[2019] UKFTT 644 (TC)

# TC07420

*Customs Duty – whether buying commission paid to intermediary – no reliable evidence that intermediary acting as buying agent – director's genuine belief insufficient - burden of proof not discharged – appeal dismissed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2017/02789**

**BETWEEN**

**ALPHA STATE APPARELS LIMITED** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE ANNE REDSTON**

**Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 10 July 2019 and 30 July 2019**

**Mr Joseph Howard of Counsel for the Appellant**

**Mr Charles Bradley of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. Alpha State Apparels Limited ("Alpha") is a company which imports clothing ("the goods") to the UK; it is owned and run by Mr Frazer Paterson. The goods were manufactured in mainland China and invoiced to Alpha by AE Fashion Company Limited ("AE"), based in Hong Kong. AE's invoices to Alpha showed a price for the goods, plus "buying commission" of 25%.

2. Buying commission is excluded when calculating the value of the goods for the purposes of customs duty. HM Revenue & Customs ("HMRC") did not accept that the 25% identified on AE's invoices was buying commission; instead, they decided that it formed part of the value of the imported goods.

3. HMRC issued Alpha with C18 post-clearance demand notes ("C18s") totalling £76,655.13 relating to 160 import entries between 2 February 2014 and 19 October 2016 ("the relevant period"). The issue in the appeal was whether the 25% added to AE's invoices was buying commission; if it was, the appeal would be allowed and the C18s set aside.

4. I found that Alpha failed to meet the burden of proving that this was the case. In particular, Alpha had no reliable evidence of the price paid by AE to the Chinese manufacturers. The appeal is therefore dismissed and the C18s upheld.

### THE ISSUE IN DISPUTE

5. There were two linked issues in dispute, namely:

(1) whether AE had acted as Alpha's buying agent, and thus

(2) whether the 25% shown on the invoices received from AE was buying commission.

6. HMRC did not seek to argue that a 25% commission was too high; their case was that Alpha had failed to meet its burden of showing that it was paying that amount as buying commission.

### THE EVIDENCE

7. The Tribunal was provided with two bundles of documents prepared by HMRC. These included:

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

(2) emails between Mr Paterson and Mr Andy Lau, the owner and director of AE, and between Mr Paterson and Mr Lau's employees;

(3) invoices, credit notes and debit notes between AE and Alpha. Some of these were copies of those originally sent to Alpha; Mr Lau also provided all invoices AE had sent to Alpha between 2008 and 2016;

(4) documents supplied by Mr Lau in response to HMRC's enquiries; these are discussed at §25-31 and §35-37 below; and

(5) documents relating to arrangements between Alpha and other third parties. However, I have not taken these into account in my decision as they do not provide relevant evidence in relation to the issue in dispute.

8. Mr Paterson provided a witness statement, gave evidence-in-chief led by Mr Howard, was cross-examined by Mr Bradley, and answered questions from the Tribunal. I found him

to be a generally honest witness, accepting points which were adverse to his company's case. For example, he confirmed that Alpha had not seen the documentation between AE and the manufacturers, and he agreed that AE's activities in China would have been no different had AE been acting as principal rather than as Alpha's agent. However, he gave inconsistent evidence about the packing lists used in the Chinese factory (see §32) and his oral evidence about the usage of the term "ex-factory" was unreliable, see §35-38 below.

9. Mr Sorab Patel, Alpha's external accountant, provided a witness statement, gave evidence-in-chief led by Mr Howard, was cross-examined by Mr Bradley, and answered questions from the Tribunal. Mr Patel accepted in cross-examination that he had had no contact with AE or with the Chinese manufacturers. Mr Bradley therefore invited me to ignore his evidence. I agree that in relation to those key issues Mr Patel is only expressing his views and is unable to add anything to Mr Paterson's evidence. However, I accepted Mr Patel's evidence about the make up of Alpha's purchase orders, see §19(4), as this was a matter within his direct knowledge.

10. Some of the emails sent to HMRC were from the account of Ms Hitu Haria, Mr Patel's secretary. Neither party sought to argue that these emails did not reflect Alpha's position and I have taken this to be the case.

