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# Federal Court of Australia

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## ← Gft → Australia Pty Ltd v Collector of Customs [1994] FCA 903; (1994) 19 Aar 361 (10 February 1994)

### FEDERAL COURT OF AUSTRALIA

← GFT → AUSTRALIA PTY LTD v. COLLECTOR OF CUSTOMS  
No. VG491 of 1992  
FED No. 26/94  
Number of pages - 11  
Customs  
[\[1994\] FCA 903; \(1994\) 19 AAR 361](#)

#### COURT

IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION  
OLNEY J

#### CATCHWORDS

Customs - import duty - determination of customs value - deductible financing costs - whether sum claimed was interest payable under written contract permitting delayed payment for goods imported.

[Administrative Appeals Tribunal Act 1975, s 44](#)

[Customs Act 1901](#), (CTA [s 13\(2\)](#)) Division 2, [Part VIII](#), [ss 154\(1\)](#), [159](#) and [161](#)

[Customs Tariff Act 1987, s 21.](#)

Halsbury's Laws of England (4th ed) Vol 32

## HEARING

MELBOURNE, 11 November 1993

10:2:1994

Mr J. Slonim (Solicitor) appeared for the applicant.

Mr J. Lenczner (instructed by Australian Government Solicitor) appeared for the respondent.

## ORDER

The Court Orders that:

The application be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

## DECISION

### THE APPLICATION





OLNEY J This is an appeal pursuant to [s 44](#) of the [Administrative Appeals Tribunal Act 1975](#) from a decision of the Administrative Appeals Tribunal on a question of law.

2. In its decision given on 13 November 1992 the Tribunal affirmed a decision made by the respondent's delegate relating to the customs value of certain goods imported into Australia by the applicant (the subject goods).

3. The question of law raised by the appeal relates to the proper construction of the term "deductible financing costs" as defined by [s 154\(1\)](#) of the [Customs Act 1901](#).

### THE FACTS

4. The Tribunal made the following findings of fact relevant to this appeal:

5. The applicant is an importer into Australia of men's and women's wear from a number of different countries. Fifty-five per cent of its imports are purchased either directly or indirectly from Gruppo Finanziario Tessile S.p.A. ("Gruppo") of Turin, Italy. Men's clothes are purchased from  **GFT**  Uomo ("Uomo"), an operating division of Gruppo; women's clothes are purchased from  **GFT**  Donna S.p.A. ("Donna"), a wholly owned subsidiary of Gruppo. There are formal distribution

agreements between the applicant and Uomo and Donna respectively. (An agreement dated 1 May 1991 between the applicant and Gruppo was tendered in evidence and extracts of same were quoted in the Tribunal's reasons).

6. Gruppo is both a manufacturer and marketer and has licence agreements with a number of design houses. Uomo comprises different sales and marketing teams representing different design groups. The applicant deals with teams representing Valentino, Louis Feraud, Ungaro, Armani and Private Label collections.



7. Prices are negotiated twice each year, for the spring/summer range of products and the autumn/winter range, approximately 18 months ahead of the relevant season in Australia. Negotiations take place in Turin and elsewhere. Before leaving for Turin, the applicant's sales and marketing staff examine the domestic market and determine where each range of product is to be positioned in respect of price so as to be competitively saleable in the relevant season.

8. In Turin (or elsewhere) the applicant's sales and marketing teams negotiate with the corresponding teams of each design group and establish a price which is consistent with the proposed market positioning of that range of products. Negotiations are in Australian dollars. Once the price is agreed by sales and marketing staff, the applicant's staff negotiate separately with the treasury department of Gruppo for the trading terms in respect of the season in question. Different trading terms may be negotiated with different divisions or subsidiaries of Gruppo: for the spring/summer 1993 season terms of payment for different divisions or subsidiaries ranged from 7 to 180 days. Once negotiated, prices for a season never vary.



