

# McGUIREWOODS

JOHN B. PELLEGRINI  
212.548-7020 Fax 212.715.2301  
jpellegrini@mcguirewoods.com

## MEMORANDUM

### Buying Agency

August 2014

---

Many importers find it convenient to employ an agent in the country of exportation to assist in the purchasing activity. Under certain circumstances the agent's commission will not be part of the customs value of the imported merchandise. This memorandum sets out the circumstances in detail.

### DISCUSSION

The general rule is that a commission paid by the importer to an agent for services rendered in connection with the purchase of merchandise, inspecting the goods, arranging shipment, preparing documentation, and making payment for the account of the buyer, no portion of which inures to the benefit of the seller, is not part of appraised value. On the other hand, where the agent is in fact the seller, acting for its own account rather than on behalf of the buyer, or is a selling agent acting on behalf of the seller, the commission is deemed to be part of appraised value.<sup>1</sup>

No single factor determines whether a relationship between two parties, one of whom purchases merchandise on behalf of another, is a *bona fide* buying agency. The existence of a *bona fide* principal-agent relationship can be ascertained only after all relevant factors have been examined. Further, it is important to keep in mind that the characterization of each relationship is governed by its peculiar facts. However, the primary consideration is the right of the principal (the importer-buyer) to control the agent's conduct with respect to matters entrusted to it.

---

<sup>1</sup> U.S. Customs and Border Protection ("Customs") will treat as dutiable a commission paid to an agent for procuring materials used in the manufacture of imported merchandise and supplied to the manufacturer free of charge as an "assist". HQ 544976 (March 17, 1993). This is the case only when the agent's sole obligation is to acquire materials. When purchasing materials is part of a *bona fide* agent's responsibilities in the acquisition of imported merchandise, no portion of the commission is dutiable. HQ 544843 (October 31, 1994).

1. **The Agreement.** The initial consideration is the existence of a written agreement between principal and agent, which describes their respective rights and obligations. Buying agency agreements were reviewed by the Customs Court in *J.C. Penney Purchasing Corp. et al. v. United States*, 80 Cust. Ct. 84, C.D. 4741 (1978). There were two such agreements, a brief letter agreement and a much longer, more detailed agreement. The court held that the relationship between the importer and its agent was a *bona fide* buying agency. The shorter agreement contained no elements, which could be interpreted as being inconsistent with a principal-agent relationship. On the other hand, the longer agreement contained a provision, which might be viewed as indicating that the agent was in fact the seller. That agreement required that the agent reimburse the importer for defective or rejected merchandise. In an agency relationship the agent would not be required to stand behind the quality of the goods unless it had failed to exercise due care in discharging its obligation to inspect the goods. This point was not raised effectively by the government and was not commented on by the Court. *Compare Rosenthal-Netter, Inc. v. United States*, 12 CIT 77, 679 F. Supp. 21 (1988), *aff'd*, 861 F.2d 261 (Fed. Cir. 1988).

It is important to keep in mind that the agreement is no more than evidence of the relationship. Thus, the agreement will help to establish the commission as non-dutiable only when it reflects the manner in which the parties act. The manner in which the principal and agent interact is controlling, not the written agreement. *See* HQ 545129 (March 6, 1995).

The absence of a written agreement is not fatal, although it will make it more difficult to persuade Customs that a principal-agent relationship exists. Customs and Border Protection, *Buying and Selling Commissions* (June 2008) at 11 (hereafter "*Commissions*"); HQ W56317 (September 14, 2007) (Other factors, including the transaction documents strongly supported an agency relationship).

2. **Identity of the Seller.** Under transaction value, imported merchandise is appraised at the price "actually paid or payable for the merchandise." A *bona fide* buying commission is not one of the additions to price; a selling commission is. Customs has ruled that in determining whether an arrangement is *bona fide*, it will look for a clear indication of the identity of the seller. Customs has indicated that it is essential that the entry papers reflect the actual seller. While it is acceptable for the goods to be accompanied by a single invoice from the buying agent covering both the price of the merchandise and the commission, stated separately, the better practice is to include the underlying seller's invoice for the merchandise in the entry package. If the manufacturer or seller's invoice for merchandise is not included in the entry package, equivalent evidence of the price paid to the seller must be available. Absent evidence of this nature, it is unlikely that Customs will agree that the buying agency arrangement is *bona fide* and that the commission is not

part of transaction value. C.S.D. 89-30, 23 Cust. Bull. 587 (1989). *New Trends, Inc. v. United States*, 10 CIT 637, 645 F. Supp. 957 (1986) (Commission held dutiable because the importer could not establish the price paid to the seller.)

