

The Commissioner of Customs and Excise
Pretoria

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Your Reference

Our Reference
Prè Prinsloo / Joëlle d'Unienville
RANK16718.1

Date
10 September 2008

Dear Sir / Madam

Comments on Draft Revenue Laws Amendment Bill, 2008 Section 65 (9) of the Customs and Excise Act No. 91 of 1964

We refer to our comments on the proposed amendments published in the Second Draft Revenue Laws Bill of 2008 ("Draft Bill"), submitted on behalf of Masstores (Pty) Ltd ("Masstores") and dated 5 September 2008 ("the Masstores Submissions").

We have been instructed to also submit comments on the aforementioned proposed amendments on behalf of one of Masstores' buying agents, Rank Sharp Limited ("Rank Sharp").

Our comments, on behalf of Rank Sharp, are limited to the amendments proposed to section 65(9) of the Customs and Excise Act, No. 91 of 1964 ("the Act").

Relationship between Masstores and Rank Sharp

Rank Sharp has acted as a buying agent for Masstores for a period in excess of 10 years.

In fact, Masstores and Rank Sharp entered into a buying agency relationship in 1996 and this relationship is still in force.

A value determination number has been issued by South African Revenue Services ("SARS") in favour of Masstores in respect of all products imported into South Africa by Masstores and sourced through Rank Sharp. The value determination number is G277020.

Essentially, the service which Rank Sharp renders to Masstores, as a buying agent, comprises to:

- Source new and existing products for and on behalf of Masstores.
- Source new and existing factories to produce the products and ensure the factories are in compliance with Masstores' requirements, which would be notified in writing to Rank Sharp by Masstores.
- Inform the suppliers of products of Masstores' principal requirements.
- Visit any necessary product shows in order to perform the above tasks.
- Obtain samples of products for the relevant Masstores' buyers.
- Oversee packaging, design and product specifications.
- Inspect production of products as well as finished products.
- Ensure factories produce, pack and deliver products in accordance with the Masstores' orders.

- Obtain SABS approval where relevant.
- Provide finance or guarantee payment to the overseas supplier or factory.
- Perform all other functions and services as instructed by Massmart from time to time.

In return for the services rendered by Rank Sharp, Masstores pays Rank Sharp a buying commission of 10% of the "free on board" value of all products sourced by Masstores through Rank Sharp.

It is extremely important to note that Rank Sharp represents a number of importers throughout the world and, particularly within South Africa. The buying agency services which Rank Sharp renders for each and every one of these importers are identical, in every respect.

In the circumstances, Rank Sharp's buying agency services for all importers represented by Rank Sharp, extends to the payment for and on behalf of the importer in respect of products sourced by the importer through Rank Sharp.

Audit by SARS

A recent audit was conducted by SARS into all products sourced by Masstores through Rank Sharp, with a view to re-visit the value determination number issued to Masstores, in respect of the products sourced by Masstores through Rank Sharp.

Following substantive submissions made on oath (by way of affidavits) and submitted to SARS, SARS determined on 23 November 2007 that Rank Sharp was a "bona fide" buying agent and, accordingly, that the value determination number issued to Masstores, in respect of products sourced through Rank Sharp, would not be withdrawn.

In this regard, SARS' initial concerns (which appeared to constitute the motivation behind the audit) related to the fact that Rank Sharp effected payment to all suppliers of products, for and on behalf of Masstores, as part of the services rendered to Masstores as a buying agent.

Having considered both Masstores' and Rank Sharp's aforementioned substantive submissions, SARS concluded on 23 November 2007 that Rank Sharp was a "bona fide" buying agent, due to the fact that:

- It acted solely under the instructions from Masstores.
- The delivery instructions between Rank Sharp and the actual supplier illustrated a clear distinction between "buyer and intermediary".
- The actual supplier's invoice clearly indicated that the sale for export to South Africa occurred between Masstores and the actual supplier.
- The fee paid to Rank Sharp was paid as a consequence of a separate agreement between Masstores and Rank Sharp.
- Rank Sharp had at all times acted under the contractual obligations imposed on it as per the agency contract.
- The finance, for the purchase of the products, was provided by Masstores with an irrevocable standby letter of credit whereby Rank Sharp draws from the letter of credit to make payment for the products on behalf of Masstores.
- The supplier's transaction documents consistently stated that the products were destined for import to South Africa.

- The indent number reflected on the delivery instructions were set by Masstores according to each unique retail number for Masstores in South Africa.

Rank Sharp's Concern

The implication of the proposed amendments to the current provisions of section 65(9) of the Act is that a buying agent would no longer be entitled to represent an importer in the payment of products sourced by the importer through the buying agent.