9. The applicant has been trading with Uomo at 180 days ex-factory terms for four years. Until mid-1991 it mostly paid on time. Since the recession, its customers have had cash flow problems and as a result it has been falling behind in payments to Uomo. Although there is provision for penalty interest for late payment, such interest has never been charged. Early payment is never made. Wholesale prices are fixed in advance and all cash flow projections are on the basis of the agreed period for payment.





10. On returning to Australia with price lists, the applicant's staff obtain orders from customers. Orders are then placed with Gruppo against the orders from customers, in the expectation that all goods imported will be sold.



11. The following extracts from the distribution agreement dated 1 May 1991 (said by the Tribunal to be the relevant provisions of the agreement) are quoted in the Tribunal's reasons:

3.1 All products shall be sold by (Gruppo) to  **GFT**  Australia on an FOB port of exit basis and in the currency which the parties shall mutually agree to from time to time.

...

3.3 Gross selling prices shall be subject to negotiation by  **GFT**  Australia each selling season and previous buying levels will be taken into account in the provision of future volume discounts. . . .

3.4 Gross selling prices shall not include any of the following, all of which shall be borne by  **GFT**  Australia: costs of transportation of the products from the port of exit in Italy to  **GFT**  Australia, storage costs, maritime and air insurance, ocean or air bills of lading, consular invoices, any applicable sales, use or excise taxes, import duties or surcharges, importer brokerage fees, charges and stamps and any other similar costs incurred in transportation, storage and importation of the products.

3.5 Gross selling prices shall be fixed on the basis that payment will be made within 30 days after delivery at the exchange rate applicable on that date. If extended credit terms are agreed upon, then the gross selling price shall be adjusted in accordance with (Gruppo's) forward estimates for movements in international currencies and  **GFT**  Australia shall pay interest on the gross selling price as adjusted. The interest rate shall be the prevailing interest rate in Italy at the time the products are shipped but may be varied in accordance with alterations brought about by Banker initiatives at any time prior to agreed settlement dates.

Withholding taxes, charges and any sums which require to be retained in Australia in relation to interest payments remitted to (Gruppo) shall form a deduction from all sums remitted.

...

8.4 This agreement sets forth the entire agreement and understanding between the parties relating to the subject matter contained herein and merges all prior discussions between them, and neither party shall be bound by any definition, condition, warranty or representation other than as expressly stated in this agreement or as subsequently set forth in writing and executed by the party to be bound thereby.

12. The invoice in respect of the subject goods is dated 22 January 1992. It relates to 2 items of one model of men's suits and 10 items of another, the prices of each model being shown. At the foot of the invoice is the endorsement:

The above prices are inclusive of 5.5% of interest due on delayed payment terms equal to AUD \$206.88.

## THE ISSUE

13. The issue in this application is whether in the facts of the case, on a proper construction of the definition of "deductible financing costs", the sum of \$206.88 referred to in the endorsement at the foot of the invoice dated 22 January 1992 is a deductible financing cost, as the applicant claims it to be. The respondent takes the contrary view, as did the original decision maker and the Tribunal.

## THE LEGISLATION

14. [Section 21](#) of the [Customs Tariff Act 1987](#) imposes duties of customs on goods imported into Australia. The value of any goods for the purposes of the [Customs Tariff Act](#) is the customs value of the goods ascertained or determined in accordance with Division 2 of [Part VIII](#) of the [Customs Act 1901](#) (CTA [s 13\(2\)](#)).

15. Division 2 of [Part VIII](#) of the [Customs Act](#) is comprised of [ss 154](#) to [161L](#) (inclusive).

16. [Section 154\(1\)](#) provides that in Division 2, "customs value" and "transaction value" in relation to imported goods, have the meanings given by [s 159](#) and [s 161](#) respectively. [Section 159\(2\)](#) provides that where a Collector can determine the transaction value of imported goods, their customs value is their transaction value.

17. [Section 161](#) provides:

161. (1) The transaction value of imported goods is an amount equal to the sum of their adjusted price in their import sales transaction and of their price related costs to the extent that those costs have not been taken into account in determining the price of the goods.