Another area of concern is the buyer's purchase order. It should identify the seller. A purchase order addressed to the agent as seller will be viewed as evidence that the agent is the seller. If the purchase order is addressed to the agent, it should be as buying agent and should identify the seller.

Note, however, that a commission paid to a *bona fide* buying agent through the seller is dutiable. *Moss Manufacturing Co., Inc. v. United States*, 13 CIT 420, 714 F. Supp. 1223 (1988), *aff'd*, 896 F.2d 535 (Fed. Cir. 1989). Further, if the commission is included in the price or calculated by deducting it from the price, Customs likely will treat an otherwise *bona fide* commission as dutiable. See HQ 545519 (June 30, 1994), *modified by*, HQ 547087 (July 30, 1998) (the importer supplied the seller's invoice and proof of payment which reflected the price paid without the commission).

3. **Agent's Responsibilities.** The services performed by the agent are important criteria in determining the true nature of the relationship. The following services have been viewed by the customs courts as being consistent with the duties of a buying agent:

- compiling market data
- collecting samples
- translating
- locating reliable vendors
- negotiating prices and terms with vendors
- placing purchase orders
- checking and inspecting production
- arranging for shipment
- arranging for inland and international shipment
- preparation of documentation.

*Commissions at 9.* This list is not exhaustive and there are no doubt additional services, which are consistent with a buying agency relationship. Under appropriate circumstances quality control, design, and "line building" services may be deemed part of a buying agent's duties. HQ 549938 (June 5, 1996); HQ 547006 (April 28, 1998); HQ 548002 (June 13, 2002). The Court of Customs and Patent Appeals has held that a commission paid to the manufacturer to obtain quality control and inspection throughout the manufacturing process was dutiable. *International Fashions v. United States*, 64 CCPA 35, 545 F.2d 138 (1976). HQ

H156115 (January 27, 2014) provides examples of services deemed beyond the scope of a buying agency.

When the agent arranges for shipment, it must be for the importer's account or billed as a reimbursable expense and may not be absorbed in the agent's commission. For example, in *New Trends*, the agent was responsible for preparing the merchandise for shipment, the cost of which was included in the commission. The court viewed this as evidence that the agent was not a *bona fide* buying agent. Further, the fact that the principal may cancel orders, leaving the agent with merchandise it must dispose of, is a strong indication that the agent is acting as an independent seller, not as an agent. *Rosenthal-Netter, Inc.*

An agent may advance funds to the importer without jeopardizing an otherwise valid principal-agent relationship. HQ 546577 (August 13, 1997). Customs has not addressed whether advancing funds to the seller by the agent, *e.g.*, to fund the acquisition of parts and materials, adversely affects the agent's status. Our view is that it should not and this is the case even if the agent charges interest, as long as the principal has been informed and does not object.

"Design" activities can sometimes call into question an agent's status. Customs has argued that where the agent creates and claims ownership of the design, the agent, not the principal, controls the transaction. If the agent controls the transaction, the commission will be considered dutiable.

4. **Contact with Seller.** In many cases where the courts have found the existence of a *bona fide* agency the importer has been able to demonstrate that it has direct contact with the seller in terms of factory visits, price negotiations and the like. At a very minimum the seller must know the identity of the buyer. It is also important that the buyer be able to deal with the seller on a direct basis. For example, if the seller and the agent agree that the former will not sell on a direct basis, or except through the agent, it is likely that the agent's commission would be dutiable as a selling commission.

One means of ensuring the requisite direct contact between buyer and seller is to arrange for payment by the buyer. The seller's invoices should be addressed to the buyer. If the invoice is addressed to the agent, it should identify the agent as acting for the buyer. Under this type of arrangement, the agent's commission would be paid against its separate invoice. This is not to say that the type of arrangement in which the buyer's letter of credit names the agent as the beneficiary and covers both purchase price and commission may not be employed. However, we think it prudent that there be separate invoices, one from the seller covering the purchase of the goods, and one from the agent covering the commission. Under existing practice, Customs will treat a commission as dutiable where the agent's invoice



covers purchase price and commission unless the seller's invoice also is presented. See HQ 545564 (August 8, 1995).

5. **Agent's Authority.** The selection of the factory or seller must be directed ultimately by the buyer. This is usually demonstrated by naming the factory or seller in the buyer's purchase order. A related consideration is the agent's authority to select a new factory if the one chosen by the buyer is unable to deliver. The fact that the agent cannot select a new factory unilaterally indicates a true principal-agent relationship.

