[2023] JMRC 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

APPEAL NO. 2021 RV 00008

BETWEEN	**SKDP HAULAGE & DISTRIBUTION LIMITED**	**APPELLANT**
AND	**THE COMMISSIONER OF CUSTOMS**	**RESPONDENT**

Carlene Larmond KC and Giselle Campbell instructed by Patterson Mair Hamilton, Attorneys-at-Law for the Appellant.

Annaliesa Lindsay and Kristina Whyte instructed by the Director of State Proceedings, Attorney-at-Law for the Respondent.

Heard: 19th and 20th September, and 20th November 2023

Revenue Law - Customs Duties - Paragraphs 8(1)(c) and 8(1)(d) of the Schedule to section 19 of the Customs Act - Whether there was a sale for export to engage the transaction value method - Whether the fallback method was the appropriate method of valuation - Whether fees paid post-importation were properly added to customs value of imported goods - Whether procedural errors by appellate tribunal determines appeal which is by way of rehearing.

C. BARNABY, J

INTRODUCTION

[1] The Appellant is a licensed seller of Herbalife products pursuant an *Agreement for Importation and Sale of Herbalife Products into Jamaica* between itself and Herbalife International of America Inc. (hereinafter called "Herbalife") dated 9th December 1998 which will be called "the 1998 Agreement" hereafter. By the

agreement Herbalife products are ordered by the Appellant and imported into Jamacia to be sold to local Herbalife distributors.

[2] Administrative assistance is provided to the Appellant by Herbalife who accepts orders and payments from local distributors on behalf of the Appellant for a fee which is prescribed as the equivalent of nine and one half (9.5%) of the US$ value of each distributor's order, excluding GCT, which the agreement terms "Order Processing Fee", to which the parties refer as "the Order Administration Fee" and will be so called hereafter.

[3] Pursuant to the said 1998 Agreement, Herbalife from its facilities in the United States also provides certain other services to the Appellant who receives the revocable right to be the sole importer of Herbalife products into Jamaica. In consideration, the Appellant pays Herbalife a monthly fee which is equivalent to twenty-five percent (25%) of the total US$ value of all distributor orders processed and paid during each month (hereinafter called "the Franchise Fee").

[4] The Respondent commenced a post clearance audit of the Appellant on or about 25th August 2015 for the period of assessment February 2014 to July 2015. By letter dated 29th December 2016 confirming the audit findings, the Appellant was advised that the Respondent determined that the Franchise Fees and Order Administration Fees paid to Herbalife related to and were a condition of sale of the imported goods and should have been added to the declared customs values of the said goods pursuant to paragraph 8(1)(c) of the Schedule to section 19 of the **Customs Act**. Unless the context requires otherwise, the Schedule to section 19 of the Act shall be referred to as "the Schedule" hereafter. Consistent with that correspondence, by Notice of Assessment dated 30th December 2016 the Appellant was advised that the cumulative sum of **Thirty Million Five Hundred and Two Thousand Two Hundred and Eighty-Nine Dollars and Ninety-three Cents ($30,502,289.93)** was raised as additional duties and taxes. The sum comprised undeclared Franchise Fees of **Twenty-Two Million Ninety-Six Thousand Seven Hundred and Eighty-Four Dollars and Fifty-Eight**

Cents ($22,096,784.58) and Order Administration Fees of **Eight Million Four Hundred and Five Thousand Five Hundred and Five Dollars and Thirty-Five Cents ($8,405,505.35)**. The additional assessments were confirmed on objection as notified to the Appellant by letter dated 12th October 2017 from the Respondent's Internal Review Committee.

[5] The Appellant appealed therefrom to the Revenue Appeals Division (hereinafter called "the RAD") on 13th November 2017. By decision made on the 27th October 2021 the RAD upheld the additional assessments. That decision is appealed to this court. Following the hearing of arguments in the appeal on 19th and 20th September 2023, judgment was reserved. The decision of the court and reasons therefor now appear below.

ISSUES AND SUMMARY DETERMINATION

[6] On consideration of the cases of the parties, which are set out more fully later in these reasons, resolution of the follow issues is dispositive of the appeal:

(a) Whether there are any incurable procedural breaches by the Respondent in raising the additional assessment; and by the Commissioner of the RAD in determining the appeal below, which operate to determine this appeal in favour of the Appellant.

(b) Whether the Commissioner of the RAD erred in rejecting the transaction value method and applying the "fallback" method of valuation for determining the customs value of the imported goods.

(c) Whether the Commissioner of the RAD erred in finding that the Franchise Fees and Order Administration Fees paid by the Appellant to Herbalife under the 1998 Agreement were to be added to the price actually paid or payable for the imported goods in determining their

transaction value, pursuant to paragraphs 8(1)(c) or 8(1)(d) of the Schedule to section 19 of the **Customs Act**.

[7] For reasons particularised subsequently, I find that the Appeal should be dismissed and the decision of the Commissioner of the RAD confirmed. While there is merit to some of the Appellant's complaint as to procedural errors, they are curable on this appeal which proceeds by way of rehearing. I also find that that the Commissioner of the RAD was correct in applying the fallback method of valuation; and that the Franchise Fees are royalties and licences fees within the meaning of paragraph 8(1)(c) of the Schedule and were properly added to the price paid or payable for the imported goods. Further, if the payments for Franchise Fees are not to be so characterised, they nevertheless fall to be included in the customs value of the imported goods as part of the proceeds of disposal by sale which accrues to the seller of the goods pursuant to paragraph 8(1)(d) of the Schedule. While the Order Administration Fees do not qualify for characterisation as royalties and licence fees to enable their addition pursuant to paragraph 8(1)(c) of the Schedule, they are part of the value of the proceeds for the disposition by sale of the imported goods which accrues to Herbalife and are dutiable under paragraph 8(1)(d).

THE APPELLANT'S CASE

[8] By its Notice of Appeal, for which an amendment was filed on 4th May 2022 the Appellant asks that the additional assessments raised by the Repsondent and confirmed by the Commissioner of the RAD be set aside, revised, or reduced on the grounds below.

1. *The Appeals Commissioner incorrectly found that certain costs(called Order Administration Fees) were includable in the transaction value or other value used as the basis for valuation of the relevant imported goods for the assessment of custom duties and taxes and failed to properly, or at all, consider that such Order Administration Fees were*

paid for business functions performed in relation to the resale of the goods and other post-importation administration of the Appellant's business which were not related to the importation of the goods.

2. *The Appeals Commissioner incorrectly found that Franchise Fees payable pursuant to an Agreement between the Appellant and Herbalife International of America Inc. ("Herbalife"), fell within the ambit of paragraph 8(1)(c) of the Schedule to the Customs Act and as such were includable in the transaction value or other value used as the basis for valuation of the relevant imported goods for the assessment of custom duties and taxes, and did not consider or give sufficient consideration to the fact that such Licence Fees were not paid for the use of the Herbalife trademark on , or in relation to, the imported goods (which were all imported under branded packaging) but such trademarks were used otherwise in relation to the Appellant's business.*

2.1 *The Appeals Commissioner failed to take into account that the Appellant paid income tax, in the form of withholding tax, on the Franchise Fees and that such payment must properly be regarded as inconsistent with any consideration of Franchise Fees as Cost of Sales.*

3.1 *The Appeals Commissioner incorrectly found that the "fall back" method of valuation is the appropriate method of valuing the relevant imported goods for the assessment of custom duties and taxes, and failed to properly, or at all, consider that the invoice price represented the genuine arm's length price actually paid by the Appellant to Herbalife (an unrelated party) and the imported goods were not subject to any restriction as to their disposition or other factor referred to under paragraph 3(2) of the Schedule to the Customs Act which substantially affected their value or the price paid by the Appellant for such goods.*

3.2 *Alternatively, even if the "fall back" method or any other method of valuation were appropriate in the circumstances there would, in any case, be no legal basis to include the Order Administration Fees and Franchise Fees in the valuation of the relevant imported goods for the assessment of custom duties and taxes as:*

(i) The Order Administration Fees were for services performed in relation to the post-importation management and resale of the goods by the Appellant to local purchasers and the administration of its business; and

(ii) As, respect the Franchise Fees, they were paid not as part of the consideration for the relevant goods but instead were bona fide payments for the independent right to use the Herbalife trade mark on the Appellant's business premises, stationary and other business materials.

4.1 The Appeals Commissioner took into account irrelevant considerations and/or erred in placing reliance on the contents of the Respondent's case file in arriving at her decision.

