the Licence, DKS also imposes a "Minimum Marketing Obligation" and a "Minimum Advertising Obligation" on CID for each accounting period, expressed as defined percentages of the net retail and wholesale sales for the period but subject in each case to specified minimum monetary amounts. However, the MCSS Agreement states in Clause 2.2(i) that the obligations to "establish and execute global marketing strategies" and "establish and formulate global development strategy" are obligations owed under that Agreement *to the company*. This is not the reality: rather, they are pre-existing obligations owed to DKS by CID under the Licence.

(2) Clause 8.4 requires CID "regularly to undertake PR activities relating to Articles, the Boutiques and the Business"; it cannot "engage in any media contacts with respect to the Licensed Mark, any Articles, any of the Boutiques or Outlets or the Business" without first clearing that with DKS or its appointed PR Staff. The requirement that CID undertake these PR activities flows from the Licence; it is an obligation owed by CID to DKS, not to the company. However, CID's services to the company under the MCSS Agreement include a requirement that it "liaise with DKI to maximise exposure ensuing from the DKNY JEANS global institutional image advertising campaigns for each Seasonal Collection (including the creation, production and placements of consumer media/print advertising)."

(3) CID incurs these marketing and PR costs on its own account, as required by the Licence; they are not incurred on behalf of the company. The other "services" set out in the MCSS Agreement are simply a disaggregation of the normal overheads of a company which has purchased as principal and is on-selling goods to a distributor, namely providing inventory control, an ordering system, distributing merchandise, warehousing, and shipping. These costs form part of "the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or

to be made as a condition of sale of the imported goods by the buyer to the seller" per Article 29(3)(a).

223. We therefore find that the payments for the Services in the MCSS Agreement are part of the "transaction value" of the goods imported by the company.

224. As with the BASS Agreement, and for the same reason, we considered whether the MCSS Agreement was a sham. Some of its terms do have "the appearance of creating between the parties legal rights and obligations different from [their] actual legal rights and obligations." For example, the MCSS Agreement contains at Clause 5 an "entire agreement" clause in the same terms as that in the BASS Agreement. Clause 4 says that "the parties expressly acknowledge and agree that the Service Provider (i.e., CID) shall act only as an independent contractor in providing the Services to the company" despite the existence of the distribution agreement. We also note the frequent references in the MCSS Agreement to DKI, despite the Licence being between CID and DKS; the Licence specifies that DKS is "the DKNY JEANS brand principal," not DKI.

225. However, as with the BASS Agreement, there is insufficient evidence of the parties' intentions for us to make a finding on whether or not the MCSS Agreement is a sham.

Decision on corporate support and global marketing

226. We refuse the company's appeal in relation to the corporate support and global marketing part of the Claim, because:

(1) The corporate support and global marketing costs which the company seeks to exclude from customs duty are simply recharges of costs incurred by CID on its own account. They do not fall within Article 29(3)(b).

(2) The CCC makes specific provision for the exclusion of buying commission as that term is defined and understood. There is no such exclusion for corporate support or global marketing costs.

(3) There is no parallel with the facts in *Overland* and its *ratio* neither applies generally to global support/corporate marketing nor does it apply on the facts of this specific case.

(4) There is no contemporaneous evidence that any amount was paid to CID for the relevant goods for corporate support or global marketing. Instead, the company paid a global price for the goods, which included a share of CID's corporate support and global marketing costs. This is correctly treated as part of the "the price actually paid or payable for the goods" i.e., the transaction value.

(5) Even had the same methodology been followed in the relevant period as in 2010, all that has happened is that the corporate support and global marketing costs borne by CID have been allocated to the company and invoiced separately. That does not make them into "activities, including marketing activities, undertaken by the buyer on his own account" so as to bring them into Article 29(2)(b). Rather, they are costs incurred by CID because of its obligations

under the Licence, under which it acted as the principal in selling goods to the company.

THE METHODOLOGY AND QUANTUM OF THE CLAIM

227. We had a number of difficulties with the methodology and quantum of the Claim, which we set out here.

The Schedules and the FoB value

228. As is clear from the Claim (see §64(1)), the FoB value for the relevant period was itself a calculated amount, being based on the company's statement that CID charged a 68% mark-up on its costs. Mr Brinsmead-Stockham questioned the basis for the this mark-up, and, by inference, also challenged the calculation of the Claim, by analysing two documents.

229. The first was PPS Schedule 1, which gives CID's 2010 design costs, development/co-ordination costs and product-related costs as $2,026,000. To this is added an 8% mark-up. The total of $2,188,000 is 11.4% of $19,167,500 (the FoB figure which is also on the 2010 Schedule).

230. PPS Schedule 1 then adds a further 5% (freight/handling) and 16.6% (royalties) making 33%. When the 14% "buying commission" is added, the total mark-up is 47%.