11. Mr Lau was asked by Mr Paterson to attend the hearing, but he refused. As explained at §60, he will no longer take or return Mr Paterson's calls. However, he provided an affidavit. Both parties invited the Tribunal to admit the affidavit and place such weight on it as I thought appropriate. I find that his affidavit has no probative value, bearing in mind his refusal to participate in the hearing and his unavailability for cross-examination.

12. Both parties accepted that the invoices between AE and Alpha which were exhibited to that affidavit should be accepted in evidence, and I agree.

13. I make the findings of fact in the next part of my decision based on the evidence summarised above, with the exception of Mr Lau's affidavit.

## FINDINGS OF FACT

14. Mr Paterson had previously been employed by other companies importing clothing into the UK from overseas, including from China. He set up Alpha in 2006 and is its only employee and director.

### The arrangements between the parties

15. Until 2016, many of Alpha's goods were sourced in China. It was not practicable for Alpha to deal directly with Chinese manufacturers, largely because of language difficulties. After 2016, Alpha's goods were mostly purchased from India; Mr Paterson dealt directly with the manufacturers, because the factory managers spoke English.

16. At some point before the beginning of the relevant period, Mr Paterson made contact with Mr Lau (who he referred to as "Andy"). Mr Paterson knew Mr Lau had his own small business in Hong Kong and had a lot of contacts with Chinese manufacturers, and he knew and trusted him from contacts made during his earlier employments. Mr Paterson asked Mr Lau's company, AE, to act on behalf of Alpha in China. There was no written contract between the two companies, but it was Mr Paterson's genuine belief that AE was acting as Alpha's buying agent.

17. Mr Lau rarely visited the UK and business was conducted on the phone or by email. Mr Paterson went to China around four times a year and visited various factories, but was unable to remember the name of any factories he had visited. None of the emails from Mr Lau to Mr Paterson named the factory which had produced the goods being sent to the UK.

**The process**

18. Alpha concentrates on the low-volume end of the market; its clients have specific requirements for the goods they are seeking. The customers communicated their requirements to Mr Paterson, and he explained them to Mr Lau or to one of his staff. Sometimes, Mr Paterson would identify a garment himself for which he could see there might be a UK market and would send it to Mr Lau with instructions – for example, to find a manufacturer who could replace the buttons on a particular garment with a zip.

19. The process was then as follows:

(1) Mr Lau identified a manufacturing company. The range of goods required by Alpha's UK customers meant that different Chinese companies were used;

(2) Mr Paterson confirmed to the customer that Alpha could supply the goods;

(3) the customer sent Alpha a purchase order;

(4) Mr Patel sent a purchase order to AE. In order not to make mistakes in the detailed customer specifications, he cut and pasted those details from the customer's purchase order onto Alpha's purchase order. However, he did not cut and paste the customer's purchase order number. Alpha had its own sequence of purchase order numbers;

(5) the amount shown on the purchase order was the price agreed between Alpha and AE; in other words, the purchase order does not show a price before the addition of buying commission, but the total price;

(6) AE sent its own purchase order to the relevant Chinese company. This contained Alpha's technical specifications, translated into Chinese;

(7) AE arranged for a prototype to be produced, which Mr Lau or one of his staff checked to Alpha's specification before sending it to Mr Paterson;

(8) further changes to the specification were often required; these were communicated by Alpha to Mr Lau, who ensured that the finished goods incorporated these changes;

(9) the finished goods were shipped via Hong Kong to Alpha;

(10) the Chinese company invoiced AE and AE invoiced Alpha. AE's invoices showed a price for the goods, plus 25% buyer's commission; and

(11) Alpha paid AE and AE paid the Chinese manufacturer(s).

20. I make further findings about some of these steps in the following paragraphs.

21. Under cross-examination, Mr Paterson accepted that the above procedures were consistent with AE acting either as principal or as agent. In other words, AE would have acted in the same way if it was acting on its own behalf, buying the goods from the Chinese manufacturers as principal.

22. Mr Paterson also acknowledged that it was no part of the process for him to be sent copies of (a) AE's purchase orders to the Chinese manufacturers; (b) the invoices sent by those manufacturers to AE, or (c) any documents setting out the terms on which the Chinese factory

agreed to produce the goods. Mr Paterson said he did not believe that "any terms and conditions that we had put in our purchase orders would have been legally binding on the manufacturers".