(2) In this section:

"adjusted price", in relation to imported goods, means the price of the goods determined by a Collector who deducts from the amount that, but for this subsection, would be the amount of that price, such amounts as the Collector considers necessary to take account of the following matters:

- (a) deductible financing costs in relation to the goods;
- (b) any costs that the Collector is satisfied:
  - (i) are payable for the assembly, erection, construction or maintenance of, or any technical assistance in respect of, the goods;
  - (ii) are incurred after importation of the goods into Australia; and
  - (iii) are capable of being accurately quantified by reference to the import sales transaction relating to the goods;

- (c) Australian inland freight and Australian inland insurance in relation to the goods;
- (d) deductible administrative costs in relation to the goods;
- (e) overseas freight and overseas insurance in relation to the goods.

18. [Section 154\(1\)](#) provides that in Division 2:

"deductible financing costs", in relation to goods in a sale, means any interest payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest (whether or not also in return for an increase in the price or for the payment of an additional amount), being a contract, agreement or arrangement entered into between the purchaser and the vendor or another person in relation to the purchase of the goods, where:

- (a) the interest is distinguished to the satisfaction of a Collector from the price actually paid or payable for the goods;
- (b) if a Collector requires the purchaser to demonstrate to the satisfaction of a Collector that identical or similar goods are actually sold at the last-mentioned price - the purchaser so demonstrates; and
- (c) if a Collector requires the purchaser to demonstrate to the satisfaction of a Collector that the rate of the interest does not exceed the rate of interest in similar contracts, agreements or arrangements entered into in the country where, and at the time when, finance under the first-mentioned contract, agreement or arrangement was provided - the purchaser so demonstrates;

#### "DEDUCTIBLE FINANCING COSTS"

19. The definition of "deductible financing costs" is complex. It has several elements, all of which require consideration. The Tribunal found that in the instant case, no requirement had been made by the Collector under either paragraph (b) or paragraph (c) of the definition and accordingly nothing in those paragraphs requires consideration in these proceedings.

20. Before an amount can be deducted as a "deductible financing cost", each of the following must be satisfied:

- (a) The sum sought to be deducted must be "interest", a term

which is not defined.

(b) The interest must be payable under a written contract, agreement or arrangement.

(c) The contract, agreement or arrangement must permit the purchaser to delay the payment of the price in return for the payment of interest.



(d) The contract agreement or arrangement must be one entered into between the purchaser and the vendor (or another person) in relation to the purchase of the goods; and

(e) The contract, agreement or arrangement must distinguish (to the Collector's satisfaction) the interest from the price actually paid or payable for the goods.

21. Before the Tribunal, the respondent's representative submitted that the amount in question could not be distinguished from the price actually paid or payable for the goods and that therefore requirement of (d) was not met. The Tribunal did not make any finding on this issue but rather said that the applicant's case failed at an earlier stage. The Tribunal's reasoning was based upon its conclusion that the words "permitted to delay the payment of the price" were intended to refer to the situation where payment for goods in a sale is made late, that is, after the period agreed to in the particular contract of sale relating to the particular goods in question. The Tribunal drew a distinction between interest due for late payment under an agreement in respect of a particular sale and an agreement which varies (in respect of that sale) the period of payment provided for in a general contract setting out the terms on which goods will generally be sold by the same vendor to the same purchaser.

22. In its reasons the Tribunal summarised the applicant's case thus: The original terms of payment were the 30 day terms set out in clause 3.5 of the distribution agreement. The negotiated terms in respect of the season for which the subject goods were purchased were "extended credit terms" of payment within 180 days. There is an interest component in the price paid for the goods which is to cover the variation of the distribution agreement. That component is added, pursuant to clause 3.5, to the price negotiated by the sales and marketing team.