4.2 Alternatively, if the contents of the case file were a relevant consideration, then, in failing to grant the Appellant the opportunity to:

(a) Review the contents of the said case file and/or;

(b) If advised, to adduce additional evidence and/or present supplemental arguments as a result of the review to support its position and/or contradict the position of the Respondent;

the Appeals Commissioner acted contrary to the established rules of procedural fairness and in breach of the principles of natural justice.

4.3 The Appeals Commissioner, in deciding on her own volition to consider the issue of whether the Order Administration Fee and Franchise Fee could be classified as "subsequent proceeds" under Paragraph 8(1)(d) of the Schedule to the Customs Act, acted in breach of the principles of natural justice when she failed to grant the Appellant the opportunity to make submissions on the said issue and in any event erred in concluding that the said fees could properly so be classified.

5. The Appeals Commissioner erred, and acted in breach of the principles of natural justice, in granting the Respondent, the opportunity to review and respond to the written case of the Appellant without giving the

Appellant an equal opportunity to review and respond, if advised, to the written case of the Respondent.

6. *Contrary to paragraph 6 of the Revenue Appeal Division Rules, 2015 the Appellant was not furnished with a copy of the Respondent's written statement of reasons for the relevant decisions.*

[9] The complaint in ground 2.1 was wisely conceded by Ms. Larmond KC in argument as the concern in respect of withholding tax which appears in the stated ground, does not arise for determination.

THE RESPONDENT'S CASE

[10] In the Respondent's Statement of Case to which a further amendment was filed on 18th July 2022, it is prayed that the appeal is refused and the decision of the Commissioner of the RAD dated 27th October 2021 be allowed to stand. Costs of the appeal, to be taxed if not agreed, together with such further or other relief as may be fair and just is also sought.

[11] The Repsondent advances the following at paragraph 3 in contending that the decision of the Commissioner of the RAD was validly made and should be confirmed on appeal.

a) *Section 19(1) of the Customs Act provides that the value of the relevant imported goods shall be determined in accordance with the provisions of the Schedule.*
b) *Paragraph 3(1) of the Schedule to Section 19 of the Customs Act provides that subject to paragraphs 2 and 8, the customs value of imported goods shall be the transaction value, which is, the price actually paid or payable for the goods when sold for export to the island in the circumstances referred to in subparagraph (2) and adjusted in accordance with paragraph 8 or, where appropriate, paragraph 9.*
c) *Paragraph 8(1)(c) of the Schedule to Section 19 of Customs Act states that:*

"8 (1) in determining the customs value under paragraph 3, there shall be added to the price actually paid or payable for the imported goods…

(c) Royalties and licence fees, including payments in respect of patents, trademarks and copyright, related to the goods being valued payable by the buyer, either directly or indirectly as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

d) The Licence Fees and Order Administration Fees payable by the Appellant to HIAI pursuant to the 1998 Agreement were related to the relevant imported goods and were a condition of sale of those goods.

e) The Appellant failed to declare the Licence Fees and Order Administration Fees, detailed in the 1998 Agreement, as part of the transaction value of the relevant imported goods, in contravention of Paragraph 3 and 8 of the Schedule to Section 19 of the Customs Act.

f) The Respondent correctly reassessed the Appellant for additional duties and taxes in respect of the undeclared Licence Fees and Order Administration Fees.

g) Having regard to the provisions of Paragraphs 3 and 8 of the Schedule to Section 19 of the Customs Act and the 1998 Agreement, the Revenue Appeals Division correctly concluded that the Licence Fees and Order Administration Fees were duly classified by the Respondent as conditions of the sale related to the relevant imported goods.

h) Section 19(8) and (9) of the Customs Act empowers the Respondent to, inter alia, adjust the value accepted by an Officer at the date of entry of imported goods within two years from the date of entry and to demand the additional duty payable, respectively.

i) Pursuant to section 15 of the Customs Act, the Appellant has an obligation to pay the outstanding duties.

[12] These additional reasons appear at paragraph 4*:*

a) *The fact that withholding tax was charged on the franchise fees proved the following:*
    i. *The fees are bona fide franchise fees;*
    ii. *Fees relate to the goods being valued; and*
    iii. *The fees were paid as a condition of the sale of the goods.*
b) *All royalties are treated as poste importation and as such royalties meet the criteria to qualify as subsequent proceeds.*
c) *The Jamaica Customs Agency does not charge duties on withholding tax, thus in this instance, there was no double taxation.*
d) *The Franchise Fees formed a part of the Cost of Sale of the goods. Paragraph 8(1)(c) of the Schedule to section 19 of the Customs Act requires that the royalty must relate to the imported goods and be paid as a condition of the sale in order for the royalty or license fee to be added to the customs value.*
e) *A royalty or license fee payment is related to the goods when the imported good is the subject of a trademark, copyright or produced using a protected process such as a patent. Related to the goods can also be demonstrated in the way in which the royalty is calculated, for example, when royalty is charged as a percentage of the price at which the imported good is sold or resold.*
f) *Where, at the time of importation the actual amount for royalty or license fee is known, the importer should declare this amount on the value declaration form where it will be added to the customs value of the goods.*

[13] In resisting the appeal, the Respondent also relies on the following facts which appear at paragraph 5 of the Further Amended Statement of Case in Appeal.

a) *By letter dated October 12, 2017, re Audit Findings for the period February 2014 to July 31, 2015, the Commissioner of Customs informed the Appellant of her decision to uphold the assessment as it relates to whether the Franchise and Administration fees paid by SKDP are dutiable. At page 2 of this letter the Commissioner of Customs*

states at sub-paragraph (d) ***"That no part of the proceeds of any subsequent resale, disposal or use of the goods, by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with provisions of Paragraph 8 of the Schedule. Sufficient information must be available to permit an accurate adjustment for any such proceeds."***

b) *Paragraph 8(1)(d) of Schedule 19 of the Customs Act States: "(1) In determining the customs value under paragraph 3, 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;*

c) *Sub-paragraph d falls under the paragraph which states that "The Transaction Value Methods demonstrates the existence of the following conditions being applicable for the goods being valued as follows:" Based on the wording of this Paragraph and sub paragraph d it is clear that the letter is speaking to paragraph (1)(d) of Schedule 19 of the Customs Act. Here the letter does highlight the fact that the Appellant paid a processing fee of 9.5% of the US dollar value of each distributor's order. This processing fee of 9.5% is a part of the proceeds of subsequent disposal of the Herbalife products wherein a percentage of the resale proceeds accrues directly to seller.*

d) *The Appellant had notice of Paragraph 8(1)(d) of Schedule 19 of the Customs Act and had the opportunity to address same in its Notice of Appeal.*

e) *Upon being notified to the Audit Assessment in letter dated December 30, 2016, the Appellant filed a Notice of Appeal and Grounds of Appeal on November 13, 2017, in objection to the Respondent's findings, causing the matter to be ventilated before the Revenue Appeals Division. This Notice of Appeal was enclosed in Letter dated November 10, 2017, from Patterson, Mair Hamilton, Attorneys-at-Law for the Appellant. Also, in that correspondence was the decision of the Internal Revenue Committee, the said letter of October 12, 2017, which refers*

to paragraph 8(1)(d) of Schedule 19 of the Customs Act and forms a part of the reasons for the Commissioner's findings.

f) *At Paragraph 9 the Commissioner of Revenue Appeals, Notice of Decision, the letter October 12, 2017, was considered by the Commissioner of Revenue Appeals and the Appellant therefore had the opportunity to respond paragraph 8(1)(d).*

g) *The Appellant had the opportunity to attend a hearing of the Appeal and to make oral arguments/submissions before the RAD*

h) *Further, in Notices of Formal hearing respectively dated February 7, 2020, and October 9, 2020, the RAD scheduled hearing dates to be held on Tuesday February 25, 2020, and November 25, 2020, at 10:00 a.m. Email correspondence between RAD and Counsel for the Appellant Mr. Trevor Patterson, inter alia attached the notices of hearing mentioned in paragraph 14 herein.*

i) *By email dated February 24, 2020, Mr. Patterson requested that the hearing date be rescheduled.*

j) *By email dated December 16, 2020, from the RAD to Mr. Patterson, same refers to Mr. Patterson's request for another hearing date. Said email also indicated that JCA had canvassed a January 2021 date or latest early February 2021 for the rescheduled hearing date. The Appellant therefore had the opportunity to attend in person hearing dates wherein in any relevant argument/ submission could have been made before the panel.*

k) *In email dated March 4, 2021, from RAD, Mr. Patterson was informed of the RAD's decision to proceed, in accordance with the Revenue Appeals Division Act 2015 and The Revenue Appeals Division Rules 2015, by means of the information already gathered. No objections were raised thus this the Appeal was considered on paper.*

[Emphasis supplied]

THE APPELLANT'S REPLY

[14] In its Reply to Further Amended Statement of Case in Appeal filed 3rd August 2022 the Appellant denies that the decision of the Commissioner of the RAD was validly made, and in so doing indicates that paragraphs 1 to 5 of its Amended Notice of Appeal are repeated. Issue is also joined with paragraphs 4 and 5 of the Further Amended Statement of Case in Appeal thus.