Whether the agent places an order before receiving one from the buyer is another important factor. Where the agent waits until it receives an order from the principal, a principal-agent relationship is indicated. However, where the agent places orders before having been instructed to do so by the principal, a *bona fide* agency is unlikely. See HQ 544945 (June 30, 1995). By the same token, an agent does not maintain an inventory. The courts have held that a so-called agent who maintained an inventory was in fact a seller.

6. **Seller-Agent Relationship.** The courts will look at the nature of the agent's relationship with the seller. Does the agent receive any compensation from the seller? Does the agent share any portion of its commission with the seller? Affirmative answers to either of these questions will jeopardize the non-dutiable status of the buying commission.

As a rule, the mere fact that the agent and seller are related does not automatically make the commission dutiable. HQ 547058 (May 19, 1998). However, there are numerous rulings which hold that such transactions will be subject to closer scrutiny, *E.g.* HQ 547623 (February 21, 2002). Recent rulings, in which Customs has reviewed these issues, have found that the purported buying agents were not *bona fide* buying agents or that the evidence was inconclusive. The Customs position may be summarized as holding that while a relationship between the agent and seller does not automatically preclude the existence of a *bona fide* buying agency, greater scrutiny will be exerted and Customs will require review of the relevant documentation before making any findings. The documentation referred to is the full transaction documentation, including purchase orders, and, if the seller is not the actual manufacturer, probably a copy of the purchase order, invoice, and proof of payment between the manufacturer and the seller. An important factor is whether the agent places orders with both related and unrelated sellers. HQ 547239 (March 29, 1999).

Importers who deal through buying agents should inquire whether the agent is related to any of the seller/manufacturers with whom it deals. The agency agreement should include a representation by the agent that it is not related to any

seller/manufacturer, or an undertaking that the agent will inform the principal of a relationship with any manufacturer/seller selected by the latter.

An agent may perform services for the seller. There are rulings, which approve arrangements in which the agent receives compensation from the seller. HQ 544676 (July 24, 1991) concerned a situation where the agent proposed to perform services on behalf of foreign manufacturers and sellers as well as normal buying agent services on behalf of importer/principals. The services to manufacturer/sellers would include locating materials needed by the manufacturer to meet the buyer's requirements; providing quality control and inspection services; advising the manufacturer with respect to United States importation requirements such as invoicing and export license requirements; and providing ministerial services to facilitate importation of merchandise into the United States. There would be full disclosure of these services by the agent to its importer principals. Customs held that this fact, standing alone, would not require the conclusion that the agency relationship was not *bona fide*. This conclusion seems to have been based primarily on the fact that the principals will, in all instances, be appraised of any payments to be made to the agent by the manufacturer/sellers. The Headquarters Office also noted that this conclusion would apply only as long as the payments by the manufacturer/sellers to the agent had no impact on the price actually paid or payable by the importer. *See also*, HQ 545660 (February 10, 1995).

The fact that any risk of price fluctuation is for the buyer's account rather than the agent's indicates an agency relationship. If on the other hand, the agent bears this risk, the indication is that the agent is acting for its own account. An agent may take title to the goods on behalf of the principal without affecting its status.

Customs has held that an agent may act as a seller in some transactions without necessarily jeopardizing its status as a *bona fide* buying agent. HQ 544958 (June 8, 1992). There is no legal impediment to an agent having multiple lines of business. The fact that an entity buys and sells merchandise and holds inventory does not, in and of itself, prevent it from acting as a *bona fide* buying agent. Nevertheless, it is prudent to refrain from dealing with the same entity as both an agent and seller.

The fact that the agent and importer are related does not negate an otherwise *bona fide* principal-agent relationship. HQ 545988 (May 18, 1995).

7. **Trademarks.** Customs has found it difficult to deal with agents who are either licensees or owners of trademarks used on imported footwear purchased by their principals. Normally, the issue is whether the royalty is dutiable and

implicates only those situations where the agent is a licensee and pays a royalty that is passed on to its principal.

However, in HQ 548287 (June 3, 2003), Customs held that because the agent controlled use of the trademark as the licensee, the importer had insufficient control of the transaction and, for that reason, the commission was dutiable.

Much of the rationale of the decision is based on the control provisions of the license agreement. These particular provisions were not unusual and are typical of those found in license agreements. The agreement provides the licensor the right to approve styles, factories, retailers in the United States, and product quality. Based upon this Customs took the position that the dominant parties in the transaction were the licensee/agent and the licensor.

This ruling does not appear in CROSS and a request for reconsideration filed in 2003 has not been answered. Accordingly, it is our view that the ruling has no validity and need not be followed.