**The invoices and purchase orders**

23. On 8 April 2016, Mr Abasi, the HMRC officer with responsibility for the case asked to see certain purchase invoices and invoices between AE and the Chinese manufacturer.

24. On 31 May 2016, Mr Abasi was informed that Alpha was unable to provide those documents as they were confidential and Mr Lau would not supply them. Following a meeting between Mr Abasi and Mr Paterson on 27 July 2016 ("the HMRC meeting"), Mr Abasi emailed Mr Paterson asking for two specific purchase orders and the related invoices from AE to the Chinese manufacturer(s).

25. On 5 September 2016, Mr Paterson provided Mr Abasi with documents which he said were the original purchase orders and the original invoices between AE and Chung Yan Garment factory in Dongguan, China. Because the provenance of these documents was in dispute, I have called them the "Chung Yan" invoices and purchase orders.

26. Both of the "Chung Yan" invoices are formatted in the same way as AE's invoices to Alpha, other than that:

(1) the name on the top is different: instead of AE it reads Chung Yan;

(2) the amount identified as commission has not been included; and

(3) the delivery details as between AE and Alpha do not appear.

27. In particular, the invoice number of the first AE invoice was "AS-289-09", the order number was 4127. The first "Chung Yan" invoice has the same invoice number, and the same order number. The invoice number on the second AE invoice was "AS-293-10", again identical to the invoice number on the second "Chung Yan" invoice; on that invoice the line entitled "order number" is blank. Although the invoices headed "Chung Yan" did not contain the delivery details as between AE and Alpha, it was noteworthy that they contained no delivery details at all.

28. In cross-examination, Mr Bradley suggested to Mr Paterson that "this supposed [first] invoice from Chung Yan is not a real document". Mr Paterson said that it was not unusual to cut and paste text from a customer, to avoid errors in detailed specifications. Mr Bradley drew his attention to the fact that it was not only the details of the clothing which had been copied, but also the invoice numbers and order numbers. He asked Mr Paterson to agree that it was "not likely that the factory and the agent uses exactly the same system of numbering". Mr Paterson had no explanation for the fact that the invoice numbers were identical.

29. I agree with Mr Bradley that there is a difference between the cutting and pasting of detailed specifications (as Mr Patel did with the orders from Alpha's customers) and copying the order and invoice numbers. I find that these supposed invoices were created for the purposes of responding to HMRC's enquiries, and were not genuine. HMRC did not allege that Mr Paterson had acted fraudulently in putting forward these invoices as evidence, but submitted that they were not reliable evidence, and I agree.

30. A further issue was raised by the "Chung Yan" purchase orders, and I consider this at §35 below.

31. I also noted that these "Chung Yan" invoices and purchase orders were in English. One of the reasons why Mr Paterson needed Mr Lau's services was because of language difficulties as between the UK and Chinese factories, in contrast to the position when production moved to India, and he confirmed to the Tribunal that "normally communication between Andy and the manufacturers would be in Chinese". I agree, and find that it would be surprising for a Chinese manufacturer to issue an invoice written in English to a Hong Kong company rather than using Chinese, the common written language of both China and Hong Kong.

**The packing lists**

32. Alpha had provided as evidence two types of documents listing the goods ordered from a particular factory. One of these documents was handwritten and one was typed; both were in English. Mr Paterson's oral evidence was that both were created as pro-formas by AE; that the handwritten document was filled in at the factory by an AE employee who checked that the garments being produced were the same as those which had been ordered and that the typed version was then completed back in AE's office. This oral evidence was inconsistent with Mr Paterson's witness statement which stated that the hand-written document was created by the Chinese factory. Mr Bradley invited him to change his witness statement, but Mr Paterson said only that the two were "inextricably linked". I agree with Mr Bradley that there was a difference. Both documents were in English, which was consistent with Mr Paterson's oral evidence that they were both created by AE. I accept that oral evidence and find that they were both AE's documents, so that the first document was not created by the Chinese factory.