231. Mr Brinsmead-Stockham spent some time cross-examining Mrs Kara on how the company arrived at a 68% mark up on costs given these figures. On the afternoon of the second (final) day of the hearing, the Tribunal was handed up a further document, also headed "Product Pricing Structure" ("PPS Schedule 2") which showed the 68% made up as follows:

Freight/handling	5.0%	(as PPS Schedule 1)
Sourcing office (HK)	14.0%	("buying commission")
Royalties	19.0%	(PPS Schedule 1: 16.6%)
Advertising contribution	4.0%	(new)
Design/product devt (S'pore): direct	11.4%	(as PPS Schedule 1)
Design/product devt (S'pore): indirect	4.4%	(new)
Distribution centre (HK)	4.6%	(new)
Corporate Office (Singapore)	5.6%	(new)
Total	68.0%	

232. The differences between PPS Schedules 1 and 2 were not explained to us and we make no finding of fact as to exactly what mark-up CID in fact charges on its costs. Had we found that the company's appeal succeeded in principle, we would have asked for further submissions on its methodology and calculations. However, given our decision, this was unnecessary.

The corporate support and global marketing amount

233. The Claim included an amount for corporate support and global marketing costs calculated as 12.6% of the FoB cost. That percentage was worked out by dividing (a) the fixed costs charged to the company by (b) the FoB value of the relevant goods.

234. It is part of the company's case that the fixed costs shown in Clause 3.1 of the MCSS Agreement are the same as those charged in the relevant period, i.e., $1,213,000 per annum, split between marketing ($277,000) and corporate services ($936,000).

235. If $1,213,000 is 12.6% of the FoB figure for the relevant period, the FoB amount must be $9,626,984.

236. However, the 2010 FoB figure was $19,167,500 (as we have seen from the 2010 Schedule) and the fixed costs were the same, $1,213,000. This is 6.3% of the 2010 FoB figure – exactly half the percentage used in the Claim for the relevant period. It occurred to us that there may be a calculation error in the Claim.

237. Had we found that the Claim succeeded in principle, we would have asked the company to review the quantum of the claim. However, given our decision, we did not consider this to be necessary.

Overall decision and appeal rights

238. The company's appeal is dismissed.

239. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 23 December 2014

APPENDIX 1

EXTRACTS FROM COUNCIL REGULATION EEC NO 2913/92 OF 12 OCTOBER 1992 ESTABLISHING THE COMMUNITY CUSTOMS CODE

TITLE II: FACTORS ON THE BASIS OF WHICH IMPORT DUTIES OR EXPORT DUTIES AND THE OTHER MEASURES PRESCRIBED IN RESPECT OF TRADE IN GOODS ARE APPLIED

Chapter 3

Article 28

The provisions of this Chapter shall determine the customs value for the purposes of applying the Customs Tariff of the European Communities and non-tariff measures laid down by Community provisions governing specific fields relating to trade in goods.

Article 29

1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

(a) that there are no restrictions as to the disposal or use of the goods by the buyer, other than restrictions which:

- are imposed or required by a law or by the public authorities in the Community,

- limit the geographical area in which the goods may be resold,

or

- do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with Article 32; and

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related shall not in itself be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the declarant or otherwise, the customs authorities have grounds for considering that the relationship influenced

the price, they shall communicate their grounds to the declarant and he shall be given a reasonable opportunity to respond. If the declarant so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1 wherever the declarant demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to the Community;

(ii) the customs value of identical or similar goods, as determined under Article 30 (2) (c);

(iii) the customs value of identical or similar goods, as determined under Article 30 (2) (d).

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 32 and costs incurred by the seller in sales in which he and the buyer are not related and where such costs are not incurred by the seller in sales in which he and the buyer are related.

(c) The tests set forth in subparagraph (b) are to be used at the initiative of the declarant and only for comparison purposes. Substitute values may not be established under the said subparagraph.

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.

(b) Activities, including marketing activities, undertaken by the buyer on his own account, other than those for which an adjustment is provided in Article 32, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller or have been undertaken by agreement with the seller, and their cost shall not be added to the price actually paid or payable in determining the customs value of imported goods.

Article 32

1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions,

(ii) the cost of containers which are treated as being one, for customs purposes, with the goods in question,

(iii) the cost of packing, whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable

(i) materials, components, parts and similar items incorporated in the imported goods,

(ii) tools, dies, moulds and similar items used in the production of the imported goods,

(iii) materials consumed in the production of the imported goods,

(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller;

(e) (i) the cost of transport and insurance of the imported goods, and

(ii) loading and handling charges associated with the transport of the imported goods

to the place of introduction into the customs territory of the Community.

2. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

4. In this Chapter, the term “buying commissions” means fees paid by an importer to his agent for the service of representing him in the purchase of the goods being valued.

5. Notwithstanding paragraph 1 (c):

(a) charges for the right to reproduce the imported goods in the Community shall not be added to the price actually paid or payable for the imported goods in determining the customs value; and

(b) payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported

goods if such payments are not a condition of the sale for export to the Community of the goods.