8. **Agent's Liability.** The agent's responsibility for loss, shortages, defective or non-conforming merchandise, and late delivery is a crucial factor in determining the nature of the relationship between an agent and principal. These failures are the seller's responsibility and if the agent is held responsible, it is likely that the agent will be considered the seller on the ground that it is "uncharacteristic of an agency relationship to allow the intermediary to bear the risk for damaged, lost or defective merchandise." *New Trends*, 695 F. Supp. at 962. *Rosenthal-Netter, Inc.; Monarch Luggage Co. Inc. v. United States*, 13 CIT 523, 715 F. Supp. 1115 (1989). It may be possible, however, to hold the agent responsible for its failures in inspecting the merchandise without affecting the non-dutiable character of the commission. *See Pier 1 Imports, Inc. v. United States*, 13 CIT 161, 708 F. Supp. 351 (1989); HQ 545421 (August 3, 1994). Also, in HQ 545423 (March 4, 1994), Customs approved an agency agreement that included penalty provisions providing for: forfeiture of commission in the case of defective merchandise that applied only when the seller refused to make adjustments; and, reduced commission payments when the agent failed to ensure timely delivery.

These rules are not immutable and there may be circumstances where the agent can bear the risk of loss. HQ 544669 (August 15, 1991) concerned an agency agreement in which the principal asked that the agent retain title and bear risk of loss for the imported merchandise. The agent arranged for the purchase of foreign merchandise after first receiving an order or other commitment from its customer in the United States. The principal advanced purchase monies to the agent. The agent arranged for purchase and transportation and acted as importer of record on behalf of the principal. All costs were for the account of the principal. The agent's

compensation was based upon the first cost of the merchandise and was set at varying percentages, decreasing as the principal's purchases increased. The arrangement was structured so that the agent acted as purchaser of the foreign merchandise, taking title at the foreign port of exportation. Title was passed to the principal after customs clearance.

The Headquarters Office concluded that the mere fact that the agent took title did not necessarily mean that the merchandise was sold by foreign vendors to the agent. Customs reasoned that the agent could not sell the merchandise to anyone other than the principal who purchased and pre-paid for the merchandise, that the principal owned the goods and had control over their disposition. In Customs' view, the fact that the agent took title was merely an additional service performed by the agent on behalf of its principals. Accordingly, Customs concluded that the service fee paid to the agent was not dutiable.

Further, in at least one ruling, Customs approved a commission as not dutiable even though the agent assumed the risk of loss. The ruling, HQ 544933 (July 10, 1992), however, describes this responsibility as uncharacteristic of a principal-agent relationship.

9. **The Commission.** The commission rate is not usually a consideration in determining whether it is dutiable, although commissions that exceed the norm in an industry or product line are likely to attract close scrutiny by Customs. Indeed, recent rulings contain a caveat that the non-dutiable status of the commission will depend on a determination by the responsible appraising officer that it does not exceed the rate customary in the trade.

This analysis assumes that the commission is uniform. Commissions that differ from transaction to transaction are likely to be considered evidence that the agent is acting as a seller. *Jay-Arr Slimwear, Inc. v. United States*, 12 CIT 133, 681 F. Supp. 875 (1988).

The agent's compensation need not be a percentage of the price. Customs has accepted compensation in the form of a fixed monthly fee plus expenses. HQ 547033 (June 25, 1998).

The form of invoicing can be a significant factor in deciding whether a commission paid to a *bona fide* agent is dutiable. A commission calculated by deducting an amount from the total FOB price is deemed dutiable, regardless of whether the relationship is *bona fide* in all other respects. HQ 545519 (June 30, 1994), *modified by*, HQ 547087 (July 30, 1998).



10. **Disclosure.** Whether or not a commission is dutiable, the importer must report its existence to Customs. Disclosure may take the form of a statement on the seller's invoice or by providing a copy of the agent's invoice with the entry documents. Another possibility, and the approach we recommend, is a disclosure letter to each port of entry describing the circumstances under which a commission is payable and forwarding a copy of the agency agreement. The correspondence also should state that it is the primary means of disclosure and that entry-by-entry disclosure will not be made. It should be noted that some Customs officials will insist on disclosure at entry. Further, the entry summary, CBP Form 7501, can be read as requiring disclosure at entry. *Commissions* at 6-7.

### CONCLUSION

These are the considerations, which Customs and the customs courts have relied on in determining the true nature of the relationship between a buyer and its agent. Although no single factor is determinative, we believe the inability to supply the seller's invoice when requested by Customs would be fatal.

The consequence of a determination that there is no *bona fide* principal-agent relationship is that the commission will be deemed part of appraised value.