> *4. [The Appellant] does not admit Paragraph 4 of the Further Amended Statement of Case in Appeal and will state as follows:*
>
> *i. The fact that withholding tax was charged on the Franchise Fees does not prove that (i) the fees relate to the goods being valued and (ii) the fees were paid as a condition of sale of the goods.*
>
> *ii. Instead, the Franchise Fee relates to payment for the right to use the Herbalife logo on, inter alia, the warehouse and stationery of the Appellant and the mere fact that withholding tax was charged does not demonstrate any relation between the Franchise Fee and the goods being valued.*
>
> *iii. As the Franchise Fee does not relate to the goods being valued, it cannot be considered "subsequent proceeds."*
>
> *iv. Double taxation arises where the same transaction or good is being taxed twice. This would arise where (i) firstly, income tax in the form of withholding tax is paid on a fee, and (ii) secondly, customs duty is then paid on the same fee, were the fee to be included in the customs value of a good.*
>
> *v. The Franchise Fee and Order Administration Fee were not costs of sale.*
>
> *vi. A royalty or licensee fee need not be declared where it is not being paid in relation to imported goods.*
>
> *5. As regards Paragraph 5 of the Further Amended Statement of Case in Appeal, the Appellant:*
>
> *i. denies that by virtue of letter dated 12 October 2017 [it] was put on notice that the Respondent intended to rely on Paragraph 8(1)(d) of*

Schedule 19 of the Customs Act. There is no finding by the Respondent in the said letter which made any express reference to this Paragraph 8(1)(d) and any obligations of the Appellant in respect of same. There was no finding that the Order Administration Fee of 9.5% would be "subsequent proceeds" under that Paragraph.

ii. *contends that if, which is denied, the contents of the letter dated 12 October 2017 constitute any finding in respect of Paragraph 8(1)(d) of Schedule 19, any such finding must be confined to the analysis of Order Administration Fees, as the contents of the said letter are silent as to the applicability of the said Paragraph to Licence Fees.*

iii. *contends that insofar as the Appeals Commissioner felt inclined to express any view and make any finding relating to the Order Administration Fee and Franchise Fee in the context of Paragraph 8(1)(d), she was under an obligation to put both parties on notice, particularly where the Appeals Commissioner intended to make an adverse finding against the Appellant. In such circumstances the principles of natural justice demanded that the Appellant specifically ought to have been put on notice, and given an opportunity to respond.*

THE ONUS OF PROOF

[15] Pursuant to section 18(2) of the **Customs Act** and as I observed in **Chas E. Ramson v Commissioner of Customs** [2021] JMRC 2, [22]

> *… the Appellant has the legal burden on the whole case to prove on a balance of probabilities that the Respondent's assessment was erroneous. It has the initial evidential burden to lead evidence that the Commissioner's assessment so qualifies and if it discharges that burden, whether in respect of liability and/or quantum, an evidential burden shifts to the Respondent. The Respondent will have discharged that burden by adducing evidence of the information and material on which [she] relied and which caused it to appear to [her] that the Appellant was under-assessed. Whether or not the evidential burden shifted to the Respondent*

in the circumstances of this case can only be answered after considering the Appellant's evidence.

REASONS FOR DECISION

(i)

Whether there are any incurable procedural breaches by the Respondent in raising the additional assessment; and by the Commissioner of the RAD in determining the appeal, which operates to determine this appeal in favour of the Appellant.

[16] I find it convenient to address paragraphs 4.1, 4.2, part of 4.3, 5, and 6 of the Appellant's grounds of appeal together under this head. The gravamen of the complaints in these grounds may be summarised thus:

(i) The Appellant was not furnished with a copy of the Respondent's written statement of reasons for the relevant decision in contravention of rule 6(b) of the Revenue Appeals Division Rules (RADR).

(ii) The Commissioner of the RAD erred in relying on the case file of the Respondent in determining the appeal; and if she did not err in that reliance, she nevertheless erred in failing to permit the Appellant to review contents of the said case file and to adduce additional evidence and/or present supplemental arguments, if so advised.

(iii) The Commissioner of the RAD erred in failing to permit the Appellant to review and respond to the written case of the Respondent if so advised, having permitted the Respondent to review and respond to the written case of the Appellant.

(iv) The Commissioner of the RAD erred, in considering on her own volition, whether the Order Administration Fees and Franchise Fees could be

classified as *"subsequent proceeds*" under paragraph 8(1)(d) of the Schedule to section 19 of the Customs Act without giving the Appellant the opportunity to respond.

[17] I find that there is merit to some of the Appellant's submissions demonstrated below.

Summarised grounds (i) to (iii)

[18] Pursuant to rule 6 of the RADR, the Commissioner of the RAD is to be furnished with *"all the files relating to the relevant decision"* and "*a written statement of the reasons"* for the said decision. The written reasons for the relevant decision must also be served on an appellant. Service of these documents is to enable the Commissioner to conduct the appeal and is to be done by the relevant Revenue Commissioner within twenty-one (21) days of being served with the notice of appeal against his decision.

[19] The Appellant's Notice of Appeal was received by the RAD on 13th November 2017, and the tribunal, pursuant to rule 5 of the RADR caused a copy of it to be served on the Repsondent under cover of letter dated 16th November 2017. In that missive, the relevant file and written statement of reasons for the decision were requested within twenty-one (21) days of the date of the communication on behalf of the Commissioner of the RAD pursuant to rule 6 of the RADR, to facilitate the hearing of the appeal.

[20] The Respondent delayed in furnishing the case file to the Commissioner of the RAD as it was only by letter dated 9th August 2018 that a copy of the file was remitted to the RAD *"as per request"*. The letter goes on to say, that *"[i]t should be noted that the relevant Statement of Case will follow as previously indicated [and that] [t]he delay is regretted*."

[21] By letter dated 16th August 2018, the Respondent remitted its Statement of Case to the RAD *"as per request".* The reasons for the appealed additional assessments were set out therein. Again, regret was expressed for the delay.

[22] The Appellant was not copied on the correspondence by which the reasons for the relevant decision were supplied to the RAD and there is no evidence of those reasons having been served by the Respondent on the Appellant within the time prescribed for service by rule 6 of the RADR or at all. I therefore find the Appellant's complaint - that it was not furnished with the Respondent's written statement of the reasons for the relevant decision contrary to rule 6 of the RADR - is meritorious.

[23] The Commissioner of the RAD at paragraph 14 of Notice of Decision indicated that the Appellant's written submissions and the Respondent's representative's statement of case which outlined the reasons for raising and confirming the additional assessment were considered in determining the appeal, and the Respondent's case file reviewed.

[24] While the review of the case file by the Commissioner of the RAD is the subject of complaint on the appeal, it was submitted by the Appellant that it is not contending that the Commissioner cannot examine or is precluded from examining the Respondent's case file, but that in this case she failed to observe established rules of procedural fairness and natural justice. According to the Appellant, this failure arises in the absence of any disclosure by the Commissioner of the RAD of the matters from the case file which she considered, the relevance of such considerations, and the failure of the said Commissioner to give the Appellant an opportunity to present additional evidence and/or arguments in respect of those considerations, if that was advised.

[25] The Appellant relies on the dictum of Morrison JA (as he then was) in **Chang v The Commissioner of Taxpayer Appeals** [2016] JMCA Civ 16 [56], the effect of which is that the tribunal to which appeals against the decision of a relevant Revenue Commissioner is made - then the Commissioner of Taxpayer Appeals (CTA) and the Commissioner of Taxpayer Audit and Assessment (CTAA) respectively - must be able to see and consider all material that was before the relevant Revenue Commissioner, as well as the reasons for decision in order to

fairly and properly carry out the tribunal's duty to hear a taxpayer's appeal from the said decision.