33. Mr Paterson also stated at another point in his witness statement that the packing lists (which he there called "quality control" lists) contained Alpha's customer name, but when taken to the documents by Mr Bradley agreed that this was not the case.

34. Mr Paterson had put forward the packing lists as evidence that the factories were contracting with Alpha. However, I refuse to make that inference: there is no reference to Alpha on the documents, and they were in any event created by AE, not by the factory.

**Ex-factory or FoB?**

35. In his witness statement Mr Paterson said that "factories in China produce goods for collection from the factory ('ex-factory')". During cross-examination, Mr Bradley drew Mr his attention to the fact that "Chung Yan" purchase order stated that the goods were being ordered "ex-factory". That is consistent with Mr Paterson's witness statement as to the normal terms on which goods were sold by Chinese manufacturers. However, the "Chung Yan" invoices say that delivery is "FoB Hong Kong". It was common ground that the term "FoB" means that the price includes the cost of delivering the goods to the port.

36. Mr Bradley asked Mr Paterson to confirm that there was an inconsistency between the purchase order and the invoices. Mr Paterson denied this, saying that the reference on the purchase order to "ex-factory" referred to the date on which the goods would be finished, and on re-examination said that the factory paid for the delivery of the goods up to the point they reached the port.

37. I do not accept that oral evidence, which is inconsistent with Mr Paterson's witness statement and with the normal meaning of the term "ex-factory": the Cambridge English Dictionary says that the term "is used for stating that the buyer of goods is responsible for arranging and paying for them to be transported from the seller's factory".

38. I find as facts that (a) goods in China are normally produced on an "ex-factory" basis; (b) this means that the costs of delivery were borne by the person who purchased the goods from the factory and (c) this was the case for the goods at issue in this appeal.

39. In coming to that conclusion, I have not overlooked an email chain in which Mr Lau told Mr Paterson quoted certain prices as being "FoB Shanghai". That simply shows that Alpha was provided with FoB prices; it says nothing about the prices paid by AE when purchasing from the Chinese factories.

**Organising the deliveries**

40. It was AE's responsibility to organise the transfer of the goods from the factory when there were large orders. Mr Paterson's witness statement says that:

> "for large orders Andy was responsible for procuring the collection by freight forwarders of the goods from the factories to the ports for delivery to us in the UK. This entailed a process called 'stuffing' whereby Andy or one of his employees at AE would supervise the filling of a container in the factory itself."

41. He goes on to say that when arranging the collection and delivery of large orders, Mr Lay was acting "in our name" ie as agent for Alpha. However, under cross-examination he accepted that he had no supporting documentation for that statement. It is therefore a statement of belief on which I place no weight.

42. Mr Paterson's witness statement also says that smaller orders "are brought to the freight forwarders Chinese office by the factory". Mr Paterson's oral evidence was that he had meant to say "the freight forwarder's Hong Kong office", and that the factory was responsible for "organising" this transport. I considered whether this was inconsistent with my findings about pricing being on an ex-factory basis, but decided it was not; a manufacturer could price on an ex-factory basis, but also arrange for the delivery of goods to its Hong Kong agent, with that delivery cost being additional.

43. It was common ground that once the goods had arrived at the port, AE was responsible for organising onward transportation. Some shipping documents were provided in evidence. These showed the consignee as being Alpha; there were various consignors. Mr Paterson's oral evidence was that the consignors were the Hong Kong branch offices of the various Chinese manufacturing companies, and this showed that the Chinese factories knew they were contracting with Alpha and that AE was simply a buying agent and not the principal. However, this was challenged by Mr Bradley, on the basis that Mr Paterson did not know the names of the factories which manufactured the goods (see §17), and there was no evidence as to whether the consignors and the manufacturers were linked. Indeed, Mr Paterson's own witness statement said that for smaller orders the goods were sent from the factories to "the freight forwarders Chinese office"; he did not say that they were sent to the manufacturer's Chinese office.