23. Although the Tribunal did not say so in specific terms, it is clear that it was of the view that the subject goods had been purchased pursuant to an agreement which had varied the period for payment provided for in the distribution agreement. At paragraphs 28 and 29 of its reasons the Tribunal said:

28. The suggestion is that, so far as it relates to the subject goods and other goods in the same seasonal range, the agreement of 1 May 1991, providing for 30 day terms has been varied by a subsequent agreement for 180 day terms, and by that subsequent agreement,  **GFT**  Australia has been "permitted to delay the payment of the price". As we have said in paragraph 25 supra,

we do not consider that the expression "permitted to delay the payment of the price" is intended to describe that situation.

29. Accordingly, we find that no amount was paid in respect of the subject goods constituting "interest payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest". That being so, the amount of \$206.88 does not constitute "deductible financing costs" in terms of the definition in sub-section 154(1) of the Act. . . .

#### WAS THE SUM CLAIMED "INTEREST"

24. The Tribunal did not specifically address the question of whether the sum claimed as deductible financing costs was "interest".

25. It is true that the invoice of 22 January 1992 asserts that the invoiced prices are inclusive of interest due on delayed payment terms.

26. The Concise Oxford Dictionary relevantly defines "interest" as:

Money paid for use of money lent or for not extracting repayment of a debt.

27. In Halsbury's Laws of England (4th ed) Vol 32 at para 106 it is said:

Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another.

28. There can be little doubt that in the context of the phrase "interest payable under a written contract . . . under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest" Parliament used the term "interest" in the ordinary sense as defined in each of the above authorities.

29. The facts of this case as found by the Tribunal disclose that the parties negotiated a unit price for the subject goods based upon the understanding that payment would not be required until 180 days after the date of the invoice. Such a procedure is obviously contemplated by paragraph 3.5 of the distribution agreement. It can be inferred for present purposes that the unit price was greater than it would have been if the agreement had been for payment within 30 days after delivery. The unit price agreed between the parties was not variable. The same price was payable whether the applicant paid for the subject goods on receipt of the invoice or on any other day within the 180 day period agreed. As payment was not due until the expiration of the 180 day period, it is difficult to categorise the



addition to the purchase price as either money paid for the use of money or for not extracting repayment of a debt nor as the return or compensation for the use or retention by the purchaser of money belonging to or owed to the vendor.

30. In these circumstances, on the facts as found, it is my opinion that the sum sought to be deducted cannot properly be described as "interest". And it seems quite clear that although the Tribunal did not specifically address the meaning of "interest", its conclusion was that the sum sought to be deducted was not interest but part of the purchase price of the goods.

#### THE WRITTEN CONTRACT

31. The definition of "deductible financing costs" contemplates that there will be a written contract, agreement or arrangement under which the purchaser is permitted to delay payment in return for the payment of interest.

32. The Tribunal made no finding as to what writing or writings constituted the written contract, agreement or arrangement in question. No doubt the distribution agreement formed part of the contract, agreement or arrangement under which the applicant purchased the subject goods from Gruppo.

33. Paragraph 8.4 of the distribution agreement contemplates that the terms of the agreement may be subsequently varied. The finding that the applicant had been trading on the basis of 180 day terms for 4 years suggests that some agreement other than as provided in paragraph 3.5 had been reached and whilst it may be open to the Court to draw such an inference from the facts as found, there is no finding as to whether such a variation was in writing. Be that as it may, a payment of interest will only be a deductible financing cost if it is payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the interest. There is no finding by the Tribunal as to any written contract, agreement or arrangement other than the finding that the applicant and Gruppo had a distribution agreement dated 1 May 1991 but there is nothing in that agreement which permits the purchaser to delay payment. Indeed, paragraph 3.5 of the distribution agreement contemplates that if extended credit terms are to apply they are to be agreed between the parties. There is no evidence of or finding in relation to any such agreement, and certainly no written agreement as to the granting of extended terms was found. Paragraph 3.5 of the distribution agreement is not a term of the agreement which permits the purchaser to delay payment of the purchase price in return for the payment of interest. It is a term which contemplates that the purchase price of goods will be adjusted by agreement between the parties to take account of the agreed terms of payment.