[26] That position is codified in the RADR. As earlier indicated, the relevant Revenue Commissioner is required to furnish the Commissioner of the RAD with documents for the conduct of the appeal, specifically all the files which relate to the relevant decision and a written statement of the reasons for the said decision, pursuant to rules 6(a) and (b) respectively.

[27] As to the ways in which an appeal may be determined by Commissioner of the RAD, rule 9 of the RADR permits it to be done in one of three ways. By convening a formal hearing, accepting a settlement agreement, or otherwise arriving at a decision based on information which it has gathered in accordance with the provisions of rule 7.

[28] Rule 7 of the RADR generally permits the Commissioner of the RAD or authorised officer to collect all necessary information to facilitate the determination of an appeal, "including" new and additional information that had not been made available to the relevant Revenue Commissioner. Rules 7(4) and (5) specifically provide as follows.

> *(4) The Commissioner [of the RAD] shall notify the parties in writing forthwith upon his having completed collection of all necessary information to facilitate his determination of an appeal.*
>
> *(5) The Commissioner [of the RAD} shall determine what information received under rule 6(a) and this rule shall be disclosed by the Commissioner [of the RAD] to any party.*

[29] On the material before me, the Commissioner of the RAD for some time sought to arrange a formal hearing to determine the appeal. After several failed attempts to agree dates for such a hearing with the attorney-at-law representing the Appellant before the tribunal, the RAD sent an email to the Attorney-at-Law on

4th March 2021 - which forms part of a thread of email correspondence between the RAD and the said representative of the Appellant - to advise that:

> *… following a **review of your written submissions, as well as the Respondent's Statement of Case**, a decision has been made by the Revenue Appeals Division to determine the appeal by means of information already gathered in accordance with Rule 9(c) of the First Scheduled to Section 19 of the Revenue Appeals Division Act 2015, The Revenue Appeals Division Rules 2015.*
>
> *It has been determined that the submissions already made, contains the relevant information needed to arrive at an appeal decision. **Please note that this does not preclude you from making further submissions or requesting a meeting (within a reasonable time), if you deem it necessary. Should you have any queries or concerns you may contact [the writer of email at the stated telephone number or email address]**.*
>
> *[Emphasis added]*

[30] It is clear from the foregoing that the Appellant, through the attorney-at-law representing it before the RAD was advised that the Respondent had supplied its statement of case to the Commissioner of the tribunal, who had reviewed the same as well as the Appellant's written submissions. Also clear is that all the files relating to the relevant decision and reasons for decision are the minimum documents required to be supplied to conduct the appeal. The provision of those documents to the Commissioner of the RAD are mandated by rule 6 and have not been left to the exercise of the discretionary investigative and information gathering power given to the said Commissioner by rule 7. There could be no legitimate surprise by the Appellant that these documents would be used by the Commissioner of the RAD in determining the appeal before her.

[31] Rule 7(4) gives the Commissioner of the RAD a discretion to determine what information received as part of the files relating to the decision pursuant to rule

6(a) or pursuant to the exercise of its investigative powers is disclosed to any party. While disclosure of relevant files of the relevant Revenue Commissioner is not mandatory, it is my view that the discretion to withhold disclosure should be exercised judiciously to ensure that there is a fair determination of the appeal.

[32] The written reasons for a relevant decision which was supplied by way of statement of case by the Respondent and relevant case files are specifically required to be served on the Commissioner of the RAD for the conduct of the appeal pursuant to rule 6 of the RADR, because they are to be considered in determining appeals to the tribunal. Accordingly, the Appellant and its representative ought to have known that both would be considered by the Commissioner of the RAD.

[33] Having been advised by email of 4th March 2021 that the Commissioner of the RAD would determine the appeal on the basis of information already gathered; there being no provision in the RADA or the RADR for the Respondent to provide proof of service of the written statement to the appellate tribunal; and there being no right to disclosure of the case files furnished to the Commissioner of the RAD pursuant to rule 6(a), it is my view that it was incumbent on the representative for the Appellant to indicate that the statement of case of the Respondent and relevant case files were not served or disclosed respectively, and that it had an objection to the Commissioner of the RAD determining the appeal on the basis of information already gathered on these bases. The representative of the Appellant was in fact reminded in the email of 4th March 2021 that the course proposed by the RAD did not preclude it from filing further submissions, requesting a meeting within a reasonable time; and that if there were concerns or queries, the RAD could be contacted through the writer of the email by that said medium or by telephone.

[34] It cannot be said that the Appellant was given no opportunity to comment on or contradict, if it so wished, documents which the Respondent would have furnished to the Commissioner of the RAD for consideration pursuant to rule 6 of

the RADR. On the contrary, it is the Appellant who failed - without explanation - in availing itself of any of the facilities extended by the RAD. It therefore comes as no surprise that the Commissioner of the RAD gave notice dated 28th September 2021 to the parties that all relevant information which was necessary to determine the appeal had been submitted for her consideration. This was done by way of *Notice of Collection of Relevant Information* issued pursuant to rule 7(4) of the RADR. Having regard to these circumstances, it is my view that reliance by the Commissioner of the RAD on the case file, the statement of case supplied to it by the Respondent, and the submisisons of Appellant in determining the appeal is not constitutive of breach of the right to natural justice which includes the right to be heard.

[35] After its email of 4th March 2021 to the representative for the Appellant indicating that the appeal would be determined based on information already gathered however, the Commissioner of the RAD was supplied with written submissions of 24th March 2021 from the representative of the Respondent, in response to the submissions furnished by the representative for the Appellant. While the submissions in response are in many respects geared towards responding to the authorities cited in the Appellant's submissions, they are submissions in response to the appeal and cite at least one authority not relied upon by the Appellant in submissions. Paragraphs 62 to 77 of the Notice of Decision of the Commissioner of the RAD are devoted to summarising the contents of the written submissions from the Respondent's representative which is as clear an indication as any that the submisisons were considered by the Commissioner in determining the appeal. The Respondent's submissions not being among the documents required to be furnished for conduct of the appeal pursuant to rule 6 of the RADR, and they having been received by the Commissioner of the RAD after its email of 4th Match 2021 to the representative for the Appellant that the appeal would be determined on information already gathered, I find that the tribunal erred procedurally in considering the written submissions without disclosing them to the Appellant or its representative, and in failing to give an opportunity to respond if deemed necessary.

Summarised ground (iv)

[36] Pursuant to rule 12(1)(d) of the RADR, in determining a relevant decision by a formal hearing or based on relevant information gathered pursuant to rules 9(a) or 9(c), the Commissioner of the RAD may *"vary the decision other than in relation to the amount determined"*. This provision is undoubtedly broad enough to permit the said Commissioner to vary the basis for decisions appealed to it. It is my view however since the decision being appealed would not be premised on that varied basis, the Commissioner of the RAD must notify the parties in the appeal that a variation of the basis for the decision is being considered by it and provide an opportunity to the parties to respond to the matter under consideration if they deem fit, as a matter of basic fairness.

[37] At paragraph 138 of her Notice of Decision, the Commissioner of the RAD states that, *"[a]n analysis of the facts of the case raises the additional issue of whether the Order Administration fees and the Franchise fees fell for consideration under paragraph 8(1)(d) of the schedule as "subsequent proceeds."* This was not among the grounds of appeal advanced before the said Commissioner and the Appellant therefore contends that she erred in considering the applicability of that provision on her own volition, without giving it the opportunity to make submissions.

[38] In answer to the complaint the Respondent submits that the Appellant had notice of paragraph 8(1)(d) of the Schedule and had the opportunity to address it in its Notice of Appeal to the Commissioner of the RAD. For this submission, the Respondent relies on the contents of a letter dated 12th October 2017 from its Internal Review Committee to the Appellant confirming the post-audit additional assessments. The Respondent's submission is without merit.

[39] Having read the letter in its entirety, it appears to me to demonstrate three (3) things, so far as relevant to the complaint under consideration.