44. Mr Paterson also said in his witness statement that AE was never the consignor. However, on 4 December 2015, Mr Abasi sent Mr Paterson printouts setting out the details of two consignments for which AE was shown as the consignor. When this was pointed out in cross-examination, Mr Paterson said it was "a complete surprise"; when asked to agree that his witness statement was therefore incorrect, said that he didn't know whether or not AE was the consignor. Mr Howard asked that little if any reliance be placed on those printouts, as HMRC

had not provided any evidence that they were a standard form document from HMRC's import records, which was Mr Bradley's understanding.

45. Even if Mr Howard were correct that HMRC should have formally proved the source of the printouts, that does not resolve this issue in Alpha's favour. The manufacturer of the goods is unknown, so it is simply not possible to show that the other consignors were the manufacturers, or to draw an inference that the manufacturers knew that they were contracting with Alpha and not with AE.

**The credit terms and obligation to make payment**

46. In his witness statement, Mr Paterson said that Mr Lau had arranged for Alpha to have 45 day credit terms with the manufacturers. However, under cross-examination he acknowledged that he had not seen any contract setting out credit terms, and did not know whether or not the factory had agreed credit terms with Alpha, or with AE. I agree with Mr Bradley that there was no reliable evidence that the manufacturers were extending 45 day credit terms to Alpha rather than to AE.

47. Mr Paterson also accepted that if Alpha did not pay AE, then AE would "probably have had to pay the supplier" but if that step was taken, this would have been in order "avoid loss of credibility" because "as our agent he was not contractually obliged" to make payment.

48. He also accepted that emails between Mr Lau and Mr Paterson dated 19 August 2016 showed that AE had paid the manufacturers on that occasion, when Alpha was late in making payments. Mr Lau said:

> "We will accept your proposed payment schedule, but only once. We understand you have been facing difficulties of your business. In the meantime we hope you understand our situation that your payment is overdue for a long time and it was hard for us to pre-pay such a large amount of costs to the suppliers. We hope you could settle the payment on time (to be honest, overdue for 1-2 weeks, it happen always, we never push). Otherwise the suppliers will not provide their service to us. I believe you are a trustful partner and hope this will never happen again so that we can co-operate with each other smoothly in future."

49. Mr Paterson's reply to Mr Lau "it's the first time in 10 years of business that we've come up against this and I hope we never do again".

50. There is no reference in that email exchange to Mr Lau making payment "on behalf of" Alpha. Indeed, the fact that AE had made payment despite not having been paid by Alpha is evidence that the contractual obligation to make payment rested with AE and not with Alpha.

**Amendments to garments**

51. Amendments were sometimes required to garments ordered by Alpha. On one occasion there was a change to the fabric and new prototypes were required. Mr Lau emailed Mr Paterson to say "noted, but supplier still will charge the development cost for the sample fabric, so we will debit you for this". I asked if an invoice showing this extra cost was included in the Bundle, but none was identified.

52. There was also no invoice showing the extra cost following an email from Mr Lau which reads "if follow the garment, supplier should be need to charge extra cost". There is thus no documentary evidence of Alpha being invoiced to reimburse extra development costs incurred by the manufacturer. I find as a fact that any such extra costs were included as part of the price

charged by the manufacturer to AE, and that AE in turn included those costs in its invoices to Alpha. In any event, simply incurring of extra supplier costs does not show that AE was acting as agent; if it were acting as principal, it could also have on-billed the extra costs to Alpha.

**Negotiations**

53. Mr Howard also sought to rely on emails showing that:

(1) AE was negotiating with Chinese manufacturers to obtain lower prices;

(2) AE was trying to find an alternative manufacturer, which could better meet Alpha's requirements;

(3) AE was on one occasion contacted by Alpha's customer, seeking urgent copies of an ordered prototype;

(4) Mr Paterson passed on to Mr Lau the "target prices" provided by one of Alpha's customers;

(5) Mr Lau had warned that the prices of goods from the Chinese factories would increase because of the dollar/yuan exchange rate, and because of small order quantities and changes to the styles being ordered; and

(6) Mr Lau had agreed to reduce the prices at which the goods were supplied to Alpha.

54. However, none of the above leads to the necessary conclusion that AE was acting as agent. As Mr Paterson himself accepted in cross-examination, AE would have acted in the same way if it was acting as principal.