#### THE INVOICE

34. The invoice dated 22 January 1992, in common with other invoices put in evidence contains the statement:

"General sales conditions are stated on our order

confirmation".

35. This statement is considered with the terms of paragraph 2 of the distribution agreement namely:

2. All orders for the products placed by  **GFT**  Australia shall be subject to written cabled acceptance by (Gruppo) and shall not be binding upon  **GFT**  Australia unless and until so accepted by it.

36. The distribution agreement clearly contemplates that there be another document in the contractual chain and without that document there could be no binding agreement for the sale of the goods. The Tribunal made no finding as to whether such a document exists in relation to the subject goods, which is not surprising as no evidence was adduced in relation to it.

37. What is clear however, is that the invoice is not the "written or cabled acceptance" referred to in paragraph 2 of the distribution agreement. The invoice is not a contractual document at all. It must have come into existence after the contract was made.

## CONCLUSION

38. The notice of appeal filed in this matter asserts that the questions of law raised by the appeal are:

- (a) the proper construction of [s 154\(1\)](#) of the [Customs Act](#);
- (b) whether deductible financing costs under [s 154\(1\)](#) of the Act are limited to penalties for late payment under contracts for the sale of goods.

39. In my opinion these questions as stated tend to misrepresent the conclusions of the Tribunal.

40. Whilst it is so that in the course of its reasons, the Tribunal referred to other sales in respect of which the invoices (which are dated 12 February 1991 and 15 April 1991) were endorsed:

Terms: 180 days from invoice date end of month; Interest 1.5% per month included in prices; Overdue accounts will be charged with interest at 1.5% per month



the significance of the Tribunal's reference to same is merely to distinguish such sales from the contractual arrangements in respect of the subject goods. In dealing with this aspect, the Tribunal said at paragraph 26:

26. Thus, in the present case, were payment to be made under one of the invoices of 15 April and 12 February after the

agreed period of 180 days, and were interest to be charged at 1.5 per cent per month, in accordance with the endorsement on the invoice, that interest would be "payable under a written contract, agreement or arrangement under which the purchase is permitted to delay the payment of the price in return for the payment of that interest", and, as a consequence, such interest would be correctly included as "deductible financing costs".

41. Assuming that the endorsement on the invoices reflected the terms of a written contract, agreement or arrangement between the vendor and purchaser, the only objection that could be taken to this statement is to query whether the imposition of an interest penalty for late payment could properly be regarded a contractual term permitting the purchaser to delay payment. Be that as it may, it is not the case that the Tribunal held that deductible financing costs under [s 154\(1\)](#) are limited to penalties for late payment.

42. If any criticism can be made of the Tribunal's reasons it is that it did not identify the writings which constituted that contract. At paragraph 22 the Tribunal said:

22. These invoices constitute almost the only material before the Tribunal, additional to the distribution agreement, which could be said to form part of "a written contract agreement or arrangement" in terms of the definition of "deductible financing costs" providing for 180 day terms or for the payment of interest. The only other such material is a letter from Gruppo to  **GFT**  Australia dated 8 July 1992, which relates to the Spring/Summer 1993 season and is not directly relevant to the subject goods.

43. For reasons already given I do not think that the invoices can be said to be part of a written agreement. Whilst they may provide evidence of what the parties have agreed, they cannot be said to be documents which create a contractual entitlement on the purchaser's part to delay the payment of the purchase price.

44. The Tribunal's findings amount to this: The applicant ordered goods from Gruppo on the basis of a previously negotiated price list which was arrived at on the basis that payment would not be required until 180 days after the end of the month in which the invoice was issued. In those circumstances the component added to the price by reason of the extension of the time for payment from 30 days to 180 days is not interest payable under an agreement by which the purchaser is permitted to delay payment.

45. In my opinion the Tribunal did not err in its construction of the definition of "deductible financing costs". The application will be dismissed.

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