(a) That the Respondent decided that the *"Order (Administration) Processing Fee is not an expense, but forms a part of the customs value established by a defined mechanism of 9.5% of each order and its payment is a condition precedent to exportation to Jamaica."*

(b) The Respondent was of the view:

> *"[t]hat sufficient information [was] available to enable the following additions to be made to the price actually paid or payable under paragraph 8 of the schedule:*
>
> *(i) Commission and brokerage, except bank Commission [8(1)(a)(i)];*
>
> *(ii) Packing and container costs and charges [8(1)(a)(ii) and (iii)];*
>
> *(iii) Assist [8(1)(b)];*
>
> *(iv) Royalties and license fees [8(1)(c)];*
>
> *(v) Subsequent proceeds [8(1)(d)];*
>
> *(vi) The cost of transport, insurance under related charges to the port of Jamaica [8(1)(e)].*

(c) It was the Respondent's *"position that SKDP pays a license fee in the form of franchise fees to HLI. Royalties or licenses fees payable to the seller are included in the customs value once it is in relation to the imported goods and are paid as a condition of the sale."*

[40] While the Appellant may be said to have had notice of paragraph 8(1((d) of the Schedule, *"subsequent proceeds"* having being listed in the letter as one of the prescribed includable costs under paragraph 8, it goes no higher than notification that a provision exists for inclusion of the value of proceeds of subsequent resale, disposal or use of the imported goods under paragraph 8 of the Schedule. There was no notice to the Appellant that the additional assessments raised against it in respect of the Order Administration Fees and Franchise Fees were on account that either or both fees constituted *"subsequent proceeds"* which were includable pursuant to paragraph 8(1)(d) of the Schedule.

[41] Further and in any event, the reason given by the Commissioner of the RAD for considering paragraph 8(1)(d) of the Schedule is that arises on *"an analysis of the facts of the case"*. The issue not having been raised as a ground of appeal before the RAD - and understandably so because it was not a basis for the Respondent's decision - it is my view that when the tribunal decided that the issue was relevant to the determination of the appeal and would be considered by it, the parties should have been advised and permitted an opportunity to respond if they thought necessary. That was not done. Consequently, I find that the Commissioner of the RAD fell into error in considering paragraph 8(1)(d) of the Schedule on her own volition, and in arriving at a decision adverse to the Appellant without giving it an opportunity to be heard on the matter.

[42] While it is my judgment that the Respondent contravened rule 6(b) of the RADR in failing to furnish the Respondent with the statement of reasons as required by the said rule; that the Commissioner of the RAD erred in failing to consider without disclosure to the Appellant and without any opportunity to respond, the written submisisons of the Respondent received after she had advised that the appeal would be determined on information gathered as at the time of the email to the Appellant's representative on 4th March 2021; and that the appeals Commissioner also fell into error in her consideration of paragraph 8(1)(d) of the Schedule, these are procedural errors. Appeals to this court being by way of rehearing, the procedural errors which I have found to exist are capable of being cured on appeal. A like conclusion would follow in respect of the other complaints as to procedural errors which I have found unmeritorious, even if I should have determined those complaints otherwise.

(ii)

Whether the Commissioner of the RAD erred in rejecting the transaction value method and applying the "fallback" method of valuation for determining the customs value of the imported goods.

[43] In the appeal before her the Commissioner of the RAD considered whether the use of the transaction value method by the Respondent in determining the customs value of the imported goods was appropriate and concluded that it was not, preferring the fall-back method of valuation. The appeals Commissioner was of the view that "*'sale for export"* as used in paragraph 3 of the Schedule *"indicates a transfer of ownership in merchandise from a foreign country by a supplier to an importer that directly causes the merchandise to be imported to Jamaica. [It] is usually evidenced by the passing of title of the subject goods from the purchaser to the seller and a clear vendor and purchases relationship."* She found that conditions required for "*sale for export"* were not met in the case as there was a lack of evidence to support the transfer of title to the goods from Herbalife to the Appellant, or of a buyer-seller relationship between the two entities. She found that on the evidence, the Appellant was providing logistics and distribution services on behalf of Herbalife to its local distributors. The Appellant submits that there was no proper basis for the approach of the tribunal. The Respondent makes no submission in response to the complaint but contends that the Appellant's failure to declare the Order Administration Fees and the Franchise Fees as part of the transaction value of the imported goods contravened paragraphs 3 and 8 of the Schedule, which evidences in my view, continued reliance on the transaction value method in the appeal. The Appellant's complaint is without merit, and I find the Respondent's continued reliance on the transaction value to be ill conceived.

[44] The general mechanism for determining the customs value of imported good is provided for at paragraph 2 of the Schedule thus.

(1) Where the conditions specified in paragraph 3 are fulfilled, the customs value of imported goods shall be determined under that paragraph.

(2) A declaration of customs value of imported goods shall be made by the importer and shall be supported by documentary evidence consisting of objective and quantifiable data that establishes the accuracy of that declaration.

(3) Subject to sub-paragraph (4), where the customs value of imported goods cannot be determined under paragraph 3, it shall be determined by proceeding sequentially through paragraphs 4 to 7, to the first such paragraph under which the customs value can be determined; but the order of application of paragraph 6 and 7 shall be reversed if the importer so requests and the Commissioner agrees.

(4) Except as provided in sub-paragraph (3), the provisions of the next paragraph in the sequence established by that sub-paragraph shall be applied only where the customs value of imported goods cannot be determined under a particular paragraph.

(5) …

[45] Paragraphs 3 of the Schedule makes provision for the determination of customs value of imported goods based on the transaction value of the goods, while

> *… other secondary, sequential methods [for determination of customs value are prescribed at] paragraphs 4 to 7, which provide for resolution on the basis of the transaction value of identical goods sold for export, transaction value of similar goods sold for export, unit price of the greatest aggregate quantity (deductive method) or on the basis of computed value, respectively. The application of the methods at paragraphs 6 and 7 may be reversed however, on the request of the importer with the agreement of the Commissioner of Customs… [I]f the customs value of imported goods cannot be determined by the methods at paragraphs 3 to 7, the fall-back method which is comprised in sub-paragraphs (5) and (6) is to be*

used." **Kingston Industrial Garage Ltd v Commissioner of Customs** [2023] JMRC 01, [16] and [17].

[46] So far as is immediately relevant, paragraph 3 of the Schedule provides that:

> *(1) Subject to paragraphs 2 and 8, the customs value of imported goods determined under this paragraph shall be the transaction value, that is to say, the price actually paid or payable for the goods* ***when sold for export to the Island*** *in the circumstances referred to in sub-paragraph (2) and adjusted in accordance with paragraph 8 or, where appropriate, paragraph 9.*
>
> *(2) …*
>
> *[Emphasis added]*

[47] Further and pursuant to paragraphs 8(2)(b) and (c), additions to the price actually paid or payable pursuant to paragraph 8, and determination of the transaction value of goods under paragraph 3 are only to be made on the basis of objective and quantifiable data.

[48] As observed in **Kingston Industrial Garage Ltd** [25(v)(1)],

> *The objective of the exercise [at paragraph 3 of the Schedule] is to determine … the price actually paid or payable for the goods* ***when sold for export to Jamaica****, or if you will, the total payment made, or to be made for the said goods by the buyer to the seller, or for the benefit of the seller.*
>
> *The term "buyer" is not defined in the Act but I can see no reason for departing from the meaning of the word in its ordinary signification, that is, a person who makes a purchase. "Seller" is defined at paragraph 1(1) of the Schedule however, to mean* "a person who has the legal or beneficial interest in the goods at the time that the contract of sale is concluded and to whom the proceeds of sale will ultimately be paid, exclusive of any commission or fee*" …*
>
> *[Emphasis added]*

[49] *"Sold for export to Jamaica"* is also undefined in the legislation but it is my view that at minimum, it contemplates an agreement between a buyer and seller for the exchange of the legal or beneficial interest which the seller has in the goods at a price, between the point at which the decision is made to export goods into the island and the importation of the said goods. Absent evidence of such an agreement, the use of the transaction value method to determine the customs value of the imported goods is impermissible.