**Evidence of payment to the manufacturers,**

55. On 8 April 2016, Mr Abasi asked Alpha to provide evidence of AE's payments to the manufacturers. As with the invoices, Mr Abasi was initially told that these could not be provided because they were "confidential"**.**

56. However, at the HMRC meeting on 27 July 2016, Mr Paterson said that he would provide copies of AE's payments to the manufacturers. On 7 September, Mr Lau provided a signed letter confirming that he had paid the amounts shown on the two "Chung Yan" invoices.

57. On 4 October 2016, Mr Abasi tried again to obtain evidence of payment, pointing out that HMRC was bound by Revenue & Customs Act 2005 to keep the documents confidential; he also undertook to shred or return any bank statements provided. Mr Lau's response was that he was being "disrespected", and that as AE makes bulk payments to manufacturers it would not be possible to follow an audit trail from Alpha's purchase order to the payments made by AE. Thus, neither HMRC nor the Tribunal were provided with any reliable evidence of the payments made to the manufacturers.

**Mr Lau's failure to provide relevant evidence.**

58. Mr Bradley submitted that AE's refusal to provide evidence of payment and his initial refusal to provide copies of invoices and purchase orders on the basis of confidentiality were both inconsistent with AE acting as Alpha's agent. I agree. An agent acts on behalf of his principal, and so can be required to provide evidence of his dealings with third parties on behalf of that principal, such as payment documentation and invoices.

59. After the two "Chung Yan" invoices were provided and challenged by HMRC, Mr Paterson pressed Mr Lau to provide for more invoices between AE and Chinese manufacturers. Mr Lau refused, for two reasons:

(1) The first was that he had not kept copies. Mr Bradley submitted that this was not credible, given that he had retained copies of eight years' worth of invoices sent by AE to Alpha. I agree.

(2) The second was that many of the factories previously visited by Mr Paterson "don't exist now because they had already closed a long time. The contact persons also can't be found". There was no supporting evidence for this statement. Mr Bradley submitted that it was simply a further excuse for not providing the invoices between AE and the manufacturers. Again, I agree.

60. Although Mr Lau provided a Statutory Declaration, he then told Mr Paterson that he was not willing to attend the hearing, or to participate further in the process, because in China any legal matter involving the government was very serious and he was "feeling fear". Mr Paterson speculated that neither he, nor the Chinese manufacturers wanted to be mentioned in a court judgment. Mr Lau has now stopped returning Mr Paterson's calls.

61. Mr Bradley submitted that if AE had been acting as Alpha's Hong Kong agent, it would have had no difficulty supplying the requested documents, and Mr Lau was not co-operating because he was unable to provide any oral or written evidence to support Alpha's case. I consider that submission later in my decision.

**THE LAW**

62. The legislation set out below is cited so far as relevant to the issues in this appeal.

63. The Community Customs Code was implemented in the EU by EC Regulation 2913/92 This was in force until 1 May 2016. The relevant period for this appeal runs from 2 February 2014 and 19 October 2016, so Reg 2913/92 applies for most of that period. From 1 May 2016, it was replaced by Reg 952/2013 which laid down the Union Customs Code ("UCC"). The parties agreed that, in the context of the issues before the Tribunal, the UCC made no substantive changes.

### Regulation 2913/92

64. Article 29 of Reg 2913/92 provides:

> "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…"

65. Article 32(1) provides:

> "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…"

66. 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".

67. 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".

**Regulation 952/2013 (the UCC)**

68. Article 70 of the UCC substantially replicates Articles 29 and 32(1) of Reg 2913/92. it is headed "method of customs value based on the transaction value" and reads:

> "The primary basis for the customs value of 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 Union, adjusted, where necessary.
>
> The price actually paid or payable shall be the total payment made or to be made by the buyer to the seller or by the buyer to a third party for the benefit of the seller for the imported goods and include all payments made or to be made as a condition of sale of the imported goods."

69. Article 71 is headed "Elements of the transaction value" and begins:

> (1) In determining the customs value under Article 70, the price actually paid or payable for the imported goods shall be supplemented by:
>
> (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;…"

70. Article 72 is headed "Elements not to be included in the customs value" and provides:

> "In determining the customs value under Article 70, none of the following shall be included:…
>
> (e) buying commissions…"

**The Valuation Agreement and the WCO**

71. Articles 32 and 33 of the CCC (and the equivalent provisions of the UCC) 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 states that it was 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".