Article 33

1. Provided that they are shown separately from the price actually paid or payable, the following shall not be included in the customs value:

(a) charges for the transport of goods after their arrival at the place of introduction into the customs territory of the Community;

(b) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation of imported goods such as industrial plant, machinery or equipment;

(c) charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods, irrespective of whether the finance is provided by the seller or another person, provided that the financing arrangement has been made in writing and where required, the buyer can demonstrate that:

- such goods are actually sold at the price declared as the price actually paid or payable, and

- the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided;

(d) charges for the right to reproduce imported goods in the Community;

(e) buying commissions;

(f) import duties or other charges payable in the Community by reason of the importation or sale of the goods.

TITLE IV: CUSTOMS APPROVED TREATMENT OR USE

Article 78: Post-clearance examination of declarations

1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in

accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.

TITLE VII: CUSTOMS DEBT

Chapter 5: Repayment or remission of duty

Article 236

1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative

APPENDIX 2

EXTRACTS FROM EXPLANATORY NOTE TO AND COMMENTARY ON ARTICLE 8 OF THE WTO AGREEMENT

EXPLANATORY NOTE 2.1

Buying and selling agents

4. The agent (also referred to as an “intermediary”) is a person who buys or sells goods possibly in his own name, but always for the account of a principal. He participates in the conclusion of a contract of sale, representing either the seller or the buyer.

5. The agent's remuneration takes the form of a commission, generally expressed as a percentage of the price of the goods.

6. A distinction can be made between selling agents and buying agents. ...

9. A buying agent is 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.

10. The buying agent's remuneration which is usually termed "buying commission" is paid by the importer, apart from the payment for the goods...

15. To sum up, when determining the transaction value of imported goods it will be necessary to include in that value commissions and brokerage incurred by the buyer, except buying commissions. Accordingly, the question of whether or not payments made to intermediaries by the buyer and not included in the price actually paid or payable should be added to that price will depend, in the final analysis, on the role played by the intermediary and not on the term ("agent" or "broker") by which he is known. It is also clear from the provisions of art 8 that commissions or brokerage payable by the seller but which are not charged to the buyer could not be added to the price actually paid or payable.'

EXTRACTS FROM COMMENTARY 17.1

2.. While the provisions of the Agreement are clear and raise no particular question of principle, the treatment of commissions for Customs valuation purposes depends on the exact nature of services rendered by the intermediaries.

3. Explanatory Note 2.1 of the Technical Committee on Customs Valuation examines commissions and brokerage in the context of Article 8, identifying the common characteristics of intermediaries, and concludes that, since the nature of the services rendered by intermediaries are often not apparent from the commercial documents, national administrations will need to take necessary reasonable measure to ensure the proper application of this provision of the Agreement.

4. This commentary provides guidelines on the question of the evidence necessary to establish under what circumstances fees paid by a buyer to an intermediary can be considered as a buying commission.

5. In this context, all relevant documents necessary to ascertain the existence and precise nature of the services in question should be made available to Customs.

6. Among such documents, one would be the agency contract between the agent and the buyer, stating the formalities and the activities which the agent may have to perform in the discharge of his duties up to the time that he puts the goods at the disposal of the buyer. The agency contracts should accurately reflect the terms of the agreement between the buyer and the agent and other documentary evidence such as purchase orders, telexes, letters of credit, correspondence, etc., which clearly supports the bona fides of the agency contract are to be produced should Customs so request.

7. In cases where written agency contracts do not exist alternative documentary evidence, such as mentioned in para 6 above, which clearly establishes the existence of an agency relationship is to be produced should Customs so request.

8. In cases where sufficient evidence establishing an agency relationship is not produced, Customs may conclude that no buying agency relationship exists.

9. Sometimes, the contracts or documents do not clearly represent or reflect the nature of the activities of the so-called agent. In such circumstances, it is essential that the actual facts of the case be determined and various factors, as explained below, be examined.

10. One of the questions which could be the subject of an enquiry is whether the so-called buying agent assumes any risk or performs additional services other than those which are indicated in para 9 of Capital Explanatory Note 2.1 and would normally be carried out by a buying agent. The extent of these additional services could affect the treatment of the buying commission. An example could be where the agent uses his own funds for the payment of the imported goods. This opens the possibility of the so-called buying agent sustaining a loss or gaining a profit arising from ownership of the goods rather than receiving an agreed fee from acting as a buying agent. In this situation, the totality of the circumstances which apparently establishes a buying agency arrangement may be examined.

11. The result of this enquiry could indicate that the agent is acting on his own account and/or that he has proprietary interest in the goods. ...

12. Another factor to be examined is the relationship, within the meaning of art 15.4 of the parties involved in the transaction. For instance, the relationship of the agent with the seller or with the person related to the seller has a bearing on the ability of the alleged agent to represent the buyer's interest. Despite the existence of an agency contract, the Customs is entitled to examine the totality of the circumstances to determine whether the so-called agent is in fact acting on behalf of the buyer and not on the account of the seller or even on his own account.