[50] This accords with the view taken of section 48(4) of the Canadian Customs Act which is worded in a manner similar to paragraph 3(1) of the Schedule in **Canada v. Mattel Canada Inc.** [2001] 2 S.C.R. 100, on which the Appellant relies. The principle emanating from the case is that the provision requires that the value of goods imported into Canada were required to be determined based on the *"price paid or payable for the goods when the goods are sold for export to Canada."* Major J in delivering the judgment of the court in **Mattel Canada**, which was applied in **Reebok Canada Inc. v Canada, Deputy Minister of National Revenue (**2002) 289 N.R. 174 (FCA) said this:

> *42 In order for there to be a sale for export, there must obviously be a person who exports. For there to be an exporter there must be an importer. Put in a different way,* ***a sale for export cannot exist without a corresponding purchase to import****.*
>
> *…*
>
> *45 For the purposes of valuation under s. 48 of the* Customs Act, ***the relevant sale for export is the sale by which title to the goods passes to the importer****. The importer is the party who has title to the goods at the time the goods are transported into Canada.*
>
> [Emphasis added]

[51] The evidence in this appeal does not disclose that there was any sale of the goods for export between the Appellant and Herbalife. On the contrary, the terms of the 1998 Agreement are indicative of an altogether different arrangement - that the goods were imported into Jamaica after order and delivered to the Appellant through whom the goods are sole to local distributors. That this is the substance

of the agreement is suggested by its very recitals which provide, so far as relevant that,

> … ***Herbalife is engaged primarily in the development, marketing and sale*** *of nutritional supplements, personal care and related products …* ***and is interested in exporting its products to Jamaica****;* ***and [the Appellant]*** *is engaged in the importation and sales of goods in Jamaica and* ***is interested in importing and distributing Herbalife products in Jamica****.*
>
> [Emphasis added]

[52] It is in pursuit of those respective interests that the contracting parties agreed the terms of the said Agreement, section 3 of which is titled "*Terms of Purchase and Product Pricing"* and provides as follows.

> *3.1 Herbalife and SKDP agree that during the Term, Herbalife will sell to SKDP and SKDP will purchase from Herbalife, the Products for importation into Jamaica. Notwithstanding the foregoing, Herbalife reserves the right to sell the Products under Herbalife's name and trademarks directly to Distributors.*
>
> *3.2 SKDP will purchase the Products from Herbalife at the prices set forth in the Product Pricing Schedule, attached hereto and hereby incorporated by reference, in Appendix A or at process from time to time communicated by Herbalife to SKDP by notice in writing.*
>
> *3.3 All Product purchase orders from SKDP shall be confirmed by Herbalife. Upon order confirmation, Herbalife shall export the Products ordered to Jamaica. Freight shall be paid by SKDP.*
>
> *3.4 SKDP will be responsible for completion and submission to Herbalife of a receiving report, which report shall include details as to any discrepancies in the order received by SKDP, damage to or missing items from the order. The receiving report must be*

submitted to the designated Herbalife office within 48 hours of clearance of the products in Jamaica.

[53] While it is a term of the agreement that Herbalife will sell the products to the Appellant for importation into Jamaica, there is no mechanism in the clause reproduced or any of the other provisions of the 1998 Agreement for the payment of the products by the Appellant in exchange for the legal or beneficial interest which Herbalife has as the seller of the products. Pursuant to the agreement the Appellant submits *"purchase orders"* for products and on confirmation of those "*purchase orders"* by Herbalife, the products are exported to Jamaica. While the Appellant is responsible for paying the cost of transporting the goods to Jamaica or freight as it is called, there is no obligation on the Appellant to pay for the goods between the submission and confirmation of purchase orders, and their export from a jurisdiction outside of Jamaica and their importation into the Island.

[54] In fact, section 4 of the Agreement which is titled "*Sales of Products by SKDP to Distributors"* provides that*:*

SKDP agrees to sell the Products only to Distributors [which are defined in the Agreement to refer to individuals located in Jamaica who distribute Herbalife Products in Jamaica and who have been assigned a distributor identification number by Herbalife, who are referred to as "Local Distributors" hereafter] upon receipt of a purchase order from the Respective Distributor, which purchase order must include the Distributor's Herbalife identification number. From time to time Herbalife, may suggest a resale price at which any of the Products may be sold by SKDP to the Distributors and SKDP may, but shall have no obligation to sell the Products at such suggested resale price. SKDP shall add General Consumption Tax (GCT) to the price of all Products sold to Distributors.

[55] Herbalife then goes on to covenant as follows.

6.1 Herbalife will provide [the Appellant] with administrative assistance by accepting orders and payments from Distributors on behalf of SKDP. For said services SKDP will pay Herbalife a processing fee equivalent to nine

and one half percent (9.5%) of the US$ value of each Distributor's order, excluding General Consumption Tax.

6.2 Upon receipt of payment from each Distributor for each order, Herbalife will send an Order Advice Notice to SKDP. Order Advice Notices will include Distributor details, a list of Products ordered and the total amount collected on behalf of SKDP.

6.3…

[56] From the foregoing it is the Local Distributors who pay for the Herbalife goods which have been delivered to SKDP for distribution in Jamaica.

[57] There are several Herbalife statements titled *"Reconciliation of Fees and Payment"* that have been produced in evidence, which among other things, discretely itemise fees and payments which are due to Herbalife from the Appellant including the amount for product purchases for the relevant reporting period. The values stated for product purchases in those statements are not disputed, and I have no reason to doubt them. While they can assist with the determination of the price payable for the goods simpliciter, they cannot be regarded as referable to the *"price payable for the goods when sold for export to the Island",* absent a corresponding purchase to import the goods. Under the agreement, while the goods are delivered to the Appellant by Herbalife through importation, they are paid for from monies collected on post-importation purchases by Local Distributors.

[58] Further still, until Herbalife receives payment for the goods - the mechanism being through post-importation purchases - the legal and beneficial interest in the said goods appear to be retained by Herbalife. I arrive at this conclusion when I have regard to the other clauses of the 1998 Agreement particularly that which provides for the storage and insurance by the Appellant of the imported goods. Sections 5.2 and 5.6 are relevant in this regard and provide thus.

> *5.2 SKDP covenants that it will establish a warehouse facility for the storage of the Products intended to be sold and distributed to the Distributors and further SKDP shall maintain the aforesaid facility in compliance with any and all applicable local laws.*
>
> *5.3 ...*
>
> *5.6 SKDP shall maintain adequate insurance coverage with an insurer acceptable to Herbalife for Product inventory in respect of which payment is still due. SKDP shall name Herbalife as loss payee under the insurance policies and shall pay all insurance premiums when due.*

[59] The foregoing provisions are, in my view, incompatible with a sale for export by which title to the goods would pass to an importer and demonstrates that until the goods have been imported and paid for by Local Distributors, the legal and beneficial interest in them remain with Herbalife, who is entitled to recover the proceeds of insurance for their loss. This arrangement is more akin to a consignment for export. In the circumstances I am unable to find that there was a sale of the goods for export to Jamaica which prevents the transaction value method at paragraph 3 of the Schedule being used to determine the customs value of the imported goods.

[60] Where the transaction value method cannot be used, the determination of the customs value of imported goods may be determined on the sequential application of the valuation methods prescribed at paragraphs 4 to 7 of the Schedule. There is nothing before me which suggests that evidence which would have enabled these other methods of valuation to be used by the Commissioner of the RAD in determining the customs value of the imported goods was led, and no such evidence has been advanced in the appeal to this court. In the circumstances, pursuant to paragraph 2(5) of the Schedule, engagement of the fallback method of valuation is authorised. Accordingly, I am unable to fault the Commissioner of the RAD in rejecting the transaction value method and applying the fallback method for determining the customs value of the imported goods. The Appellant's challenge in this regard must therefore fail.

(iii)

Whether the Commissioner of the RAD erred in finding that the Franchise Fees and Order Administration Fees paid by the Appellant to Herbalife under the 1998 Agreement were to be added to the price actually paid or payable for the imported goods in determining their transaction value, pursuant to paragraphs 8(1)(c) or 8(1)(d) of the Schedule to section 19 of the Customs Act.

[61] The fallback method for valuation which is codified in paragraph 2(5) of the Schedule provides that where the customs value of imported goods cannot be determined under paragraphs 3 to 7, it is to be determined *"(a) using such means as are reasonable having regard to the principles and general provisions of this Schedule; and (b) be based, as far as practicable, on previously determined customs values."* This method of valuation permits the appraisal of goods based on value derived from one of the valuation methods at paragraphs 3 to 7, reasonably adjusted to arrive at a value of the imported goods. In the absence of evidence which enables other valuation methods to be used and being the first in the sequence of available methods in any event, a reasonable adjustment of the transaction value method in arriving at the value of the imported goods is indeed appropriate.

[62] So far as is relevant paragraph 8 of the Schedule provides:

> *(1) In determining the customs value under paragraph 3, there shall be added to the price actually paid or payable for the imported goods-*
>
> > *(c) Royalties and licence fees, including payments in respect of patents, trademarks and copyright, related to the goods being valued payable by the buyer, either directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;*

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

(e) …

(2) In determining the customs value of imported goods –

(a) no additions shall be made to the price actually paid or payable for those goods, except as provided in this paragraph; and

(b) additions to the price actually paid or payable shall be made under this paragraph only on the basis of objective and quantifiable data;

(c) …

(3) Notwithstanding sub-paragraph (1) (c) -

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

(b) payments made by the buyer for the right to distribute or resell those goods shall not be added to the price actually paid or payable for the goods if such payments are not a condition of the sale for export of those goods to the Island.