*The status of the Explanatory Notes and Commentary*

73. The World Customs Organisation ("WCO") provides Explanatory Notes and Commentary on the Valuation Agreement. In *Umbro International v HMRC* [2009] STC 1345 ("*Umbro*") 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. That 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 the WCO's Notes on the Valuation Agreement. However, *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].

75. There is no similar weight of authority in relation to the WCO Explanatory Notes and Commentary. However, as I previously noted in *Club 21 v HMRC* [2014] UKFTT 1113, Advocate General Mischo said in *Hauptzollamt Karlsruhe v Gebrüder Hepp GmbH & Co* Case C-299/90 at [22]-[25] that Explanatory Note 2.1 "should carry a lot of weight" in the context of the WCO Explanatory Notes and Commentary on buying commission, because:

> "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."

76. On the basis of that analysis, together with Proudman J's reliance on *BVBA* in *Umbro,* I find 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.

*The Explanatory Notes: Buying Commission*

77. 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."

78. 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."

79. 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."

*The Commentary: Buying Commission*

80. The Commentary at 17.1 is headed "Buying Commission" and at (4) states that it "provides guidance 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".

81. It goes on to state that in the absence of a written agency contract, "alternative documentary evidence" such as "purchase orders, telexes, letters of credit, correspondence etc" which "clearly establish the existence of an agency relationship is to be produced should Customs so request". It continues:

> "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 Article 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.
>
> 13. In certain transactions, the agent concludes the contract, re-invoices the importer distinguishing the price of the goods and the fee. The mere act of reinvoicing does not make him the seller of the goods. However, since the price paid to the supplier is the basis for the transaction value under the Agreement, the Customs may require the declarant to produce the invoice issued by the supplier and other documents to substantiate the declared value
>
> 14. Failure by the importer to supply Customs with the commercial invoice to the agent, or other satisfactory evidence of sale, may prevent Customs from verifying the price actually paid or payable in the country of importation and could preclude Customs from considering that sale as the bona fide sale for export."

**Other guidance from *Umbro***

82. The following further guidance can be found at [15], [27], [29] and [30] of *Umbro*:

(1) it was a "common-sense proposition" that the characterisation employed by the parties cannot control the true nature of the relationship at law and that this was supported by Explanatory Note 2.1(15), and this "has even more force when the characterisation is employed in retrospect."

(2) the relationship between the parties "must be categorised by reference to objective criteria", see *De Danske;*

(3) "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)".

**THE PARTIES' SUBMISSIONS**

83. The parties made the submissions summarised below.

### Submissions on the law and the commentary

*Article 70 a subjective or objective test?*

84. Mr Howard referred to Article 70 of the UCC, and the equivalent earlier provisions in the CCC, which I repeat for ease of reference

> "The price actually paid or payable shall be the total payment made or to be made by the buyer to the seller or by the buyer to a third party for the benefit of the seller for the imported goods and include all payments made or to be made as a condition of sale of the imported goods."

85. He submitted that "the price actually paid or payable" was a purpose test, so that if the buyer genuinely believed that the price was £X, then that was determinative. Mr Bradley referred to *Umbro* at [27], also cited above, where Proudman J referred to *De Danske,* and then said that the relationship between the parties "must be categorised by reference to objective criteria".

86. In my judgment there is no basis for reading Article 70 or the earlier provisions as setting out any sort of purpose test which is to be satisfied on the basis of the buyer's subjective belief. It is, as Proudman J said, an objective test. I therefore agree with Mr Bradley.

*The weight to be placed on the Commentary*

87. Mr Howard also submitted that too much weight should not be placed on the Commentary, which had no legal force. In particular, he invited me to find that para 14 "should not be read as laying down a rule that where there are no invoices the Tribunal should necessarily find that the appellant had not proved his case".

