

WORLD CUSTOMS ORGANIZATION ORGANISATION MONDIALE DES DOUANES ORGANIZACIÓN MUNDIAL DE ADUANAS

TECHNICAL COMMITTEE ON CUSTOMS VALUATION

VT1061E1a (+ Annex)

43rd Session

O. Fr.

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SPECIFIC TECHNICAL QUESTIONS INTERNATIONAL MARKETING FEE

(Item V (d) on the Agenda)

Reference documents:

VT1011E1b (TCCV/41 – Draft Report) VT1020E1a (TCCV/41) VT1034E1a (TCCV/42) VT1047E1a (TCCV/42)

I. BACKGROUND

- 1. Following the discussions on this Agenda item at its 42nd Session, the Technical Committee decided to continue examining the question of an International Marketing Fee (IMF) at its 43rd Session on the basis of an improved working document. Members agreed that the improved text should state that the relationship between the licensor and the licensee had not influenced the price; include other relevant clauses from the contract where possible; and contain some of the analysis featured in Annex I to working document VT1034E1a.
- 2. In response to the Technical Committee's request, Colombia sent the Secretariat the improved text of its question which is set out in the Annex to this document.

II. CONCLUSION

- 3. Members are invited to give consideration to this improved text sent by Colombia and to submit their written comments to the Secretariat in electronic format (e-mail address: valuation@wcoomd.org), by 4 September 2016 at the latest.
- 4. Written comments sent in response to this document will be published and circulated to members of the Technical Committee for examination at its 43rd Session.

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INTERNATIONAL MARKETING FEE

Case submitted by Colombia

1. Parent company "X" (**licensor**), holder of the industrial property rights (trademarks, patents and know-how), domiciled abroad, enters into a royalty and licence fee contract with importing company "I" (**licensee**) domiciled in the country of importation. The **licensor** and the **licensee** are related within the meaning of Article 15.4 of the WTO Valuation Agreement.

Although the parties are related, it was possible to verify the circumstances surrounding the sale using a post-clearance audit, which found that, although both the **licensee** and the **licensor** are related, that relationship did not influence the price paid or payable; the requirements for use of the transaction value method were thereby met.

- Under the above contract, the **licensor** grants the **licensee**, among others, the exclusive distribution rights within the country of importation of the finished and imported licensed products.
- 3. The finished and imported products are delivered and invoiced to the **licensee** by any affiliate of the **licensor** Group, manufacturer or any other body of any country, independently of the licensing relationships laid down in the contract.
- 4. Under the same contract, the licensee must pay the licensor the following elements :
- a. A non-negotiable royalty of 6 % of net sales of the authorized products¹ and products².
- b. An International Marketing Fee (IMF) corresponding to 4 % of **net sales** of the products and authorized products, as remuneration for the **marketing benefits** gained under the contract from the advertising and promotional strategy for the trademark, implemented globally by the **licensor** on behalf of the entire Group and its **licensees**.

This fee covers the following activities performed by the **licensor** at global level in support of the trademark:

- Signing and managing contracts with regionally or globally renowned athletes, teams and sports federations whose reputation may be advantageously exploited within the country of importation in promoting local sales and distribution, and supplying materials (for example, advertising) and opportunities (for example, appearances/events) featuring the athletes, teams and federations for the promotion and sale of the products;
- Signing and managing event sponsorship contracts including, but not limited to, the Olympic Games, Football World Cups, the European Champions Cup and other regional championships, the Football Champions League or any marketing vehicle which the **licensor** considers to be of similar value and whose reputation may be advantageously exploited within the territory, and supplying materials and opportunities arising at events through the promotion and sale of the products;

¹Authorized products: Those products granted to the **licensee** by the **licensor** with regard to the right of manufacture under the contract.

²**Products:** Any article from the range of products developed by or for the **licensor** (different to the products which the **licensor** does not distribute itself).

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- Generating the concepts for regional and global advertising campaigns and their corresponding slogans, and supplying the associated materials and other aids for advertising the products within the territory;
- Creating and maintaining a website for the trademark, which can be accessed within the territory and which supports and strengthens the ability of the trademark in the territory of the **licensee** to promote and sell the products within the territory; and
- Benefiting from the **licensor's** organizing, and/or participating in, international trade conferences and trade meetings.

These activities are all at the discretion of the **licensor**, which is not obliged to provide details to the **licensee** as to actual or planned expenditure on performing the marketing activities described above.

The **licensor** nonetheless reserves the right to promote, distribute, market and sell the products within the territory via its website or any alternative global e-commerce platform.

- 5. Net sales is taken to mean gross income arising from the products' total sales made by the **licensee** or its subsidiaries to independent customers, less sales taxes, returns, trade discounts, freight and insurance if these are invoiced separately or specifically excluded from the sale price.
- 6. **Condition of sale**: If the **licensee** fails to make the due payments on the specified dates, the **licensor** will terminate the contract, all the rights granted must immediately revert to the **licensor** from the **licensee**, and the latter must desist from using the trademarks and the know-how and from selling the products within the country of importation.