Effectively, this would then disqualify the commission paid to the buying agent from being deducted from the transaction value of the products, for Customs duty purposes.

As we have already explained, in the Masstores Submissions, there are a number of factors which need to be considered in defining the role of a buying agent and the fact that a buying agent makes payment on behalf of an importer, for products sourced through the buying agent, cannot be the determining factor in whether or not a relationship of buying agency exists between the importer and the agent.

Practical Implications

If the proposed amendments to section 65(9) of the Act were to be accepted, it would lead to a situation where, at a practical level:

- It would become extremely difficult for the buying agent to control the quality of products produced by a supplier by way of controlling the payment to the manufacturer. In this regard:
 - Very few suppliers in the Far East that are able to maintain a standard range of products and, more often than not, the products are produced or manufactured as a result of a special production run requested by the importer.

- It is therefore difficult for an importer to monitor the production of products and ensure that the required specifications and quality requirements are adhered to by the supplier.
- The buying agent would no longer be entitled to ensure that a deposit is paid to a supplier, on behalf of the importer, in circumstances where a special tooling and design equipment and information is required, once the buying agent has sourced the tooling and equipment from a supplier.
- The buying agent would no longer be able to ensure that products which are to be delivered to the supplier by a sub-contractor is delivered timeously and to control the payment to the sub-contractor (thereby ensuring timeous delivery of the products).
- The buying agent would no longer be able to make payment to suppliers in a "local currency" due to the fact, as is often the case, that the supplier does not possess an export permit.
- The buying agent would be unable to withhold payment to the supplier in circumstances where the buying agent is not satisfied with the quality of the product, due to the fact that the product does not meet with the requirements of the importer.

Recommendations

Rank Sharp supports those recommendations made in the Masstores Submissions and to the extent that it should apply to Rank Sharp's buying agency services, for all South African importers represented by Rank Sharp.

In this regard, we are instructed to emphasise the fact that the role of a buying agent needs to be distinguished from entities acting in the capacity of a selling agent, a buying house or exporter.

Rank Sharp has made submissions on oath that it does not receive any commission from any suppliers and that it has absolutely no proprietary interest in any products, sourced for and on behalf of Masstores, other than the buying commission paid to Rank Sharp by Masstores.

As such, Rank Sharp could never be considered, in its relationship with Masstores and with all other importers represented by Rank Sharp, to be acting as a selling agent, a buying house or an exporter.

Rank Sharp has deposed to submissions, on oath and through its Director, Mr Ellian Joseph Perch, to the effect that Rank Sharp:

- is only entitled to act as an agent on behalf of Masstores in accordance with the provisions of the buying agency agreement,
- only represents Masstores in the payment for any products which is supported by the fact that Rank Sharp is only allowed a credit facility for the issuing of letters of credit against Masstores' standby documentary letter of credit,
- never takes delivery or possession of the products,
- is not the registered trademark holders of any of the brands under which the products are ultimately manufactured or produced,
- is dictated to by Masstores as to under which brands the products are to be manufactured or produced and Masstores is the registered trademark holder of these brands (or have exclusive rights of use of the brands),

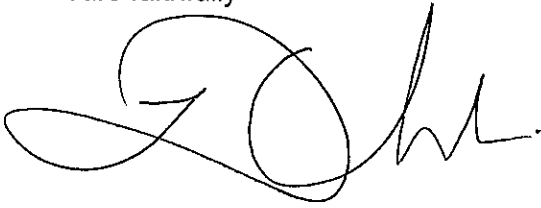
- never decides which manufacturer to use in the manufacturing or production of the products,
- never decides on the specification of the products to be sourced from a factory or the manner of payment,
- never takes ownership of the products,
- never bears any risk in and to the products, and the commission which Rank Sharp earns on the products is certainly not affected by whether or not any products are damaged at any particular time,
- does not arrange any insurance for the land or ocean carriage of any products, which underwrites the fact that it bears no risk in and to the products,
- makes it particularly clear on its documentation that it is only acting as an agent for and on behalf of Masstores.

In the circumstances, it would be nonsensical to disallow a buying agent from making payment on behalf of an importer in respect of products sourced by the buying agent on behalf of the importer.

As already mentioned, Rank Sharp's buying agency services for all importers throughout the world extend to payment for products, for and on behalf of the importers. In all instances, the buying commission earned by Rank Sharp, in the rendering of these services, qualifies as a deduction from the transaction value of the products for Customs Duty purposes.

For these reasons, we submit that those recommendations set out in our comments on behalf of Masstores, submitted to you on 5 September 2008, should be accepted.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Joëlle Marrier d'Unienville', written in a cursive style.

Prè Prinsloo / Joëlle Marrier d'Unienville
SHEPSTONE & WYLIE