88. I have already found that while not binding, the Commentary is an important interpretative aid. Moreover, para 14 does not, in fact, state that the invoices are the only relevant evidence, but instead refers to a "Failure by the importer to supply Customs with the commercial invoice to the agent, or other satisfactory evidence of sale.." (emphasis added). I consider below whether Alpha has provided satisfactory alternative evidence.

*The burden and standard of proof*

89. Although Mr Howard said he accepted that Alpha had the burden of proof, he also submitted that in a case such as this there were only three possibilities: (1) AE was acting as principal; (2) it was acting as a selling agent for the manufacturers, or (3) it was acting as buying agent for Alpha. In such a case, he said, the Tribunal should weigh each of these

options, decide that the most plausible succeeded, and this in turn affected the burden and standard of proof.

90. I found this difficult to follow, but have no hesitation in finding that the burden of proof is on Alpha, and that the standard is the balance of probabilities.

**Submissions on the relationship between AE and Alpha**

91. Mr Howard submitted that AE was clearly acting as Alpha's buying agent. He relied on the following:

(1) Mr Paterson's genuine belief that this was the position, and he had gave honest evidence;

(2) Mr Lau had confirmed this in his affidavit;

(3) both parties therefore believed that AE was acting as a buying agent;

(4) an agency relationship did not require a written contract;

(5) there was nothing in the parties' conduct which was inconsistent with their joint belief;

(6) the emails between the parties showed that AE was acting as an intermediary between Alpha and the manufacturers, for instance, finding cheaper suppliers, checking quality and solving problems; and

(7) the 25% level of buying commission had not been challenged by HMRC.

92. He added that Mr Lau's failure to provide the invoices, and his refusal to attend the hearing, did not necessarily lead to the conclusion that he was not acting as a buying agent. He postulated that the prices paid by AE to the manufacturers might be less than the figure on AE's invoices. If so, Mr Lau would have been acting in breach of his fiduciary duty, but that would only mean that he was a "bad agent" taking a higher buying commission, and not the agreed amount.

93. Mr Bradley submitted that Alpha had not met the burden of proof because:

(1) there was no evidence that the amounts declared as the transaction value on AE's invoices to Alpha were, in fact, the same as the sums paid by AE to the manufacturers;

(2) Mr Lau failed provide the invoices showing the amounts paid to the manufacturers. That is completely inconsistent with him acting as Alpha's agent. An agent acts on behalf of his principal, and if AE was acting on behalf of Alpha, he would have provided invoices showing what he had committed his principal to pay to the manufacturers;

(3) Mr Lau's reasons for refusing to provide the invoices were not credible;

(4) the "Chung Yan" invoices were "transparent fabrications";

(5) Mr Lau failed to attend the hearing for no good reason. It was simply not credible that he was afraid to give evidence, or that his participation would put him at risk. As already noted, he invited the Tribunal to make the inference that Mr Lau failed to attend because he could not give honest evidence in support of Alpha's case;

(6) AE paid a manufacturer when Alpha was late in paying AE. That is consistent with AE acting as principal; it is not consistent with AE acting as agent, and is one of the indicators that a so-called agent is in fact a principal, see para 10 of the Commentary; and

(7) Mr Paterson rightly accepted that AE's activities, as evidenced in the email chains, were equally consistent with that company acting as principal.

**THE TRIBUNAL'S VIEW**

94. I agree entirely with Mr Bradley's submissions set out above. A buying agent is defined in the Explanatory Notes "as a person who buys or sells goods possibly in his own name, but always for the account of a principal". I accept that Mr Paterson genuinely believed that this was the role being played by AE, and that he trusted Mr Lau to act in that capacity. But that is insufficient. There is, as Mr Bradley submitted, absolutely no independent third party evidence that AE was acting on Alpha's account in its dealings with the manufacturers. There are no invoices, no payment documentation, no bank statements, no contracts. There is no written agency contract. Mr Lau failed, for no good reason, to attend the hearing. None of the findings of fact set out earlier in this decision provide a basis for me to decide that AE was acting as Alpha's buying agent.

95. As a result, I refuse Alpha's appeal and confirm HMRC's decision.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

96. This document contains full findings of fact and reasons for the decision. If Alpha is dissatisfied with this decision, it 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 Alpha. 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: 21 AUGUST 2019**