[63] Paragraph 8 of the Schedule makes provision for the circumstances under which additions can be made to the price actually paid or payable for imported goods. While subparagraph (1) is specific to customs value determinable under paragraph (3) of the Schedule, it is my view that paragraph 8(2) enables engagement of the principles at paragraph 8(1) in determining the customs value of imported goods where resort is had to the fallback method of valuation prescribed at paragraph 2(5) of the Schedule.

[64] Although I have earlier found that the Commissioner of the RAD erred in in considering the applicability of paragraph 8(1)(d) of the Schedule without giving the Appellant notice that it would do so, thereby depriving the Appellant of the opportunity to be heard in that regard, that deficiency is curable on the appeal to this court which is by way of rehearing. Accordingly, the addition of the *Franchise Fees* and *Order Administration Fees* to the price paid or payable for the imported goods pursuant to paragraphs 8(1)(c) or (d) of the Schedule in determining their customs value is appropriately considered in resolving the appeal.

8(1)(c) - Royalties and Licence Fees

[65] Paragraph 8(1)(c) of the Scheule permits the addition of *"royalties and licence fees"* in determining their customs value but nowhere in the legislation are the fees defined. It is my view however that they derive meaning from the words *"including payments in respect of patents, trademarks and copyright"* which follow them, and are referable to payments or consideration if you will, which is made in respect of intangible property which includes but is not limited to property in patents, trademarks or copyright. It is against this background that the examination into whether the fees are dutiable pursuant to paragraph 8(1)(c) must commence.

[66] Liability of the Appellant to pay Order Administration Fees arises pursuant to section 6.1 of the 1998 Agreement thus.

> *6.1 Herbalife will provide SKDP with administrative assistance by accepting orders and payments from Distributors on behalf of SKDP. For said services, SKDP will pay Herbalife a processing fee equivalent to nine and one half percent (9.5%) of the US$ value of each Distributor's Order, excluding General Consumption Tax ("GCT").*

[67] Those fees appear to me to be made exclusively for administrative services provided to the Appellant by Herbalife and not in respect of intangible property to enable their characterization as royalties or license fees within the meaning of paragraph 8(1)(c). The same cannot be said of the Franchise Fees which the

Appellant is liable to pay pursuant to section 7.3 of the 1998 Agreement, however. That clause provides that,

> *7.3 In consideration for the rights extended in this Section 7, SKDP shall pay Herbalife monthly a franchise fee equivalent to twenty-five (25%) of the total US$ value of all Distributor orders processed and paid during the month. For the purposes of this Clause 7.3 total US$ value is defined as the total US$ value of Distributor orders excluding GCT.*

[68] In summary, in addition to the revocable and amendable right to be the sole importer of Herbalife products in Jamaica pursuant to section 7.2, Herbalife from its facilities in the United States of America will provide the Appellant with product sales promotion, marketing, Distributor training and sales events in accordance with certain of its promotional programs; computerised tracking of sales and the generation of sales reports; maintenance of distributor database; global market analysis in respect of new product development; inventory control/planning support; and ***"product licensing in Jamaica, new product introduction in Jamaica and product development for the Jamaican market"*** of the pursuant to section 7.1. [Emphasis added]

[69] Under section 10 the rights in the trademarks appearing in or used in relation to the products the subject the Agreement and the goodwill attaching thereto are the exclusive property of Herbalife. Rights which the Appellant acquires in the trademarks by virtue of activities pursued under the agreement vests in Herbalife and on request are to be assigned to it absolutely. Herbalife may require the Appellant to execute documents and carry out actions necessary to protect Herbalife's trademark rights in Jamaica and it was agreed that trademarks are not to be used in any manner likely to invalidate their registration.

[70] When the foregoing provisions as to ownership of intellectual property are read in the context of other provisions in the 1998 Agreement, particularly the earlier emphasised rights acquired by the Appellant under section 7, it is my view that rights to intangible property are being accessed through the payment of the

Franchise Fees. It is observed for example, that among the rights for which the Appellant is obliged to pay the fees under the agreement is product licensing, which involves obtaining permission to manufacture and sell licenced products within a defined market, with the party obtaining the right usually agreeing to pay a royalty fee to the owner of the right. In these circumstances it is my judgment that the Franchise Fees are properly characterised as royalties or license fees and are within the scope of paragraph 8(1)(c) of the Schedule.

[71] The enquiry does not end there however, as royalties and license fees are only dutiable where the payments relate to the goods being valued. The importance of this requirement is demonstrated by the decision in the **Commissioner of Customs v M/S Ferodo India Pvt. Ltd** Civil Appeal No. 8426 of 2002, 21st February 2008 which is relied upon by the Appellant. In that case the buyer (licensee) who was a manufacturer of brake liners and brake pads entered into an agreement with its foreign collaborator (licensor), whereby the latter permitted the former to manufacture brake liners and brake pads which were the licenced products. Under the agreement, the licensor was obliged to disclose relevant secret processes, formula and information to the licensee. Under the said agreement, the licensee was also required to import or buy raw material and capital goods from the licensor. It was admitted that the licensee was obliged to pay a licence fee along with royalty based on net sales value of the licenced products consumed, sold or otherwise disposed. The court found that the royalties were in no way related to the imported goods but related entirely to the licensed products - the manufacture of brake liners and brake pads.

[72] The Appellant places great emphasis on the fact that the Franchise Fees are paid post-importation but as stated in the guidance contained in the Canadian Borders Services Agency Memorandum D13-4-9,[1]

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[1] Ottawa, January 14, 2014 [14]

> *The timing of when the royalty or licence fee must be paid does not affect the decision on whether or not the fee is in respect of the goods. A royalty or licence fee payment may be added to the price paid or payable regardless of whether it is to be paid at the time of importation, time of resale, or any other time.*

[73] Having regard to the services to which the Franchise Fees go in aid, and the fact that they are calculated in the agreement as *"equivalent to twenty-five (25%) of the total US$ value of all [not some] Distributor orders processed and paid during the month"*, I find that they relate to the goods which are the subject of the challenged valuation.

[74] The fees must also be payable by the buyer either directly or indirectly as a "condition of the sale" of the goods being valued in order to be added to the price paid or payable. *"Condition of sale"* is not defined in the legislation but as stated in **Kingston Industrial Garage Ltd.** [37],

> *[a]s a practical matter … the exchange of goods for payment being premised upon an agreement between a buyer and seller, I can see no reason to depart from the general view taken of conditions, certainly in the English contract law tradition, that is, those terms which go to the root of the parties' agreement.*

[75] In **Mattel Canada** Major J put it this way.

> *68 The words incorporate the traditional concepts found in sale of goods legislation and the common law of contract. Unless a vendor is entitled to refuse to sell licensed goods to the purchaser or repudiate the contract of sale where the purchaser fails to pay royalties or licence fees, [the provision] is inapplicable.*

[76] Pursuant to section 7.3, 7.4. and 7.5 of the 1998 Agreement, the obligation to pay the Franchise Fees lies with the Appellant and are payable to Herbalife within fifteen (15) days of the end of each calendar month following their invoicing by Herbalife. The fees are deducted from payments collected by Herbalife on behalf

of the Appellant from the post-importation purchases by Local Distributors during the immediately preceding calendar month. The deductions are made at the time the payments are being remitted by Herbalife to the Appellant. Having regard to the mechanism established under the agreement, the Appellant is not given an option to refuse to pay the Franchise Fees which could then give rise to any entitlement in Herbalife to refuse to sell the goods or repudiate the agreement to sell the goods to the Appellant. I therefore find that the payment of the Franchise Fees goes to the root of the agreement between the Appellant and Herbalife for the sale of the imported goods the subject of the valuation and is a condition of their sale.

[77] Where royalties and licence fees are paid or payable by the buyer for the right to distribute or resell the imported goods, paragraph 8(3)(b) prohibits their addition to the price actually paid or payable for the goods, unless the payments are a condition of the sale for export of the goods to the Island. While there is undoubtedly a distribution component to the 1998 Agreement, the rights which are conveyed to the Appellant under section 7 for which the Franchise Fees go in aid are beyond distribution or resale rights so that the provision is not engaged.