Furthermore, the **licensee** may not actively promote, outside the country of importation, the sale of any finished, imported or manufactured product, or the offering or the sale online, without prior and written authorization from the **licensor**. Action to the contrary may be considered a serious infringement and the **licensor** may terminate the contract.

- 7. The contract's provisions indicate that, upon payment by the **licensee** of the IMF on net sales of the imported products, part of the profit gained from marketing the licensed products accrues, meaning that the payment is directly related to the resale of the products, and not to the company's global profits (dividends) during a specific fiscal year.
- 8. In the light of the considerations in Commentary 25.1 of the TCCV, payment of the IMF relates to the imported products and is a condition of sale, since failure to pay is grounds for termination of the contract and all the rights granted to the **licensee** must revert to the **licensor**, thereby precluding the sale, manufacture or distribution of the trademarked products.
- 9. Given these circumstances, it is clear that these payments made by the buyer to the seller for the resale of the imported goods should be added to the price actually paid or payable as they have been found to be a condition of sale, as provided for in sub-paragraph 2 of the Interpretative Note to paragraph 1 (c) of Article 8 of the WTO Valuation Agreement.

Marketing activities undertaken by the licensee as required by the licensor

The **licensee** must, as well as paying the International Marketing Fee, send the **licensor** a marketing and business plan as part of the annual budget process. To this end, the **licensor** must provide the **licensee** with details of its marketing policies, promotional programmes,

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advertising concepts and campaigns which the **licensee** must carry out in the country of importation. Furthermore, the **licensor** should, at its discretion, provide the **licensee** with guidelines on any matter relating to the marketing activities which the **licensee** undertakes in the country of importation.

The **licensee** must, after accepting the marketing and advertising guidelines provided by the **licensor**, carry out sports marketing, public relations, market research, activities at points of sale and sales training in the country of importation. In this context, the **licensee** must agree to spend an annual amount based on net sales of the products and authorized products, and comply with the guidelines specified by the **licensor** on the use of the marketing budget and the appointment of a local advertising agency in the country of importation.

As can be seen, these activities are not carried out by the **licensee** on its own account but, rather, are required by the **licensor**, constituting a cost in the country of importation which, despite being an obligation stipulated by the **licensor**, is not a condition of sale and does not affect the price paid or payable for the imported products, and should not be added to the Customs value.

QUERIES FOR SUBMISSION TO THE COMMITTEE

- 1. Should the International Marketing Fee payment by the licensee to the licensor as profit for marketing the trademark globally be added to the price actually paid or payable as part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller?
- 2. If so, should that adjustment be made under Article 8.1 (d) of the WTO Valuation Agreement?

POSITION OF COLOMBIA

The International Marketing Fee payment to the **licensor** should be added to the price actually paid or payable because:

- Pursuant to Article 8 of the WTO Valuation Agreement, in determining the Customs value under Article 8, there shall be added to the price actually paid or payable for the imported goods:
 - (...)
 (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.
 (...)
- 2. Additions to the price paid or payable shall be made under Article 8 only on the basis of objective and quantifiable data, a condition which is met in the present case.
- 3. When considering the addition, it is important to bear in mind the event giving rise to the payment, and not the purpose for which the beneficiary uses these funds.
- 4. The event giving rise to the payment is the "profit" which the buyer gains from the marketing strategies and activities (advertising and marketing) implemented globally by the **licensor** on behalf of all its affiliates, not a share, payable by the buyer, of actual global expenditure on these items by the **licensor** on behalf of the Group. Furthermore, these activities are undertaken by the **licensor** without the buyer's knowledge.

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- 5. This payment which the licensor receives from the licensee would not be included in the invoice price of the imported goods as it must be paid subsequently by the licensee (buyer) on the basis of net sales of the imported goods in the country of importation.
- 6. The fact that the IMF is calculated on net sales of the imported goods suggests that the calculation is based on objective and quantifiable data, as required by Article 8.3 of the Agreement; there is no doubt that the payment is directly related to the imported goods and constitutes proceeds of the resale of the imported goods that accrue indirectly to the seller. since the latter and the buyer are related to the parent company receiving the payment.

This payment must not be confused with net dividends or profits made over the financial year (Case Study 2.2).

- 7. Finally, Colombia considers that, in keeping with the facts described, the international marketing fee payment by the licensee to the licensor is a payment which is subsequent to importation and which is required as a condition of sale under the provisions of the royalty and licence fee contract. It may be treated as part of the price ultimately paid or payable for the imported goods, or as part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues indirectly to the related seller under Article 8.1 (d) of the WTO Valuation Agreement, since the licensee/importer and the licensor/seller and other related sellers are part of the same Corporate Group controlled directly by the parent company which, in this case, as well as acting as the licensor, also acts as the seller of some of the imported goods – and especially since the aforementioned payment is calculated on net sales of the imported goods in the country of importation, and not on actual advertising and marketing expenditure met by the **licensor** on behalf of the entire Group.
- 8. In addition, it is important to mention the provisions in point 7 of Annex III to the Valuation Agreement, which provides:

"The price actually paid or payable includes all payments actually 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".