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CUSTOMS ATTACK ON BUYING COMMISSIONS

It has been our recent experience that the Australian Customs & Border Protection Service (Australian Customs) have recently been taking a far more narrow and literal approach to what they will consider to be a buying commission as provided for under the Customs Act.

As you will be aware, where an importer utilises the services of a buying agent, the commission or charges levied by that buying agent to the importer, do not form part of the customs value for duty.

This exemption for buying commissions comes about in a fairly complex manner which is due to the labyrinth way the valuation legislation comes together. The definition of "transaction value" provides that it is the sum of the adjusted price in the import sales transaction and the relevant price related costs.

The definition of "price related costs" in turn includes commissions, but excludes buying commissions.

The term "buying commissions" is specifically defined in section 155 of the Customs Act. For ease of reference this is set out below.

> *"155(1) [Buying commission] Subject to subsection (2), reference in this Division to a buying commission in relation to imported goods is a reference to an amount paid or payable by or on behalf of the purchaser of the goods directly or indirectly to a person who, as an agent of the purchaser, represented the purchaser in the purchase of the goods in the import sales transaction.*
>
> *155(2) [Not a buying commission] An amount paid by a purchaser of imported goods to another person in the circumstances referred to in subsection (1) shall be taken not to be a buying commission unless a Collector is satisfied that that other person did not and does not:*

> *(a) produce, in whole or in part, or control the production in whole or in part of:*
> *i. the imported goods, or any other goods whose value would be taken into account in determining, or attempting to determine, the transaction value of the imported goods; or*
> *ii. any other goods of the same class as goods referred to in subparagraph (i);*
> *(b) supply, or control the supply of, any services:*
> *i. whose value would be taken into account in determining, or attempting to determine, the price of the imported goods; or*
> *ii. any other services of the same class as the services referred to in subparagraph (i);*
> *(c) transport the imported goods, or any other goods referred to in subparagraph (a)(i), within any foreign country, between a foreign country and Australia, or within Australia, for any purpose associated with the manufacture or importation of those imported goods;*
> *(d) purchase, exchange, sell or otherwise trade any of the goods referred to in subparagraph (a)(i) or supply any of the services referred to in subparagraph (b)(i) other than in the capacity of an agent of the purchaser;*
> *(e) in relation to any of the goods referred to in subparagraph (a)(i) or any of the services referred to in subparagraph (b)(i):*
> *i. act as an agent for, or in any other way represent, the producer, supplier, or vendor of the goods or services; or*
> *ii. otherwise be associated with any such person except as the agent of the purchaser; or*
> *(f) claim to receive, directly or indirectly, the benefit of any commission, fee or other payment, in the form of money, letter of credit, negotiable instruments, or any goods or services, from any person as a consequence of the import sales transaction, other than commission received from the purchaser for the services rendered by that person in that transaction."*

There are two areas where we have noted that Australian Customs have taken a more restricted line.

The first area arises from the interpretation of the phrase "other services of the same class" in section 155(2)(b)(ii). For ease of reference, I set out below that particular subsection.

> *"155(2) [Not a buying commission] An amount paid by a purchaser of imported goods to another person in the circumstances referred to in subsection (1) shall be taken not to be a buying commission unless a Collector is satisfied that that other person did not and does not:*
>
> *(a) ...*
>
> *(b) supply, or control the supply of, any services:*

i. whose value would be taken into account in determining, or attempting to determine, the price of the imported goods; or

ii. any other services of the same class as the services referred to in subparagraph (i);

(c) ..."

What this subsection is in effect saying is that the buying agent cannot undertake **any services of the same class** as those services which are part of the process which would add value to the supply and control of the imported goods.

A simple example which is beyond argument is that a buying agent who acts to assist an importer to procure ladies coats must not itself be involved in the manufacture of ladies coats.

However, what is the situation where the buying agent is assisting an importer with the importation of lingerie, but **quite separately** is involved in the manufacture of men's jeans. Obviously lingerie and jeans are made from different materials and on different machines.

The same would be true of rubber thongs and leather shoes. Another example is where the buying agent arranges the manufacture and supply of soft drinks, but separately is involved in the manufacture of one of the ingredients.

The critical question in these examples is whether these activities i.e. the manufacture of lingerie and jeans or rubber thongs and leather shoes or a soft drink and one of its ingredients are "of the same class". The reason why this has recently become important is that in many instances in Asia, there is a diversity of commercial activities that may be undertaken by any one organisation. In other words, an enterprise in China may hold itself out as a buying agent for womens clothing but at the same time it may also be involved in the manufacture of mens jeans. In some instances, this will be totally unknown to the importer.

As stated at the beginning of this article, Australian Customs are currently taking a very narrow interpretation of the concept of "the same class". This interpretation comes from an explanation provided by one of the Articles, being WTO Article 15.3, to the WTO Agreement on Customs Valuation to which Australia is a signatory and on which the valuation provisions in the Customs Act are based. This Direction provides that –

> *"Goods of the same class or kind" means goods which fall within a group or range of goods produced by a particular industry or industry sector, and include identical or similar goods."*

This means that lingerie and jeans would be regarded as of the apparel class. Rubber thongs and leather shoes would be treated as footwear and the soft drink and its ingredient would be treated as a non-alcoholic beverage.

We do not accept that this narrow interpretation is necessarily correct. I am of the opinion that a Court might take a more pragmatic view of this type of situation as the Federal Court did in the Kia case which is outlined below.

The second area which has given rise to some issues lately stems from the bar in section 155(2)(e)(ii) of the buying agent being "associated" with the producer, supplier or vendor of the goods. This subsection was the subject of an AAT case and a subsequent Federal Court Appeal being the matter of *Kia Australia Pty Ltd v CEO of Customs FCA 1060 – 1st of September 1998.*

In the Kia case, the buying agent was a very large Japanese trading house being Itochu. Itochu also happened to have a two percent shareholding in the vendor of the goods. Customs claimed that this barred Itochu from being recognised as a buying agent.

The Federal Court rejected such a narrow interpretation. It said that to give the word "associated" a meaning that would have the effect that a mere holding of shares by the agent in the vendor would constitute and association would be to give the word a meaning that would produce an unreasonable result and was not something Parliament intended.

The problem that has arisen in a number of cases recently is that unbeknown to the importer, the agent has had a shareholding of more than twenty percent and/or been a director of the vendor. Where this has been discovered, Customs have taken the view that this creates an "association" and bars the agent from being recognised as an agent as allowed for by section 155.

There is obviously a question of degree. However, I believe that where the agent has a substantial shareholding and/or a directorship of the vendor, then it is likely that a Court will hold the agent as being "associated" to the vendor. This is because it can be argued that unlike in the Kia case, the agent is able to exert some degree of control over the vendor and thus there is a lack of independence between the vendor and the agent.

In summary, the points to note are that Australian Customs is stipulating that:-

1. The buying agent cannot be involved in the manufacture or supply of goods of the same class as the goods being imported.
2. Class is defined broadly to relate to the general category of the goods.
3. The buying agent cannot be a substantial shareholder and/or a director of the vendor.

From the importers point of view, this means that the importer has to be extremely vigilant and must check carefully that its buying agent does not transgress in these areas. Obviously, it is essential that there be a proper written buying agents agreement in place. It is also essential to ascertain that it is being adhered to by the buying agent.

If there are any queries relating to any of these or related matters please do not hesitate to give me a call.

LOUIS GROSS
GROSS & BECROFT