[78] In conclusion, while the Order Administration Fees are not royalties or licences within the meaning of paragraph 8(1)(c) of the Schedule, the Franchise Fees are to be so regarded and are properly added to the price paid or payable for the imported goods in determining their customs value.

8(1)(d) - Proceeds of any subsequent resale, disposal, or use of the imported goods

[79] The Appellant contends that the Order Administration Fees and Franchise Fees are not to be added to the price paid or payable for the imported goods as they were payments for business functions performed in relation to the resale of the goods and other post-importation activities of its business. For reasons which I will set out after addressing the authorities relied upon by the Appellant in these regards, I do not find the submissions meritorious.

[80] The court is advised by Memorandum D13-4-13 - which is among the authorities supplied by the Appellant - that the Canada Border Services Agency (CBSA) permits the exclusion of management fees and/or fees for administrative services from the price paid or payable for imported goods on the ground of discretionary administrative policy, based on the agency's definition of management and administrative services. The guidance succinctly puts the position of the CBSA thus:

> *15. Payments made for management and/or administration services may meet the criteria to be subsequent proceeds, since the payments are remitted to the vendor after the importation of goods and they are often based on the resale, disposal, or use of the goods in Canada. However, in certain circumstances, the CBSA allows some payments made for management or administration services to be excluded from the subsequent proceeds provisions of the Act.*
>
> *16. To determine whether they can be excluded, the three following elements are examined:*
>
> > *(a) the services must have been rendered for the operation of the business in Canada;*
> >
> > *(b) the amount of the charge must be in accordance with an arm's length charge; and*
> >
> > *(c) the services provided are justified for the operation of the business in Canada.*
>
> *17…*
>
> *18. … The importer is responsible for keeping sufficient and appropriate evidence, which establishes the nature of the services and proves that they were truly provided for the operation of the business in Canada. The basis used must be available for examination by the CBSA…*
>
> *21. … the burden of proof lies with the importer to substantiate that the amount in question is an arm's length charge…*
>
> *24. The allowable management and/or administration fees excluded from the amount of subsequent proceeds added to the price paid or payable does not include amounts for services not related to the*

> *Canadian operation. For that reason, in order to be considered a legitimate fee for management and/or administration services, an importer must establish that the specific activity performed by their related party is a service for which a charge is justified…*

[81] I am not advised of any or a similar exclusionary discretion which is reserved to the Respondent. Accordingly, the Appellant is not assisted by the that aspect of the Canadian guidance. If such a discretion was reserved to the Respondent in any event, the burden would be upon the Appellant to establish that each of the criteria for exclusion have been satisfied, a burden which it would not have discharged on the evidence presented in this appeal.

[82] The Appellant also relies on the Indian case of **C.C.E, Mangalore v Mangalore Refinery & Petrochemicals Ltd**. 2016 (1) TMI 325 where the revenue sought to include demurrage charges incurred after crude oil reached Indian ports in the valuation of the goods for customs purposes. It was held, in a very brief judgment that these post-importation charges could not be included in the transaction value of the goods. Although the reasons for so concluding are not explored in the judgment, it is apparent that those payments by their very character were properly to be excluded. Demurrage charges are payable by the owner of a chartered ship on the failure to load or discharge the vessel within the agreed time and could not relate to the goods being valued. In the context of a subsequent proceeds enquiry, the charges could not be said to be part of the value of proceeds of the subsequent resale, disposal or use of the imported goods which accrued to the seller of the crude oil directly or indirectly, to be found dutiable.

[83] In **Tata Iron & Steel Company Ltd.** (2003] 3 SCC 472 there was an agreement for the supply of technical documentation and an agreement for the sale of equipment and material. There was also a third umbrella contract which covered both agreements for establishing a contractual relationship between the seller and the purchaser, setting up conditions for the sale of equipment and the supply of documentation. In that latter contract, the total price was stated as being the

price of the imported equipment and the price of “engineering”. It was held on appeal that the cost of engineering could not be added in determining the value of the imported goods as rule 9(1)(e), which is the equivalent of paragraph 3(8)(a) of the Schedule had not been engaged. The rule permitted payments which were made or were to be made as a condition of sale of imported goods by the buyer to the seller, or by a buyer to a third party in order to satisfy an obligation of the seller to be added to the price paid of payable for the imported goods. The court found that the price paid for the technical drawings and technical documentation under the agreement for sale of equipment and material was not an obligation of the seller and was not made a condition of sale of the imported goods. In addition to the facts of the case being distinguishable from the instant, paragraph 3(8)(a) is not engaged on the facts in this appeal.

[84] I arrive at the same conclusion in respect of **Commissioner of Customs v M/S. Essar Steel Ltd.** Civil Appeal No. 3042 of 2004, a decision of the Supreme Court of India. The question for the court was whether the payment made for a technical services agreement - which was separate from the agreement to purchase an imported plant - could properly be added to the value of the imported plant “inasmuch” that the payment has been made a condition of sale of the plant, pursuant to the provision in the valuation rules which is equivalent to paragraph 3(8)(a) of the Schedule. The court found that the technical services agreement was to coordinate and advise the respondent to successfully set up, commission and operate the plant in India after its importation, without any agreement for the transfer of know-how or patents, trademarks, or copyright. On a conjoint reading of the agreements, it was also found that the technical services agreement was in no way a condition for the sale of the imported plant and could not be added to the value of the said plant.

[85] The Commissioner of the RAD confirmed the additional assessments on the application of paragraph 8(1)(d) of the Schedule. It permits addition to the price paid or payable for the imported goods, the value of any part of proceeds of any subsequent resale, disposal or use of the imported goods which accrues to the

seller directly or indirectly. These are otherwise referred to as *"post-importation payments or fees"* or *"subsequent proceeds"*.

[86] A like provision appears at section 48(5)(a)(v) of the Customs Act Canada, guidance for which is found in CBSA Memorandum D13-4-13,[2] which appears among the Appellant's authorities. The following appears at paragraph 7 of the guidance.

> *Subsequent proceeds are a type of post-importation payment. They are subject to two conditions:*
>
> *(a) the payments accrue directly or indirectly to the vendor of the goods (in this instance the use of the word "accrue" means to increase the amount you have by adding to it); and,*
>
> *(b) the payments are based on, or a result of, the resale, disposal or use of the goods in Canada:*
>
> *(i) for valuation purposes, a resale means the further sale of imported goods by the purchaser to someone else.*
>
> *(ii) "disposal or use" means the sale, pledge, giving away, utilization, consumption or any other disposition of a good.*

[87] I agree with and accept the construction of the words "accrue", "resale", "disposal" and "use" in the guidance, which gives them their ordinary and natural meaning.

[88] The word "proceeds" is not defined in the guidance or the Schedule to section 19 of the **Customs Act**, but I see no reason from departing from its ordinary meaning, that is, *"money obtained from an event or activity."*[3]

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[2] Ottawa, March 31, 2015
[3] Oxford Paperback Dictionary & Thesaurus, 3rd Edn.

[89] In the circumstances of this case, the question of resale does not arise as the goods are sold for the first time after importation through purchase by Local Distributors.

[90] Further, as earlier indicated, the 1998 Agreement provides that both the Order Administration Fee and Franchise Fees are payable by the Appellant and are calculated as a percentage of payments made for purchases by Local Distributors. Payments for these purchases are collected by Herbalife on behalf of the Appellant, and both fees are deducted by Herbalife from those Local Distributor payments before proceeds of purchases collected are remitted to the Appellant. In these circumstances I am constrained to find that both the Order Administration Fees, and the Franchise Fees (if not dutiable as a royalty or license fee pursuant to pararaph 8(1)(c)), may be said to be part of the proceeds of disposal by sale of the imported goods, which accrues to Herbalife qua seller of the imported goods, and are dutiable in law pursuant to paragraph 8(1)(d) of the Scheule.

[91] It is in all the foregoing circumstances that I make the orders below.

ORDER

1. The appeal against the decision of the RAD made on 27th October 2021 is dismissed.
2. The decision of the RAD confirming the Respondent's assessment against the Appellant for additional duties in the amount of **Thirty Million Five Hundred and Two Thousand Two Hundred and Eighty-Nine Dollars and Ninety-three Cents ($30,502,289.93)** is confirmed.
3. Costs of the appeal to the Respondent, to be taxed, if not sooner agreed.

Carole S. Barnaby
Puisne Judge